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THE  
AMERICAN AND ENGLISH  
ENCYCLOPÆDIA  
OF  
LAW

EDITED BY  
DAVID S. GARLAND AND LUCIUS P. McGEHEE  
UNDER THE SUPERVISION OF  
JAMES COCKCROFT

SECOND EDITION

VOLUME XV.

NORTHPORT, LONG ISLAND, N. Y.  
EDWARD THOMPSON COMPANY

LONDON: C. D. CAZENOVE AND SON, 26 HENRIETTA STREET

1900

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# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

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**GUARANTY INSURANCE.** (See also the title FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3.)—The business of guaranteeing the fidelity of persons holding public or private places of trust, and the performance by persons, firms, and corporations, of contracts, bonds, recognizances, and other undertakings, is guaranty insurance.<sup>1</sup>

1. *People v. Rose*, 174 Ill. 310. The court further said: "It is said in 9 AM. AND ENG. ENCYC. OF LAW 65 (*cited in People v. Fidelity and Casualty Co.*, 153 Ill. 25): '*Guaranty insurance* is, in its practical sense, a *guaranty* or *insurance* against loss in case a person named shall make a designated default or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employee or officer, though sometimes against the breach of a contract. This branch of insurance is so much more modern in origin and development than fire, marine, life, and accident insurance, that there are few decisions upon the subject; but the business is gradually increasing, and is doubtless destined to take an important place in the commercial world. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus the general doctrine of warranty, representation, and concealment, as applied to fire, life, and marine insurance, is applicable also to the subject of *guaranty insurance*. It was held in a Canadian case that a company was liable on a policy guaranteeing the faithful and diligent performance of the duty of a clerk, where such clerk went to lunch leaving a large sum of money in open bags in his room, which money disappeared while he was gone. Over-drafts allowed without security, by collusion with the party making the over-

drafts, are within a policy which insures against loss "by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities, of the manager.'" In *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, it was held that a contract to indemnify a merchant against loss from insolvency of customers was a contract of insurance, and it was said: 'We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is in fact much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (*sub silentio*) construed as a policy of insurance by the Supreme Court of New Jersey. (*Robertson v. U. S. Credit System Co.*, 57 N. J. L. 12.) The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of sections 1977 and 1978 R. S.'"

# GUARDIAN AD LITEM.

BY LOMAX PITTMAN.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *INFANTS*, vol. 10, p. 581; *INSANE PERSONS*, vol. 10, p. 1169.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *GUARDIAN AND WARD*, *post*; *INFANTS*; *INSANITY*; *JUDGMENTS*; *PROCHEIN AMI*.

**I. DEFINITIONS — 1. In General.** — A guardian *ad litem* is not a party to the suit,<sup>1</sup> but is an officer appointed by a court of justice in a cause<sup>2</sup> to prosecute<sup>3</sup> or defend<sup>4</sup> for, or otherwise to represent and look after the interests of, an infant or an insane person<sup>5</sup> whose property rights are affected by the judgment or decree the rendition of which is contemplated. His powers fundamentally differ from those of a general testamentary or natural guardian, and from those of a guardian in socage, in that he is without control of either the person or property of the infant.<sup>6</sup>

**1. Guardian ad Litem Not Party to Suit.** — *Ingram v. Little*, 11 Q. B. D. 251; *McDonald v. McDonald*, 24 Ind. 68; *Dahoney v. Hall*, 20 Ind. 267; *Sanford v. Phillips*, 68 Me. 431; *Bryant v. Livermore*, 20 Minn. 313.

It follows that the relationship of such guardian to the judge will not disqualify the latter from trying the cause. *Bryant v. Livermore*, 20 Minn. 313.

**2. Guardian ad Litem Officer of Court.** — *Austin v. Bean*, 101 Ala. 133; *Sharp v. Findley*, 59 Ga. 729; *Bulow v. Witte*, 3 S. Car. 322; *Tyson*

*v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439.

**3. See *infra*, this section, *Guardian ad Litem and Prochein Ami Distinguished*.**

**4. See *infra*, this title, *Appointment — When Necessary*.**

**5. See *infra*, this title, *Appointment — When Necessary*.**

**6. No Control over Infant's Person or Property.** — *Burrill's L. Dict.* See *infra*, this title, *Duties, Powers, and Liabilities*; and the title *GUARDIAN AND WARD*, *post*.

2. **Guardian ad Litem and Prochein Ami Distinguished.** — At common law infants were required to sue and defend by guardian, but by the statutes of Westminster (3 Edw. I., c. 49; 13 Edw. I., c. 15) they were authorized to sue by *prochein ami*.<sup>1</sup> Though in a few states infants still sue by guardian *ad litem*,<sup>2</sup> in most jurisdictions in the United States such guardian can be appointed only for infant defendants;<sup>3</sup> hence it is commonly said that "an infant shall sue by next friend, and defend by guardian."<sup>4</sup> The duties, powers, and liabilities of the two officers seem to be substantially the same.<sup>5</sup>

**II. APPOINTMENT — 1. When Necessary** — Actions and Suits Against Infants. — Where an infant or an insane person is sued either at law or in equity, it is, with special limitations as to insane persons,<sup>6</sup> the general rule that he should

1. **Statute Abolishing Necessity of Guardian ad Litem for Infant Plaintiffs.** — Co. Litt. 135*b*, note 1. See also *Roy v. Louisville*, etc., R. Co., 34 Fed. Rep. 276; *Chudleigh v. Chicago*, etc., R. Co., 51 Ill. App. 491; *Clarke v. Gilmanton*, 12 N. H. 515; *Green v. Harrison*, 3 Sneed (Tenn.) 131.

Though the appointment of a guardian *ad litem* for infant plaintiffs was, after the passage of the above acts, no longer necessary, and though such an appointment was confined almost uniformly to cases where the infant was defendant, yet it was still optional for suits to be brought by a guardian *ad litem* or next friend. See 2 Steph. Comm. (13th ed.) 285; Co. Litt. 135*b*, note 1; *Simpson v. Jackson*, Cro. Jac. 640; *Younge v. Yonge*, W. Jones 177, citing *Rawlyn's Case*, 4 Coke 53*b*. But see the same case *sub nom.* *Young v. Young*, Cro. Car. 86, where no mention is made of a ruling on this point.

2. **Where Statute Authorizes Appointment of Guardian ad Litem for Infant Plaintiff** — *California*. — *Crawford v. Neal*, 56 Cal. 321, construing Code Civ. Pro., § 372, authorizing infants to sue by guardian *ad litem*.

*Minnesota*. — *Peterson v. Bailliff*, 52 Minn. 386; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

*New York*. — *Hill v. Thaxter*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 407; *Hoftailing v. Teal*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 188; *Freyberg v. Pelerin*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 202; *Sere v. Coit*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 481; *Sparmann v. Keim*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 355; *Grantman v. Theall*, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 308; *Buermann v. Buermann*, (N. Y. Super. Ct. Spec. T.) 17 Abb. N. Cas. (N. Y.) 391; *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 638; *Grantman v. Thrall*, 44 Barb. (N. Y.) 173; *Segelken v. Meyer*, 14 Hun (N. Y.) 593; *Carr v. Huff*, 57 Hun (N. Y.) 18; *Segelken v. Meyer*, 94 N. Y. 473.

Before the enactment of the Code of Civil Procedure an infant sued by his next friend and defended by guardian *ad litem*, but now he must appear by guardian *ad litem* in both instances. *Hoftailing v. Teal*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 188.

*Tennessee*. — *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619.

*Texas*. — The statute in force in 1882 (Pasc. Dig., art. 6969, 6973; Laws 15th Leg. 187, §§ 134, 138) required that minors should sue by guardian *ad litem* appointed by the court. *Brooke v. Clark*, 57 Tex. 105; *Bond v. Dillard*,

50 Tex. 302. See also *Long v. Behan*, 19 Tex. Civ. App. 325.

*Wisconsin*. — See *Straka v. Lander*, 60 Wis. 115; *Hepp v. Huefner*, 61 Wis. 148.

3. See *infra*, this title, *Appointment — When Necessary*.

4. **Infant Sues by Next Friend, and Defends by Guardian ad Litem.** — Co. Litt. 135*b*; Bac. Abr., tit. Infancy and Age, K 2, *Simpson v. Jackson*, Cro. Jac. 640; *Clark v. Platt*, 30 Conn. 285; *Ewing v. Armstrong*, 4 J. J. Marsh. (Ky.) 68; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Wakefield v. Marr*, 65 Me. 341; *Bush v. Linthicum*, 59 Md. 344; *Lang v. Belloff*, 53 N. J. Eq. 298; *Bulow v. Witte*, 3 S. Car. 322; *Priest v. Hamilton*, 2 Tyler (Vt.) 49.

**Defendant Appearing by Next Friend.** — But in *Cuyler v. Wayne*, 64 Ga. 78, it was held that where a bill was served on a minor and his stepfather answered as *prochein ami*, he was bound by the decree in the absence of fraud.

In *Filmore v. Russell*, 6 Colo. 171, it was held, under the *Colorado* statute, that where no guardian *ad litem* was appointed, but the record recited that the minor appeared by his next friend as well as by attorney, the appearance was authorized, the presumption being that the infant was over fourteen years of age.

5. *Sharp v. Findley*, 59 Ga. 729. See also the title INFANTS, 10 ENCYC. OF PL. AND PR. 610.

**Each Officer an Appointee of the Court Subject to Its Removal.** — *Chudleigh v. Chicago*, etc., R. Co., 51 Ill. App. 491; *Clarke v. Gilmanton*, 12 N. H. 515.

**Neither a Party to the Suit.** — It has been seen that a guardian *ad litem* is not a party. See *supra*, this section, *In General*. The same thing is true with reference to a *prochein ami*. In this respect the relation of each officer to the court is identical. *Morgan v. Thorne*, 7 M. & W. 400; *Sinclair v. Sinclair*, 13 M. & W. 640; *Leavitt v. Bangor*, 41 Me. 458; *Sanborn v. Merrill*, 41 Me. 467; *Brown v. Hull*, 16 Vt. 673.

6. **How Lunatics Defend.** — At common law it appears that when an idiot or lunatic a *nativitate* is a defendant, he must appear in person and not by guardian or attorney. Co. Litt. 135*b*; *Beverley's Case*, 4 Coke 124*b*.

But a person who becomes *non compos* appears by attorney if of full age, or by his guardian if a minor. *Beverley's Case*, 4 Coke 124; *Dennis v. Bennis*, 3 Term. Rep. 100; 4; *Van Horn v. Hann*, 39 N. J. L. 213.

The rule in chancery, now adopted also at law, is that the lunatic defends by guardian *ad litem*, and his committee is appointed such



be represented by a guardian *ad litem*, appointed by the court in the action, to conduct the defense for him.<sup>1</sup>

guardian as of course, in the absence of some disqualification. *Story's Eq. Pl.*, § 70; *Westcomb v. Westcomb*, 1 Dick. 233; *Harrison v. Rowan*, 4 Wash. (U. S.) 207; *Van Horn v. Hann*, 39 N. J. L. 213; *Heller v. Heller*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 194. See also *Lang v. Whidden*, 2 N. H. 435.

Or, according to the practice prevailing in some jurisdictions and under some statutes, his committee defends for him without special appointment. *Symmes v. Major*, 21 Ind. 443; *Hinton v. Bland*, 81 Va. 588. So in *England*, but the committee must obtain the sanction of the lord chancellor or lords justices in the lunacy. 1 *Daniell's Ch. Pl. and Pr.* (6th Am. ed.) 175.

The distinction between the practice at common law and in equity no longer obtains, and now, generally by the force of special statutes, a lunatic defends both at law and in equity by committee or guardian *ad litem*. *Mitchell v. Kingman*, 5 Pick. (Mass.) 431. See *Van Horn v. Hann*, 39 N. J. L. 213.

Where the committee has interests conflicting with those of the lunatic, or where there is no committee, a guardian *ad litem* must be appointed. *Story's Eq. Pl.*, § 70; *Harrison v. Rowan*, 4 Wash. (U. S.) 207; *Hinton v. Bland*, 81 Va. 588.

**1. Where Infants and Insane Persons Should Be Represented by Guardians ad Litem — England.** — *Simpson v. Jackson*, Cro. Jac. 640; *Colman v. Northcote*, 7 Jur. 528; *Jarman v. Lucas*, 15 C. B. N. S. 474, 109 E. C. L. 474; *Hindmarsh v. Chandler*, 7 Taunt. 488, 2 E. C. L. 488, 1 Moo. 250; *Stokes v. Oliver*, 5 Mod. 209; *Wilson v. Grace*, 14 Ves. Jr. 172; *Howlett v. Wilbraham*, 5 Madd. 423; *Needham v. Smith*, 6 Beav. 130; *Charlton v. West*, 3 De G. F. & J. 156; *Bird v. Pegg*, 5 B. & Ald. 418, 7 E. C. L. 153.

**United States.** — *O'Hara v. MacConnell*, 93 U. S. 150; *Carrington v. Brents*, 1 McLean (U. S.) 167; *Harrison v. Rowan*, 4 Wash. (U. S.) 202; *Fitch v. Cornell*, 1 Sawy. (U. S.) 156; *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

**Alabama.** — *Irwin v. Irwin*, 57 Ala. 614; *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918; *Stammers v. McNaughten*, 57 Ala. 277; *Roach v. Hix*, 57 Ala. 576; *Rhett v. Martin*, 43 Ala. 86; *McIntosh v. Atkinson*, 63 Ala. 241; *Ashford v. Patton*, 70 Ala. 479; *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Austin v. Bean*, 101 Ala. 133; *Walker v. Clay*, 21 Ala. 797.

**Arkansas.** — *Hodges v. Frazier*, 31 Ark. 58; *Bonner v. Little*, 38 Ark. 397; *Morris v. Edmonds*, 43 Ark. 427.

**California.** — *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617; *Justice v. Ott*, 87 Cal. 530; *Security L. & T. Co. v. Kauffman*, 108 Cal. 214.

**Connecticut.** — *Fahay v. State*, 25 Conn. 205; *Clark v. Turner*, 1 Root (Conn.) 200. But see *Colt v. Colt*, 111 U. S. 578, discussing the Connecticut practice.

**Florida.** — *Brock v. Doyle*, 18 Fla. 172; *Thompson v. McDermott*, 19 Fla. 852; *McDermott v. Thompson*, 29 Fla. 299.

**Georgia.** — *Kilpatrick v. Strozier*, 67 Ga. 247;

*Nicholson v. Wilborn*, 13 Ga. 467; *Groce v. Field*, 13 Ga. 24.

**Illinois.** — *Enos v. Capps*, 12 Ill. 255; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Quigley v. Roberts*, 44 Ill. 503; *Hall v. Davis*, 44 Ill. 494; *Peak v. Shasted*, 21 Ill. 137, 74 Am. Dec. 83; *Kesler v. Penninger*, 59 Ill. 134; *Tibbs v. Allen*, 27 Ill. 119; *Lemon v. Sweeney*, 6 Ill. App. 507; *Crocker v. Smith*, 10 Ill. App. 376; *Fietsam v. Kropp*, 6 Ill. App. 144.

**Indiana.** — *Hough v. Canby*, 8 Blackf. (Ind.) 301; *Abdil v. Abdil*, 26 Ind. 287; *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Timmons v. Timmons*, 6 Ind. 8; *Yount v. Turnpugh*, 33 Ind. 46.

**Kansas.** — *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47.

**Kentucky.** — *Letcher v. Letcher*, 2 A. K. Marsh. (Ky.) 158; *Newman v. Kendall*, 2 A. K. Marsh. (Ky.) 243; *Irons v. Crist*, 3 A. K. Marsh. (Ky.) 123; *Chalfant v. Monroe*, 3 Dana (Ky.) 36; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Cook v. Totton*, 6 Dana (Ky.) 108; *Covington, etc., R. Co. v. Bowler*, 9 Bush. (Ky.) 468; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 567; *Ewing v. Armstrong*, 4 J. J. Marsh. (Ky.) 69; *Rowland v. Cook*, 1 J. J. Marsh. (Ky.) 453; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 45; *Meredith v. Sanders*, 2 Bibb (Ky.) 101; *Shields v. Bryant*, 3 Bibb (Ky.) 525; *Searcey v. Morgan*, 4 Bibb (Ky.) 96; *Chandler v. Com.*, 4 Met. (Ky.) 66; *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109; *Jewell v. Kirk*, (Ky. 1898) 47 S. W. Rep. 766.

**Maine.** — *Wakefield v. Marr*, 65 Me. 341; *Stinson v. Pickering*, 70 Me. 273.

**Maryland.** — *Bush v. Linthicum*, 59 Md. 344; *Post v. Mackall*, 3 Bland (Md.) 486; *Hewitt's Case*, 3 Bland (Md.) 184.

**Massachusetts.** — *Johnson v. Waterhouse*, 152 Mass. 585, 23 Am. St. Rep. 858; *Swan v. Horton*, 14 Gray (Mass.) 179; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Parker v. Lincoln*, 12 Mass. 16; *Conto v. Silvia*, 170 Mass. 152; *Farris v. Richardson*, 6 Allen (Mass.) 118, 83 Am. Dec. 618; *Cassier's Case*, 139 Mass. 458; *Denny v. Denny*, 8 Allen (Mass.) 311; *Davenport v. Davenport*, 5 Allen (Mass.) 464; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Mansfield v. Mansfield*, 13 Mass. 412.

**Michigan.** — *Bearing v. Pelton*, 78 Mich. 109; *Prince v. Clark*, 81 Mich. 167; *In re Sanborn*, 109 Mich. 191.

**Mississippi.** — *Lee v. Jenkins*, 30 Miss. 592.

**Missouri.** — *Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895; *Gamache v. Prevost*, 71 Mo. 84; *Wells v. Wells*, 144 Mo. 108; *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422.

**Nebraska.** — *Manfull v. Graham*, 55 Neb. 645; *McAlister v. Lancaster County Bank*, 15 Neb. 295; *Kuhn v. Kilmer*, 16 Neb. 699.

**New Jersey.** — *Lang v. Belloff*, 53 N. J. Eq. 298; *Foulkes v. Young*, 21 N. J. L. 438.

**New York.** — *Fairweather v. Satterly*, 7 Rob. (N. Y.) 546; *McMurray v. McMurray*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 315; *Kellog v. Klock*, (Supm. Ct. Spec. T.) 2 Code Rep. (N. Y.) 29; *Larkin v. Mann*, 2 Paige (N.

**All Proceedings Where Infant's Property Interests Involved.** — A guardian *ad litem* must be appointed to defend an infant's interests, not only in proceedings wherein a personal judgment is sought against the infant,<sup>1</sup> but in every case where the rendering of a judgment or decree in a matter affects the infant's property rights.<sup>2</sup>

**In Criminal Cases** an infant appears, like an adult, in person or by attorney, and not by a guardian.<sup>3</sup> In *Connecticut*, however, it seems that an infant must appear and defend in criminal cases by a guardian *ad litem*.<sup>4</sup>

**When General Guardian May Act.** — An infant cannot ordinarily appear and defend by his general guardian.<sup>5</sup> In some states, however, where the infant has a general guardian, the latter may be summoned, and it is his duty to defend for the infant. In such case the appointment of a guardian *ad litem* to perform that duty is improper, unless the general guardian fails to act or

Y.) 27; *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418; *Frost v. Frost*, (County Ct.) 15 Misc. (N. Y.) 167; *Rogers v. McLean*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 440; *Fox v. Fee*, 24 N. Y. App. Div. 314; *Shepherd v. Hibbard*, 19 Wend. (N. Y.) 96; *Copous v. Kauffman*, 3 Edw. Ch. (N. Y.) 370; *Hanley v. Brennan*, (N. Y. City Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 186; *Markle v. Markle*, 4 Johns. Ch. (N. Y.) 168; *New v. New*, 6 Paige (N. Y.) 237; *Heller v. Heller*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 194; *Hunter v. Hatfield*, 12 Hun (N. Y.) 381; *Montgomery v. Montgomery*, 3 Barb. Ch. (N. Y.) 132; *Wood v. Wood*, 2 Paige (N. Y.) 108; *Boylan v. McAvoy*, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 278; *Dewitt v. Post*, 11 Johns. (N. Y.) 460; *McConnell v. Adams*, 3 Sandf. (N. Y.) 728.

*North Carolina.* — *Harrison v. Harrison*, 106 N. Car. 282.

*Ohio.* — *Sturges v. Longworth*, 1 Ohio St. 545.

*Pennsylvania.* — *Brown v. Downing*, 137 Pa. St. 569.

*South Carolina.* — *Carrigan v. Drake*, 36 S. Car. 354; *Finley v. Robertson*, 17 S. Car. 435; *Tederal v. Bouknight*, 25 S. Car. 275.

*Tennessee.* — *Rucker v. Moore*, 1 Heisk. (Tenn.) 726; *Kelley v. Kelley*, 15 Lea (Tenn.) 194; *Speak v. Metcalf*, 2 Tenn. Ch. 214; *Steifel v. Clark*, 9 Baxt. (Tenn.) 466.

*Texas.* — *Montgomery v. Carlton*, 56 Tex. 361; *Taylor v. Rowland*, 26 Tex. 293; *Taylor v. Whitfield*, 33 Tex. 181; *Buchanan v. Thompson*, 4 Tex. Civ. App. 236.

*Vermont.* — *Fall River Foundry Co. v. Doty*, 42 Vt. 412; *Starbird v. Moore*, 21 Vt. 529; *Barber v. Graves*, 18 Vt. 290.

*Virginia.* — *Roberts v. Stanton*, 2 Munf. (Va.) 129, 5 Am. Dec. 463.

*West Virginia.* — *Hull v. Hull*, 26 W. Va. 1; *Alexander v. Davis*, 42 W. Va. 465; *McDonald v. McDonald*, 3 W. Va. 676; *Myers v. Myers*, 6 W. Va. 369.

*Wisconsin.* — *Gerster v. Hilbert*, 38 Wis. 609; *Marx v. Rowlands*, 59 Wis. 110; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439.

1. See the first paragraph of this subsection.

2. Thus on the Final Settlement of the Estate of a Decedent it is error to proceed without making the infant heirs parties and appointing a guardian *ad litem* to represent them. *Willis v. Willis*, 16 Ala. 652; *King v. Collins*, 21 Ala. 263; *Morgan v. Morgan*, 35 Ala. 303; *Scarcy v. Holmes*, 43 Ala. 608; *Barwick v. Rackley*,

45 Ala. 215; *Petty v. Britt*, 46 Ala. 491; *Cason v. Cason*, 31 Miss. 578, apparently overruling *Frisby v. Harrison*, 30 Miss. 452. But see *Balch v. Hooper*, 32 Minn. 158.

Upon the Final Settlement of the Accounts of an Infant's General Guardian who is applying for a discharge, a guardian *ad litem* should be appointed. *Matter of Cutting*, 38 N. Y. App. Div. 247.

**In Condemnation Proceedings** to lay out a public highway, if there are infant owners, they should be personally notified and must defend through a guardian. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

**In Partition Proceedings**, where one of the tenants in common is an infant and the other his guardian, the former should be represented by a guardian *ad litem*. *Prince v. Clark*, 81 Mich. 167; *Mace v. Scott*, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 100.

**Appointment in Trustee Process.** — Under the statute relative to trustee process, the plaintiff must at his peril apply to the court to appoint a guardian *ad litem*. *Wilder v. Eldridge*, 17 Vt. 226.

**Where an Infant Becomes a Party to Trustee Process as Claimant**, in order to render the proceedings conclusive against him it must appear that he appeared by guardian or by guardian *ad litem*. *Keeler v. Fassett*, 21 Vt. 539, 52 Am. Dec. 71.

**In Proceedings for the Assignment of Dower** infants are entitled to notice of application therefor, and guardians *ad litem* should be appointed for them. *Pierson v. Hitchner*, 25 N. J. Eq. 124.

See generally as to the subject of this note the title INFANTS, 10 ENCYC. OF PL. AND PR. 618 *et seq.*

3. *Reg. v. Tanner*, 2 Ld. Raym. 1284; *Word v. Com.*, 3 Leigh (Va.) 748; 1 Chitty's Crim. Law 411; 1 Bish. New Crim. Pro., § 959c.

4. *Fahay v. State*, 25 Conn. 205; *State v. James*, 37 Conn. 355.

5. Cannot Appear and Defend by General Guardian. — *Thompson v. McDermott*, 10 Fla. 852; *Bearinger v. Pelton*, 78 Mich. 110; *Gibson v. Chouteau*, 39 Mo. 536; *Matter of Stratton*, 1 Johns. (N. Y.) 509; *Sharp v. Pell*, 10 Johns. (N. Y.) 486; *McKinney v. Jones*, 55 Wis. 31.

**The Appearance and Hearing of a General Guardian Have Been Held Equivalent to His Appointment as Guardian ad Litem.** — *Price v. Winter*, 15 Fla. 66.



unless he is adversely interested in the proceedings in which the infant is defendant.<sup>1</sup>

**2. Power to Appoint -- Power Incident to Every Court.** — The power to appoint a guardian *ad litem* to represent the interests of an infant defendant (or of an insane defendant where necessary) is incident to the jurisdiction of every court of justice, whether of law or of equity,<sup>2</sup> and of inferior courts<sup>3</sup> as well as of superior ones.

**3. Upon Whose Motion Appointment Is Made.** — If the defendant himself does not move for the appointment of a guardian to represent him, the court will, on a motion of the plaintiff, appoint a guardian for such purpose.<sup>4</sup> In such case, however, the appointee should not be of the plaintiff's selection.<sup>5</sup>

**Appointment by Court Sua Sponte.** — Where neither the plaintiff nor the defendant asks for the appointment, the court will *ex mero motu* appoint a guardian *ad litem* to represent him.<sup>6</sup>

**4. At What Stage of Proceeding Appointment Is Made.** — As a general rule, until the defendant, whether an infant, an idiot, or an insane person, be first brought into court, either by personal service or by some other mode of service provided by statute,<sup>7</sup> the court is not authorized to appoint, on the

**1. Guardian Ad Litem for Infants Appointed Only When General Guardian Fails to Act or Is Incapacitated to Act** — *Arkansas*. — Pinchback *v.* Graves, 42 Ark. 222; Moore *v.* Woodall, 40 Ark. 42.

*California*. — Gronfier *v.* Puymiro, 19 Cal. 629; Smith *v.* McDonald, 42 Cal. 484; Western Lumber Co. *v.* Phillips, 94 Cal. 54; Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617.

*Indiana*. — Hughes *v.* Sellers, 34 Ind. 337.

*Kentucky*. — McMakin *v.* Stratton, 82 Ky. 226.

*Massachusetts*. — Mansur *v.* Pratt, 101 Mass. 60; Swan *v.* Horton, 14 Gray (Mass.) 179.

*Mississippi*. — Wells *v.* Smith, 44 Miss. 296; Winston *v.* McLendon, 43 Miss. 254; Johnson *v.* Cooper, 56 Miss. 608.

*North Carolina*. — Ward *v.* Lowndes, 96 N. Car. 367.

*Tennessee*. — Simpson *v.* Alexander, 6 Coldw. (Tenn.) 619; Cowan *v.* Anderson, 7 Coldw. (Tenn.) 284.

*Texas*. — Pucket *v.* Johnson, 45 Tex. 550.

It will be observed that in a few instances cases cited in this note are from the same states as are those cited in the first note of this section. The failure to appoint a guardian *ad litem* in such cases was held to be error either because there was no general guardian, or because, if there was, he was incapacitated from acting or failed or refused to do so.

**2. Power of Court to Appoint Guardian ad Litem.** — 3 Black. Com. 427; 2 Kent's Com. 229.

*Alabama*. — Austin *v.* Bean, 101 Ala. 133.

*Georgia*. — Jack *v.* Davis, 29 Ga. 219.

*Illinois*. — Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83; Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179; Fietsam *v.* Kropp, 6 Ill. App. 144; Rhoads *v.* Rhoads, 43 Ill. 239.

*Kentucky*. — Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468.

*Massachusetts*. — Davenport *v.* Davenport, 5 Allen (Mass.) 464; Denny *v.* Denny, 8 Allen (Mass.) 311; Mansfield *v.* Mansfield, 13 Mass. 412.

*Minnesota*. — Plympton *v.* Hall, 55 Minn. 22.

*Nebraska*. — Kuhn *v.* Kilmer, 16 Neb. 699.

*New Hampshire*. — Clarke *v.* Gilmanton, 12 N. H. 515.

*New York*. — Brick's Estate, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12; *In re* Monell, (Supm. Ct. Gen. T.) 22 Civ. Pro. (N. Y.) 377; Ontario Bank *v.* Strong, 2 Paige (N. Y.) 301; Bullard *v.* Spoor, 2 Cow. (N. Y.) 430; Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132; Markle *v.* Markle, 4 Johns. Ch. (N. Y.) 168; Hanley *v.* Brennan, (N. Y. City Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 186; Copous *v.* Kaufman, 3 Edw. Ch. (N. Y.) 370.

*Ohio*. — Sturges *v.* Longworth, 1 Ohio St. 545.

*Texas*. — Smith *v.* Taylor, 34 Tex. 589.

3. Austin *v.* Bean, 101 Ala. 133.

**A Justice of the Peace May Appoint Such a Guardian.** — Mockey *v.* Grey, 2 Johns. (N. Y.) 192; Bullard *v.* Spoor, 2 Cow. (N. Y.) 430.

**The Surrogate under the New York statute has this power.** Brick's Estate, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12. See also *In re* Monell, (Supm. Ct. Gen. T.) 22 Civ. Pro. (N. Y.) 377.

**4. Guardian ad Litem Appointed on Motion of Plaintiff.** — Jack *v.* Davis, 29 Ga. 219; Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83; Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 470; Clarke *v.* Gilmanton, 12 N. H. 515; Ontario Bank *v.* Strong, 2 Paige (N. Y.) 301; Mace *v.* Scott, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 100; Concklin *v.* Hall, 2 Barb. Ch. (N. Y.) 136; Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132; Markle *v.* Markle, 4 Johns. Ch. (N. Y.) 168; Hanley *v.* Brennan, (N. Y. City Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 186.

5. See *infra*, this section, *Who Should Be Appointed*.

**6. Appointment by Court Sua Sponte.** — Rhoads *v.* Rhoads, 43 Ill. 239; Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179; Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 470; Bullard *v.* Spoor, 2 Cow. (N. Y.) 430; Mockey *v.* Grey, 2 Johns. (N. Y.) 192; Brick's Estate, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12; *In re* Monell, (Supm. Ct. Gen. T.) 22 Civ. Pro. (N. Y.) 377; Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132.

**7. Service on Infants and Lunatics.** — The service of process on infants is regulated by local statutes. The subject is fully discussed

motion of the complainant or plaintiff in the cause, or *sua sponte*, a guardian *ad litem* to represent the defendant, and the appointee in such case is without authority to act.<sup>1</sup>

**5. Who Should Be Appointed.** — The general rule is that no person ought to be selected as guardian *ad litem* unless he be the general guardian of the infant, or an attorney of the courts of record, fully competent to understand and protect the rights of the infant, having no interest adverse to his, and not connected in business with the attorney or counsel of the adverse party.<sup>2</sup>

**General Guardian, Relative, Attorney, or Officer of Court.** — Ordinarily the general or testamentary guardian of the infant will be appointed.<sup>3</sup> If this appointment is improper, the infant's nearest relative not interested in the matter in question is usually selected,<sup>4</sup> but the appointment of a relative is not absolutely necessary.<sup>5</sup> If no person of these classes is available, it is usual to appoint a

under the title INFANTS, 10 ENCYC. OF PL. AND PR. 599 *et seq.*

As to service on lunatics, see the title INSANE PERSONS, 10 ENCYC. OF PL. AND PR. 1227 *et seq.*

As will be seen by consulting the references just given, in some states service on the general guardian or parent of infant without service on the infant is all that is required. And see *supra*, this section, *When [Appointment] Necessary*, the paragraph *When General Guardian May Act*.

**1. Process Should Be Served on Minor Before Guardian Appointed** — *United States*. — New York L. Ins. Co. v. Bangs, 103 U. S. 435; Carrington v. Brents, 1 McLean (U. S.) 167.

*Alabama*. — McIntosh v. Atkinson, 63 Ala. 241; Rowland v. Jones, 62 Ala. 322; Cook v. Rogers, 64 Ala. 406.

*Arkansas*. — Pinchback v. Graves, 42 Ark. 222; Boyd v. Roane, 49 Ark. 397.

*California*. — Johnston v. San Francisco Sav. Union, 63 Cal. 554; Boyd v. Dodson, 66 Cal. 360 (guardian *ad litem* for insane person).

*Florida*. — Thompson v. McDermott, 19 Fla. 852; McDermott v. Thompson, 29 Fla. 299.

*Georgia*. — Harvey v. Cubbage, 75 Ga. 792. In this case the general rule of the text is admitted, but that rule is modified by statute in Georgia, and in certain classes of cases the practice is not to notify the infant, but to appoint a guardian *ad litem* to represent him.

*Illinois*. — Crocker v. Smith, 10 Ill. App. 376; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457.

*Indiana*. — Carver v. Carver, 64 Ind. 194.

*Iowa*. — Good v. Norley, 28 Iowa 188; Allen v. Saylor, 14 Iowa 435; Matter of Hunter, 84 Iowa 388 (guardian *ad litem* for insane person).

*Kansas*. — Claypoole v. Houston, 12 Kan. 324.

*Kentucky*. — Allsmiller v. Freutchenicht, 86 Ky. 198; Wooldridge v. Harding, (Ky. 1899) 51 S. W. Rep. 162.

*Mississippi*. — Price v. Crone, 44 Miss. 571; Johnson v. Cooper, 56 Miss. 608.

*Missouri*. — Nagel v. Schilling, 14 Mo. App. 576; Fischer v. Sickmann, 125 Mo. 165.

*New York*. — Potter v. Ogden, 136 N. Y. 384; Ingersoll v. Mangam, 84 N. Y. 622.

*North Carolina*. — Moore v. Gidney, 75 N. Car. 34; Larkins v. Bullard, 88 N. Car. 35.

*Ohio*. — Moore v. Starks, 1 Ohio St. 369.

*South Carolina*. — Riker v. Vaughan, 23 S. Car. 187.

*Tennessee*. — Bruce v. Bruce, 11 Heisk. (Tenn.) 760; Rucker v. Moore, 1 Heisk. (Tenn.) 726; Taylor v. Walker, 1 Heisk. (Tenn.) 734.

*Texas*. — Montgomery v. Carlton, 56 Tex. 361; Moore v. Prince, 5 Tex. Civ. App. 352.

*Wisconsin*. — Helms v. Chadbourne, 45 Wis. 60.

*Canada*. — Robinson v. Dobson, 1 Ch. Chamb. (Ont.) 257.

**This Question Is Elaborately Discussed** under the title INFANTS, 10 ENCYC. OF PL. AND PR. 638 *et seq.*

**For the Effect of a Premature Appointment**, see ENCYC. OF PL. AND PR., *ubi supra*.

**2. Story v. Dayton**, 22 Hun (N. Y.) 450. See also Walker v. Hallett, 1 Ala. 379; Morris v. Gentry, 89 N. Car. 248.

**Appointee Must Be Real and Not Fictitious Person.** — Bullard v. Spoor, 2 Cow. (N. Y.) 430. But see Van Deusen v. Brower, 6 Cow. (N. Y.) 50, and Fearing v. Clawson, 1 Hall (N. Y.) 55, in which cases it was held that a nominal guardian might be appointed for infants who were arrested for default in failing to appear in actions against them for necessities, and where they failed to take any notice of the arrest.

**A Person Without the Jurisdiction** will not be selected. — *v.* —, 18 Jur. 770.

**3. General Guardian.** — Howard v. Abergavenny, 1 Dick. 31; Mathewson v. Sprague, 1 Curt. (U. S.) 457; Scott v. Winningham, 79 Ga. 492; Kesler v. Penninger, 59 Ill. 134; Patterson v. Pullman, 104 Ill. 80; Heller v. Heller, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 194; Cook v. Rawdon, (Supm. Ct.) 6 How. Pr. (N. Y.) 233; Story v. Dayton, 22 Hun (N. Y.) 450.

**4. Relative.** — Jongsma v. Pfiel, 9 Ves. Jr. 357; U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128; Rhoads v. Rhoads, 43 Ill. 239; Grant v. Van Schoonhoven, 9 Paige (N. Y.) 255, 37 Am. Dec. 393. See also Cantrell v. Ford, (Tenn. Ch. 1898) 46 S. W. Rep. 581.

**There Should Be Some Interest**, either relationship or the like, to show that the person claiming to be guardian is not a mere volunteer. Foster v. Cantley, 17 Jur. 370.

**Next of Kin Entitled to Be Heard.** — Where a father or mother, guardian or next of kin of an infant is complainant in a suit, the next nearest relative is entitled to a hearing as to the selection of a guardian *ad litem*. Grant v. Van Schoonhoven, 9 Paige (N. Y.) 255, 37 Am. Dec. 393.

**5. Rhoads v. Rhoads**, 43 Ill. 239.



solicitor or attorney of the court,<sup>1</sup> or sometimes the selection falls on an officer of the court making the appointment.<sup>2</sup>

**Should Have No Interest Adverse to Defendant.** — The person appointed guardian *ad litem* should have no interest adverse to the defendant<sup>3</sup> in the subject-matter of the litigation. The court should not appoint either the plaintiff or his attorney or a connection of either of them,<sup>4</sup> nor any other person whose interests are adverse to those of the infant.<sup>5</sup>

**Financial Responsibility of Appointee.** — The person appointed guardian *ad litem* must have sufficient financial ability to respond to the infant in damages for any neglect or default in the performance of his duties.<sup>6</sup>

**Should Not Be Selection of Adverse Party.** — Although a guardian *ad litem* may be appointed upon the application of the plaintiff,<sup>7</sup> the court will not permit the adverse party or his attorney to select the person to be appointed.<sup>8</sup>

**The Appointment of a Stranger Has Been Declared to Be a Circumstance of Suspicion.** — U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128.

1. **Solicitor or Attorney.** — Cookson *v.* Lee, 15 Sim. 302; Robinson *v.* Aston, 9 Jur. 224; Bennett *v.* Wheeler, 1 Ir. Eq. 16; Thomas *v.* Thomas, 7 Beav. 47; Thomas *v.* Gwyn, 13 L. J. Ch. 79; Bentley *v.* Robinson, 9 Hare (appendix) lxxvi; Story *v.* Dayton, 22 Hun (N. Y.) 450; Cook *v.* Rawdon, (Supm. Ct.) 6 How. Pr. (N. Y.) 233; Carter *v.* Montgomery, 2 Tenn. Ch. 455.

2. **Officer of Court.** — Smith *v.* Edwardson, 1 Dick. 234; Morgan *v.* Morgan, 2 Molloy 362; Greenup *v.* Bacon, 1 T. B. Mon. (Ky.) 109.

The court will appoint the clerk of the court or an attorney. Cook *v.* Rawdon, (Supm. Ct.) 6 How. Pr. (N. Y.) 233; Carter *v.* Montgomery, 2 Tenn. Ch. 455. See also Maloney *v.* Dewey, 127 Ill. 395, 11 Am. St. Rep. 131.

3. **Improper that Guardian Selected Should Have Interests Adverse to Defendant.** — Estes *v.* Bridgforth, 114 Ala. 221; Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291; Parker *v.* Lincoln, 12 Mass. 16; Damouth *v.* Klock, 29 Mich. 289; Hecker *v.* Sexton, 43 Hun (N. Y.) 593; Matter of Frits, 2 Paige (N. Y.) 374; Story *v.* Dayton, 22 Hun (N. Y.) 450; George *v.* High, 85 N. Car. 113.

**Same Person Should Not Be Appointed to Represent Infants Whose Interests Are Antagonistic.** — In a proceeding where there are minors whose interests are directly antagonistic—for instance, where some would take as heirs if a will were not probated, and others would take as beneficiaries if it were—it is improper to appoint the same person guardian *ad litem* to represent the interests of both classes. Estes *v.* Bridgforth, 114 Ala. 221.

**If the General Guardian Is Interested, Another Should Be Appointed.** — Where the funds of an infant having a legal guardian are secured by a mortgage on real estate, and the mortgagor desires to redeem, the infant and his legal guardian are proper defendants to a bill filed for that purpose. The court should, however, appoint some other suitable person, who is without any interest in the business, guardian *ad litem* to the infant, to defend his interests in the suit. Parker *v.* Lincoln, 12 Mass. 16.

**Prima Facie Showing of Fitness Held Sufficient.** — When a *prima facie* case is made showing that no conflicting interest exists between the infant and the proposed guardian, or the party proposing him, the court will not go into the

question of the fact or extent of interest. Ferguson *v.* Langtry, 2 Ch. Chamb. (Ont.) 473.

4. **Plaintiff or Complainant Improper Appointee.** — Hecker *v.* Sexton, 43 Hun (N. Y.) 593.

**Improper to Appoint Plaintiff's Attorney Guardian ad Litem.** — James *v.* Robertson, 1 Ch. Chamb. (Ont.) 197; Sargeant *v.* Rowsey, 89 Mo. 617.

In Walters *v.* Hermann, 99 Mo. 529, the court held, where infants were defendants in a tax suit and the general attorney of the tax collector was appointed guardian *ad litem* to defend the suit for them, that such appointment did not invalidate a judgment against them where the attorney was not employed by the collector in that special case.

**Plaintiff's Husband, though Father of Defendant, Improper Appointee.** — Bicknell *v.* Bicknell, 111 Mass. 265.

**Nephew of Plaintiff and Employee in His Office Improper Appointee.** — Story *v.* Dayton, 22 Hun (N. Y.) 450.

**Must Not Be Connected in Business with Plaintiff's Attorneys.** — It is said that the guardian *ad litem* must be "in no way connected in business with the attorneys for the adverse party." Tyson *v.* Richardson, (Wis. 1899) 79 N. W. Rep. 439.

Thus the agent of the plaintiff's solicitor should not be appointed. Fletcher *v.* Bosworth, 5 Grant Ch. (U. C.) 458.

5. **Adverse Interest — Where Attorney of Co-defendant Improper.** — Where a father and his infant children are codefendants, if it appears that the interests of the father conflict with those of the children the court will not appoint his solicitor guardian *ad litem* to the infants. Aikins *v.* Blain, 1 Ch. Chamb. (Ont.) 249.

6. **Financial Ability.** — Young *v.* Whitaker, 1 A. K. Marsh. (Ky.) 398; Story *v.* Dayton, 22 Hun (N. Y.) 450; McDonald *v.* Brass Goods Mfg. Co., (Supm. Ct.) 2 Abb. N. Cas. (N. Y.) 434; Ten Broeck *v.* Reynolds, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 462; Matter of Mang, 50 N. Y. Super. Ct. 96; Cook *v.* Rawdon, (Supm. Ct.) 6 How. Pr. (N. Y.) 233; Tyson *v.* Richardson, (Wis. 1899) 79 N. W. Rep. 439. See also *In re Daly*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 437.

7. See *supra*, this section, *Upon Whose Motion Appointment Is Made.*

8. **Not Nominee of Adverse Party.** — Clements *v.* Arnold, 3 Ch. Chamb. (Ont.) 75; Fletcher *v.* Bosworth, 5 Grant Ch. (U. C.) 458; Rhoads *v.*

**Consulting Infant as to Appointee.** — If the infant is over fourteen years of age, the court may in its sound discretion<sup>1</sup> consult him in the appointment of a guardian *ad litem*.<sup>2</sup> No person should be appointed on his own motion without the consent of the infant.<sup>3</sup>

**6. Effect of Failure to Appoint or of Irregular Appointment — Failure to Appoint — Judgment or Decree Erroneous.** — If the court, after the service of process on the defendant, fails to appoint a guardian *ad litem*, the judgment rendered in the cause is irregular and reversible by a proceeding in error, but is not void.<sup>4</sup> This is true whether the defendant in such action be an insane person<sup>5</sup> or an infant.<sup>6</sup> It follows, therefore, that such judgment is not subject to impeachment upon collateral attack.<sup>7</sup>

Rhoads, 43 Ill. 239; Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291; Sargeant *v.* Rowsey, 89 Mo. 617; Hecker *v.* Sexton, 43 Hun (N. Y.) 593; Knickerbacker *v.* De Freest, 2 Paige (N. Y.) 304; Story *v.* Dayton, 22 Hun (N. Y.) 450; Matter of Cutting, 38 N. Y. App. Div. 247.

**Immaterial that Adult Codefendant Also Consented to Appointment.** — Where the plaintiff's attorney was made guardian *ad litem* for an infant defendant, such appointment was unauthorized by the court; and it does not help matters that an adult defendant and the plaintiff in the suit consented of record to the appointment. Sargeant *v.* Rowsey, 89 Mo. 617.

**1. Consulting Infant.** — Walker *v.* Hallett, 1 Ala. 379.

It is not necessary to consult the infant as to the appointee. Beddinger *v.* Smith, (Ark. 1890) 13 S. W. Rep. 734; Brick's Estate, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12.

**2. Walker v. Hallett, 1 Ala. 379; Stammers v. McNaughten, 57 Ala. 277; Roach v. Hix, 57 Ala. 576.**

**3. E. B. v. E. C. B., 28 Barb. (N. Y.) 299, 8 Abb. Pr. (N. Y.) 44.**

**4. Judgment in Case Where Guardian ad Litem Not Appointed Erroneous but Not Void — United States.** — O'Hara *v.* MacConnell, 93 U. S. 150.

**Alabama.** — Levystein *v.* O'Brien, 106 Ala. 352, 54 Am. St. Rep. 56; Rowland *v.* Jones, 62 Ala. 322.

**Arkansas.** — Trapnall *v.* State Bank, 18 Ark. 53; Pinchback *v.* Graves, 42 Ark. 222.

**Connecticut.** — Fahay *v.* State, 25 Conn. 205; State *v.* James, 37 Conn. 361.

**Georgia.** — Groce *v.* Field, 13 Ga. 24.

**Illinois.** — Lemon *v.* Sweeney, 6 Ill. App. 507; Quigley *v.* Roberts, 44 Ill. 503; Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83; Millard *v.* Marmon, 116 Ill. 649.

**Indiana.** — Blake *v.* Douglass, 27 Ind. 416.

**Iowa.** — Drake *v.* Hanshaw, 47 Iowa 291; Webster *v.* Page, 54 Iowa 461; Myers *v.* Davis, 47 Iowa 325; Hoover *v.* Kinsey Plow Co., 55 Iowa 668.

**Kansas.** — Walkenhorst *v.* Lewis, 24 Kan. 420; Halloway *v.* McIntosh, 7 Kan. App. 37.

**Kentucky.** — Simmons *v.* McKay, 5 Bush (Ky.) 25; Allison *v.* Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68; Pond *v.* Doneghy, 18 B. Mon. (Ky.) 558; Smith *v.* Ferguson, 3 Met. (Ky.) 424; Porter *v.* Robinson, 3 A. K. Marsh. (Ky.) 254, 13 Am. Dec. 153; Darby *v.* Richardson, 3 J. J. Marsh. (Ky.) 544; Irons *v.* Crist, 3 A. K. Marsh. (Ky.) 143.

**Maryland.** — Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681.

**Massachusetts.** — Conto *v.* Silvia, 170 Mass.

152; Austin *v.* Charlestown Female Seminary, 8 Met. (Mass.) 196, 41 Am. Dec. 497; Knapp *v.* Crosby, 1 Mass. 479; Hill *v.* Keyes, 10 Allen (Mass.) 258; Swan *v.* Horton, 14 Gray (Mass.) 179; Crockett *v.* Drew, 5 Gray (Mass.) 399; Valier *v.* Hart, 11 Mass. 300; Goodridge *v.* Ross, 6 Met. (Mass.) 487.

**Missouri.** — Bailey *v.* McGinniss, 57 Mo. 362; Powell *v.* Gott, 13 Mo. 458, 53 Am. Dec. 153; Charley *v.* Kelley, 120 Mo. 134; Creech *v.* Creech, 10 Mo. App. 586.

**Nebraska.** — Manfull *v.* Graham, 55 Neb. 645; Parker *v.* Starr, 21 Neb. 680; McAlister *v.* Lancaster County Bank, 15 Neb. 295.

**New York.** — Fox *v.* Fee, 24 N. Y. App. Div. 314; Sims *v.* New York College, 35 Hun (N. Y.) 344; McMurray *v.* McMurray, 66 N. Y. 175.

**North Carolina.** — Larkins *v.* Bullard, 88 N. Car. 35; England *v.* Garner, 90 N. Car. 197.

**Ohio.** — St. Clair *v.* Smith, 3 Ohio 355; Johnson *v.* Pomeroy, 31 Ohio St. 247.

**Pennsylvania.** — Moore *v.* McEwen, 5 S. & R. (Pa.) 373.

**Texas.** — Montgomery *v.* Carlton, 56 Tex. 361; Taylor *v.* Rowland, 26 Tex. 293; Wallis *v.* Stuart, 92 Tex. 568.

**Vermont.** — Barber *v.* Graves, 18 Vt. 290.

**Virginia.** — Roberts *v.* Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463.

**West Virginia.** — Piercy *v.* Piercy, 5 W. Va. 199; Myers *v.* Myers, 6 W. Va. 369; McDonald *v.* McDonald, 3 W. Va. 676.

**5. Judgment Rendered Against Insane Person Without Appointment of Guardian ad Litem Not Void.** — Allison *v.* Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68; McAlister *v.* Lancaster County Bank, 15 Neb. 295; Johnson *v.* Pomeroy, 31 Ohio St. 247.

**6. See the cases cited in the first note to this subsection other than those also cited in the last note, in which the defendants were infants.**

**7. Such Judgment Not Subject to Impeachment upon Collateral Attack.** — Levystein *v.* O'Brien, 106 Ala. 352, 54 Am. St. Rep. 56; Trapnall *v.* State Bank, 18 Ark. 53; Lemon *v.* Sweeney, 6 Ill. App. 507; Drake *v.* Hanshaw, 47 Iowa 291; Myers *v.* Davis, 47 Iowa 325; Hoover *v.* Kinsey Plow Co., 55 Iowa 668; Walkhenhorst *v.* Lewis, 24 Kan. 420; Halloway *v.* McIntosh, 7 Kan. App. 37; Porter *v.* Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; Allison *v.* Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68; Austin *v.* Charlestown Female Seminary, 8 Met. (Mass.) 196, 41 Am. Dec. 497; Bailey *v.* McGinniss, 57 Mo. 362; Parker *v.* Starr, 21 Neb. 680; Johnson *v.* Pomeroy, 31 Ohio St. 247; Montgomery *v.* Carlton, 56 Tex. 361.



**Appointment of Improper Person.** — Where the person appointed by the court is some member of that class heretofore indicated as an improper one from which to make selection, on appeal the cause will generally be reversed for error,<sup>1</sup> if, indeed, the court does not direct a rehearing.<sup>2</sup> When a decree has actually been rendered in the cause, however, such an improper appointment will not of itself warrant setting the decree aside as fraudulent or constructively fraudulent.<sup>3</sup>

**III. COURT'S CONTROL OF GUARDIAN AD LITEM.** — Infants and persons *non compos mentis* whose property rights are in litigation are regarded as the wards of the court,<sup>4</sup> and the court will exercise the most vigilant care in seeing that their rights are properly asserted and protected. For this purpose the guardian *ad litem* is under the direct control of the court, and it will compel him to perform his duties in protecting the rights of the person whom he is appointed to represent, and will not suffer the latter to be prejudiced by his guardian's acts or omissions.<sup>5</sup>

**Enforcement of Such Judgment Not Restrained by Injunction.** — *Lemon v. Sweeney*, 6 Ill. App. 507; *Drake v. Hanshaw*, 47 Iowa 291; *Halloway v. McIntosh*, 7 Kan. App. 37.

**Such Judgments Not Avoided by Act in Pais.** — *Trappall v. State Bank*, 18 Ark. 53.

**Such Judgment Cannot Be Vacated by Audita Querela.** — *Barber v. Graves*, 18 Vt. 290.

**1. Where Error of Court Corrected by Appellate Tribunal.** — *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291; *Damouth v. Klock*, 29 Mich. 289; *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Hecker v. Sexton*, 43 Hun (N. Y.) 593.

**2. Guardian ad Litem Removed and Rehearing Directed.** — A suit had been instituted by a creditor for the administration of the estate of a decedent, and the agent of the plaintiff's solicitor was appointed guardian *ad litem* to the infant defendants. After a sale of the lands under the decree, at which the plaintiff by leave of the court had bid off a portion of the lands, a motion was made to change the name of the purchaser. The court refused the application and directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside. *Fletcher v. Bosworth*, 5 Grant Ch. (U. C.) 458.

**3. Not Ordinarily Ground for Vacating Decree.** — *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291; *Story v. Dayton*, 22 Hun (N. Y.) 450. See also *Ward v. Lowndes*, 96 N. Car. 367.

**Where One of Complainants through Concealment Induces Court to Appoint Him.** — In an action to foreclose a mortgage, one of the complainants was the general guardian of an infant defendant, and was upon his own petition appointed guardian *ad litem* to defend the cause for the infant, by the concealment of the fact that he was a party plaintiff. The court said that if indeed the decree rendered in such cause was not absolutely void so as to render it assailable collaterally, it was certainly "so far voidable as to enable any party to the action or any person interested therein, as, for instance, a purchaser at a foreclosure sale, to raise the objection to it by motion and to call upon the court to undo the inadvertence which it fell into through the concealment of one of the parties." *Hecker v. Sexton*, 43 Hun (N. Y.) 593.

**4. Persons under Disability Are Wards of Courts.** — This doctrine is asserted in courts of chan-

cery. As to infants, see *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128; *Branch v. Mitchell*, 24 Ark. 431; *Richards v. East Tennessee, etc., R. Co.*, 106 Ga. 614; *Turner v. Jenkins*, 79 Ill. 228; *Lloyd v. Kirkwood*, 112 Ill. 329; *Neblett v. Neblett*, 70 Miss. 572; *Stephens v. Van Buren*, 1 Paige (N. Y.) 479; *Long v. Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439; *Duncan v. Ross*, 2 Ch. Chamb. (Ont.) 443. See also 2 *Story's Eq. Jur.* (13th ed.), § 1352.

As to lunatics, see *Austin v. Bean*, 101 Ala. 133.

**5. Court Controls Guardian in Ward's Interest.** — *Austin v. Bean*, 101 Ala. 133; *Lloyd v. Kirkwood*, 112 Ill. 329; *Cavender v. Smith*, 5 Iowa 157; *Neblett v. Neblett*, 70 Miss. 572; *Howell v. Mills*, 53 N. Y. 322; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439. See also *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

It is the duty of a court to protect the interests of minors, whether the proper defense be made or not; and in order to accomplish this purpose, it should look to the record in all of its parts, and, *ex mero motu*, give to such defendants the benefit of all objections and exceptions, as fully as if they had been specially pleaded by their guardian *ad litem*. *Price v. Crone*, 44 Miss. 571.

**The Benefit of All Defenses** of which the ward could have availed himself by demurrer or by denials of the allegations of the bill will be secured to him by both the trial court and the appellate court. *Branch v. Mitchell*, 24 Ark. 432.

An appellate court will protect the rights of such defendants when a case comes before it on appeal, even though they themselves are not parties to the appeal. *Tillar v. Cleveland*, 47 Ark. 287; *Kempner v. Dooley*, 60 Ark. 525.

**Compelling Guardian to Answer.** — Where some of the defendants in a chancery cause are infants, it is error to hear the cause without answer from them. The court should coerce the answer from the guardian *ad litem* or appoint a new one and defer the hearing until the answer comes in. *Henly v. Gore*, 4 Dana (Ky.) 133. And see *Richards v. Richards*, 17 Ind. 636.

**Permitting Withdrawal of Guardian's Plea.** — It is the duty of the court to see that the

## IV. DUTIES, POWERS, AND LIABILITIES — 1. General Duty in Making Defense.

— It is the duty of the guardian *ad litem* thoroughly to examine into the case in which he is appointed, to ascertain the rights of his ward, and to interpose such defenses as his ward's interests demand and the nature of the case admits.<sup>1</sup>

2. **Extent of Authority to Bind Infant** — *a.* **GENERAL STATEMENT AS TO HIS POWERS.** — The court is charged with the duty of protecting infants and incompetent persons whose rights are in controversy before it,<sup>2</sup> and the guardian *ad litem* is its agent in the discharge of this duty.<sup>3</sup> The court is the only source of the guardian's power,<sup>4</sup> and the authority committed to him is a limited one, confined solely to the duty of defending the rights of his ward in the action in which he is appointed.<sup>5</sup> He may employ the ordinary and customary means to bring it if possible to a successful termination,<sup>6</sup> and may bind his ward by admissions and waivers in the course of the litigation which

proper defense is interposed by the guardian *ad litem*, and it is error for the court to permit the guardian to withdraw the plea and allow a judgment to be entered against the defendant. *Peak v. Pricer*, 21 Ill. 164.

1. **Energy and Vigilance Should Be Used in Defense.** — *Pillow v. Sentelle*, 39 Ark. 61; *Varner v. Rice*, 44 Ark. 236; *Rhoads v. Rhoads*, 43 Ill. 239; *Sprague v. Beamer*, 45 Ill. App. 17; *Stunz v. Stunz*, 131 Ill. 210; *Mercer v. Watson*, 1 Watts (Pa.) 330; *Tyson v. Tyson*, 94 Wis. 225; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439.

In *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439, in amplification of the rule stated in the text, it was said that it is the duty of the guardian *ad litem* "to take nothing for granted in plaintiff's favor that by any reasonable probability could be the subject of contest, to make no admissions regarding such matters adverse to the defendants, but to put the plaintiff to proof of the facts as to every such matter upon which relief in her behalf was demanded, to make a vigorous defense against plaintiff's claim where defense was reasonable in any view of the case, to bring all the facts and the law in defendant's behalf, so far as practicable, to the attention of the court, not stopping even with an adverse decision if reasonable doubt as to its justice existed."

The mere perfunctory performance of duty does not meet the requirements of the position of guardian *ad litem*. *Tyson v. Tyson*, 94 Wis. 225. See also *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 108.

**Sufficiency of Answer.** — In some states it is the rule that the answer of the guardian *ad litem* must specifically deny all the material allegations of the bill or complaint. *Pillow v. Sentelle*, 39 Ark. 61; *Varner v. Rice*, 44 Ark. 236; *Brenner v. Bigelow*, 8 Kan. 496. See also *Randall v. Turner*, 17 Ohio St. 262.

But according to the practice in chancery the answer is usually a merely formal one, disclaiming all knowledge or information with respect to the matters alleged in the complaint and requiring strict proof thereof and invoking the protection of the court. *Proctor v. Scharpf*, 80 Ala. 229; *Tucker v. Bean*, 65 Me. 352; *Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162; *Johnson v. McCabe*, 42 Miss. 255; *Revely v. Skinner*, 33 Mo. 100; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 368; *Ridgely v. Bennett*, 13 Lea (Tenn.) 210.

Such an answer, however, is taken as a denial so as to put the complainant upon proof of all the material allegations of his bill. *Carnall v. Wilson*, 14 Ark. 482; *Gregory v. Orr*, 61 Miss. 307; *Wood v. Butler*, 23 Ohio St. 520. And it is sufficient to let in any defense to which the infant appears entitled on the evidence. *Skaggs v. Kincaid*, 48 Ill. App. 608; *Stark v. Brown*, 101 Ill. 395.

The answer of an infant cannot be excepted to for insufficiency. *Copeland v. Wheeler*, 4 Bro. C. C. 256; *Lucas v. Lucas*, 13 Ves. Jr. 274; *Price v. Crone*, 44 Miss. 571; *Leggett v. Sellon*, 3 Paige (N. Y.) 84.

See further on this subject the title INFANTS, 10 ENCYC. OF PL. AND PR. 687 *et seq.*

2. See *supra*, this title, *Court's Control of Guardian ad Litem*.

3. *Cole v. Superior Ct.*, 63 Cal. 86, 49 Am. Rep. 78; *Seaton v. Tohill*, 11 Colo. App. 216; *Rogers v. McLean*, 34 N. Y. 540; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439.

4. *Edsall v. Vandemark*, 39 Barb. (N. Y.) 599.

5. *McClure v. Farthing*, 51 Mo. 109.

"The only authority of the guardian to appear is by virtue of the appointment, and the appointment limits the effect of the appearance to the subject-matter of the suit in which the appearance is made." *Waterman v. Lawrence*, 19 Cal. 218, 79 Am. Dec. 212, *per Baldwin, J.*

The Guardian *ad Litem* Cannot Authorize the Disbursement of Moneys coming from a source distinct from the litigation in which he is appointed. *Matter of Kennedy*, 120 Cal. 458.

6. *Per Campbell, P. J.*, in *Edsall v. Vandemark*, 39 Barb. (N. Y.) 599.

**May Employ Attorney.** — *Taylor v. Hill*, 115 Cal. 149.

A Guardian *ad Litem* May File a Cross-bill where necessary to protect his ward's interests. *Sprague v. Beamer*, 45 Ill. App. 17.

**May Consent to Arrangements in Cause Looking to Orderly Management and Trial of Cause.** — *Newins v. Baird*, 19 Hun (N. Y.) 306; *Lemmon v. Herbert*, 92 Va. 653.

**May Consent to Removal of Case from One Circuit Court to Another.** — *Lemmon v. Herbert*, 92 Va. 653.

**May Accept Short Notice of Trial under the New York practice.** — *Newins v. Baird*, 19 Hun (N. Y.) 306, holding that Code Civ. Pro. N. Y., § 120, applies only to defendants.



merely facilitate the trial and do not prejudice the ward.<sup>1</sup>

*b. ADMISSIONS, ANSWERS, AND JUDGMENTS BY CONSENT — Infant Not Bound by Guardian's Admissions or Stipulations.* — The rule is elementary that an infant cannot be bound by the admissions of his guardian *ad litem* unless they are for his benefit,<sup>2</sup> nor by his omissions in failing to object to incompetent evidence.<sup>3</sup> So the guardian's stipulations prejudicing his ward's rights are invalid.<sup>4</sup>

1. *May Admit Facts Tending to Facilitate Trial and Not Prejudicing Ward.* — *Kingsbury v. Buckner*, 134 U. S. 650; *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

As to the *Guardian's Admissions Generally*, see *infra*, this section, *Admissions, Answers, and Judgments by Consent*.

*May Waive Service of Process on Himself in Order to Accelerate Trial.* — *Pollock v. Buie*, 43 Miss. 140; *Hannum v. Wallace*, 9 Humph. (Tenn.) 129.

*May Consent to Rendition of Decree by Chancery Court in Vacation under the Virginia statute* (Code 1873, c. 167, § 53). *Morriss v. Virginia Ins. Co.*, 85 Va. 588.

2. *Admissions or Stipulations Cannot Prejudice Infants — England.* — *Holden v. Hearn*, 1 Beav. 445.

*United States.* — *Kingsbury v. Buckner*, 134 U. S. 650.

*Alabama.* — *Matthews v. Dowling*, 54 Ala. 202; *Ashford v. Patton*, 70 Ala. 479.

*California.* — *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212.

*Colorado.* — *Seaton v. Tohill*, 11 Colo. App. 211.

*Illinois.* — *Fischer v. Fischer*, 54 Ill. 231; *Turner v. Jenkins*, 79 Ill. 228; *Johnson v. Johnston*, 138 Ill. 385.

*Indiana.* — *McEndree v. McEndree*, 12 Ind. 97; *Hough v. Doyle*, 8 Blackf. (Ind.) 300.

*Iowa.* — *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

*Kentucky.* — *Melton v. Brown*, (Ky. 1898) 47 S. W. Rep. 764.

*Michigan.* — *Cooper v. Mayhew*, 40 Mich. 528; *Sanborn v. Mitchell*, 94 Mich. 519; *Peck v. Adsit*, 98 Mich. 639.

*Mississippi.* — *Johnson v. McCabe*, 42 Miss. 255.

*Missouri.* — *Collins v. Trotter*, 81 Mo. 275.

*New York.* — *Litchfield v. Burwell*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 341; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Buffalo Loan, etc., Co. v. Knights Templar, etc., Assoc.*, 126 N. Y. 450, 22 Am. St. Rep. 839; *Newins v. Baird*, 19 Hun (N. Y.) 306.

*Virginia.* — *Daingerfield v. Smith*, 83 Va. 81; *Ewing v. Ferguson*, 33 Gratt. (Va.) 548.

*West Virginia.* — *Fowler v. Lewis*, 36 W. Va. 128.

See also the title *INFANTS*, 10 ENCYC. OF PL. AND PR. 675 *et seq.*

*In Partition Proceedings* under statute in some states a guardian *ad litem* may admit material facts and may bind his ward by a stipulation in the nature of a waiver of proof. In such a proceeding he "seems to be clothed with the full power of his ward after removal of disabilities." *Le Bourgeois v. McNamara*, 82 Mo. 189. See also *San Fernando Farm Homestead Assoc. v. Porter*, 58 Cal. 81;

*Althause v. Radde*, 3 Bosw. (N. Y.) 410; *McLarty v. Broom*, 67 N. Car. 311; *Kromer v. Friday*, 10 Wash. 621.

*Guardian Cannot Admit Service of Summons or Other Process on Infant Defendant.* — *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Robbins v. Robbins*, 2 Ind. 74.

*Prejudicial Admissions Susceptible of Direct Proof.* — In *Rarick v. Vandevier*, 11 Colo. App. 116, it was held not error to allow the guardian *ad litem* even to make a prejudicial admission where the fact sought to be established thereby was otherwise unquestionably susceptible of direct proof. The decision in this case seems, however, to tread dangerously close to conflicting with the general rule debarring him from making prejudicial admissions.

3. *Johnston v. Johnston*, 138 Ill. 385; *Neblett v. Neblett*, 70 Miss. 572.

*The Guardian Can neither Waive Proof nor Consent to the Use of Illegal Evidence as Such.* — *Litchfield v. Burwell*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 341. See also *Crotty v. Eagle*, 35 W. Va. 143.

4. *Guardian ad Litem Cannot Submit Claim Against His Ward to Arbitration.* — *Fort v. Battle*, 13 Smed. & M. (Miss.) 133; *Hannum v. Wallace*, 9 Humph. (Tenn.) 129. As to the application of the same rule to a next friend, see *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

*Cannot Agree that Decision Shall Abide That in Another Cause.* — *McClure v. Farthing*, 51 Mo. 109.

*Cannot Consent to Foreclosure of Mortgage on Ward's Land Before Maturity of Note.* — *Melton v. Brown*, (Ky. 1898) 47 S. W. Rep. 764.

*Cannot Execute Release Discharging Interest of Witness.* — The guardian *ad litem* cannot execute a release discharging the interest of a person so as to render him a competent witness in the cause. *Fraser v. Marsh*, 2 Stark 41, 3 E. C. L. 308; *Walker v. Ferrin*, 4 Vt. 523.

*Compromising Cause.* — He cannot, of his own motion and without an order of court, make an absolute settlement of the whole matter in controversy, so as to bind the infant whom he represents in the cause. *Edsall v. Vandemark*, 39 Barb. (N. Y.) 589.

But the court may sanction a compromise by the guardian. *King v. King*, 15 Ill. 188; *Savage v. McCorkle*, 17 Oregon 42.

*An Absolute Agreement Fixing the Compensation of the Attorney* employed to represent the infant is beyond the power of a guardian and will not bind the court, for to the court itself belongs the right of fixing his disbursements and such compensation. *Cole v. Superior Ct.*, 63 Cal. 86, 49 Am. Rep. 78.

*Agreement by Which Infant's Property Sold for Less than Its Value.* — In a partition suit, the guardian *ad litem* cannot bind the infant whom he represents by an agreement by which the property is bid off for less than its value,

**Admissions Disregarded — Whole Case Must Be Proved.** — Admissions actually made by the guardian will be disregarded,<sup>1</sup> and the whole case against the infant must be established by proof.<sup>2</sup>

**Answer Not Evidence Against Infant.** — The answer put in by a guardian *ad litem* for an infant defendant is regarded as the answer of the guardian, and the infant is not bound by it, and it cannot be read against him for any purpose.<sup>3</sup>

**A Decree or Judgment Founded on the Admissions of the Guardian** is erroneous,<sup>4</sup> and such a decree may be reversed on appeal.<sup>5</sup>

**Judgments or Decrees by Consent.** — The general rule is that a guardian *ad litem* cannot consent to a judgment or decree against his ward,<sup>6</sup> and such a judgment, while not void, is erroneous.<sup>7</sup> Where, however, it clearly appears that a decree is for the benefit of the infant, it may be pronounced by the consent of the infant and all other parties.<sup>8</sup> It is usual to refer the matter to determine the course beneficial to the infant.<sup>9</sup> Even in the absence of such a reference there is authority to the effect that a decree pronounced against an

whatever advantages to the infant he may have had in view at the time of making such agreement. *Howell v. Mills*, 53 N. Y. 322.

1. *Seaton v. Tohill*, 11 Colo. App. 211.

2. **Whole Case Must Be Proved** — *England*. — *Holden v. Hearn*, 1 Beav. 445; *Wilkinson v. Beal*, 4 Madd. 408.

*United States*. — *Walton v. Coulson*, 1 McLean (U. S.) 120.

*Alabama*. — *Matthews v. Dowling*, 54 Ala. 202; *Ashford v. Patton*, 70 Ala. 482.

*Arkansas*. — *State v. Atkins*, 53 Ark. 307.

*Illinois*. — *Tuttle v. Garrett*, 16 Ill. 354.

*Indiana*. — *Hough v. Doyle*, 8 Blackf. (Ind.) 300; *Crain v. Parker*, 1 Ind. 374; *Martin v. Starr*, 7 Ind. 224.

*Iowa*. — *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

*Maine*. — *Tucker v. Bean*, 65 Me. 352; *Stinson v. Pickering*, 70 Me. 275.

*Mississippi*. — *Johnson v. McCabe*, 42 Miss. 255.

*Missouri*. — *Revely v. Skinner*, 33 Mo. 98; *Collins v. Trotter*, 81 Mo. 275.

*New York*. — *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

*Ohio*. — *Massie v. Donaldson*, 8 Ohio 377.

*Rhode Island*. — *Eaton v. Tillinghast*, 4 R. I. 284.

See also the title *INFANTS*, 10 ENCYC. OF PL. AND PR. 719.

The guardian *ad litem* of infant heirs cannot consent to a sale of real property on account of the deficiency of assets of the infants' testator, without proof of the creditor's claim against the estate. *Daingerfield v. Smith*, 83 Va. 81.

3. **Answer Not Evidence Against Infant.** — *Wrottesley v. Bendish*, 3 P. Wms. 235; *Johnson v. McCabe*, 42 Miss. 255; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Bulkley v. Van Wyck*, 5 Paige (N. Y.) 536; *Alexandria Bank v. Patton*, 1 Rob. (Va.) 535; *Fowler v. Lewis*, 36 W. Va. 128; 1 *Daniell's Ch. Pl. and Pr.* (6th Am. ed.) 169.

The declaration of a guardian is not evidence against his ward. *Cowling v. Ely*, 2 Stark. 366, 2 E. C. L. 447.

See also the title *ANSWERS IN EQUITY PLEADING*, 1 ENCYC. OF PL. AND PR. 955, also in the same work the title *INFANTS*, vol. 10, p. 723.

4. *Crain v. Parker*, 1 Ind. 374; *Hough v. Canby*, 8 Blackf. (Ind.) 301. See also the last note but one *supra*, and the title *INFANTS*, 10 ENCYC. OF PL. AND PR. 721. But see *English v. Savage*, 5 Oregon 518; *Kromer v. Friday*, 10 Wash. 621.

5. *Ashford v. Patton*, 70 Ala. 479. And see the last note to the next paragraph of text *infra*.

6. **Guardian Cannot Consent to Judgment** — *United States*. — *Walton v. Coulson*, 1 McLean (U. S.) 120; *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

*Florida*. — *Brasswell v. Downs*, 11 Fla. 62.

*Illinois*. — *Bennett v. Bradford*, 132 Ill. 269; *Gooch v. Green*, 102 Ill. 507; *Allison v. Drake*, 145 Ill. 500; *Reddick v. State Bank*, 27 Ill. 145; *Hitt v. Ormsbee*, 12 Ill. 169; *Hamilton v. Gilman*, 12 Ill. 260; *Tuttle v. Garrett*, 16 Ill. 354; *Greenough v. Taylor*, 17 Ill. 602.

*Indiana*. — *Martin v. Starr*, 7 Ind. 226.

*Louisiana*. — *Aiken v. Gatlin*, 48 La. Ann. 877.

*Maine*. — *Tucker v. Bean*, 65 Me. 352.

*Michigan*. — *Burt v. McBain*, 29 Mich. 260; *Wood v. Truax*, 39 Mich. 628; *Claxton v. Claxton*, 56 Mich. 557; *Bearinger v. Pelton*, 78 Mich. 114.

*Mississippi*. — *Johnson v. McCabe*, 42 Miss. 255.

*New York*. — *Litchfield v. Burwell*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 341.

7. **Judgments Founded on Consent Erroneous.** — *San Fernando Farm Homestead Assoc. v. Porter*, 58 Cal. 81; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; *Bloom v. Burdick*, 1 Hill (N. Y.) 143; *White v. Albertson*, 3 Dev. L. (14 N. Car.) 241, 22 Am. Dec. 719; *Hollis v. Dashiell*, 52 Tex. 187; *Gunter v. Fox*, 51 Tex. 383; *Barber v. Graves*, 18 Vt. 290.

8. **Beneficial Decree May Be Pronounced by Consent.** — *Pulliam v. Pulliam*, 4 Dana (Ky.) 123; *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27.

A consent decree will not be set aside where it appears that it was beneficial to the infants. *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854; *Morris v. Virginia Ins. Co.*, 85 Va. 588.

9. **Reference to Determine Beneficial Course.** — *Dow v. Jewell*, 21 N. H. 470; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.



infant by consent is binding upon him except in a case of fraud or collusion.<sup>1</sup>

**3. Liability to Ward for Damage Occasioned by Fraud or Negligence.** — There are a number of dicta to the effect that a guardian *ad litem* is responsible in damages to his ward when he has been guilty of fraudulent or negligent acts of commission or of omission in the cause he has been appointed to defend, by which the financial interests of his ward are made to suffer,<sup>2</sup> and there can be no doubt of the truth of the proposition, though adjudications enforcing the liability directly are wanting.<sup>3</sup>

**States Requiring Bond of Guardians ad Litem — Partition Proceedings.** — It is the practice in several states, at least when the action in which the guardian *ad litem* represents the defendant is one for the partition of real estate, to require him to execute a bond, that the effect of any bad faith or negligence of which he may be guilty may, so far as his wards are concerned, be the more effectually provided against.<sup>4</sup>

**V. COMPENSATION.** — A guardian *ad litem* is entitled to a reasonable compensation for his services in the cause. The amount of his compensation is fixed by the court appointing him, having regard to the character of the litigation and the service actually rendered. The statutes generally provide that the amount allowed to the guardian *ad litem* shall be taxed as costs in the suit in which he is appointed. Where not regulated by statute these several matters are governed by rules of court and the practice prevailing thereunder in the several states.<sup>5</sup>

**1. Decrees Against Infant Held Binding.** — *Wall v. Bushby*, 1 Bro. C. C. 484; *Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162; *Dow v. Jewell*, 21 N. H. 470; *Savage v. McCorkle*, 17 Oregon 48. See also *Brooke v. Mostyn*, 33 Beav. 457, 2 De G. J. & S. 373, L. R. 4 H. L. 304.

Under the statutes of Oregon "a guardian *ad litem* has full power to bind an infant defendant by admissions, even to the confessions of a judgment." Burnett, J., in *English v. Savage*, 5 Oregon 518.

"Although the court does not usually, where infants are concerned, make a decree by consent without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed and a certificate thereupon made that it would be for their benefit. \* \* \* An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or error." 1 Daniell's Ch. Pl. and Pr. (6th Am. ed.) 163.

In *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367, a distinction was taken between a decree of strict foreclosure against an infant, which can be valid only upon proof, and a decree of sale, which, though rendered by consent, may bind the infant absolutely, and it was shown how in the English chancery the practice of decreeing a sale superseded the decreeing a foreclosure where the defendants were infants.

A decree against minors may be attacked for fraud, and such an attack is direct, not collateral. *Kirby v. Kirby*, 142 Ind. 419.

**2. Liability to Ward for Damage Occasioned by Fraud or Negligence.** — *Young v. Whitaker*, 1

*A. K. Marsh* (Ky.) 398; *Knickerbacker v. DeFreest*, 2 Paige (N. Y.) 304; *Reed v. Reed*, 46 Hun (N. Y.) 212; *Litchfield v. Burwell*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 341; *Tyton v. Tyson*, 94 Wis. 225.

"If he [a guardian *ad litem* for a defendant] misbehaves himself, an action of deceit lies against him." Bac. Abr., tit. Infancy and Age, K 2.

**3.** The liability of a guardian is similar to that of an agent or attorney. See the titles AGENCY, vol. 1, p. 1058 *et seq.*; ATTORNEY AND CLIENT, vol. 3, p. 379 *et seq.*

**4. States Requiring Bonds of Guardians ad Litem — Partition Proceedings.** — *Kennedy v. Arthur*, (Supm. Ct. Spec. T.) 18 Civ. Pro. (N. Y.) 390; *Walter v. De Graaf*, (N. Y. Super. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 407; *Minor v. Betts*, 7 Paige (N. Y.) 596; *Fisher v. Lyon*, 34 Hun (N. Y.) 183; *Hamilton v. Flume*, 2 Tex. Unrep. Cas. 694. It will be observed that the states from which these cases are cited are two in which the general guardian of the ward is the proper person to act for infant defendants. See *supra*, this title, *Appointment*.

**5.** See the title INFANTS, 10 ENCYC. OF PL. AND PR. 683 *et seq.*

**The Court May Make the Guardian's Compensation a Lien on the Property Protected.** — *Wilbur v. Wilbur*, 138 Ill. 446; *Weed v. Paine*, 31 Hun (N. Y.) 10; *Kerbaugh v. Vance*, 5 Lea (Tenn.) 113; *Persons v. Young*, 7 Lea (Tenn.) 293; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439. See also *Sheahan v. Wayne* Circuit Judge, 42 Mich. 69. Compare *Walton v. Yore*, 58 Mo. App. 562.

**Where There Is No Fund Belonging to the Infant** under the control of the court, it has been held that the allowance to the guardian *ad litem* must be limited to the taxable costs. *Carter v. Montgomery*, 2 Tenn. Ch. 458. See the title INFANTS, 10 ENCYC. OF PL. AND PR. 684.

**VI. TERMINATION OF OFFICE — 1. In General.** — When a guardian *ad litem* is appointed, his authority continues, unless he is sooner removed by the court, until the rendition of the final judgment or decree in the cause,<sup>1</sup> or until a dismissal of the action,<sup>2</sup> unless he represents an infant and his authority is sooner terminated by the arrival of the infant at the age of majority.<sup>3</sup>

**2. Right to Prosecute Appeal.** — The guardian *ad litem* does not become *functus officio* on the rendition of a judgment in the trial court, but he may, where he thinks it to be to the interest of the defendant, take an appeal therefrom, and his duties and office continue until the final determination of the cause thereafter.<sup>4</sup>

**1. Authority Continues until Final Judgment in Cause.** — *Matter of Stewart*, 23 N. Y. App. Div. 17; *Davis v. Gist*, Dudley Eq. (S. Car.) 1; *Tyson v. Tyson*, 94 Wis. 225; *Jones v. Roberts*, 96 Wis. 427.

**2. Authority Terminates by Dismissal of Action.** — An action in which a guardian *ad litem* had been appointed was dismissed. Thereafter he was without authority to make an application to permit the plaintiff to sue *in forma pauperis* in another action. *Rosso v. Second Ave. R. Co.*, 13 N. Y. App. Div. 375.

**3. Expiration of Authority of Guardian ad Litem for Infant when Ward Attains Majority.** — *Lang v. Belloff*, 53 N. J. Eq. 298.

**4. Authority Continues until After Decision of Cause on Appeal.** — *Sprague v. Beamer*, 45 Ill. App. 17; *Thomas v. Safe Deposit, etc., Co.*, 73 Md. 451; *Matter of Stewart*, 23 N. Y. App. Div. 17; *Tyson v. Tyson*, 94 Wis. 225; *Jones v. Roberts*, 96 Wis. 427; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439.

A guardian *ad litem* is appointed for all the purposes of the action, including an appeal if he deems such advisable, and continues until the disability ceases, unless he is sooner discharged by the court. *Tyson v. Tyson*, 94 Wis. 225; *Jones v. Roberts*, 96 Wis. 427; *Tyson v. Richardson*, (Wis. 1899) 79 N. W. Rep. 439.

# GUARDIAN AND WARD.

BY EPAPHRODITUS PECK.

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#### CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *FOREIGN GUARDIANS*, vol. 13, p. 965; *GUARDIAN AD LITEM*, ante, p. 2; *INFANTS*; *INVESTMENTS*; *INSANITY*; *PARENT AND CHILD*; *TRUSTS AND TRUSTEES*.

**I. DEFINITIONS — Guardian** — Generally, one to whom the law intrusts the care of the person or property, or both, of another.<sup>1</sup> More specifically, one to whom the law intrusts the care of the person or property, or both, of an infant.

**Ward.** — Generally, one whose person or property, or both, are under the control of a guardian. More specifically, a minor over whose person or property, or both, a guardian has been appointed by lawful authority. While a father, and in some cases a mother, is guardian by nature of his or her children during their minority,<sup>2</sup> the term "ward" is not usually applied to such children because of the existence of natural guardianship alone.

**II. VARIOUS KINDS OF GUARDIANSHIP — 1. Guardianship by Common Law.** — "By the common law there are four manner of guardians, viz., guardian in chivalry, \* \* \* guardian by nature, as the father of the eldest son,

1. *Century Dict.*; *Civ. Code Cal.*, § 236.

2. See *infra*, this title, *Modern Forms of Guardianship by Nature*.

\* \* \* guardian in socage, \* \* \* and guardian *per cause de nurture*; all frequent in our books."<sup>1</sup>

*a. GUARDIANSHIP IN CHIVALRY.* — Guardianship in chivalry was one of the rights of the feudal lord. If a tenant by knight service died, leaving an heir male under the age of twenty-one, or an heir female under the age of fourteen, the lord had the custody of the body and estate of the heir, and the right to take the income of the estate, or the sum to be realized by the marriage of the ward, for his own benefit, as a recompense for the loss of the military service incident to the tenure.<sup>2</sup> This differed from all other forms of guardianship, in that it was a privilege of the guardian for his own benefit, instead of a trust for the ward's benefit. It was abolished, together with the whole structure of military tenures, by the statute 12 Car. II., c. 24.<sup>3</sup>

*b. GUARDIANSHIP IN SOCAGE.* — Guardianship in socage was incident to tenure in socage, as guardianship in chivalry was to tenure by knight service. Whenever an infant under the age of fourteen years inherited an estate in socage, his nearest relative to whom the estate itself could not descend was guardian of the land until the infant arrived at the age of fourteen, when the trust terminated.<sup>4</sup> Since tenure in socage does not exist in the *United States*, this species of guardianship has no existence there,<sup>5</sup> except in a modified form in *New York*.<sup>6</sup>

*c. GUARDIANSHIP BY NATURE.* — The father was guardian by nature of the person of his heir apparent or heiress presumptive, during the minority. This guardianship of the person was an exception to the powers of the guardian in chivalry, so long as the father lived.<sup>7</sup>

*d. GUARDIANSHIP FOR NURTURE.* — The father, and after his death the mother, were guardians for nurture of the persons of all their children up to the age of fourteen years.<sup>8</sup> The last two species of guardianship were of the person only, and both have been merged in the modern guardianship by nature.

**2. Guardianship by Local Custom.** — Guardianship by local custom existed in London and in Kent, and perhaps in other places. As this form of guardianship was of only local existence, and has long since ceased to exist, it will not be necessary to examine it further.<sup>9</sup>

1. Co. Litt. 88*b*. See *Lord v. Hough*, 37 Cal. 657; *Kline v. Beebe*, 6 Conn. 500; *Mauro v. Ritchie*, 3 Cranch (C. C.) 147.

2. *Guardianship in Chivalry.* — Co. Litt. 74*b*, § 103.

3. 2 Black. Com. 77.

4. *Guardian in Socage.* — Co. Litt. 87*b*, § 123; 1 Black. Com. 461; 2 Black. Com. 88; *Egleton's Case*, 1 Roll. Abr. 40; *Snook v. Sutton*, 10 N. J. L. 133.

The guardian in socage has the legal possession of his ward's lands, may bring trespass or ejectment in his own name and lease them till the ward is fourteen, and is to be regarded as the owner and occupier. *Rex v. Sutton*, 3 Ad. & El. 597, 30 E. C. L. 168. He is *dominus pro tempore*, and has an interest in the land, and may let it for years, and avow in his own name and right. *Shopland v. Ryoler*, Cro. Jac. 55, 98; *Rex v. Oakley*, 10 East 491; *Brisden v. Hussey*, 2 Roll. Abr. 41. He may grant a copyhold, *car il fuit dominus pro tempore*. 2 Roll. Abr. 41, c. 10.

Guardians in chivalry and in socage shall have an action of ravishment of the ward. 2 Roll. Abr. 42.

Guardianship in socage cannot exist where there is no descent, as if the grant was to one in tail, so that his title is by purchase and not

by descent. *Quadrang v. Downs*, 2 Mod. 176.

If a female guardian in socage marries, her husband takes the wardship in right of the wife, but if he makes a lease with the wife, nevertheless it is voidable by the wife after his death. *Osborn v. Carden*, 1 Plowd. 293.

The guardian in socage shall not take any issues or profits to his own use, but only to the use and profit of the ward. Co. Litt. 87*b*.

5. See *Kline v. Beebe*, 6 Conn. 500; *Kinney v. Harrett*, 46 Mich. 87; *Mauro v. Ritchie*, 3 Cranch (C. C.) 147.

6. See *infra*, this title, *Modern Forms of Guardianship, Their Nature and Origin* — *New York Guardianship in Socage*.

7. Century Dict.; *Hargrave's* note 66 to Co. Litt. 88*b*; *Combs v. Jackson*, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568.

8. *Guardian for Nurture.* — Century Dict.; *Ratcliffe's Case*, 3 Coke 37*a*; *Lord v. Hough*, 37 Cal. 657; *Kline v. Beebe*, 6 Conn. 500; *In re Moore*, 11 Ir. C. L. 1.

9. *Guardian by Local Custom.* — Century Dict.; Co. Litt. 88*b*; 2 Black. Com. 462; *Mauro v. Ritchie*, 3 Cranch (C. C.) 147.

A custom for the lord of the manor to appoint will prevail over the right of the mother to be guardian in socage. *Wade v. Baker*, 1 Ld. Raym. 131.



**3. Testamentary Guardianship.**—The Act 12 Car. II., c. 24, which abolished guardianship in chivalry, provided a substitute, and also supplied the need which was caused by the termination of guardianship for nurture at the early age of fourteen years, by the provision that a father, by deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, might dispose of the custody and tuition of his child or children, either born or unborn, for and during such time as they should remain under twenty-one years of age, to any persons other than Popish recusants.<sup>1</sup> This species of guardianship is still in force in *England*, and generally in the *United States*, and will be fully considered hereafter.<sup>2</sup>

**4. Guardianship by Judicial Appointment.**—By far the most important class of guardianships is that comprising guardianships created by the appointment of some judicial tribunal, authorized by law to make such appointment. These are of three kinds:

*a.* **GUARDIANSHIP OVER MINORS.**—Guardianships over minors constitute the great body of modern guardianships, and the remainder of this article is chiefly devoted to their consideration.

*b.* **GUARDIANSHIP OVER INSANE AND INCOMPETENT PERSONS.**—In *England* and the *United States* provision has been made by the statutes for the appointment of persons to care for the property and the persons of insane persons, and of those of insufficient capacity safely or prudently to care for themselves. Those so appointed are called guardians in some jurisdictions, in others conservators, committees, or trustees. These *quasi* guardianships are not within the scope of this article.<sup>3</sup>

*c.* **GUARDIANSHIP AD LITEM.**—All courts before which actions against minors are pending have power to appoint guardians *ad litem*, to protect such infants in their defense, or, in some cases, to prosecute actions in behalf of infants. This class of guardianships, also, is without the scope of this article.<sup>4</sup>

### III. MODERN FORMS OF GUARDIANSHIP, THEIR NATURE AND ORIGIN—

**1. Guardianship by Nature**—*a.* **IN WHOM VESTED**—(1) *In Father.*—By the *Common Law*, as a general rule, the father, if he is not unfit, is recognized as the natural guardian of his legitimate children, during their minority, and is entitled to their custody and control, and this right has received statutory recognition in most of the *United States*.<sup>5</sup>

**1. Testamentary Guardian.**—Stat. 12 Car. II., c. 24; 2 Black. Com. 462.

**2. See *infra*, this title, *Modern Forms of Guardianship, Their Nature and Origin—Testamentary Guardianship.***

**3. See the title INSANITY.**

**4. See the title GUARDIAN AD LITEM, ante, p. 2.**

**5. Guardian by Nature—General Rule—*England.***—Rex v. De Manneville, 5 East 221; Reg. v. Smith, 16 Eng. L. & Eq. 221; Rex v. Thorp, 5 Mod. 221.

*United States.*—Mauro v. Ritchie, 3 Cranch (C. C.) 147.

*Alabama.*—Isaacs v. Boyd, 5 Port. (Ala.) 388; Huie v. Nixon, 6 Port. (Ala.) 77; Hall v. Lay, 2 Ala. 529; Wood v. Wood, 3 Ala. 756; Lang v. Pettus, 11 Ala. 37; Nelson v. Goree, 34 Ala. 565.

*Arkansas.*—Bowles v. Dixon, 32 Ark. 92.

*California.*—Matter of Vance, 92 Cal. 195.

*Connecticut.*—Burk v. Phips, 1 Root (Conn.) 487; Kline v. Beebe, 6 Conn. 500; Selden's Appeal, 31 Conn. 548; Johnson v. Terry, 34 Conn. 259.

*Georgia.*—Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202.

*Illinois.*—Perry v. Carmichael, 95 Ill. 519; Bedford v. Bedford, 136 Ill. 354.

*Iowa.*—Shanks v. Seamounts, 24 Iowa 131, 92 Am. Dec. 465.

*Kentucky.*—McKee v. Hann, 9 Dana (Ky.) 526.

*Louisiana.*—Matter of Upton, 16 La. Ann. 175; Way v. Levy, 41 La. Ann. 447; Dauterive v. Shaw, 47 La. Ann. 882.

*Massachusetts.*—May v. Calder, 2 Mass. 55; Miles v. Boyden, 3 Pick. (Mass.) 213.

*Missouri.*—McCarty v. Rountree, 19 Mo. 345; Temple v. Price, 24 Mo. 288; Spillane v. Missouri Pac. R. Co., 111 Mo. 555; Sherwood v. Neal, 41 Mo. App. 416.

*New Jersey.*—State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399.

*New York.*—People v. Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Genet v. Tallmadge, 1 Johns. Ch. (N. Y.) 3; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Savage v. Olmstead, 2 Redf. (N. Y.) 478; Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568, affirming 7 Cow. (N. Y.) 36; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 50 Am. Dec. 77.

*Tennessee.*—Haynie v. Hall, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427.

(2) *In Mother*. — Upon the death of the father, or upon his being adjudged unfit, the guardianship passes to the mother.<sup>1</sup> And according to some authorities the mother's title is paramount where the child is in tender infancy.<sup>2</sup>

(3) *Father and Mother Joint Guardians — Statutes*. — By statute in several states the parents are declared to be the natural guardians of their minor

*Texas*. — *Byrne v. Love*, 14 Tex. 87.

*West Virginia*. — *Rust v. Vanvacter*, 9 W. Va. 600.

**Father Cannot Transfer Custody of Infant.** — The right which the father has to the custody of his minor children cannot, at common law, be alienated by him to their mother; and a separation agreement by which she is to retain a child to a given time will be no bar to a habeas corpus by him for the child. *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644. See also *Johnson v. Terry*, 34 Conn. 259.

Still less can the father transfer the custody to an uncle, *Reg. v. Smith*, 16 Eng. L. & Eq. 221; or to a stranger, *State v. Baldwin*, 5 N. J. Eq. 451, 45 Am. Dec. 399; *Byrne v. Love*, 14 Tex. 87.

The father as natural tutor cannot relieve himself of obligation by refusing the tutorship, and omitting to take the oath. *Way v. Levy*, 41 La. Ann. 447.

For the general rights and duties between father and child, see the title PARENT AND CHILD.

**1. When Natural Guardianship Passes to Mother** — *England*. — *Mellish v. De Costa*, 2 Atk. 14; *Reg. v. Clarke*, 7 El. & Bl. 186, 90 E. C. L. 186; *Villareal v. Mellish*, 2 Swanst. 533.

*Alabama*. — *Capal v. M'Millan*, 8 Port. (Ala.) 198; *Striplin v. Ware*, 36 Ala. 87.

*California*. — *Lord v. Hough*, 37 Cal. 657 (based on statute).

*Connecticut*. — *Fields v. Law*, 2 Root (Conn.) 320; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339. But see *Kline v. Beebe*, 6 Conn. 500; *Macready v. Wilcox*, 33 Conn. 321.

*Georgia*. — *Perkins v. Dyer*, 6 Ga. 401; *Southwestern R. Co. v. Chapman*, 46 Ga. 557; *Beard v. Dean*, 64 Ga. 258; *Hood v. Perry*, 73 Ga. 322.

*Illinois*. — *Pittsburg, etc., R. Co. v. Haley*, 170 Ill. 610.

*Iowa*. — *Cain v. Devitt*, 8 Iowa 116; *Jones v. Jones*, 46 Iowa 466.

*Louisiana*. — *Berluchaux v. Berluchaux*, 7 La. 545.

*Maryland*. — *Jarrett v. State*, 5 Gill & J. (Md.) 27; *Lefever v. Lefever*, 6 Md. 472.

*Missouri*. — *De Jarnett v. Harper*, 45 Mo. App. 415.

*New Hampshire*. — *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288.

*New Jersey*. — *Albert v. Perry*, 14 N. J. Eq. 540; *State v. Clover*, 16 N. J. L. 410.

*New York*. — *People v. Wilcox*, 22 Barb. (N. Y.) 184; *People v. Boice*, 39 Barb. (N. Y.) 307.

*Texas*. — *Cook v. Bybee*, 24 Tex. 278.

**Remarriage of Mother.** — In some jurisdictions it has been held that if the mother remarries she loses her right to the guardianship. *Com. v. Hamilton*, 6 Mass. 273; *Worcester v. Marchant*, 14 Pick. (Mass.) 510; *State v. Scott*, 30 N. H. 274; *Spears v. Snell*, 74 N. Car. 210.

In some states this rule has been enforced by statute. See *Rev. Stat. Me.* (1883), c. 67, § 3; *Stat. Wis.* (1898), § 3964.

For the peculiar provisions of the *Louisiana* statutes upon this subject, see *Rev. Civ. Code La.* (1900), arts. 254, 255.

**Abandonment by Father.** — A father, by abandoning his child, and ceasing to support it, loses his right to custody, and the natural guardianship devolves on the mother. *People v. Dewey*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 267.

**Mother Cannot Assign Her Right.** — The mother cannot assign or transfer her guardianship, and any agreement by her for the relinquishment of its custody to others will be unavailing. *Villareal v. Mellish*, 2 Swanst. 533; *Albert v. Perry*, 14 N. J. Eq. 540; *Cook v. Bybee*, 24 Tex. 278. Still more is this true of a mere consent to the child's going to live with another until majority. *State v. Clover*, 16 N. J. L. 410.

**Superior Right of Testamentary Guardian.** — The right of a testamentary guardian appointed by the father to the custody of the child is superior to that of the surviving mother. *Talbot v. Shrewsbury*, 4 Myl. & C. 673; *Macready v. Wilcox*, 33 Conn. 321; *Slack v. Perrine*, (D. C.) 23 Wash. L. Rep. 853; *Matter of Van Houten*, 3 N. J. Eq. 220, 29 Am. Dec. 707; *Com. v. Hamilton*, 1 Pittsb. (Pa.) 412. *Contra*, *Lord v. Hough*, 37 Cal. 657 (under statute); *Fields v. Law*, 2 Root (Conn.) 320; *People v. Boice*, 39 Barb. (N. Y.) 307 (under statute); *McKinney v. Noble*, 37 Tex. 731.

**A Divorce Judgment Awarding Custody to One Parent** constitutes that parent the natural guardian of the child. *Jordan v. Jordan*, 4 Tex. Civ. App. 559.

**2. Children of Tender Years.** — *Com. v. Smith*, 1 Brews. (Pa.) 547; *Com. v. Hart*, 14 Phila. (Pa.) 352, 37 Leg. Int. (Pa.) 72; *State v. Kirkpatrick*, 54 Iowa 375; *Paine v. Paine*, 4 Humph. (Tenn.) 523.

By the *New Jersey* Act of 1860, the custody of children within the age of seven years is transferred from the father to the mother. See *Bennet v. Bennet*, 13 N. J. Eq. 114; *State v. Baird*, 18 N. J. Eq. 194. And there are statutes of similar import in other jurisdictions. See the local statutes.

**In Pennsylvania** the rule of the common law has never been rigidly adhered to, but a more liberal application has been given to the principle of the controlling power of the state, as *parens patriæ*, and it has been held that in a dispute between the father and the mother, the court will make such disposition of a minor child as the circumstances of the case demand, having always in consideration as its guiding principle the welfare of the infant. If the mother is worthy, her custody is preferred



children, with equal powers, rights, and duties in regard to them.<sup>1</sup>

(4) *In Grandparents.* — Though several eminent authorities lay down the rule that only the father or the mother of an infant can be its guardian by nature,<sup>2</sup> there are several which support the doctrine that after the death of both parents the grandfather or grandmother, when next of kin, is the guardian by nature.<sup>3</sup>

(5) *Natural Guardianship over Bastards.* — In England there has been considerable conflict of authority upon the question whether, in the case of illegitimate children, the mother is the natural guardian, and as such entitled to their custody. But it now seems to be well settled that though the mother has not the same legal rights to the guardianship and custody of her illegitimate child that the father has to that of a legitimate child, yet the court in granting the custody of an illegitimate child will primarily consider the wishes of the mother, provided the fulfilment of her desires in the matter will not be detrimental to the welfare of the child.<sup>4</sup>

In the United States it has been generally held that the mother is the natural guardian of her illegitimate children.<sup>5</sup>

**Putative Father Entitled to Custody as Against All but Mother.** — The putative father of an illegitimate child, if a fit person, is entitled to its custody as against all but the mother.<sup>6</sup> Therefore it has been held that after the death of the mother he is entitled to the custody as against a person claiming to have been

during the years in which the health and proper care of the child require her oversight. See the cases from this jurisdiction, *supra*, this note.

1. **Statute — Joint Guardianship of Parents.** — See, for example, Rev. Stat. N. Y. (9th ed., 1896), p. 1896, § 1; Code Iowa (1897), § 3192; Gen. Stat. Kan. (1897), c. 108, § 1; Comp. Stat. Neb. (1899), § 3217. And see *State v. Kirkpatrick*, 54 Iowa 373; *State v. Jones*, 16 Kan. 608.

2. 1 Black. Com. 461; 2 Kent's Com. 219; Schouler on Domestic Relations (3d ed.), § 285; Woerner on Am. Law of Guardianship, § 19.

3. **Grandparents — When Next of Kin.** — Hargrave's note 66 to Co. Litt. 88b; Reeve on Domestic Relations 315; Lamar v. Micou, 114 U. S. 218; Matter of Benton, 92 Iowa 202, 54 Am. St. Rep. 546.

4. **Guardianship over Bastards — English Rule.** — *Barnardo v. McHugh*, (1891) A. C. 388, 65 L. T. N. S. 423, 40 W. R. 97, 55 J. P. 628; Reg. v. Nash, 10 Q. B. D. 454, 52 L. J. Q. B. 442, 48 L. T. N. S. 447, 31 W. R. 420; *In re Ullee*, 54 L. T. N. S. 286. See also *Strangeways v. Robinson*, 4 Taunt. 498.

**Where Child is in Custody of Father.** — It has been said that where the putative father of an illegitimate child has its custody, fairly and peaceably, the court will not take it away from him and give it to the mother. Lord Kenyon, C. J., in *Rex v. Moseley*, 5 East 224, note a. See also the opinion of Lord Ellenborough, in *Rex v. Hopkins*, 7 East 579. And see *In re Lloyd*, 3 M. & G. 547, 42 E. C. L. 288; *Barnardo v. McHugh*, (1891) A. C. 388. But see *Ex p. Knee*, 1 B. & P. N. R. 148.

But where the father has obtained possession of the child by force or fraud, the court will interfere to put matters in the same situation as before. Lord Kenyon, C. J., in *Rex v. Moseley*, 5 East 224, note a; *Rex v. Soper*, 5 T. R. 278; *Rex v. Hopkins*, 7 East 579; *Barnardo v. McHugh*, (1891) A. C. 388.

**Where a Child Is Old Enough to Exercise a Dis-**

cretion the court will allow it to choose for itself, and will not permit the mother to take it by force against its will. *In re Lloyd*, 3 M. & G. 547, 42 E. C. L. 288.

5. **American Rule — Georgia.** — *Adams v. McKay*, 36 Ga. 440.

*Indiana.* — *Dalton v. State*, 6 Blackf. (Ind.)

357. *Massachusetts.* — *Wright v. Wright*, 2 Mass. 109.

*New Hampshire.* — *Hudson v. Hills*, 8 N. H. 417.

*New Jersey.* — *Friesner v. Symonds*, 46 N. J. Eq. 521.

*New York.* — *People v. Kling*, 6 Barb. (N. Y.) 366; *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247; *People v. Mitchell*, 44 Barb. (N. Y.) 245; *Matter of Doyle, Clarke* (N. Y.) 154; *People v. Landt*, 2 Johns. (N. Y.) 375; *Carpenter v. Whitman*, 15 Johns. (N. Y.) 208.

*Oregon.* — *Nine v. Starr*, 8 Oregon 49.

*Pennsylvania.* — *Com. v. Fee*, 6 S. & R. (Pa.) 255.

Under the Louisiana Code the father of an illegitimate child could not compel the mother to surrender it into his custody. *Acosta v. Robin*, 7 Mart. N. S. (La.) 387.

In Texas it has been held that after a bastard attains the age of seven years, the father has an equal right to the guardianship with the mother. *Byrne v. Love*, 14 Tex. 87.

A Contract between the superintendents of the poor and the putative father of a bastard, by which the mother is required to give up the control to the putative father, in consideration of his supporting the child, is invalid, and no bar to the mother's right. *People v. Mitchell*, 44 Barb. (N. Y.) 245.

6. **Right of Custody in Father as Against All but Mother.** — *Com. v. Anderson*, 1 Ashm. (Pa.) 55; *Pote's Appeal*, 106 Pa. St. 574, 51 Am. Rep. 540; *Moritz v. Garnhart*, 7 Watts (Pa.) 302, 32 Am. Dec. 762; *Barela v. Roberts*, 34 Tex. 554; *Burwell's Case*, 1 Vent. 48; *Sherman's Case*, 1 Vent. 210.

appointed guardian by the mother<sup>1</sup> or as against the maternal relatives.<sup>2</sup>

*b. CONTROLLED BY COURTS.* — The right of the natural guardian to the custody and control of the ward is always subject to control by the courts, and he will be removed from guardianship, or refused the custody of the child in habeas corpus<sup>3</sup> or other proceedings to determine the right of custody, for such unfitness or misconduct as imperils the child's welfare, which is always the supreme consideration, and prevails over any legal right of the guardian.<sup>4</sup>

1. *In re Kerr*, 24 L. R. Ir. 59. See also *Ord v. Blackett*, 9 Mod. 116.

2. *Com. v. Anderson*, 1 Ashm. (Pa.) 55; *Pote's Appeal*, 106 Pa. St. 574, 51 Am. Rep. 540; *Barela v. Roberts*, 34 Tex. 554.

In *Alabama* it has been held that the father of a bastard child, merely as such, has no right to its custody, but that if such a child is above seven years of age and has no mother or guardian to receive it, and is of sufficient health and discretion, it should be permitted to select its own custodian. *Matthews v. Hobbs*, 51 Ala. 210.

In *New Jersey* it has been held that after the mother's death her illegitimate child is an orphan, and a guardian may be appointed for it, though such appointment is opposed by the acknowledged father. *Friesner v. Symonds*, 46 N. J. Eq. 521.

3. See the title *HABEAS CORPUS*, *post*.

4. In *England, Courts, in the Exercise of Their Common-Law Jurisdiction*, could not deprive the natural guardian of a child of its custody, unless by gross misconduct he or she had forfeited the right to it. A child would not be given to its natural guardian if it would thereby be exposed to cruelty or gross corruption. *Rex v. Greenhill*, 4 Ad. v. El. 624, 31 E. C. L. 153. But the immoral conduct of such a guardian, to authorize the court in depriving him of the custody of his child, must have been of such a nature as would be liable to contaminate and corrupt the morals of the child. *In re Spence*, 2 Phill. 247; *In re Moore*, 11 Ir. C. L. 1.

So a father was held to be entitled to the custody of the children as against the mother, though he was living in adultery, where it appeared that he never brought his mistress to his house or into contact with his children. *Rex v. Greenhill*, 4 Ad. & El. 624, 31 E. C. L. 153; *Ball v. Ball*, 2 Sim. 35; and though he refused to the mother access to the child, and kept it concealed from her, *Ball v. Ball*, 2 Sim. 35.

A court of chancery, in the exercise of a common-law jurisdiction on habeas corpus, will not interfere with the father's right to the control and education of his children, unless (1) by gross moral turpitude he forfeits his rights, or (2) he has abdicated his parental authority by his conduct, or (3) he seeks to remove the wards of court from its jurisdiction. *In re Agar-Ellis*, 24 Ch. D. 317, explained in *Reg. v. Gyngall*, (1893) 2 Q. B. 241.

In *England Certain Statutes Have Been Enacted* which authorize the courts, under certain circumstances, to grant the custody of a child away from its natural guardian, though such guardian has not been guilty of misconduct that would have disentitled him or her to the custody of the child at common law. *Reg. v.*

*Gyngall*, (1893) 2 Q. B. 232; *In re A and B*, (1897) 1 Ch. 786.

A Court Having Chancery Jurisdiction is not confined by the strict rule of the common law, but may remove a child from the custody of its natural guardian when it is shown that such guardian has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better, but clearly right for the welfare of the child in some serious and important respect, that his rights should be suspended or superseded. *In re Fynn*, 2 De G. & Sm. 457; *In re McGrath*, (1893) 1 Ch. 143; *Reg. v. Gyngall*, (1893) 2 Q. B. 232. See also *Barry v. Barry*, 1 Molloy 210.

Chancery has taken the custody of infants from the father for the father's unfitness, *Ex p. Mountfort*, 15 Ves. Jr. 445; *Wellesley v. Wellesley*, 2 Bligh N. S. 128; where he was in constant habits of drunkenness and blasphemy, poisoning the infants' minds with irreligion, *De Manneville v. De Manneville*, 10 Ves. Jr. 52; for open immorality of life and immoral training, *Wellesley v. Beaufort*, 2 Russ. 28; where he had deserted them, and was not of ability to maintain them, *Matter of England*, 1 Russ. & M. 499.

Where an uncle had maintained his niece in his house, and left her a legacy of ten thousand pounds, and she continued to live there, and preferred to do so, the chancellor, while recognizing the father's legal right to her custody as natural guardian, refused to enforce it by an order. *Ex p. Hopkins*, 3 P. Wms. 152.

The American Cases pay less regard to the legal rights of the parent than to the child's welfare. See *Prime v. Foote*, 63 N. H. 52; *Huie v. Nixon*, 6 Port. (Ala.) 77; *Matter of Vance*, 92 Cal. 195; *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708; *State v. Banks*, 25 Ind. 495; *Van Walters v. Children's Guardians*, 132 Ind. 567; *State v. Richardson*, 40 N. H. 272; *Luppie v. Winans*, 37 N. J. Eq. 245; *People v. Kling*, 6 Barb. (N. Y.) 366; *People v. Landt*, 2 Johns. (N. Y.) 375; *Burmester v. Orth*, 5 Redf. (N. Y.) 259; *Heinemann's Appeal*, 96 Pa. St. 112, 42 Am. Rep. 532.

The father is entitled to the care and education of the child, in the absence of good cause for removing the child from his custody, such as ill usage, or grossly immoral principles or habits. *Rust v. Vanvacter*, 9 W. Va. 600.

Where the child has been long in its grandfather's family, where it has every opportunity and refinement, and the mother has long abandoned it, the grandfather will be appointed guardian. *Albert v. Perry*, 14 N. J. Eq. 540.

If the mother has been addicted to habits of intoxication, the court will not commit the



**C. IS OVER PERSON ONLY.** — At Common Law Natural Guardianship Is over the Person Only, and the natural guardian, as such, has no right to, or control over, the property of the ward.<sup>1</sup> This rule of the common law is enforced by statute in most of the *United States*.<sup>2</sup> It follows that the natural guardian cannot collect and discharge<sup>3</sup> nor compromise<sup>4</sup> claims due to the ward, make

custody of the children to her, although she has abandoned the habit, until her abandonment is tested by time and found to be complete. *Com. v. Smith*, 1 Brews. (Pa.) 547.

In New York the Supreme Court, like the former Court of Chancery, has a general jurisdiction over the custody of minors, to be exercised for the child's benefit, rather than in support of any merely legal right. If the father has voluntarily committed the child to a third person, the court will not enforce the father's right to reclaim it, unless required by the child's interests. *People v. Erbert*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 395.

By Statute in Indiana children may be taken from the custody of parents whose course of life or evil conduct unfits them to rear children, and may be committed to the custody of a "board of children's guardians." This statute is constitutional. *Van Walters v. Children's Guardians*, 132 Ind. 567.

The action of the court in awarding the custody of a child of ten years of age will not be controlled by the wishes of the child. *State v. Richardson*, 40 N. H. 272.

**1. Natural Guardianship Is over the Person Only** — *England*. — *Dagley v. Tolferry*, 1 P. Wms. 285.

*United States*. — *Mauro v. Ritchie*, 3 Cranch (C. C.) 147.

*Alabama*. — *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Capal v. M'Millan*, 8 Port. (Ala.) 198; *Lang v. Pettus*, 11 Ala. 37 [*disapproving dicta in Hall v. Lay*, 2 Ala. 529, and *Wood v. Wood*, 3 Ala. 756]; *Alston v. Alston*, 34 Ala. 15; *Nelson v. Gorce*, 34 Ala. 565.

*Arkansas*. — *Gwynn v. McCauley*, 32 Ark. 97.

*California*. — *Kendall v. Miller*, 9 Cal. 591.

*Connecticut*. — *Kline v. Beebe*, 6 Conn. 500.

*Delaware*. — *Spruance v. Darlington*, (Del. Ch. 1894) 30 Atl. Rep. 663.

*Georgia*. — *Perkins v. Dyer*, 6 Ga. 401; *Southwestern R. Co. v. Chapman*, 46 Ga. 557; *Beard v. Dean*, 64 Ga. 258.

*Illinois*. — *Perry v. Carmichael*, 95 Ill. 519; *Bedford v. Bedford*, 136 Ill. 354; *Pittsburg, etc., R. Co. v. Haley*, 170 Ill. 610.

*Iowa*. — *Shanks v. Seamonds*, 24 Iowa 131, 92 Am. Dec. 465; *Jones v. Jones*, 46 Iowa 466.

*Massachusetts*. — *May v. Calder*, 2 Mass. 55; *Miles v. Boyden*, 3 Pick. (Mass.) 213.

*Michigan*. — *Kinney v. Harrett*, 46 Mich. 87; *Power v. Harlow*, 57 Mich. 107.

*Missouri*. — *McCarty v. Rountree*, 19 Mo. 345; *Duncan v. Crook*, 49 Mo. 116; *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555; *Sherwood v. Neal*, 41 Mo. App. 416.

*Nebraska*. — *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627.

*New Jersey*. — *Graham v. Houghtalin*, 30 N. J. L. 552.

*New York*. — *Jackson v. Combs*, 7 Cow. (N. Y.) 36, *affirmed* 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Savage v. Olmstead*, 2 Redf. (N. Y.) 478; *Hyde v. Stone*, 7 Wend.

(N. Y.) 354, 22 Am. Dec. 582; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

*Tennessee*. — *Haynie v. Hall*, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427; *Ross v. Cobb*, 9 Yerg. (Tenn.) 463.

*Texas*. — *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171.

*West Virginia*. — *McDodrill v. Pardee, etc., Lumber Co.*, 40 W. Va. 564.

2. See the statutes of the several states.

But by Statute in Several States control of the property of their wards has been given to natural guardians.

*United States*. — *Mauro v. Ritchie*, 3 Cranch (C. C.) 147.

*Connecticut*. — *Selden's Appeal*, 31 Conn. 553.

*Louisiana*. — *Dauterive v. Shaw*, 47 La. Ann. 882.

*Maryland*. — *Lefever v. Lefever*, 6 Md. 472.

*Missouri*. — *McCarty v. Rountree*, 19 Mo. 346; *Higgins v. Hannibal, etc., R. Co.*, 36 Mo. 418; *Sherwood v. Neal*, 41 Mo. App. 416; *Rhoades v. McNulty*, 52 Mo. App. 301; *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555.

Under the Maryland Statute the natural guardian was required to qualify and give bond, and a failure to do so acted as a renunciation. *Lefever v. Lefever*, 6 Md. 472.

Under the Missouri Statute (Rev. Stat. 1879, § 2560, substantially re-enacted in Rev. Stat. 1889, § 5279), a parent, as the natural guardian of his child, has no control over the property of such child which is not derived from him, unless he has qualified by giving bond in accordance with the statute. *McCarty v. Rountree*, 19 Mo. 345; *Temple v. Price*, 24 Mo. 288; *Higgins v. Hannibal, etc., R. Co.*, 36 Mo. 418; *Sherwood v. Neal*, 41 Mo. App. 416; *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555. But under this statute a parent, as the natural guardian of his child, is, without giving bond, entitled to the possession and control of such personal property belonging to the child as was derived from him. *Rhoades v. McNulty*, 52 Mo. App. 301.

By the Texas Act of 1848, parents, as the natural guardians of their children, were entitled to the custody of such property as had been given by them to the children. *Byrne v. Love*, 14 Tex. 81; *Harris v. Petty*, 66 Tex. 514. But this statute was repealed by the Act of Aug. 15, 1870, under the provisions of which a natural guardian was only entitled to be appointed guardian of the estates of his child, although the estates might have been given by such parent. *Harris v. Petty*, 66 Tex. 514.

**3. Natural Guardian Cannot Collect and Discharge Claims Due to Ward.** — *Dagley v. Tolferry*, 1 P. Wms. 285; *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Southwestern R. Co. v. Chapman*, 46 Ga. 557; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Jackson v. Combs*, 7 Cow. (N. Y.) 36; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Savage v. Olmstead*, 2 Redf. (N. Y.) 478.

**4. Cannot Compromise Claims.** — *Pittsburg, etc.,*

contracts in regard to his estate,<sup>1</sup> lease<sup>2</sup> or take statutory proceedings to sell<sup>3</sup> his land, sell personal property,<sup>4</sup> nor bring suit to recover his estate,<sup>5</sup> except in those states where he is authorized by statute to do so, and then only upon complying with the requirements of the statute.<sup>6</sup>

**2. Testamentary Guardianship** — *a.* IS OF STATUTORY ORIGIN. — At common law there was no power in any person to appoint a testamentary guardian; in *England*, therefore, the power rested (until the Guardianship of Infants Act of 1886) upon the terms of the statute 12 Car. II., c. 24, § 8, already cited.<sup>7</sup> In the *United States*, also, the power is regarded as purely statutory, resting either on local statutes or on the statute 12 Car. II., regarded as a part of the English law existing by adoption in the colonies.<sup>8</sup> In *Iowa*, however, the statute has never been adopted by the legislature nor recognized by the courts, and this species of guardianship does not exist there.<sup>9</sup>

*b.* POWER OF APPOINTMENT — (1) *General Rule.* — Where the statute of 12 Car. II. is in force, or where its provisions as to the power of appointment have been literally re-enacted, the power to appoint a testamentary guardian for legitimate children is in the father only,<sup>10</sup> and neither the mother,<sup>11</sup>

*R. Co. v. Haley*, 170 Ill. 610; *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171.

**1. Cannot Make Contracts in Regard to Ward's Estate.** — *Jones v. Jones*, 46 Iowa 466.

**2. Cannot Lease Ward's Land.** — *May v. Calder*, 2 Mass. 55; *Anderson v. Darby*, 1 Nott & M. (S. Car.) 369; *Ross v. Cobb*, 9 Yerg. (Tenn.) 463.

A guardian for nurture can make only a lease at will. *Pigot v. Garnish*, Cro. Eliz. 678-734.

**3. Cannot Take Statutory Proceedings to Sell Ward's Land.** — *Guynn v. McCauley*, 32 Ark. 97; *Shanks v. Seamonds*, 24 Iowa 131, 92 Am. Dec. 465; *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627; *Wells v. Steckleberg*, 50 Neb. 670; *Graham v. Houghtalin*, 30 N. J. L. 552; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Judson v. Sierra*, 22 Tex. 365.

In *Kentucky* it has been held that a father, as the natural guardian of his children, they having no other guardian, is a guardian within the meaning of a statute authorizing sales of the real estate of infants, and requiring the proceedings to be founded upon the petition of their "guardian." *McKee v. Hann*, 9 Dana (Ky.) 526.

**4. Cannot Sell Ward's Personal Property.** — *McCarty v. Rountree*, 19 Mo. 345.

**5. Cannot Bring Suit to Recover Ward's Estate.** — *Kinney v. Harrett*, 46 Mich. 87.

**6. Statutory Authority of Natural Guardians.** — *Lefever v. Lefever*, 6 Md. 472; *McCarty v. Rountree*, 19 Mo. 345; *Higgins v. Hannibal, etc.*, R. Co., 36 Mo. 418; *Sherwood v. Neal*, 41 Mo. App. 416; *Rhoades v. McNulty*, 52 Mo. App. 301; *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555; *Duncan v. Crook*, 49 Mo. 116. Compare *Temple v. Price*, 24 Mo. 288.

**7. Power to Appoint Testamentary Guardian of Statutory Origin.** — *Reddell v. Ledford*, 3 Phill. Ecc. 256; *Bedel v. Constable*, Vaugh. 177; *Ex p. Ilchester*, 7 Ves. Jr. 348.

**8. Mauro v. Ritchie**, 3 Cranch (C. C.) 147; *Lord v. Hough*, 37 Cal. 657; *Ingalls v. Campbell*, 18 Oregon 461; *Balch v. Smith*, 12 N. H. 437; *Thomson v. Thomson*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 495.

The statute of 12 Car. II. is in force in *New Hampshire*, *Balch v. Smith*, 12 N. H. 437; and in the *District of Columbia*, *Mauro v. Ritchie*, 3 Cranch (C. C.) 147; but it was never in force in *Massachusetts*. There the power rests on the statute of the state only. *Wardwell v. Wardwell*, 9 Allen (Mass.) 518.

**Subject of Testamentary Guardianship under Legislative Control.** — "As the right to appoint a testamentary guardian depends on statute, it follows that the whole subject is within the control of the legislature, and that it may not only regulate and restrict the power of appointment, but may define, limit, and regulate the authority of the guardian, and prescribe the conditions under which the authority shall be exercised." *Wuesthoff v. Germania L. Ins. Co.*, 107 N. Y. 580.

**9. Testamentary Guardianship Does Not Exist in Iowa.** — *Matter of Johnson*, 87 Iowa 130; *Matter of O'Connell*, 102 Iowa 355.

**10. Power of Appointment in Father Only.** — Statute 12 Car. II., c. 24, § 9, cited *supra*, this title, *Various Kinds of Guardianship* — *Testamentary Guardianship*; *Matter of Turner*, 19 N. J. Eq. 433; *Matter of Pierce*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 532; *Ingalls v. Campbell*, 18 Oregon 461; *Ex p. Bell*, 2 Tenn. Ch. 327.

If in *Divorce Proceedings* an order has been made, giving custody of the child to the father, but giving to the mother the right to visit the child at certain times, the power of a testamentary guardian appointed by the father will be subject to the right reserved to the mother in the decree. *Hill v. Hill*, 49 Md. 450, 33 Am. Rep. 271.

**11. Mother Cannot Appoint Testamentary Guardian.** — *Ex p. Edwards*, 3 Atk. 519; *In re Hunt*, 2 Con. & Law. 373; *In re Johnstons*, 3 J. & La. T. 222; *Villareal v. Mellish*, 2 Swanst. 536; *In re Kaye*, L. R. 1 Ch. 387; *In re G—*, (1892) 1 Ch. 296; *Matter of Turner*, 19 N. J. Eq. 433; *Matter of Pierce*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 532; *Ingalls v. Campbell*, 18 Oregon 461; *Ex p. Bell*, 2 Tenn. Ch. 327.

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the grandfather,<sup>1</sup> nor any other person<sup>2</sup> can make such appointment.

But the Designation of One as Guardian in a Will which devises or bequeaths property to a minor may be construed, when the language will permit, as an appointment of a trustee for the property given.<sup>3</sup>

In the Case of Illegitimate Children the father has no authority to appoint a testamentary guardian,<sup>4</sup> nor can the mother, except in those states where she is authorized by statute to do so, appoint a guardian for such children.<sup>5</sup>

How Father's Right of Appointment May Be Lost. — It would seem that the father's right to appoint a testamentary guardian for his child may be lost by abandoning the child or by legally committing its custody and control to others.<sup>6</sup>

(2) *Statutory Modifications.* — The increased regard for the rights of women which has characterized modern legislation has led to the adoption of statutes in England<sup>7</sup> and in many of the United States which have equalized, or partially equalized, the rights of father and mother in regard to the power to appoint guardians for their minor children. In some states the power to appoint testamentary guardians is given to the surviving parent;<sup>8</sup> in others the father cannot appoint such a guardian unless the mother consents

Child to the Mother does not empower her to appoint a testamentary guardian. *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202. *Contra*, *Wilkinson v. Deming*, 80 Ill. 342, 22 Am. Rep. 192.

1. Grandfather Cannot Appoint Testamentary Guardian. — *Blake v. Leigh*, AmbL. 306; *Williamson v. Jordan*, Busb. Eq. (45 N. Car. 46; *Hoyt v. Hilton*, 2 Edw. (N. Y.) 202; *Fullerton v. Jackson*, 5 Johns. Ch. (N. Y.) 278; *Vanartsdalen v. Vanartsdalen*, 14 Pa. St. 384.

2. Grimsley v. Grimsley, 79 Ga. 397; *Bush v. Bush*, 2 Duv. (Ky.) 269; *Brigham v. Wheeler*, 8 Met. (Mass.) 127; *Matter of Lichtenstadter*, 5 Dem. (N. Y.) 214; *Camp v. Pittman*, 90 N. Car. 615; *Taliaferro v. Day*, 82 Va. 79.

3. Will Leaving Property to Minor and Designating One as Guardian. — *Grimsley v. Grimsley*, 79 Ga. 397; *Bush v. Bush*, 2 Duv. (Ky.) 269; *Matter of Lichtenstadter*, 5 Dem. (N. Y.) 214; *Fullerton v. Jackson*, 5 Johns. Ch. (N. Y.) 278; *Camp v. Pittman*, 90 N. Car. 615.

Where it appears that it is intended that the person erroneously designated guardian is to have the control and management of the funds, the instrument is to be regarded as creating a trust. *Vanartsdalen v. Vanartsdalen*, 14 Pa. St. 384; *Luken's Appeal*, 47 Pa. St. 358; *Holbrook's Estate*, 3 Pa. Co. Ct. 265. But a trust will not be implied *ex vi termini* from the mere appointment of a "guardian" by one not having the power to appoint. *Holbrook's Estate*, 3 Pa. Co. Ct. 265.

If a grandfather makes a will giving to a child a bequest on the condition that a certain person shall be guardian, and the father accepts a benefit under the will, he cannot insist on his parental rights against the guardian named. *Blake v. Leigh*, AmbL. 306; *Vanartsdalen v. Vanartsdalen*, 14 Pa. St. 384.

But in Massachusetts it has been held that where one gives property by will to grand-nephews, and appoints their father to be guardian without bond "for the purpose of receiving and managing said property so given," the appointment is invalid, and the clause will not be regarded as creating a trust. *Brigham v. Wheeler*, 8 Met. (Mass.) 127.

4. Father Not Authorized to Appoint Testamentary Guardian for Illegitimate Children. — *Ward v. St. Paul*, 2 Bro. C. C. 583; *Sleeman v. Wilson*, L. R. 13 Eq. 36; *Ramsay v. Thompson*, 71 Md. 315; *Holbrook's Estate*, 3 Pa. Co. Ct. 265; *Peckham v. Peckham*, 2 Cox Ch. 46; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339.

But the Court Will Appoint the person named by the putative father as testamentary guardian, without reference to a master. *Ward v. St. Paul*, 2 Bro. C. C. 583; *Peckham v. Peckham*, 2 Cox Ch. 46; *Chatteris v. Young*, 1 Jac. & W. 106.

In Maryland it has been held that while the appointing court will often be guided by the wishes of a putative father, the observance of such wishes is a matter of discretion, and an appointment of the mother instead of the guardian named in the father's will will not be set aside. *Ramsay v. Thompson*, 71 Md. 315.

5. Mother Cannot Appoint Guardian for Illegitimate Children. — *Ex p. Glover*, 4 Dowl. P. C. 291; *In re Kerr*, 24 L. R. Ir. 59; *Ord v. Blackett*, 9 Mod. 116.

6. How Right to Appoint Testamentary Guardian May Be Lost. — *Com. v. Hearne*, 10 Phila. (Pa.) 199, 31 Leg. Int. (Pa.) 28.

7. England. — By the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27), the mother, on the death of the father, is guardian either alone or jointly with such guardian, as the father or mother shall appoint. The mother may appoint a testamentary guardian to act after the death of herself and the father, or provisionally, to act jointly with the father, if the court finds the father unfit to act alone. This does not prevent the court, in a proper case, from displacing the father altogether. *In re G—*, (1892) 1 Ch. 292.

8. Statutes Authorizing Surviving Parent to Appoint Guardian. — *Sand. & H. Dig. Stat. Ark.* (1894), § 3574; *Rev. Stat. Idaho* (1887), § 5781; *Starr & Curt. Annot. Stat. Ill.* (1896), c. 64, par. 5; *Gen. Stat. Kan.* (1897), c. 108, § 2; *Rev. Civ. Code La.* (1900), art. 257; *Comp. Stat. Neb.* (1899), § 3222; *Bates's Annot. Stat. Ohio* (1897), § 6266; *Code W. Va.* (1891), c. 82, § 1.

In Louisiana "the right of appointing a tutor



thereto;<sup>1</sup> while some statutes authorize the mother to appoint a testamentary guardian to her minor children if the father dies without appointing such a guardian.<sup>2</sup>

c. **METHOD OF APPOINTMENT** — (1) *May Be by Deed or Will*. — Under the statute of 12 Car. II.,<sup>3</sup> and under the local statutes in most of the United States a testamentary guardian may be appointed either by deed or by will.<sup>4</sup> But under the statutes of some of the states the power of appointment can be exercised by will only.<sup>5</sup>

(2) *Requisites of Deed or Will* — **Execution**. — The deed or will by which the appointment of a testamentary guardian is made must be validly executed.<sup>6</sup>

**Probate**. — In England and in the United States, in the absence of a statutory provision requiring it, a will merely appointing a testamentary guardian need not be probated.<sup>7</sup> But under the statutes of most of the United States a probate of the will is necessary to entitle the testamentary guardian to act.<sup>8</sup>

(3) *Necessary Language*. — No particular form of language is necessary to the validity of the appointment of a testamentary guardian,<sup>9</sup> not even the use

[by will] \* \* \* belongs exclusively to the father or mother dying last." Rev. Civ. Code La. (1900), art. 257. See Farrelly's Succession, 47 La. Ann. 1667.

**The New York Legislation**. — Under the statute of 1860, making the father and mother joint guardians, the mother's guardianship continued after the father's death, and the father had no right to appoint a testamentary guardian with title superior to hers. *People v. Boice*, 39 Barb. (N. Y.) 307. In 1862, the legislature enacted that "no man shall create any testamentary guardian for his child unless the mother, if living, shall in writing signify her assent thereto." Laws 1862, c. 172, § 2; *Ruppert's Estate*, Tuck. (N. Y.) 480. This provision was repealed by Laws 1871, c. 32. *Matter of Fitzgerald*, (Supm. Ct. Gen. T.) 61 How. Pr. (N. Y.) 59. Laws 1896, c. 272, § 51, p. 223, makes the father and mother joint guardians of their infant children, and provides that the surviving parent may appoint a testamentary guardian for such children. Under this statute, the father cannot make any appointment of a testamentary guardian which will be effective unless he survives the mother. *Matter of Schmidt*, 77 Hun (N. Y.) 201; *Matter of Howard*, (Surrogate Ct.) 5 Misc. (N. Y.) 293; *Matter of Zwickert*, (Surrogate Ct.) 5 Misc. (N. Y.) 272; *People v. Brugman*, 3 N. Y. App. Div. 155. Such appointment is not validated by her subsequent assent. *Matter of Schmidt*, 77 Hun (N. Y.) 201.

**In Texas** only the surviving parent has the right to appoint a testamentary guardian. This is so although the parents lived separate, and the mother had been awarded the custody of the child, and then died before the father. *McKinney v. Noble*, 37 Tex. 731. But where a general guardian has already been appointed by consent of the mother, she loses her right, and cannot supersede him by appointing a testamentary guardian. *Potts v. Terry*, 8 Tex. Civ. App. 394.

1. **Statutes Requiring Mother's Consent to Appointment**. — See Civ. Code Mont. (1895), § 335; Gen. Stat. N. J. (1895), p. 1615; Rev. Codes N. Dak. (1895), § 2812; Comp. L. Dak. (1887), § 2637.

2. **Statutes Authorizing Mother to Appoint Guardian Where Father Dies Without Appointing**.

— *Mills's Annot.*, Stat. Colo. (1891), § 2090; 2 Code Ga. (1895), § 2515; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; Pub. Stat. Mass. (1882), c. 139, § 5; Gen. Stat. Nev. (1885), § 558; Gen. Stat. N. J. (1895), p. 1616; Code N. Car. (1883), § 1562.

**For Other Statutory Modifications of the rule** established by the statute of 12 Car. II., see the statutes of the several states.

3. 12 Car. II., c. 24.

4. See the statutes of the several states.

5. Describes *v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501. And see for example, *Starr & Curt. Annot.*, Stat. Ill. (1896), c. 64, par. 5; *Bright. Purd. Dig.*, Laws Pa. (1894), p. 579, par. 44 *et seq.*

**The Appointment by the Probate Court of an Administrator de Bonis Non** with the will annexed, confers no authority on the person appointed to act as testamentary guardian of the decedent's infant children. *Dunham v. Hatcher*, 31 Ala. 483.

6. **The Will Must Be Validly Executed** under the requirements for the execution of wills generally. *Wardwell v. Wardwell*, 9 Allen (Mass.) 518.

It must be written. *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77 (see also *Johnstone v. Beattie*, 10 Cl. & F. 42). And under the language of the statute of 12 Car. II. it must be attested by two witnesses. *Reddall v. Leddiard*, 3 Phill. Ecc. 256.

A testamentary appointment is not revoked by a codicil making a different appointment, but not legally executed, nor expressly revoking the former appointment. *Ex p. Ilchester*, 7 Ves. Jr. 348.

7. **Will Need Not Be Probated**. — 2 Kent's Com. 225; *Gilliat v. Gilliat*, 3 Phill. Ecc. 222; *Slack v. Perrine*, (D. C.) 23 Wash. L. Rep. 853; *Brigham v. Wheeler*, 8 Met. (Mass.) 127; *Hoyt v. Hilton*, 2 Edw. (N. Y.) 202; *In re Hunt*, 2 Con. & Law. 375; *Chester's Case*, 1 Vent. 207.

8. **Probate Required by Statute in the United States**. — Describes *v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Wardwell v. Wardwell*, 9 Allen (Mass.) 518.

9. **No Particular Language Necessary**. — *Miller v. Harris*, 9 Jur. 388, 14 Sim. 540; *Gaines v. Spann*, 2 Brock. (U. S.) 81; Describes *v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Corrigan v.*

of the word "guardian,"<sup>1</sup> if it clearly appears that the person is to have the custody of the child's person and property, or either.<sup>2</sup> Illustrations of the language held necessary to create a testamentary guardianship will be found in the note.<sup>3</sup>

*d. NECESSITY OF QUALIFICATION.*—As the authority is derived from the will, and the statute of 12 Car. II. required no qualification to complete the appointment, it was not originally deemed necessary for the guardian to file a bond, receive letters of guardianship, or in any way qualify for the trust;<sup>4</sup> but it is now generally required, in some cases under statutes and in some without statutory provisions, that the guardian appointed by will shall accept, file a bond, and receive letters of guardianship.<sup>5</sup>

Kiernan, 1 Bradf. (N. Y.) 208; *People v. Kearney*, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 493; *Kevan v. Waller*, 11 Leigh (Va.) 431. See also *Capps v. Hickman*, 97 Ill. 429.

**1. Appointment of Testamentary Guardian May Be Made by Implication.**—*Gaines v. Spann*, 2 Brock. (U. S.) 81; *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501.

**But the Intention Should Be Unequivocally Indicated** where the term "guardian" is not used. *Peyton v. Smith*, 2 Dev. & B. Eq. (22 N. Car.) 325; *Matter of Van Houten*, 3 N. J. Eq. 220, 29 Am. Dec. 707.

**2. The Words Used Must Convey the Powers Essential to the Office.**—*Gaines v. Spann*, 2 Brock. (U. S.) 81; *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501.

**3. Language Held Sufficient.**—In the following cases the language used was held sufficient to constitute the persons named testamentary guardians: "I desire that my son and daughter may be under the care and direction of" a person named. *Bridges v. Hales*, Mosely 108.

"I desire and will that my beloved wife, E. S., \* \* \* take and have possession of all my effects, both real and personal, and to use and live off of the profits of the same as a support for herself and minor children, \* \* \* and \* \* \* the same is to be under her exclusive control for the comfort and convenience of herself and maintenance and education of our minor children, my executors looking alone to the protection of the estate." *Southern Marble Co. v. Stegall*, 90 Ga. 236.

A provision that the testator's sons and residuary legatees should "maintain and support, in sickness and health, their brothers during their minority, \* \* \* and their sisters, until they arrive at the age of twenty-one years, or are married, in the same manner as fathers or guardians, my said children rendering due subjection as children, by labor and obedience." *Balch v. Smith*, 12 N. H. 437.

**Language Held Insufficient.**—"I respectfully request the managers of the Protestant Orphan Asylum of this city to place my said children in the custody of D.," was held to be insufficient to constitute D. a testamentary guardian. *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501.

A direction that the use of the property shall be with the testator's wife, for the support of herself and the children, subject to the supervision of the executors, until it can be conveniently divided between wife and children, does not constitute the executors guardians.

*Peyton v. Smith*, 2 Dev. & B. Eq. (22 N. Car.) 325.

A will gave specific portions of the testator's estate to his wife and each of his children, and gave his accounts to the widow for the support and maintenance of herself and children, and the education of the children. It was held that the will did not create a testamentary guardianship. *Massingale v. Tate*, 4 Hayw. (Tenn.) 30.

A will which gave certain property to Charles T. and a child, adding: "When this child is old enough to be sent to school, I wish Charles to educate and give her (\$5,000) five thousand dollars as her portion of this estate," was held not to constitute T. guardian of the child. *Taliaferro v. Day*, 82 Va. 79.

For other instances see *Hare v. Hare*, 5 Beav. 629; *In re Norbury*, 1r. R. 9 Eq. 134; *Gaines v. Spann*, 2 Brock. (U. S.) 81; *Smith v. Kennard*, 38 Ala. 695; *Kevan v. Waller*, 11 Leigh (Va.) 431.

**4. Formerly Testamentary Guardian Was Not Required to Qualify.**—*Norris v. Harris*, 15 Cal. 256; *Southern Marble Co. v. Stegall*, 90 Ga. 236, citing Code Ga. (1882), § 1804.

In *New York*, before the Act of 1877, c. 206, a guardian's right was derived solely from the will, and no qualification was required. *Geoghegan v. Foley*, 5 Redf. (N. Y.) 501.

**When Equity Will Require Security.**—But though the statute requires no bond from a testamentary guardian, equity will require him to give security where he is engaged in active building operations, and has used the ward's money in his operations. *Stanton's Estate*, 13 Phila. (Pa.) 213, 36 Leg. Int. (Pa.) 148.

**5. Qualification Now Generally Required.**—*Murphy v. Superior Ct.*, 84 Cal. 592; *Poe v. Schley*, 16 Ga. 367; *Wadsworth v. Connell*, 104 Ill. 369; *Davidson v. Koehler*, 76 Ind. 398; *Geoghegan v. Foley*, 5 Redf. (N. Y.) 501; *Matter of Constantine*, 2 Connoly (N. Y.) 1; *Wuesthoff v. Germania L. Ins. Co.*, 107 N. Y. 580.

**Where Guardian Fails to Qualify.**—It is the duty of the court, if the guardian appointed fails to qualify, to appoint some other person as guardian. *Wadsworth v. Connell*, 104 Ill. 369; *Davidson v. Koehler*, 76 Ind. 398; *M'Alister v. Olmstead*, 1 Humph. (Tenn.) 210.

Under the *New York* statute, Code Civ. Pro., § 2852, a guardian who does not qualify within thirty days after probate of the will is deemed to have renounced the appointment. *Geoghegan v. Foley*, 5 Redf. (N. Y.) 501.



**c. INCIDENTS OF TESTAMENTARY GUARDIANSHIP.** — Testamentary guardianship,<sup>1</sup> unless limited by the will, extends to the person and estate of the ward,<sup>2</sup> and in its nature and extent is identical with general guardianship conferred by appointment of a court.<sup>3</sup>

**It Is Not Assignable.**<sup>4</sup> — If several are appointed, their title is joint and several, and in case of the refusal<sup>5</sup> or death<sup>6</sup> of a part the power survives to the others.

**Removal.** — A testamentary guardian is subject to removal for cause.<sup>7</sup>

**3. Guardianship by Judicial or Legislative Appointment** — *a. GENERAL POWER* — (1) *Of Chancery.* — The king, as *parens patriæ*, or in the United States the state, as exercising those paternal powers necessary to the public welfare, has the right and owes the duty to care for the persons and property of infants. In *England* this jurisdiction was delegated to the Court of Chancery, and has become a settled part of chancery jurisprudence.<sup>8</sup> Chancery guardianship was generally adopted in the *United States*. In nearly all the states, in the absence of countervailing statutes, courts having equity powers have a jurisdiction over guardianships similar to that possessed by the English Court of Chancery. The jurisdiction of chancery is very broad. It has authority to appoint a guardian to orphaned children, where no testamentary guardian has been appointed, or to those owning property and having only a natural guardian,<sup>9</sup> to remove natural or other guardians for unfitness or mis-

In *Florida*, while the authority of a testamentary guardian emanates directly from the will, it extends only to the custody of the person; to entitle him to act as guardian of the estate he must be appointed by the court. *Thomas v. Williams*, 9 Fla. 289.

In *Mississippi* a testamentary guardian must appear before the Probate Court and declare his acceptance, but a petition for probate of the will by one who is named both executor and guardian is a sufficient acceptance, though there is no order of appointment and he does not take the oath. *Gregory v. Field*, 63 Miss. 323.

**Will May Absolve Guardian from Giving Bond.** — A will appointing a testamentary guardian may provide that he shall not be required to give bond. *Carpenter v. Harris*, 51 Mich. 223.

**Appointment Refused to Nonresident Alien.** — A letter of guardianship will not be issued to a nonresident alien, though duly appointed by will. *Matter of Taylor*, 3 Redf. (N. Y.) 259.

**That a Testamentary Guardian Has Begun to Act Without Having Qualified or given bond, if in good faith, is not cause for refusal to confirm the testamentary appointment.** *Stone v. Dorsett*, 18 Tex. 700.

**1. Testamentary Guardianship May Be Granted to Widow During Widowhood Only.** — *Holmes v. Field*, 12 Ill. 424; *Corrigan v. Kiernan*, 1 Bradf. (N. Y.) 208.

**2. But under the Florida Statute, testamentary guardianship is only over the person, and gives no power over the estate of the ward.** *Thomas v. Williams*, 9 Fla. 289.

**3. Powers Identical with Those of Guardian Appointed by Court.** — The powers of a testamentary guardian supersede and override those of any other guardian, to the person, and to the real and personal estate, until the full age of the minor. *Sheetz's Estate*, 6 Pa. Dist. 367; *People v. Kearney*, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 493, 31 Barb. (N. Y.) 430.

The office is left the same as the law had prescribed and settled of guardians in socage,

except that it continues to the age of twenty-one instead of to the age of fourteen, and that it is not limited to any person, but the selection is made by the father. *Bedel v. Constable*, Vaugh. 178.

**By the New York Statute**, a testamentary guardian (who gives no security) is not entitled to receive a legacy due to the ward, which by the act is to be paid to "the general guardian." *Sackett's Estate*, Tuck. (N. Y.) 84.

**4. Testamentary Guardianship Not Assignable.** — *Mellish v. De Costa*, 2 Atk. 14; *Reynolds v. Tenham*, 9 Mod. 40; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Balch v. Smith*, 12 N. H. 437.

**5. Where Several Are Appointed Power Remains in Survivors.** — *Matter of Reynolds*, 11 Hun (N. Y.) 41; *Kevan v. Waller*, 11 Leigh (Va.) 431.

**6. Eyre v. Shaftsbury**, 2 P. Wms. 103. Under the statute of 12 Car. II. a father may authorize the survivor of two guardians appointed by him to nominate a successor. *Goods of Parnell*, L. R. 2 P. & D. 379.

**7. Testamentary Guardian May Be Removed for Cause.** — *Matter of King*, 42 Hun (N. Y.) 607; *Damarell v. Walker*, 2 Redf. (N. Y.) 198; *McPhillips v. McPhillips*, 9 R. I. 536.

**Only for Good Cause.** — A testamentary guardian cannot be removed, nor any other guardian appointed, except for good cause. *Copp v. Copp*, 20 N. H. 284.

The court will not interfere or remove him, unless it is absolutely necessary. *In re Goode*, 1 Ir. Ch. 256. See also *infra*, this title, *Termination of Guardianship — By Removal from Trust*.

**8. By the Judicature Act** power to exercise the chancery jurisdiction over guardianships is given to the judges of the Queen's Bench. *Reg. v. Gyngall*, (1893) 2 Q. B. 232.

**9. Jurisdiction of Chancery to Appoint Guardians** — *England*. — *Mellish v. De Costa*, 2 Atk. 14; *Ex p. Birchell*, 3 Atk. 813; *Wellesley v. Wellesley*, 2 Bligh N. S. 128; *Ex p. Salter*, 3 Bro. C.

behavior,<sup>1</sup> and to control and direct all guardians in the performance of their trust, so as to insure the proper care of the infant's person<sup>2</sup> and property.<sup>3</sup>

(2) *Of the Legislature.* — The legislature, which primarily represents the power of the state, can also, by a special legislative act, provide a guardian for an infant, in the absence of any constitutional restriction.<sup>4</sup>

(3) *Of Statutory Courts.* — But the power of the legislature is more commonly exercised by the creation of special courts to which the probate of wills, the administration of estates, and the like trusts are committed, and to

C. 500; *Johnstone v. Beattie*, 10 Cl. & F. 85; *Ex p. Champney*, 1 Dick. 350; *In re Bond*, 11 Jur. 114; *Eyre v. Shaftsbury*, 2 P. Wms. 118; *Ex p. Watkins*, 2 Ves. 470; *Ex p. Mountfort*, 15 Ves. Jr. 445; *Reg. v. Gyngall*, (1893) 2 Q. B. 232.

*United States.* — *Williamson v. Berry*, 8 How. (U. S.) 555.

*Alabama.* — *Hall v. Lay*, 2 Ala. 529; *Wood v. Wood*, 3 Ala. 756; *Lango v. Pettus*, 11 Ala. 37; *Lee v. Lee*, 55 Ala. 590.

*Arkansas.* — *Myrick v. Jacks*, 33 Ark. 425.

*Illinois.* — *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708.

*Indiana.* — *Childrens' Guardians v. Shutter*, 139 Ind. 268.

*Kentucky.* — *Com. v. Henshaw*, 2 Bush (Ky.) 286.

*New York.* — *Matter of Hosford*, 2 Redf. (N. Y.) 168.

*Tennessee.* — *Lake v. McDavitt*, 13 Lea (Tenn.) 26.

*Virginia.* — *Durrett v. Davis*, 24 Gratt. (Va.) 302; *Ficklin v. Ficklin*, 2 Va. Cas. 204.

*Wisconsin.* — *Glasscott v. Warner*, 20 Wis. 654; *In re Klein*, 95 Wis. 246.

1. See *infra*, this title, *Termination of Guardianship—By Removal from Trust—Jurisdiction to Remove—Of Chancery.*

2. The power of chancery is not limited to cases where the infants have property to protect. *In re Spence*, 2 Phil. 247. But see *Wellesley v. Beaufort*, 2 Russ. 1.

3. **Power of Chancery to Control Guardians in Performance of Their Trust—England.** — *Johnstone v. Beattie*, 10 Cl. & F. 85.

*Arkansas.* — *Myrick v. Jacks*, 33 Ark. 425.

*California.* — *Lord v. Hough*, 37 Cal. 657.

*Illinois.* — *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708; *Lynch v. Rotan*, 39 Ill. 14; *Grattan v. Grattan*, 18 Ill. 171; *Smith v. Sackett*, 10 Ill. 534.

*Indiana.* — *Children's Guardians v. Shutter*, 139 Ind. 268.

*Kentucky.* — *Com. v. Henshaw*, 2 Bush (Ky.) 286; *Clark v. Layne*, 97 Ky. 290.

*Maryland.* — *Crain v. Barnes*, 1 Md. Ch. 151.

*New York.* — *Disbrow v. Henshaw*, 8 Cow. (N. Y.) 349; *Matter of Andrews*, 1 Johns. Ch. (N. Y.) 99; *Matter of Dyer*, 5 Paige (N. Y.) 534.

*Pennsylvania.* — *Shollenberger's Appeal*, 21 Pa. St. 340.

*Tennessee.* — *Talbot v. Provine*, 7 Baxt. (Tenn.) 502; *Thompson v. Mebane*, 4 Heisk. (Tenn.) 370; *Lake v. McDavitt*, 13 Lea (Tenn.) 26; *Lancaster v. Lancaster*, 13 Lea (Tenn.) 132; *Hurt v. Long*, 90 Tenn. 445.

See also *People v. Wilcox*, 22 Barb. (N. Y.) 184; *People v. Erbert*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 395; *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534.

**Chancery May Order Mother to Deliver Infant to Guardians.** — *Wright v. Naylor*, 5 Madd. 77.

**So Chancery Has Jurisdiction to Restore Custody of an Infant to the Father**, if a guardian has been illegally appointed without notice to him. *Collins v. Warner*, 32 Ark. 87; *Bowles v. Dixon*, 32 Ark. 92.

**Chancery May Oblige a Guardian to Give Security.** — *Per North, C. J.*, in *Quadrang v. Downs*, 2 Mod. 176.

Where one guardian is insolvent, and the other and the sureties are of very doubtful credit, and the trust has many years yet to run, the court will order further security, or the funds brought into court, to be paid out only by its order. *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298.

Under the *Alabama* rule, by which the father has control of the estate as well as of the person of his child, equity will interpose its aid to prevent the estate from being squandered, and will require the father to give security. *Hall v. Lay*, 2 Ala. 529; *Wood v. Wood*, 3 Ala. 756.

**Chancery Has Jurisdiction of a Demand by a Ward's Heirs** against the guardian, though for money only. *Armstrong v. Miller*, 6 Ohio 118.

**Chancery Has Jurisdiction Though No Cause Is Pending.** — The chancery jurisdiction over infants in England does not depend upon the pendency of any bill in chancery, but may be exercised on the presentation of a petition to the chancellor, without any bill pending. *Mellish v. De Costa*, 2 Atk. 14; *Ex p. Whitfield*, 2 Atk. 315; *Ex p. Birchell*, 3 Atk. 813; *Ex p. Kent*, 3 Bro. C. C. 88; *Ex p. Salter*, 3 Bro. C. C. 500; *Ex p. Champney*, 1 Dick. 350; *In re M'Cullochs, Drury* 276; *In re Bond*, 11 Jur. 114; *Eyre v. Shaftsbury*, 2 P. Wms. 118; *In re Spence*, 2 Phil. 247; *Villareal v. Mellish*, 2 Swanst. 533; *Ex p. Watkins*, 2 Ves. 470; *Ex p. Mountfort*, 15 Ves. Jr. 445. *Contra, Ex p. Hopkins*, 3 P. Wms. 152.

So chancery may act upon an application to fix the maintenance of an infant, though no cause is pending. *Ex p. Whitfield*, 2 Atk. 315; *Ex p. Kent*, 3 Bro. C. C. 88; *Ex p. Salter*, 3 Bro. C. C. 500; *Ex p. Green*, 1 Jac. & W. 253.

In *Tennessee* it has been held that chancery has the right to determine the custody of infants, without a cause pending. *Villareal v. Mellish*, 2 Swanst. 533.

**4. Guardianship by Legislative Appointment.** — *Henderson v. Dowd*, 116 N. Car. 795. See *Hoyt v. Sprague*, 103 U. S. 613.

But a legislative act authorizing M., guardian of F., to sell the real estate of said minor does not constitute her such guardian, but assumes her capacity, and she must be appointed guardian by the proper court before she can use the power. *Paty v. Smith*, 50 Cal. 153.



these courts, variously entitled Probate, Orphans' or Surrogates' Courts, the appointment of guardians is now generally committed in the United States.

**Concurrent Jurisdiction with Courts of Chancery.** — It has been generally held that where the statute creating these courts does not expressly give exclusive jurisdiction to them, the authority conferred upon them is simply cumulative, and their jurisdiction is concurrent with that of courts of chancery.<sup>1</sup> Generally guardians appointed by these statutory courts are, like all other guardians, subject to the supervision and control of courts of chancery, and liable to removal by them for incompetence or misbehavior.<sup>2</sup> Practically, however, the jurisdiction to appoint guardians to infants and to control them in the administration of their property is confined to the statutory courts. Courts of chancery rarely exercise their jurisdiction to appoint guardians,<sup>3</sup> nor will a chancery court take upon itself the management of the estate of a ward for whom a guardian has been appointed by a statutory court, and thus supersede that court, except in extraordinary cases and for special reasons.<sup>4</sup>

**b. JURISDICTION OF PARTICULAR COURT** — (1) *Arising from Ward's Domicil.* — The particular court, whether a court of chancery or a statutory court, which has the right and owes the duty to appoint a general guardian, that is, a guardian over both the person and the estate of the ward, is the one within whose territorial jurisdiction the ward is domiciled.<sup>5</sup> But as a guardian's authority, as a matter of strict legal right, is restricted to the country and in the United States to the state in which he was appointed,<sup>6</sup> if an infant resides in a country or state other than that of his domicil it may be necessary for his protection to have a legal guardian there. In such a case, the residence of the infant within the state is sufficient to give to the courts of the state jurisdiction to appoint a guardian.<sup>7</sup> In such cases, however, the courts will generally, in a spirit of comity, recognize the authority of the guardian appointed in the state or country of the infant's domicil.<sup>8</sup>

**What Constitutes Domicil for the Purpose** — **Infant's Domicil Primarily That of Father.** — The domicil of an infant, for the purpose of conferring jurisdiction to appoint

**1. Jurisdiction of Statutory Courts Generally Concurrent with That of Chancery.** — *Lee v. Lee*, 55 Ala. 590; *Myrick v. Jacks*, 33 Ark. 425; *Shumard v. Phillips*, 53 Ark. 37; *Wilson v. Roach*, 4 Cal. 362; *Children's Guardians v. Shutter*, 139 Ind. 268; *Corrie's Case*, 2 Bland (Md.) 488; *Crain v. Barnes*, 1 Md. Ch. 151; *Taff v. Hosmer*, 14 Mich. 249; *Wilcox v. Wilcox*, 14 N. Y. 575; *Lake v. McDavitt*, 13 Lea (Tenn.) 26 (but see *Webb v. Fritts*, 8 Baxt. (Tenn.) 218); *Durrett v. Davis*, 24 Gratt. (Va.) 302; *Glasscott v. Warner*, 20 Wis. 654. See also *Sterritt v. Robinson*, 17 Iowa 61; *Harlin v. Stevenson*, 30 Iowa 371.

**2. Power of Chancery over Guardians Appointed by Statutory Courts.** — *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708; *Disbrow v. Henshaw*, 8 Cow. (N. Y.) 349; *Matter of Andrews*, 1 Johns. Ch. (N. Y.) 99; *Matter of Dyer*, 5 Paige (N. Y.) 534; *Shollenberger's Appeal*, 21 Pa. St. 340; *Willis v. Fox*, 25 Wis. 646.

**3. Chancery Courts Rarely Appoint Guardians.** — *Schouler on Domestic Relations* (3d ed.), § 303.

**4. When Chancery Will Supersede Statutory Court.** — *Ames v. Ames*, 148 Ill. 321; *Willis v. Fox*, 25 Wis. 646.

**5. General Guardian Appointed by Court of Ward's Domicil** — *England*. — *Johnstone v. Beattie*, 10 Cl. & F. 42.

*Georgia*. — *Ross v. Southwestern R. Co.*, 53 Ga. 514.

*Illinois*. — *Barnsback v. Dewey*, 13 Ill. App. 581; *Wackerle v. People*, 65 Ill. App. 423.

*Louisiana*. — *Shaw's Succession*, 13 La. Ann. 265.

*New York*. — *Ex p. Bartlett*, 4 Bradf. (N. Y.) 221.

*Ohio*. — *Maxsom v. Sawyer*, 12 Ohio 195.

**But by Statute in Several States** the jurisdiction to appoint a guardian is given to the court of the county in which the ward resides. *Matter of Raynor*, 74 Cal. 421; *Harding v. Weld*, 128 Mass. 587; *Herring v. Goodson*, 43 Miss. 392; *Duke v. State*, 57 Miss. 229; *Matter of Pierce*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 532; *Ex p. Bartlett*, 4 Bradf. (N. Y.) 221; *Mintzer's Estate*, 2 Pa. Dist. 584.

Under the *Ohio* statute it was held that a County Court had jurisdiction to appoint a guardian for a minor when the minor had either an actual or a constructive residence in the county. *Maxsom v. Sawyer*, 12 Ohio 195.

**A Statute Authorizing the Grant of Guardianship** by the court of a county other than that where the ward is domiciled or resides is not unconstitutional. *Shine v. Brown*, 20 Ga. 375.

**6.** See the title FOREIGN GUARDIANS, vol. 13, p. 965.

**7. Residence in State Confers Jurisdiction to Ap-  
point Guardian.** — *Johnstone v. Beattie*, 10 Cl. & F. 42; *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Farrington v. Wilson*, 29 Wis. 383. Compare *Matter of Hubbard*, 82 N. Y. 90.

**8.** See the title FOREIGN GUARDIANS, vol. 13, p. 967.

a general guardian, primarily arises from the domicile of the father, or, if the father be dead, from his domicile at the time of death.<sup>1</sup>

**When Domicil of Mother Determines That of Infant.**—But if, since the father's death, the mother, without fraudulent intent, has removed her residence and that of the child to another jurisdiction, the infant's domicile will be deemed to follow that of the mother.<sup>2</sup> And even before the father's death, if he abandons his child and ceases to support it, and thereby loses his right to its custody, and the natural guardianship devolves upon the mother, her domicile will thereafter determine that of the child.<sup>3</sup>

**Effect of Removal of Infant by Guardian.**—It has been held that under certain conditions the removal of an infant by a guardian other than its natural guardian will change its domicile. But upon this question there is great conflict of authority.<sup>4</sup> It is well settled, however, that in case of the removal of

**1. Domicil of Infant Primarily That of Father.**—*United States.*—Sprague v. Litherberry, 4 McLean (U. S.) 442.

*Alabama.*—Daniel v. Hill, 52 Ala. 430; Desribes v. Wilmer, 69 Ala. 31, 44 Am. Rep. 501; Allgood v. Williams, 92 Ala. 551.

*Indiana.*—Warren v. Hofer, 13 Ind. 167  
*Iowa.*—Jenkins v. Clark, 71 Iowa 552; Matter of Johnson, 87 Iowa 130.

*Louisiana.*—Stephen's Succession, 19 La. Ann. 499; Vennard's Succession, 44 La. Ann. 1076.

*Mississippi.*—Wells v. Andrews, 60 Miss. 373.

*Missouri.*—Lewis v. Castello, 17 Mo. App. 593; De Jarnett v. Harper, 45 Mo. App. 415.

*New York.*—Guardianship of Hughes, Tuck. (N. Y.) 38.

*Pennsylvania.*—Taylor's Estate, 9 Pa. Co. Ct. 122.

**Under the English Rules** as to national domicile, the Chancery Court in England took jurisdiction to determine the custody of infants of English parentage, although they were born and had always lived in Paris, their mother living there with them, but the father living in England. Hope v. Hope, 27 Eng. L. & Eq. 249.

**Where the Father Died a Resident of Iowa,** and his will was probated there, it was held that that was the jurisdiction for appointment of a guardian, though the child was actually resident in another state. Matter of Johnson, 87 Iowa 130.

**Domicil of Illegitimate Infant.**—But the rule stated in the text applies only to legitimate children. The domicile of an illegitimate infant is that of the mother. Jacobs on Domicil, § 105.

**2. Removal of Infant by Surviving Mother**—*England.*—Potinger v. Wightman, 3 Meriv. 79.

*United States.*—Lamar v. Micou, 112 U. S. 452.

*Kentucky.*—Swayzee v. Miller, 17 B. Mon. (Ky.) 565.

*Louisiana.*—Winn's Succession, 3 Rob. (La.) 303; Bailey v. Morrison, 4 La. Ann. 523; Lewis's Succession, 10 La. Ann. 789, 63 Am. Dec. 600.

*Massachusetts.*—Dedham v. Natick, 16 Mass. 135.

*Missouri.*—Lacy v. Williams, 27 Mo. 280.

*Nebraska.*—Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627.

*Ohio.*—Commercial Gazette Co. v. Dean, 25 Cinc. L. Bul. 250, 11 Ohio Dec. (Reprint) 207.

*Texas.*—Munson v. Newson, 9 Tex. 109.

**In Alabama** the rule that formerly prevailed was that if after the death of the father a guardian had been appointed, the mother could not change the domicile of the infant without such guardian's consent, but she might change it during her widowhood, if the child was of tender years, and no guardian had been appointed. Carlisle v. Tuttle, 30 Ala. 613; Johnson v. Copeland, 35 Ala. 521; Moses v. Faber, 81 Ala. 445. But under the Act of Feb. 26, 1881, amending section 2800 of the Code of 1876, if the surviving mother of an infant under fourteen years of age, for whom a guardian had been appointed in the county of his father's last domicile, removed with him into another county in the state, another guardian might be appointed for him there. Moses v. Faber, 81 Ala. 445.

**Effect of Remarriage of Mother.**—There is some conflict of authority upon the question whether the infant's domicile follows the mother's where she acquires a new domicile by remarriage. The better opinion seems to be that it does not. Lamar v. Micou, 112 U. S. 452; Freetown v. Taunton, 16 Mass. 52; Johnson v. Copeland, 35 Ala. 521; Mears v. Sinclair, 1 W. Va. 185. But this exception to the general rule is denied in some states. Winn's Succession, 3 Rob. (La.) 303; Lewis's Succession, 10 La. Ann. 789, 63 Am. Dec. 600; Munson v. Newson, 9 Tex. 109.

Where the ward resided in Tennessee with a testamentary guardian, and his mother, having remarried, removed him by force to Mississippi and procured her appointment as guardian there, the child was restored to the custody of the Tennessee guardian on habeas corpus. Alston v. Foster, Freem. (Miss.) 732, 6 How. (Miss.) 406.

**In New York** it has been held that if after the death of the father the mother remarries and moves to her husband's home, but leaves the child in the domicile of its origin, the domicile of the child will not follow hers. Brown v. Lynch, 2 Bradf. (N. Y.) 214.

**3. Where Father Abandons Infant.**—People v. Dewey, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 267.

**4. As to when the guardian has power to change the ward's domicile,** see *infra*, this title, *Powers and Duties of Guardian*, subdiv. 1. c. *Right to Alter Ward's Domicil*.



an infant from its former domicile by a person wholly unauthorized, or by the infant's own act, without the consent of parent or guardian, no change of domicile occurs.<sup>1</sup>

**When Domicil of Person Standing in Loco Parentis Determines Infant's Domicil.** — Where, however, the parents are dead, or have relinquished the custody of their infant, and it is living with other relatives acting *in loco parentis*, this residence will be deemed sufficient to confer jurisdiction to appoint a guardian.<sup>2</sup>

**When a Court Has Taken Jurisdiction over a Ward** by appointing a guardian, its jurisdiction continues though the ward change his residence, and if the guardian die or be removed the same court should appoint his successor.<sup>3</sup> In such a case the relation of the ward to the court of the prior domicile is itself a decisive fact in determining whether the change of residence amounts to a change of domicile. But it should always be borne in mind that a guardian appointed in the country or state of the infant's domicile has, as a matter of strict legal right, no authority as guardian in any other country or state.<sup>4</sup>

Under the Statutes of Several of the United States, in case a guardianship becomes vacant by death, removal, or resignation, the court of the county in which the ward then resides has jurisdiction to appoint another guardian, notwithstand-

**1. Unauthorized Removal or Removal by Infant's Own Act.** — *Stuart v. Bute*, 9 H. L. Cas. 440; *Grimmett v. Witherington*, 16 Ark. 377, 63 Am. Dec. 66; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202 (*compare Dampier v. McCall*, 78 Ga. 607); *Warren v. Hofer*, 13 Ind. 167; *Matter of Johnson*, 87 Iowa 130; *Munday v. Baldwin*, 79 Ky. 121; *Stephens's Succession*, 19 La. Ann. 499; *Ex p. Dawson*, 3 Bradf. (N. Y.) 130; *Matter of Daniels*, 71 Hun (N. Y.) 195; *Taylor's Estate*, 9 Pa. Co. Ct. 122.

The domicile of origin can be changed only by choice; and that cannot be exercised by a minor, nor by any one except his parent or guardian. *Ex p. Dawson*, 3 Bradf. (N. Y.) 130.

**Clandestine or Fraudulent Removal.** — Where an infant has property in both England and Scotland, and the English court has been the first to appoint a guardian, and the infant is afterwards clandestinely removed to Scotland without the guardian's consent, the Scotch courts will direct the restoration of the infant to the English guardian. *Stuart v. Bute*, 9 H. L. Cas. 440.

The courts of New York have jurisdiction to appoint a guardian to a ward resident there, though domiciled elsewhere, or having property there; but if the infant has neither domicile, residence, nor property there, there is no jurisdiction. That the infant has been temporarily brought to the state by stratagem will not avail. *Matter of Hubbard*, 82 N. Y. 90.

Where the infant's residence was fixed by the parents in Connecticut, and its property was there, its unauthorized removal to New York after their death, with intent to prevent the Connecticut courts from selecting the guardian, does not give to the New York courts jurisdiction to appoint him. *Matter of Daniels*, 71 Hun (N. Y.) 195.

**2. When Infant's Domicil Determined by That of Persons Acting in Loco Parentis.** — *Lamar v. Micou*, 114 U. S. 218; *Matter of Vance*, 92 Cal. 195; *Kelsey v. Green*, 69 Conn. 201; *Darden v. Wyatt*, 15 Ga. 414; *Matter of Benton*, 92 Iowa 202, 54 Am. St. Rep. 546; *Matter of Solomon*, 71 Mich. 100; *Winters's Estate*, 11 Pa. Co. Ct. 465; *Taney's Appeal*, 97 Pa. St. 74.

In Iowa it has been held that after the death of an infant's parents the paternal grandfather and next of kin becomes its natural guardian, and may in good faith change its domicile, so as to give to a Probate Court jurisdiction to appoint a guardian for it. *Matter of Benton*, 92 Iowa 202, 54 Am. St. Rep. 546.

But in the same state, where the parents of an infant were dead, and an aunt, at the request of the mother in her will, took the child out of the state where the parents had been domiciled, but assumed no legal obligations towards it, it was held that the domicile of the infant, for the appointment of a guardian, was where the parents had lived, and not in the state in which the aunt had her domicile. *Jenkins v. Clark*, 71 Iowa 552.

In Alabama a doctrine contrary to that stated in the text prevails. There the domicile of the father, while living, continues to be the child's only legal domicile after the father's death, though the child is living elsewhere with a relative to whom the father had intrusted it. *Allgood v. Williams*, 92 Ala. 551.

So in Missouri it has been held that the jurisdiction for the appointment of a guardian is where the father lived and the mother still lives, though the father intrusted the child to the care of one living in another country, and the mother is insane. *De Jarnett v. Harper*, 45 Mo. App. 415.

**3. Court Appointing Guardian Retains Its Jurisdiction Notwithstanding Ward's Change of Residence.** — *Dorman v. Ogbourne*, 16 Ala. 759; *Shorter v. Williams*, 74 Ga. 539; *Marheineke v. Grothaus*, 72 Mo. 204; *Garrison v. Lyle*, 38 Mo. App. 558. See also *People v. Wamsley*, (Supm. Ct. Spec. T.) 15 Abb. Pr. (N. Y.) 323; *Wackerle v. People*, 65 Ill. App. 423; *McGale v. McGale*, 18 R. I. 675.

In Louisiana removal of the father and tutor to another state does not change the domicile of the wards who remain, so as to oust the court which appointed a guardian of jurisdiction. *Succession of La. v. La. v. Andrieux*, 19 La. Ann. 685.

**4.** See the title FOREIGN GUARDIANS, vol. 13, p. 965.

ing the fact that the former guardian was appointed by the court of another county in which the ward formerly resided or had his domicile.<sup>1</sup>

(2) *Arising from Ward's Ownership of Property Within Jurisdiction.* — In addition to the general jurisdiction vested in the courts of the ward's domicile, a special jurisdiction exists wherever the ward has property, for the appointment of a guardian to secure and administer that property.<sup>2</sup> Such a guardianship gives no authority over the person of the ward, nor over any property except that within the jurisdiction.<sup>3</sup> An appointment of a guardian by a court within whose jurisdiction the ward is not domiciled, does not reside, and has no property, is wholly void.<sup>4</sup>

*c. FACTS NECESSARY TO JUSTIFY APPOINTMENT.* — Jurisdictional facts that must appear to make any appointment legal are the infancy of the ward,<sup>5</sup> the lack of any guardian within the jurisdiction,<sup>6</sup> and the death of the father, except in cases where he is found to be unfit, or where he is residing abroad, or where the infant owns property.<sup>7</sup>

1. Rule under Statutes of Certain States. — *Matter of Raynor*, 74 Cal. 421; *Harding v. Welds*, 128 Mass. 587; *Ex p. Bartlett*, 4 Bradf. (N. Y.) 221. See also *Moses v. Faber*, 81 Ala. 445.

2. Special Jurisdiction to Appoint Guardian to Administer Ward's Property. — *Maxwell v. Campbell*, 45 Ind. 361; *Gaines's Succession*, 42 La. Ann. 699; *Kraft v. Wickey*, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; *Clarke v. Cordis*, 4 Allen (Mass.) 466; *Davis v. Hudson*, 29 Minn. 27; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380; *McLoskey v. Reid*, 4 Bradf. (N. Y.) 334; *Neal v. Bartleson*, 65 Tex. 478.

*Trust Property.* — Where an infant resides without the state, but has an interest in a trust the trustee whereof resides within the state, the residence of the trustee is the situs of the property and the jurisdiction for the appointment of a guardian. *Clarke v. Cordis*, 4 Allen (Mass.) 466.

*Property Acquired by Will or Inheritance.* — The court which proves the will, appoints the executor, and receives his returns, has power to appoint a guardian for a minor legatee. *Trumbo v. Reigne*, 11 Rich. L. (S. Car.) 189.

A Probate Court has power to appoint a guardian to a ward residing in another county and having no guardian, if the necessity for one arises within the territory of the court, as by the fact that the father's estate is being administered there. *Probate Judge v. Hinds*, 4 N. H. 464.

*Guardian to Recover Concealed Property.* — A guardian may be appointed, although there is no property in possession, if there is claimed to be concealed property, and a guardian is sought for the purpose of recovering it. *Seff's Appeal*, (Pa. 1887) 9 Atl. Rep. 282.

Formerly, under the New York Statutes, the surrogate had no power to appoint a guardian for a nonresident minor having property within the jurisdiction; but the general power of the chancellor extended to such a case. *Matter of Hosford*, 2 Redf. (N. Y.) 168. But this lack of power was afterwards corrected by statute. *Matter of Fitch*, 3 Redf. (N. Y.) 457.

3. Extent of Guardian's Authority. — *Moise v. Mutual Reserve Fund L. Assoc.*, 45 La. Ann. 736; *Davis v. Hudson*, 29 Minn. 27; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380; *Kraft v. Wickey*, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569.

4. Appointment Void Where There Is Neither Domicil, Residence, nor Property. — *Norton v. Miller*, 25 Ark. 109; *Grier v. McLendon*, 7 Ga. 362; *Boyd v. Glass*, 34 Ga. 253, 89 Am. Dec. 252; *Matter of Hubbard*, 82 N. Y. 90.

But if the Record Shows the Fact of Residence, it cannot be inquired into collaterally. *Dequindre v. Williams*, 31 Ind. 444; *Derome v. Vose*, 140 Mass. 575; *Dutton v. Dutton*, (Supm. Ct.) 8 How. Pr. (N. Y.) 99. See *infra*, this section, *When Appointment May Be Attacked Collaterally*.

5. Facts Essential to Justify Appointment — Infancy of Ward. — *State v. McLaughlin*, 77 Ind. 335.

The Chancery Court may appoint a guardian to a female over eighteen and under twenty-one years of age. *Waring v. Waring*, 2 Bland (Md.) 673.

6. A Former Guardian Must Have Been Removed Before a Successor Can Be Appointed. — *Dupree v. Perry*, 18 Ala. 34; *Justices v. Selman*, 6 Ga. 432; *Leavel v. Bettis*, 3 Bush (Ky.) 74; *Cotton v. Wolf*, 14 Bush (Ky.) 238; *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154; *Bledsoe v. Britt*, 6 Yerg. (Tenn.) 458.

Where There Is a Testamentary Guardian who has not been removed, the appointment of a guardian by the Orphans' Court is a nullity. *Robinson v. Zollinger*, 9 Watts (Pa.) 169; *Murphy v. Superior Ct.*, 84 Cal. 592. See also *Haley's Succession*, 49 La. Ann. 709.

But the mother's agreement to surrender to a man and his wife her right of custody will not bar the proper court, in its discretion, from appointing a different person guardian. *Gloucester v. Page*, 105 Mass. 231.

The right of an incorporated charitable institution to take the custody of a child by grant from the father does not bar the appointment of a guardian, since its powers are not coextensive with those of a general guardian. *Kearney v. Brooklyn Industrial School Assoc.*, 1 Redf. (N. Y.) 292.

A Motion to Remove a Guardian Who Was Appointed when No Vacancy Existed is in effect a motion to revoke his illegal appointment, and it should be received and granted, so as to leave no excuse for collision. *Leavel v. Bettis*, 3 Bush (Ky.) 74. See also *Haley's Succession*, 49 La. Ann. 709.

7. When Death of Father Essential to Appointment. — *Friesner v. Symonds*, 46 N. J. Eq. 521;



**When Property Is in Hands of Testamentary Trustee.**—A guardian will not be appointed where the infant's property is in the hands of a testamentary trustee who is properly caring for it, unless the circumstances of the ward require a guardian of the person to be appointed.<sup>1</sup>

**Removal of Ward to a Foreign Country.**—A Probate Court has no power to appoint a guardian for the purpose of removing the ward to a foreign country; and an appointment made on application which shows that to be the purpose should be revoked.<sup>2</sup>

**d. REQUISITE PROCEDURE.**—The procedure to be followed in appointing a guardian is very largely a matter of local practice and legislation, but certain principles are generally recognized. Thus, a guardian should not be appointed without notice to the natural guardian or near relatives of the infant, and for errors committed by the court in making the appointment there is a right of appeal.<sup>3</sup>

**e. WHEN APPOINTMENT MAY BE ATTACKED COLLATERALLY.**—The appointment of a guardian by a court not having jurisdiction is void, and where the want of jurisdiction appears upon the record of the court the appointment may be impeached in any collateral proceeding.<sup>4</sup> But where the appointment has been made by a court having jurisdiction, it cannot be attacked collaterally.<sup>5</sup>

*Harris v. Petty*, 66 Tex. 514; *In re Thomas*, 21 Eng. L. & Eq. 524. In this case two infants having been sent to England for their education by their father, who was resident in India, the court appointed a guardian for them, to act for the father during his absence abroad, notwithstanding the fact that their mother was residing in England.

**Under the Kentucky Statute** in force in 1832, a guardian could not be appointed while the father was living, though the father declined appointment, and the child had a valuable estate derived from the mother. *Poston v. Young*, 7 J. J. Marsh. (Ky.) 501.

**Under a Constitutional Provision** giving to the Probate Court power over "orphans' business," it cannot appoint a guardian to a child whose father is living. *Stewart v. Morrison*, 38 Miss. 417; *Earle v. Crum*, 42 Miss. 165; nor can the legislature authorize it to make such an appointment, *Ex p. Atkinson*, 40 Miss. 17.

**The Appointment of a Guardian to Free Colored Minors** was held to be legal under the *Kentucky* statute in force in 1860. *Clinkinbeard v. Clinkinbeard*, 3 Met. (Ky.) 330.

1. *Vaccaro v. Cicalla*, 89 Tenn. 63.

2. *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501. But see *In re Thomas*, 21 Eng. L. & Eq. 524.

3. As to these and other questions of procedure, see the title GUARDIANS, 9 ENCYC. OF PL. AND PR. 886.

4. **Appointment by Court Not Having Jurisdiction.**—*Dorman v. Ogbourne*, 16 Ala. 759; *Shaw's Succession*, 13 La. Ann. 265; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; *Gillett v. Needham*, 37 Mich. 143; *Davis v. Hudson*, 29 Minn. 27; *Lacy v. Williams*, 27 Mo. 280; *De Jarnett v. Harper*, 45 Mo. App. 415; *Maxsom v. Sawyer*, 12 Ohio 195.

5. **Appointment by Court Having Jurisdiction.**—*California.*—*Warner v. Wilson*, 4 Cal. 313; *Burroughs v. De Coutts*, 70 Cal. 361; *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642; *Ex p. Miller*, 109 Cal. 643.

*Florida.*—*Simpson v. Gonzales*, 15 Fla. 9.

*Illinois.*—*People v. Medart*, 63 Ill. App. 111, 166 Ill. 348.

*Indiana.*—*Dequindre v. Williams*, 31 Ind. 444.

*Louisiana.*—*Winn's Succession*, 3 Rob. (La.) 305; *Hoover v. Sellers*, 5 La. Ann. 180; *Thibodeaux v. Thibodeaux*, 5 La. Ann. 598; *Martin v. Jones*, 12 La. Ann. 168; *Cailleteau v. Ingouf*, 14 La. Ann. 634; *Keller's Succession*, 39 La. Ann. 579; *Arlaud's Succession*, 42 La. Ann. 320; *New England Mortg. Security Co. v. Metcalfe*, 49 La. Ann. 347.

*Maine.*—*Raymond v. Wyman*, 18 Me. 385.

*Maryland.*—*Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Lefever v. Lefever*, 6 Md. 472.

*Massachusetts.*—*Derome v. Vose*, 140 Mass. 575.

*New York.*—*People v. Wilcox*, 22 Barb. (N. Y.) 186; *Dutton v. Dutton*, (Supm. Ct.) 8 How. Pr. (N. Y.) 99.

*North Carolina.*—*Howerton v. Sexton*, 104 N. Car. 75.

*Ohio.*—*Shroyer v. Richmond*, 16 Ohio St. 455.

*Texas.*—*Fitts v. Fitts*, 21 Tex. 511.

*Virginia.*—*Durrett v. Davis*, 24 Gratt. (Va.) 302.

*West Virginia.*—*Mathews v. Wade*, 2 W. Va. 464.

Where the clerk has issued letters of guardianship and taken a bond, and the guardian has filed accounts and been recognized by the court, the validity of the appointment cannot be questioned collaterally. *Shumard v. Phillips*, 53 Ark. 37.

The act of a court in appointing a guardian will be supported by every legal intendment. *Slattery v. Smiley*, 25 Md. 389.

The appointment cannot be reviewed collaterally, even by the court that made it. *Keller's Succession*, 39 La. Ann. 579.

Where the Probate Court having jurisdiction removes one guardian and appoints another, the acts cannot be questioned collaterally. *Simpson v. Gonzalez*, 15 Fla. 9.

*f. SELECTION OF GUARDIAN* — (1) *Is Discretionary with Trial Court.* — The choice of the person to be appointed as guardian is peculiarly a matter for the discretion of the appointing court; and the exercise of this discretion will not be reviewed on appeal, except for manifest legal errors.<sup>1</sup>

(2) *Infant's Welfare Controls.* — The welfare of the infant is the primary consideration, to which all others yield,<sup>2</sup> but the mere wishes of an infant under fourteen years of age have no controlling weight.<sup>3</sup>

(3) *Parents' Wishes.* — The wishes of the deceased parents of an orphan child will have careful consideration, but will not be conclusive upon the court.<sup>4</sup>

The appointment of a guardian by the proper court cannot be attacked collaterally by showing that there was a natural guardian, nor that the guardian appointed was one of the judges of the court. *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

**Appointment Cannot Be Attacked Collaterally for Fraud.** — An order appointing a guardian, regular on its face and made by a court having jurisdiction, cannot be attacked collaterally for fraud or collusion. *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642. But such an order may be declared null and void *ab initio* by the court which made it, in a direct proceeding to vacate it, on the ground that it was procured by fraud, provided the rights of innocent third parties will not be injuriously affected thereby. *Pease v. Roberts*, 16 Ill. App. 634.

**Rule Prohibiting Collateral Attack Does Not Bar Appeal.** — The rule that the appointment of a guardian cannot be attacked collaterally does not apply to bar an appeal, since that is the direct means of testing the legality of the appointment, and is not a collateral attack. *Haley's Succession*, 49 La. Ann. 709.

**As to Estoppel of Guardian and Sureties to attack the appointment, see *infra*, this title, Rights and Duties Arising from Relation of Guardian and Ward—Obligations of Guardian—Estoppel to Deny His Appointment or His Acts Thereunder; and Guardian's Bonds—Estoppel by Bond.**

**1. Choice of Guardian Discretionary with Court** — *Arkansas*. — *Sadler v. Rose*, 18 Ark. 600; *Nelson v. Green*, 22 Ark. 367.

*Indiana*. — *Bernhamer v. Miller*, 114 Ind. 501.

*Kansas*. — *Adams v. Specht*, 40 Kan. 387.

*Louisiana*. — *State v. Houston*, 32 La. Ann. 1305.

*Maine*. — *Lunt v. Aubens*, 39 Me. 392.

*Maryland*. — *Ramsay v. Thompson*, 71 Md. 315.

*Michigan*. — *Matter of Stockman*, 71 Mich. 180.

*New York*. — *Matter of Vandewater*, 115 N. Y. 669; *Ex p. Dawson*, 3 Bradf. (N. Y.) 130.

*North Carolina*. — *Battle v. Vick*, 4 Dev. L. (15 N. Car.) 294; *Wynne v. Always*, 1 Murph. (5 N. Car.) 38; *Long v. Rhymes*, 2 Murph. (6 N. Car.) 122.

*Pennsylvania*. — *Senseman's Appeal*, 21 Pa. St. 331; *Pote's Appeal*, 106 Pa. St. 574, 51 Am. Rep. 540; *Gray's Appeal*, 96 Pa. St. 243.

The surrogate's discretion is entirely unlimited, except by such principles as control his conscience. Relatives have no control or interest, except to inform the court as to the

welfare and interest of the child. *Ex p. Dawson*, 3 Bradf. (N. Y.) 130.

**The Supreme Court Will Not Appoint a Guardian**, though it reverses a decree of the Probate Court refusing such appointment, but will remand the case to the Probate Court to make the selection. *Congdon v. Hersey*, 2 R. I. 153.

**Rules Governing the Choice of a Guardian Are Codified** in a few of the United States. See for example Civ. Code Cal., § 246.

**2. Infant's Welfare Controlling Consideration** — *Alabama*. — *Describes v. Wilmer*, 69 Ala. 28, 44 Am. Rep. 501.

*Georgia*. — *Watson v. Warnock*, 31 Ga. 716.

*Louisiana*. — *Fuqua's Succession*, 27 La. Ann. 271.

*Maryland*. — *Compton v. Compton*, 2 Gill (Md.) 241.

*Michigan*. — *Matter of Stockman*, 71 Mich. 180.

*Nevada*. — *Badenhoof v. Johnson*, 11 Nev. 87.

*New York*. — *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216; *Foster v. Mott*, 3 Bradf. (N. Y.) 409; *Griffin v. Sarsfield*, 2 Dem. (N. Y.) 4; *Smith v. Smith*, 2 Dem. (N. Y.) 43; *Matter of Annan*, 74 Hun (N. Y.) 19; *Holley v. Chamberlain*, 1 Redf. (N. Y.) 333.

The court will take into account not merely the infant's temporary welfare, but his affections, attachments, training, education, and morals. *Foster v. Mott*, 3 Bradf. (N. Y.) 409.

The interests of the infant as viewed by the court, rather than its wishes, are to be regarded. *Compton v. Compton*, 2 Gill (Md.) 241.

**3. In appointing a guardian to a child under fourteen years old the court may in its discretion inquire into the child's wishes; but it is no legal error to disregard them.** *Walton v. Twiggs*, 91 Ga. 90.

**4. Parents' Wishes Considered.** — *In re Kaye*, L. R. 1 Ch. 387; *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216; *Watson v. Warnock*, 31 Ga. 716; *Matter of Johnson*, 87 Iowa 130; *Matter of O'Connell*, 102 Iowa 355; *Goss v. Stone*, 63 Mich. 319; *Matter of De Marcellin*, 24 Hun (N. Y.) 207, 4 Redf. (N. Y.) 299.

The parental wishes will prevail, unless good reason to the contrary is shown. *Fuqua's Succession*, 27 La. Ann. 271; *Badenhoof v. Johnson*, 11 Nev. 87.

**A Contract by the Father giving the custody of the child to an applicant may be proved, not as conveying a legal right to the applicant, but as showing the father's wishes, and therefore of assistance to the court in exercising its discretion.** *Janes v. Cleghorn*, 63 Ga. 335, 68 Ga. 87.

(4) *Preference of Next of Kin.* — In making the selection, if there are no good reasons for varying the natural order, the father (except, of course, where the appointment is being made because of his own unfitness) will have the preference,<sup>1</sup> then the mother,<sup>2</sup> then the nearest relatives.<sup>3</sup> There is no preference as between paternal and maternal relatives.<sup>4</sup> But the welfare of the infant being the primary consideration, the court, in appointing a guardian of his estate, is not restricted to the relatives. It may appoint a stranger who is shown to be competent.<sup>5</sup> Other things being equal, however, a relative will always be preferred to a stranger.<sup>6</sup>

**Weight to Be Given to Mother's Wishes.** — Though the mother has no power to appoint a testamentary guardian, her expressed wishes will receive great attention. *In re Kaye*, L. R. 1 Ch. 387; *Matter of Turner*, 19 N. J. Eq. 433.

Where the father promised the mother on her deathbed that the infant's grandparents should have its custody, and it lived with the grandparents accordingly for seven years, it was held after the father's death that the grandfather should be appointed guardian, notwithstanding the fact that the father, before dying, expressed a desire to have his brother appointed. *Foster v. Mott*, 3 Bradf. (N. Y.) 499.

Where the mother and two others were appointed testamentary guardians, and the others declined, and the mother accepted, upon her death the other two, though not entitled as of right, will be preferred to persons named in the mother's will. *In re Johnston*, 3 J. & La T. 222.

**Illegitimate Children.** — Though the putative father has no power to appoint a guardian to an illegitimate child, the person named by him has been appointed by the court, without a reference. *Ward v. St. Paul*, 2 Bro. C. C. 583; *Peckham v. Peckham*, 2 Cox Ch. 46; *Chatteris v. Young*, 1 Jac. & W. 106.

While the court will often be guided by the wishes of the putative father, it is a matter of discretion, and an appointment of the mother instead of the guardian named will not be set aside. *Ramsay v. Thompson*, 71 Md. 315.

**1. Father Entitled in Absence of Cause to Contrary.** — *Griffin v. Sarsfield*, 2 Dem. (N. Y.) 4.

**Contra.** — On the other hand, in *Senseman's Appeal*, 21 Pa. St. 331, the court declared it improper to appoint the father guardian of his child's estate, saying: "To place its property or money in his hands has been found unfavorable to the interests and happiness of both."

**A Judgment Rendered in Another State Awarding the Custody to the Mother** is not conclusive against the father's appointment. *Griffin v. Sarsfield*, 2 Dem. (N. Y.) 4.

**Natural Father Preferred to Testamentary Guardian Appointed by Adopting Father.** — By the laws of *Louisiana* the adoption of a child does not divest the father's natural guardianship; and after the death of the adopting father the natural father will be preferred as tutor to a testamentary guardian appointed by the adopting father. *Matter of Upton*, 16 La. Ann. 175. See *Matter of Johnson*, 87 Iowa 130.

**2. Mother Preferred Next to Father.** — *Leavel v. Bettis*, 3 Bush (Ky.) 74; *Isaacs v. Taylor*, 3 Dana (Ky.) 600; *Berluchaux v. Berluchaux*, 7

La. 545; *Read v. Drake*, 2 N. J. Eq. 78; *Eldridge v. Lippincott*, 1 N. J. L. 455.

The mother's preference will be disregarded only for some substantial reason satisfactory to the court. *Read v. Drake*, 2 N. J. Eq. 78; *Eldridge v. Lippincott*, 1 N. J. L. 455; *Albert v. Perry*, 14 N. J. Eq. 540.

**If the Mother Is Fit**, another person will not be appointed on the ground that the ward now lives with him and is too ill to be moved; that is a matter for the mother's judgment. *Weisne's Appeal*, 39 Conn. 538.

**Mother's Immorality Sufficient Cause for Not Appointing Her.** — *Le Blanc's Succession*, 37 La. Ann. 546.

**Mother Cannot Alienate Her Right.** — *Albert v. Perry*, 14 N. J. Eq. 540. Though she relinquish the right, and another is appointed, she can afterwards apply for the removal of the other, and her own appointment. *Cook v. Bybee*, 24 Tex. 278, *overruled*, as to guardianship of the estate, in *Kahn v. Israelson*, 62 Tex. 221.

**Where the Mother Declined the Appointment**, and another was appointed, after the death of the latter her right revives, and she is entitled to be appointed. *Jarrett v. State*, 5 Gill & J. (Md.) 27.

As to the effect of the mother's remarriage, see *infra*, this section, *Appointment of Married Women*.

**3. Next to Mother Nearest Relative Preferred.** — *Matter of Stockman*, 71 Mich. 180; *Allen v. Peete*, 25 Miss. 29; *Read v. Drake*, 2 N. J. Eq. 78; *Eldridge v. Lippincott*, 1 N. J. L. 455; *White v. Pomeroy*, 7 Barb. (N. Y.) 640.

**As Between Mere Relatives**, a less objection will be sufficient to bar the nearest than would bar the mother. *Albert v. Perry*, 14 N. J. Eq. 540.

**4. No Preference as Between Paternal and Maternal Relatives.** — *Matter of Turner*, 19 N. J. Eq. 433.

This is so though the ward's property came from the paternal side. *Albert v. Perry*, 14 N. J. Eq. 540; *Underhill v. Dennis*, 9 Paige (N. Y.) 202.

**But in Pennsylvania** it has been held that the paternal grandparent or his nominee will, by analogy, be given the preference in appointment over the maternal grandparent's nominee. *Mintzer's Estate*, 2 Pa. Dist. 584.

**5. Court Not Bound to Appoint Relative.** — *Holley v. Chamberlain*, 1 Redf. (N. Y.) 333.

**6. Relative Preferred to Stranger.** — *Johnson v. Kelly*, 44 Ga. 485; *Goss v. Stone*, 63 Mich. 319; *Morchouse v. Cooke*, Hopk. (N. Y.) 226.

*In Louisiana* it has been held that should a relative, if resident in that state, would have been entitled to be tutor, he will not displace a



(5) *Religious Belief of Guardian — Roman Catholics Formerly Excluded.* — In the intolerant spirit which dominated English legislation and judicial action prior to the present century, Roman Catholics were excluded from holding the trust of guardianship,<sup>1</sup> and this rule of exclusion was inserted in the act for the creation of testamentary guardianships.<sup>2</sup>

*Present Rule in England.* — But the more tolerant spirit of modern days has abolished this discrimination,<sup>3</sup> and the rule prevails in England to appoint a guardian of the faith in which the father died, and in which he wished his child to be brought up.<sup>4</sup>

*Rule in the United States.* — In the United States, religious discrimination has never been exercised in appointing guardians, and the only purpose of the courts has been to carry out the expressed or presumed wishes of the parents in this respect.<sup>5</sup>

(6) *Appointment of Corporations.* — The appointment of a corporation as guardian is permitted, and is very common in recent times, when the circumstances of the ward do not require personal supervision of his education and conduct.<sup>6</sup>

(7) *Appointment of Partnerships.* — A partnership is not a suitable appointee, and no case is found of a partnership guardian.<sup>7</sup>

regularly appointed tutor by afterwards coming into the state. *Bronson's Succession*, 11 La. Ann. 24.

1. *Roman Catholics Formerly Excluded from Guardianship.* — See *Blake v. Leigh*, Ambler, 306.

Under the Irish Act, 2 Anne, no "papist" could be a guardian, but the appointment of the nearest relative to whom the estate could not descend, being a Protestant, was required. *Preston v. Ferrard*, 4 Bro. P. C. (Toml. ed.) 298.

2. Stat. 12 Car. II., c. 24, cited *supra*, this title, *Various Kinds of Guardianship — Testamentary Guardianship*.

3. Now neither a dissenter (*Corbett v. Tottenham*, 1 Ball & B. 59) nor a Roman Catholic priest (*In re Byrnes*, Ir. R. 7 C. L. 199) is disqualified to be appointed a guardian.

4. *English Rule to Appoint Guardian of Father's Religion.* — *In re McGrath*, (1893) 1 Ch. 143, (1892) 2 Ch. 496; *In re Clarke*, 21 Ch. D. 817; *In re Nevin*, (1891) 2 Ch. 299.

The father has the absolute right in his lifetime to decide what religious education the child shall receive, and after his death the guardians are to follow out his wish. *In re Scanlan*, 40 Ch. D. 200.

If the Mother Is of a Religion Different from That of the Father, the court will appoint others as joint guardians with her to bring up the child in the father's faith. *In re Scanlan*, 40 Ch. D. 200. And this is so though the father leaves no directions, it being presumed that he desired the child educated in his own faith. *Matter of North*, 11 Jur. 7. But this last case is questioned, and the right of the mother, as against a mere presumption of the father's wishes, is asserted, in *Reg. v. Clarke*, 7 El. & Bl. 202, 90 E. C. L. 202.

For Other Cases Applying the General Rule to Varying Facts, see *Teynham v. Lennard*, 4 Bro. P. C. (Toml. ed.) 302; *In re Walsh*, 13 L. R. Ir. 269; *In re Nevin*, (1891) 2 Ch. 299. See further *infra*, this title, *Powers and Duties of Guardian*, subdv. I. b., paragraph *Subject to Control of Court*.

5. *No Religious Discrimination in the United*

*States — Courts Guided by Parents' Wishes.* — *Cozine v. Horn*, 1 Bradf. (N. Y.) 143; *Underhill v. Dennis*, 9 Paige (N. Y.) 202; *Matter of De Marcellin*, 24 Hun (N. Y.) 207, 4 Redf. (N. Y.) 299; *Matter of Turner*, 19 N. J. Eq. 423. See also *Bolling v. Coughlin*, 5 Redf. (N. Y.) 116.

The Provision in the Pennsylvania Act of March 29, 1832, that persons of the same religious persuasion as the parents shall be preferred by the court in the appointment of guardians, should be observed when practicable, but a guardian should not be removed for mere difference of religious belief from that of the parents. If, however, he attempts by any harsh or unfair means to erase the religious impressions made by the parents or to constrain the ward's conscience, he should be removed. *Nicholson's Appeal*, 20 Pa. St. 50. In a recent case in the District Court the appointment of a guardian was vacated under this act, where the appointment was inadvertently made, and the appointee was a Protestant, and persisted in having the minor placed in a Protestant church home, although the mother had been a Roman Catholic, and the father, though a Protestant, had not been a member of any church, and had consented to the minor's being baptized and brought up in the Roman Catholic church, the relatives of the mother, professing her faith, being ready to provide a home for the minor. *Parks's Estate*, 7 Pa. Dist. 700.

6. *Appointment of Corporations as Guardians.* — *Ledwith v. Ledwith*, 1 Dem. (N. Y.) 154; *Matter of Cordova*, 4 Redf. (N. Y.) 66; *Matter of Beebe*, 58 Hun (N. Y.) 604, 11 N. Y. Supp. 522.

In New York it has been held that when a corporation is authorized by the law of its own state to act as guardian without bonds, its capital being regarded as supplying the requisite security, it will be so appointed in New York. *Matter of Cordova*, 4 Redf. (N. Y.) 66.

The Laws of Michigan do not provide for corporate guardianships. *Matter of Rice*, 42 Mich. 528.

7. *Partnership Not Suitable Appointee.* — See *De Mazar v. Pybus*, 4 Ves. Jr. 644.



(8) *Appointment of Married Women.* — Formerly a married woman could not be appointed, and if appointed guardian of her own children, her trust ceased at remarriage;<sup>1</sup> but since the modern enlargement of the legal status of married women, this discrimination has little recognition.<sup>2</sup>

(9) *Appointment of Nonresidents.* — The guardian should be within the summons and effective control of the court, and therefore nonresidents of the jurisdiction will not be appointed except under special circumstances of necessity.<sup>3</sup> But the court is the sole judge of this necessity;<sup>4</sup> therefore the appointment of a nonresident is not void.<sup>5</sup>

(10) *Appointment of Executors or Administrators.* — It is regarded as inexpedient to appoint as guardian the executor or administrator of an estate from which the ward is to receive a portion, since it will be the guardian's duty to represent the ward's interests in the care and distribution of the estate.<sup>6</sup>

(11) *Other Considerations.* — There are certain other matters, proper to be considered in the appointment of a guardian, which have received the attention of the courts.<sup>7</sup>

1. **Formerly Married Women Could Not Be Appointed.** — *Swartwout v. Swartwout*, 2 Redf. (N. Y.) 52; *Holley v. Chamberlain*, 1 Redf. (N. Y.) 333.

2. **A Married Woman May Now Be Appointed a Guardian.** — *Goss v. Stone*, 63 Mich. 319; *Farrer v. Clark*, 29 Miss. 195; *Ex p. Maxwell*, 19 Ind. 88. But it should appear that her husband consents, and that he, as well as she, is a suitable person. *Ex p. Maxwell*, 19 Ind. 88.

But in England it has been held that the appointment of a *feme covert* to be sole guardian is improper. *In re Kaye*, L. R. 1 Ch. 387.

In Alabama it has been held that a widow may be appointed a guardian, but it was doubted whether a married woman may be so appointed during the lifetime of her husband. *King v. Seals*, 45 Ala. 415.

The Remarriage of the Mother is no objection to her appointment. *Matter of Hermance*, 2 Dem. (N. Y.) 1 (declaring the rule in *Holley v. Chamberlain*, 1 Redf. (N. Y.) 333, to be obsolete). Nor is she barred by the birth of children by the second marriage. *Corbett v. Tottenham*, 1 Ball & B. 59.

Illegitimate Children. — In *Wallis v. Campbell*, 13 Ves. Jr. 517, a married woman was appointed guardian of an illegitimate child.

3. **Nonresidents Appointed Only under Special Circumstances of Necessity.** — *Stuart v. Bute*, 9 H. L. Cas. 440; *Johnstone v. Beattie*, 10 Cl. & F. 42; *Hanbest's Estate*, 11 Phila. (Pa.) 63, 32 Leg. Int. (Pa.) 135.

That the person desired by the deceased father is a nonresident is sufficient reason for refusing the appointment. *Matter of Johnson*, 87 Iowa 130.

A person without the jurisdiction will not be appointed guardian, though the wards be resident at the same place. *Logan v. Fairlee*, Jac. 193.

But where residents of Ireland had been appointed guardians there to infants domiciled there, the English court appointed them guardians of funds situated in England. *Daniel v. Newton*, 8 Beav. 485; *Johnstone v. Beattie*, 10 Cl. & F. 42.

4. The power of the court is not limited to the appointment of residents. *Berry v. Johnson*, 53 Me. 401. See also *Gaines's Succession*, 42 La. Ann. 699.

In Louisiana a nonresident mother (*Gaines's Succession*, 42 La. Ann. 699) or grandfather (*Dobb v. Massey*, 9 La. Ann. 354) may be appointed guardian where the infant has property in that state, but if the nonresident mother marries again she cannot be appointed. *Matter of Foley*, 34 La. Ann. 129.

5. The appointment of a nonresident is not void, but at the most is only irregular. *Martin v. Tally*, 72 Ala. 23.

6. **Appointment of Executor or Administrator Inexpedient.** — *Isaacs v. Taylor*, 3 Dana (Ky.) 500; *Ex p. Crutchfield*, 3 Verg. (Tenn.) 336.

In some states such an appointment has been forbidden by statute. *Sawyer v. Knowles*, 33 Me. 208; *Deering v. Adams*, 34 Me. 41; *Scobey v. Gano*, 35 Ohio St. 550.

The Husband of an Executrix should not be appointed guardian to the heirs, especially where she has power to set aside sums for her support and that of the children. *Massingale v. Tate*, 4 Hayw. (Tenn.) 30.

Trustee of Funds for Infant's Support Favored. — That the applicant was already trustee of funds producing an income for the ward's support was held in *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216, to be a consideration in favor of his appointment.

7. **Whether Guardianship of Person and Estate Can Be Separated.** — In *New Jersey* guardianship of the person cannot be given to one and guardianship of the estate to another. *Tenbrook v. McCollm*, 12 N. J. L. 97. Such a separation is inadvisable, and the court will not grant an application to appoint the mother guardian of the person alone, with a view to appointing a corporate guardian for the estate. *Matter of Ross*, 53 N. J. Eq. 344.

But under the *Iowa* Code the guardianships of the person and estate may be given to different persons. *Lawrence v. Thomas*, 84 Iowa 362.

Appointment of Joint Guardians. — An order appointing an aunt and a grandmother joint guardians, each to have the custody every other six months, was disapproved. *Matter of Annan*, 74 Hun (N. Y.) 19.

The Probability of an Early Change, by reason of the applicant's age, will count against a proposed appointment. *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216.

Applicant's Means. — The larger means of one

g. **RIGHT OF NOMINATION BY WARD**—(1) *In General*.—At common law, upon the termination of guardianship in socage, the ward had the right to appoint his own guardian.<sup>1</sup> This power of the ward in socage does not exist in the United States, but in most, if not all, of the states statutes have been enacted under the provisions of which an infant who has reached the age of fourteen years, and requires a guardian, is entitled to choose his own guardian.<sup>2</sup>

(2) *Is Subject to Control by Court*.—This right of choice is subject to control by the court, to insure a suitable appointment,<sup>3</sup> but the choice of the infant must prevail, unless the court finds substantial cause for its disapproval.<sup>4</sup>

(3) *Whether Existing Guardian Is Superseded*.—This right of choice does not extend to wards who have a natural guardian, or a testamentary guardian, or a guardian appointed in chancery.<sup>5</sup> Upon the question whether an infant having a guardian appointed by a statutory court can, upon reaching the age of fourteen years, choose a guardian who shall supersede that guardian, there is considerable conflict of authority. In some states it has been held that when the ward arrives at the age of fourteen years, the former guardian is *ipso facto* superseded, and a new guardian should be appointed on the nomination of the ward.<sup>6</sup> In other jurisdictions the ward at fourteen years has the right to have the former guardian removed, to permit him to exercise his choice,<sup>7</sup>

applicant is proper for consideration. *Walton v. Twiggs*, 91 Ga. 90.

It is proper to refuse the appointment of a grandmother who lives in the ward's house, has little means of her own, and evidently hopes to be partially supported from the ward's property. *Matter of Beebe*, 58 Hun (N. Y.) 604, 11 N. Y. Supp. 522.

**Practice of Appointing Master of Court**.—In *In re Sullivan*, 1 Molloy 225, an existing practice of appointing one of the masters of the court guardian was followed with reluctance. The court said: "It was right enough when there was a total want of family connections, as a last resort to make the master a guardian; but to do it as the general course is mischievous."

**Where Sureties Sign Bond upon Certain Conditions**.—No judge should appoint a guardian if he knew that the guardian's sureties signed the bond on the agreement that the guardian should commit the funds to a certain company, and should resign at the end of a year. *Lee v. Lee*, 67 Ala. 406.

If a Guardian Resigns and Applies for Re-appointment with Different Sureties, the judge should inquire into the cause, and should, *prima facie*, refuse the appointment. *Lee v. Lee*, 67 Ala. 406.

1. **Right of Infant to Choose His Own Guardian**.—Anonymous, 2 Ves. 375; *Ex p. Watkins*, 2 Ves. 470; *Mauro v. Ritchie*, 3 Cranch (C. C.) 147. Compare *Curtis v. Rippon*, 4 Madd. 462; *Coham v. Coham*, 13 Sim. 639; *Mauro v. Ritchie*, 3 Cranch (C. C.) 147; *Smoot v. Bell*, 3 Cranch (C. C.) 343.

2. *Campbell v. English*, Wright (Ohio) 119; *Perry v. Brainard*, 11 Ohio 442; *Silver's Estate*, 5 Pa. Dist. 475. See also the cases cited in notes following.

Under the Michigan Statute the Probate Court has no power to appoint a guardian to a ward over fourteen years of age without giving him notice to make his choice; and though the application stated him to be less than fourteen years old, if he was really over that age the appointment is void. *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

In Ohio the Age of Choice for a Female Ward is twelve years. *Campbell v. English*, Wright (Ohio) 119; *Perry v. Brainard*, 11 Ohio 442.

3. **Right of Choice Subject to Control by Court**.—*Grant v. Whitaker*, 1 Murph. (5 N. Car.) 231.

The ward must present a fit person, who is willing to accept. *Bryce v. Wynn*, 50 Ga. 332.

A minor should not be permitted to change his guardian after reaching fourteen years of age, where the change would be disadvantageous to him. *Berryman's Estate*, 17 Phila. (Pa.) 463, 42 Leg. Int. (Pa.) 142.

4. **Discretion of Court Not Reviewable on Appeal**.—The discretion of the court in refusing or confirming the choice of the infant is not reviewable on appeal. *Adams's Appeal*, 38 Conn. 304; *Cramer v. Forbis*, 31 Ill. App. 259; *Arthurs's Appeal*, 1 Grant Cas. (Pa.) 55; *McCann's Appeal*, 49 Pa. St. 304.

5. **Wards to Whom Right of Choice Does Not Extend**.—*Newton v. Janvrin*, 62 N. H. 440; *Ledwith v. Ledwith*, 1 Dem. (N. Y.) 154; *Matter of Reynolds*, 11 Hun (N. Y.) 41; *Matter of Nicoll*, 1 Johns. Ch. (N. Y.) 25; *Sessions v. Kell*, 30 Miss. 458; *Jordan v. Jordan*, 4 Tex. Civ. App. 559.

At common law, where there was a guardian in chivalry, by nature, or by statute, the ward had no right of choice. It was only when the guardianship was in socage, which terminated at fourteen. *Mauro v. Ritchie*, 3 Cranch (C. C.) 147.

6. **Guardian Appointed by Statutory Court Is Superseded**.—*Kelly v. Smith*, 15 Ala. 687; *Montgomery v. Smith*, 3 Dana (Ky.) 599; *Sessions v. Kell*, 30 Miss. 458; *Campbell v. English*, Wright (Ohio) 119; *Perry v. Brainard*, 11 Ohio 442; *Arthurs's Appeal*, 1 Grant Cas. (Pa.) 55; *Lewry's Estate*, 12 Phila. (Pa.) 120, 35 Leg. Int. (Pa.) 234.

7. *Inferior Ct. v. Cherry*, 14 Ga. 594; *Bryce v. Wynn*, 50 Ga. 332; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Lee's Appeal*, 27 Pa. St. 229; *Arthurs's Appeal*, 1 Grant Cas. (Pa.) 55; *Lewry's Estate*, 12 Phila. (Pa.) 120, 35 Leg. Int. (Pa.) 234.

In Illinois and Pennsylvania it has been held



while in quite a number of states the guardian appointed by the statutory court before the infant reached the age of fourteen years continues in office until the ward arrives at his majority, and the ward has no right to choose a new guardian to supersede him.<sup>1</sup>

**h. NECESSITY OF QUALIFICATION.** — The giving of a probate bond is required to complete a judicial appointment of a guardian in most jurisdictions. The giving of the bond is a condition precedent to the existence of the guardian's authority, and acts done without such qualification are void.<sup>2</sup> But in some jurisdictions the giving of a bond is not essential to complete the guardian's appointment, and his acts are valid though no bond be given.<sup>3</sup> The receipt of the formal letters of guardianship, taking the oath,<sup>4</sup> and filing the inventory<sup>5</sup> are not essential prerequisites to the exercise of authority as a guardian. The amount of the bond is often regulated by statute, the usual requirement being twice the amount of the personal property.<sup>6</sup> Under recent acts chartering corporations to hold probate trusts, the capital of the corpora-

that where the court appoints a guardian to act until the ward shall reach majority, though the ward has power to make a different appointment when reaching fourteen years of age, if he does not act, the guardian appointed by the court will continue in office. *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Lee's Appeal*, 27 Pa. St. 229.

**The Former Guardian Is Entitled to Notice and to controvert the fact of the ward's having reached the age of fourteen years.** *Montgomery v. Smith*, 3 Dana (Ky.) 599.

But in *Alabama*, where it was conceded that the infant was fourteen years old when he chose his guardian, it was held not to be error for the court to appoint such guardian without notice to the former guardian. *Kelly v. Smith*, 15 Ala. 687.

**1. Guardian Appointed by Statutory Court Not Superseded — United States.** — *Mauro v. Ritchie*, 3 Cranch (C. C.) 147; *Smoot v. Bell*, 3 Cranch (C. C.) 343.

*Connecticut.* — *May v. Webb*, Kirby (Conn.) 287.

*Indiana.* — *Dibble v. Dibble*, 8 Ind. 307.

*New York.* — *Matter of Nicoll*, 1 Johns. Ch. (N. Y.) 25; *Matter of Dyer*, 5 Paige (N. Y.) 534.

*South Carolina.* — *Ex p. De Graffenreid*, Harp. Eq. (S. Car.) 107.

*Virginia.* — *Ross v. Gill*, 4 Call (Va.) 250, 1 Wash. (Va.) 87; *Ham v. Ham*, 15 Gratt. (Va.) 74.

**In North Carolina** the choice of a guardian by minors over fourteen years of age does not of itself remove the former guardian. The removal of the former guardian and confirmation of the ward's choice are matters of discretion with the appointing court. *Bray v. Brumsey*, 1 Murph. (5 N. Car.) 227.

**2. Giving of Bond Essential to Complete Appointment.** — *Hatch v. Ferguson*, 57 Fed. Rep. 966, 68 Fed. Rep. 43; *Clarke v. State*, 8 Gill & J. (Md.) 111; *State v. Sloane*, 20 Ohio 327.

**Bond Given for One Appointment Cannot Stand as Security for Another Appointment.** — *Vanderburg v. Williamson*, 52 Miss. 233. But one bond may be taken for two wards. *Call v. Ruffin*, 1 Call (Va.) 333. See *infra*, this title, *Guardian's Bonds—Joint Bonds—Of One Guardian for Several Wards*.

**Bond Cannot Be Canceled While Guardianship Duties Are Unperformed.** — *Newcomer's Appeal*, 43 Pa. St. 43.

**Where One of the Sureties Has Become Insolvent**, the court will not suffer additional funds to be paid to the guardian before he gives further security. *Genet v. Tallmudge*, 1 Johns. Ch. (N. Y.) 561.

**Personal Liability of Judge.** — By the *Virginia* Act of 1819, the judge of the court was personally liable for resulting loss if he omitted to require a bond. *Austin v. Richardson*, 1 Gratt. (Va.) 310.

**Where the Statute Requires a Bond "with Freehold Sureties,"** the fact that the bond contains only one surety does not make the acts of the guardian void. *Arrowsmith v. Gleason*, 129 U. S. 86.

**3. Bond Not Essential to Complete Appointment.** — The giving of a bond is not a condition precedent to entering on the duties of guardianship under the *Michigan* statute. *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

The same rule prevails in *Massachusetts*, it being in the power of the court to remove a guardian if he fails to comply with orders for bond. *Russell v. Coffin*, 8 Pick. (Mass.) 143. Compare *Fay v. Hurd*, 8 Pick. (Mass.) 528.

**In Kansas** the appointment of a guardian who takes the oath, receives his letters, and is recognized by the court is not void though he fails to give bond. *Hunt v. Insley*, 56 Kan. 213.

**In Georgia** letters of guardianship issued without taking a bond are not void as against a *bona fide* purchaser under the guardian without notice of the defect. *Cuyler v. Wayne*, 64 Ga. 88.

**4. Whyler v. Van Tiger**, (Cal. 1887) 14 Pac. Rep. 846.

**5. Lee v. Ice**, 22 Ind. 384.

**6. Amount of Bond.** — *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216.

**A Guardian for Wards Having a Pension** should be required to give a bond sufficient to cover the entire amount of the pension until the majority of the wards, though the pension money may be used from time to time for their support. *West v. Forsythe*, 34 Ind. 418.

**Where the Estate Is Very Large**, the amount of the bond will be limited in the court's discretion, and suitable orders to limit the periods and mode of accounting will be made, so as to render the security ample. *Matter of Hedges*, 1 Edw. (N. Y.) 57.



tion is commonly regarded as sufficient security, and the execution of a special bond is not required.<sup>1</sup>

**4. New York Guardianship in Socage.** — The common-law guardianship in socage was retained in New York, with some modifications, the nearest relative who could by no possibility inherit being entitled to the guardianship of the infant's socage land until the ward reached the age of fourteen years.<sup>2</sup> By the Revised Statutes this peculiar species of guardianship has been continued, but without the exclusion of possible heirs, and subject to being superseded by a general guardianship.<sup>3</sup>

**5. Louisiana System of Guardianship.** — The Louisiana law of tutorship, derived from the civil instead of from the common law, differs so greatly from the law of the other states as to need a separate statement.

The Natural Tutorship of the Father and Mother is recognized, as is also the right of the parents to appoint a testamentary tutor. The authority of the natural tutor extends to the property as well as to the person of the ward.<sup>4</sup>

Where the Minor Has Lost Both Father and Mother, and no tutor by will has been appointed, the judge appoints to be tutor the next of kin, determined according to rules stated in the code.<sup>5</sup>

Where No Relative Exists or Will Take the Tutorship, a dative tutor may be appointed by the judge with the advice of a family meeting.<sup>6</sup>

**Undertutor.** — In every tutorship there is required to be an undertutor, whom the judge appoints at the same time with the tutor. His duty is to act for the minor whenever the interest of the minor is in opposition to that of the tutor,<sup>7</sup> as in settling the tutorship account, or in proceedings for the tutor's removal.

**Mortgage on Tutor's Real Estate as Security for Trust.** — The entire immovable property (real estate) of every tutor is subject to a so-called tacit mortgage, which continues to the termination of the guardianship, and secures the payment of the final balance to the person entitled thereto.<sup>8</sup> The father, mother, grand-

1. Matter of Cordova, 4 Redf. (N. Y.) 66.

2. Guardianship in Socage in New York. — Jackson v. Combs, 7 Cow. (N. Y.) 36, affirmed in Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568.

But the common-law rules for the appointment of a guardian in socage were never recognized in chancery. Morehouse v. Cooke, Hopk. (N. Y.) 226.

3. See Rev. Stat. N. Y. (9th ed. 1896), p. 1783, §§ 5, 7; 2 Kent's Com. 224; Emerson v. Spicer, 46 N. Y. 594; Torry v. Black, 58 N. Y. 185; Matter of Hynes, 105 N. Y. 560; Foley v. Mutual L. Ins. Co., 138 N. Y. 335, 34 Am. St. Rep. 456; Sylvester v. Ralston, 31 Barb. (N. Y.) 286.

**Extends Only over Real Estate.** — This guardianship extends only over the real estate, and the guardian cannot surrender a life-insurance policy. Foley v. Mutual L. Ins. Co., 138 N. Y. 335, 34 Am. St. Rep. 456.

**A Widow Who Takes Possession of Her Husband's Real Estate** after his death will be deemed to hold as guardian in socage for the children; if she buys an adverse title, it will inure to the benefit of the children at their election, General Synod v. O'Brien, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 729; and her tenants held by a title subordinate to the children's, and are estopped to deny their title, Jackson v. De Walts, 7 Johns. (N. Y.) 157.

**Interest and Powers of Guardian.** — A guardian in socage has an interest in the real estate, is entitled to the profits thereof, may lease it

until the expiration of his own trust, and may maintain trespass, ejectment, and summary process. Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66; Emerson v. Spicer, 55 Barb. (N. Y.) 428, 38 How. Pr. (N. Y.) 114; Holmes v. Seely, 17 Wend. (N. Y.) 75; Gallagher v. David Stevenson Brewing Co., (C. Pl. Gen. T.) 13 Misc. (N. Y.) 40.

**Termination of Guardianship.** — Upon the appointment of a general guardian by choice of the ward or appointment of the court, the rights and powers of the guardian in socage cease; but if no other guardian is appointed, his title continues until the majority of the ward. Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66; Beecher v. Crouse, 19 Wend. (N. Y.) 306.

4. Dauterive v. Shaw, 47 La. Ann. 882.

5. Rev. Civ. Code La. (1900), art. 263-269.

6. Rev. Civ. Code La. (1900), art. 270-272. None but a resident of the parish can be appointed a dative tutor without bonds. Matter of Foley, 34 La. Ann. 129.

7. Rev. Civ. Code La. (1900), art. 273-280.

8. **Tacit Mortgage on Tutor's Real Estate.** — Holmes v. Hemken, 6 Rob. (La.) 51; Labranche v. Trepagnier, 4 La. Ann. 558; Woolfolk v. Woolfolk, 20 La. Ann. 513; McHugh v. Stewart, 12 La. Ann. 361; Mille v. Dupuy, 21 La. Ann. 53; Hatcher v. Jackson, 21 La. Ann. 737; Skipwith v. Glathary, 34 La. Ann. 28; Cochran v. Violet, 37 La. Ann. 221; Bredell v. Calder, 37 La. Ann. 805; Way v. Levy, 41 La. Ann. 447; Schneider v. Burns, 45 La. Ann. 875.

father, or grandmother of a ward may give a special mortgage as security for the trust and procure from the court a release of the tacit mortgage.<sup>1</sup>

**Tutor's Right of Administration.** — The Louisiana tutor also has the exceptional right of administering the succession (estate) of the ward's ancestor, when the ward is the sole party in interest, or the adult heirs and creditors do not demand an administrator.<sup>2</sup>

**Family Meeting.** — Another peculiarity of the Louisiana law is the institution of the family meeting, which is convened to pass upon questions affecting the ward's interest, and the action of which is a substitute for the discretion of the court relied upon in other jurisdictions.

**Minor Peculiarities of the Louisiana law and practice will appear in many of the notes to this article.**

**IV. TERMINATION OF GUARDIANSHIP — 1. By Death or by Ward's Arrival at Full Age.** — Guardianships, however constituted, terminate upon the death of the guardian, the death of the ward, or the arrival of the ward at full age.<sup>3</sup>

**2. By Ward's Arrival at Age of Choice.** — Whether a guardianship created before the ward reaches the age of fourteen years, the age of choice, is terminated by his arrival at that age or by the exercise of his choice has been already discussed.<sup>4</sup>

**3. By Marriage of Female Guardian.** — At the common law the marriage of a *feme sole* guardian terminated the guardianship *ipso facto*, and this rule was followed in some of the early American cases;<sup>5</sup> but with the more extended

**Lien Prior to All Incumbrances Imposed After Date of Appointment.** — This lien takes effect from the day of the appointment, and is prior to all incumbrances imposed after that date, *Mille v. Dupuy*, 21 La. Ann. 53; even as to property which the tutor sold before the rights of the minor had begun to exist, *Skipwith v. Glathary*, 34 La. Ann. 28.

But a ward who has received the benefit of funds raised by mortgaging the tutrix's property, after proceedings to postpone the ward's tacit mortgage for the purpose, cannot attack the validity of these proceedings and claim priority for the tacit mortgage. *Beauregard v. Leveau*, 30 La. Ann. 302.

**When Tacit Mortgage Can Be Enforced.** — This tacit mortgage can be enforced only after termination of the guardianship. *Holmes v. Hemken*, 6 Rob. (La.) 51.

**If the Tutrix Marries and continues to hold the funds, all the property of her husband, who by law is co-tutor, becomes subject to the tacit mortgage.** *Keene v. Guier*, 27 La. Ann. 232. This seems to reverse, upon that point, *Hatcher v. Jackson*, 21 La. Ann. 737.

**If a Guardian Appointed in Another State Comes into Louisiana, and brings the ward, the tacit mortgage is thereby cast upon his real estate.** *Leverich v. Adams*, 15 La. Ann. 310.

**1. How Release of Tacit Mortgage May Be Secured.** — Rev. Civ. Code La. (1900), art. 325-332; *Lesassier v. Dashiell*, 17 La. 194; *Barnard v. Erwin*, 2 Rob. (La.) 407. See *Guillet v. Jure*, 15 La. Ann. 417.

**The Substituted Special Mortgage Is Security Only for Its Amount,** but if the wards have collected a part of their claim, the mortgage is still liable to its full amount for the balance remaining due. *Kuntz's Succession*, 34 La. Ann. 852.

**Where Special Mortgage and Release Are Based on Fraudulent Account.** — If it appears that the special mortgage and release were based on a fraudulent account, they are null and void,

and the general mortgage is effective against a creditor with notice, though the substitution was approved by a family meeting and ordered by the court. *Elliott's Succession*, 31 La. Ann. 35.

**But in the Absence of Fraud,** third parties will be protected by the action of a family meeting and the court. *Casanova v. Avegno*, 9 La. 192; *Le Blanc v. His Creditors*, 16 La. 120.

**2. When Tutor May Administer Estate of Ward's Ancestor.** — *Bryan v. Atchison*, 2 La. Ann. 462; *Story's Succession*, 3 La. Ann. 502; *Labranche v. Trepagnier*, 4 La. Ann. 558; *Hoover v. Sellers*, 5 La. Ann. 180; *Hair v. McDade*, 10 La. Ann. 534; *Martin v. Dupre*, 1 La. Ann. 239; *Dumestre's Succession*, 40 La. Ann. 571; *Tutorship of Scarborough*, 43 La. Ann. 315.

**3. Termination by Death or by Ward's Arrival at Full Age.** — These causes for the termination are too evident to require citation, or to have been directly affirmed in the cases. The cases in which they are assumed are far too numerous to cite.

**Guardianship Cannot Be Continued After Majority by Agreement.** — Guardianship does not continue after the ward's majority, though the former guardian and the ward agree that it shall continue. *Matter of Kincaid*, 120 Cal. 203.

**Statute Held Not to Extend Guardian's Power Beyond Ward's Majority.** — A statute that the guardian's control of the ward's person and estate shall continue until the minor reaches twenty-one, "or until the guardian is legally discharged," does not extend his power beyond the ward's majority in any case. *Curtis v. Devoe*, 121 Cal. 468.

**4. See *supra*, this title, *Modern Forms of Guardianship*, subd. 3, g. (3) *Whether Existing Guardian Is***

**5. Termination of Guardianship of Feme Sole by Marriage.** — *Curt v. Spennard*, 4 Mo. App.



status of married women in modern times the rule has ceased to be generally recognized.<sup>1</sup>

4. **By Marriage of Female Ward.** — The marriage of a female ward to a man of full age terminates the guardianship, as the marital rights of the husband are inconsistent with the powers of a guardian;<sup>2</sup> and guardianship of the person terminates by her marriage, though the husband be a minor.<sup>3</sup> But whether, where the husband is a minor, the guardianship of the estate termi-

285; *Swartwout v. Swartwout*, 2 Redf. (N. Y.) 52; *Field v. Torrey*, 7 Vt. 372.

It is matter of course to appoint a new guardian if a female guardian marries. *Anonymous*, 8 Sim. 346. But if the master finds both the former guardian and her husband to be suitable persons, he may continue her in the trust. *In re Gornall*, 1 Beav. 348.

In *Morgan v. Dillon*, 9 Mod. 135, the chancellor having appointed a new guardian on the marriage of the former guardian, the House of Lords, on appeal, reversed the decree and continued the former appointment.

In Louisiana the mother upon remarriage *ipso facto* loses her tutorship, but she may be retained by the advice of a family meeting. *Rachal v. Rachal*, 10 La. 460; *Smith v. Dickerson*, 2 La. Ann. 401; *Gaudet v. Gaudet*, 14 La. Ann. 112; *Hatcher v. Jackson*, 21 La. Ann. 737; *Keene v. Guier*, 27 La. Ann. 232; *Grant v. Maier*, 32 La. Ann. 51. If such consent is given, her husband becomes co-tutor with her. *Hatcher v. Jackson*, 21 La. Ann. 737.

Where a tutrix, about to be married, applied to a family meeting for her continuance in the tutorship, and it was voted that she be continued, and that she make all drafts to the undertutor, by whom they should be indorsed, it was held that these restrictions on her power were unavailing. *Stone v. Payne*, 12 La. Ann. 726.

In Georgia the mother's guardianship of the person, as natural guardian, does not abate by the marriage, but the guardianship of the estate does abate. *Beard v. Dean*, 64 Ga. 258; *Hood v. Perry*, 73 Ga. 322.

1. **Rule that Marriage Terminates Guardianship Not Now Recognized.** — *Carlisle v. Tuttle*, 30 Ala. 613; *Martin v. Foster*, 38 Ala. 688; *Leavel v. Bettis*, 3 Bush (Ky.) 74; *Cotton v. Wolf*, 14 Bush (Ky.) 238; *Wood v. Stafford*, 50 Miss. 370. See also *Hood v. Perry*, 73 Ga. 319.

**Husband Becomes Joint Guardian.** — Upon the marriage of a *feme sole* guardian, her husband becomes joint guardian with her. *Carlisle v. Tuttle*, 30 Ala. 613; *Martin v. Foster*, 38 Ala. 688. And he may exercise the powers of a guardian. *Wood v. Stafford*, 50 Miss. 370.

If the second husband of the ward's mother, after being appointed, resigns the guardianship, this operates as a relinquishment of the mother's right, and the next of kin is entitled to be appointed. *Spaun v. Collins*, 10 Smed. & M. (Miss.) 624.

2. **Marriage to Adult Terminates Guardianship** — *Alabama*. — *Wise v. Norton*, 48 Ala. 214.

*Arkansas*. — *Price v. Peterson*, 38 Ark. 494.  
*Georgia*. — *Nicholson v. Wilborn*, 13 Ga. 467.

*Indiana*. — *Kidwell v. State*, 45 Ind. 27; *State v. Joest*, 46 Ind. 235; *Ex p. Post*, 47 Ind. 142; *Haines v. State*, 60 Ind. 41; *Spicer v. Hockman*, 72 Ind. 120; *Swihart v. Shaffer*, 87

Ind. 208; *Burkam v. State*, 88 Ind. 200; *Decker v. Fessler*, 146 Ind. 16.

*Kentucky*. — *Beazley v. Harris*, 1 Bush (Ky.) 533; *Finnell v. O'Neal*, 13 Bush. (Ky.) 176; *Barnet v. Com.*, 4 J. J. Marsh. (Ky.) 389, 5 J. J. Marsh. (Ky.) 286.

*Mississippi*. — *Bickerstaff v. Marlin*, 60 Miss. 509, 45 Am. Rep. 418.

*New Jersey*. — *Porch v. Fries*, 18 N. J. Eq. 204.

*New Mexico*. — *Montoya De Antonio v. Miller*, 7 N. Mex. 289.

*New York*. — *Brick's Estate*, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12; *Matter of Whitaker*, 4 Johns. Ch. (N. Y.) 378. But by the Revised Statutes (9th ed. 1896, p. 3621, § 54) marriage of a female ward terminates the guardianship as to her person, but not as to property.

*North Carolina*. — *Shutt v. Carlross*, 1 Ired. Eq. (36 N. Car.) 232; *Mebane v. Mebane*, 66 N. Car. 334.

*Pennsylvania*. — *Dyer v. Cornell*, 4 Pa. St. 359.

*Tennessee*. — *Lane v. Farmer*, 11 Lea (Tenn.) 568; *Jones v. Ward*, 10 Yerg. (Tenn.) 160.

*Texas*. — *Carpenter v. Soloman*, (Tex. App. 1889) 14 S. W. Rep. 1074.

*Virginia*. — *Armstrong v. Walkup*, 12 Gratt. (Va.) 608.

In England this question has not been very satisfactorily determined. In *Roach v. Garvan*, 1 Ves. 157, which was tried before Lord Hardwicke, there was a petition by two female infants to be taken from the custody of their mother, who had been appointed their guardian, and to have some other proper person appointed guardian. One of the infants had married a minor. It does not appear from the report whether the husband had reached his majority at the time of the trial. The court refused to discharge the order appointing the mother guardian, but made an order upon her to let the children be placed with a proper person named by the court. But see the opinion of the same judge in *Mendes v. Mendes*, 1 Ves. 89. Compare the report of the same case in 3 Atk. 619.

If the Guardian Turns Over to the Husband a Note Payable to Him as Guardian, the guardianship will be deemed to continue sufficiently to enable the name of the guardian to be used in a suit on the note. *Mebane v. Mebane*, 66 N. Car. 334.

A Statute providing that guardianship terminates at the ward's marriage does not give to the ward, upon marrying, the right to receive a trust fund, limited in terms to be paid when she comes of age. *Montoya De Antonio v. Miller*, 7 N. Mex. 289.

3. **Marriage to Minor Terminates Guardianship of Person.** — *Decker v. Fessler*, 146 Ind. 16; *Nicholson v. Wilborn*, 13 Ga. 467; *State v. Joest*, 46 Ind. 235.



nates, is a question upon which the cases are not agreed, some holding that it does not,<sup>1</sup> and others holding that it does, and that the control of the wife's estate passes to the husband's guardian.<sup>2</sup>

5. **By Marriage of Male Ward.** — The marriage of a male ward terminates the guardianship over his person,<sup>3</sup> but not over his estate.<sup>4</sup>

6. **By Resignation.** — An appointment of a guardian is a nullity if he declines to act and does not enter upon the office.<sup>5</sup> But a guardian who has accepted and entered upon the trust cannot relieve himself of it by a mere resignation. He must properly account and be discharged before his responsibility as guardian ceases.<sup>6</sup>

7. **By Death of Surety.** — The death of a surety does not *ipso facto* terminate the guardianship.<sup>7</sup>

8. **By Removal from Trust** — *a.* **RULE STATED.** — Guardianship may be terminated by the removal of the guardian from his trust by a competent court.

*b.* **JURISDICTION TO REMOVE** — (1) *Of Chancery.* — The general power of chancery over the estates and interests of infants includes the power to remove any guardian for sufficient cause, whether he was appointed by chancery or by a statutory court.<sup>8</sup> Some doubt once existed whether chancery had the power to remove testamentary guardians,<sup>9</sup> but the power has long

1. **Marriage to Minor Does Not Terminate Guardianship of Estate.** — *State v. Joest*, 46 Ind. 235; *Decker v. Fessler*, 146 Ind. 16. See also *Roach v. Garvan*, 1 Ves. 157, set out in the last note but one, *supra*.

2. **Control of Wife's Estate Passes to the Husband's Guardian.** — *Ware v. Ware*, 28 Gratt. (Va.) 670. See also *Nicholson v. Wilborn*, 13 Ga. 467.

3. **Marriage of Male Ward Terminates Guardianship over His Person.** — *Reeves on Domestic Relations* 328; 2 Kent's Com. 226.

4. **Guardianship over Estate Not Terminated.** — *Eyre v. Shaftsbury*, 2 P. Wms. 103; *Mendes v. Mendes*, 3 Atk. 619, 1 Ves. 89; *Shutt v. Carlloss*, 1 Ired. Eq. (36 N. Car.) 232; *Brick's Estate*, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12; *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Ware v. Ware*, 28 Gratt. (Va.) 670.

5. **Appointment Null if Guardian Declines to Act.** — *O'Keefe v. Casey*, 1 Sch. & Lef. 106; *M'Alister v. Olmstead*, 1 Humph. (Tenn.) 210.

Where one is appointed testamentary guardian, but renounces the appointment, it does not take effect, and the court should appoint another, though the former may have done acts appropriate to his character as guardian. *M'Alister v. Olmstead*, 1 Humph. (Tenn.) 210.

6. **Mere Resignation Will Not Relieve Guardian from Liability.** — *Wackerle v. People*, 65 Ill. App. 423.

So in Louisiana the Adoption of a Ward by the guardian, though lawfully made, does not relieve the tutor from responsibility, as such, nor from liability to account. *Unforsake's Succession*, 48 La. Ann. 546.

**Statute Requiring Guardian to Account Construed.** — A statute providing that no resignation shall be accepted until the guardian shall have settled his accounts does not apply where the guardian had received no property. *McGale v. McGale*, 18 R. I. 675.

**Guardian's Liability to Account Not Affected by His Appointment in Another County.** — *Wackerle v. People*, 168 Ill. 250.

**Resignation Is a Sufficient Ground for Removal,**

and it makes no difference whether the form of the order is that the resignation is accepted or that the guardian is removed. *Brown v. Huntsman*, 32 Minn. 466; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463.

In Louisiana, on the Other Hand, the tutor's consent to a petition for removal, and his filing an account and receiving a discharge, will be regarded as a resignation and the trust as vacated, though no order of removal is found. *Colomb v. Jones*, 8 La. Ann. 442.

**When Two Guardians Are Appointed and One of Them Resigns,** the title of the survivor continues, and a decree removing him on the ground that the joint guardianship had been terminated is erroneous. *Pepper v. Stone*, 10 Vt. 427.

7. *Prine v. Mapp*, 80 Ga. 137.

8. **Jurisdiction of Chancery to Remove Guardians** — *England.* — *Wellesley v. Wellesley*, 2 Bligh N. S. 128; *Hanbury v. Walker*, 3 Ch. Rep. 58; *Morgan v. Dillon*, 9 Mod. 135; *Beaufort v. Berty*, 1 P. Wms. 705.

*Alabama.* — *Lee v. Lee*, 55 Ala. 590.

*California.* — *Lord v. Hough*, 37 Cal. 657.

*Florida.* — *Thomas v. Williams*, 9 Fla. 289.

*Illinois.* — *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708.

*New York.* — *Disbrow v. Henshaw*, 8 Cow. (N. Y.) 349; *Ex p. Crumb*, 2 Johns. Ch. (N. Y.) 439; *Matter of Andrews*, 1 Johns. Ch. (N. Y.) 99; *Matter of Dyer*, 5 Paige (N. Y.) 534.

*Wisconsin.* — *In re Klein*, 95 Wis. 246.

Chancery may discharge or change a guardian appointed by the surrogate, but it will not do this except in a special case. *Ex p. Crumb*, 2 Johns. Ch. (N. Y.) 439.

As to the power to remove custody from natural guardian, see *supra*, ch. 10, § 10. *Forms of Guardianship, Their Nature and Origin*, subd. 1. *b. Controlled by Courts.*

9. In Several Cases It Was Held that Chancery Could Not Remove a Testamentary Guardian, *Foster v. Denny*, 2 Ch. Cas. 237; *Ingham v. Bickerdike*, 6 Madd. 275; but would restrain him from marrying the infant without the consent of the court, *Foster v. Denny*, 2 Ch. Cas. 237;

been firmly established.<sup>1</sup>

(2) *Of Probate Courts.* — The probate and other courts to whom by statute the jurisdiction over infants' estates has been committed have the power to remove the guardians by them appointed.<sup>2</sup> Whether, in any jurisdiction, this statutory authority has superseded and ousted the power of chancery is a question depending on the local legislation and practice.

c. *MODE OF REMOVAL.* — In the absence of statutory provisions to the contrary, the proceedings for the removal of a guardian are usually instituted by petition or bill filed. The application should be made by the next friend of the ward, or by some relative or interested person. The guardian is entitled to notice and a hearing. But notice to an infant ward is not necessary unless some special reason exists therefor. The final determination of the trial court may be reviewed at the instance of a person aggrieved, but where the determination below is based on facts supported by legal evidence, or where there has been an exercise of discretion which has not been abused, the reviewing court will not interfere.<sup>3</sup>

d. *CAUSE FOR REMOVAL* — (1) *In General.* — Guardians can be removed only for some definite cause; a finding that the interest of the ward would be promoted by a change is not sufficient.<sup>4</sup>

(2) *Removal of Guardian's Residence.* — It is essential that the guardian should be under the effective control of the supervising court; removal of residence from the jurisdiction and reach of process of the court is sufficient ground for removal from the guardianship.<sup>5</sup>

(3) *Unfitness of Guardian.* — If the guardian, after appointment, shows

and would, in a proper case, appoint a fit person to superintend the maintenance and education of the infant and restrain the testamentary guardian from interfering with his person or estate, *In re M'Cullochs*, Drury 276; *Ingham v. Bickerdike*, 6 Madd. 275.

1. *Chancery Has Power to Remove Testamentary Guardians.* — *Wellesley v. Wellesley*, 2 Bligh N. S. 128; *Dillon v. Mount-Cashell*, 4 Bro. P. C. (Toml. ed.) 306; *Smith v. Bate*, 2 Dick. 631; *Morgan v. Dillon*, 9 Mod. 135; *In re Swift*, 2 Molloy 330; *Beaufort v. Berty*, 1 P. Wms. 705; *McPhillips v. McPhillips*, 9 R. I. 536; *Massingale v. Tate*, 4 Hayw. (Tenn.) 30; *In re Klein*, 95 Wis. 246. See *In re McGrath*, (1893) 1 Ch. 143, *affirming* (1892) 2 Ch. 496, under the English Guardianship of Infants Act, 1886.

*In Roach v. Garvan*, 1 Ves. 160, Lord Chancellor Hardwicke said: "The court sometimes, though rarely, removes a testamentary guardian; but if he behaves not to the satisfaction of the court, orders regulating his conduct are frequently made upon him." See also *Lecone v. Sheires*, 1 Vern. 442.

Chancery may remove all guardians, whether guardians by nature, guardians appointed by itself, by the court of probate, by testament, or even by special act of the legislature, whenever there has been an abuse of trust or the interest of the ward requires it. *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708.

2. *Jurisdiction of Statutory Courts to Remove Guardians.* — *Pickens v. Clayton*, 7 Blackf. (Ind.) 321; *Young v. Young*, 5 Ind. 513; *Piat v. Allaway*, 2 Bibb (Ky.) 554; *Macgill v. McEvoy*, 85 Md. 286; *Matter of Clement*, 25 N. J. Eq. 508; *Cherry v. Wallis*, 65 Tex. 442; *State v. McKown*, 21 Vt. 503.

*Order Removing Guardian Appointed by Chancery Void.* — The surrogate has only the power given by statute, and an order of removal

by the surrogate of a guardian appointed by chancery is void. *Matter of Dyer*, 5 Paige (N. Y.) 534; *Matter of Andrews*, 1 Johns. Ch. (N. Y.) 99.

3. See the title GUARDIANS, 9 ENCYC. OF PL. AND PR. 886.

4. *Must Be Definite Cause for Removal.* — *Ledwith v. Union Trust Co.*, 2 Dem. (N. Y.) 439.

*A Guardian Must Be Removed to Qualify Him to Act as Witness for the Ward.* — *Nicoll v. Huntington*, 1 Johns. Ch. (N. Y.) 166.

*Insufficiency of Security.* — In *Indiana* under Rev. Stat. 1838, a guardian could be removed for the insufficiency of the security given by him. *Morgan v. Anderson*, 5 Blackf. (Ind.) 503; *Pickens v. Clayton*, 7 Blackf. (Ind.) 321.

*Refusal to Give Additional Bond.* — Under the *Rhode Island* statutes it was held that a guardian could be removed for refusal to give an additional bond ordered. *McPhillips v. McPhillips*, 9 R. I. 536.

5. *Removal from Jurisdiction of Supervising Court.* — *Eiland v. Chandler*, 8 Ala. 781; *Speight v. Knight*, 11 Ala. 461; *Cockrell v. Cockrell*, 36 Ala. 673; *Farrington v. Secor*, 91 Iowa 606; *Bookter's Succession*, 18 La. Ann. 157; *Cass's Succession*, 42 La. Ann. 381; *Finnely v. State*, 9 Mo. 227; *Cooke v. Beale*, 11 Ired. L. (33 N. Car.) 36.

*Under the Indiana Statute of 1852*, removal from the state was a sufficient cause, in the discretion of the court, for the removal of a guardian. *Nettleton v. State*, 13 Ind. 159. The cases of *Morgan v. Anderson*, 5 Blackf. (Ind.) 503, and *Pickens v. Clayton*, 7 Blackf. (Ind.) 321, were decided under an earlier statute, which made no provisions for the removal of a guardian on the ground of his removal from the jurisdiction of the court.

*In Louisiana* the removal of a guardian from the state terminates his trust *ipso facto*, and no



himself or is found to be unfit for the trust, he may be removed. This unfitness need not necessarily have arisen since the appointment.<sup>1</sup> Unfitness warranting removal may consist of immorality of character,<sup>2</sup> intemperance,<sup>3</sup> ignorance so great as to prevent a proper performance of the trust,<sup>4</sup> insanity or other incapacitating illness,<sup>5</sup> insolvency<sup>6</sup> or such poverty as will render him unable properly to care for the ward's interests,<sup>7</sup> or any hostility of interests between the guardian and ward.<sup>8</sup> The marriage of a female guardian has been held in some cases to be good cause for removal,<sup>9</sup> but this rule is probably obsolete now.<sup>10</sup>

(4) *Malfesance in Office*. — Actual misconduct in the performance of the trust will demonstrate the guardian's unfitness and constitute an independent ground for removal. Thus, any neglect<sup>11</sup> of or injury to the ward's interest,<sup>12</sup>

order of removal is necessary. Bookter's Succession, 18 La. Ann. 157; Cass's Succession, 42 La. Ann. 381.

But a mother and natural tutrix has a right to remove from the state and take the child with her, and she will not be removed from her guardianship therefor. *Delacroix v. Boissblanc*, 4 Mart. (La.) 717.

Though a relative would have been entitled to be appointed if she had been a resident, she does not oust a regularly appointed guardian by coming into the state. *Bronson's Succession*, 11 La. Ann. 24.

**In England Testamentary Guardians Will Not Be Removed for Residing Abroad.** — *In re Lewis*, 2 Molloy 485.

In *Spencer v. Chesterfield*, AmbL. 146, the court refused to discharge testamentary guardians on their own application because they were going abroad; but afterwards, on the application of the infant, and by consent of his relatives and guardians, appointed other persons to have charge of the person and education of the infant until further order.

**1. Guardian's Unfitness for Trust.** — *Crooker v. Smith*, 47 Neb. 102.

**2. Immorality of Character.** — *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598; *Soley's Estate*, 13 Phila. (Pa.) 402, 37 Leg. Int. (Pa.) 486. See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin*, subd. 1. b. *Controlled by Courts*.

**3. Intemperance So Extreme as to Produce Occasional Insanity** is good cause for removal of a guardian; and it is improper that the wife of such intemperate person should be guardian, since she is subject to his control. *Kettletas v. Gardner*, 1 Paige (N. Y.) 488.

**4. Extreme Ignorance.** — *Nicholson's Appeal*, 20 Pa. St. 50.

**5. Insolvency or Other Incapacitating Illness.** — *Modawell v. Holmes*, 40 Ala. 391.

A guardian should not be removed because he was absent for several months from illness, if the estate was properly administered by his subordinates in his absence, and he is, at the time of the proceedings for his removal, fully recovered and competent to execute the trust. *Macgill v. McEvoy*, 85 Md. 286.

**6. Insolvency.** — *Smith v. Bate*, 2 Dick. 631; *Matter of Cooper*, 2 Paige (N. Y.) 34; *Massingale v. Tate*, 4 Hayw. (Tenn.) 30.

Insolvency of the husband will not *ipso facto* effect the removal of the wife. *Rachal v. Rachal*, 10 La. 460.

**7. Poverty.** — *Senior v. Ackerman*, 2 Redf. (N. Y.) 302; *King v. King*, 73 Mo. App. 78.

15 C. of L.—4

The incompetency justifying removal of a guardian does not refer alone to mental condition and moral status, but the relative social and pecuniary position of the guardian may be taken into account. Where the child is living with her aunt, a lady of wealth, refinement, and social position, the court will remove a testamentary guardian appointed by the father, who is a nurse having no means and little education, who has been at times insane, and is in no way related to the child. *Damarell v. Walker*, 2 Redf. (N. Y.) 198.

But lack of means to support the child is not sufficient cause for the removal from the mother of the custody of the ward's person. *Ramsay v. Ramsay*, 20 Wis. 507.

**8. Hostility of Interests Between Guardian and Ward.** — *Windsor v. McAtee*, 2 Met. (Ky.) 430; *Gray v. Parke*, 155 Mass. 433; *Silver's Estate*, 5 Pa. Dist. 415, 18 Pa. Co. Ct. 340.

**9. Marriage of Female Guardian.** — *Morgan v. Dillon*, 9 Mod. 135; *Swartwout v. Swartwout*, 2 Redf. (N. Y.) 52; *Guardianship of Elgin*, Tuck. (N. Y.) 97.

In *Kentucky* it was held that the marriage of a female guardian may be cause for her removal if her husband does not consent to her retaining the guardianship. *Cotton v. Wolf*, 14 Bush (Ky.) 238.

Where the father appoints his widow testamentary guardian, chancery has no right to remove her unless on proof of misbehavior. That she is young, and remarried in six months, is not sufficient cause for removal. *Dillon v. Mount Cashell*, 4 Bro. P. C. (Toml. ed.) 306.

**10.** See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin*, subd. 3. f. (8) *Appointment of Married Women*; *supra*, this section, *By Marriage of Female Guardian*.

**11. Neglect of Ward's Interest.** — *Lefever v. Lefever*, 6 Md. 472.

A guardian who has assets producing an income of two thousand dollars per year, and who refuses to expend anything for the maintenance of his wards, should be removed. *Matter of Swift*, 47 Cal. 629.

**Failure to Protect the Ward's Interests Need Not Be Corrupt**, to justify removal. *Crooker v. Smith*, 47 Neb. 102.

Misconduct in making investments is cause for removal, and it is no defense that the guardian left the entire management to his counsel, and knew nothing of the acts of the latter. *Accounting of O'Neil*, Tuck. (N. Y.) 34.

**12. Acts Held to Justify Removal.** — The follow-



neglecting to file an inventory<sup>1</sup> or to keep and file accounts,<sup>2</sup> or neglecting to obey the orders of the court<sup>3</sup> will justify removal. Any effort to interfere with or change the ward's inherited religious belief will be checked and punished by removal of the guardian.<sup>4</sup>

(5) *Fraud in Procuring Appointment*. — If the guardian procured his appointment by misrepresentation or concealment of material facts from the court, his letters will be revoked.<sup>5</sup>

**V. POWERS AND DUTIES OF GUARDIAN — 1. As to Person — a. WHEN GUARDIANSHIP EXTENDS TO PERSON.** — A guardian appointed generally over an orphan child is guardian of both his person and his estate.<sup>6</sup> But when the father is living, the appointment will be construed to be only over the estate, unless the father is found to be unfit to have the child's custody.<sup>7</sup>

ing acts have been held to justify removals from guardianship:

Ill treatment of the ward. *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598; *Lefever v. Lefever*, 6 Md. 472.

Taking the ward from school at the age of nine and marrying her to the guardian's son, who had no property. *Goodall v. Harris*, 2 P. Wms. 561.

Fraud on the ward by corrupt and collusive acts. *Marks v. Witkouski*, 16 La. Ann. 341.

Trying to alienate the affections of the ward from her mother, who was of good character. *Perkins v. Finnegan*, 105 Mass. 501.

Wasting the estate, *King v. King*, 73 Mo. App. 78; *Massingale v. Tate*, 4 Hayw. (Tenn.) 30; or applying it to the guardian's own benefit, *Ripitoe v. Hall*, 1 Stew. (Ala.) 166.

In a *South Carolina* case it was held that the guardian will not be removed for applying his ward's funds to his own use, since he is charged with interest as a borrower, and there is no loss of time in investment, and his bond secures the ward against loss. *Sweet v. Sweet*, Spears Eq. (S. Car.) 309. But this decision was *disapproved* in *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184.

**Guardian of Person Only May Be Removed for Misapplying Property.** — *Cherry v. Wallis*, 65 Tex. 442.

**Court Has Large Discretion.** — Large discretion must necessarily be reposed in the trial court, and where the guardian retained all the funds, amounting to five thousand dollars, himself, keeping no account, charging board, and allowing nothing for the ward's labor, his removal was sustained. *Snaveley v. Harkrader*, 29 Gratt. (Va.) 112.

**The Conversion of Real into Personal Estate is cause for removal**, particularly where the guardian himself bought the real estate, and its retention would have been beneficial to the ward. *Ex p. Crutchfield*, 3 Yerg. (Tenn.) 336.

**Acts Held Not to Justify Removal.** — That a guardian has unnecessarily incurred large counsel fees will not justify his removal, since the charge will be disallowed; nor that he had used a small part of the ward's funds in his business, where he is abundantly able to pay it on demand. *Matter of Flinn*, 31 N. J. Eq. 640.

**1. Neglect to File Inventory.** — *Markel v. Phillips*, 5 Ind. 510; *Kimmel v. Kimmel*, 43 Ind. 203; *Windsor v. McAtee*, 2 Met. (Ky.) 430; *Prince v. Ladd*, (Tex. 1890) 15 S. W. Rep. 159.

But in *New York* it has been held that mere neglect to file an inventory is no cause for removal, unless an order has been made for such inventory. *Ledwith v. Union Trust Co.*, 2 Dem. (N. Y.) 439.

And a guardian will not be removed for failure to file an inventory where he had received no personal property nor income from the real estate. *Johnson v. Metzger*, 95 Ind. 307.

**Failure to File an Inventory at the Required Time** may be cause for removal, though it was filed before the application for removal. *Barnes v. Powers*, 12 Ind. 341.

**2. Neglect to Keep and File Accounts.** — *Ripitoe v. Hall*, 1 Stew. (Ala.) 166.

**A Guardian of Several Wards Having an Estate in Common** should keep separate accounts; and if he neglects this, though through ignorance, he should be removed. *Wood v. Black*, 84 Ind. 279.

**But Mere Failure to File Accounts Will Not Be Cause for Removal** where no order therefor had been made, and there has been no waste, substantial neglect, or probability of loss. *Sanderson v. Sanderson*, 79 N. Car. 369.

**3. Failure to File Accounts After Being Ordered to Do So** is ground for removal. *Deegan v. Deegan*, 22 Nev. 202.

**Selling Bonds under Mistaken Belief that Sale Has Been Ordered.** — A guardian should not be removed for selling bonds without an order of court, though such sale is prohibited by statute, when he *bona fide* believed that such sale had been ordered, and his bond is ample to secure the estate from loss. *Macgill v. McEvoy*, 85 Md. 286.

**4. Effort to Change Ward's Inherited Religious Belief.** — *In re Hunt*, 2 Con. & Law. 373; *Nicholson's Appeal*, 20 Pa. St. 50. See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin*, subdiv. 3, f. (5) *Religious Belief of Guardian*; *infra*, this title, *Powers and Duties of Guardian*, subdiv. 1. b., paragraph *Subject to Control of Court*.

**5. Fraud in Procuring Appointment Cause for Revoking Letters.** — *Matter of Clement*, 25 N. J. Eq. 508; *Matter of Pierce*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 532; *Mintzer's Estate*, 163 Pa. St. 484.

**6. Guardianship over Orphan.** — *Wade v. Carpenter*, 4 Iowa 361; *Burger v. Frakes*, 67 Iowa 460; *Com. v. Dugan*, 2 Pa. Dist. 772.

**7. When Father Is Living.** — *McDowell v. Bonner*, 62 Miss. 278; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177.

b. RIGHT TO CUSTODY OF WARD. — When the guardianship extends to the person, the guardian has a legal right to the custody and control of the ward superior to that of any other person.<sup>1</sup> He can enforce this right by habeas corpus<sup>2</sup> or by action of trespass for taking away the ward.<sup>3</sup>

Subject to Control of Court. — This legal right, however, is subordinate to the

1. **Guardian's Right to Custody and Control** — *England*. — *Rex v. Isley*, 5 Ad. & El. 441, 31 E. C. L. 376; *Reg. v. Clarke*, 7 El. & Bl. 193, 90 E. C. L. 193; *Talbot v. Shrewsbury*, 4 Myl. & C. 673; *Rex v. Johnson*, 1 Stra. 579, 2 Ld. Raym. 1333; *Matter of Andrews*, L. R. 8 Q. B. 153.

*Connecticut*. — *Macready v. Wilcox*, 33 Conn. 328.

*Indiana*. — *Bounell v. Berryhill*, 2 Ind. 613; *Johns v. Emmert*, 62 Ind. 533; *Grimes v. Butsch*, 142 Ind. 113.

*Iowa*. — *Burger v. Frakes*, 67 Iowa 460; *Jenkins v. Clark*, 71 Iowa 552.

*Louisiana*. — *Percy v. Provan*, 15 La. 74.

*Maine*. — *Coltman v. Hall*, 31 Me. 196.

*Compare Com. v. Dugan*, 7 Kulp (Pa.) 66; *Ward v. Roper*, 7 Humph. (Tenn.) 111; *Mathews v. Wade*, 2 W. Va. 464.

Thus the guardian's legal rights have been declared to be superior to those of the following persons:

The grandparents. *Rex v. Isley*, 5 Ad. & El. 441, 31 E. C. L. 376; *Percy v. Provan*, 15 La. 74; *Com. v. Keisel*, 13 Montg. Co. Rep. (Pa.) 172; *Mathews v. Wade*, 2 W. Va. 464. See also *Ex p. Ralston*, R. M. Charl. (Ga.) 119.

The step-parents. *Bounell v. Berryhill*, 2 Ind. 613; *Com. v. Dugan*, 7 Kulp (Pa.) 66.

The mother. *People v. Wilcox*, 22 Barb. (N. Y.) 178. See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin*, subdiv. 1. a. (2) *In Mother*, notes.

An aunt. *Jenkins v. Clark*, 71 Iowa 552.

A sister. *Grimes v. Butsch*, 142 Ind. 113.

One to whom the parents had informally committed the child. *Johns v. Emmert*, 62 Ind. 533; *Burger v. Frakes*, 67 Iowa 460; *Jenkins v. Clark*, 71 Iowa 552; *Coltman v. Hall*, 31 Me. 196.

The court will not give children to the custody of grandparents where there is a testamentary guardian, not found to be unsuitable, though the guardian has hitherto, under the express terms of the will, left the children in the care of an incompetent person. *In re Young*, 120 N. Car. 151.

**The Unwillingness of Young Children to Leave Their Present Custodians** will not prevail against the guardian's right. *Bounell v. Berryhill*, 2 Ind. 613; *Johns v. Emmert*, 62 Ind. 533; *Rex v. Johnson*, 1 Stra. 579, 2 Ld. Raym. 1333.

**Foreign Guardians.** — Where infants domiciled in a foreign country have been sent to England for education, equity will not interfere with the discretion of the foreign guardian to recall them to their home, for a supposed benefit to the infants of remaining in England. *Nugent v. Vetzera*, L. R. 2 Eq. 704.

In *Indiana* it has been held that a guardian, even in another state, will be preferred to a sister in *Indiana* to whom the ward has run away, if such guardian is perfectly fit for the

trust and the sister is not. *Grimes v. Butsch*, 142 Ind. 113.

A guardian can never be held guilty of false imprisonment for taking possession of the ward's person, though he takes her from the mother, who has removed to another state. *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534. See the title FOREIGN GUARDIANS, vol. 13, p. 965.

**It Is the Ward's Duty** to live with and submit to the guardian, and if he leaves him, and returns only on the guardian's promise to board him free, the promise is without consideration. *Keith v. Miles*, 39 Miss. 442, 77 Am. Dec. 685.

But a guardian's primary duty is to promote the ward's interests, rather than to assert his own rights; and he is not justified in refusing support to the ward because the latter refuses to leave a proper home and live with him. *Matter of Wentz*, (Surrogate Ct.) 9 Misc. (N. Y.) 240.

**Guardian's Power to Protect Ward from Bad Companionship.** — The guardian can order persons of bad character who have formed companionships with the ward to leave his premises, and can compel them to go in case of refusal. *Wood v. Gale*, 10 N. H. 247, 34 Am. Dec. 150.

**Guardian May Detain Female Ward's Clothes to Prevent Her Elopement.** — Guardians of a girl are justified in stopping her elopement by seizing and detaining her clothes; and their order will justify a carrier in delivering the clothes to them. *Barker v. Taylor*, 1 C. & P. 101, 11 E. C. L. 330.

As to the rights of parents as guardians by nature, see *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin* — *Guardianship by Nature*; also the title PARENT AND CHILD.

2. **Guardian Can Enforce His Right by Habeas Corpus.** — *Rex v. Johnson*, 1 Stra. 579, 2 Ld. Raym. 1333; *Reg. v. Gyngall*, (1803) 2 Q. B. 232; *Com. v. Dugan*, 7 Kulp (Pa.) 66, 2 Pa. Dist. 772; *Fields v. Law*, 2 Root (Conn.) 320; *Matter of Wollstonecraft*, 4 Johns. Ch. (N. Y.) 80.

3. **Action of Trespass.** — *Reg. v. Clarke*, 7 El. & Bl. 193, 90 E. C. L. 193, 2 Roll. Abr. 42.

But in *Connecticut* it has been held that no action lies by a guardian to recover damages for the taking away of his ward, unless loss of services is alleged; otherwise his remedy is by habeas corpus. *Fields v. Law*, 2 Root (Conn.) 320.

**Suit for Seduction of Ward.** — The prevailing doctrine seems to be that a guardian may maintain an action for the seduction of his female ward. *Ball v. Bruce*, 21 Ill. 161; *Comstock v. Board of Education*, 100 N. Y. 101; *Jones v. Jones*, 5 Barb. (N. Y.) 661; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273; *Fernsler v. Moyer*, 3 W. & S. (Pa.) 416, 39 Am. Dec. 33. But in *Massachusetts* a different rule prevails. *Blanchard v. Isley*, 120 Mass. 487, 21 Am. Rep. 535. See the title SEDUCTION.

welfare of the ward, and will be disregarded by the court whenever necessary in the ward's interest.<sup>1</sup> The courts will also restrain the guardian from using his power to alter the child's religious belief from that of his father.<sup>2</sup>

**C. RIGHT TO ALTER WARD'S DOMICIL.** — The right of a guardian, other than a natural guardian, to change the domicile of his ward from one state to another, is generally denied.<sup>3</sup> It has sometimes been held, however, that a testamentary guardian so far represents the father that he has power to make such a change.<sup>4</sup> But removal of the ward from one town, parish, or county to another within the same state is within the power of the guardian.<sup>5</sup>

**1. Guardian's Right Subordinate to Ward's Welfare** — *England.* — Talbot v. Shrewsbury, 4 Myl. & C. 673.

*Connecticut.* — Kelsey v. Green, 69 Conn. 291.

*Indiana.* — Garner v. Gordon, 41 Ind. 92; Bryan v. Lyon, 104 Ind. 227, 54 Am. Rep. 309.

*Iowa.* — Jenkins v. Clark, 71 Iowa 552.

*Michigan.* — Matter of Heather, 50 Mich. 261; Matter of Stockman, 71 Mich. 180.

*New York.* — People v. Wilcox, 22 Barb. (N. Y.) 184; Wilcox v. Wilcox, 14 N. Y. 575; Matter of Welch, 74 N. Y. 299; People v. Walts, 122 N. Y. 238.

*Pennsylvania.* — Brown's Estate, 166 Pa. St. 249.

*Tennessee.* — Ward v. Roper, 7 Humph. (Tenn.) 111.

If the Child Is Competent to Declare an Election, the court will suffer it to go where it pleases; but if it is too young, the court is to exercise its own judgment for the ward's interest. Matter of Wollstonecraft, 4 Johns. Ch. (N. Y.) 80.

**In a Contest Between Two Guardians** claiming under appointment in different states, the superior legal title of the plaintiff will not necessarily entitle him to recover the custody of the child in habeas corpus, but the interest of the child should be an important element in determining the question. Kelsey v. Green, 69 Conn. 291.

**Circumstances under Which Custody Will Be Refused to Guardian.** — Custody of the child will not be given to a testamentary guardian appointed by the father, where the maternal grandparents have taken the child at the request of both parents, and are caring for it without expense, and the testamentary guardian has no knowledge of or care for the child, and was appointed to gratify the father's spite against the grandparents. Matter of Stockman, 71 Mich. 180.

Where the mother is unfit to have the child's custody, and the defendants have taken the child from her and are caring for it properly, the court will not order it given up to a guardian of whose good faith they are not satisfied, and who has placed another ward in the mother's care. *In re Clancy*, 108 Mich. 427.

**If the Ward's Wants Are Carefully Attended to** by the legal guardian, the court will not remove the child from him. *Macready v. Wilcox*, 33 Conn. 328. See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin*, subd. 1. b. *Controlled by Courts.*

**2. Interference with Ward's Religious Belief May Be Restrained.** — The fact that it would be for the child's pecuniary advantage to be educated as a Protestant will not induce the court

to interfere with his education by his testamentary guardian, a Roman Catholic priest, where the father was also a Roman Catholic. *Talbot v. Shrewsbury*, 4 Myl. & C. 673.

**For Other Cases** where the religious training of a child by the guardian has been passed upon, see *Hill v. Hill*, 10 W. R. 400; *Reg. v. Clarke*, 7 El. & Bl. 202, 90 E. C. L. 202; *Andrews v. Salt*, L. R. 8 Ch. 622. See also *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin*, subd. 3. f. (5) *Religious Belief of Guardian*; *supra*, this title, *Termination of Guardianship*, subd. 8. d. (4) *Malfeasance in Office.*

**3. Guardian Cannot Change Ward's Domicil from One State to Another.** — *Lamar v. Micou*, 112 U. S. 452; *Daniel v. Hill*, 52 Ala. 430; *Wynn v. Bryce*, 59 Ga. 520; *Vennard's Succession*, 44 La. Ann. 1076; *Fulton's Estate*, 14 Phila. (Pa.) 298, 38 Leg. Int. (Pa.) 224; *Mears v. Sinclair*, 1 W. Va. 185.

A guardian cannot take advantage of a change of the ward's domicile illegally effected by himself. *Trammell v. Trammell*, 20 Tex. 406.

A guardian being about to remove the ward from the state was required to give bond to return him to the state for education, and whenever ordered by the Probate Court. *Ex p. Martin*, 2 Hill Eq. (S. Car.) 71.

In *Wheeler v. Hollis*, 19 Tex. 522, 70 Am. Dec. 363, a mother and her second husband, being guardians, were declared to have the right to remove the ward's domicile, if *bona fide*, and not with intent fraudulently to change the succession to the ward's property; and it was held that the desire of the guardian to avoid payment of his own debts by a removal would not render the removal fraudulent as to the ward. But this case can be rested on the power of the mother.

**4. Right of Testamentary Guardian to Change Ward's Domicil.** — See *Lamar v. Micou*, 112 U. S. 452.

Parents or testamentary guardians have the right to change the residence of wards from one state to another. But the court will restrain a removal in derogation of the rights of the surviving mother. Therefore a testamentary guardian will not be allowed to take the child to another state against the mother's wish, though the father's will contemplated such a removal. *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

**5. Guardian's Power of Removal Within State.** — *State v. Judge*, 2 Rob. (La.) 418; *State v. Bermudez*, 14 La. 484; *State v. Pettit*, 14 La. Ann. 565; *Stephens's Succession*, 19 La. Ann. 499; *Kirkland v. Whately*, 4 Allen (Mass.) 462; *Townsend v. Kendall*, 4 Minn. 412, 77 Am.



**d. RIGHT TO CONSENT TO MARRIAGE, ADOPTION, OR ENLISTMENT.** — By the statutes regulating marriage, adoption, enlistment, etc., guardians are, in many jurisdictions, in the absence of parents, to give or withhold consent to the ward's entering into such relations. For these powers reference must be had to the several statutes.<sup>1</sup>

**Right to Bind Out Ward as Apprentice.** — The guardian also had power, under the early statutes, when apprenticeships were common, to bind out the ward as an apprentice, and it was often held to be his duty to do so, when the ward's income was insufficient to support him.<sup>2</sup>

**2. As to Estate** — *a. GENERAL NATURE OF GUARDIAN'S INTEREST.* — The guardian has the general control and management of the ward's property.<sup>3</sup>

Dec. 534; *Ex p. Bartlett*, 4 Bradf. (N. Y.) 221; *Wilkins's Guardian*, 146 Pa. St. 585.

The Least Suspicion of Fraud would cause careful scrutiny in the Court of Chancery; but this goes only to the exercise of the power, not to its existence. *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534.

But in Missouri even this limited power of removal is denied. *Marheineke v. Grothaus*, 72 Mo. 204; *Garrison v. Lyle*, 38 Mo. App. 558.

**The Domicil of Guardian Is Not Necessarily That of the Ward.** — So if the minors reside with their own mother, and have a guardian in another county, their funds are taxable where they themselves reside. *School Directors v. James*, 2 W. & S. (Pa.) 568, 37 Am. Dec. 525.

**1. Marriage — English Marriage Act.** — The guardian's power to consent to the marriage of the ward under the English marriage act was considered and recognized in *Matter of Woolscombe*, 1 Madd. 213, and in *Reddall v. Leddiard*, 3 Phill. Ecc. 256.

**A Guardian Has No Authority to Enter into Marriage Articles** imposing liabilities on the ward's property. *Healy v. Rowan*, 5 Gratt. (Va.) 414, 52 Am. Dec. 94.

**Adoption.** — Under the Iowa Code a ward cannot be adopted without the consent of its guardian. Whether it can be adopted with the guardian's consent, *quære*. *Burger v. Frakes*, 67 Iowa 460.

**Enlistment.** — Under the United States Statute requiring the consent of the parent or guardian to a minor's enlistment, such consent cannot be given by a guardian appointed after the enlistment. *In re Perrone*, 89 Fed. Rep. 120.

**2. Power to Apprentice Ward** — *Connecticut.* — *Hewit v. Morgan*, 2 Root (Conn.) 363; *Clement v. Wheeler*, 2 Root (Conn.) 466; *Paddock v. Higgins*, 2 Root (Conn.) 316, 482.

*Kentucky.* — *Campbell v. Golden*, 79 Ky. 544.

*Maine.* — *Chapman v. Crane*, 20 Me. 172.

*Massachusetts.* — *Blunt v. Melcher*, 2 Mass. 228; *Holbrook v. Bullard*, 10 Pick. (Mass.) 68.

*New York.* — *Ackley v. Hoskins*, 14 Johns. (N. Y.) 374.

*North Carolina.* — *Long v. Norcom*, 2 Ired. Eq. (37 N. Car.) 354; *Johnston v. Coleman*, 3 Jones Eq. (56 N. Car.) 290.

*Pennsylvania.* — *Yelds v. Levering*, 2 Rawle (Pa.) 269; *Leech v. Agnew*, 7 Pa. St. 21.

*Virginia.* — *Anderson v. Thompson*, 11 Leigh (Va.) 458.

**The Guardian Cannot Bind Out the Ward as a Servant.** — *Respublica v. Keppeler*, 1 Yeates (Pa.) 233.

But if the ward has little means and is able

to earn her support the guardian has authority to place her, without any fixed term, in a family who will board and educate her for her work. *Brown v. Yaryan*, 74 Ind. 305.

**3. Power of Guardian over Ward's Property.** — The guardian, upon the death of the father, stands *in loco parentis*; possesses all the father's control and authority, and is subject to all his duties except that of maintaining the ward out of his own funds. *Maclay v. Equitable L. Assur. Soc.*, 152 U. S. 499; *U. S. Mortgage Co. v. Sperry*, 24 Fed. Rep. 838; *Fernsler v. Moyer*, 3 W. & S. (Pa.) 416, 39 Am. Dec. 33; *Homstead v. Loomis*, 53 Me. 549.

**Powers Limited in Iowa.** — Under the Iowa Code, a guardian cannot lease lands, loan money, or make investments, without orders of court. *Bates v. Dunham*, 58 Iowa 308.

**Guardian's Powers Cannot Be Restricted.** — In appointing a guardian, the surrogate has no power to order that he shall notify the father of all matters affecting the ward's person or estate, permit him to visit her, and consult with him as to his own acts. *Matter of Lindley*, 1 Connolly (N. Y.) 500. Nor that he shall keep the funds in a certain bank, and pay them only on orders of court. *De Greayer v. Superior Ct.*, 117 Cal. 640, 59 Am. St. Rep. 220.

An act of the legislature authorizing a third person to sell the ward's estate and apply the proceeds to the ward's maintenance and education is void as judicial in its nature. *Lincoln v. Alexander*, 52 Cal. 482, 28 Am. Rep. 639.

But in *Hoyt v. Sprague*, 103 U. S. 613, it was held that in the case of guardians for property of nonresident persons, the legislature has the right to prescribe their powers and duties, and that an act authorizing a particular guardian to invest in the stock of a corporation named was valid.

A guardian cannot be garnished for the ward's debts, since that would deprive him of the control of the ward's property and the right to pay his debts. *Homstead v. Loomis*, 53 Me. 549.

**Special Trusts Not Included in Guardian's Control.** — Where land has been devised to the ward under special trusts created by the will, the general guardian cannot claim the management thereof which has been conferred on the trustees. *Findley v. Wilson*, 3 Litt. (Ky.) 390, 14 Am. Dec. 72; *Ware v. Coleman*, 6 J. J. Marsh. (Ky.) 108; *Hindman v. State*, 61 Md. 471; *Bradley v. Amidon*, 10 Paige (N. Y.) 235; *Young's Estate*, 17 Phila. (Pa.) 511, 42 Leg. Int. (Pa.) 454.

And if the same man is testamentary trustee

As to the theoretical question whether the legal title is vested in him, or whether he has a power not coupled with an interest, the cases are in conflict;<sup>1</sup> but as to the practical extent of his powers over the ward's personal property, and over the use of his real estate,<sup>2</sup> there is general agreement.

**B. GUARDIAN'S RIGHT TO POSSESSION** — (1) *In General*. — He is, therefore, entitled to possession of the ward's real and personal estate,<sup>3</sup> and his possession is regarded as the possession of the ward.<sup>4</sup>

and general guardian, he will hold the trust property as trustee and not as guardian. *Atwood v. Frost*, 57 Mich. 229.

**Authority Cannot Be Exercised in Derogation of the Trust.** — If a guardian for several heirs receives their money and gives all or most of it to one, or conveys real estate to one in derogation of the rights of the others, the title will not pass thereby, but the property will still belong to all alike. *Hampton's Appeal*, 17 S. & R. (Pa.) 144.

**1. Naked Power Not Coupled with Interest.** — It is held in *Connecticut*, *Maine*, *Massachusetts*, *Mississippi*, and *New Hampshire* that the guardian has a naked power not coupled with an interest. *Welles v. Cowles*, 4 Conn. 189, 10 Am. Dec. 115; *Hutchins v. Dresser*, 26 Me. 76; *Manson v. Felton*, 13 Pick. (Mass.) 206; *Hicks v. Chapman*, 10 Allen (Mass.) 463; *Simmons v. Almy*, 100 Mass. 239; *Rollins v. Marsh*, 128 Mass. 116; *Grist v. Forehand*, 36 Miss. 69; *Newton v. Nutt*, 58 N. H. 599.

**Vested Interest.** — But in *California*, *New Jersey*, *New York*, *Pennsylvania*, *Vermont*, and *Virginia* it is held that he has not only an authority, but also a vested interest in the property of the ward. *Lincoln v. Alexander*, 52 Cal. 482, 28 Am. Rep. 639; *Jones v. Jones*, 71 Cal. 89; *Van Doren v. Everitt*, 5 N. J. L. 528; *People v. Byron*, 3 Johns. Cas. (N. Y.) 53; *Fernsler v. Moyer*, 3 W. & S. (Pa.) 416, 39 Am. Dec. 33; *Pepper v. Stone*, 10 Vt. 427; *Truss v. Old*, 6 Rand. (Va.) 556, 18 Am. Dec. 748.

**Legal Title to Notes.** — A note made to a guardian in his own name confers title on him and not on the ward. *Gentry v. Owen*, 14 Ark. 396, 60 Am. Dec. 549. Though he has been removed from the guardianship, the legal title is *prima facie* in him, and he can sue on it. *Chambless v. Vick*, 34 Miss. 109.

The right of action on a note payable to "A, guardian," passes at his death to his successor, not to his administrator. *Cocke v. Rucks*, 34 Miss. 105.

See further, as to the title to choses in action, *infra*, this section, *To Bring and Defend Suits*.

**2. Guardian's Control over Real Estate Confined to Rents and Profits.** — The law never allows to a guardian any control over the ward's real estate, except as to the rents and profits. *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 564.

The guardian's power over the real estate is limited to leasing it and collecting the rents and profits. He cannot sign a petition for a public improvement, so as to make one in the number of resident property owners required. *Aplin v. Fisher*, 84 Mich. 128. But he is an "owner and occupier" liable by statute for the repair of a bridge. *Rex v. Sutton*, 3 Ad. & El. 597, 30 E. C. L. 168.

**Under the Rhode Island Statutes**, if the guard-

ian can most advantageously to the ward manage his farm and support him from its produce, he will be permitted to do so. It is not an absolute requirement that the farm should be leased rather than managed for the ward's direct support. *Remington v. Field*, 16 R. I. 509.

**3. Guardian Entitled to Possession of Ward's Estate.** — *Rex v. Sutton*, 3 Ad. & El. 597, 30 E. C. L. 168; *Bonner v. Evans*, 89 Ga. 656; *Boruff v. Stipp*, 126 Ind. 32; *Hutchins v. Dresser*, 26 Me. 76; *Baltimore v. Norman*, 4 Md. 352; *Matter of Hynes*, 105 N. Y. 560; *Beecher v. Crouse*, 19 Wend. (N. Y.) 306; *Hudgins v. Sansom*, 72 Tex. 229.

**Agreement that Surety Shall Hold Ward's Funds Against Public Policy.** — *Rogers v. Hopkins*, 70 Ga. 454; *Poultney v. Randall*, 9 Bosw. (N. Y.) 232.

**The Ward Cannot Sue for the Products of Real Estate**, since the right of possession is in the guardian. *Beecher v. Crouse*, 19 Wend. (N. Y.) 306.

**A Next Friend Suing for Waste Committed, or Money Received**, by the guardian, cannot recover unless the guardian be removed. *Bonner v. Evans*, 89 Ga. 656.

**Guardian of Person Cannot Be Excluded from Occupying Ward's Home.** — *Hudgins v. Sansom*, 72 Tex. 229.

**Where Guardian Is Not Entitled to Possession of Ward's Will.** — The assets of the ward to the possession of which the guardian is entitled do not include a will made by the ward and delivered to another person to keep until the ward's death, and then to deliver to the executor named. *Mastick v. Superior Ct.*, 94 Cal. 347.

**Funds Transmitted to Foreign Country.** — Where the wards have gone to a foreign country to reside, and an insurance company has transmitted the funds to the consul there for disposition by the proper tribunal, the domestic guardian cannot maintain an action for them. *Ameisen v. National Slavonic Assoc.*, 20 Pa. Co. Ct. 59.

**On an Account Settled Without the Removal of the Guardian** there is no warrant for an order requiring him to pay the balance into court. *Hughes v. Ringstaff*, 11 Ala. 564.

**4. The Ward Can Trace Title by Possession Through Possession by His Guardian.** — *Davis v. Mitchell*, 5 Yerg. (Tenn.) 282; *Williams v. Walton*, 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122.

**Guardian's Recovery of Possession of Ward's Choses in Action.** — The recovery of possession by the guardian constitutes reduction to possession of a ward's choses in action, so that the marital rights of the ward's husband attach thereto. *Magee v. Toland*, 8 Port. (Ala.) 36; *Chambers v. Perry*, 17 Ala. 726; *Sallee v. Arnold*, 32 Mo. 532, 82 Am. Dec. 144; *Davis v. Rhame*, 1 McCord Eq. (S. Car.) 191.



(2) *Right to Invest Funds.* — This duty of possession and control implies and includes the power of investing the ward's funds,<sup>1</sup> subject to all the regulations imposed by statute upon the investment of trust funds and to the duty of due diligence and caution in selecting investments.<sup>2</sup>

(3) *Right to Pay Incumbrances.* — The guardian has also the right to clear off, with any available funds, incumbrances resting upon the ward's property.<sup>3</sup>

c. TO COLLECT AND SETTLE CHOSSES IN ACTION. — The guardian has power to collect and reduce to possession the ward's choses in action, and to discharge them on settlement.<sup>4</sup>

And the husband's guardian may reduce the wife's choses in action to possession, and will thereby be entitled to possession in the right of the husband. *Ware v. Ware*, 28 Gratt. (Va.) 670.

In Louisiana, When the Tutrix Takes Possession of and Administers the Ancestor's Estate in the ward's behalf, the ward constructively takes possession, and cannot assert a claim as creditor without restoring the possession. *Lemmon v. Clark*, 36 La. Ann. 744.

1. *Guardian's Right to Invest Ward's Funds.* — *Beasley v. Watson*, 41 Ala. 234; *Newman v. Reed*, 50 Ala. 297; *Thompson v. Thompson*, 92 Ala. 545; *Fidelity Trust, etc., Co. v. Glover*, 99 Ky. 355; *Willick v. Taggart*, 17 Hun (N. Y.) 511.

But in California, Illinois, Iowa, and Maryland a guardian cannot make any investment of funds without an order of court. *Matter of Carver*, 118 Cal. 73; *McIntyre v. People*, 103 Ill. 142; *Bates v. Dunham*, 58 Iowa 308; *Carlyle v. Carlyle*, 10 Md. 440.

If the Guardian Changes the Investment of funds which are already securely invested, the burden of proof to show a reasonable cause for the change is on him. *State v. Washburn*, 67 Conn. 187.

Sending Ward's Funds out of State. — In Louisiana the tutor has no right to send the ward's funds out of the state, and such an act will justify intervention by the undertutor. *Welch v. Baxter*, 45 La. Ann. 1062.

Right to Extend Time of Payment of Mortgage. — The guardian has power, at the maturity of a mortgage, to receive interest in advance and extend the time of payment. *Willick v. Taggart*, 17 Hun (N. Y.) 511.

2. See *infra*, this title, *Accounting by Guardian*, subdiv. 2. b. (5) *Losses Not Attributable to Guardian's Negligence*.

3. *Guardian's Right to Pay Incumbrances.* — *Ronald v. Barkley*, 1 Brock. (U. S.) 356; *Cheney v. Roodhouse*, 135 Ill. 257; *Wright v. Comley*, 14 Ill. App. 551; *Fuller's Appeal*, 98 Pa. St. 534; *Merkel's Estate*, 154 Pa. St. 285.

But in Missouri, where such a payment was made under an order of court, it was held that the justification of it depended not on the necessity or resulting benefit, but on the jurisdiction of the court to make the order. *Windleton v. O'Brien*, 68 Mo. App. 675.

4. *Guardian's Right to Collect and Settle Choses in Action* — *England*. — *M'Craith v. M'Craith*, 13 Ir. Eq. 314.

Alabama. — *Mason v. Buchanan*, 62 Ala. 110.

Louisiana. — *Dolhonde v. Lemoine*, 32 La. Ann. 251; *Riddell v. Vizard*, 35 La. Ann. 310.

Mississippi. — *Gammage v. Noble*, 24 Miss.

150; *Keith v. Jolly*, 26 Miss. 131; *Longino v. Delta Bank*, 75 Miss. 407.

New York. — *Chapman v. Tibbets*, 33 N. Y. 289; *Torry v. Black*, 58 N. Y. 185, reversing 65 Barb. (N. Y.) 414; *Matter of Moody*, 2 Dem. (N. Y.) 624; *Wall v. Bulger*, 46 Hun (N. Y.) 346; *Dakin v. Demming*, 6 Paige (N. Y.) 95.

Tennessee. — *Hubbard v. Ewing*, 4 Baxt. (Tenn.) 404.

Payment by an Executor of a Vested Legacy to the Guardian of the legatee is valid, though made during minority, and the will directed it to be paid at the ward's coming of age. *M'Craith v. M'Craith*, 13 Ir. Eq. 314.

Contra. — In Michigan such a payment is not valid. *Hinckley v. Harriman*, 45 Mich. 343. See *infra*, this title, *Guardian's Bonds* — *What Funds Are Covered by Bond*, note.

Acceptance of Real Estate in Payment of Debt. — In Alabama it has been held that parties dealing with a guardian in good faith are protected if he accepts real estate in payment of a debt due to the ward. *Mason v. Buchanan*, 62 Ala. 110.

But in Michigan it has been held that where an order has been made for the payment of a sum into court for the ward, her guardian has no power to accept a deed of land in lieu thereof. *Westbrook v. Comstock*, Walk. (Mich.) 314.

Debt to Deceased Ancestor. — A guardian can collect by suit a debt to a deceased ancestor whose estate has been settled, where the note has been delivered to the guardian as the ward's portion of the estate, *Walter v. Walter*, 10 Neb. 123; or where the ward is the sole heir, and no administration has been taken, *Roberts v. Sacra*, 38 Tex. 580.

But Payment to a Guardian of Money Due to His Ward as Administrator is no defense against the ward, though there were no debts, and the ward was the sole heir. *Ryan v. North End Sav. Bank*, 168 Mass. 215.

The Guardian Can Demand of the Executor of the Ancestor's Estate sufficient funds, from the ward's share, for his support and education. *Miller v. Duy*, 36 Ind. 521.

Payment of Life Insurance to Guardian. — A provision in a life-insurance policy that payment may be made to the guardian of a minor's beneficiaries justifies payment to any guardian legally authorized to receive it, *e. g.*, a guardian *ad litem* duly appointed, but not to a guardian duly appointed by will but who has not qualified. *Wuesthoff v. Germania L. Ins. Co.*, 107 N. Y. 580.

Payment to Guardian in Notes of Third Party. — Payment to a guardian will be effective though made in notes of a third party, if the guardian collected the notes and used the pro-



*d. TO BRING AND DEFEND SUITS* — (1) *To Bring Suits*. — An infant usually brings suit by *prochein ami*, or next friend, but in many of the United States the general guardian is authorized by statute to bring suit without being appointed *prochein ami*. Where the appointment is necessary, the general guardian will as a rule be appointed *prochein ami* where his interests do not conflict with those of the ward, and in that capacity he may not only bring suits to obtain possession of the ward's property and to collect his choses in action, but he may institute any litigation necessary for the protection of the ward's personal or property rights.<sup>1</sup>

*In Whose Name Suit Must Be Brought*. — If such suits concern merely the possession of the ward's property, the right to which is in the guardian, or if they are upon contracts made by the guardian himself, they may be brought in the guardian's own name, but generally the guardian must sue in the name of the ward and not in his own name.<sup>2</sup>

*Right to Employ Counsel and Contract for Contingent Fee*. — The right to sue necessarily implies the right to employ counsel,<sup>3</sup> and in some cases, especially those of claims against the government, the right of the guardian to contract to pay counsel by a portion of the property recovered is recognized.<sup>4</sup>

(2) *To Defend Suits*. — As a general rule, an infant defends suits brought against him, by a guardian *ad litem*. But the general guardian will almost always be appointed guardian *ad litem* if his interests do not conflict with those of the ward, and in some of the United States he is authorized by statute to defend without being appointed guardian *ad litem*.<sup>5</sup>

*e. TO SELL PERSONAL ESTATE*. — The guardian has the power to sell the ward's personal property, without an order of court,<sup>6</sup> except where the statute

ceeds for the ward's benefit. *Jones v. Jones*, 20 Iowa 388.

**A Guardian's Settlement of an Account by Crediting His Own Debt thereon is void.** *Baughn v. Shackleford*, 48 Miss. 255; *Lancaster v. Allen*, 1 Head (Tenn.) 326.

**Release of Mortgage on Receiving Other Security.** — A guardian authorized by the court to release a mortgage on receiving other security on unencumbered real estate cannot release it without such substitution, and his release without it is void. *Swarthout v. Curtis*, 5 N. Y. 302, 55 Am. Dec. 345.

**The Husband of a Guardian Has No Authority to Receive Funds of the ward, and payment to him is no defense unless it was specially authorized by the guardian.** *Holmes v. Field*, 12 Ill. 424.

**1. Guardian's Right to Sue** — *California*. — *Gronfier v. Puymiroi*, 19 Cal. 632; *Spear v. Ward*, 20 Cal. 673; *Fox v. Minor*, 32 Cal. 111, 91 Am. Dec. 566; *Carrillo v. McPhillips*, 55 Cal. 130.

*Indiana*. — *Kinsley v. Kinsley*, 150 Ind. 67; *Bowen v. Swander*, 121 Ind. 164; *Shepherd v. Evans*, 9 Ind. 260; *Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, 2 Am. St. Rep. 371; *Cleveland, etc., R. Co. v. Moneyhun*, 146 Ind. 147; *Schee v. McQuilken*, 59 Ind. 269.

*Louisiana*. — *Dolhonde v. Lemoine*, 32 La. Ann. 251.

*Maine*. — *Hutchins v. Dresser*, 26 Me. 76.

*Massachusetts*. — *Winslow v. Winslow*, 7 Mass. 96; *Jennings v. Collins*, 99 Mass. 29, 96 Am. Dec. 687.

*Michigan*. — *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69.

*Mississippi*. — *Wade v. Bridewell*, 38 Miss. 420.

*Nebraska*. — *Walter v. Wala*, 10 Neb. 123.

*New York*. — *Wall v. Bulger*, 46 Hun (N. Y.) 346; *Torrey v. Black*, 58 N. Y. 185; *Thomas v. Bennett*, 56 Barb. (N. Y.) 197; *Carr v. Huff*, 57 Hun (N. Y.) 18; *Perkins v. Stimmel*, 114 N. Y. 359, 11 Am. St. Rep. 659, 42 Hun (N. Y.) 520; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Segelken v. Meyer*, 14 Hun (N. Y.) 593. *Compare Seaton v. Davis*, 1 Thomp. & C. (N. Y.) 91.

*South Carolina*. — *Pepoon v. Clarke*, 1 Mill L. (S. Car.) 137.

*Tennessee*. — *Murphy v. Green*, 2 Baxt. (Tenn.) 403.

*Texas*. — *Roberts v. Sacra*, 38 Tex. 580.

*Virginia*. — *Truss v. Old*, 6 Rand. (Va.) 556, 18 Am. Dec. 748.

*West Virginia*. — *Burdett v. Cain*, 8 W. Va. 282.

**2. See the title GUARDIANS**, 9 ENCYC. OF PL. AND PR. 886.

**3. See *infra*, this title, *Accounting by Guardian*, subdiv. 2. *b. (1) (b) Expenses of Litigation and Counsel Fees*.**

**4. Right to Contract to Pay Contingent Fee.** — *Taylor v. Bemiss*, 110 U. S. 42; *Semmes v. Whitney*, 50 Fed. Rep. 666; *Goldthwaite v. Whitney*, 50 Fed. Rep. 568; *Matter of Hynes*, 105 N. Y. 560; *Wren v. Harris*, 78 Tex. 349; *Ellis v. Stone*, 4 Tex. Civ. App. 157.

But if the ward has a vested title to land, as distinguished from a mere certificate, the guardian cannot contract to pay counsel for recovering possession thereof by conveying a portion. *Glassgow v. McKinnon*, 79 Tex. 116. And see *House v. Brent*, 69 Tex. 27.

**5. Guardian's Right to Defend Suits.** — See the title GUARDIAN AD LITEM, *ante*, p. 2.

**6. Guardian May Sell Personal Property Without Order of Court** — *United States*. — *Maclay v.*

prohibits such sale.<sup>1</sup>

*f. TO SELL REAL ESTATE* — (1) *Guardian Has No Inherent Power to Sell Real Estate*. — A guardian has no inherent power to sell real estate, and as a general rule can make such a sale only by virtue of some special grant of power. A deed made without such authority is void.<sup>2</sup>

*No Inherent Power to Make Contract of Sale*. — A contract by a guardian to sell the ward's real estate, made in advance of any legal authority, is contrary to public policy and void.<sup>3</sup>

*Equitable L. Assur. Soc.*, 152 U. S. 499; *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65, 5 Fish. Pat. Cas. 37.

*Alabama*. — *Woodward v. Donally*, 27 Ala. 198, *overruling Hudson v. Helmes*, 23 Ala. 585.

*Georgia*. — *Fountain v. Anderson*, 33 Ga. 372.

*Louisiana*. — *Hawkins's Succession*, 35 La. Ann. 591.

*Minnesota*. — *Humphrey v. Buisson*, 19 Minn. 221.

*New York*. — *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441.

*Vermont*. — *Fletcher v. Fletcher*, 29 Vt. 98.

*Virginia*. — *Hunter v. Lawrence*, 11 Gratt. (Va.) 111 62 Am. Dec. 640; *State Bank v. Craigh*, 6 Leigh (Va.) 399.

*Contra*. — *Bailey v. Patterson*, 3 Rich. Eq. (S. Car.) 156; *Moore v. Hood*, 9 Rich. Eq. (S. Car.) 322, 70 Am. Dec. 210; *McDuffie v. McIntyre*, 11 S. Car. 551, 32 Am. Rep. 500.

*The Power to Sell Includes the Power to Exchange*. — *Freeman v. Wilson*, 74 N. Car. 369.

*A Guardian Is Always Bound to Obey the Orders of Court*; and if he sells in violation of an order, the sale is void, though he had power to sell without an order. *Cox v. Manvel*, 56 Minn. 358.

1. *Statutes*. — *Kendall v. Miller*, 9 Cal. 591; *De La Montagne v. Union Ins. Co.*, 42 Cal. 290; *Baltimore v. Norman*, 4 Md. 352; *Washbaugh v. Hall*, 4 S. Dak. 168.

*Statute Authorizing Court to Order Sale*. — But it was held in *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65, that a statute authorizing the court to order a sale does not take away the guardian's power to sell without an order.

*A Sale under Order of Court Is Not Valid until Confirmation*. — *Harrison v. Ilgner*, 74 Tex. 86.

2. *Special Grant of Power Essential to Authorize Sale of Real Estate*. — *Wells v. Chaffin*, 60 Ga. 677; *Cooter v. Dearborn*, 115 Ill. 509; *White v. Clawson*, 79 Ind. 188; *Dumestre's Succession*, 40 La. Ann. 571; *Matter of Dorr*, Walk. (Mich.) 145; *Morrison v. Kinstra*, 55 Miss. 71; *Jackson v. Todd*, 25 N. J. L. 121; *State v. Commissioners*, 39 Ohio St. 58; *Johns v. Tiers*, 114 Pa. St. 611; *Washbaugh v. Hall*, 4 S. Dak. 168; *House v. Brent*, 69 Tex. 27.

*Whether a Bona Fide Buyer Obtains Even Color of Title by a deed from a guardian without legal authority, quare*. If he bought *mala fide*, he does not obtain even color of title. *Cooter v. Dearborn*, 115 Ill. 509.

*Consent of Ward Gives No Validity to Sale*. — *Antonidas v. Walling*, 4 N. J. Eq. 42, 31 Am. Dec. 248; *Dellinger v. Foltz*, 93 Va. 720.

*If the Ward Himself Makes a Deed of His Land*, it cannot be validated by guardian, except by a sale regularly made on an order of court. *Doty v. Hubbard*, 55 Vt. 278.

*Authority Not Presumed from Long Lapse of*

*Time*. — See *House v. Brent*, 69 Tex. 27; *Mitchell's Succession*, 33 La. Ann. 353.

*Right to Convey or Dedicate Land for a Public Use*. — A guardian cannot, without an order of court, convey a strip of land to the county for highway purposes. *State v. Commissioners*, 39 Ohio St. 58. But under an order to cut up a strip of land into town lots and sell them he has authority to dedicate the necessary highway strips. *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

Under an order to sell, however, the guardian cannot donate a strip of land to a railroad company, in consideration of the benefits to be derived from the construction of the railroad. *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 294.

*An Order to Mortgage Lands* does not justify inserting a power of sale in the mortgage, since that would authorize a sale without the required proceedings. *Barry v. Clarke*, 13 R. I. 65.

*Statutory Authority to Unite with Cotenants in a Sale* does not authorize a sale of a ward's land to cotenants. *Matter of Congdon*, 2 Paige (N. Y.) 566.

*A Guardian Has No Power to Give a Power of Attorney* to sell the ward's lands. *Gaylord v. Stebbins*, 4 Kan. 42.

*An Agreement of a Guardian for Partition of Lands* in which his ward has an interest does not estop the minor unless ordered or sanctioned by a proper court. *Rainey v. Chambers*, 56 Tex. 17.

*Easement in Ward's Lands*. — A guardian cannot grant an easement in the ward's lands beyond the term of his office; nor can title to such an easement be gained by prescription. *Watkins v. Peck*, 13 N. H. 360.

*Under Certain Exceptional Circumstances a Guardian May Sell or Convey Real Estate Without a Special Grant of Power*. — Thus a general guardian having foreclosed in her own name a mortgage of the ward can sell the property acquired, and standing in her name as guardian, without an order. *Bayer v. Phillips*, (Supm. Ct. Gen. T.) 10 Civ. Pro. (N. Y.) 227.

3. *Guardian Cannot Contract to Sell Real Estate Unless Legally Authorized*. — *Downing v. Peabody*, 56 Ga. 40; *Rome Land Co. v. Eastman*, 80 Ga. 683; *Worth v. Curtis*, 15 Me. 228; *Johns v. Tiers*, 114 Pa. St. 611; *Doughty v. Cottraux*, 8 Tex. Civ. App. 125; *Judson v. Sierra*, 22 Tex. 365.

*Guardian's Contract May Pass Chattel Interest*. — In *New York* it has been held that while a guardian's contract to sell the ward's real estate is wholly void as to the fee, it will pass the reversionary interest after the termination of a lease, during the ward's minority, if approved by the court. *Thacker v. Henderson*, 63 Barb. (N. Y.) 271.



(2) *Power by Will or Deed.* — Power to convey real estate may be conferred on the guardian by the terms of the deed or will by which he is appointed or the land given to the ward; and when power is so given, no order of the court is necessary.<sup>1</sup>

(3) *Power by Special Legislative Act.* — It has been generally held that the legislature has power by special act to confer upon a guardian authority to sell his ward's real estate.<sup>2</sup> But in *New Hampshire* and *Tennessee* a contrary doctrine prevails.<sup>3</sup>

(4) *Power by Order of Court* — (a) *In General.* — The legislative power is usually exercised by general act, to be applied in a particular case only on the order of some court having jurisdiction.

(b) *What Court Has Jurisdiction — Chancery Courts.* — In some jurisdictions it has been held that the power to order a sale of a minor's real estate exists only by virtue of a statute, and that the inherent power of chancery over the estates of infants does not extend to ordering sales of their real estate, on general considerations of advantage to them;<sup>4</sup> but the cases are not uniform as to this limitation of the power of chancery.<sup>5</sup>

*Probate Courts.* — The power to order a sale is usually vested in the probate court having general power over the guardianship; or, if the guardianship be foreign, in the probate court having jurisdiction over the situs of the land.<sup>6</sup>

(c) *Causes Justifying Sale.* — The statutes also fix the grounds on which a sale

**Lands in Which Both Guardian and Ward Have Interest.** — An agreement by a guardian to exchange lands in which both he and the ward owned a share, for other lands, and that he would procure an order, make the sale, and that the price should not exceed three thousand dollars, is void and binds neither the ward nor the guardian personally. *Zander v. Feely*, 47 Ill. App. 659.

1. **Power May Be Conferred by Will or Deed.** — *Norris v. Harris*, 15 Cal. 226; *Thurmond v. Faith*, 69 Ga. 832.

**A Sale Cannot Be Ordered Against the Provisions of the Will** under which the infant holds the land. *Rogers v. Dill*, 6 Hill (N. Y.) 415.

2. **Power May Be Conferred by Special Legislative Act** — *United States*. — *De Mill v. Lockwood*, 3 Blatchf. (U. S.) 56; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 565.

*Mississippi.* — *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Burrus v. Burrus*, 56 Miss. 92.

*Missouri.* — *Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148.

*New York.* — *Brevoort v. Grace*, 53 N. Y. 245; *Clark v. Van Surlay*, 15 Wend. (N. Y.) 436; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570.

*Rhode Island.* — *Thurston v. Thurston*, 6 R. I. 296.

So a legislative act authorizing a particular guardian to convey land in fulfilment of a contract of the former owner is valid. *Estep v. Hutchman*, 14 S. & R. (Pa.) 435.

Whether a special act authorizing a stranger to sell the ward's land, or the guardian to sell it without complying with the general law, are valid, *quære*. *Paty v. Smith*, 50 Cal. 153.

**Special Act Valid though a General Law Exists.** — *Brenham v. Davidson*, 51 Cal. 352; *Rice v. Parkman*, 16 Mass. 326.

**Act Held to Assume Not to Confer Guardianship.** — If the act authorizes "M., the mother and guardian of F.," to sell, it assumes the fact of the guardianship, but does not confer it, and

M. must be appointed guardian by the proper court before she can use the power. *Paty v. Smith*, 50 Cal. 153.

3. In these states acts of the legislature authorizing the sale of a particular ward's lands have been held to be void as judicial acts, and also as depriving the ward of property without due process of law. *Opinions of Justices*, 4 N. H. 572; *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

4. **No Inherent Power in Chancery to Order Sale of Real Estate.** — *Matter of —*, an Infant, 1 Molloy 528; *Calvert v. Godfrey*, 6 Beav. 97; *Rogers v. Dill*, 6 Hill (N. Y.) 415; *Pierce v. Trigg*, 10 Leigh (Va.) 423; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698. See also *Garland v. Loving*, 1 Rand. (Va.) 396.

5. **Chancery Has an Inherent Power to Order the Sale of an Infant's Real Estate** whenever it is for its interest to do so. *Ex p. Jewett*, 16 Ala. 409; *Smith v. Sackett*, 10 Ill. 534; *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *Thompson v. Mebane*, 4 Heisk. (Tenn.) 370; *Lancaster v. Lancaster*, 13 Lea (Tenn.) 132; *Hurt v. Long*, 90 Tenn. 445.

6. **Power of Probate Courts to Order Sale.** — *Spellman v. Dowse*, 79 Ill. 66; *Nelson v. Lee*, 10 B. Mon. (Ky.) 495; *Menage v. Jones*, 40 Minn. 254; *Neal v. Bartleson*, 65 Tex. 478. See also *Thaw v. Ritchie*, 136 U. S. 519.

**Foreign Guardian Required to Give Bond** — *Tennessee.* — *McClelland v. McClelland*, 7 Baxt. (Tenn.) 210; *Hickman v. Dudley*, 2 Lea (Tenn.) 375.

**Judge in Chambers May Order Guardian's Sale.** — *Stewart v. Daggy*, 13 Neb. 290.

**Jurisdiction Acquired by Special Act Dividing Town.** — A court to which has been given jurisdiction of an estate by a special act dividing a town may order a sale of the real estate, though the residence of the ward and the real estate are outside its general limit of jurisdiction. *McGale v. McGale*, 18 R. I. 675.

**Court Cannot Order Exchange of Lands.** — *Meyer v. Rousseau*, 47 Ark. 460.



may be ordered. These are ordinarily to raise funds for the maintenance of the ward, or for the necessary expenses of the estate; in some jurisdictions the better investment of the funds, or the general interest of the ward as determined by the court, is made a statutory ground for a sale; but the power of the courts is always strictly limited to the grounds fixed by statute.<sup>1</sup>

(a) **What Interest May Be Sold.** — The power of sale of the ward's real estate (unless limited by statute) extends to future<sup>2</sup> and even to contingent<sup>3</sup> interests. But great caution will be exercised in ordering a sale of such estates, in order that the ward's interests may not be sacrificed.<sup>4</sup>

**1. Grounds on Which Sale May Be Ordered.** — *Smith v. Biscailuz*, 83 Cal. 344; *Dumestre's Succession*, 40 La. Ann. 571; *Fitzpatrick v. Beal*, 62 Miss. 244; *Glasgow v. McKinnon*, 79 Tex. 116. And see the statutes of the several states.

As to whether chancery has inherent power to order a sale of the ward's real estate on general considerations of advantage to him, see *supra*, the next preceding subdivision of this section.

But in *Maryland* it has been held that a sale for better investment is a matter of speculative judgment, and not of judicial discretion, and that neither a court nor the legislature has a right to dispose of an infant's land except for necessary reasons; that a statute authorizing a sale "for the interest and advantage of such infant" must be qualified by adding "for the maintenance and education of the said infant," and that unless so construed the act would be unconstitutional and void. *Williams's Case*, 3 Bland (Md.) 186.

**Where Father Is Able to Support Infant.** — The lands of a minor will not be sold even for support where the father is able to support him. *Morris v. Morris*, 15 N. J. Eq. 239. See *infra*, this title, *Accounting by Guardian*, subdiv. 2. b. (2) (c) *When Father Is Guardian*.

**To Pay Incumbrances.** — Chancery may order a sale to pay off an incumbrance, though the encumbered land be in another state. *Allman v. Taylor*, 101 Ill. 185.

A sale should not be ordered to pay a mortgage, unless it is shown to be more desirable to sell the land than to have it sold on foreclosure. *Greenbaum v. Greenbaum*, 81 Ill. 397.

**To Make Improvements.** — The ward's land cannot be sold to pay for improvements, even if they were ordered by the court. *Payne v. Stone*, 7 Smed. & M. (Miss.) 367. But in *U. S. Mortgage Co. v. Sperry*, 24 Fed. Rep. 838, it was said that where the power of sale is granted, and the objects are not limited, the court may order a sale for the purpose of improving other real estate.

**To Pay Debts.** — Where the heirs are indebted, but the debts are not being pressed, and there is other property from the income of which the debts can be paid in a reasonable time, a sale to pay the debts and to invest the surplus proceeds differently will not be ordered against the opposition of the ward's relatives. *Linder v. Holmes*, 2 Ind. 629.

In *Louisiana* a sale of an entire estate owned by adults and minors, to pay debts and settle the interests and claims of the adults, cannot be granted, since it does not fall within the provisions for either an administrator's or a

tutor's sale. *Dumestre's Succession*, 40 La. Ann. 571.

**To Repay Guardian's Advances.** — A guardian who has exceeded the available funds in his expenditures cannot have an order of sale to pay his advances, where such order is not necessary for the ward's future necessities. *Harkrader v. Bonham*, 88 Va. 247; *Phelps v. Buck*, 40 Ark. 219.

**A Statute Authorizing the Sale of Land Belonging to Heirs or Devisees Jointly**, being minors, does not authorize a sale where the minors are co-owners, but not by descent or legacy. *Fitzpatrick v. Beal*, 62 Miss. 244.

**Sale for Partition Void Unless Authorized by Statute.** — If the statute gives no power to sell the ward's estate for partition, such sale, though confirmed, is void. *Glasgow v. McKinnon*, 79 Tex. 116.

**If the Sale Is for the Purpose of Raising Money for the Ward's Necessities**, the ward's needs and his entire estate must be shown; but if it is for the purpose of making a better investment of the funds, only the condition of the estate to be sold need be set up. *Smith v. Biscailuz*, 83 Cal. 344.

**2. Power of Sale Extends to Future Interests.** — *Nunn v. Hancock*, L. R. 6 Ch. 850; *Jenkins v. Fahey*, 73 N. Y. 355, reversing 11 Hun (N. Y.) 351; *Cooper v. Hepburn*, 15 Gratt. (Va.) 551.

**Illustration.** — So under a statutory power to mortgage the ward's land, a reversion may be mortgaged. *Foster v. Young*, 35 Iowa 27.

**Interests Not Divested by Sale.** — A guardian's sale divests only the interest then possessed by the ward, and not an interest thereafter inherited by him. *Erwin v. Garner*, 108 Ind. 488.

And in *Louisiana*, where a tutor sells, under an order to sell the ward's immovable property, a piece of land half of which the tutor owns, her interest being mortgaged to the ward, and half of which the ward owns, the sale does not divest the ward's mortgage interest. *Lyman v. Stroudbach*, 47 La. Ann. 71.

**3. Power of Sale Extends to Contingent Interests.** — *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Hovey v. Nellis*, 98 Mich. 374; *Matter of Dodge*, 105 N. Y. 585, solving the doubt stated in *Dodge v. St. John*, 96 N. Y. 260, and reversing *Baker v. Lorillard*, 4 N. Y. 257.

**4. Caution Will Be Exercised to Protect Ward's Interest.** — *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Cooper v. Hepburn*, 15 Gratt. (Va.) 551.

If no fair sale can be made on account of possible future claimants with superior title, a sale should not be ordered. *Garland v. Lov-*

And the Interest of Unborn Heirs cannot be divested by such a sale, except by express legislative authority.<sup>1</sup>

(6) **Requisites of Valid Sale.**—To make a sale which will confer title on the purchaser and divest the ward's title, the provisions of the statute must be substantially complied with.<sup>2</sup> Under most of the statutes there must be a lawful guardian,<sup>3</sup> a petition filing substantially at least the requirements of the law,<sup>4</sup>

ing, 1 Rand. (Va.) 396. Nor will a sale be ordered where a sacrifice is probable, on account of flaws in the title. *Moore's Estate*, 9 Phila. (Pa.) 326, 30 Leg. Int. (Pa.) 176.

A reversion will not be sold to raise funds for repairs which it is the life-tenant's duty to make. The question is whether it will or will not sell better after the lapse of the life estate. *Matter of Heaton*, 21 N. J. Eq. 221.

1. **Interests of Unborn Heirs.**—*Massie v. Hiatt*, 82 Ky. 314; *Downin v. Sprecher*, 35 Md. 474; *Baker v. Lorillard*, 4 N. Y. 257; *Garland v. Loving*, 1 Rand. (Va.) 396.

2. **Provisions of Statute Must Be Substantially Complied With.**—*Orman v. Bowles*, 18 Colo. 463; *Strouse v. Drennan*, 41 Mo. 289; *Edwards v. Taliaferro*, 34 Mich. 13; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537.

In some states it is held that all the requirements must be strictly complied with, to divest the ward's title by a guardian's sale.

*Kentucky.*—*Wells v. Cowherd*, 2 Met. (Ky.) 514; *Bell v. Clark*, 2 Met. (Ky.) 573; *Mattingly v. Read*, 3 Met. (Ky.) 524, 79 Am. Dec. 565; *Watts v. Pond*, 4 Met. (Ky.) 62; *Woodcock v. Bowman*, 4 Met. (Ky.) 40; *Carpenter v. Strother*, 16 B. Mon. (Ky.) 292; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 387.

*New York.*—*Ellwood v. Northrup*, 106 N. Y. 172.

*North Carolina.*—*Leary v. Fletcher*, 1 Ired. L. (25 N. Car.) 259; *Ducket v. Skinner*, 11 Ired. L. (33 N. Car.) 431; *Spruill v. Davenport*, 3 Jones L. (48 N. Car.) 42; *Pendleton v. Trueblood*, 3 Jones L. (48 N. Car.) 96.

In *Louisiana* a sale cannot be made without the advice of a family meeting, and an order of court. *Bailey v. Morrison*, 4 La. Ann. 523; *Lemoine v. Ducote*, 45 La. Ann. 857; *Weber's Succession*, 16 La. Ann. 420. But the purchaser is not bound to look to the constitution of the meeting. *Lemoine v. Ducote*, 45 La. Ann. 857.

**A Compliance with the Statute Must Affirmatively Appear on the Record.**—*Ellwood v. Northrup*, 106 N. Y. 172; *Orman v. Bowles*, 18 Colo. 463.

**Requirements Have No Applications to Administrator's Sales.**—The requirements of the law in regard to guardian's sales have no application where the sale is by an administrator and the wards are interested only as heirs of the estate. *Lange's Succession*, 46 La. Ann. 1017.

3. **Requisites of Valid Sale—Lawful Guardian.**—*Hatch v. Ferguson*, 68 Fed. Rep. 43; *Seaverns v. Gerke*, 3 Sawy. (U. S.) 353; *Dooley v. Bell*, 87 Ga. 74; *State v. McLaughlin*, 77 Ind. 335; *McKee v. Thomas*, 9 Kan. 343; *Higinbotham v. Thomas*, 9 Kan. 328; *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 779; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; *Matter of Winkleman*, 11 Nev. 87; *Perry v. Brainard*, 11 Ohio 442.

**Natural Guardian Cannot Sell.**—A deed made

by a father as natural guardian of his child is void, though ordered by the proper court. See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin—Guardianship by Nature—Is over Person Only.*

**A Husband Is Not the Wife's Guardian**, within the statute authorizing a sale on the guardian's application, though her guardianship was terminated by the marriage. *Dengenhart v. Cracraft*, 36 Ohio St. 549.

**The Curator Provided for by the Arkansas Statutes**, whose duty is *ad interim* only, and ceases on the appointment of a guardian, has no power to make a sale even if ordered by the court. *Summers v. Howard*, 33 Ark. 490.

**Appointment of Foreign Guardian Must Be Proved.**—One who buys at a sale made on petition of a foreign guardian cannot be required to complete the purchase without proof of the actual appointment of the foreign guardian. *Williams v. Duncan*, 92 Ky. 125.

**Guardian May Pursue Petition Filed by His Predecessor.**—A petition of sale does not abate by the resignation of the guardian, but his successor may pursue it. *Wade v. Carpenter*, 4 Iowa 361.

**Irregularities in Appointment of Guardian—Statute Construed.**—A provision in a statute that a sale shall not be invalidated by any irregularity in the proceedings extends to irregularities in the appointment of the guardian. *Walker v. Goldsmith*, 14 Oregon 125. See *Davis v. Hudson*, 29 Minn. 27.

**Partition Sale by Guardian Who Has Not Filed Inventory or Received Commission.**—The other owners have a right to object to a partition sale where the guardian of a minor owner, though appointed and sworn, has never filed an inventory or received a commission, as the doubt as to his power might affect the price or induce litigation. *Hewes v. Baxter*, 45 La. Ann. 1049, 1059.

**There Is No Such Thing as a Guardian De Facto.**—The deed of one not legally appointed is null, and can be attacked by one claiming under a deed given by the heirs themselves when of age. *Bell v. Love*, 72 Ga. 125.

**Guardian Formerly Executor of Ancestor's Estate.**—A decree of sale cannot be attacked against *bona fide* purchasers because the guardian had fourteen years before been executor of the estate of an ancestor, where his duties as such had long been ended, all parties asked his appointment, and there was no fraud or wrongdoing as to the appointment or sale. *Kramer v. Mugele*, 153 Pa. St. 493.

4. **Petition.**—*Fitch v. Miller*, 20 Cal. 352; *Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447; *Vowless v. Buckman*, 6 Dana (Ky.) 466; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

**Petitions Held Insufficient to Support Sale.**—A petition by next friend, instead of by guardian (*Vowless v. Buckman*, 6 Dana (Ky.) 466),



a proper sale bond given by the guardian,<sup>1</sup> an oath administered to

or one which misdescribes the land (*Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447; *contra*, *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190), or which is returnable on no return or term day (*Haws v. Clark*, 37 Iowa 355), is insufficient to support a sale.

**But the Truth or Untruth of the Matters Stated in the Petition** cannot be inquired into to attack a sale. *Lynch v. Kirby*, 36 Mich. 238; *Durrett v. Davis*, 24 Gratt. (Va.) 302.

**Filing of Petition or of Particular Form of Petition Not Essential.** — But while, under most of the statutes, the filing of a proper petition is essential to the validity of the sale, under some of them a different rule prevails. Thus it has been held that the filing of a proper petition need not be shown (*McKeever v. Ball*, 71 Ind. 398; *Blanchard v. De Graff*, 60 Mich. 107; *compare* *Ryder v. Flanders*, 30 Mich. 336); that no particular form of petition is necessary to support an order of sale made by a proper court (*Thaw v. Ritchie*, 5 Mackey (D. C.) 200); that the failure to sign or swear to the petition will not invalidate the sale (*Ellsworth v. Hall*, 48 Mich. 407; *Williamson v. Warren*, 55 Miss. 199); that the fact of the petition being made in the name of the guardian instead of the ward will not render the sale invalid (*Newbold v. Schlens*, 66 Md. 585); and that the sale will not be invalidated by the fact that the petition asked for an order to exchange land, instead of to sell it, if the order was right (*Nesbit v. Miller*, 125 Ind. 106).

**Not Essential that Petition Be Supported by Evidence.** — Under the *Indiana* Revised Statutes of 1843 it was not necessary for a guardian's application to sell to be supported by evidence to authorize an order. *Adkins v. Sidener*, 5 Ind. 228.

In *Maryland* it has been held that an order is admissible as a link in the title, though no evidence was introduced to support the petition, and it was granted on the admissions of the infant's answer. *House v. Wiles*, 12 Gill & J. (Md.) 338.

**1. Proper Sale Bond Requisite** — *Kentucky*. — *Barber v. Hopewell*, 1 Met. (Ky.) 260; *Megowan v. Way*, 1 Met. (Ky.) 418; *Carpenter v. Strother*, 16 B. Mon. (Ky.) 296; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 391; *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 779; *Barnett v. Bull*, 81 Ky. 127; *Kelly v. Muir*, 17 Ky. L. Rep. 167; *Loeb v. Struck*, 19 Ky. L. Rep. 935, 42 S. W. Rep. 401. But see *Thornton v. McGrath*, 1 Duv. (Ky.) 349; *Power v. Power*, 12 Ky. L. Rep. 793.

*Maine*. — *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

*Massachusetts*. — *Williams v. Reed*, 5 Pick. (Mass.) 480.

*Michigan*. — *Stewart v. Bailey*, 23 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336.

*Mississippi*. — *Vanderburg v. Williamson*, 52 Miss. 233.

*Wisconsin*. — *Weld v. Johnson Mfg. Co.*, 84 Wis. 537.

Where the statute provides that the sale shall be absolutely void unless bond is given, such a sale is void though the land was a reinvestment made under a will giving to the

mother power to sell land and reinvest the proceeds. *Fritsch v. Klansing*, 11 Ky. L. Rep. 788.

In *Indiana* a sale can be set aside against the purchaser in a direct proceeding for the purpose, if the guardian never gave a sale bond, and has not accounted for the proceeds. *McKeever v. Ball*, 71 Ind. 398. But the sale cannot be set aside on this account in a collateral proceeding. *Davidson v. Bates*, 111 Ind. 391; *Davidson v. Hutchins*, 112 Ind. 322; *Marquis v. Davis*, 113 Ind. 219.

In *Wisconsin* a sale confirmed by the court is not void though the sale bond fails in almost every particular to conform to the statute. *McKinney v. Jones*, 55 Wis. 39.

And in *Michigan* it has been held that where the guardian gave no sale bond, but properly accounted for the proceeds, if the sale is void at all, it may be affirmed by the ward. *Fender v. Powers*, 62 Mich. 324.

**Kentucky Statute** — **Sale of Land Owned Jointly.** — It is not essential to the validity of a sale of real estate, owned jointly with an infant, under the provisions of Bullitt's Civ. Code Ky. (1895), § 490, subsec. 2, that the guardian should execute the bond required by section 493, as it is provided in section 497 that the infant's share shall not be paid to the purchaser, but shall remain a lien on the land, bearing interest, until the infant becomes of age, or until the guardian executes the bond. *Shelby v. Harrison*, 84 Ky. 144.

**Sureties.** — A sale for reinvestment, under Bullitt's Civ. Code Ky. (1895), § 493, subsec. 1, is void if there is only one surety on the guardian's bond, instead of two as required by the statute. *Barnett v. Bull*, 81 Ky. 127. *Compare* *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. Rep. 294.

But under the *Indiana* statute, Rev. Stat. 1881, § 2532, a sale ordered by the proper court, upon a bond approved by the court, will not be set aside against a *bona fide* purchaser, though the sale bond had only one surety instead of two. *Marquis v. Davis*, 113 Ind. 219.

**Giving Bond After Order.** — Under a *Kentucky* statute it has been held that giving bond after the order does not cure the defect. *Barber v. Hopewell*, 1 Met. (Ky.) 260; *Megowan v. Way*, 1 Met. (Ky.) 418. But see *McKee v. Hann*, 9 Dana (Ky.) 526.

But under a *New York* statute a contrary rule has been held to prevail. *Kelly v. Pitcher*, (Brooklyn City Ct. Gen. T.) 4 N. Y. Supp. 3.

**Who Can Question Sale for Lack of Proper Bond.** — No one except the ward or some one claiming under him can question a sale for lack of a proper bond. *Goldsmith v. Gilliland*, 10 Sawy. (U. S.) 606, 23 Fed. Rep. 645.

**Bond Not Essential.** — Under the statutes of some of the United States a failure to give bond does not render the sale void. *Bunce v. Bunce*, 59 Iowa 533; *Hamiel v. Donnelly*, 75 Iowa 93; *Watts v. Cook*, 24 Kan. 278; *Howbert v. Heyle*, 47 Kan. 58; *Mauarr v. Parrish*, 26 Ohio St. 636; *Arrowsmith v. Harmoning*, 42 Ohio St. 254, followed in *Arrowsmith v. Gleason*, 129 U. S. 86.

Under the *Mississippi* Statute, Code 1857, art.



him,<sup>4</sup> an order of the court for the sale of the land,<sup>2</sup> a sale in compliance therewith and in substantial conformity to the requirements of the statute,<sup>3</sup> a report of the sale to and confirmation by the court,<sup>4</sup> and an actual convey-

151 a special sale bond was not essential unless the court required it. *Morton v. Carroll*, 68 Miss. 699. Compare *Vanderburg v. Williamson*, 52 Miss. 233.

1. Oath. — *Cooper v. Sunderland*, 3 Iowa 114; *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537. The oath is stated as a requisite, with other requirements, in *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394; *Williams v. Reed*, 5 Pick. (Mass.) 480.

2. Order of Court Essential. — *Weld v. Johnson Mfg. Co.*, 84 Wis. 537.

Under the *California* statute, Code Civ. Pro., § 1544, the order was required to contain a definite and certain description of the land. The description contained in the order could not be helped out by reference to documents not contained in the order itself. *Hill v. Wall*, 66 Cal. 130.

3. The Sale Is Generally Required to Be Public. — Thus, in *Florida*, under a general order to sell the ward's real estate, the guardian cannot sell it at private sale. *Leuders v. Thomas*, 35 Fla. 518, 48 Am. St. Rep. 255.

So under the *Oregon* Act of 1853, a guardian's sale was void unless it appeared that it was made at public auction after due notice of the time and place. *Hobart v. Upton*, 2 Sawy. (U. S.) 302. But a public adjournment from the time and place published did not avoid the sale. *Gager v. Henry*, 5 Sawy. (U. S.) 237.

That a private sale was ordered where the value was such as to require a public sale will not invalidate the sale if confirmed by the proper court. *Eliason v. Bronnenberg*, 147 Ind. 248.

The change of the order of sale, so as to require a public instead of a private sale, does not vitiate the bond nor invalidate the sale already made. *Stevenson v. State*, 69 Ind. 257, 71 Ind. 52.

Appraisal. — Some of the statutes require that an appraisal be made of the property to be sold. *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 779; *Strouse v. Drennan*, 41 Mo. 289.

A Guardian Can Sell for Nothing but Cash, and if he sells property in which the ward owns a half, and his (the guardian's) wife the other half, receiving pay by the cancellation of his own debt, the payment so made will be regarded as being for the wife's part, and he must account in money for the ward's half. *Brenham v. Davidson*, 51 Cal. 352.

Fraud to Misrepresent Sale as Made for Cash. — It is fraud in law, whatever the intent, for the guardian to represent the sale as made for cash when no cash has been paid, and a deed made in pursuance of such a sale will not pass the title. *Wohlscheid v. Bergrath*, 46 Mich. 46.

Inadequacy of Price. — Mere inadequacy of price, without more, is not a sufficient cause for setting aside the sale. The English practice of opening the biddings has not been adopted in the United States. *Ayers v. Baumgarten*, 15 Ill. 444.

4. Report and Confirmation of Sale — *Arkansas*. — *Guynn v. McCauley*, 32 Ark. 97; *Reid v.*

*Hart*, 45 Ark. 41; *Apel v. Kelsey*, 47 Ark. 413; *Ambleton v. Dyer*, 53 Ark. 224; *Alexander v. Hardin*, 54 Ark. 480; *Lumkins v. Johnson*, 61 Ark. 80; *Greer v. Anderson*, 62 Ark. 213.

*Illinois*. — *Mason v. Wait*, 5 Ill. 127; *Young v. Keogh*, 11 Ill. 642; *Rawlings v. Bailey*, 15 Ill. 178; *Chapin v. Curtenius*, 15 Ill. 427; *Ayers v. Baumgarten*, 15 Ill. 444; *Matter of Harvey*, 16 Ill. 127; *Musgrave v. Conover*, 85 Ill. 374. But see *Mulford v. Beveridge*, 78 Ill. 455.

*Indiana*. — *Maxwell v. Campbell*, 45 Ind. 360; *Hammann v. Mink*, 99 Ind. 279.

*Michigan*. — *People v. Judge*, 19 Mich. 296; *Edwards v. Taliaferro*, 34 Mich. 13.

*Mississippi*. — *State v. Cox*, 62 Miss. 786.

*Missouri*. — *Strouse v. Drennan*, 41 Mo. 289; *McVey v. McVey*, 51 Mo. 406; *Bone v. Tyrrell*, 113 Mo. 175. But see *Robert v. Casey*, 25 Mo. 584, under a statute since repealed.

*New Jersey*. — *Titman v. Riker*, 43 N. J. Eq. 122.

*New York*. — *Ellwood v. Northrup*, 106 N. Y. 172.

*Texas*. — *Robertson v. Johnson*, 57 Tex. 62.

The Same Requirement Applies to a Mortgage by Order of the Court. — *Battell v. Torrey*, 65 N. Y. 294.

Conveyance Before Confirmation Inoperative — Effect of Subsequent Confirmation. — A conveyance made before the sale is reported and confirmed is inoperative, and conveys no title to the purchaser, but subsequent confirmation gives an equitable title which is good against collateral attack. *Alexander v. Hardin*, 54 Ark. 480; *Maxwell v. Campbell*, 45 Ind. 360.

Approval of Prior Deed After Confirmation. — And if a deed made before confirmation of the sale is after such confirmation reported to and approved by the court, it will become effectual to convey the title. *Hammann v. Mink*, 99 Ind. 279; *Dawson v. Helmes*, 30 Minn. 107.

Sale Lacking in Legal Requirements Validated by Confirmation. — It has been held that the court may, by its order of confirmation, give validity to a sale although it was entirely lacking in the legal requirements of a sale. *Elliott v. Blair*, 5 Coldw. (Tenn.) 185; *Ex p. Kirkman*, 3 Head (Tenn.) 517; *Cralle v. Meem*, 8 Gratt. (Va.) 496; *Daniel v. Leitch*, 13 Gratt. (Va.) 195.

Recording Not Essential. — If the order of confirmation was actually made, it is not fatal to the sale that it was not recorded. The fact, and not the evidence, is looked to. *Calloway v. Nichols*, 47 Tex. 331.

The Confirmation Need Not Be Formal; the acceptance of the account, which shows the sale, and the disposition made of the proceeds, may be sufficient. *Robertson v. Johnson*, 57 Tex. 62.

Confirmation Not Essential. — Under statutes in *California* and *Ohio* it has been held that confirmation is not essential to the validity of the conveyance to the purchaser. *Scarfe v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190; *Stall v. Macalester*, 9 Ohio 19.

ance by deed.<sup>1</sup>

Notice to the Ward of the petition for a sale is not usually required, since the proceeding is not adversary to his rights, and the guardian represents him;<sup>2</sup> but notice must be given to whatever persons in interest are made parties by the statute.<sup>3</sup>

(f) **Sale Cannot Be Collaterally Attacked for Mere Irregularities of Procedure.** — A sale cannot be collaterally attacked for mere irregularities of procedure if the court having jurisdiction of the matter ordered and confirmed the sale.<sup>4</sup>

**1. Conveyance by Deed Essential.** — A sale, followed by confirmation and payment of the price, is not enough to pass the title. *Doe v. Jackson*, 51 Ala. 514.

But a Contract of Sale, Duly Confirmed, Passes an Equitable Title if in writing; and if by parol, payment of the price, possession, and the making of improvements complete the equitable title. *Wood v. Mather*, 38 Barb. (N. Y.) 473.

The Execution of the Deed Is a Ministerial Act, which may be performed by the guardian afterwards, though her authority has ceased by her marriage. *Carr v. Spannagel*, 4 Mo. App. 285.

**Requirements of Deed.** — Where one described himself as guardian, and recited the "license and authority to me granted by the Court of Probate for the district of E.," it was held to be a sufficient recital of the order. *Howard v. Lee*, 25 Conn. 1, 65 Am. Dec. 550.

A mortgage executed by the guardian on a regular order, and which shows its nature on its face, is effectual, though she erroneously signs "A., widow." *Middleton v. Parke*, 3 App. Cas. (D. C.) 149.

**2. Notice to Ward Generally Not Essential — California.** — *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190.

*Georgia.* — *Prine v. Mapp*, 80 Ga. 137.

*Indiana.* — *Davidson v. Lindsay*, 16 Ind. 186; *Williams v. Williams*, 18 Ind. 345.

*Kentucky.* — *Howard v. Singleton*, 94 Ky. 336.

*Nebraska.* — *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627.

*New York.* — *Matter of Whitlock*, 32 Barb. (N. Y.) 48.

*Texas.* — *Barnes v. Hardeman*, 15 Tex. 366.

*Wisconsin.* — *Mohr v. Porter*, 51 Wis. 487, overruling *Mohr v. Tulip*, 40 Wis. 66, and following *Mohr v. Manierre*, 101 U. S. 417. These Wisconsin cases were of an insane ward.

The ward is not entitled to a review of the proceedings. *Davidson v. Lindsay*, 16 Ind. 186; *Williams v. Williams*, 18 Ind. 345.

But in Some Jurisdictions proceedings for the sale of the ward's lands are void, unless the ward has notice thereof. *Musgrave v. Conover*, 85 Ill. 374; *Washburn v. Carmichael*, 32 Iowa 475; *Lyon v. Vanatta*, 35 Iowa 521; *Rankin v. Miller*, 43 Iowa 11.

In Mississippi the ward is a necessary party to a probate order of sale, *M'Allister v. Moyer*, 30 Miss. 258; *Kennedy v. Gaines*, 51 Miss. 625; *Rule v. Broach*, 58 Miss. 552; but not in proceedings in chancery. *McDuff v. McDuff*, 58 Miss. 751 [restricting *Hamilton v. Lockhart*, 41 Miss. 460]; *Morton v. Carroll*, 68 Miss. 699; *Louisville, etc., R. Co. v. Blythe*, 69 Miss. 939, 30 Am. St. Rep. 599. But the legislature may by special act authorize a sale

of the infant's land without notice to him. *Burrus v. Burrus*, 56 Miss. 92.

In Maryland proceedings in equity for a sale by the guardian, to which the ward was not a party, are not binding on her. But if she and her husband enter in the case, and ask confirmation of the sale, they are concluded. *Hunter v. Hatton*, 4 Gill (Md.) 115, 45 Am. Dec. 117.

**3. Notice to Persons Made Parties by the Statute Essential.** — *Stampley v. King*, 51 Miss. 728; *Wells v. Steckleberg*, 50 Neb. 670.

In Lufkin's Petition, 3 Mass. 398, notice was given to the presumptive heirs of the ward on a petition for sale to pay debts. But in *Kelley v. Morrell*, 29 Fed. Rep. 736, it was held that a sale ordered by a court of superior jurisdiction will not be disregarded because notice to interested parties does not appear on record.

**4. Mere Irregularities of Procedure Not Ground for Collateral Attack — United States.** — *Gager v. Henry*, 5 Sawy. (U. S.) 237; *Kelley v. Morrell*, 29 Fed. Rep. 736; *Arrowsmith v. Gleason*, 46 Fed. Rep. 256.

*Alabama.* — *Doe v. Jackson*, 51 Ala. 514; *Daughtry v. Thweatt*, 105 Ala. 615, 53 Am. St. Rep. 146.

*Arkansas.* — *Fleming v. Johnson*, 26 Ark. 421; *Beidler v. Friedell*, 44 Ark. 411; *Alexander v. Hardin*, 54 Ark. 480.

*California.* — *Fitch v. Miller*, 20 Cal. 352.

*Illinois.* — *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Fitzgibbon v. Lake*, 29 Ill. 165, 81 Am. Dec. 302; *Mulford v. Stalzenback*, 46 Ill. 303; *Mulford v. Beveridge*, 78 Ill. 455; *Spring v. Kane*, 86 Ill. 580; *Allman v. Taylor*, 101 Ill. 185; *Benefield v. Albert*, 132 Ill. 665.

*Indiana.* — *Worthington v. Dunkin*, 41 Ind. 515; *Davidson v. Koehler*, 76 Ind. 421; *Hamann v. Mink*, 99 Ind. 279; *Walker v. Hill*, 111 Ind. 223; *Meikel v. Borders*, 129 Ind. 529; *Eliason v. Bronnenberg*, 147 Ind. 248.

*Iowa.* — *Pursley v. Hayes*, 22 Iowa 11, 92 Am. Dec. 350; *Bunce v. Bunce*, 59 Iowa 533; *Hamiel v. Donnelly*, 75 Iowa 93.

*Kansas.* — *Howbert v. Heyle*, 47 Kan. 58.

*Louisiana.* — *Wisenor v. Lindsay*, 33 La. Ann. 1211.

*Maine.* — See *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

*Maryland.* — *Downin v. Sprecher*, 35 Md. 474; *Gregory v. Lenning*, 54 Md. 51; *Mumma v. Brinton*, 77 Md. 107.

*Massachusetts.* — *Brigham v. Boston, etc., R. Co.*, 102 Mass. 14.

*Michigan.* — *Marvin v. Schilling*, 12 Mich. 356; *Dexter v. Cranston*, 41 Mich. 448; *Schaale v. Wasey*, 70 Mich. 414. See also *Blanchard v. De Graff*, 60 Mich. 107.

*Minnesota.* — *Blanchard v. De Graff*, 384, 88 Am. Dec. 88.



(g) **Obligations and Rights of Purchaser.** — The purchaser is bound to look to the proceedings for a sale and see that an order has been properly made by a competent court: and so far the maxim *caveat emptor* applies.<sup>1</sup> But if he pays the purchase money in good faith, without actual notice of defects, the ward will be required to do him equity if he attacks the sale.<sup>2</sup> The purchaser is not bound to inquire into irregularities not appearing of record,<sup>3</sup> nor as to the application of the purchase money by the guardian.<sup>4</sup> If, however, he had actual knowledge of the defects,<sup>5</sup> or was himself guilty of any collusion with the guardian,<sup>6</sup> or if he failed to pay the purchase price in cash,<sup>7</sup> he can claim

*Mississippi.* — Morton v. Carroll, 68 Miss. 699.

*Missouri.* — Exendine v. Morris, 76 Mo. 416.

*Nebraska.* — Larimer v. Wallace, 36 Neb. 444; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627.

*New Hampshire.* — Kenniston v. Leighton, 43 N. H. 309.

*North Carolina.* — Williams v. Harrington, 11 Ired. L. (33 N. Car.) 616, 53 Am. Dec. 421; Bryan v. Manning, 6 Jones L. (51 N. Car.) 334.

*Ohio.* — Mauarr v. Parrish, 26 Ohio St. 636.

*Oregon.* — Walker v. Goldsmith, 14 Oregon 125; McCulloch v. Estes, 20 Oregon 349.

*Pennsylvania.* — Merklein v. Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634; Gilmore v. Rodgers, 41 Pa. St. 120.

*Texas.* — Berry v. Young, 15 Tex. 369; Brown v. Christie, 27 Tex. 73, 84 Am. Dec. 607; Butler v. Stephen, 77 Tex. 599; Weems v. Masterson, 80 Tex. 49; Kendrick v. Wheeler, 85 Tex. 247; Williams v. Pollard, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020.

*Virginia.* — Pennybacker v. Switzer, 75 Va. 671. See also Cooper v. Hepburn, 15 Gratt. (Va.) 551.

*Washington.* — Brazee v. Schofield, 2 Wash. Ter. 209.

*Wisconsin.* — Emery v. Vroman, 19 Wis. 689; Farrell v. Hennessy, 21 Wis. 632. Mohr v. Tulip, 40 Wis. 66, held that a shortage of two days in the four weeks' notice of sale required was a jurisdictional and fatal defect; but this is overruled in Mohr v. Porter, 51 Wis. 487.

**Where There Is a Special Statute of Limitations** as to suits to recover land sold by guardian's sale, the statute applies, no matter how irregular the procedure may have been, if there was an actual sale ordered by the jurisdictional court. Smith v. Swenson, 37 Minn. 1.

**As to Fraud in Sale.** — The order of the court will not support a sale if there was fraud and collusion to which the buyer was a party. Arrowsmith v. Gleason, 46 Fed. Rep. 256; Loyd v. Malone, 23 Ill. 43, 74 Am. Dec. 179; Gregory v. Lenning, 54 Md. 51; Tong v. Marvin, 26 Mich. 35. But a third person cannot set up such fraud or collusion. Only the ward, or one claiming under him, can take advantage of it. Marvin v. Schilling, 12 Mich. 356.

**1. How Far Maxim Caveat Emptor Applies.** — Black v. Walton, 32 Ark. 321; Leuders v. Thomas, 35 Fla. 518, 48 Am. St. Rep. 255; Dooley v. Bell, 87 Ga. 74; Mason v. Wait, 5 Ill. 127; James v. Meyer, 41 La. Ann. 1100; Stewart v. Bailey, 28 Mich. 251; Strouse v. Drennan, 41 Mo. 289.

But a purchaser is not affected by error in the decree, as not having given a day to infant

defendants, or having ordered the sale without an account of the personal property, if all parties interested were before the court. Bennett v. Hamill, 2 Sch. & Lef. 566.

**2. Ward Required to Do Equity.** — The better rule seems to be that the ward can avoid the sale, but only on paying back the purchase price. Bone v. Tyrrell, 113 Mo. 175; Antonidas v. Walling, 4 N. J. Eq. 42, 31 Am. Dec. 248; Harrison v. Ilgner, 74 Tex. 86; Kendrick v. Wheeler, 85 Tex. 247. Compare Penn v. Heisey, 19 Ill. 295, 68 Am. Dec. 597.

**3. Purchaser Not Bound to Inquire into Irregularities Not Appearing of Record.** — Fleming v. Johnson, 26 Ark. 421; Thaw v. Ritchie, 5 Mackey (D.C.) 200; Pursley v. Hayes, 22 Iowa 28, 92 Am. Dec. 350; James v. Meyer, 41 La. Ann. 1100; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Morrison v. Nellis, 115 Pa. St. 41; Robertson v. Johnson, 57 Tex. 62; Durrett v. Davis, 24 Gratt. (Va.) 302.

**When the Guardian Obtained an Order of Sale for Debts**, and, after obtaining all the funds needed for that purpose, sold other lands, the sale will not be void if the purchaser had no knowledge and paid a fair value. Arrowsmith v. Gleason, 46 Fed. Rep. 256.

**In Louisiana** a sale without a family meeting is void, but the purchaser need not inquire into the constitution of the meeting. Lemoine v. Ducote, 45 La. Ann. 857.

**The Death of the Guardian After the Sale** is ordered, made, reported, and confirmed does not affect the rights of the purchaser, and the successor should complete the sale. Lynch v. Kirby, 36 Mich. 238.

**4. Purchaser Need Not Inquire into Application of Purchase Money.** — Fitzgibbon v. Lake, 29 Ill. 176, 81 Am. Dec. 302; Mulford v. Stalzenback, 46 Ill. 303; Hickman's Succession, 13 La. Ann. 364; Exendine v. Morris, 8 Mo. App. 383.

**5. Where Purchaser Has Actual Knowledge of Defects.** — Branch v. Du Bose, 55 Ga. 21.

**6. Where Purchaser Is Guilty of Collusion.** — Where the purchasers assisted the guardian to misapply the purchase price by paying the amount to his creditors, they take no title. Grimsley v. Grimsley, 79 Ga. 397.

Where a guardian obtained an order of sale without necessity for or notice of it, the proceeding being a contrivance to get the ward's land for sinister purposes, a vendee who was cautioned at the sale, and who had a collusive agreement not to compete at the bidding, and to share the profit, takes only a voidable title. Loyd v. Malone, 23 Ill. 43, 74 Am. Dec. 179.

**7. Purchase Price Must Be Paid in Cash.** — A purchaser who pays for the land in the guardian's own notes is liable to repay the price if the guardian fails to account for it. Ambledon



no protection against the full assertion of the ward's rights.

But a Bona Fide Purchaser from the Vendee is not affected even by the latter's collusion.<sup>1</sup>

The Purchaser May Refuse to Complete the Sale if he discovers any cloud on the title because of irregularities.<sup>2</sup>

Ward's Lien for Purchase Price. — In some jurisdictions it is held that the ward has a lien on the land for the purchase price until it is paid.<sup>3</sup>

(h) Ratification of Sale by Ward. — If a sale is so illegally made as not to be binding on the ward, he has the option at majority to avoid or confirm it; and if he accepts the proceeds of the sale, with full knowledge of the facts,<sup>4</sup> or permits the vendee to retain the land without objection for an unreasonable time after his majority,<sup>5</sup> or otherwise expressly or impliedly acquiesces in the

*v. Dyer*, 53 Ark. 224; *Wallace v. Brown*, 41 Ind. 436. Payment in Confederate notes is no protection to the purchaser. *White v. Nesbit*, 21 La. Ann. 600.

Liability for Rents and Profits. — A purchaser who never paid the price is liable to account for rents and profits. *Ambleton v. Dyer*, 53 Ark. 224.

Where the guardian conveys the ward's lands in payment of his own debts and those of the ward's ancestor, the deed will be set aside, but the vendee will be allowed the ancestor's debt, repairs, and valuable improvements as a set-off to rents and profits. *Thomas v. Hite*, 5 B. Mon. (Ky.) 590.

Payment to Administrator of Ancestor's Estate Not Sufficient. — Payment to the guardian discharges the vendee, though the guardian had given no bond; but not payment to an administrator of an ancestor's estate. *Herndon v. Lancaster*, 6 Bush (Ky.) 483.

1. Bona Fide Purchaser from Vendee. — *Worthington v. Dunkin*, 41 Ind. 515; *White v. Iselin*, 26 Minn. 487.

The Fact that the Purchaser, Six Months After the Sale, Deeds to the Guardian, is not sufficient to put a purchaser on notice of the collusion. *White v. Iselin*, 26 Minn. 487.

2. When Purchaser May Refuse to Complete Sale. — *Woodcock v. Bowman*, 4 Met. (Ky.) 40; *Williams v. Duncan*, 92 Ky. 125; *Dumestre's Succession*, 40 La. Ann. 571.

But if infants after coming of age affirm a defective sale, and the purchasers have had possession for thirteen years, they cannot refuse to pay unpaid instalments of the price because of irregularities. *Nelson v. Lee*, 10 B. Mon. (Ky.) 495.

Under an act permitting the chancellor to perfect a defective sale, if the guardian takes proper steps for such an order, the purchaser will not be heard to object. *Mahoney v. McGee*, 4 Bush (Ky.) 527.

A purchaser who has allowed the sale to be confirmed cannot have it set aside for a mere irregularity. *Cooper v. Hepburn*, 15 Gratt. (Va.) 551.

3. Lien for Purchase Price. — *Murrill v. Humphrey*, 88 N. Car. 138; *Matter of Macy*, 84 N. Car. 59; *Ferguson v. Shepherd*, 58 Miss. 804.

If after the completion of the sale and giving of a sale note the guardian, with the approval of the court, surrenders the sale note, and takes another note with security, this divests the lien, and the vendee's title is good

against a claim by the ward for the price. *Flemming v. Roberts*, 84 N. Car. 532. But the mere taking of the sale note does not divest the lien. *Matter of Macey*, 84 N. Car. 59.

4. Acceptance of Proceeds by Adult Ward — *Indiana*. — *Test v. Larsh*, 76 Ind. 462.

*Iowa*. — *Pursley v. Hays*, 17 Iowa 310; *DeFord v. Mercer*, 24 Iowa 118, 92 Am. Dec. 460.

*Maine*. — *Williamson v. Woodman*, 73 Me. 163; *Kingsley v. Jordan*, 85 Me. 137; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

*Mississippi*. — *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; *Handy v. Noonan*, 51 Miss. 166; *Douglas v. Bennett*, 51 Miss. 680; *Parmele v. McGinty*, 52 Miss. 476.

*Ohio*. — *Bohart v. Atkinson*, 14 Ohio 228.

*Pennsylvania*. — *Wilson v. Bigger*, 7 W. & S. (Pa.) 111.

*Tennessee*. — *O'Conner v. Carver*, 12 Heisk. (Tenn.) 436.

But in Michigan it has been held that plaintiffs in ejectment are not estopped from setting up their title as heirs against the purchaser at a sale made by their guardian during their minority, by reason of their having accepted the proceeds of such sale after they became of age, with full knowledge of all the facts; that if such acceptance of the proceeds can have any force at all, it will operate only as an equitable estoppel, and will not be available in an action of ejectment. *Ryder v. Flanders*, 30 Mich. 336.

Where the Guardian Sold the Property to Himself, the ward's act ought not to be construed too strongly against him, if he acted without due precaution. *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; *Rist v. Hartner*, 44 La. Ann. 378, 430.

Wards Are Not Estopped to claim land illegally sold by their having received the benefit of the proceeds in their nurture and education. *Wilkinson v. Filby*, 24 Wis. 441.

Ratification Not Implied unless Ward Was Fully Informed of Facts. — Ratification of a sale is not implied by receipt of the purchase price, unless the ward was fully informed of the facts. *Self v. Taylor*, 33 La. Ann. 769; and intended to cure the defect, *Rist v. Hartner*, 44 La. Ann. 378, 430. See *infra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. 3, a. (3) (b) *Ward's Right of Election in Case of Conversion or Misuse of Funds*.

5. Long Acquiescence in Retention of Possession by Vendee. — *Davie v. Davie*, (Ark. 1892) 18 S. W. 935; *Burroughs v. De Couts*, 70 Cal. 361;

sale,<sup>1</sup> the defects will be regarded as waived.

(i) **Sale to Guardian.** — If a guardian directly or indirectly buys the property at guardian's sale, the purchase is voidable, and the ward may hold him as a trustee of the land,<sup>2</sup> whether the purchase was with or without actual fraudulent intent.<sup>3</sup> But if the sale was nominally to a third person, a *bona fide* pur-

Webster v. Bebinger, 70 Ind. 9; Fraser v. Zylitz, 29 La. Ann. 534; Bostwick v. Atkins, 3 N. Y. 53; Brazee v. Schofield, 2 Wash. Ter. 209.

Where land was regularly sold, and the funds properly applied to the ward's benefit, he cannot, after long acquiescence, set aside the sale against innocent purchasers, although it was never confirmed. Penn v. Heisey, 19 Ill. 295, 68 Am. Dec. 597.

Where a fund was really available for materially less than its face, and there was an outstanding title by curtesy, and the ward's interest was sold for a price generally deemed to be fair, and the ward made no complaint for many years, nor until the death of the life tenant, the court refused to set aside the sale against a *bona fide* purchaser. Myrick v. Jacks, 39 Ark. 293.

1. **Execution of Deed by Ward in Accordance with Bond Illegally Given by Guardian.** — Mason v. Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

**Receipt in Full Discharging Guardian from All Liability.** — Seward v. Didier, 16 Neb. 58.

**Uniting with Guardian in Suing for Price.** — Evans v. Williamson, 79 N. Car. 86.

**Prayer for Confirmation of Proceedings in Equity by Ward and Her Husband.** — Hunter v. Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117.

**A Sale Without an Order of Court** is not cured by subsequent judicial approval, nor by the ward's receipt of the property purchased with the proceeds, unless an account has been rendered to him. Mitchell's Succession, 33 La. Ann. 353.

**Right to Assert Vendor's Lien.** — Ratification relates back to the sale, and the ward can assert the vendor's lien. Shorter v. Frazer, 64 Ala. 74.

**Doctrine of Ratification Denied.** — In *Virginia* it has been held that a sale made by the guardian without an order of court is void, and cannot be ratified or confirmed by the ward after coming of age. Dellinger v. Foltz, 93 Va. 729.

2. **Purchase by Guardian.** — Coffey v. Greenfield, 62 Cal. 602; Downs v. Rickards, 4 Del. Ch. 416; Lane v. Taylor, 40 Ind. 495; Winter v. Truax, 87 Mich. 324, 24 Am. St. Rep. 160; Beal v. Harmon, 38 Mo. 435; Hoskins v. Wilson, 4 Dev. & B. L. (20 N. Car.) 243; Patton v. Thompson, 2 Jones Eq. (55 N. Car.) 285; Jones's Estate, 179 Pa. St. 36; Messervey v. Barelli, 2 Hill Eq. (S. Car.) 567; Hampton v. Hampton, 9 Tex. Civ. App. 497; *In re* Pierce, 68 Vt. 639.

The guardian holds title subject to a trust for payment of the purchase money, which is good against his trustee for creditors. Small v. Small, 74 N. Car. 16.

**Ward's Lien Against Purchaser with Notice.** — If the guardian sells the ward's land to a third person, who then conveys it to the guardian, and the guardian discharges the security given for the price, the ward can hold the land to a lien for the price against a purchaser with notice. Willey v. Tindal, 5 Del. Ch. 194.

**Where a Guardian and a Third Person Buy the Land Jointly,** neither acquires title as against the ward. Brockett v. Richardson, 61 Miss. 766.

**Whether Ward Must Repay Consideration.** — In *New York* it has been held that where the guardian buys the ward's land, and pays the consideration, the ward will not be required to repay the consideration on disallowing the sale. Green v. Green, 7 Hun (N. Y.) 492.

In *Louisiana* it has been held that the ward is not required to tender the price as a condition precedent, but that the guardian will be allowed to set up his claim in reconvention. Aronstein v. Irvine, 48 La. Ann. 301.

**What Allowed to Guardian and What Charged Against Him.** — A guardian whose purchase has been avoided will be allowed for commissions, repairs, and improvements which increase the saleable value, and will be charged for rents. Hudson v. Strickland, 58 Miss. 186. See also *In re* Pierce, 68 Vt. 639.

**Bona Fide Sale to One Subsequently Appointed Guardian.** — Where one who bought the ward's land regularly, and was afterwards appointed guardian without collusion or fraud, afterwards sold the land at a profit, he was not liable to account for the profit. Winborne v. White, 69 N. Car. 253.

**A Guardian Who Buys in Good Faith to Prevent a Sacrifice** must account for the amount of his bid to one of the wards who is entitled to receive his portion, by reason of his having come of age. Burtis v. Brush, 1 Redf. (N. Y.) 448.

**Guardian Not Incapacitated to Purchase from Administrator of Ward's Ancestor.** — Barber v. Bowen, 47 Minn. 118. See *infra*, this title, *Rights and Duties*, etc., subdiv. 3. a. (3) (b) *Ward's Right of Election in Case of Conversion or Misuse of Funds*.

3. **Sale Voidable Though There Was No Fraudulent Intent.** — Brockett v. Richardson, 61 Miss. 766; Patton v. Thompson, 2 Jones Eq. (55 N. Car.) 285.

But in *Tennessee* it has been held that if a sale was made by order of court, and the guardian purchased fairly, in entire good faith, without benefit to himself at the ward's expense, the sale will be held valid. Blackmore v. Shelby, 8 Humph. (Tenn.) 439; *Ex p.* Crump, 16 Lea (Tenn.) 732; Elrod v. Lancaster, 2 Head (Tenn.) 571, 75 Am. Dec. 749.

If, however, the guardian buys at considerably less than the appraisal value, he should be required to prove that the price was reasonable. *Ex p.* Crump, 16 Lea (Tenn.) 732.

**Sale to Guardian's Attorney.** — A sale of real estate by a guardian is voidable if the guardian's attorney bought it, and then conveyed it to the guardian, though he paid a good price, and the guardian did not know of his intention to buy. Walker v. Walker, 101 Mass. 169.

**A Sale to One Who Was Virtually Guardian of the Person,** the minor having been committed to his care by will and the Probate Court having recognized the relation, will be set aside.



chaser from him without knowledge of the guardian's interest will take a good title.<sup>1</sup>

If the Ward Ratifies the Sale, it cannot be repudiated by the guardian<sup>2</sup> nor by third persons.<sup>3</sup>

**Sale by Master or Commissioner.** — If the sale is properly made by a master or commissioner appointed by the court, the incapacity of the guardian to buy does not exist.<sup>4</sup>

(j) **Proceeds Regarded as Real Estate.** — The rights of subsequent parties are carefully guarded in case of a sale of real estate by treating the proceeds as real estate, for the purpose of descent or determining the rights of any subsequent parties.<sup>5</sup>

(k) **Covenants in Guardian's Deed.** — A guardian's deed carries no implied covenant of title, and express covenants, if inserted, bind the guardian only, and not the ward's estate. An after-acquired title will not, therefore, be divested.<sup>6</sup>

(l) **Other Incidents of Sale.** — A Guardian's Sale Does Not Relate Back to the Order, so as to give precedence over a judgment sale made in the interim.<sup>7</sup>

**Sale of Land to Pay Debts.** — When the guardian sells more land than is neces-

though no actual fraud or imposition is shown, and though the sale was made by a curator of the estate. *Hindman v. O'Connor*, 54 Ark. 627.

1. **Bona Fide Purchaser from Third Person to Whom Sale Was Nominally Made.** — *Wallace v. Jones*, 93 Ga. 419; *Wyman v. Hooper*, 2 Gray (Mass.) 141; *White v. Iselin*, 26 Minn. 487.

But in Texas it has been held that a sale by a guardian, indirectly to himself, is voidable even against innocent third parties. But the ward must restore to the holder the price paid to the guardian, and must look to the guardian for reimbursement. *Hampton v. Hampton*, 9 Tex. Civ. App. 497. See *infra*, this title, *Rights and Duties*, etc. — *Remedies of Ward — Right to Reclaim His Property from Third Persons*.

A Subsequent Purchaser Is Not Charged with Notice by the fact that six months after the sale the purchaser conveyed to the guardian. *White v. Iselin*, 26 Minn. 487.

2. **If Ward Ratifies Sale, Guardian Cannot Repudiate It.** — *Redd v. Jones*, 30 Gratt. (Va.) 123.

A sale to the guardian, confirmed by the court and ratified by the ward, is binding on the guardian; and if by fraudulent representations he procures it to be set aside, the ward can repudiate the latter transaction and hold the guardian to the purchase. *Schur's Appeal*, (Pa. 1886) 2 Atl. Rep. 336.

3. **Sale Ratified by Ward Cannot Be Attacked by Third Persons.** — The surety of the guardian cannot attack a sale to the guardian confirmed by the court and ratified by the ward. *Schur v. Schwartz*, 140 Pa. St. 53.

Though a guardian bought the ward's land with fraudulent intent, yet if the ward after maturity has given a full release to him, the guardian's title cannot be attacked by third parties having no privity to the ward. *Pedro v. Carriker*, 168 Ill. 570.

4. **Where Sale Is by Master or Commissioner.** — *Doe v. Hassell*, 68 N. Car. 213; *Lee v. Howell*, 69 N. Car. 200; *Clements v. Ramsey*, (Ky. 1887) 4 S. W. Rep. 311.

In Missouri, under the Old Spanish Laws, the guardian might purchase by permission of the judge. *McNair v. Hunt*, 5 Mo. 301.

In Arkansas a Sale Made by a Curator of the Estate to a virtual guardian of the person, though without actual fraud, was set aside. *Hindman v. O'Connor*, 54 Ark. 627.

5. **Proceeds of Sale Treated as Real Estate.** — *Ware v. Polhill*, 11 Ves. Jr. 278; *Horton v. McCoy*, 47 N. Y. 21; *Matter of Bolton*, (Surrogate Ct.) 20 Misc. (N. Y.) 532; *McCabe's Petition*, 15 R. I. 330; *Rinker v. Strait*, 33 Gratt. (Va.) 667.

**Rule Applies Only During Ward's Minority.** — This rule (embodied in statute) applies only during the minority; and if at the age of twenty-one years the ward receives a bond and mortgage given for the price of land, and discharges the guardian, it becomes personal property. *Forman v. Marsh*, 11 N. Y. 544.

**Rule in Pennsylvania.** — If the ward's land is sold for his maintenance and education, and he dies leaving a surplus, the surplus will descend as money and not as land. *Dyer v. Cornell*, 4 Pa. St. 359.

6. **Covenants in Guardian's Deed.** — *Chestnut v. Tyson*, 105 Ala. 149, 53 Am. St. Rep. 101; *Black v. Walton*, 32 Ark. 321; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Nichols v. Sargent*, 125 Ill. 309, 8 Am. St. Rep. 378; *Webster v. Conley*, 46 Ill. 13, 92 Am. Dec. 234; *Foster v. Young*, 35 Iowa 27; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Donahoe v. Emery*, 9 Met. (Mass.) 63.

If the Guardian Makes a Contract to Sell Land Without Legal Authority, and covenants to make a good and sufficient deed, he is personally bound thereby. *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330.

Where a Guardian by Mistake Included in His Deed Land Not Belonging to the Ward, he is personally liable on the covenants purporting to bind himself. *Holyoke v. Clark*, 54 N. H. 578.

A Covenant of Right to Sell estops the guardian from setting up his own prior right. *Heard v. Hall*, 16 Pick. (Mass.) 457.

As to the Covenants in Indentures of Apprenticeship, see *infra*, this title, *Indentures of Apprenticeship*.

— **Obligations of Guardian — To Third Persons.**  
7. *Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1.



sary to raise the sum needed for debts, the sale of so much as was sold before the limit was reached is not invalidated by the error.<sup>1</sup>

**Sale by Widow as Guardian.** — A deed of the interest of heirs made by the widow as guardian does not release her dower interest.<sup>2</sup>

**g. TO PURCHASE REAL ESTATE.** — In England the guardian may change the character of the ward's estate by buying real estate with his funds, where it is manifestly for his advantage.<sup>3</sup>

In the United States the prevailing rule is that the guardian has no such power, unless the purchase be ordered by the court under statutory authority. If he makes such a purchase, the ward has the election, at his majority, to hold the land or to demand the money.<sup>4</sup>

**h. TO LEASE REAL ESTATE.** — The guardian's general power of control over the ward's property, and his duty to produce an income from it, involve the right to make leases for a period not extending beyond his term of office;<sup>5</sup> but if the guardianship terminates, either by expiration of the term

1. *Emery v. Vroman*, 19 Wis. 639.

2. *Jones v. Hollopeter*, 10 S. & R. (Pa.) 326.

3. **Guardian's Right to Purchase Real Estate — English Rule.** — *Inwood v. Twyne*, Ambl. 419, 2 Eden 148.

4. **Rule in United States — Arkansas.** — *Shelton v. Lewis*, 27 Ark. 190.

*Illinois.* — *Attridge v. Billings*, 57 Ill. 489.

*Indiana.* — *Sherry v. Sansberry*, 3 Ind. 320.

*Kentucky.* — *Edmonds v. Morrison*, 5 Dana (Ky.) 223; *Moore v. Moore*, 12 B. Mon. (Ky.) 651.

*Michigan.* — *Rowley v. Towsley*, 53 Mich. 329.

*New York.* — *White v. Parker*, 8 Barb. (N. Y.) 48; *Cromwell v. Kirk*, 1 Dem. (N. Y.) 599; *Matter of Bolton*, (Surrogate Ct.) 20 Misc. (N. Y.) 532; *Eckford v. De Kay*, 8 Paige (N. Y.) 89.

*South Carolina.* — *Huger v. Huger*, 3 Desaus. (S. Car.) 18.

*Tennessee.* — *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572.

*Vermont.* — *Hendee v. Cleaveland*, 54 Vt. 142.

*Virginia.* — *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616.

**Under the Missouri Statute**, the guardian has no power to invest money in land, nor the court to authorize it; and such a purchase is void. *Woods v. Boots*, 60 Mo. 546.

**In Pennsylvania**, as a general rule, the guardian cannot without authority from the proper court convert money into realty. *Bonsall's Appeal*, 1 Rawle (Pa.) 266; *School Directors v. James*, 2 W. & S. (Pa.) 568, 37 Am. Dec. 525; *Davis's Appeal*, 60 Pa. St. 118. But in a case where the guardian bought in a part of land in which the ward had an interest on sale for debts, and the transaction then seemed clearly beneficial, it was supported as against the ward, though subsequent depreciation resulted in loss. *Bonsall's Appeal*, 1 Rawle (Pa.) 266. And it was held that a guardian has power to buy in land for the ward on a partition sale, especially where he gets it below the appraisal. *Bowman's Appeal*, 3 Watts (Pa.) 369; *Gelbach's Appeal*, 8 S. & R. (Pa.) 205; *Bonsall's Appeal*, 1 Rawle (Pa.) 266.

**Under the Alabama Statute**, Code 1876, §§ 2788, 2789 (Civ. Code 1896, §§ 2305, 2306), a guardian may, without an order of court, invest his ward's money in real estate; but the

title must be taken in the ward's name. *Robinson v. Peabworth*, 71 Ala. 240.

**Third Persons Cannot Question Guardian's Authority.** — The authority of guardians to buy land cannot be questioned by third persons in a suit to recover the land by the guardian, especially where the ward has become of age and joined in the suit. *Collins v. Dixon*, 72 Ga. 475.

**Inheritable Character of Property Preserved.** — Courts of equity, in authorizing a guardian to invest personal property in the purchase of real estate, are strenuous in preserving through all mutations the descendible or inheritable character of the original property. *Matter of Bolton*, (Surrogate Ct.) 20 Misc. (N. Y.) 532.

By the *Pennsylvania* statute authorizing conversion of money into land, the rights of inheritance as to personal property are preserved. *Davis's Appeal*, 60 Pa. St. 118.

**A General Guardian Has Authority to Accept a Deed of Land for his ward.** *Barney v. Seeley*, 38 Wis. 381. See *infra*, this title, *Rights and Duties*, etc., subdiv. 3. a. (3) (b) *Ward's Right of Election in Case of Conversion or Misuse of Funds*.

5. **Guardian's Power to Make Leases — England.** — *Rex v. Sutton*, 3 Ad. & El. 597, 30 E. C. L. 168; *Brisden v. Hussey*, 2 Roll. Abr. 41; *Wade v. Baker*, 1 Ld. Raym. 131.

*United States.* — *Ronald v. Barkley*, 1 Brock. (U. S.) 356.

*Indiana.* — *Huff v. Walker*, 1 Ind. 193.

*Kentucky.* — *Graham v. Chatoque Bank*, 5 B. Mon. (Ky.) 45.

*Maine.* — *Hutchins v. Dresser*, 26 Me. 76.

*Michigan.* — *Weldon v. Lytle*, 53 Mich. 1.

*Missouri.* — *Richardson v. Richardson*, 49 Mo. 29.

*New Jersey.* — *Snook v. Sutton*, 10 N. J. L. 133.

*New York.* — *Emerson v. Spicer*, 55 Barb. (N. Y.) 428, 38 How. Pr. (N. Y.) 114, *affirmed* 46 N. Y. 594; *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Gallagher v. Stevenson Brewing Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 40; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271; *People v. Ingersoll*, 20 Hun (N. Y.) 316, 58 How. Pr. (N. Y.) 351; *In re Stafford*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 106; *Putnam v.*

or for other cause, the lease becomes revocable by the ward or the succeeding guardian, as the case may be.<sup>1</sup>

i. TO ASSIGN DOWER. — The right of the guardian to assign dower has already been discussed.<sup>2</sup>

j. TO MORTGAGE REAL ESTATE. — The guardian has no inherent power to make a mortgage of the ward's real estate.<sup>3</sup> But in many jurisdictions power to do so is conferred upon him by statute, upon his obtaining an order from the proper court.<sup>4</sup> When the authority is so conferred, the statute must be strictly followed.<sup>5</sup> As to the incidents of this power, the decisions gener-

Ritchie, 6 Paige (N. Y.) 390; Pond v. Curtiss, 7 Wend. (N. Y.) 45.

Pennsylvania. — Hughes's Appeal, 53 Pa. St. 500.

Virginia. — Ross v. Gill, 1 Wash. (Va.) 87.

West Virginia. — Windon v. Stewart, 43 W. Va. 711.

But under Statutes in Illinois and Iowa it was held that a guardian could not make a lease without an order of court. Field v. Herrick, 5 Ill. App. 54; Bates v. Dunham, 58 Iowa 308; Alexander v. Buffington, 66 Iowa 360.

Power Confined to Guardians of Estate. — This power, of course, is confined to guardians of the estate, and does not extend to natural guardians. See *supra*, this title, *Modern Forms of Guardianship, Their Nature and Origin — Guardianship by Nature — Is over Person Only*.

A guardian for nurture, though the will by which the land is given empowers him to "set and let" the said land, cannot make any lease except at will. Pigot v. Garnish, Cro. Eliz. 678, 734.

He may make a lease to try the title in ejectment. Magruder v. Peter, 4 Gill & J. (Md.) 323.

The Guardian May Lease the Land on Shares, and such a lease will be good against a subsequent purchaser. Weldon v. Lytle, 53 Mich. 1. But he cannot make an "oil lease," with right to take the oil, as that would be to take the *corpus* of the land. Stoughton's Appeal, 88 Pa. St. 198; Wilson v. Youst, 43 W. Va. 826.

A Long-term Lease, with Building Rights, cannot, in England, be made even by order of chancery, but the guardian must obtain an Act of Parliament. Russell v. Russell, 1 Molloy 525.

Contracts for Protection, Preservation, and Enhancement of Estate. — But chancery may authorize and confirm leasehold contracts for the protection, preservation, and enhancement of the real estate which are manifestly advantageous. Talbot v. Province, 7 Baxt. (Tenn.) 502.

1. Upon Termination of Guardianship Lease Is Revocable. — Thus the lease made by an ordinary guardian must not extend beyond the ward's arrival at the age of twenty-one years. Roe v. Hodgson, 2 Wils. C. Pl. 129; Emerson v. Spicer, 55 Barb. (N. Y.) 428, 38 How. Pr. (N. Y.) 114, 46 N. Y. 594; *In re* Stafford, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 106; People v. Ingersoll, 20 Hun (N. Y.) 316, 58 How. Pr. (N. Y.) 351; Putnam v. Ritchie, 6 Paige (N. Y.) 390; Ross v. Gill, 1 Wash. (Va.) 87. And a lease by a guardian in socage, or one whose office expires when the ward becomes fourteen years of age, must be limited to that period. Snook v. Sutton, 10 N. J. L. 133; Emerson v.

Spicer, 46 N. Y. 594; Putnam v. Ritchie, 6 Paige (N. Y.) 390.

If the lease be made for a term without limitations, but if the guardian's office be terminated by his removal, the lease is avoidable by the new guardian. *In re* Stafford, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 106; Emerson v. Spicer, 46 N. Y. 594; Snook v. Sutton, 10 N. J. L. 133.

And if the guardianship terminated by the ward's death, the lease is available by the successor in title. Welles v. Cowles, 4 Conn. 189.

A lease of land belonging to several heirs, subject to a dower right, signed by the widow and the several guardians, is good as to a one-third interest until the death of the dowress, and as to each heir's portion until he comes of age and chooses to avoid it. Graham v. Chatoque Bank, 5 B. Mon. (Ky.) 45.

Ward May Ratify Lease After Coming of Age. — If the lease extends beyond the ward's majority, the ward may ratify it after coming of age and collect the future rents. People v. Ingersoll, 20 Hun (N. Y.) 316, 58 How. Pr. (N. Y.) 351.

A License from a Guardian to Enter on the Ward's Lands expires upon the death of the guardian. Johnson v. Carter, 16 Mass. 443.

2. Guardian's Power to Assign Dower. — See the title DOWER, vol. 10, p. 172.

3. Guardian Has No Inherent Power to Mortgage. — Tyson v. Latrobe, 42 Md. 325; Sample v. Lane, 45 Miss. 556. See also Robinson v. Peabworth, 71 Ala. 240.

Mortgage Merely Exchanging One Creditor for Another to Ward's Benefit. — The absence of a statute authorizing a mortgage by the guardian does not render void a mortgage made by a guardian under an order of court, where it creates no new debt or incumbrance, but simply gains an extension of time and a reduction of interest by exchanging one creditor for another. Northwestern Guaranty Loan Co. v. Smith, 15 Mont. 101, 48 Am. St. Rep. 662.

4. See the statutes of the several states.

Implied Authority. — In the *Trusts of the Georgia* it has been held that statutory power in a court to order the sale of a ward's real estate implies the power to order a mortgage. Middleton v. Parke, 3 App. Cas. (D. C.) 149. But in Oregon, on the other hand, it has been held that a statute authorizing the "renting, sale, or other disposal" of a ward's land by order of court gives no power to mortgage. Trutch v. Bannell, 11 Oregon 58, 50 Am. Rep. 450.

5. Statute Must Be Strictly Followed. — Thus, under Illinois statutes which limit the term of a mortgage given by the guardian to the minority of the ward (U. S. Mortgage Co. v.



ally follow those on the power to sell land.<sup>1</sup>

*k. TO MAKE CONTRACTS.* — The prevailing doctrine is that a guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be; but that contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account.<sup>2</sup>

Sperry, 138 U. S. 313), a mortgage given in fee is void. *Merritt v. Simpson*, 41 Ill. 391.

A petition for an order of sale does not justify an order of mortgage. *McMannis v. Rice*, 48 Iowa 361.

In *Louisiana*, borrowing on mortgage having been approved by a family meeting, the guardian cannot waive appraisal unless expressly permitted by the meeting. *Scottish-American Mortg. Co. v. Ogden*, 49 La. Ann. 8.

**Constitutional Limitation on Authority of Legislature.** — The right of the legislature, as *parens patriæ*, to protect the property of infants exists for their benefit alone, and does not authorize taking their rights away without compensation. An order of court, in pursuance of a special legislative act, authorizing a ward's lands to be mortgaged to pay for improvements already put upon his lands without legal authority, is void, as the ward had legal title to the improved lands, and the obligation to pay for them was only moral. *Burke v. Mechanics' Sav. Bank*, 12 R. I. 513.

1. See *supra*, this section, *To Sell Real Estate*.

**General Authority Includes Reversion.** — Under a statute authorizing the mortgaging of an infant's lands, a reversion may be so mortgaged. *Foster v. Young*, 35 Iowa 27.

**An Order to Mortgage on Application of One Falsely Representing Himself as Guardian Is Void.** — *Grier's Appeal*, 101 Pa. St. 412.

**Mortgage for Money Borrowed by Natural Tutor.** — In *Louisiana* the ward cannot be made liable for money borrowed by a natural tutor for a partnership in which the ward had no interest, though a mortgage to pay such loan was approved by a family meeting and ordered by the court. *Querin v. Carlin*, 30 La. Ann. 1131.

**A Mortgage Made by a Special Guardian is void without report and confirmation.** *Battell v. Torrey*, 65 N. Y. 294.

**A Mortgage Cannot Be Collaterally Attacked** because the guardian, who petitioned for the sale, was a creditor of the ward, and obtained the order to pay his own debt, *Battell v. Torrey*, 65 N. Y. 294; nor because the general attorney of the creditor was appointed special guardian to make the sale, *Warren v. Union Bank*, 28 N. Y. App. Div. 7.

**No Deficiency Decree** can be taken on a bond and mortgage given by a guardian. *Wood v. Truax*, 39 Mich. 628.

**2. Contracts by Guardian — England.** — *Hooper v. Eyles*, 2 Vern. 480.

*Alabama.* — *Westmoreland v. Davis*, 1 Ala. 299; *Simms v. Norris*, 5 Ala. 42; *St. Joseph's Academy v. Augustini*, 55 Ala. 493.

*California.* — *Hunt v. Maldonado*, 89 Cal. 636; *Fish v. McCarthy*, 96 Cal. 484, 31 Am. St. Rep. 237; *Sweigert's Estate*, Myr. Prob. (Cal.) 152.

*Colorado.* — *Lusk v. Patterson*, 2 Colo. App. 306; *Lusk v. Kershow*, 17 Colo. 487.

*Connecticut.* — *Brown v. Eggleston*, 53 Conn. 119.

*Georgia.* — *Poole v. Wilkinson*, 42 Ga. 539; *Rice v. Paschal*, 59 Ga. 637.

*Illinois.* — *Sperry v. Fanning*, 80 Ill. 371.

*Indiana.* — *Stevenson v. Bruce*, 10 Ind. 397; *Lewis v. Edwards*, 44 Ind. 333; *Turner v. Flagg*, 6 Ind. App. 563.

*Kentucky.* — *Lindsey v. Stevens*, 5 Dana (Ky.) 105.

*Massachusetts.* — *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Simmons v. Almy*, 100 Mass. 239; *Wallis v. Bardwell*, 126 Mass. 366; *Rollins v. Marsh*, 128 Mass. 116; *Massachusetts Gen. Hospital v. Fairbanks*, 132 Mass. 414; *Bicknell v. Bicknell*, 111 Mass. 265.

*Michigan.* — *Wood v. Truax*, 39 Mich. 628.

*Mississippi.* — *McKee v. Whitten*, 25 Miss. 32; *Steen v. Steen*, 25 Miss. 513; *Wade v. Bridewell*, 38 Miss. 423; *Scott v. Porter*, 44 Miss. 365; *McGavock v. Whitfield*, 45 Miss. 452; *Dalton v. Jones*, 51 Miss. 585.

*Missouri.* — *Adams v. Jones*, 8 Mo. App. 602.

*New Hampshire.* — *Phelps v. Worcester*, 11 N. H. 51; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Hardy v. Citizens' Nat. Bank*, 61 N. H. 34.

*New Jersey.* — *Reading v. Wilson*, 38 N. J. Eq. 446.

*New York.* — *Meyers v. Cohn*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 185; *Copley v. O'Neil*, 57 Barb. (N. Y.) 299.

*North Carolina.* — *Fessenden v. Jones*, 7 Jones L. (52 N. Car.) 14, 75 Am. Dec. 445; *Hussey v. Roundtree*, Busb. L. (44 N. Car.) 110.

*South Carolina.* — *Tobin v. Addison*, 2 Strobl. L. (S. Car.) 3.

**Under the Virginia Code**, § 2605, the court may order the sale, or confirm a sale already made, of any personal estate for necessary expenditures; but neither the ward personally nor his real estate shall be liable for such expenditures. *Gayle v. Hayes*, 79 Va. 542; *Harkrader v. Bonham*, 88 Va. 247.

**Under an Indiana Statute** which imposed upon the guardian the duty to manage the ward's estate for his best interest, and to pay all just charges of the ward out of the estate in his hands, money borrowed by the guardian under order of court to remove liens from the ward's lands was recoverable from the ward's estate by suit against the guardian as such. *Ray v. McGinnis*, 81 Ind. 451.

**When Question of Guardian's Personal Liability Should Be Submitted to Jury.** — In a suit against the guardian for the tuition and board of his ward it was held that the guardian who enters his ward in a school is presumably liable for the charges personally, but if he alleged that he did not intend to be personally bound, and that the plaintiff knew that, and gave credit to



But in some jurisdictions it has been held that the guardian has power to bind the ward's estate by any contract proper and necessary to be made in the fulfillment of his office.<sup>1</sup>

**Rule in Equity.** — In some cases it has been held that where a debt incurred by a guardian was essential to the welfare of the ward or to the preservation of his property, equity will enforce the claim against the ward's estate.<sup>2</sup>

**Acts of Guardian Before Appointment, or of Third Person Assuming to Act as Guardian.** — The ward's estate can be bound only by the acts of a guardian legally appointed,<sup>3</sup> and the fraudulent or mistaken representations of one who without authority assumes to act as guardian lay no foundation for an equitable estoppel against the infant, or against a guardian subsequently appointed, so as to bind the infant or charge his property.<sup>4</sup>

**7. TO RELEASE OR WAIVE WARD'S RIGHTS.** — A guardian has no power to relinquish, abandon, or release, without consideration, any right or interest of the ward,<sup>5</sup> nor to bind him by admissions contrary to his

the estate only, the case turns on the issue of fact, and should be submitted to the jury. *Salem Female Academy v. Phillips*, 68 N. Car. 491.

1. *Davis v. Kerr*, 17 Can. Sup. Ct. 235; *Robinson v. Hersey*, 60 Me. 225; *Price's Appeal*, 116 Pa. St. 410.

In Texas it has been held that a minor takes his estate subject to all liabilities incurred by his guardian in its management, *Owens v. Mitchell*, 38 Tex. 588; that where guardians act in behalf of minors in a contract, the minors cannot, while enjoying the benefit of the contract, deny its obligations, in the absence of fraud, folly, or negligence, *Hartwell v. Jackson*, 7 Tex. 578; but that the guardian can by express contract bind himself personally; and if he so contracts for supplies for two wards, he may be sued in one suit, leaving him to apportion the charges between them, *Young v. Smith*, 22 Tex. 345.

In Louisiana one who seeks to recover from wards on their guardian's contract must show either a fulfilment of all the requirements of the law or that the contract inured to the ward's benefit to the amount claimed. *Miltenberger v. Elam*, 11 La. Ann. 667; *Payne v. Scott*, 14 La. Ann. 773.

If the guardian contracted a debt without due authority, or in excess of the ward's income, the creditor must show that it was absolutely necessary for the ward's support or the preservation of his property, and that it actually inured to his benefit. *Payne v. Scott*, 14 La. Ann. 773; *Urquhart v. Scott*, 12 La. Ann. 674; *Sanford v. Waggaman*, 14 La. Ann. 865; *Randlett v. Gordy*, 32 La. Ann. 904.

A note made in the guardian's own name may be shown to have been in the ward's behalf, and for a debt due by him, in order to charge the ward's estate. *Leonard v. Hudson*, 12 La. Ann. 840.

One who lends to the tutor borrowing under the order of a competent court can recover the amount, whether the proceeds were or were not used for the ward. *Cane v. Cawthon*, 32 La. Ann. 954; *Gilmer v. Winter*, 47 La. Ann. 37.

The natural tutrix can borrow money by the advice of a family meeting and the order of court. *Sadler v. Henderson*, 35 La. Ann. 826.

The tutor has no power to indorse commercial paper for the ward without the advice of

a family meeting; but such a transaction is not absolutely a nullity, and if the proceeds were really used for the ward the holder's title will be good. *Woodbridge v. Pope*, 22 La. Ann. 293.

The tutor cannot bind his pupil as surety, and all obligations of that character made by the tutor are null and void. *Shiff v. Shiff*, 20 La. Ann. 269.

A merchant who has supplied the ward with necessities on the guardian's order can recover from the minor when of age, if the amount did not exceed the ward's revenues, and was not included in the guardian's settlement. *Giquel v. Daigre*, 22 La. Ann. 137.

The consideration of a note given by the tutor may be questioned by the ward, after majority, in the hands of the payee or of a taker after maturity of the paper. *Clement v. Sigur*, 29 La. Ann. 798.

See also *supra*, this section, subdiv. 2. d. (1) *To Bring Suits*, paragraph *Right to Employ Counsel and Contract for Contingent Fee*; subdiv. 2. f. (4) (k) *Covenants in Guardian's Deed*, etc.; and *infra*, this title, *Rights and Duties*, etc. — *Obligations of Guardian — To Third Persons*.

2. **When Equity Will Enforce Claim Against Ward's Estate.** — *James v. Lane*, 33 N. J. Eq. 30; *Barnum v. Frost*, 17 Gratt. (Va.) 398.

But contracts of a guardian touching the ward's property will not be specifically enforced unless they are strictly equitable and for the ward's interest. *Sherman v. Wright*, 49 N. Y. 227.

And where a guardian, having the money of another person in his hands, agreed to borrow it for the ward, and to give a mortgage, but never executed the mortgage, nor expended the money for the ward's benefit, it was held that the owner had no equitable lien on the ward's land. *Noble v. Runyan*, 85 Ill. 618.

3. *Holden v. Curry*, 85 Wis. 504.

4. *Sherman v. Wright*, 49 N. Y. 227.

5. **Guardian Cannot Relinquish, Abandon, or Release a Right Without Consideration.** — *Ratcliff v. Davis*, 64 Iowa 467; *Pond v. Hopkins*, 154 Mass. 38; *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655; *Swarthout v. Curtis*, 5 N. Y. 302, 55 Am. Dec. 345, affirming 7 Barb. (N. Y.) 354; *Roland v. Thompson*, 73 N. Car. 419; *Witman's Appeal*, 28 Pa. St. 376; *Smith v. Dibrell*, 31 Tex. 239, 98 Am. Dec. 526; *Freiberg v. De Lamar*, 7 Tex. Civ. App. 263; *Ban-*

interest;<sup>1</sup> nor can the ward be divested of such rights by waiver of the guardian<sup>2</sup> or estoppel resting on his acts or omissions.<sup>3</sup>

*m.* TO MAKE ELECTION FOR WARD. — But where the ward has an election between alternative rights or remedies, the guardian can exercise the necessary election on his behalf.<sup>4</sup>

*n.* TO ARBITRATE OR COMPROMISE DISPUTED CLAIMS. — And where the ward has claims which are a matter of fair dispute, the guardian has authority to submit them to arbitration,<sup>5</sup> or to make a reasonable compromise.<sup>6</sup>

*nister v. Bannister*, 44 Vt. 624; *Hite v. Hite*, 2 Rand. (Va.) 409.

But in *Indiana* it has been held that a guardian has power to release the guarantor on a note payable to himself, but part of his ward's estate. *Ditmar v. West*, 7 Ind. App. 637.

**Release of Debt to Qualify Holder to Testify.** — Guardians have not the power to release a debt due to their wards in order to qualify the holder to testify in a suit. *Horine v. Horine*, 11 Mo. 649. *Contra*, *Capehart v. Huey*, 1 Hill Eq. (S. Car.) 405.

**Relinquishment of Ward's Interest as Heir to Surviving Owner of Community Property.** — A guardian cannot relinquish the interest of the ward as heir of a deceased owner of community property to the survivor, without an order of court. *Stephenson v. Chappell*, 12 Tex. Civ. App. 296.

**A Natural Guardian Has No Power to Release the Claim of the Ward to an Inheritance**, without the sanction of some court. *Naeglin v. De Cordova*, 171 U. S. 638.

**A Guardian Can Do No Act Harmful to the Interest of the Ward**, as, *e. g.*, to attorn to one erroneously claiming superior title. *Jackson v. Sears*, 10 Johns. (N. Y.) 435.

So a guardian cannot consent to the institution of a suit so as injuriously to affect his ward's interest. *Fowler v. Lewis*, 36 W. Va. 112.

**Guardian's Release Prima Facie Valid.** — A guardian's release under seal expressing a valuable consideration of a claim for injuries to the real estate of the ward is *prima facie* valid, and the burden of impeaching it is on the attacking party. *Torry v. Black*, 58 N. Y. 185, *reversing* 65 Barb. (N. Y.) 414.

**1. Guardian Cannot Bind Ward by Admissions Contrary to His Interest.** — *Driver v. Evans*, 47 Ark. 297; *Cochran v. McDowell*, 15 Ill. 10.

A guardian cannot bind the ward by a confession of judgment, *Metcalfe v. Alter*, 31 La. Ann. 389; or by a consent decree, *Braswell v. Downs*, 11 Fla. 62; *Bearinger v. Pelton*, 78 Mich. 109.

A guardian cannot make a stipulation admitting in evidence facts occurring since the pendency of the suit, and not legally admissible. *Wood v. Truax*, 39 Mich. 628.

**2. Guardian Cannot Waive Ward's Rights.** — A guardian cannot waive the bar of the statute of limitations which has already run. *Clement v. Sigur*, 29 La. Ann. 798. Nor can he waive notice to a ward of proceedings in the settlement of an estate. *Wade v. Bridewell*, 38 Miss. 420.

As to waiver of service of process by a guardian, see *supra*, this section, subdiv. 2. *d.* (2) *To Defend Suits*, note.

A guardian cannot consent to executors making partition of an ancestor's estate with-

out order of court or power under the will. *Jones v. Massey*, 9 S. Car. 376.

Where an order has been made in chancery for the payment of money into court for the ward, the guardian cannot accept a deed of land in lieu thereof. *Westbrook v. Comstock*, Walk. (Mich.) 314.

**3. Ward Not Estopped by Guardian's Acts or Omissions.** — A minor cannot be estopped by the silence of his guardian while one is encroaching upon his rights. *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 32.

A guardian cannot defeat the title of the ward to lands improperly sold by the administrator for division, by his receipt of a share of the price. *Whitehead v. Jones*, 56 Ala. 152.

The act of a guardian in levying on the ward's lands, which had been illegally sold for taxes, for a claim due to the ward from the purchaser will not affect the ward's title. *Cummings v. Bird*, 33 Ohio L. J. 332.

**4. Right of Guardian to Make Election.** — Thus the guardian can elect whether to keep an insurance policy in force, or to surrender it and take the accrued value, *Maclay v. Equitable L. Assur. Soc.*, 152 U. S. 499; to avoid or affirm a deed made by the ward, *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Warfield v. Fisk*, 136 Mass. 219; or to repudiate a purchase of the ward's property by a preceding guardian for his own interest, *McAvoy's Estate*, 2 Pa. Dist. 609.

"The powers of guardians to make an election on behalf of their wards have been pretty liberally construed in *Massachusetts*, when otherwise the wards would lose important rights." *Warfield v. Fisk*, 136 Mass. 219.

As to the election to avoid a lease, see *supra*, this section, subdiv. 2. *h.* *To Lease Real Estate*.

**5. Guardian's Authority to Submit Claims to Arbitration.** — See the title *ARBITRATION AND AWARD*, vol. 2, p. 629.

**6. Guardian's Power to Compromise Claims.** — *Maclay v. Equitable L. Assur. Soc.*, 152 U. S. 499; *Lunday v. Thomas*, 26 Ga. 537; *Schee v. McQuilken*, 59 Ind. 269; *Hagy v. Avery*, 69 Iowa 434; *Manion v. Ohio Valley R. Co.*, 99 Ky. 504; *Worthington v. Worthington*, (Ky. 1896) 35 S. W. Rep. 1039; *Lowery's Estate*, 9 Pa. Co. Ct. 88. But see *Forbes v. Mitchell*, 1 J. J. Marsh. (Ky.) 440.

**Statutes Authorizing Compromise.** — A statute authorizing guardians to compromise any claims for or against the ward under the direction of the court justifies an agreement by which the ward received the entire real estate in dispute, and assumed certain debts to which he was not otherwise liable. *Smith v. Angell*, 14 R. I. 192.

Where a statute permits partition by one heir's taking the real estate and paying propor-



But a compromise is binding only when it is made in good faith.<sup>1</sup>

*o. TO ACT IN OTHER JURISDICTIONS.* — By the law of England and of the United States a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as is allowed by the comity of that state as expressed through its legislation or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicile, and to support the authority of the guardian appointed there. In the exercise of such comity the funds in the hands of a guardian not of the domicile are often ordered to be transmitted to the guardian of the domicile, or the guardian of the *locus* of the property is ordered to pay over to the guardian of the domicile sufficient funds for the ward's support.<sup>2</sup>

*p. TO ACT AFTER EXPIRATION OF HIS OFFICE.* — Upon the death or maturity of the ward, or the removal of the guardian, the latter's active authority ceases, and he has no further power over the person of the ward, nor over his estate, except to keep it safely, render an account, and turn over the balance of the property to the person entitled.<sup>3</sup> He may, however, as a necessary incident to the closing of the estate, reduce to possession choses in action standing in his own name.<sup>4</sup>

## VI. RIGHTS AND DUTIES ARISING FROM RELATION OF GUARDIAN AND WARD —

**1. Obligations of Guardian — a. TO WARD — (1) Generally — Measure of Care Required.** — The guardian, in the performance of his duties, is required to exercise that degree of diligence and care that a prudent business man would exercise, under like circumstances, in his own affairs. Such a degree of strictness is not to be used in measuring his conduct as would deter responsible men from accepting such a trust.<sup>5</sup> He is bound to manage the estate him-

self, and to pay the balance of the estate to the ward, or to the person entitled to it. He is not liable for the loss of the estate, unless he has been negligent. He is not liable for the loss of the estate, unless he has been negligent. He is not liable for the loss of the estate, unless he has been negligent.

**Statute Held to Be Constitutional.** — An act empowering guardians to agree with a railroad company as to the compensation for land taken was held not unconstitutional. *Louisville, etc., R. Co. v. Blythe*, 69 Miss. 939, 30 Am. St. Rep. 599.

**Statute Requiring Approbation of Court.** — Where the statute authorizes a guardian to compromise claims of the ward "with the approbation of the court," he cannot release an insurance policy for less than its face without such approbation. *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626.

**Rule in Louisiana.** — In Louisiana tutors cannot compromise a claim of the ward without the approval of a family meeting and the order of the court. *Graham v. Hester*, 15 La. Ann. 148; *Burney v. Ludeling*, 47 La. Ann. 73; *Calloway's Succession*, 49 La. Ann. 968.

**1. Compromise Must Be Bona Fide.** — *Lunday v. Thomas*, 26 Ga. 537; *Underwood v. Brockman*, 4 Dana (Ky.) 309, 29 Am. Dec. 407.

**2.** See the title FOREIGN GUARDIANS, vol. 13, p. 965.

**3. Guardian's Power After Expiration of His Office.** — *Silvers v. Hedges*, 3 Dana (Ky.) 439; *Barreit v. Provincher*, 39 Neb. 773; *Sommers v. Boyd*, 48 Ohio St. 648.

**The Admission of One of Two Guardians, after his letters had been revoked, is incompetent against the other.** *Freeman v. Brewster*, 93 Ga. 648.

**A Settlement Made by a Ward, After He Came of Age, of a claim against a third person is a**

defense to a suit thereon by the guardian, though he had not settled his account when the settlement was made. *Cheever v. Congdon*, 34 Mich. 296.

**Acts Preceding Appointment.** — An appointment cannot be carried back so as to validate acts already done by the guardian, nor will proof of a parol appointment and approval of the bond be admitted. *Holden v. Curry*, 85 Wis. 504.

**4. Reduction to Possession of Choses in Action Standing in Guardian's Name.** — *Chambliss v. Vick*, 34 Miss. 109.

**Guardian's Duty to Collect from Attorney Employed by Him.** — If an attorney employed by him has collected money of the ward, it is the guardian's duty to collect it from the attorney, and he can sue therefor in his own name though the ward has come of age. *Huntsman v. Fish*, 36 Minn. 148.

**Assignment of Note.** — An assignment by a guardian of a note made to him in his own name, as guardian, will be valid between third parties, if the ward raises no objection, though made after the termination of the guardianship. *Hippee v. Pond*, 77 Iowa 235.

**If Guardians Were Interested Jointly with Another, they may join with him in a suit, though their guardianship has terminated.** *Shearman v. Akins*, 4 Pick. (Mass.) 283.

**Ward's Maturity Pending Suit.** — A suit by the guardian on a note payable to him by name is not abated by the ward's maturity pending the suit. *Gard v. Neff*, 39 Ohio St. 607. Compare *Richmond v. Adams Nat. Bank*, 152 Mass. 359.

**5. Measure of Diligence and Care Required of Guardian.** — *Thompson v. Thompson*, 33 Conn. 347.



self, and has no right to divest himself of its supervision and control.<sup>1</sup> This rule, of the reasonable diligence of a prudent man, applies to the collection of the ward's assets,<sup>2</sup> their investment,<sup>3</sup> and the employment of necessary

*Illinois*. — *Whitney v. Peddicord*, 63 Ill. 249; *Kingsbury v. Powers*, 131 Ill. 182; *Hughes v. People*, 10 Ill. App. 148; *Means v. Earls*, 15 Ill. App. 273.

*Indiana*. — *Marquess v. La Baw*, 82 Ind. 550; *Slauter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106.

*Kentucky*. — *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238; *Boaz v. Milliken*, 83 Ky. 634; *Hancock v. Cooper*, (Ky. 1897) 38 S. W. Rep. 883. See also *Hemphill v. Lewis*, 7 Bush (Ky.) 214.

*Louisiana*. — *Lay v. O'Neil*, 29 La. Ann. 722.

*Massachusetts*. — See *Pierce v. Prescott*, 128 Mass. 140.

*Michigan*. — *Gott v. Culp*, 45 Mich. 265.

*Missouri*. — *Taylor v. Hite*, 61 Mo. 142; *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526; *Finley v. Schluter*, 54 Mo. App. 455; *Reynolds's Appeal*, 70 Mo. App. 576.

*New York*. — *White v. Parker*, 8 Barb. (N. Y.) 48; *Accounting of Jackson*, Tuck. (N. Y.) 71.

*North Carolina*. — *Covington v. Leak*, 67 N. Car. 363; *Atkinson v. Whitehead*, 66 N. Car. 296; *Luton v. Wilcox*, 83 N. Car. 20.

*Pennsylvania*. — *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451; *Jones's Appeal*, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282; *Eyster's Appeal*, 16 Pa. St. 372; *Konigmacher v. Kimmel*, 1 P. & W. (Pa.) 207, 21 Am. Dec. 374; *Long's Estate*, 7 Lanc. L. Rev. (Pa.) 323; *Worrell's Estate*, 14 Phila. (Pa.) 311, 38 Leg. Int. (Pa.) 270.

*South Carolina*. — *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408.

*Vermont*. — *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

*Virginia*. — *Elliott v. Howell*, 78 Va. 297.

*West Virginia*. — *Windon v. Stewart*, 43 W. Va. 711.

See also *Willis v. Fox*, 25 Wis. 646; *Shurtleff v. Rile*, 140 Mass. 213; *Perrin v. Lepper*, 72 Mich. 454.

#### Duty of Guardian in Leasing Ward's Property.

— The court will not hold a guardian liable for renting premises at a smaller rental than he could have obtained if he had leased the premises for a saloon, where a statute imposed personal responsibility upon him for all damage done in a saloon hired from him. *In re Stafford*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 106.

Under a statute requiring all sales and rentals to be public, a guardian who rents his ward's property privately is liable for the statutory penalty. *Pate v. Kennedy*, 104 N. Car. 234.

**Protection of Probate Orders.** — To make a guardian responsible for loss by a sale ordered by the court, it must be shown that he practiced deception on the court in procuring the order. *Harrison v. Bradley*, 5 Ired. Eq. (40 N. Car.) 136.

Orders of probate directing the guardian in the performance of his duty cannot be impeached collaterally, except for fraud. *Sherry v. Sansberry*, 3 Ind. 320.

**Responsibility After Trust Ceases.** — The duty

of a guardian does not cease with the abating of the letters, as by her marriage; if she holds on to the property, and her husband uses it up, she is liable. *Hood v. Perry*, 73 Ga. 319. See *infra*, this title, *Accounting by Guardian*, subdiv. 2. b. (9) *Transactions After Ward's Majority*.

**1. Guardian Must Manage Ward's Estate Himself.** — *Lee v. Lee*, 67 Ala. 406; *Eichelberger's Appeal*, 4 Watts (Pa.) 84; *Matter of Plumb*, 52 Hun (N. Y.) 119.

**An Agreement that the Guardian's Surety Shall Himself Hold the Funds for his security** is against public policy. *Rogers v. Hopkins*, 70 Ga. 454; *Poultney v. Randall*, 9 Bosw. (N. Y.) 232.

**A Deposit in a Bank on a Two Weeks' Withdrawal Agreement** renders the guardian responsible. He is allowed to deposit the ward's funds in a bank for safe keeping only, and is not permitted to put them out of his control, even temporarily. *Law's Estate*, 9 Pa. Co. Ct. 225. But see *contra*, 9 Lanc. L. Rev. (Pa.) 13.

**A Guardian Cannot Set Up the Ward in Business**, except at his own risk. *Eichelberger's Appeal*, 4 Watts (Pa.) 84.

**A Guardian Cannot Account for the Proceeds of Property Sold** by showing that he turned it over to the ward. *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.

**Permitting Mother to Receive Rent for Ward's Support.** — But where the guardian permitted the rents of a small place to be received by the ward's mother and used for the ward's support, and the amount was not unreasonable, he was held not liable. *Eyster's Appeal*, 16 Pa. St. 372.

**Family Agreement.** — In a *California* case it was held that only under extraordinary circumstances would other persons than the guardian be permitted to manage the ward's business, but it was permitted in pursuance of a family agreement desired by all parties. *Racouillat v. Requena*, 36 Cal. 651.

**2. Measure of Diligence Required in Collecting Assets.** — *Pierce v. Prescott*, 128 Mass. 140; *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *Konigmacher v. Kimmel*, 1 P. & W. (Pa.) 207, 21 Am. Dec. 374.

The guardian is not bound to collect debts well secured and not needed for maintenance or education. If he forces collection by sale of the security at an unfavorable time, he will be liable for the resulting loss. *Taylor v. Hite*, 61 Mo. 142.

**Taking Administrator's Bond Without Security.** — Though the guardian would be responsible for loaning without security funds that he had actually received, he will not be liable where the funds were in the hands of an administrator who was in good credit and had a large amount of visible property, and where he took such administrator's bond without security. *Konigmacher v. Kimmel*, 1 P. & W. (Pa.) 207, 21 Am. Dec. 374. See also *infra*, this title, *Accounting by Guardian*, subdiv. 2. a. (2) *(a) Sums Lost by His Neglect*.

**3. Measure of Care Required in Making Investments.** — *Hughes v. People*, 10 Ill. App. 148;

agents<sup>1</sup> and legal counsel.<sup>2</sup>

(2) *Is under Trust Obligations.* — The guardian sustains in the fullest sense a trust relation to his ward. In all dealings with the ward's property he is bound to look only to the ward's interest. He will not be permitted, therefore, to occupy a hostile position to that of the ward, nor to pursue personal interests antagonistic to those of the ward.<sup>3</sup> He cannot make a contract with himself so as to gain any individual rights against the ward.<sup>4</sup> For any profit accruing to him from his management of the ward's affairs, he is bound to account to the ward,<sup>5</sup> and any property which he may acquire with the ward's

*Slaughter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106; *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238; *Harding v. Larned*, 4 Allen (Mass.) 426; *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526; *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408.

It is the duty of a guardian to loan or otherwise invest the money of the ward in his hands, so as to keep it all the time at interest, so far as practicable, and to use due care in making the investment as to safety. *State v. Sanders*, 62 Ind. 562, 30 Am. Rep. 203.

**Burden of Proof.** — If the guardian does not obtain the approval of the court, the burden of showing due care rests on him. *Hughes v. People*, 10 Ill. App. 148. See also *infra*, this title, *Accounting by Guardian*, subdiv. 2. b. (5) *Losses Not Attributable to Guardian's Negligence*.

**1. Employment of Necessary Agents.** — *Holeman v. Blue*, 10 Ill. App. 130; *Beach v. Moser*, 4 Kan. App. 66.

**2. Employment of Legal Counsel.** — *Harris v. Berry*, 82 Ky. 137; *Hancock v. Cooper*, (Ky. 1897) 38 S. W. Rep. 883.

**3. Thus One Who Is Appointed Guardian While He Has a Suit Pending Against the Ward** will be required by chancery either to withdraw the suit or to resign the trust. *Smith v. Dudley*, 1 Dev. Eq. (16 N. Car.) 358.

**And Where the Guardian Brings, with Others, an Action Against the Ward**, and procures his own appointment as guardian *ad litem*, the judgment obtained is wholly void. *Hecker v. Sexton*, 43 Hun (N. Y.) 593.

**A Guardian Cannot Bring a Partition Suit for the Ward** where he is himself the other owner. *Roodhouse v. Roodhouse*, 132 Ill. 360.

**Nor Can He Submit a Controversy to Arbitration** where he is himself the adverse party. *Fortune v. Killebrew*, 86 Tex. 172.

**One Who Is Both Administrator and Guardian Cannot Settle His Account in Probate.** — So if the same person is administrator of an estate and guardian for the heirs, he cannot settle his account in probate, because of his representing both sides of the question, and a settlement made is a nullity. *Hays v. Cockrell*, 41 Ala. 75; *Tankersly v. Pettis*, 61 Ala. 354; *Vaughan v. Suggs*, 82 Ala. 357; *Cleere v. Cleere*, 82 Ala. 581, 60 Am. Rep. 750; *Aronstein v. Irvine*, 48 La. Ann. 301. And it makes no difference that a guardian *ad litem* is appointed for the minor. *Vaughan v. Suggs*, 82 Ala. 357. But in *California* it has been held that the guardian can, as administrator of an estate, apply for an order to sell the ward's estate, if a guardian *ad litem* is appointed. *Townsend v. Tallan*, 33 Cal. 45, 91 Am. Dec. 617.

**Guardian Restrained from Executing Fraudulent Contract.** — *Clark v. Layne*, 97 Ky. 290.

**Guardian May Represent Ward Where Their**

**Interests Are Identical.** — *Ross v. Enaut*, 46 La. Ann. 1250.

**Suit by Undertutor in Louisiana.** — In Louisiana the tutor is not incapacitated to be a party adverse to the ward in litigation, since the undertutor acts for the ward in such event. *James v. Meyer*, 41 La. Ann. 1100; *Meyer's Succession*, 42 La. Ann. 634.

**4. Downs v. Rickards**, 4 Del. Ch. 416; *Lanier v. Chappell*, 2 Fla. 621; *Bush v. Bush*, 33 Kan. 556; *Platt v. Wyche*, 41 La. Ann. 856; *Hayward v. Ellis*, 13 Pick. (Mass.) 272; *Sparhawk v. Allen*, 21 N. H. 9; *Spelman v. Terry*, 74 N. Y. 448; *White v. Parker*, 8 Barb. (N. Y. 48; *Copley v. O'Neil*, 57 Barb. (N. Y. 299; *Smith v. Gilmer*, 64 N. Car. 546; *Love v. Lea*, 2 Ired. Eq. (37 N. Car.) 627; *Hendee v. Cleaveland*, 54 Vt. 142. But see *Paxton v. Game-well*, 82 Va. 706.

**Mortgage on Guardian's Property Securing Loan to Himself.** — A guardian who has loaned the funds of the estate to himself, and recorded a mortgage on his own property to secure the loan, cannot release the mortgage without payment or order of court, so as to give clear title to one claiming under him, though by a *bona fide* deed. But his mortgage will be deemed valid, both as having a sufficient consideration and as having been validly delivered. *Jennings v. Jennings*, 104 Cal. 150.

**A Guardian Has No Right to Receive His Own Notes** for a claim of the ward, and if he takes such a note for the purchase price of the ward's land he is liable on his bond. *Heflin v. Bevis*, 82 Ind. 388.

**The Rule Stated in the Text Will Not Be Applied So Strictly** as to prevent a guardian from recovering for necessary goods sold from his own store at the regular price. *Moore v. Shields*, 69 N. Car. 50.

As to a sale of land by the guardian to himself, see *supra*, this title, *Powers and Duties of Guardian*, subdiv. 2. f. (4) (i) *Sale to Guardian*.

**5. Guardian Must Account to Ward for Profits.** — *Holbrook v. Brooks*, 33 Conn. 351; *Pinkard v. Smith*, Litt. Sel. Cas. (Ky.) 331; *White v. Parker*, 8 Barb. (N. Y.) 48; *Moore v. Shields*, 69 N. Car. 50; *Mann v. McDonald*, 10 Humph. (Tenn.) 275.

**Where a Guardian Paid a Claim Against the Ward in Confederate Money**, he can claim credit only for the actual value of the money at the time. *State v. Peebles*, 70 N. Car. 10; *Darby v. Stribling*, 24 S. Car. 422.

**Where Guardian Buys and Resells Ward's Land.** — Where the guardian personally buys the ward's land, at guardian's or other sale, and sells at a profit, he will be held to account to the ward for the profit. *Hayward v. Ellis*, 13 Pick. (Mass.) 272; *Spelman v. Terry*, 8 Hun



funds, or in the course of the ward's business, is subject to a resulting trust in favor of the ward.<sup>1</sup>

(3) *Estoppel to Deny His Appointment or His Acts Thereunder.* — One who has been appointed guardian, or who has acted and received funds as such, is estopped to avoid liability therefor by denying the guardianship relation;<sup>2</sup> and if he has done acts as guardian, he is estopped to deny the validity of such

(N. Y.) 205; Jones's Estate, 179 Pa. St. 36. And it makes no difference that he sold a small piece of his own land with the ward's, if he furnishes no evidence to separate the two. Jones's Estate, 179 Pa. St. 36. But where one bought a ward's land at guardian's sale, there being no ground of attack on the sale, and gave his bond for the price, and he was afterwards appointed guardian, and then sold the land at a profit, the ward cannot claim anything more than payment of the bond. Winborne v. White, 69 N. Car. 253.

As to profits made by the use of ward's funds, see *infra*, this title, *Accounting by Guardian*, subdiv. 2. a. (3) *Profits on Funds Used by Guardian*.

1. *Land Purchased Held in Trust for Ward.* — Thus the land bought by the guardian, whether in his own name or the ward's, at a guardian's tax, or other sale, is held on a trust for the ward.

*Arkansas.* — Shelton v. Lewis, 27 Ark. 190.

*Georgia.* — Groover v. King, 46 Ga. 101; Alexander v. Alexander, 46 Ga. 283; Sterling v. Arnold, 54 Ga. 690.

*Illinois.* — McFarland v. Conlee, 44 Ill. 455.

*Iowa.* — Rankin v. Miller, 43 Iowa 11.

*Kentucky.* — Smith v. Maxwell, 7 T. B. Mon. (Ky.) 602.

*Mississippi.* — Wise v. Hyatt, 68 Miss. 714.

*Missouri.* — Patterson v. Booth, 103 Mo. 402.

*New York.* — General Synod v. O'Brien, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 729.

*North Carolina.* — Younce v. McBride, 68 N. Car. 532; Small v. Small, 74 N. Car. 16.

*Tennessee.* — Gordon v. English, 3 Lea (Tenn.) 634.

And if it appears in the deed that he bought as guardian the trust will prevail against a purchaser from him. Rankin v. Miller, 43 Iowa 11; Morrison v. Kinstra, 55 Miss. 71; Patterson v. Booth, 103 Mo. 402.

*Purchase for Infants by One Subsequently Appointed Guardian.* — One who, in behalf of infants, purchased land of their father, and declared at and after the sale that his purchase was for such infants, and who was afterwards appointed guardian for the same infants, is bound to account to them for any profit on a resale of the land. Hayman's Appeal, 65 Pa. St. 433. But see Kisler v. Kisler, 2 Watts (Pa.) 323, 27 Am. Dec. 308.

*A Guardian Who Buys the Estate of His Ward,* in order to get possession and postpone payment until the ward's majority, commits a fraudulent breach of trust, and holds the property on a constructive trust. Downs v. Rickards, 4 Del. Ch. 416.

*Where a Guardian Buys Land on Which the Ward Holds a Mortgage,* he will be deemed to have bought for the ward's benefit, and the ward can compel a conveyance on paying to

him the amount of disbursements over rent received. Taylor v. Calvert, 138 Ind. 67.

*Where a Guardian Bought In the Ward's Land at a Foreclosure Sale,* the presumption is that he bought with the ward's funds, the foreclosure title merges with the ward's equity, and the guardian cannot sell the land except by the regular proceedings of probate sale. But if he used his own funds, he can hold the title until reimbursed for the cost. Low v. Purdy, 2 Lans. (N. Y.) 422.

*Trust Results Only Where Conversion of Funds Is Coeval with Conveyance.* — In order to create a resulting trust the conversion of the funds must be coeval with the conveyance. When a person borrows money from the guardian, to be used in paying his notes for land which he has purchased, upon an agreement between them that on the guardian's resignation in a short time the borrower would take out letters of guardianship, and receive his own notes from the former guardian as money, and this agreement is carried into effect, and the money is so used, the transaction does not create an equity in the ward to charge the lands with the payment of the money so borrowed and used. Coles v. Allen, 64 Ala. 98.

*Purchase of Land with Land Scrip.* — A guardian who in good faith converted land scrip of the ward into money by buying land with it for himself and others, and crediting the ward with the amount, will not be treated as a trustee. Davies v. Lowrey, 15 Ohio 655. But see Stoddard v. Smith, 11 Ohio St. 581.

2. *Estoppel to Deny Appointment — Alabama.* — Alston v. Alston, 34 Ala. 15; Corbitt v. Carroll, 50 Ala. 315; Harbin v. Bell, 54 Ala. 389; Vaughan v. Suggs, 82 Ala. 357.

*California.* — Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566.

*Georgia.* — Hines v. Mullins, 25 Ga. 696.

*Illinois.* — People v. Medart, 63 Ill. App. 111, affirmed 166 Ill. 348.

*Indiana.* — Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481; State v. Parrish, 1 Ind. App. 441.

*Kentucky.* — Taylor v. Taylor, 6 B. Mon. (Ky.) 561.

*Missouri.* — Bombeck v. Bombeck, 18 Mo. App. 26.

*North Carolina.* — Latham v. Wilcox, 99 N. Car. 367.

*Pennsylvania.* — McClure v. Com., 80 Pa. St. 167.

*Tennessee.* — M'Alister v. Olmstead, 1 Humph. (Tenn.) 210.

*Wisconsin.* — Hazelton v. Douglas, 97 Wis. 214.

*Receipt of Funds After Ward's Majority.* — If a guardian receives funds under color of his office, he is estopped to deny that he received them as guardian, though the receipt was after the ward's majority. Bombeck v. Bombeck, 18 Mo. App. 26.



acts or to assert claims in conflict therewith.<sup>1</sup>

(4) *Obligations of Joint Guardians* — (a) *Of Several Guardians for Same Estate.* — Where two or more guardians are appointed over the same estate, each has the power of a guardian; but they must exercise their powers in harmony, and neither has the right to act in defiance of the will of the other.<sup>2</sup> They are jointly responsible for acts done jointly, and separately for their separate acts and defaults.<sup>3</sup>

(b) *Of One Guardian for Several Wards.* — If one is appointed guardian for several wards, though by a single decree, his relation to the wards is several and not joint.<sup>4</sup> He must keep a separate account with each one; all receipts of common funds must be apportioned between them, and credited to each, and all payments charged to the one for whose benefit they were made, or properly apportioned if they were for the common benefit.<sup>5</sup>

b. *TO THIRD PERSONS* — (1) *For His Own Acts and Contracts.* — The guardian is personally liable to third persons with whom he has made contracts, though they were made properly, and for the ward's benefit.<sup>6</sup>

1. *Estoppel to Deny Validity of Official Acts.* — Thus he cannot attack the validity of a sale that he has made. *Williamson v. Woodman*, 73 Me. 163; *State v. Weaver*, 92 Mo. 673; *Dodge v. St. John*, 96 N. Y. 260.

A guardian who has receipted as such to himself as administrator for the ward's funds is estopped thereby. *Pfeiffer v. Knapp*, 17 Fla. 144; *Cranford v. Brewster*, 57 Ga. 226; *State v. Roeper*, 9 Mo. App. 21.

So, also, by charging himself with the funds as received from his predecessor, he is estopped to deny the receipt. *Byrd v. State*, 44 Md. 492; *Flickinger v. Hull*, 5 Gill (Md.) 60.

One who has been appointed guardian, and receipted as such for funds received, cannot claim that he has a right to them as husband, *In re Camp*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 141; *Matter of Camp*, 91 Hun (N. Y.) 204; *State v. Parrish*, 1 Ind. App. 441; nor that they belong to others, *Humble v. Mebane*, 89 N. Car. 410; *Carr v. Askew*, 94 N. Car. 194.

One who has received funds as the ward's, and receipted for them as guardian, cannot withhold them and question the source from which they came. *Morrison's Estate*, 5 Pa. Dist. 571.

He may explain by parol a patent error as to the interest and amount received; but he is estopped to deny the interest of the ward in lands sold by him as guardian. *In re Steele*, 65 Ill. 322. See *infra*, this title, *Guardian's Bonds* — *Recepted by Bond*.

2. *Several Guardians for Same Estate — Powers.* — *Gilbert v. Schwenck*, 14 M. & W. 488. In this case it was held that trespass lies by one joint guardian against the other for forcibly removing the ward from his lawful service without his consent.

It is competent, however, for one of two guardians to receive payment of a debt due to the ward. *Raymond v. Wyman*, 18 Me. 385.

3. *Liability.* — *Kirby v. Turner*, 110 N. Y. 107.

*Where Two Guardians Join in a Receipt for Money*, it is presumptive evidence that the money came into possession of both; and both are answerable for it. *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283.

*Where a Husband and Wife Were Guardians*, the husband is liable for funds received by the

wife, unless it appears that she applied them to her own separate use. *Gardner v. Gardner*, 7 Paige (N. Y.) 112.

*Where Guardians Apportion Custody and Management of Property.* — Where joint guardians in affluent circumstances and good repute apportion the custody and management of the property between them, but without surrendering the right of either to deal with any part of the property, each is chargeable with only what he received, unless he stood supinely by while the other was manifestly impairing the estate. *Jones's Appeal*, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282.

*Allowing Co-Guardian to Control Property.* — Where one guardian negligently left the funds in the other's hands, when he knew that the latter was using them in his own business and there was reason to deem them insecure, he is liable. *Pim v. Downing*, 11 S. & R. (Pa.) 66.

A guardian is liable for property which he, when about to be removed, voluntarily delivered to his co-guardian. *Clark's Appeal*, 18 Pa. St. 175. See *infra*, this title, *Guardian's Bonds* — *Joint Bonds*.

4. *One Guardian for Several Wards.* — *Tate v. Stevenson*, 55 Mich. 320; *Weyand's Appeal*, 62 Pa. St. 198.

5. *Crow v. Reed*, 38 Ark. 482; *Wood v. Black*, 84 Ind. 279; *Foteaux v. Lepage*, 6 Iowa 123; *Pursley v. Hayes*, 22 Iowa 28; *Freeman v. Mohrman*, 1 Dem. (N. Y.) 461; *Falconer's Estate*, 11 Pa. Co. Ct. 354; *Stanton's Estate*, 13 Phila. (Pa.) 213, 36 Leg. Int. (Pa.) 148; *Widdoe's Estate*, 17 Phila. (Pa.) 477, 42 Leg. Int. (Pa.) 236; *Weyand's Estate*, 62 Pa. St. 198; *Cranston v. Sprague*, 3 R. I. 205; *Armstrong v. Walkup*, 9 Gratt. (Va.) 372; *Hescht v. Calvert*, 32 W. Va. 215.

A settlement of a guardian's account which finds a certain amount due to the three wards will be set aside for error, since it should find the amount due to each one. *Croft v. Terrell*, 15 Ala. 652. See *infra*, this title, *Guardian's Bonds* — *Joint Bonds*.

6. See, for a full discussion and citation of authority on this point, *supra*, this title, *Powers and Duties of Guardian*, subd. 2. k. *To Make Contracts*, where it is shown that the primary responsibility to third persons for contracts made by the guardians rests upon the guard-

When One Has Paid Money to the Guardian by Mistake the guardian is not liable therefor, if he has paid it to the ward.<sup>1</sup>

(2) *For Ward's Contracts and Torts.* — A guardian is not personally liable for any contract made by the ward,<sup>2</sup> except where it was authorized by himself;<sup>3</sup> nor for a tort committed by the ward.<sup>4</sup> Even his previous authority to the ward to make a particular contract will not ordinarily make a later contract of the same kind binding on him.<sup>5</sup>

(3) *For Necessaries Furnished to Ward.* — Nor is the guardian personally liable for necessities furnished to the ward without his order, since his duty is not a general one, like the father's, to support the ward.<sup>6</sup> But one who furnishes necessities may have the ward's income, if it is sufficient, subjected to the satisfaction of his claim, by a suit against the guardian in his fiduciary capacity.<sup>7</sup> As a general rule, however, the guardian is the proper judge of

personally, and not upon the estate of the ward.

**Contract to Support Ward.** — A guardian who contracts with another person to support his ward, and does not expressly limit the right of recovery to the estate of the ward, is personally liable. *Hutchinson v. Hutchinson*, 19 Vt. 437.

**A Mother, Being Also Guardian,** who engages board for a child, is liable personally and not as guardian. *McNabb v. Clipp*, 5 Ind. App. 204.

**A Guardian Who Has Given a Note as Guardian** is personally liable thereon. *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Gibson v. Irby*, 17 Tex. 173. But in *Louisiana* it has been held that a note given by the tutor does not bind him personally after his resignation. *Ford v. Miller*, 18 La. Ann. 571.

**A Replevin Bond Signed by the Guardian's Own Name** binds him personally. *Oliver v. Townsend*, 16 Iowa 430.

**Liability for Ground Rent.** — A guardian who receives a conveyance made to him as guardian reserving ground rents is personally liable for the rents. *Hannen v. Ewalt*, 18 Pa. St. 9.

**Where a Guardian Executes with His Ward an Indenture of Apprenticeship,** the covenants therein do not bind him personally, so as to make him liable for the ward's breach thereof. *Chapman v. Crane*, 20 Me. 172; *Holbrook v. Bullard*, 10 Pick. (Mass.) 68; *Blunt v. Melcher*, 2 Mass. 228; *Ackley v. Hoskins*, 14 Johns. (N. Y.) 374; *Velde v. Levering*, 2 Rawle (Pa.) 269; *Leech v. Agnew*, 7 Pa. St. 21.

*Contra in Connecticut.* — *Paddock v. Higgins*, 2 Root (Conn.) 316, 482; *Hewit v. Morgan*, 2 Root (Conn.) 363; *Clement v. Wheeler*, 2 Root (Conn.) 466.

**Services Rendered Without Authority Before Guardian's Appointment.** — A guardian suing an attorney for moneys collected by him in the guardian's name, but in the ward's behalf, cannot be charged by the attorney with services rendered to the ward's estate before the plaintiff's appointment, and without authority. *Huntsman v. Fish*, 36 Minn. 148.

**Tradesman Not Bound to Inquire Whether Income Is Sufficient.** — Though the guardian has no right to use the principal of the ward's estate, yet a tradesman from whom he orders goods is not bound to inquire whether the income is sufficient. *Broadus v. Rosson*, 3 Leigh (Va.) 12.

**Consideration for Promise to Pay Amount Due to**

**Predecessor.** — Receipt of the ward's assets from a preceding guardian is a good consideration for the new guardian's promise to pay the amount due to the predecessor. *French v. Thompson*, 6 Vt. 54.

1. *Massey v. Massey*, 2 Hill Eq. (S. Car.) 492.

2. **Guardian Not Personally Liable for Ward's Contract.** — *Camp v. Dill*, 27 Ala. 553; *Edmunds v. Davis*, 1 Hill L. (S. Car.) 279; *Kraker v. Byrum*, 13 Rich. L. (S. Car.) 163.

3. **Unless Authorized by Him.** — If the ward's contract is made with the guardian's consent and approbation, it is binding on him personally, as if he had made it himself. *May v. Webb*, Kirby (Conn.) 287.

But that the guardian knew that the ward had made a contract, and expressed no dissent, is not sufficient. *Edmunds v. Davis*, 1 Hill L. (S. Car.) 279.

4. *Garrigus v. Ellis*, 95 Ind. 598.

5. *Camp v. Dill*, 27 Ala. 553; *Rossiter v. Marsh*, 4 Conn. 196; *Prescott v. Cass*, 9 N. H. 93.

6. **Guardian Not Personally Liable for Necessaries Furnished to Ward Without His Order** — *Arkansas.* — *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610.

*Connecticut.* — *Penfield v. Savage*, 2 Conn. 387.

*Florida.* — *Baird v. Steadman*, 39 Fla. 40.

*Indiana.* — *Clark v. Casler*, 1 Ind. 243; *Turner v. Flagg*, 6 Ind. App. 563.

*Massachusetts.* — *Spring v. Woodworth*, 4 Allen (Mass.) 326; *Cole v. Eaton*, 8 Cush. (Mass.) 587.

*North Carolina.* — *State v. Cook*, 12 Ired. L. (34 N. Car.) 67.

*Pennsylvania.* — *Call v. Ward*, 4 W. & S. (Pa.) 118, 39 Am. Dec. 64.

*South Carolina.* — *Tucker v. M'Kee*, 1 Bailey L. (S. Car.) 344; *Edmunds v. Davis*, 1 Hill L. (S. Car.) 279; *Kraker v. Byrum*, 13 Rich. L. (S. Car.) 163.

*Virginia.* — *Barnum v. Frost*, 17 Gratt. (Va.) 398.

7. **Liability of Guardian in His Fiduciary Capacity.** — *Meyer v. Temme*, 72 Ill. 574; *Turner v. Flagg*, 6 Ind. App. 563; *Rooker v. Rooker*, 60 Ind. 550; *Hastings v. Bachelor*, 27 Tex. 259.

But in *Pennsylvania* it has been held that the action must be brought against the ward and not against the guardian. *Call v. Ward*, 4 W. & S. (Pa.) 118, 39 Am. Dec. 64.



what are necessities for his ward, and if he makes reasonable provision for the ward's wants, one who assumes to furnish necessities without his authority or consent cannot recover therefor.<sup>1</sup>

(4) *For Ward's Debts.* — It is the guardian's duty to pay all lawful debts of the ward if he has funds,<sup>2</sup> but they do not become his personal debts, and the remedy for his failure to pay them is, in most of the United States, by suit, not on the debt, but on his bond.<sup>3</sup>

2. *Rights of Guardian.* — The guardian's rights have occasioned very little litigation. It is settled, however, that when he has fully discharged his obligations to the ward, he is entitled to protection from personal loss.<sup>4</sup> But his acts will be construed strictly against him, whenever it is a question of right between him and the ward.<sup>5</sup>

Under the Massachusetts Statutes the proper remedy was a suit on the guardian's bond. *Cole v. Eaton*, 8 Cush. (Mass.) 587.

*Right to Set Off Ward's Labor Against Claim for Necessaries.* — In a suit against a guardian in his fiduciary capacity for necessities furnished to his wards, he may prove that the wards have worked for the plaintiff, and the value thereof, and set it off against his claim; but the jury cannot take into consideration any labor that such wards may do for the plaintiff in the future, and for the court to instruct them that they may do so is error. *Meyer v. Temme*, 72 Ill. 574.

1. *Guardian Generally Judge of What Are Necessaries.* — *Nicholson v. Spencer*, 11 Ga. 607; *McKanna v. Merry*, 61 Ill. 177; *Gwaltney v. Cannon*, 31 Ind. 227; *Turner v. Flagg*, 6 Ind. App. 563; *Hussey v. Roundtree*, Busb. L. (44 N. Car.) 110; *Bredin v. Dwen*, 2 Watts (Pa.) 95; *Kraker v. Byrum*, 13 Rich. L. (S. Car.) 163. See also *Hastings v. Bachelor*, 27 Tex. 259.

In North Carolina it has been held that if a stranger, without a contract with the guardian, furnishes the ward with board, or anything else, he cannot recover therefor, except under very peculiar circumstances. *State v. Cook*, 12 Fred. L. (34 N. Car.) 67.

2. *Guardian's Duty to Pay Ward's Debts.* — *Rolfe v. Rolfe*, 15 Ga. 451; *Rooker v. Rooker*, 60 Ind. 550; *Raymond v. Sawyer*, 37 Me. 406; *Conant v. Kendall*, 21 Pick. (Mass.) 36.

A guardian cannot avoid beneficial contracts of his ward, especially where they were assented to by him. *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134.

3. *Raymond v. Sawyer*, 37 Me. 406; *Conant v. Kendall*, 21 Pick. (Mass.) 36; *Pendexter v. Cole*, 66 N. H. 556; *Arnold v. Angell*, 1 R. I. 289; *Willard v. Fairbanks*, 8 R. I. 1; *Allen v. Hoppin*, 9 R. I. 258.

*Debt Contracted by Former Guardian.* — A guardian against whom a judgment has been obtained for goods ordered by a former guardian is not personally bound to pay it, unless he has funds. *Stumph v. Goepper*, 76 Ind. 323.

He cannot be sued for necessities ordered by his predecessor unless he expressly promised to pay for them. *Young v. Warne*, 2 Rob. (Va.) 420.

*Remedy in Equity Where Guardian Has Wasted Ward's Estate.* — A creditor of the ward may proceed against the guardian in equity, if he has wasted the estate, and may hold the sureties of the guardian, though he took the guard-

ian's bond for the debt, without intending to release the estate. *Barnum v. Frost*, 17 Gratt. (Va.) 398.

*Guardian's Promise to Pay Ward's Debts Need Not Be in Writing.* — The promise of a guardian to pay a debt contracted by his ward is an original and not a collateral undertaking within the statute of frauds, and need not be in writing. *Roche v. Chaplin*, 1 Bailey L. (S. Car.) 419.

*Liability for Taxes.* — Under the Massachusetts tax acts it was held that a guardian might be assessed personally for taxes on the ward's estate in his possession. *Payson v. Tufts*, 13 Mass. 493.

4. *Guardian's Right to Protection from Personal Loss.* — Thus where a guardian loans his ward's money, taking a note and mortgage to himself as guardian, and afterwards accounts to the ward and pays the amount, the note and mortgage become his own property. *Wright v. Robinson*, 94 Ala. 479.

So with a debt which he neglects for several years to collect, and for which he accounts to his ward. *Breneman's Appeal*, 121 Pa. St. 641.

Where the guardian has recovered a judgment for the ward for a libel, and the ward on coming of age discharges the judgment, the discharge will be set aside to enable the guardian to recover his expenditures in obtaining it, where he is without other funds. *Curran v. Abbott*, 141 Ind. 492, 50 Am. St. Rep. 337.

A guardian who has incurred personal responsibility in the proper discharge of his duty has a right to be protected against loss by the funds remaining in the custody of the court. *Woodward's Appeal*, 38 Pa. St. 322.

But a tutor who has collected a note due to the ward and applied the proceeds to his individual debt cannot sue the creditor to recover from him the sum paid. *Semple v. Scarborough*, 44 La. Ann. 257. See *infra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward—Liabilities of Ward.*

5. *Guardian's Acts Construed Strictly Against Him.* — Thus new buildings erected by a guardian on the ward's land will be construed to be a permanent addition to the land, especially where the guardian is also the ward's father. *Copley v. O'Niel*, (Supm. Ct. Gen. T.) 39 How. Pr. (N. Y.) 41.

If a guardian, under a mistake of law as to the title, retains his own property as the property of his ward, and continues so to treat it for a period of eight years, his right will be



**3. Remedies of Ward — a. WARD'S RIGHT OF ACTION AGAINST GUARDIAN — (1) During Guardianship.** — It has generally been held that during the guardianship the ward cannot maintain any action at law or in equity against the guardian. The continuing trust between the parties and the jurisdiction of the Probate Courts over its fulfilment are inconsistent with the maintenance of any action in the ordinary courts. In case of malfeasance, the removal of the guardian should first be obtained.<sup>1</sup>

(2) *Upon Termination of Guardianship.* — But when the guardianship terminates, the ward can maintain in the proper court any action required to secure his full rights from the former guardian.<sup>2</sup> In many cases, however, it is held that the accounting in the probate court is a necessary prerequisite to the maintenance of assumpsit, or any similar action, for the balance due.<sup>3</sup>

(3) *Incidents of Ward's Right of Action* — (a) **What Constitutes Conversion.** — Any commingling by the guardian of the ward's funds with his own, by which their identity is lost,<sup>4</sup> or any use of such funds for his own benefit,<sup>5</sup> is a conversion.

barred by the statute of limitations, and the title to the property will vest in the ward. *Magee v. Keegan*, 35 Miss. 244, 72 Am. Dec. 123.

**1. No Right of Action While Guardianship Exists.** — *Ely v. Hawkins*, 15 Ind. 230; *Gibbs v. Lum*, 29 La. Ann. 526; *Pickering v. De Rochemont*, 45 N. H. 67.

**Right to Sue by Next Friend.** — But in some jurisdictions it has been held that though an infant himself cannot require his guardian to account during the guardianship, yet a third person may, during the subsistence of the trust, bring a bill in equity for an account in the ward's behalf. *Eyre v. Shaftsbury*, 2 P. Wms. 119; *Swan v. Dent*, 2 Md. Ch. 111.

And in *North Carolina* it has been held that a debt by a person to a ward is not suspended by his own appointment as guardian, but that the infant may sue thereon by next friend. *Winborn v. Gorrell*, 3 Ired. Eq. (38 N. Car.) 117, 40 Am. Dec. 456.

In a *Massachusetts* case it was held that a spendthrift ward cannot sue his guardian while the relation exists. The court refused to express an opinion as to whether an infant ward could in certain cases sue his guardian by next friend. *Mason v. Mason*, 19 Pick. (Mass.) 506.

**2. Ward's Right of Action upon Termination of Guardianship.** — *Lataillade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219; *Booth v. Starr*, 5 Day (Conn.) 427; *Linton v. Walker*, 8 Fla. 144, 71 Am. Dec. 105; *Pfeiffer v. Knapp*, 17 Fla. 144; *Pickering v. De Rochemont*, 45 N. H. 67; *Armstrong v. Miller*, 6 Ohio 118; *Pedan v. Robb*, 8 Ohio 227; *Rinker v. Streit*, 33 Gratt. (Va.) 663.

But in *Massachusetts* the ward cannot sue in assumpsit, the right of action being on the bond only. *Brooks v. Brooks*, 11 Cush. (Mass.) 18.

The Ward at Majority can sue the guardian either alone or on his bond without procuring his removal. *Stroup v. State*, 70 Ind. 495; *Hays v. Walker*, 90 Ind. 105.

**That an Account Has Been Had Will Not Bar an Action for Negligence** in failing to collect a note, unless it appears that the question of negligence was passed upon in the accounting. *Potter v. Hiscox*, 30 Conn. 508.

If the Guardian Has Paid the Funds to the

Ward's Husband, with her assent, both being minors, she can sue him after coming of age, without tendering to him the amount so paid. *State v. Joest*, 46 Ind. 235.

**Where Ward Allows His Wages to Be Used for Family Support.** — If a minor lives with a brother who is his guardian, and a sister, and allows his wages to go for the common family support, he cannot recover from the guardian the surplus of wages over his own support. *Shurtleff v. Rile*, 140 Mass. 213.

**Defense to Partition Proceedings Instituted by Widow as Guardian.** — When of age, the ward may claim the amount of his estate in the hands of his mother as guardian, as a defense to partition proceedings instituted by her as widow. *Moore v. Moore*, (Tex. Civ. App. 1895) 31 S. W. Rep. 532.

**3. Accounting in Probate Court Necessary Prerequisite to Suit.** — *Ludowig v. Weber*, 35 La. Ann. 579; *Murray v. Wood*, 144 Mass. 195; *Jacobs v. Fouse*, 23 Minn. 51; *Critchett v. Hall*, 56 N. H. 324; *Davis v. Drew*, 6 N. H. 399, 25 Am. Dec. 467; *Bowman v. Herr*, 1 P. & W. (Pa.) 282; *Denison v. Cornwell*, 17 S. & R. (Pa.) 377; *Nutz v. Reutter*, 1 Watts (Pa.) 229; *In re Maybin*, 15 Nat. Bankr. Reg. 468.

*Contra.* — *Stannard v. Whittlesey*, 9 Conn. 559. But see *Robertson v. Robertson*, 1 Root (Conn.) 51; *Davenport v. Olmstead*, 43 Conn. 67; *Field v. Torrey*, 7 Vt. 372.

As to a similar rule requiring a settlement in probate as a condition precedent to suit on the bond, see *infra*, this title, *Guardian's Bonds*, subdv. 2. *b. Settlement of Account Must Precede Suit.*

**4. Covey v. Neff**, 63 Ind. 395.

**Taking a Note in Guardian's Name** is not in itself a conversion, but only evidence tending to show a conversion. *Richardson v. State*, 55 Ind. 381.

"That case is of doubtful soundness." *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753.

**5. Use of Funds by Guardian for His Own Benefit.** — *State v. Sanders*, 62 Ind. 562, 30 Am. Rep. 203; *Lowry v. State*, 64 Ind. 421; *Asher v. State*, 88 Ind. 215; *Hogshead v. State*, 120 Ind. 327; *Myers v. State*, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712; *Burwell v. Burwell*, 78 Va. 574.

To Loan the Funds and Take Securities in His

(b) **Ward's Right of Election in Case of Conversion or Misuse of Funds.** — Whenever the guardian converts the ward's property to his own use, or without right changes its character, as from real to personal estate, or *vice versa*, the ward has the election to repudiate the transaction and hold the guardian to account as if the conversion or change had not been made; or he can affirm it and claim the resulting benefits;<sup>1</sup> but he cannot assert inconsistent claims, and the election of either course concludes him from afterwards following the other.<sup>2</sup>

(c) **Statute of Limitations.** — The general rule is that the statute of limitations begins to run against the maintenance of an action by the ward against his

**Own Name** is *prima facie* a conversion; but this may be rebutted by proof. *Sanders v. Forgasson*, 3 Baxt. (Tenn.) 249. See *infra*, this title, *Accounting by Guardian*, subdiv. 2. b. (5) (b) (ee) *Investments in Guardian's Own Name*.

**It Makes No Difference that the Guardian Is Solvent** at the time of the conversion, and afterwards gives a new bond with sufficient surety. The right of action exists immediately upon the conversion. *State v. Sanders*, 62 Ind. 562, 30 Am. Rep. 203.

**It Does Not Constitute the Crime of Embezzlement** for a guardian to use the ward's money in his own business, where it was done in good faith, and with honest intention, and in full expectation of fully paying the debt, though it was lost without the guardian's fault. *Myers v. State*, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712.

**1. Ward's Right of Election — United States.** — *Yerger v. Jones*, 16 How. (U. S.) 30.

*Alabama.* — *Kyle v. Barnett*, 17 Ala. 306; *Martin v. Raborn*, 42 Ala. 648; *Shorter v. Frazer*, 64 Ala. 74.

*Arkansas.* — *Shelton v. Lewis*, 27 Ark. 190.

*California.* — *Curtis v. Devoe*, 121 Cal. 468.

*Illinois.* — *Padfield v. Pierce*, 72 Ill. 500.

*Iowa.* — *Robinson v. Robinson*, 22 Iowa 427.

*Kansas.* — *Bush v. Bush*, 33 Kan. 556.

*Kentucky.* — *Edmonds v. Morrison*, 5 Dana (Ky.) 223; *Irvine v. McDowell*, 4 Dana (Ky.) 629.

*Michigan.* — *Rowley v. Towsley*, 53 Mich. 329.

*Mississippi.* — *Wood v. Stafford*, 50 Miss. 370; *Fant v. Dunbar*, 71 Miss. 576.

*New Jersey.* — *Durling v. Hammar*, 20 N. J. Eq. 220.

*New York.* — *White v. Parker*, 8 Barb. (N. Y.) 48; *Cromwell v. Kirk*, 1 Dem. (N. Y.) 599; *Eckford v. De Kay*, 8 Paige (N. Y.) 89.

*North Carolina.* — *Hoskins v. Wilson*, 4 Dev. & B. L. (20 N. Car.) 243; *Beam v. Froneberger*, 75 N. Car. 540.

*Pennsylvania.* — *McAvoy's Estate*, 2 Pa. Dist. 609; *Lukens's Appeal*, 7 W. & S. (Pa.) 48; *Royer's Appeal*, 11 Pa. St. 36.

*South Carolina.* — *Richardson v. Day*, 20 S. Car. 412.

*Tennessee.* — *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572; *Singleton v. Love*, 1 Head (Tenn.) 357; *Caplinger v. Stokes*, Meigs (Tenn.) 175; *Tealey v. Hoyte*, 3 Tenn. Ch. 561.

*Texas.* — *Smoot v. Richards*, 8 Tex. Civ. App. 146; *Hampton v. Hampton*, 9 Tex. Civ. App. 497.

**The Court May Exercise the Election for Him During Minority.** — *Tealey v. Hoyte*, 3 Tenn. Ch. 561. Or the ward's husband, after her

death, may elect. *Matter of Bolton*, (Surrogate Ct.) 20 Misc. (N. Y.) 532.

**Guardian's Successor Cannot Affirm Unlawful Purchase of Land.** — But if the guardian dies before the ward comes of age, the successor cannot affirm an unlawful purchase of land, but can only claim the sum so used, with interest. *Cromwell v. Kirk*, 1 Dem. (N. Y.) 599. See *McAvoy's Estate*, 2 Pa. Dist. 609; *Clayton v. McKinnon*, 54 Tex. 211.

**The Ward Can Demand an Account Both Ways**, so as to enable him to make his election. *Fant v. Dunbar*, 71 Miss. 576.

**Where the Guardian Trades the Ward's Land for Other Land**, without authority, the ward can repudiate the transaction and recover the land traded away; or he can hold the land acquired; but he cannot demand from the guardian the value of the land conveyed, tendering to him a deed of that received. *Morgan v. Johnson*, 68 Ill. 190. See *supra*, this title, *Powers and Duties of Guardian*, subdiv. 2. f. (4) (h) *Ratification of Sale by Ward*; subdiv. 2. g. *To Purchase Real Estate*.

**2. Ward Cannot Assert Inconsistent Claims.** — *Kyle v. Barnett*, 17 Ala. 306; *Padfield v. Pierce*, 72 Ill. 500; *Cassedy v. Casey*, 58 Iowa 326; *Rowley v. Towsley*, 53 Mich. 329; *Wood v. Stafford*, 50 Miss. 370; *Fant v. Dunbar*, 71 Miss. 576; *Matter of Wood*, 71 Mo. 623; *Caplinger v. Stokes*, Meigs (Tenn.) 175.

**Ward Concluded by Acts of Guardian's Successor.** — So if the successor of a guardian accepted the sum for which the ward's property was sold to the guardian, and it was paid without fraud, concealment, or ignorance of the facts, the ward is concluded. *McAvoy's Estate*, 2 Pa. Dist. 609.

Where a guardian bought land for himself with the ward's funds, and the successor sued for the money and obtained judgment, which he levied on the land, the ward is barred from claiming the land. *Clayton v. McKinnon*, 54 Tex. 211.

**If a Guardian Was Afterwards Appointed Trustee**, and receipted as such to himself as guardian, and the ward, then of age, knowing all the facts, and represented by counsel, brought a suit to charge him as trustee, he will be estopped to claim against him as guardian. *State v. Branch*, 134 Mo. 592, 56 Am. St. Rep. 533.

**The Ward Cannot Ratify in Part and Disaffirm in Part**; and by adoption of a part of the transaction, his representative is concluded as to the whole. *Singleton v. Love*, 1 Head (Tenn.) 357. See *supra*, this title, *Powers and Duties of Guardian*, subdiv. 2. f. (4) (h) *Ratification of Sale by Ward*.



guardian at his majority,<sup>1</sup> or other termination of the guardianship.<sup>2</sup>

(d) **Measure of Damages.**—The sum which the ward should receive and the guardian pay is that which the former has lost by the failure of the latter to execute the trust honestly and properly. Where the guardian has misappropriated the fund, or neglected to invest it, the ward will be presumed to have lost at least the legal interest; and if it has been so used that the accumulations exceed the interest, the court will award whatever may have been received. If the guardian fails or refuses to account, he may be charged with such accumulations as the best management of a successful business would be likely to secure, even to allowing compound interest at the highest lawful rate.<sup>3</sup>

(e) **Notice Imputed to Ward.**—The ward will be charged with knowledge of any facts which are disclosed by the records.<sup>4</sup>

**b. RIGHT OF FOLLOWING HIS PROPERTY INTO ESTATE OF GUARDIAN.**—As long as the property of the ward retains its identity, or can be specifically

**1. Statute of Limitations Begins to Run at Ward's Majority**—*Alabama*.—*Alston v. Alston*, 34 Ala. 15; *Glass v. Woolf*, 82 Ala. 281.

*Indiana*.—*Jones v. Jones*, 91 Ind. 378; *Peelle v. State*, 118 Ind. 512; *Lambert v. Billheimer*, 125 Ind. 519.

*Louisiana*.—*Sewell v. McVay*, 30 La. Ann. 673; *Cochran v. Violet*, 37 La. Ann. 221; *Bedell v. Calder*, 37 La. Ann. 805.

*Maryland*.—*State v. Henderson*, 54 Md. 332.

*Michigan*.—*Tate v. Stevenson*, 55 Mich. 320.

*Missouri*.—*State v. Willi*, 46 Mo. 236; *Cohen v. Atkins*, 73 Mo. 163; *State v. Miller*, 44 Mo. App. 118.

*North Carolina*.—*Williams v. McNair*, 98 N. Car. 332.

*Pennsylvania*.—*Bull v. Towson*, 4 W. & S. (Pa.) 557; *Bones's Appeal*, 27 Pa. St. 492.

*Texas*.—*Hampton v. Hampton*, 9 Tex. Civ. App. 497. Compare *Hagerty v. Scott*, 10 Tex. 525.

**2. Or at Termination of Guardianship from Other Cause.**—*Alston v. Alston*, 34 Ala. 15.

Thus the statute begins to run upon the marriage of a female ward to an adult husband, *Finnell v. O'Neal*, 13 Bush (Ky.) 176; *Bull v. Towson*, 4 W. & S. (Pa.) 557; *Langston v. Shands*, 23 S. Car. 149; *Lane v. Farmer*, 11 Lea (Tenn.) 568; at the death of the ward, *Glass v. Woolf*, 82 Ala. 281; or at the death of the guardian, *Sewell v. McVay*, 30 La. Ann. 673.

**Final Settlement of Account Starting Point in Some States.**—*Connelly v. Weatherly*, 33 Ark. 658; *Cobb v. Kempton*, 154 Mass. 266; *Nunnery v. Day*, 64 Miss. 457. If not from majority, at least from the settlement of the account and order to pay the balance over. *Probate Ct. v. Child*, 51 Vt. 82.

In *South Carolina* it has been held that the statute begins to run, where a guardian is removed, upon his settlement with his successor. *Long v. Cason*, 4 Rich. Eq. (S. Car.) 60.

**Settlement and Receipt in Full.**—Where a ward, through an attorney in fact, made a settlement with the guardian, and gave to him a receipt in full, receiving money and a claim in judgment, being at the time acquainted with all the facts urged in the suit, it was held that the statute of limitations began to run from the giving of the receipt. *Owens v. Watts*, 24 S. Car. 76.

Where the guardian and the ward made a

settlement two months before the ward's majority, and it was regularly filed, and the ward gave a receipt in full, the statute runs from that time. *Motes v. Madden*, 14 S. Car. 488.

**Where a Curator Gave a Mortgage on the Ward's Land for His Own Debt**, which the ward by suit procures to be removed, an action to recover the cost of the suit is barred only from the time when the cost was incurred. *State v. Tittman*, 54 Mo. App. 490, affirmed 134 Mo. 162.

**If the Guardian Is Also Life Tenant**, the statute will not run until the termination of his life estate, since the ward could not have demanded the funds before then. *In re Camp*, 126 N. Y. 377. See also *infra*, this title, *Guardian's Bonds*, subdiv. 2. f. (i) *Statute of Limitations*.

**3. Measure of Damages.**—*Perrin v. Lepper*, 72 Mich. 454.

The highest rate of interest which could have been obtained by due diligence may be allowed. *Hays v. Walker*, 90 Ind. 105.

In *California* the rule has been held to be the return of the principal, with interest compounded annually at the legal rate, unless it is shown that more was realized by the guardian. A judgment fixing a higher rate of interest than the legal rate is erroneous, though it was the current commercial rate. *Cousins's Estate*, 111 Cal. 441.

**Damages for Conversion of Stocks.**—Where a guardian sold his ward's stocks, but kept his accounts as if he still had them, he should be charged the highest price they attained after the conversion. *Lamb's Appeal*, 58 Pa. St. 142.

Where a guardian converted his ward's Confederate funds, he was chargeable with the actual, not the nominal, value at the time of conversion. *Brand v. Abbott*, 42 Ala. 499.

**The Cost of the Necessary Litigation to Recover the Ward's Funds** may be recovered from the guardian guilty of conversion. *State v. Tittman*, 134 Mo. 162.

**Statutes.**—In *Indiana* there is a statutory penalty of ten per cent. in addition to the sum converted. *Potter v. State*, 23 Ind. 550, 607.

In *Mississippi* ten per cent. interest is allowed; and this does not cease at maturity, but continues to run until actual payment. *Boyd v. Hawkins*, 60 Miss. 277.

**4. Parish v. Alston**, 65 Tex. 194. See *Robert v. Morrin*, 27 Mich. 306.



traced into particular funds in the hands of the guardian, the ward can follow it into the guardian's estate; but if its identity has become lost, so that no property in the guardian's hands can be specifically identified as the ward's, he has no lien on the guardian's property, nor right of preference in case of administration or insolvency.<sup>1</sup>

c. **RIGHT TO RECLAIM HIS PROPERTY FROM THIRD PERSONS.** — If the ward's property has passed, by the voidable act of the guardian, into the hands of third persons who have received it *bona fide* and on good consideration, the ward cannot reclaim it from them.<sup>2</sup> But if they acquired it in collusion with the guardian,<sup>3</sup> with knowledge of the wrong,<sup>4</sup> or of facts putting them on

**1. Following Ward's Property** — *Connecticut*. — State v. Osborne, 69 Conn. 257.

*Georgia*. — Vason v. Bell, 53 Ga. 416.

*Indiana*. — Covey v. Neff, 63 Ind. 391.

*Kentucky*. — Hemphill v. Lewis, 7 Bush (Ky.) 215; Chanslor v. Chanslor, 11 Bush (Ky.) 665; Beaven v. Citizens' Nat. Bank, 19 Ky. L. Rep. 1261, (Ky. 1897) 43 S. W. Rep. 242.

*Louisiana*. — Burdeau v. Davey, 43 La. Ann. 585.

*Maryland*. — Hartsock v. Russell, 52 Md. 619.

*Massachusetts*. — Brown v. Dunham, 11 Gray (Mass.) 42.

**Money Deposited in Bank, Payable to One "as Guardian,"** does not become part of his estate, and the title of the ward is superior to that of the guardian's executor or administrator. Gary v. People's Nat. Bank, 26 S. Car. 538, 4 Am. St. Rep. 733, *overruling* McColl v. Weatherly, 5 Strobb. L. (S. Car.) 72. In Chitwood v. Cromwell, 12 Heisk. (Tenn.) 658, the contrary doctrine is held as to a note payable to "S., guardian of R."

**Bank Stock Subscribed to in the Name of "C., Guardian of B.,"** is the property of the ward, and at maturity he can compel the bank to transfer it to him on the books, though the administrator of the guardian claims it. Brisbane v. Harrisburg Bank, 4 Watts (Pa.) 92.

**Where a Guardian Takes a Deed of the Ward's Land in His Own Name,** but inventories it as the ward's, and charges expenses and credits proceeds thereof to the ward, equity will compel the administrator to convey the land to the ward and account for earnings received by himself. Fogler v. Buck, 66 Me. 205.

**Where a Guardian Mingled the Ward's Money with His Own in the Purchase of a Farm,** and took title in his own name, the equity of the infants will prevail over the title of the guardian's trustee, though he has made a judicial sale of the property, if the sale is not completed, nor the price paid. Sheetz v. Neagley, 13 Phila. (Pa.) 506, 35 Leg. Int. (Pa.) 340.

**Land Purchased by Father with Ward's Funds.** — If the guardian furnishes the ward's father with funds of the ward to buy real estate, the claim of the ward to the land is superior to that of the father's creditors. Robinson v. Robinson, 22 Iowa 427.

**Where the Guardian's Wife Invested the Ward's Funds in Her Own Name,** the ward is entitled to the accruing profits, and his title is superior to that of the guardian's creditors. Kepler v. Davis, 80 Pa. St. 153.

**Ward's Right to Deed Made to Him.** — Where the guardian, being largely indebted to the ward, executed a deed to him of a mortgage

less than the amount due, the ward can compel a trustee in insolvency to deliver the deed to him, though he did not know of the deed. Moore v. Hazelton, 9 Allen (Mass.) 102.

**Where the Ward Owned a Farm Which Was Carried on by the Guardian,** the stock and tools will be presumed, *prima facie*, but not conclusively, to be the ward's. Tenney v. Evans, 11 N. H. 346.

**Funds Used for Paying Debt for or Lien on Guardian's Land.** — That a guardian has used his ward's funds in paying his own debt for land already owned by him, or paying off a lien on it, does not give to the wards a trust in the land or a right to be subrogated to the lien. French v. Sheplor, 83 Ind. 266, 43 Am. Rep. 67. See *supra*, this section, *Obligations of Guardian — To Ward — Is under Trust Obligations*.

**2. Ward Cannot Reclaim Property from Bona Fide Holder for Good Consideration.** — Wallace v. Jones, 93 Ga. 419. But see Carter v. Lipsey, 70 Ga. 417; Goldstein v. Goldstein, 11 Ill. App. 530; McFarland v. Conlee, 44 Ill. 455; Wyman v. Hooper, 2 Gray (Mass.) 141; White v. Iselin, 26 Minn. 487; Gordon v. English, 3 Lea (Tenn.) 634.

**But in Indiana** it has been held that a guardian may follow his ward's funds and recover them from one who received them from a former guardian under a contract made by him individually and not as guardian. Fox v. Kerper, 51 Ind. 148.

**A Minor Whose Guardian Has Improperly Paid Attorney Fees** cannot by bill or cross-bill compel repayment by the attorney, but his remedy is against his guardian. Dougherty v. Hughes, 165 Ill. 384.

**Though a Guardian Sold His Ward's Note Without Legal Authority,** and the maker paid it with knowledge of the facts, yet if the guardian actually accounted to the ward for the sum received, neither the purchaser nor the maker is liable to the ward. Gum v. Swearingen, 69 Mo. 553.

**A Sale by a Guardian Indirectly to Himself** is voidable even against innocent parties. Hampton v. Hampton, 9 Tex. Civ. App. 497.

**3. Collusion with Guardian.** — Myrick v. Jacks, 33 Ark. 425, 39 Ark. 293.

**4. Knowledge of Wrong.** — Robinson v. Peabworth, 71 Ala. 240; Porter v. Tudor, 9 Conn. 416; Alspaugh v. Adams, 80 Ga. 345; Mathis v. Barnes, 1 Ind. App. 164; Henry v. Pennington, 11 B. Mon. (Ky.) 55; Lockhart v. Philips, 1 Ired. Eq. (36 N. Car.) 342; Lancaster v. Allen, 1 Head (Tenn.) 326; Turner v. Petigrew, 6 Humph. (Tenn.) 438; Boisseau v. Boisseau, 79 Va. 73, 52 Am. Rep. 616; Asberry

inquiry,<sup>1</sup> or if the facts appear on the face of the papers,<sup>2</sup> or if the holders gave no present consideration for their title,<sup>3</sup> the ward can set aside their title and recover his property.

**d. DEFENSES OF THIRD PARTIES AGAINST WARD**—**Payment to Supposed Guardian Is at Payer's Peril.**—One who pays the ward's debt to a supposed guardian is bound to know the authority of the payee at his peril. So where a woman who was, during her widowhood, guardian *durante viduitate*, subsequently marries, payment to her after her marriage is a nullity and no defense.<sup>4</sup>

**A Ward Cannot Sue on an Administration Bond** to recover sums which were due to the guardian during the minority, and which were barred by the statute of limitations during such minority.<sup>5</sup>

**Debt Paid to Natural Guardian.**—Though the mother as natural guardian has no right to collect a debt, yet if she does so, and properly expends the amount for the ward's benefit, he cannot compel the debtor to pay it again.<sup>6</sup>

**e. RATIFICATION OR LACHES BY WARD.**—The acceptance by the ward, after attaining his majority, of the resulting benefits of the guardian's voidable act, will be treated as a ratification thereof,<sup>7</sup> if made with full knowledge of the facts.<sup>8</sup> Long acquiescence and neglect to assert his claims may also be equivalent to a ratification.<sup>9</sup>

*v. Asberry*, 33 Gratt. (Va.) 470. See *supra*, this section, *Obligations of Guardian—To Ward—Is under Trust Obligations*.

A ward whose guardian is insolvent, and his sureties irresponsible, can follow his property, by bill in equity, into the hands of any one who obtained possession with notice of his interest. *Hill v. McIntire*, 39 N. H. 410, 75 Am. Dec. 229.

**1. Knowledge of Facts Sufficient to Put Purchaser on Inquiry.**—*Evertson v. Evertson*, 5 Paige (N. Y.) 644; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441.

**Payment to the Guardian in His Own Notes for Property of the Ward** gives to the buyer sufficient notice of the ward's equities. *Porter v. Tudor*, 9 Conn. 416; *Bevis v. Heflin*, 63 Ind. 129; *Henry v. Pennington*, 11 B. Mon. (Ky.) 55; *Lancaster v. Allen*, 1 Head (Tenn.) 326; *Turner v. Petigrew*, 6 Humph. (Tenn.) 438.

**A Subsequent Purchaser of Land Sold Indirectly to the Guardian** is not charged with knowledge by the fact that the nominal buyer conveyed to the guardian six months after the sale. *White v. Iselin*, 26 Minn. 487.

**One Who Took a Deed from Guardian of Land on a Pretended Consideration**, but really to prevent it from being attached and to preserve it for the wards, and who then sold it and paid over the money to the guardian, is not liable to the ward for the amount, since these facts do not impute to him knowledge that the guardian intended to convert the money to his own use. *Armitage v. Snowden*, 41 Md. 119.

**2. Facts Appearing on Face of Papers.**—Thus, if a guardian assigns a note which on its face shows the ward's interest, the court will follow the proceeds into the assignee's hands. *Carpenter v. McBride*, 3 Fla. 292, 52 Am. Dec. 379. So of a bond, *Lemly v. Atwood*, 65 N. Car. 46; or a mortgage, *Villalonga v. Hicks*, 13 S. Car. 163. Or if a deed is to the guardian as such, or as trustee, a purchaser from him on private account is bound by knowledge of the ward's interest. *Rankin v. Miller*, 43 Iowa 11; *Morrison v. Kinstra*, 55 Miss. 71; *Patterson v. Booth*, 103 Mo. 402.

**3. Where No Present Consideration Was Given.**—Thus the title may be set aside if the adverse party was a mere creditor, *Robinson v. Roinson*, 22 Iowa 427; or an assignee for creditors, *Small v. Small*, 74 N. Car. 16; or a judgment lienor, unless he was induced to give credit by the apparent title to ward's property, *Sterling v. Arnold*, 54 Ga. 690; or a grantee for precedent debts, *Hill v. Johnston*, 3 Ired. Eq. (38 N. Car.) 432; *Shelton v. Lewis*, 27 Ark. 190.

**4. Holmes v. Field**, 12 Ill. 424.

**5. Beavers v. Brewster**, 62 Ga. 574.

As to defenses arising from settlement with the guardian, see *supra*, this title, *Powers and Duties of Guardian—To Collect and Settle Choses in Action*.

**6. Southwestern R. Co. v. Chapman**, 46 Ga. 557.

**7. Ratification by Ward.**—*Ashley v. Martin*, 50 Ala. 537; *Howard v. Tucker*, 65 Ga. 323; *Sherry v. Sansberry*, 3 Ind. 320; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221; *Caffey v. McMichael*, 64 N. Car. 507. See also *Greagan v. Buchanan*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 580; *Robinson v. Peabworth*, 71 Ala. 240. And see *supra*, this title, *Powers and Duties of Guardian*, subdiv. 2. f. (4) (h) *Ratification of Sale by Ward*; *supra*, this section, *Remedies of Ward*, subdiv. a. (3) (b) *Ward's Right of Election in Case of Conversion or Misuse of Funds*.

**8. Knowledge of Facts Essential to Ratification.**—*Worrell's Appeal*, 23 Pa. St. 44; *Wills's Appeal*, 22 Pa. St. 325.

**9. Laches Equivalent to Ratification.**—*Johnston v. Furnier*, 69 Pa. St. 449.

**But Five Years' Delay After Majority** was held insufficient in *Gilbert v. Guptill*, 34 Ill. 112.

**Receipt by Ward upon Settlement of Account.**—If a guardian who has made unauthorized investments in land files his accounts, deducting the amount, and the account is settled, the balance paid, and a receipt given, the ward waives his right to reclaim the money. *Myer v. Rives*, 11 Ala. 760.



**4. Liabilities of Ward — a. TO GUARDIAN — (1) During Guardianship.** — No action can be maintained by the guardian against the ward during the continuance of the guardianship, either at law or in equity, the sole remedy being in the probate court.<sup>1</sup>

(2) *After Termination of Guardianship.* — Nor will the settlement of the account and the fixing of the balance due to the guardian give to the latter a right of action for recovery of the amount against the ward, since he has no right to make even proper expenditures in excess of his funds on the general credit of the ward.<sup>2</sup> But if he furnishes necessities to the ward, who has no means of procuring them, the ward will be liable to him therefor, on the general principles of law relating to infants.<sup>3</sup>

**Sale by Guardian Subsequently Vacated by Ward — Guardian's Right to Recover Proceeds.** — If a guardian has settled with his ward, and paid to him the balance, including the proceeds of real estate, and the ward afterwards vacates the sale by suit, the guardian can recover back from him the amount of such proceeds.<sup>4</sup>

**b. TO THIRD PARTIES — Not Liable on Contracts Made by Guardian.** — The ward is not liable to third parties on contracts made by the guardian.<sup>5</sup>

**A Stranger Who Furnishes Goods to the Ward Against the Command of the Guardian cannot recover against the ward without showing strict necessity.**<sup>6</sup>

**Remedies of One Having Claim Against Ward.** — If one has a just legal or equitable claim against the ward, besides the general remedies he can procure an order for its payment from the court in charge of the estate.<sup>7</sup>

**A Judgment Against the Guardian does not bind the ward, and his property cannot be taken thereon.**<sup>8</sup>

**5. Contracts Between Guardian and Ward — a. DURING WARD'S MINORITY.** — No legal contract can be made between the guardian and the ward during the ward's minority. This results both from the ward's disability of infancy and from the trust relation between the parties, which is inconsistent with the formation of contract relations.<sup>9</sup>

**1. Guardian's Sole Remedy Against Ward Is in Probate Court.** — *Hapgood v. Wesson*, 7 Pick. (Mass.) 47; *McLane v. Curran*, 133 Mass. 531, 43 Am. Rep. 535; *Smith v. Philbrick*, 2 N. H. 395; *Davis v. Ford*, 7 Ohio (pt. ii.) 104; *Carl v. Wonder*, 5 Watts (Pa.) 97.

**The Statute of Limitations on a suit to recover for disbursements does not run until the termination of the guardianship.** *Taylor v. Kilgore*, 33 Ala. 214.

**2. After Settlement Guardian Cannot Recover in Excess of Ward's Funds.** — *Duval v. Chaudron*, 10 Ala. 391; *Preble v. Longfellow*, 48 Me. 279, 77 Am. Dec. 227; *Moore v. Cason*, 1 How. (Miss.) 53.

A ward is not liable for expenditures made by the guardian in excess of the estate, without an express promise to pay. *Wyatt v. Woods*, 31 Mo. 351; *Frost v. Winston*, 32 Mo. 489.

**A Guardian Who Is Also Stepfather, and who has supported the ward in his family, does not thereby gain a right of action against him.** *Gillett v. Camp*, 27 Mo. 541.

**Guardian's Right to Commissions.** — A guardian who has expended properly the entire income received by him, and is without funds, may have an order for the payment of his commissions by his successor. *Oakley v. Oakley*, 3 Dem. (N. Y.) 140.

**3. Ward's Liability for Necessaries.** — *Mills v. St. John*, 2 Root (Conn.) 188.

The accounting by the guardian and settlement of the balance due create a liability

which equity will enforce. *Shollenberger's Appeal*, 21 Pa. St. 337; *Bellamy v. Thornton*, 103 Ala. 404.

**4. Burleigh v. Bennett**, 9 N. H. 15, 31 Am. Dec. 213.

**5. See supra, this title, Powers and Duties of Guardian, subdiv. 2. k. To Make Contracts.**

**6. Bredin v. Dwen**, 2 Watts (Pa.) 95.

**7. Turner v. Flagg**, 6 Ind. App. 563.

**8. Baird v. Steadman**, 39 Fla. 40; *Este v. Strong*, 2 Ohio 401.

**9. Ward Cannot Contract with Guardian During Minority.** — *Howard v. Tucker*, 65 Ga. 323; *Platt v. Wyche*, 41 La. Ann. 856; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Jones v. Parker*, 67 Tex. 76.

Though by statute a female ward may receive her funds at the age of sixteen years, she has no power to contract, and her release of the guardian will not be binding. *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

**Where the Guardian Paid Funds of the Ward to Her Husband**, while she was still a minor, and the husband thereupon made a bill of sale to the ward, stated to be the residue of the amount due to her, her acceptance of the bill of sale will not conclude her, unless it is shown to have been made with full knowledge of the facts and understanding of her rights. *Trader v. Lowe*, 45 Md. 1.

**Exchange by Order of Court.** — An order of court properly made for the exchange of ward's land for tutor's land will be conclusive



*b. BETWEEN WARD'S MAJORITY AND SETTLEMENT.* — After the ward attains majority, but before the guardian's accounts have been settled, while the disability of infancy has been removed, that arising from the trust relation is slightly, if at all, diminished, and contracts between the guardian and the ward are either conclusively<sup>1</sup> or presumptively<sup>2</sup> deemed to be void.

*c. AFTER MAJORITY AND SETTLEMENT.* — Even after the trust is terminated by the settlement of the accounts and delivery of the ward's funds to him, transactions occurring soon after between the guardian and the ward will be scrutinized with great care by the courts; and if the guardian derives a benefit, or the ward a loss, by the transaction, it will not be sustained without affirmative and satisfactory proof of the utmost fairness and good faith.<sup>3</sup>

between the tutor and the ward. *Rawlins v. Giddens*, 46 La. Ann. 1136.

**Ratification.** — A contract made by a ward with his guardian during minority may be ratified by the act of the ward after attaining majority, upon full knowledge of the facts and free deliberation. *Howard v. Tucker*, 65 Ga. 323; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194. See also *Sherry v. Sansberry*, 3 Ind. 320. And see *supra*, this section, *Remedies of Ward — Ratification or Laches by Ward*.

**1. Deeds of Gift or of Release** made by the ward to the guardian between his majority and the settlement are void, on grounds of public policy, without actual fraud. *Waller v. Armistead*, 2 Leigh (Va.) 14, 21 Am. Dec. 594. See also the title GIFTS, vol. 14, p. 1014.

**By Statute in Louisiana**, any agreement between guardian and ward after majority, but before settlement of accounts, is null and void. *Vanwickle v. Matta*, 16 La. Ann. 325; *White v. Gleason*, 15 La. Ann. 479.

**2. Contracts After Majority but Before Settlement Presumptively Void.** — *Willey v. Tindal*, 5 Del. Ch. 194; *McParland v. Larkin*, 155 Ill. 84. As to settlement between guardian and ward by agreement, see *infra*, this title, *Accounting by Guardian*, subdiv. I. a. (2) *Suspicion Attaching Thereto*.

**3. Contracts Between Guardian and Ward After Majority and Settlement — England.** — *Dawson v. Massey*, 1 Ball & B. 219; *Aylward v. Kearney*, 2 Ball & B. 463; *Archer v. Hudson*, 7 Beav. 551; *Mulhallen v. Maram*, 3 Dr. & War. 317; *Espey v. Lake*, 15 Eng. L. & Eq. 579; *Sanderson's Case*, cited in *Wright v. Proud*, 13 Ves. Jr. 138.

*Alabama.* — *Jackson v. Harris*, 66 Ala. 565.  
*Connecticut.* — *Hall v. Cone*, 5 Day (Conn.) 549.

*Illinois.* — *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587; *Condon v. Churchman*, 32 Ill. App. 317.

*Indiana.* — *Sherry v. Sansberry*, 3 Ind. 320; *Wainwright v. Smith*, 106 Ind. 239.

*Iowa.* — *Tucke v. Buchholz*, 43 Iowa 415.

*Kentucky.* — *Richardson v. Linney*, 7 B. Mon. (Ky.) 571.

*Missouri.* — *Goodrich v. Harrison*, 130 Mo. 263.

*New York.* — *Bergen v. Udall*, 31 Barb. (N. Y.) 9.

*North Carolina.* — *Williams v. Powell*, 1 Ired. Eq. (36 N. Car.) 460.

*Ohio.* — *Berkmeyer v. Kellermann*, 32 Ohio St. 240.

**Great Inadequacy in the Price of Land** bought

by the guardian from the ward soon after his majority is *per se* evidence of fraud. *Eberts v. Eberts*, 55 Pa. St. 110.

**Indorsement of Guardian's Note by Ward Immediately After Majority.** — A guardian who procures the ward, immediately after majority, to indorse his individual note can take no benefit therefrom; nor can the payee take any benefit where he knew of the relation and urged the procuring of the indorsement. *Gale v. Wells*, 12 Barb. (N. Y.) 84.

**An Agreement by the Ward to Extend the Guardian's Time for Settlement**, upon the guardian's agreement to pay ten per cent. interest, is void for want of consideration, the usurious interest being uncollectible, and legal interest being due without the agreement. *Douglass v. State*, 44 Ind. 67.

**False Representations by Guardian.** — Where the guardian procured a conveyance of land worth one thousand three hundred dollars for six hundred dollars, by falsely representing that it was mortgaged for seven hundred dollars, the transaction was set aside. *Wickiser v. Cook*, 85 Ill. 68.

Where the guardian told the ward that he would say nothing about compensation, nor about the interest which he had received, and that he supposed that he was entitled to the interest, but did not tell her the amount, there was both a *suppressio veri* and a *suggestio falsi*. *Hall v. Cone*, 5 Day (Conn.) 549.

**Quasi Guardians.** — Chancery has jurisdiction of transactions between *quasi* guardians and wards. Indorsement by a ward of the note of her stepfather, shortly after majority, with the knowledge of the payee, will not be permitted to bind the ward. *Espey v. Lake*, 15 Eng. L. & Eq. 579.

So of a gift by a daughter to her father, immediately after majority, *Bergen v. Udall*, 31 Barb. (N. Y.) 9; or of a ward to one who has been placed in control of her by the guardian, *Mulhallen v. Maram*, 3 Dr. & War. 317.

**Lapse of Time.** — In *Mulhallen v. Maram*, 3 Dr. & War. 317, a lease was set aside eleven years after its execution.

In *Aylward v. Kearney*, 2 Ball & B. 463, thirty years' time did not prevent the granting of relief, where the ward was of weak mind, and continued all his life under the guardian's influence.

Where the ward was a deaf mute, and gave a deed to the guardian soon after her majority, and he continued to support her until her marriage four years later, relief was granted to her even sixteen years after the marriage. *Hatch v. Hatch*, 9 Ves. Jr. 292.

The Same Principle Applies to a Will <sup>1</sup> or a Gift <sup>2</sup> made by the ward in favor of the guardian, during or soon after the trust relation.

**VII. ACCOUNTING BY GUARDIAN — 1. To Whom Made — a. TO WARD —**  
(1) *Ward's Right to Settle Account.* — On reaching majority the ward has the legal right himself to settle the accounts of the guardianship with the guardian, and by his release to discharge him from further liability.<sup>3</sup>

(2) *Suspicion Attaching Thereto.* — But the considerations which cause suspicion upon a contract between guardian and ward made soon after the ward's majority <sup>1</sup> apply with at least equal force to a settlement of the guardian's account agreed upon between them; and the courts will not sustain such a

**Guardian Not Allowed for Improvements.** — Where a guardian, immediately after the ward's majority, obtained a deed from the ward which the court set aside as constructively fraudulent, the guardian will not be allowed for improvements made by him. *McParland v. Larkin*, 155 Ill. 84.

**1. Will.** — *Morris v. Stokes*, 21 Ga. 552; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314.

**2. Gift.** — *Pierce v. Waring*, cited in *Crary v. Mansfield*, 1 Ves. 380; *Hylton v. Hylton*, 2 Ves. 547; *Hatch v. Hatch*, 9 Ves. Jr. 297.

**3. Ward's Right on Reaching Majority to Settle Account — Alabama.** — *Satterfield v. John*, 53 Ala. 127.

*Connecticut.* — *Davenport v. Olmstead*, 43 Conn. 75.

*Georgia.* — *Steadham v. Sims*, 68 Ga. 741.

*Kansas.* — *Davis v. Hagler*, 40 Kan. 187.

*Louisiana.* — *Haydel v. Roussel*, 1 La. Ann. 38.

*Maine.* — *Ela v. Ela*, 84 Me. 423.

*Maryland.* — *McClellan v. Kennedy*, 8 Md. 230, 3 Md. Ch. 234.

*Massachusetts.* — *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

*Mississippi.* — *Bickerstaff v. Marlin*, 60 Miss. 509, 45 Am. Rep. 418; *Gilleyleen v. McKinney*, 74 Miss. 764.

*New Hampshire.* — *Kittredge v. Betton*, 14 N. H. 401.

*New York.* — *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435; *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242; *Downing v. Smith*, 4 Redf. (N. Y.) 310.

*North Carolina.* — *State v. Cordon*, 8 Ired. L. (30 N. Car.) 179; *Whedbee v. Whedbee*, 5 Jones Eq. (58 N. Car.) 392.

*Pennsylvania.* — *Stryker's Estate*, 17 Phila. (Pa.) 507, 42 Leg. Int. (Pa.) 454; *Lukens's Appeal*, 7 W. & S. (Pa.) 48; *Hawkins's Appeal*, 32 Pa. St. 263.

*South Carolina.* — *Dunsford v. Brown*, 19 S. Car. 566. See also *Lewis v. Browning*, 111 Pa. St. 493.

In Louisiana a ward cannot attack the final settlement of his tutor, for the amount of which he has given a receipt, without first bringing an action to annul his receipt. *Kellar v. O'Neal*, 13 La. Ann. 472.

**Payment of Ward Made in Good Faith at His Majority**, in county bonds which were then good, will be sustained though the bonds afterwards became worthless. *Hardin v. Taylor*, 8 Ky. 595.

**Notwithstanding a Statute making void agreements between guardian and ward between**

majority and settlement, the ward cannot repudiate payments made and accepted on the tutor's account. *Chapman v. Chapman*, 13 La. Ann. 228; *Frost v. McLeod*, 19 La. Ann. 80.

**Settlement Cannot Be Attacked by Creditors Because Accounts Were Not Kept.** — Notes given by a guardian to his ward in settlement of his guardianship, and not proved to be exorbitant, cannot be attacked as fraudulent by other creditors because no accounts had been kept. *Hanford v. Prouty*, 133 Ill. 339.

**Settlement After Ward's Marriage.** — In *Indiana*, after the marriage of a female ward, the guardian is authorized by statute to account to the husband, with the ward's assent, *Haines v. State*, 60 Ind. 41; or to the wife with her husband's assent, *Swihart v. Shaffer*, 87 Ind. 208.

At common law, upon such marriage, the funds of the ward vested absolutely in the husband, and payment to him was a discharge. *Beazley v. Harris*, 1 Bush (Ky.) 533.

If a Married Woman and Her Husband Join in a Receipt to the Guardian, it is binding upon the wife, in the absence of mistake or fraud, though the payment was made in land and Confederate money. *Vaughan v. Bibb*, 46 Ala. 153. She is emancipated by marriage, so as to permit her to receive her funds. If she desires to make a gift, and the guardian, without collusion, pays over the sum on her order, taking her receipt, it is a good defense to him. *Bickerstaff v. Marlin*, 60 Miss. 509, 45 Am. Rep. 418.

**Where Ward Fraudulently Claims to Be of Age.** — Where a ward falsely declared himself to be of age, and procured a settlement thereby, taking certain real estate at a valuation, and the guardian took no advantage of him, and relinquished securities relying on the settlement, the infant will not be permitted by equity to attack it. *Hayes v. Parker*, 41 N. J. Eq. 630. See also *Maulfair's Appeal*, 110 Pa. St. 402.

**Mistake in Settlement.** — A sealed receipt by the ward to the guardian will not avail against a mistake admitted to have been made in it. *Felton v. Long*, 8 Ired. Eq. (43 N. Car.) 224.

**Settlement Either Valid or Wholly Null.** — If the settlement is honest, it discharges both guardian and sureties. But if it is tainted with fraud, and is afterwards set aside, it is wholly void, and cannot be treated as an extension of time to the guardian, so as to discharge the sureties. *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435.

4. See *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward* — *Contract Between Parties*.



settlement as a bar to the ward's rights unless it is clearly shown that the settlement was a fair one, and that the ward acted in entire freedom from the guardian's influence and upon full knowledge as to the facts and his rights thereupon.<sup>1</sup>

(3) *Confirmation by Long Acquiescence.* — Long acquiescence by the ward in the settlement, after he has become wholly free from the guardian's influence, will be treated as a confirmation of the settlement, and will cast upon the ward who attacks it the burden of showing fraud or error.<sup>2</sup>

1. **What Essential to Valid Settlement Between Guardian and Ward** — *Alabama.* — *Andrews v. Jones*, 10 Ala. 400; *Malone v. Kelley*, 54 Ala. 532; *Ferguson v. Lowery*, 54 Ala. 510, 25 Am. Rep. 718.

*Georgia.* — *Briers v. Hackney*, 6 Ga. 419.

*Illinois.* — *Bruce v. Doolittle*, 81 Ill. 103; *Carter v. Tice*, 120 Ill. 277; *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587; *People v. Borders*, 31 Ill. App. 426.

*Indiana.* — *Beedle v. State*, 62 Ind. 26.

*Kentucky.* — *Brewer v. Vanarsdale*, 6 Dana (Ky.) 204; *Clay v. Clay*, 3 Met. (Ky.) 548; *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513; *Fielder v. Harbison*, 93 Ky. 482.

*Maryland.* — *McClellan v. Kennedy*, 8 Md. 230; *McConkey v. Cockey*, 69 Md. 286; *Spalding v. Brent*, 3 Md. Ch. 411.

*Massachusetts.* — *Wade v. Lobdell*, 4 Cush. (Mass.) 510.

*Mississippi.* — *Sullivan v. Blackwell*, 28 Miss. 737; *Gregory v. Orr*, 61 Miss. 307; *Fowls v. Lombard*, (Miss. 1892) 11 So. Rep. 724.

*New Hampshire.* — *Stark v. Gamble*, 43 N. H. 465.

*New Jersey.* — *Runkle v. Gale*, 7 N. J. Eq. 101.

*New York.* — *Fish v. Miller*, Hoffm. (N. Y.) 267; *Douglass v. Low*, 36 Hun (N. Y.) 497, affirmed 107 N. Y. 628.

*North Carolina.* — *Graham v. Davidson*, 2 Dev. & B. Eq. (22 N. Car.) 155; *Boyett v. Hurst*, 1 Jones Eq. (54 N. Car.) 166; *Harris v. Carstarphen*, 69 N. Car. 416.

*Ohio.* — *Lindsay v. Lindsay*, 28 Ohio St. 157; *Berkmeyer v. Kellerman*, 32 Ohio St. 240.

*Pennsylvania.* — *Say v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679; *Hickman's Appeal*, 7 Pa. St. 464; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *Hawkins's Appeal*, 32 Pa. St. 263; *Mulholland's Estate*, 154 Pa. St. 491.

*South Carolina.* — *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277; *Womack v. Austin*, 1 S. Car. 421.

*Virginia.* — *Waller v. Armistead*, 2 Leigh (Va.) 14, 21 Am. Dec. 594.

**Receipt May Be Impeached.** — A receipt by a ward to a guardian is no more conclusive than any other receipt, and may be impeached. *Powell v. Powell*, 52 Mich. 432.

A receipt in full given by a ward to a guardian will not bar a suit to establish a trust in land bought by the guardian in his own name, but with the ward's funds. *Groover v. King*, 46 Ga. 101; *Alexander v. Alexander*, 46 Ga. 283.

**Receipt Without Accounting or Upon Erroneous Account.** — A receipt will not be binding if it was given without any accounting. *Briers v. Hackney*, 6 Ga. 419; *Graham v. Davidson*, 2

Dev. & B. Eq. (22 N. Car.) 155; *Hickman's Appeal*, 7 Pa. St. 464; *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277. Nor if the account was erroneous. *Bruce v. Doolittle*, 81 Ill. 103; *Lindsay v. Lindsay*, 28 Ohio St. 157.

**The Acts of a Ward Who Has Long Acted for Himself**, has not been under the immediate control of his guardian, and is well acquainted with the estate, are to be taken much more strongly against him than where none of those facts exist. *Caplinger v. Stokes*, Meigs (Tenn.) 175.

**Where Ward Unites in a Family Agreement.** — Where a ward, on coming of age, united with his mother, sisters, and brothers in a family agreement by which a farm was released to his former guardian, the usual presumptions against such a release do not apply. *Cowan's Appeal*, 74 Pa. St. 329.

**A Settlement Made with a Ward Who Is Intelligent, Three Years After Majority**, will not be presumed to be unfair. The burden of proof is on the ward to falsify it. *Kittredge v. Betton*, 14 N. H. 401.

**Release Made with Full Knowledge of Facts.** — Where the ward was fully informed before his majority as to all the facts affecting his estate, and executed a release, and fourteen months later, when he had just come of age, he executed a second release, the information already received validated the later release. *Forbes v. Forbes*, 5 Gill (Md.) 29.

**Expenditures Made in Good Faith, at the Request of the Ward's Sister and Physician**, who deemed them necessary for his health, and approved by the ward with full knowledge at maturity, will be sustained. *Fielder v. Harbison*, 93 Ky. 482.

**2. Long Acquiescence Treated as Confirmation of Settlement.** — *Whedbee v. Whedbee*, 5 Jones Eq. (58 N. Car.) 392; *Smith v. Davis*, 49 Md. 471.

**Length of Delay Essential to Ratification.** — The rule of ratification of the account by delay to question it has been applied when the period of delay was four years, in *Steadham v. Sims*, 68 Ga. 741; *Aaron v. Mendel*, 78 Ky. 427, 39 Am. Rep. 248; *Lukens's Appeal*, 7 W. & S. (Pa.) 48; *Ex p. Cress*, 2 Whart. (Pa.) 494. In the last-cited case the ward has been assisted in the original accounting by two competent friends.

Where it was five years, in *Alexander's Estate*, 156 Pa. St. 368, reversing 10 Lanc. L. Rev. (Pa.) 153.

Where it was six years, in *Stryker's Estate*, 17 Phila. (Pa.) 507, 42 Leg. Int. (Pa.) 454; *Kelly v. McQuinn*, 42 W. Va. 774.

Seven years (the ward having been twenty-five years old, and an educated and experienced business man, at the time of the account), in *Ela v. Ela*, 84 Me. 423.



b. TO SUCCEEDING GUARDIAN. — Upon a change of guardians, the newly appointed guardian has the power and owes the duty of procuring an account from his predecessor and collecting the amount thereof.<sup>1</sup> The account should ordinarily be sought in the probate court and adjusted there; but the succeeding guardian has the legal power himself to adjust the account.<sup>2</sup>

c. TO COURT — (1) *What Court Has Jurisdiction.* — The courts of equity and the probate courts have each inherent jurisdiction of the matter of guardian's accounts, and in the absence of statute or settled local practice the ward may proceed in either.<sup>3</sup> But the modern practice, sometimes made imperative by statute,<sup>4</sup> is to adjust such accounts in the probate court, unless other

Eight years, in *Beck's Estate*, 17 Phila. (Pa.) 471, 42 Leg. Int. (Pa.) 192.

Ten years, in *Springer's Estate*, 4 Pa. Dist. 232, 16 Pa. Co. Ct. 326 (though items not for the ward's support, but for other family purposes, were allowed in the account); *Southall v. Clark*, 3 Stew. & P. (Ala.) 338; *Jackson v. Harris*, 66 Ala. 565.

Thirteen and seventeen years, in *Chorpenning's Appeal*, 32 Pa. St. 315, 72 Am. Dec. 789.

Nineteen years, in *Gress's Appeal*, 14 Pa. St. 463; *Roth's Estate*, 150 Pa. St. 261 (both parties to the disputed item being dead and the facts in doubt, and the original account having been made from books and papers in the presence of a reputable justice of the peace); *Maulfair's Appeal*, 110 Pa. St. 402 (the original account having been made when the ward was not of age, but fraudulently pretended to be).

Nearly twenty-five years, in *Railsback v. Williamson*, 88 Ill. 494.

**When Delay Is No Ratification.** — A ward whose father and guardian obtains from her a release by fraud, without paying anything to her, will not be barred by a delay of nine years after majority and four years after discovery of the facts, if the legal limitation has not elapsed. *Carter v. Tice*, 120 Ill. 277. See also *Voltz v. Voltz*, 75 Ala. 555.

Two years' delay is no bar, if the ward during that time was still being misinformed by the guardian as to the value of the stock he received. *McConkey v. Cockey*, 69 Md. 286.

A guardian obtained a release from three wards without making an account or turning over the funds. Their delay until the ages of twenty-three, twenty-six, and twenty-eight years respectively before demanding an account was held not to bar them. *Alexander's Estate*, 8 Lanc. L. Rev. (Pa.) 52.

A ward released the guardian without any explanation or knowledge of the contents of his account. She married on the same day, and lived with her husband until his death, more than twenty years. It was held that this period did not bar her right to impeach the release. *Waller v. Armistead*, 2 Leigh (Va.) 11, 21 Am. Dec. 594.

See also *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subd. 3. e. *Ratification or Laches by Ward*, and the cross-references there given.

1. **Guardian Can Sue His Predecessor Without Previous Demand.** — A guardian can sue his predecessor, or his sureties, for the funds of the ward, without a previous demand. *Voris v. State*, 47 Ind. 345.

**Where the Predecessor Is Dead**, the predeces-

sor's administrator may be sued. *Iglehart v. State*, 2 Gill & J. (Md.) 235.

The successor of a deceased guardian who had converted the funds can sue on the bond or sue his estate. *Harshman v. McBride*, 2 Ind. App. 382.

**Guardian's Fault Will Not Prevent Recovery from Predecessor.** — A guardian, before her marriage, loaned the funds to her future husband and otherwise wasted them. After the marriage the husband was appointed guardian and agreed to pay the entire amount due to the wards, but died, and the wife was again appointed. It was held that her right to recover the wards' entire funds from her husband's estate was not affected by her own fault as guardian. *West v. West*, 75 Mo. 204.

**After Ward's Majority Settlement Must Be with Him.** — Where the guardian was removed and a successor appointed, but the former guardian did not turn over the funds, and nine years later the ward comes of age, the one then authorized to settle with and release him is the ward. *McClellan v. Kennedy*, 8 Md. 230.

2. **How Account Should Be Adjusted.** — *Porche v. Ledoux*, 12 La. Ann. 350.

**The Account Settled by a Guardian on Removal Is Only Tentative**, and his successor, on appointment, has a right to a new accounting. *Matter of Wright*, 2 Connoly (N. Y.) 108.

**Settlement with Ward Represented by Guardian ad Litem.** — A settlement made with an infant ward who is represented by a guardian *ad litem* is as binding as if made with an adult. *Stabler v. Cook*, 57 Ala. 22.

3. **Inherent Jurisdiction in Equity and Probate Courts.** — *Hailey v. Boyd*, 64 Ala. 399; *Booth v. Starr*, 5 Day (Conn.) 427; *Stannard v. Whitteley*, 9 Conn. 559; *Davenport v. Olmstead*, 43 Conn. 67; *Linton v. Walker*, 8 Fla. 144; *Pfeiffer v. Knapp*, 17 Fla. 144; *Armstrong v. Miller*, 6 Ohio 118; *Field v. Torrey*, 7 Vt. 372.

**Jurisdiction of Probate Courts After Ward's Majority.** — The Probate Courts have power to require and take an account as well after as before the majority of the ward. *Jacobs v. Fouse*, 23 Minn. 51; *Wills's Appeal*, 9 Pa. St. 103. *Contra*, *Matter of Hopsop*, 1 Edw. (N. Y.) 8.

See *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subd. 3. a. *Ward's Right of Action Against Guardian*; also *Modern Forms of Guardianship, Their Nature and Origin — Guardianship by Judicial or Legislative Appointment — General Power — Of Chancery*.

4. *Graff v. Mesmer*, 52 Cal. 636; *Allen v. Tiffany*, 11 Cal. 112.

elements than those of ordinary account are to be adjusted,<sup>1</sup> or the parties have removed from the jurisdiction of the proper probate court.<sup>2</sup> The particular court of probate by which the account must be settled is the one by which the guardian was appointed. A settlement in any other probate court is a nullity.<sup>3</sup>

(2) *Obligation to Account.* — It is the duty of every guardian, upon the termination of his trust, to render an account of the entire trust to the court by which he was appointed.<sup>4</sup> The annual or other accounts filed during the pendency of the guardianship do not obviate this requirement, even partially, since all matters included in them are subject to re-examination on final account.<sup>5</sup>

(3) *Who May Ask for Accounting.* — The application for an account may

**1. When Equity Will Take Jurisdiction.** — Courts of equity have jurisdiction over guardians, and may compel them to account; but they should not exercise this jurisdiction except in extraordinary cases, or where there are special reasons for withdrawing the account from probate.

But where the guardian had wasted the estate, and used it for his own benefit, causing depreciation, the matter is not clearly one of probate account, and equity will take jurisdiction and charge the guardian with the loss. *Willis v. Fox*, 25 Wis. 646. See *Lataillade v. Orefia*, 91 Cal. 565, 25 Am. St. Rep. 219.

**2.** *Pickering v. De Rochemont*, 45 N. H. 67; *Davis v. Davis*, (N. J. 1898) 41 Atl. Rep. 353; *Pedan v. Robb*, 8 Ohio 227; *Moore v. Hood*, 9 Rich. Eq. (S. Car.) 322, 70 Am. Dec. 210; *Stallings v. Barrett*, 26 S. Car. 474.

Equity has jurisdiction to call a guardian to account though he lives out of the state and has no property within it. *Pratt v. Wright*, 13 Gratt. (Va.) 175, 67 Am. Dec. 767.

**3.** *Robb v. Perry*, 35 Fed. Rep. 102.

**A Guardian Appointed in a County Where He Does Not Reside** becomes an officer of that court, and may be summoned to account in it, though otherwise he could not be summoned out of his county. *Usry v. Usry*, 82 Ga. 198.

**The Court Will Not Take Jurisdiction of a Foreign Guardian's Account.** — *Bell v. Suddeth*, 2 Smed. & M. (Miss.) 533. Even by consent of both guardian and ward. *Anderson v. Story*, 53 Neb. 259.

**But a Contrary Rule Prevails in Louisiana.** — *Leverich v. Adams*, 15 La. Ann. 310.

**Duty to Account in Country of Appointment.** — Where a guardian appointed in one country receives money in another, he must account in the country of his appointment for the amount, unless he shows affirmatively that he accounted in the other country. *Secchi's Estate*, Myr. Prob. (Cal.) 225.

**Account of Funds from Sale of Land in Another State.** — The appointing court will take jurisdiction of the guardian's account of funds held within its jurisdiction though they were the proceeds of sale of land in another state. *U. S. v. Bender*, 5 Cranch (C. C.) 620; *U. S. v. Nicholls*, 4 Cranch (C. C.) 191, 290.

**A Guardian Appointed in Two States** is not bound to account in one for money received in the other. *Smoot v. Bell*, 3 Cranch (C. C.) 343.

**Removal from State.** — A guardian was not discharged from liability to account in the courts of New York, by which he was appointed, by

the outbreak of the rebellion, and by the residence of himself and the ward in a Confederate state. *Micou v. Lamar*, 17 Blatchf. (U. S.) 378, 112 U. S. 452.

A guardian appointed by will in another state, who has removed to Pennsylvania with the ward and the funds, may be cited to file his account in Pennsylvania; but an exemplification of the will should be filed and letters issued in Pennsylvania. *Mayer's Estate*, 14 Phila. Pa.) 299, 38 Leg. Int. (Pa.) 224.

**4. Obligation of Guardian to Account.** — *Gailard v. Foster*, 15 La. Ann. 121; *In re Camp*, 126 N. Y. 377; *Baskin's Appeal*, 34 Pa. St. 272; *Lewis v. Browning*, 111 Pa. St. 493; *Marr's Appeal*, 78 Pa. St. 66; *Bumpas v. Dotson*, 7 Humph. (Tenn.) 310, 46 Am. Dec. 81.

**Order to Pay Funds to Administrator Without Accounting Erroneous.** — An order which orders a guardian to pay over the balance of funds in his hands to the ward's administrator, without ordering an accounting, is erroneous. *Egner v. McGuire*, 7 Ark. 107.

**The Failure of a Guardian to Make Annual Accounts** constitutes either negligence or fraud. *Hutcheson v. Mudd*, 6 J. J. Marsh. (Ky.) 580.

**One Appointed in Probate to Sell a Minor's Real Estate** is bound to account under oath in the Probate Court, though the ward has given to him a power of attorney to discharge the mortgages for the purchase money. *Pope v. Jackson*, 11 Pick. (Mass.) 113.

**Where the Guardian Has Left the State, and Has Appointed an Agent** to manage the ward's estate, the Orphans' Court has power to call on the agent to make an account. *Matter of Getts*, 2 Ashm. (Pa.) 441.

**Though the Guardian Received No Funds**, he may file an account for the purpose of having the balance due to him determined. *Portuondo's Estate*, 14 Phila. (Pa.) 271, 38 Leg. Int. (Pa.) 139.

**If the Guardian Is Tenant by the Curtesy** of the funds which the ward owns in fee, he may be required at the ward's majority to account, to determine the amount in his hands, but cannot be ordered to pay it over. *In re Camp*, 126 N. Y. 377.

**Where the Ward's Funds Are Charged with a Trust for Another**, the guardian must first account with the *cestuis que trustent*, in the proper tribunal, and then account in the probate for the balance belonging to the ward. *Baskin's Appeal*, 34 Pa. St. 272.

**5.** See *infra*, this section, *Effect of Account as Res Judicata*.

be made by the ward or any person properly acting in his interest, or by any other person interested in the determination of the amount due.<sup>1</sup>

(4) *Defenses to Demand for Account* — (a) **Statute of Limitations.** — The statute of limitations does not run against a demand for an accounting as long as the trust is subsisting — that is, until the guardianship ceases, the account is settled, and the property is surrendered, or until the existence of the trust is denied or repudiated by the guardian.<sup>2</sup>

(b) **Other Defenses.** — No laches on the part of the ward, nor any agreement or act of his or of any other person, will act as a bar to a demand for an accounting, unless it is of such a nature as to show that the ward has received full justice, and that injustice will be done to the guardian by requiring an account from him.<sup>3</sup>

**2. Principles on Which Accounting Is Had** — *a. CHARGES AGAINST GUARDIAN* — (1) *All Property Received.* — The guardian's account should begin, as a matter of course, by charging him with all funds received by him as guardian. No irregularity as to the source or manner of receipt will excuse him from accounting for sums actually received as the ward's.<sup>4</sup>

**1. Who May Apply for Account.** — *Gaillard v. Foster*, 15 La. Ann. 121; *Swan v. Dent*, 2 Md. Ch. 111.

**The Right to an Annual Account Cannot Be Denied to the Ward;** and appeal will lie from a refusal to order it. *Moore v. Askew*, 85 N. Car. 199.

**A Creditor of the Ward may cite the guardian to account.** *Carr's Estate*, 4 Pa. Co. Ct. 128.

**Where One Was Appointed by a Single Order Guardian for Three Infants, and two have died, leaving the other their heir, the curator of the third appointed in another state may demand an accounting for the entire fund.** *McCleary v. Menke*, 109 Ill. 294.

**2. From When Statute of Limitations Will Run.** — *Kimball v. Ives*, 17 Vt. 430; *Taylor v. Hill*, 86 Wis. 90.

**New York Rule.** — The statute runs from the majority of the ward, and he cannot demand an account after ten years. *Matter of Van Derzee*, 73 Hun (N. Y.) 532. Nor after eleven years from the majority of one and eight from that of the other. *Bertine v. Varian*, 1 Edw. (N. Y.) 343.

But where the guardian never filed an inventory nor an account, and never informed the heirs of the existence of the funds, they will not be barred from demanding an account by the lapse of ten and six years after they came of age. *Matter of Camp*, 50 Hun (N. Y.) 388, 10 N. Y. Supp. 141.

**3. A Settlement Agreed to by the Ward, after Marriage, that he would release the guardian from all liability to account is void.** *Hamilton v. Mohun*, 1 P. Wms. 118.

**A Receipt to a Guardian Appointed in One State by a Guardian in Another for the funds turned over to him is no bar to a demand for an accounting for sums lost by his mismanagement.** *Lamar v. Micou*, 112 U. S. 452.

**A Settlement Agreed to by the Ward, after Marriage, but During Minority, is no bar to an order to account.** *Wing v. Rowe*, 69 Me. 282.

**Mere Lapse of Time Furnishes No Bar to a Demand for an Accounting.** — But where the ward made no claim for thirty years after majority, and the guardian showed that the ward had been ill during the minority, and proved some payments for that cause, it was held that a

full account would not be ordered. *Gregg v. Gregg*, 15 N. H. 190. See also *In re Pierce*, 68 Vt. 639.

Where a guardian received less than fifty dollars and paid it over to the ward's mother and there was no evidence that the infant did not receive the benefit of it, and ten years had elapsed since the payment, a bill for an account was denied. *Maguire v. Doonan*, 24 W. Va. 507.

**Where the Guardian Has Received the Proceeds of a Life-insurance Policy payable to the widow and children, he is bound to account to the heirs for their shares, and it is no defense that he has paid it to the widow in good faith, nor that the company had no right to issue policies except to the widow.** *Taylor v. Hill*, 86 Wis. 99.

**As to the Effect of an Accounting with the Ward,** see *supra*, this section, *To Whom Made — To Ward*.

**4. Guardian Must Account for All Property Received** — *Connecticut.* — *Davenport v. Olmstead*, 43 Conn. 67.

*Georgia.* — *Freeman v. Brewster*, 93 Ga. 648. *Indiana.* — *Jennings v. Kee*, 5 Ind. 257; *Warwick v. State*, 5 Ind. 350.

*Kentucky.* — *Taylor v. Hemingray*, 81 Ky. 158.

*Maryland.* — *Gunther v. State*, 31 Md. 21.

*Massachusetts.* — *Brooks v. Tobin*, 135 Mass. 69.

*Mississippi.* — *Martin v. Stevens*, 30 Miss. 159.

*New Jersey.* — *McGill v. O'Connell*, 33 N. J. Eq. 256.

*Tennessee.* — *Pearson v. Dailey*, 7 Lea (Tenn.) 674.

**Liability for Stocks and Dividends.** — The guardian is liable for all stocks received by him, at the prices at which he received them, and also for all dividends received by him as guardian; and if he has sold any stocks he is liable for the price received. *French v. Currier*, 47 N. H. 88.

**Where the Guardian Has Engaged the Ward's Estate in Planting in Partnership with Another, the plantation expenses must first be separated from the proceeds, then the balance divided and the ward's individual expenses charged on his half.** *Matter of Scott*, 21 La. Ann. 187.



(2) *Property Which He Ought to Have Received*—(a) **Sums Lost by His Neglect.**—Any funds which by the exercise of due diligence he would have received, as, for instance, sums due to the ward which he negligently failed to collect,<sup>1</sup>

**If the Guardian Is Dowress of the Ward's Real Estate,** and she is ordered to sell the ward's interest, and makes a deed of such interest, she cannot retain the value of the dower on the ground that the price received included dower. *Bean v. Bumpus*, 22 Me. 549.

**If the Guardian Makes a Gift to the Ward,** he cannot afterwards recall it and charge it back. *Pratt v. McJunkin*, 4 Rich. L. (S. Car.) 5; *Bond v. Lockwood*, 33 Ill. 212.

**Receipts Not Charged.**—The guardian cannot be charged with sums sent to him by a foreign guardian to use for the ward, before his appointment. *Rait v. Rait*, 1 Bradf. (N. Y.) 345. Nor can he be charged with moneys received before appointment as cotenant of the ward. *Cheney v. Roodhouse*, 135 Ill. 57.

A guardian and his sureties are not liable to the ward for money received by mistake and not belonging to the ward's estate, though the guardian became insolvent, and did not repay the sums to the real owner. *Ballard v. Brummitt*, 4 Strobb. Eq. (S. Car.) 171.

**Money Repaid to Claimant with Better Title.**—If the guardian inventories certain moneys as his ward's, but is afterwards compelled to repay them to a claimant with better title, he can correct his inventory or be allowed for the amount on account. *Martin v. Sheridan*, 46 Mich. 93.

**If a Guardian Received the Share of the Widow with That of the Ward,** by her assent, it does not constitute a part of the guardianship funds, and should not be included in the guardianship account. *Evans's Estate*, 7 Pa. Super. Ct. 146.

**As to the Estoppel of the Guardian to deny the receipt of sums for which he has given receipt, etc.,** see *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdv. 1. a. (3) *Estoppel to Deny His Appointment or His Acts Thereunder*; *infra*, this title, *Guardian's Bonds—Estoppel by Bond*.

**1. Guardian Charged with Funds Which He Negligently Fails to Collect**—*United States*.—*U. S. v. Bender*, 5 Cranch (C. C.) 620.

*Alabama*.—*Hughes v. Mitchell*, 19 Ala. 268; *Lane v. Mickle*, 43 Ala. 109, 46 Ala. 600; *Stewart v. McMurray*, 82 Ala. 269; *Crumpler v. Deens*, 85 Ala. 149.

*Illinois*.—*Bond v. Lockwood*, 33 Ill. 212.

*Massachusetts*.—*Pierce v. Prescott*, 128 Mass. 140.

*Michigan*.—*Dodson v. McKelvey*, 93 Mich. 263.

*Mississippi*.—*Ames v. Williams*, 74 Miss. 404.

*New Jersey*.—*Stothoff v. Reed*, 32 N. J. Eq. 213.

*North Carolina*.—*Armfield v. Brown*, 73 N. Car. 81; *Covington v. Leak*, 65 N. Car. 594; *Culp v. Lee*, 109 N. Car. 675; *Alexander v. Alexander*, 120 N. Car. 472.

*Texas*.—*Reed v. Timmins*, 52 Tex. 84.

**Missouri Rule.**—The guardian is bound to use such diligence and prudence as men of discretion and intelligence use in their own affairs. He is not liable for funds not re-

ceived, except for gross negligence. *Taylor v. Hite*, 61 Mo. 142; *Finley v. Schluter*, 54 Mo. App. 455; *Reynolds's Appeal*, 70 Mo. App. 576.

**Neglect to Collect Choses in Action—Guardian Liable.**—*Potter v. Hiscox*, 30 Conn. 520; *Com. v. Miller*, 5 T. B. Mon. (Ky.) 205; *Ames v. Williams*, 74 Miss. 404; *McNeill v. Hodges*, 83 N. Car. 504; *Coggins v. Flythe*, 113 N. Car. 102; *Webber's Estate*, 133 Pa. St. 338.

The guardian is presumptively liable for all accounts remaining uncollected, and if any were not collectible it is for him to show it. *Stewart v. McMurray*, 82 Ala. 269; *Seigler v. Seigler*, 7 S. Car. 317. It is no excuse that the ward requested him not to collect it, *Com. v. Miller*, 5 T. B. Mon. (Ky.) 205. Nor that it was owed by a resident of another state, where the guardian could not bring suit himself; it was his duty to institute proper proceedings to obtain it, *Potter v. Hiscox*, 30 Conn. 520.

**Negligence in Collecting Funds from Predecessor, Executor, or Administrator.**—A guardian who knows that his predecessor used the ward's money for his own purposes, but suffers his accounts to be passed without charging this sum to him, *Burke v. Turner*, 85 N. Car. 500; or who accepts from the administrator (*Bescher v. State*, 63 Ind. 302) or from his predecessor (*State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753) a note, instead of money, is liable.

But the guardian is not liable for a note taken by the executor which came into the guardian's hands as part of the estate, except upon a finding of negligence. *Sanders v. State*, 49 Ind. 228.

**Where the Guardian Suffered the Administrator to Retain the Ward's Funds,** invest them and support the ward, the guardian doing nothing, he is chargeable with the ward's funds, with reasonable allowance for his support. *Keenan's Estate*, 6 Kulp (Pa.) 67. See also *Wills's Appeal*, 22 Pa. St. 325.

**If the Guardian, upon Being Removed, Took the Ward's Property out of the state,** it is his successor's duty to sue the sureties. *Horton v. Horton*, 4 Ired. Eq. (39 N. Car.) 54.

**Where the Ward Was Entitled to a Pension,** but the guardian took no steps to secure it, whereby it was lost, the guardian is liable for the amount to which the ward was entitled. *Boaz v. Milliken*, 83 Ky. 634; *Clodfelter v. Bost*, 70 N. Car. 733.

**Collection of Money from Attorney.**—And where an attorney had collected by suit two thousand dollars for the ward, and the guardian suffered him to retain one thousand dollars out of it, the guardian was charged with six hundred dollars, the court holding four hundred dollars to be the utmost reasonable allowance. *Butler v. Legro*, 62 N. H. 350.

But if a lawyer in good standing embezzled the ward's money, the guardian will not be held liable for mere failure to institute criminal or disbarment proceedings, there being no chance of collection by suit. *Landmesser's Appeal*, 126 Pa. St. 115, 12 Am. St. Rep. 854.

or income which was lost by his failure properly to invest the funds or rent the real estate,<sup>1</sup> will also be charged to him.

(b) **Sums Due from Himself.** — If he himself was indebted to the ward's estate, his duty to collect the debt makes it immediately an asset by implication of law, and it is treated, not as a mere debt, but as a part of the ward's estate, held by him as guardian, and for which his sureties are liable.<sup>2</sup>

**Where a Guardian Accepted Half the Amount of a Good Note** on the hasty advice of the debtor's lawyer, he was held liable. *Culp v. Stanford*, 112 N. Car. 664.

**Where the Guardian Had Individual Claims Against a Debtor Who Also Owed the Ward**, and he collected his own claim but neglected to collect the ward's, he is liable for the debt. *Royer's Appeal*, 11 Pa. St. 36.

**Collection of Part by Successor No Defense.** — Where the guardian negligently failed to collect a note, but delivered it to his successor, it is no defense that the successor obtained a judgment and collected a part. *Ames v. Williams*, 74 Miss. 404. Compare *Mattox v. Patterson*, 60 Iowa 434; *State v. Bolte*, 4 Mo. App. 599, 72 Mo. 272.

**Loss of Debts Caused by War.** — Where the guardian made efforts in good faith to collect debts, and the debts were lost by the confusion and loss of war, he is not liable. *Covington v. Leak*, 65 N. Car. 594; *Love v. Logan*, 69 N. Car. 70; *White v. Robinson*, 64 N. Car. 698; *Coggins v. Flythe*, 113 N. Car. 102. See also *Clark v. Tompkins*, 1 S. Car. 119.

**Where the Guardian Received from His Predecessor a Note**, which might have been collected by immediate action, but was soon lost by the debtor's insolvency, he was held not liable, the court saying: "He is not bound instantly to sue in all directions." *Stem's Appeal*, 5 Whart. (Pa.) 472, 34 Am. Dec. 569.

**When Failure to Proceed Against Predecessor or Executor Creates No Liability.** — Where a former guardian had settled his account and had been discharged three months before the guardian was appointed, he will not be charged for failure to attack the account for excessive allowances, the facts as to which are doubtful. *Wonders's Estate*, 9 Pa. Co. Ct. 271.

Nor will he be charged for funds lost by the insolvency of an executor, if by the will the guardian was not entitled to possession. *Johnson's Appeal*, 12 S. & R. (Pa.) 317.

He cannot be charged for failure to proceed against his predecessor until the latter has filed an account showing the loss. *Watson's Estate*, 8 Kulp (Pa.) 280.

**A Guardian Who Permits an Executor to Retain Funds to Defend a Suit** in which the ward is interested will not be held liable. *Bethune v. Green*, 27 Ga. 56. See also *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. 1, a. (1) *Generally* — *Measure of Care Required*.

**The Guardian Is Not Liable for Not Suing the Sureties of His Predecessor** for sums which he had fairly used for the ward, though he had no proper vouchers. *Young v. Gray*, 65 Tex. 99.

**1. Loss from Failure Properly to Invest Funds or Rent Real Estate.** — *Thompson v. Thompson*, 92 Ala. 545; *Beavers v. Harvey*, 102 Ga. 184; *Gross's Succession*, 23 La. Ann. 105; *Shurtleff*

*v. Rile*, 140 Mass. 213; *Smith v. Gummere*, 39 N. J. Eq. 27; *Knothe v. Kaiser*, 2 Hun (N. Y.) 515, 5 Thomp. & C. (N. Y.) 4. As to charging interest, see *infra*, this section and subsection, *Interest on Funds*.

**Guardian Must Collect Rents Regularly.** — It is no defense that upon the majority of the ward, the account for several years' arrears of rent is still collectible and not barred by the statute of limitations, since it was the guardian's duty to collect the rents regularly. *Scott v. Caruth*, 9 Verg. (Tenn.) 418.

**Where the Ward's Land Is Encumbered by Outstanding Dower**, it is the guardian's duty to assign the dower and make a rental from the rest of the land, and he is liable for neglect of this duty. *Clark v. Burnside*, 15 Ill. 62.

**Statutory Penalty in Indiana.** — The guardian will be charged with the principal and interest that could have been realized, with the statutory penalty of ten per cent. added. *Colburn v. State*, 47 Ind. 310.

**Measure of Liability.** — Where the guardian leased a hotel at a certain rental, and the tenant sublet at an increased rental, receiving a bonus of one thousand three hundred and fifty dollars for the good will, it was held that the guardian should not be charged with that sum, but should be charged with the increased rental which might have been obtained. *Thackray's Appeal*, 75 Pa. St. 132.

**Practicability of Profitably Investing Funds Ultimately Decided by Court.** — While the practicability of profitably investing the ward's funds is necessarily left to the guardian in the first instance, it is ultimately to be decided by the court on settlement of the account. *Thompson v. Thompson*, 92 Ala. 545.

**Justifying Circumstances.** — The guardian will not be liable for renting a farm to a desirable tenant for a term of years, with the approval of the court, for a smaller sum than he could have obtained for it by the year. *McElheny v. Musick*, 63 Ill. 328.

He will be liable only for actual revenue, when the estate was rendered unproductive by war. *Lay v. O'Neil*, 29 La. Ann. 722.

He will be liable for loss of rent only when his delay was unreasonable; and the liability will not be placed above the legal rate of interest. *Gott v. Culp*, 45 Mich. 265.

**2. Guardian's Liability for Sums Due from Himself — Alabama.** — *Jay v. Martin*, 49 Ala. 192.

*Florida.* — *Williams v. Moseley*, 2 Fla. 327; *Pfeiffer v. Knapp*, 17 Fla. 144.

*Kentucky.* — *Clement v. Hughes*, (Ky. 1891) 16 S. W. Rep. 358, (Ky. 1891) 17 S. W. Rep. 285; *Black v. Kaiser*, 91 Ky. 422; *Johnson v. Hicks*, 97 Ky. 116.

*Louisiana.* — *Hebert's Succession*, 27 La. Ann. 300.

*Massachusetts.* — *Mattoon v. Gray* (Mass.) 387.



(c) **Funds Held by Him in Other Capacities.** — Where the guardian was also administrator, executor, or trustee, and as such held trust funds to which the ward eventually became entitled, he will be regarded as holding the funds as guardian from the time when any act of transfer took place,<sup>1</sup> or from the time when he credited his prior trust accounts and charged himself as guardian,<sup>2</sup> or from the time when his final accounts in the prior trust were settled, showing a balance due to him as guardian,<sup>3</sup> though in the latter cases no act of transfer ever took place.<sup>4</sup> In some cases it is held that the mere arrival of the time when the ward becomes entitled to the funds, and it is the guardian's duty to settle the prior account and transfer the funds, is sufficient to charge the guardian as such.<sup>5</sup>

*Mississippi.* — Neill v. Neill, 31 Miss. 36; State v. Hull, 53 Miss. 626.

*New Jersey.* — McGill v. O'Connell, 33 N. J. Eq. 256.

*North Carolina.* — Avent v. Womack, 72 N. Car. 397; Harris v. Harrison, 78 N. Car. 202.

*South Carolina.* — O'Neill v. Herbert, McMull. Eq. (S. Car.) 495.

*Vermont.* — Haskell v. Jewell, 59 Vt. 91.

*Wisconsin.* — Martin v. Davis, 80 Wis. 376.

**Where the Present Guardian Had Given His Note to a Predecessor,** he is liable for the amount, though the predecessor's administrator refuses to give up the note, claiming that the ward owes the estate. Jay v. Martin, 49 Ala. 192.

**Where Guardian Was Surety for His Predecessor.** — But where the guardian never received any funds from his predecessor, and the wards have released the predecessor, he is not liable because he was surety of the predecessor. Flinn v. Carter, 59 Ala. 364.

**Sums Received Before Appointment, as Cotenant of Ward.** — In *Cheney v. Roodhouse*, 135 Ill. 257, a guardian was held not liable as such for sums that he had received before his appointment as cotenant of the ward.

1. Acts charging the guardian as such take place when he sells lands under a power in the will and takes bonds payable to himself as guardian, *Broadus v. Rosson*, 3 Leigh (Va.) 12; or writes to the obligor in a bond specifically bequeathed to the ward that he henceforth owes the ward, *Alston v. Munford*, 1 Brock. (U. S.) 266.

2. *Davis v. Davis*, 10 Ala. 299; *Weaver v. Thornton*, 63 Ga. 655; *Crenshaw v. Crenshaw*, 4 Rich. Eq. (S. Car.) 14; *In re Scott*, 36 Vt. 297. See also *Wilson v. Knight*, 18 Ala. 129.

**If He Has Receipted as Guardian to Himself as Administrator** for the funds, he is concluded thereby. *Pfeiffer v. Knapp*, 17 Fla. 144; *Cranford v. Brewster*, 57 Ga. 226; *State v. Roeper*, 9 Mo. App. 21. See *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. 1. a. (3) *Estoppel to Deny His Appointment or His Acts Thereunder*.

But in *Massachusetts* the guardian will not render himself liable as such merely by charging himself as guardian. A settlement of the prior trust accounts is essential to his liability. *Conkey v. Dickinson*, 13 Met. (Mass.) 51.

3. **Guardian Liable from Time of Settlement of Former Trust.** — *Tutorship of Scarborough*, 43 La. Ann. 315; *Graham v. Davidson*, 2 Dev. & B. Eq. (22 N. Car.) 155; *Drane v. Bayliss*, 1 Humph. (Tenn.) 174; *Myers v. Wade*, 6 Rand. (Va.) 444.

If on final settlement of the administration he is ordered to pay the balance to himself as guardian, he is liable as guardian therefor, though the funds have already been wasted. *Matter of Noll*, 10 N. Y. App. Div. 356.

**Liability of Foreign Guardian on Receiving Domestic Appointment.** — So where one had been guardian in another state, and his accounts settled there showed a certain amount due to the ward, he will be charged with that amount on being afterwards appointed in another jurisdiction. *State v. Stewart*, 36 Miss. 652; *Jefferson v. Glover*, 46 Miss. 510.

**Guardian Liable for Judgment Previously Recovered Against Him as Administrator.** — *Harris v. Harrison*, 78 N. Car. 202.

**Where One, Being Both Executor and Guardian, Mingled the Two Funds Together,** it will be presumed that the infant heirs were supported from the estate, and that the proceeds of insurance payable to them were kept intact. *Matter of Hill*, 8 Wash. 330.

**Where One Who Is Both Executor and Guardian Dies.** — In *Pennsylvania* it has been held that where one who is both executor and guardian dies before completion of administration, it is error to settle both accounts together, charging the guardian with the balance of the execution account, but that the actual amount which came to him as guardian must be ascertained. *Fish's Appeal*, (Pa. 1886) 7 Atl. Rep. 222.

4. *Matter of Brown*, 72 Hun (N. Y.) 160; *Adams v. Gleaves*, 10 Lea (Tenn.) 367.

5. **Guardian Liable as Such When Ward Becomes Entitled to Funds.** — *Karr v. Karr*, 6 Dana (Ky.) 3; *Watkins v. State*, 2 Gill & J. (Md.) 220; *Clancy v. Dickey*, 2 Hawks (9 N. Car.) 497; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277; *Gray v. Brown*, 1 Rich. L. (S. Car.) 351; *Carroll v. Bosley*, 6 Yerg. (Tenn.) 220, 27 Am. Dec. 460.

But in *Delaware* it has been held that in order to charge as guardian one who was also administrator there must have been some definite act transferring the liability to the guardianship. *Burton v. Tunnell*, 4 Harr. (Del.) 424.

Where the guardian was one of two administrators, it was held that he was liable as guardian for all funds in his hands as administrator and due to the ward, and for half of the sum which the two administrators had in the hands of their agent. *Coleman v. Smith*, 14 S. Car. 511. Compare *Watkins v. State*, 2 Gill & J. (Md.) 220.

**Where a Legacy Is Payable at a Certain Time,** and the executor is also guardian, he cannot



(3) *Profits on Funds Used by Guardian.* — If the guardian has himself used the ward's property, he will be charged with the fair value of the use;<sup>1</sup> and if he has used the ward's funds in his own business, he will be charged with all the profits made therefrom,<sup>2</sup> or with legal interest, as the ward may elect, or as may be most to his advantage.<sup>3</sup>

(4) *Interest on Funds.* — In addition to interest actually received, the guardian will be charged with interest on all sums which he negligently failed to invest so as to produce an income, or which he has mingled with his own funds, or of which he has failed to render proper accounts.<sup>4</sup> This will be

discharge himself as executor, or charge himself as guardian, before the legacy is payable. *Livermore v. Bemis*, 2 Allen (Mass.) 394; *Swope v. Chambers*, 2 Gratt. (Va.) 319.

1. *Guardian's Liability for Using Ward's Property.* — *Owen v. Peebles*, 42 Ala. 338; *In re Kopp*, (Surrogate Ct.) 15 Civ. Pro. (N. Y.) 282.

But Where the Guardian Was the Ward's Husband, he will not be required to account for the rent of premises which they occupied together as a home, nor with rentals for other property which were applied to family expenses by her consent. *State v. Parrish*, 1 Ind. App. 441.

If the Guardian Occupied the Ward's Farm and allowed to him a rent below the real value, but made no charge for his services and only very low charges for other things, the court will charge him a reasonable rent, and will allow credits to him only as charged by him. *Taylor v. Taylor*, (Ky. 1892) 19 S. W. Rep. 528.

2. *Where Guardian Uses Ward's Funds in His Business.* — *Clarkson v. De Peyster*, Hopk. (N. Y.) 424; *Carr v. Askew*, 94 N. Car. 194.

The guardian is liable for the actual value of funds used in his own business, which will be scaled to the real value at the time when they were used, if they were Confederate funds. *Winstead v. Stanfield*, 68 N. Car. 40.

3. *Bond v. Lockwood*, 33 Ill. 212; *Foteaux v. Lepage*, 6 Iowa 123; *Seguin's Appeal*, 103 Pa. St. 139; *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184; *Reed v. Timmins*, 52 Tex. 84.

*Allowance to Guardian for Skill and Labor — Funds Invested in Partnership.* — In estimating profits, an allowance should be made to the guardian for the skill and labor put into the business (one-third of the gross profits was allowed in this case); and where the funds were invested in a partnership of which the guardian was one member, only his profits were allowed to the ward, although the other partner knew of the facts. *Seguin's Appeal*, 103 Pa. St. 139.

*Where Guardian Allows Interest to Ward.* — Where the guardian in good faith and in the ward's interest used the funds in his own business, leaving his own funds idle meanwhile, and made full reports allowing legal interest to the ward, it was held that if the ward should demand an account of profits, he would be charged also with losses and expenses. *Small's Estate*, 144 Pa. St. 293.

A guardian who made unavailing efforts to invest his ward's money, and then invested it in his own business, making full reports and charging interest against himself, will not be charged for interest before he used the ward's funds. *Spath's Estate*, 144 Pa. St. 383.

If a guardian has used his ward's funds in his own business, but credited the ward with

interest compounded annually, the report will be accepted. *Cheney v. Roodhouse*, 135 Ill. 257.

4. *On What Funds Guardian Will Be Charged with Interest — England.* — *Dawson v. Massey*, 1 Ball & B. 219.

*United States.* — *Bourne v. Maybin*, 3 Woods (U. S.) 724.

*Alabama.* — *Bryant v. Craig*, 12 Ala. 354; *Thompson v. Thompson*, 92 Ala. 545.

*California.* — *Guardianship of Cardwell*, 55 Cal. 137.

*Illinois.* — *Steyer v. Morris*, 39 Ill. App. 382; *Rawson v. Corbett*, 43 Ill. App. 127; *Winslow v. People*, 117 Ill. 152.

*Indiana.* — *Stumph v. Pfeiffer*, 58 Ind. 472.

*Maine.* — *Starrett v. Jameson*, 29 Me. 504.

*Massachusetts.* — *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

*Michigan.* — *Jacobia v. Terry*, 92 Mich. 275.

*North Carolina.* — *McNeill v. Hodges*, 83 N. Car. 504; *Wilson v. Lineberger*, 88 N. Car. 416.

*Pennsylvania.* — *Huffer's Appeal*, 2 Grant Cas. (Pa.) 341; *Watson's Estate*, 8 Kulp (Pa.) 280; *Widdoes's Estate*, 17 Phila. (Pa.) 469, 42 Leg. Int. (Pa.) 161; *In re Noble*, 26 Pittsb. Leg. J. N. S. (Pa.) 365; *Hughes's Appeal*, 53 Pa. St. 500; *Baker's Appeal*, 8 S. & R. (Pa.) 12; *McCahan's Appeal*, 7 Pa. St. 56; *Pennypacker's Appeal*, 41 Pa. St. 494; *Mulholland's Estate*, 175 Pa. St. 411.

*Tennessee.* — *Sanders v. Forgasson*, 3 Baxt. (Tenn.) 249.

*Texas.* — *Smythe v. Lumpkin*, 62 Tex. 242.

*Virginia.* — *Snavelly v. Harkraker*, 29 Gratt. (Va.) 112.

*Wisconsin.* — *Olsen v. Thompson*, 77 Wis. 666.

If a Guardian Lends Ward's Money Without Sufficient Security he is regarded as having used it in his own behalf, and is chargeable with interest. *Brewer v. Ernest*, 81 Ala. 435.

*Mississippi Rule.* — In Mississippi a guardian cannot be charged with interest unless he has consented to take the funds at interest, has loaned them out, or has used or made a profit from them. *Hendricks v. Huddleston*, 5 Smed. & M. (Miss.) 422; *Austin v. Lamar*, 23 Miss. 189; *Reynolds v. Walker*, 29 Miss. 262; *Roach v. Jelks*, 40 Miss. 754; *Crump v. Gercock*, 40 Miss. 765; *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449; *Jefferson v. Glover*, 46 Miss. 510; *Garland v. Norman*, 50 Miss. 238; *Fitz-Gerald v. Bailey*, 58 Miss. 658. *Brown v. Mullins*, 24 Miss. 204, followed the general rule, overruling *Hendricks v. Huddleston*, 5 Smed. & M. (Miss.) 422, and *Austin v. Lamar*, 23 Miss. 189, but was itself overruled in *Reynolds v. Walker*, 29 Miss. 250.

computed at the legal rate <sup>1</sup> from the time when by the use of reasonable diligence the funds should have been invested.<sup>2</sup> Six months is the period for investment most commonly allowed,<sup>3</sup> but it may be doubted whether, with the increased facilities for investment, so long a period should be allowed.<sup>4</sup> Consideration will always be given to the peculiar circumstances of each particular case.<sup>5</sup>

**Compound Interest.**—In some courts the interest is computed with annual rests;<sup>6</sup>

But if a guardian fails to account as ordered, he will be charged with interest. *Reynolds v. Walker*, 29 Miss. 262.

**The Fact that the Guardian Took a Loan in His Own Name**, where it was done *bona fide*, does not render him liable for the sum, with interest, if lost. *Cousins's Estate*, 111 Cal. 441, in which case, no question being made as to the principal sum, it was allowed, but without interest.

**Exceptions to and Qualifications of Rule.**—The guardian's commissions will be deducted from moneys as received, and interest charged only on the balance. *Snively v. Harkrader*, 29 Gratt. (Va.) 112.

A guardian is entitled to hold each year a sufficient sum for his year's disbursements, without liability for interest. *Royston v. Royston*, 29 Ga. 83.

Where the guardian had only a small sum, and he boarded, clothed, and educated the ward without charge, he was not charged with interest. *Sayers v. Cassell*, 23 Gratt. (Va.) 525.

**Sum Kept for Expenses or Too Small to Invest.**—The guardian will be charged with interest not received, only in case of neglect; and keeping a sum for expenses, or too small to invest, is no neglect. But if he mixes the money with his own, and keeps no account, he must be charged with interest. *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609.

**Where Receipts and Disbursements Are About Equal**, and are kept on open account, no interest should be charged either way. *Matter of Livernois*, 78 Mich. 330.

**Interest Not Allowed on Furniture and Plate.**—A guardian of several heirs who permits certain of them to take the furniture and plate is liable to the others; but interest will not be allowed on such articles. *Baker's Appeal*, 8 S. & R. (Pa.) 12.

**Where Guardian Could Not Invest with Reasonable Safety.**—A guardian is not chargeable with interest on funds which he could not loan with reasonable safety. *Owens v. Peebles*, 42 Ala. 338; *Brand v. Abbott*, 42 Ala. 499.

**1. Where the Guardian Could Not Invest So as to Obtain the Legal Rate**, the court ordered an investment in a savings bank at a lower rate, without prejudice to the ward's right to question the facts on coming of age. *Wherry's Estate*, 19 Pa. Co. Ct. 664.

**Where the Guardian Kept No Separate Account of His Investments** of his ward's funds, allowing the guardianship accounts to become confused with his own, but acted in good faith and on a strict accounting would have been entitled for his expenses to the whole income of the ward's funds, he was charged with only the legal rate of interest though in some instances he had received a rate three per cent. higher. *Moyer v. Fletcher*, 56 Mich. 508.

**2. Steyer v. Morris**, 39 Ill. App. 382; *Boyn-*

*ton v. Dyer*, 18 Pick. (Mass.) 1; *Baker's Appeal*, 8 S. & R. (Pa.) 12; *Hooper v. Royster*, 1 Munf. (Va.) 119.

**3. White v. Parker**, 8 Barb. (N. Y.) 48; *De-Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Huffer's Appeal*, 2 Grant Cas. (Pa.) 341; *Say v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679; *Hooper v. Royster*, 1 Munf. (Va.) 119; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608.

**4. In Rawson v. Corbett**, 43 Ill. App. 127, only sixty days were allowed; and in *In re Noble*, 178 Pa. St. 460, the court declared that the doctrine of a six months' period is inapplicable at the present time.

**5. One Who for Twelve Years Received Two Hundred to Seven Hundred Dollars Annually**, and used it in his own business, was charged with interest from each period when one thousand dollars had accumulated. *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 399.

**If the Guardian Retains the Funds in His Own Hands** he will be charged from the date of their receipt without allowing a period for investment; and if the estate consisted of his own bond at twelve per cent., he will be charged at that rate to the end of his guardianship. *Snively v. Harkrader*, 29 Gratt. (Va.) 112.

**Where Appeal from Allowance of Account is Pending.**—Interest should not be charged while an appeal from the allowance of the account is pending. *Matter of Mott*, 26 N. J. Eq. 509; *McElhenny's Appeal*, 46 Pa. St. 347. But if the guardian uses the funds meanwhile, he should be charged with interest. *Matter of Mott*, 26 N. J. Eq. 509.

**Allowance of Period for Investment Held Discretionary with Court.**—*Matter of Thurston*, 57 Wis. 104.

**6. Compound Interest Charged.**—*Bradford v. Bodfish*, 39 Iowa 681; *Frost v. Winston*, 32 Mo. 489; *Stark v. Gamble*, 43 N. H. 465; *French v. Currier*, 47 N. H. 88; *Davis v. Combs*, 38 N. J. Eq. 473; *Matter of Dissinger*, 39 N. J. Eq. 227.

Where the guardian held large sums, and rendered no account for many years, regularly receiving the rents and income, the account was ordered settled with annual rests, adding the accumulated income whenever the amount was so large that a prudent trustee could have invested it. *Fay v. Howe*, 1 Pick. (Mass.) 529, and note. *Compare Reed v. Timmins*, 52 Tex. 84.

**Where a Statute Requires an Annual Account and Adjustment of the Balance**, the interest will be annually compounded. *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Garrett v. Carr*, 1 Rob. (Va.) 208.

**Where the Guardian Mingles the Trust Funds with His Own**, so that the investment cannot be traced, he will be charged with interest, and the surplus income will be compounded,



but the general rule is to allow simple interest only,<sup>1</sup> unless there was gross negligence,<sup>2</sup> fraud,<sup>3</sup> or a wilful or extreme disregard of the duties of the trust,<sup>4</sup> in which cases the interest will be compounded.

**Interest Compounded to Termination of Trust.** — The guardian will be charged with compound interest only to the termination of the trust.<sup>5</sup>

(5) *Value of Ward's Labor.* — For such reasonable labor as is incident to the ward's training in habits of industry, or to his position in the guardian's family, the guardian is not liable to account to him;<sup>6</sup> but if the labor entirely or partially compensates the guardian for the board furnished, it should be taken into account in fixing the allowance for such board.<sup>7</sup> And if the ward

though it does not appear that he made any profit from the use of the money. *In re Noble*, 178 Pa. St. 460.

Where the guardian received some securities bearing annual interest, and some bearing simple interest, and he mingled both with his own funds, and made investments on some of which he received more than legal interest, he should be charged with annual interest. *Farwell v. Steen*, 46 Vt. 678.

**1. Simple Interest Only Charged.** — *Tyson v. Sanderson*, 45 Ala. 364; *Starling v. Balkum*, 47 Ala. 314; *Moyer v. Fletcher*, 56 Mich. 508; *Matter of Ward*, 73 Mich. 220.

Where the annual receipts exceed the expenditures, the expenditures will be applied primarily to the extinguishment of current income, and the balance of interest will not be added to the principal for future computations of interest; but the claim that all expenditures should be charged on the principal, so as to leave the entire income to accumulate as a non-interest-bearing fund, cannot be sustained. *Huggins v. Blakely*, 9 Rich. Eq. (S. Car.) 408.

**Conflicting Cases in Kentucky.** — The rule of compounding the interest every two years is laid down in *Karr v. Karr*, 6 Dana (Ky.) 3, and *Alsop v. Barbee*, 14 B. Mon. (Ky.) 419; recognized in *Tanner v. Skinner*, 11 Bush (Ky.) 120, and *Finnell v. O'Neal*, 13 Bush (Ky.) 176; but denied in *Crooks v. Turpen*, 1 B. Mon. (Ky.) 183, and *Campbell v. Golden*, 79 Ky. 544.

**2. Interest Compounded Where There Was Gross Negligence.** — *Calhoun v. Calhoun*, 41 Ala. 369; *Brand v. Abbott*, 42 Ala. 499; *Vaughan v. Bibb*, 46 Ala. 153; *Childress v. Childress*, 49 Ala. 237; *State v. Washburn*, 67 Conn. 196; *Royston v. Royston*, 29 Ga. 82; *Starrett v. Jameson*, 29 Me. 504; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Clarkson v. De Peyster*, Hopk. (N. Y.) 424; *Hughes's Appeal*, 53 Pa. St. 500.

**What Is Such Gross Negligence as to Warrant Compounding Interest.** — Buying unauthorized investments, but such as were commonly bought by private investors, is not sufficient. *State v. Washburn*, 67 Conn. 196.

A guardian who negligently, but in good faith, mixes the funds with his own, and does not invest them, but makes no profit, will be charged with simple interest, compound interest being allowed for gross delinquency only. *Clarkson v. De Peyster*, Hopk. (N. Y.) 424. See also *Dietterich v. Heft*, 5 Pa. St. 87; *Pennypacker's Appeal*, 41 Pa. St. 474.

**3. Interest Compounded Where There Was Fraud.** — *Bryant v. Craig*, 12 Ala. 354; *Royston v. Royston*, 29 Ga. 82; *Peelle v. State*, 118

Ind. 512; *Crump v. Gerock*, 40 Miss. 765; *Matter of Harland*, 5 Rawle (Pa.) 323; *Matter of Thurston*, 57 Wis. 104.

**Interest Will Be Compounded Where There Was Collusion or Gross Delinquency.** — *Crooks v. Turpen*, 1 B. Mon. (Ky.) 183.

**4. Interest Compounded for Wilful or Extreme Disregard of Duty.** — *Cousin's Estate*, 111 Cal. 441; *State v. Richardson*, 29 Mo. App. 595; *State v. Gilmore*, 50 Mo. App. 353; *Latham v. Wilcox*, 99 N. Car. 367; *Lukens's Appeal*, 7 W. & S. (Pa.) 48. Compare *Johnson v. Johnson*, 6 Heisk. (Tenn.) 240.

**Long Retention of Funds and Refusal to Account when Summoned.** — One who has retained the funds for many years, and has refused to render an account, even when summoned, should be charged with compound interest. *Price v. Peterson*, 38 Ark. 494.

**One Who Has Used His Ward's Money for His Own Purposes,** and neglected to make any accounts, will be charged with compound interest. *Matter of Eschrich*, 85 Cal. 98.

**Loaning Without Security or Interest.** — Where the guardian loaned the ward's funds to his mother-in-law, from year to year, without security or payment of interest, compound interest was charged. *Gilbert v. Guptill*, 34 Ill. 112.

**5. Carr v. Askew**, 94 N. Car. 194, where the trust was terminated by the death of the ward.

**6. Bass v. Cook**, 4 Port. (Ala.) 390; *Tutorship of Hollingsworth*, 45 La. Ann. 134; *Shurtleff v. Rile*, 140 Mass. 213; *Moyer v. Fletcher*, 56 Mich. 508; *Phillips v. Davis*, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608.

**7. Ward's Labor Considered in Fixing Allowance for Board — Alabama.** — *Montgomery v. Givhan*, 24 Ala. 568; *Calhoun v. Calhoun*, 41 Ala. 369.

*Arkansas.* — *Campbell v. Clark*, 63 Ark. 450. *Illinois.* — *Meyer v. Temme*, 72 Ill. 574.

*Indiana.* — *Marquess v. La Baw*, 82 Ind. 550. *Iowa.* — *Foteaux v. Lepage*, 6 Iowa 123.

*Kentucky.* — *Hayden v. Stone*, 1 Duv. (Ky.) 396; *Clement v. Hughes*, (Ky. 1891) 16 S. W. Rep. 358.

*Louisiana.* — *Gross's Succession*, 23 La. Ann. 105.

*Michigan.* — *Matter of Livernois*, 78 Mich. 330.

*Pennsylvania.* — *Beam's Appeal*, 96 Pa. St. 74; *Simon's Appeal*, (Pa. 1887) 8 Atl. Rep. 34.

*Tennessee.* — *Phillips v. Davis*, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472.

But it is erroneous to charge the jury to take into consideration the future value of the ward's work. *Meyer v. Temme*, 72 Ill. 574.



regularly works for the guardian, so as to earn substantial wages, no doubt the guardian will be held liable to pay him therefor.<sup>1</sup>

*b. CREDITS ALLOWED TO GUARDIAN*—(1) *Expenses of Administering Trust*—(a) *In General*.—The guardian is allowed all expenses properly incurred in the execution of his trust,<sup>2</sup> and all sums rightfully chargeable upon the ward's property and paid by the guardian.<sup>3</sup>

(b) *Expenses of Litigation and Counsel Fees*.—A guardian who has instituted litigation, or defended actions, if he has acted reasonably and prudently in suing or defending, can charge in his guardian's account the proper and necessary expenses incurred in such litigation,<sup>4</sup> including counsel fees.<sup>5</sup> He may also

A guardian who treats the wards as members of his family, and has them help in the family work, though he has servants sufficient to do all necessary work, will not be charged with their labor, although he has allowance for board and clothing. *Armstrong v. Walkup*, 12 Gratt. (Va.) 608. See also *Moyer v. Fletcher*, 56 Mich. 508; *Tutorship of Hollingsworth*, 45 La. Ann. 134.

1. See *Beam's Appeal*, 96 Pa. St. 74.

2. *Reducing Estate to Possession*.—The expense of reducing the estate to possession, in addition to commissions for managing it, may be allowed to the guardian. *Bickerstaff v. Marlin*, 60 Miss. 509, 45 Am. Rep. 418.

*A Trust Company Acting as Guardian* may employ agents to collect the rents and charge the sums paid to the estate. *Garvey v. Owens*, (Super. Ct. Gen. T.) 12 N. Y. Supp. 349.

*Where Three Wards Are Owners of a Fund*, each should be charged one-third of the general expenses, and each the expenses peculiar to himself. *Whitford v. Foy*, 65 N. Car. 265.

*Expenses in Managing Farm*.—Under the *Rhode Island* statute (Pub. Stat., c. 168, § 33; Gen. Laws 1896, c. 196, § 34) providing that a guardian shall improve his ward's estate frugally, and apply the income and profits to his support, if the guardian can most advantageously to the ward manage the farm and support him from its proceeds, instead of renting it, expenditures in its necessary operation will be allowed. *Remington v. Field*, 16 R. I. 509.

*Expenses of and Losses in Business*.—A guardian cannot engage the estate in business and charge it with losses. *Corcoran v. Allen*, 11 R. I. 567.

But if such business is done, and the profits have gone into the estate, or are claimed by the ward, the necessary expenses and incidental losses will be deducted from the profits. *Corcoran v. Allen*, 11 R. I. 567; *Murphy v. Walker*, 131 Mass. 341.

*The Prohibition Against Exceeding the Minor's Income* applies to expenditures for the management and preservation of the ward's estate, as well as to personal expenditures for the ward. *Payne v. Scott*, 14 La. Ann. 773.

3. *Claims Against Ancestor*.—Whether the guardian is compellable to pay the bond debts of an ancestor from the ward's estate, *quære*. *March v. Bennett*, 1 Vern. 428.

The guardian is not compellable to apply the profits of the ward's estate to pay the ancestor's debts. *Waters v. Ebrall*, 2 Vern. 606.

Credit will not be allowed to a guardian for paying a note of the ward's deceased father, where such note was barred by the statute of limitations and was in no way binding upon

the ward's estate. *In re Wordell*, (N. J. 1888) 12 Atl. Rep. 133.

But if the guardian receives from the administrator the funds of the ward's father's estate, and from it pays debts due from that estate, he is entitled to credit therefor. *Foreman v. Murray*, 7 Leigh (Va.) 412.

If he pays such claims before their approval, he runs the risk of their disapproval, or of the estate being insolvent, but he is not guilty of a wrong which will prevent the payments being credited to him, if they are finally approved. *Corcoran v. Allen*, 11 R. I. 567.

A guardian has no right to use the money derived from the sale of the estate of the ward's grandmother to pay debts due from the estate of the ward's grandfather, though the ward had the same interest in each estate. *Matter of Kennedy*, 120 Cal. 458.

*Making Good Defective Title*.—A guardian who has sold his ward's land, which is afterward taken and sold to pay an ancestor's debt, cannot protect the purchaser by buying in the land out of the ward's funds, and a payment made for that purpose will not be allowed. *State v. Clark*, 28 Ind. 138.

*Payments for Joint Benefit of Guardian and Ward*.—Where the guardian is also life tenant of land of which the ward owns the remainder, he cannot remove incumbrances with the ward's funds, and charge the entire payment to him; but the ward's interest will be computed by the life tables, and his proportion of the burden allowed. *Bourne v. Maybin*, 3 Woods (U. S.) 724.

*Where a Guardian Is Dowress in Her Ward's Lands*, but takes no steps to have her dower assigned, she cannot charge the ward with one-third of the rents. *Rawson v. Corbett*, 150 Ill. 466.

4. *Expenses of Litigation*.—*Alexander v. Alexander*, 5 Ala. 517; *Taylor v. Kilgore*, 33 Ala. 214; *Kingsbury v. Powers*, 131 Ill. 182; *Smith v. Bean*, 8 N. H. 15; *Ex p. Dawson*, 3 Bradf. (N. Y.) 130; *M'Dowell v. Caldwell*, 2 McCord Eq. (S. Car.) 43.

If a Guardian Institutes Suits Without Any Pretense of Right or possibility of success, he is not permitted to charge the ward with the cost. Even the advice of counsel will not protect him, if it was so manifestly wrong as to show the total incompetence of the counsel employed. *Savage v. Dickson*, 16 Ala. 257.

*Where Litigation Is Rendered Necessary by the Guardian's Negligent and irregular* (though not dishonest) acts, he will be charged with the entire cost. *Mulholland's Estate*, 154 Pa. St. 491; *Steyer v. Morris*, 39 Ill. App. 382.

5. *Counsel Fees Incident to Litigation*.—*Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150; *Mc-*

charge counsel fees for advice and other legal assistance, if the services were necessary and the amount paid reasonable.<sup>1</sup> If his own accounts are attacked, and litigation results, he will be allowed to charge the expenses of his defense, if the controversy was not due to his own fault, and he is sustained, or substantially so, in the result.<sup>2</sup>

(2) *Support and Education of Ward* — (a) *In General*. — The first duty of the guardian is to provide for the proper maintenance and education of the ward; and if the ward has sufficient means to make it proper, or if his circumstances make it necessary, to support him from the estate, proper charges for board and education furnished or procured by the guardian will be allowed.<sup>3</sup>

*Williams v. McWilliams*, 15 La. Ann. 88; *Brown v. Mullins*, 24 Miss. 204; *Mathes v. Bennett*, 21 N. H. 204; *Matter of Hynes*, 105 N. Y. 560; *Evan's Estate*, 13 Lanc. L. Rev. (Pa.) 409.

**But When the Administrator of an Estate Had Employed Competent Counsel** to represent the estate, an heir who personally employs counsel to look after his interests cannot charge a part of the fees to other heirs to whom he is afterward appointed guardian. *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150.

**A Guardian Who Himself Prosecuted a Claim Against the Ward's Estate** which was disallowed has no right to an allowance for counsel fees. *Smythe v. Lumpkin*, 62 Tex. 242.

**1. Counsel Fees for Advice and Legal Assistance.** — *Alexander v. Alexander*, 8 Ala. 796; *Royston v. Royston*, 29 Ga. 82; *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434; *Pyatt v. Pyatt*, 44 N. J. Eq. 491; *Moore v. Shields*, 69 N. Car. 50; *Burke v. Turner*, 85 N. Car. 500; *McElhenny's Appeal*, 46 Pa. St. 347; *McGary v. Lamb*, 3 Tex. 342.

**Fees Must Have Been Paid.** — Counsel fees will not be allowed to a guardian unless it appears that he has paid them. *Modawell v. Holmes*, 40 Ala. 391.

**Advice as to Payment of Claim Where No Legal Question Is Involved.** — A guardian who has paid a claim of five hundred dollars incurred by his predecessor for the ward's education is not entitled to a credit for auditing such claim and advising whether it should be paid, if no legal question was involved. *Brewer v. Ernest*, 81 Ala. 435.

**Assistance of Counsel in Preparing Accounts.** — The guardian's commissions cover the keeping of proper accounts, and no allowance to him will be made for the assistance of counsel to prepare them. *Pyatt v. Pyatt*, 44 N. J. Eq. 491.

Where the employment of an attorney was rendered necessary by the confusion of the guardian's accounts, due to negligence, the attorney's fees will be disallowed. *Rawson v. Corbett*, 43 Ill. App. 127, 150 Ill. 466.

**Allowance Discretionary.** — The allowance of attorney fees, it has been held, is in the discretion of the trial court. *Matter of Beisel*, 110 Cal. 267.

**2. Expenses of Defending Guardian's Accounts.** — *Neilson v. Cook*, 40 Ala. 498; *Ashley v. Martin*, 50 Ala. 537; *Kingsbury v. Powers*, 131 Ill. 182; *In re Carman*, (Super. Ct. Gen. T.) 4 N. Y. Supp. 690; *McElhenny's Appeal*, 46 Pa. St. 347.

In *North Carolina* it has been held that the guardian is entitled to a reasonable allowance

for counsel in stating his account, and for advice and professional services if there is special difficulty; but that the expense of defending the account should be charged to the ward only in exceptional cases. *Whitford v. Foy*, 65 N. Car. 265.

**Where Controversy Results from Guardian's Fault.** — But a guardian will not be allowed to charge the expense of litigating the settlement of the account where the controversy was largely due to his own fault. *Blake v. Pegram*, 109 Mass. 541.

Where maladministration by the guardian is found on the accounting he may properly be charged with the cost of the proceedings. *In re Kopp*, (Surrogate Ct.) 15 Civ. Pro. (N. Y.) 282.

**In Removal Proceedings**, the allowance of counsel fees to a guardian for resisting proceedings for his removal depends not altogether on the result, but on whether he proceeded in good faith and exercised a sound discretion in making the defense. *Dearborn v. Batten*, 64 N. H. 568. But if the accusations against him were sustained, and the infant was not in fault, the costs will be charged against the guardian personally. *Silver's Estate*, 6 Pa. Dist. 267.

**3. Allowance for Support and Education of Ward.** — *Martin v. Foster*, 38 Ala. 688; *Owen v. Peebles*, 42 Ala. 338; *Bond v. Lockwood*, 33 Ill. 212; *Mahony v. Mahony*, 41 La. Ann. 135; *Brent v. Grace*, 30 Mo. 253; *Scott's Estate*, 15 Pa. Co. Ct. 316; *Wildoner's Appeal*, (Pa. 1887) 9 Atl. Rep. 272; *Albert's Appeal*, 128 Pa. St. 613.

**Where Ward Is Out of the Jurisdiction.** — The court has power to order maintenance of an infant out of the jurisdiction, and though the father has taken him to another country, and will not bring him back, the guardian will be ordered, in a proper case, to support him there. *Stephens v. James*, 1 Myl. & K. 627.

**When Maintenance Will Be Charged on Real Estate.** — The maintenance of a ward who has no personal property will be charged on his real estate, though the estate would pass to others if the infant should die before the age of twenty-one years. *In re Howarth*, L. R. 8 Ch. 415.

**A Reversionary Interest May Be Charged with the Maintenance of Infants**, though some of them may not ultimately be entitled to the estate. In such a case the court will order the protection of the integrity of the estate by requiring insurance on the life of the infants. *De Witte v. Phila. & P. R. R. Co.*

Under the *Mississippi Statute* a guardian has no right to contract for education and main-



(b) **Limitation to Income.** — Expenditures for the ward's support should be limited, if possible, to the income, and it has been held in *England* and in many of the *United States* that expenditures in excess of the income will not be allowed unless they had been ordered by the court,<sup>1</sup> except in cases of

tenance without an order of court, and if he does so he is personally liable, and cannot charge the expense thereof to the ward. *Dalton v. Jones*, 51 Miss. 585.

**A Ward Should Be Required to Earn His Own Support if Possible;** but if he be physically unable to do so, or cannot do it without using the time needed for a good English education, the guardian may use the funds for his support. *State v. Clark*, 16 Ind. 97; *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676.

**What Must Be Shown to Authorize Allowance.** — A claim of a guardian for allowances for board and education will not be allowed unless it appears that there were no parents willing to support the ward, and that the estate justified the rate of expenditure. *State v. Roche*, 91 Ind. 406, 94 Ind. 372.

**Income Cannot Be Used for Support of Ward's Relatives.** — The income of a child's fortune will not be allowed to be used to maintain his father, and others of the family, in a way suited to the ward's fortune, but not to theirs. *McKnight v. Walsh*, 23 N. J. Eq. 136. See also *Hume v. Warters*, 13 Lea (Tenn.) 554.

**1. Expenditures in Excess of Income Not Allowed Unless Ordered by Court** — *England.* — *Anstis v. Gandy*, 4 Bro. P. C. 186; *Carmichael v. Wilson*, 3 Molloy 84; *Beasley v. Magrath*, 2 Sch. & Lef. 35; *Walker v. Wetherell*, 6 Ves. Jr. 474. *Alabama.* — *Stewart v. Lewis*, 16 Ala. 734; *Starling v. Balkum*, 47 Ala. 314; *Bellamy v. Thornton*, 103 Ala. 404.

*Arkansas.* — *Campbell v. Clark*, 63 Ark. 450.

*Florida.* — *Osborne v. Van Horn*, 2 Fla. 360.

*Georgia.* — *Rolfe v. Rolfe*, 15 Ga. 451; *Freeman v. Tucker*, 20 Ga. 6; *Rolf v. Rolf*, 20 Ga. 325; *Royston v. Royston*, 29 Ga. 82; *Smith v. Hilly*, 29 Ga. 582; *Speer v. Tinsley*, 55 Ga. 89; *Cook v. Rainey*, 61 Ga. 452; *Dowling v. Feelev*, 72 Ga. 557; *Poullain v. Poullain*, 76 Ga. 448.

*Illinois.* — *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184; *Cummins v. Cummins*, 15 Ill. 33.

*Indiana.* — *State v. Clark*, 16 Ind. 97.

*Iowa.* — *Foteaux v. Lepage*, 6 Iowa 123.

*Kentucky.* — *Whitledge v. Callis*, 2 J. J. Marsh. (Ky.) 403; *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150; *Bybee v. Tharp*, 4 B. Mon. (Ky.) 313; *Withers v. Hickman*, 6 B. Mon. (Ky.) 292; *Campbell v. Golden*, 79 Ky. 544.

*Louisiana.* — *Barbarin v. Barbarin*, 3 La. Ann. 264; *Hubbell v. Hubbell*, 5 La. Ann. 524; *Samuels's Succession*, 21 La. Ann. 15; *Webre's Succession*, 36 La. Ann. 312; *Mahony v. Mahony*, 41 La. Ann. 135; *Tutorship of Crane*, 47 La. Ann. 906.

*Mississippi.* — *Moore v. Cason*, 1 How. (Miss.) 53; *Davis v. Roberts, Smed. & M. Ch. (Miss.)* 543; *Austin v. Lamar*, 23 Miss. 189; *Brown v. Mullins*, 24 Miss. 204; *Frellick v. Turner*, 26 Miss. 393; *Gilbert v. McEachen*, 38 Miss. 469; *Scott v. Porter*, 44 Miss. 365; *Sample v. Lane*, 45 Miss. 556; *Wiggle v. Owen*, 45 Miss. 691; *Boyd v. Hawkins*, 60 Miss. 277.

*North Carolina.* — *Hussey v. Roundtree*, Busb. L. (44 N. Car.) 110; *Long v. Norcom*, 2 Ired. Eq. (37 N. Car.) 354; *Johnston v. Coleman*, 3 Jones Eq. (56 N. Car.) 290; *Caffey v. McMichael*, 64 N. Car. 507; *Johnston v. Haynes*, 68 N. Car. 514; *Tharington v. Tharington*, 99 N. Car. 118.

*South Carolina.* — *McDowell v. Caldwell*, 2 McCord Eq. (S. Car.) 43, 16 Am. Dec. 635; *Teague v. Dendy*, 2 McCord Eq. (S. Car.) 211; *Prince v. Logan*, Spears Eq. (S. Car.) 29; *Villard v. Robert*, 2 Strobb. Eq. (S. Car.) 40, 49 Am. Dec. 654; *Holmes v. Logan*, 3 Strobb. Eq. (S. Car.) 31.

*Tennessee.* — *Roseborough v. Roseborough*, 3 Baxt. (Tenn.) 314; *Beeler v. Dunn*, 3 Head (Tenn.) 87, 75 Am. Dec. 761; *Owens v. Pearce*, 10 Lea (Tenn.) 45; *Hobbs v. Harlan*, 10 Lea (Tenn.) 268; *Phillips v. Davis*, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472; *Cohen v. Shyer*, 1 Tenn. Ch. 192.

*Texas.* — *Smythe v. Lumpkin*, 62 Tex. 242; *Jones v. Parker*, 67 Tex. 76.

*Virginia.* — *Jackson v. Jackson*, 1 Gratt. (Va.) 143; *Anderson v. Thompson*, 11 Leigh (Va.) 458; *Hooper v. Royster*, 1 Munf. (Va.) 119; *Myers v. Wade*, 6 Rand. (Va.) 444.

*West Virginia.* — *Windon v. Stewart*, 43 W. Va. 711.

**Whether Mean Income May Be Used.** — In *Georgia* it has been held that if there is property not immediately productive, or if the income is fluctuating, the ward's support will not be confined to the actual receipts of each year, but to the mean income. *Carmichael v. Wilson*, 3 Molloy 79; *Speer v. Tinsley*, 55 Ga. 89.

But in *Kentucky*, on the other hand, it has been held that a guardian should not expend more than the year's income, though he replace it from the excess of other years. *Bybee v. Tharp*, 4 B. Mon. (Ky.) 313.

**When Courts Will Order Use of Principal.** — The courts will order the use of the principal, even for necessities, only with great caution, and in clearly urgent cases. *Walker v. Wetherell*, 6 Ves. Jr. 474; *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184; *Cummins v. Cummins*, 15 Ill. 33; *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150.

An order for the use of the principal will be granted when the smallness of the income and the needs of the ward make it imperative. *Ex p. Green*, 1 Jac. & W. 253; *Barlow v. Grant*, 1 Vern. 255; *Osborne v. Van Horn*, 2 Fla. 360; *Rolf v. Rolf*, 20 Ga. 325; *Withers v. Hickman*, 6 B. Mon. (Ky.) 292.

**By Statute in Maryland** the courts could order the use of the principal, but such use was strictly limited to the ward's maintenance and education in a manner suited to his prospects. *Brodess v. Thompson*, 2 Har. & G. (Md.) 120.

**Approval by Court of Use of Principal.** — Approval by the court of a return showing expenditures in excess of income constitutes a



extreme necessity.<sup>1</sup> But in some of the United States the rule limiting expenditures to the income is merely one of caution, and such expenditures as are required for the proper support and education of the ward will be approved though they involve an encroachment upon the principal of his funds.<sup>2</sup>

ratification of such expenditures. *Cook v. Rainey*, 61 Ga. 452; *Smith v. Hilly*, 29 Ga. 582.

But in *Arkansas* the court is forbidden by statute to approve the use of the principal for maintenance without an order, though such order would have been granted if applied for. *Campbell v. Clark*, 63 Ark. 450.

1. *Stewart v. Lewis*, 16 Ala. 734; *Montgomery v. Givhan*, 24 Ala. 568; *Calhoun v. Calhoun*, 41 Ala. 369; *Bellamy v. Thornton*, 103 Ala. 404; *State v. Clark*, 16 Ind. 97; *Jarret v. Andrews*, 7 Bush (Ky.) 311; *Campbell v. Golden*, 79 Ky. 544; *Overfield v. Overfield*, (Ky. 1895) 30 S. W. Rep. 994; *Holmes v. Logan*, 3 Strobb. Eq. (S. Car.) 31; *Weathersbee v. Blanton*, 31 S. Car. 604; *Roseborough v. Roseborough*, 3 Baxt. (Tenn.) 314; *Owens v. Pearce*, 10 Lea (Tenn.) 45.

In *Massachusetts* it has been held that if the sale of real estate for reinvestment is ordered, and the proceeds are used for the ward's support, the guardian, in order to have such use allowed, must clearly show the necessity therefor. *Strong v. Moe*, 8 Allen (Mass.) 125.

In *North Carolina* it has been held that expenditures beyond the principal without an order will be approved where the necessity is extreme, arising from bodily or mental weakness of the ward. *Long v. Norcom*, 2 Ired. Eq. (37 N. Car.) 354; *Johnston v. Coleman*, 3 Jones Eq. (56 N. Car.) 290; *Tharington v. Tharington*, 99 N. Car. 118.

In *Tennessee* it seems to be the better opinion that expenditures in excess of the income will not be allowed without an order of court, unless both necessity for the expenditures and a good cause why the order was not applied for in advance are shown. *Hobbs v. Harlan*, 10 Lea (Tenn.) 268; *Cohen v. Shyer*, 1 Tenn. Ch. 192. If the estate is meagre, the income small, and the expenditures less than the expense of procuring an order, the absence of an order will be excused. *Hobbs v. Harlan*, 10 Lea (Tenn.) 268.

In *Virginia* it has been held that charges in excess of the income will be allowed under very special circumstances. *Jackson v. Jackson*, 1 Gratt. (Va.) 143; as where such disbursements were unavoidable without culpable neglect on the part of the guardian, *Hooper v. Royster*, 1 Munf. (Va.) 119.

It has been held in this state that equity will approve the use of the principal of personal property for the ward's support and education, where it would have ordered the expenditure beforehand, if application therefor had been made. *Barton v. Bowen*, 27 Gratt. (Va.) 849; *Rinker v. Streit*, 33 Gratt. (Va.) 663. *Aliter*, as to the principal fund derived from the sale of real estate. *Rinker v. Streit*, 33 Gratt. (Va.) 663.

But under a statute it was held that the principal of the proceeds of real estate could be used only upon an order of court, and that the order was required in every case to precede the expenditure. *Gayle v. Hayes*, 79 Va.

542; *Whitehead v. Bradley*, 87 Va. 676; *Cumming v. Simpson*, (Va. 1887) 1 S. E. Rep. 657.

The guardian will not be allowed for expenditures in excess of the income from an entire estate, part of which is still in the hands of the administrator. *Foreman v. Murray*, 7 Leigh (Va.) 412.

**Power Implied from Will.** — Where a will directed that the testator's children be sent to "such school as will enable them to acquire the best education," it was held that the guardian might exceed the income, if necessary to educate them in the manner prescribed. *Maclin v. Smith*, 2 Ired. Eq. (37 N. Car.) 371.

2. *Gott v. Culp*, 45 Mich. 265; *Chubb v. Bradley*, 58 Mich. 268; *In re Hough*, 1 Ohio Dec. 699.

In *Pennsylvania* it has been held that the principal may be used for the medical education of the ward, *Smith's Appeal*, 30 Pa. St. 397; and that it may be used for the education of a deaf mute, *Gilfillen's Estate*, 170 Pa. St. 185, 50 Am. St. Rep. 760. But no part of the principal can be used if the guardian receives or might receive sufficient interest. *Huffer's Appeal*, 2 Grant Cas. (Pa.) 341.

**Rule in New York** — *When Guardian May Use Principal Without Order.* — The general rule is that a guardian cannot encroach on the ward's principal without an order of court. *Black's Estate*, Tuck. (N. Y.) 145; *Matter of Paton*, (Surrogate Ct.) 7 Misc. (N. Y.) 377. But this rule is not inflexible, and if the income is not sufficient and the ward's welfare requires it, the guardian may resort to the principal. *Matter of Bostwick*, 4 Johns. Ch. (N. Y.) 100; *Browne v. Bedford*, 4 Dem. (N. Y.) 304. However, if the guardian takes this responsibility, he must make out as clear a case as if he had applied for an order in advance. *Oakley v. Oakley*, 3 Dem. (N. Y.) 140; *Hyland v. Baxter*, 98 N. Y. 610.

It is not sufficient that the expenditures were suited to the ward's social position, if they were beyond his means. *Oakley v. Oakley*, 3 Dem. (N. Y.) 140.

Where by will the income of a fund is devoted to the ward's support, the guardian is strictly limited to that, and cannot be reimbursed, even for necessary expenditures, from the principal. *Smith v. Bixby*, 5 Redf. (N. Y.) 196.

*When Court Will Permit Use of Principal.* — Permission to encroach on the principal should be given cautiously, and only when the necessity is apparent. *Matter of Wandell*, 32 Hun (N. Y.) 545.

The court has no power to order the principal to be used for maintenance while there is uncollected income in the hands of solvent debtors. *Matter of Plumb*, 22 Hun (N. Y.) 100.

The guardian should not be allowed to exceed the income where the wards are able to earn their own support and the father is living. *Kelahr v. McCahill*, 26 Hun (N. Y.) 148.

(c) **When Father Is Guardian** — *aa. GENERAL RULE.* — If the guardian be also the ward's father, he will not ordinarily be allowed to charge the account with expenditures for the support or education of the ward, since it is the father's duty himself to support his minor child.<sup>1</sup> The same consideration will prevent the allowance to a guardian of sums paid to the ward's father for board furnished by him.<sup>2</sup>

*bb. EXCEPTIONS TO RULE.* — But if the father is so poor as to be unable to support the ward, or if the ward's fortune is so far superior to the father's means that he is able to afford a better maintenance and education than the father is able to give him, the court will make an allowance to the father from the ward's estate.<sup>3</sup>

*cc. WHETHER EXPENDITURES MUST BE SANCTIONED BY ORDER OF COURT.* — In some of the older cases an order preceding the expenditure is held to be an absolute prerequisite to the allowance to the father of expenditures for the ward's support, and this still seems to be the rule in a few of the *United States*; <sup>4</sup> but the

**1. Father Not Ordinarily Allowed for Support and Education** — *United States.* — Bourne v. Maybin, 3 Woods (U. S.) 724.

*District of Columbia.* — Rhodes v. Robie, 9 App. Cas. (D. C.) 305.

*Georgia.* — Hines v. Mullins, 25 Ga. 696.

*Illinois.* — Bedford v. Bedford, 136 Ill. 354.

*Indiana.* — Haase v. Roehrscheid, 6 Ind. 66;

Corbaley v. State, 81 Ind. 62; Kinsey v. State, 98 Ind. 351.

*Kentucky.* — Clement v. Hughes, (Ky. 1891) 16 S. W. Rep. 358.

*Massachusetts.* — Dawes v. Howard, 4 Mass. 97.

*New Jersey.* — Tompkins v. Tompkins, 18 N. J. Eq. 303.

*New York.* — Matter of Kane, 2 Barb. Ch. (N. Y.) 375.

*North Carolina.* — Walker v. Crowder, 2 Ired. Eq. (37 N. Car.) 478; Burke v. Turner, 85 N. Car. 500.

*Ohio.* — *In re Gould*, 2 Ohio Dec. 398.

*Pennsylvania.* — Matter of Harland, 5 Rawle (Pa.) 323.

*Texas.* — Buckley v. Howard, 35 Tex. 565; Kendrick v. Wheeler, 85 Tex. 247; Moore v. Moore, (Tex. Civ. App. 1895) 31 S. W. Rep. 532.

**2. Guardian Not Allowed for Payments to Father for Ward's Board.** — Jackson v. Jackson, 1 Atk. 514; Butler v. Butler, 3 Atk. 60; Pulsford v. Hunter, 3 Bro. C. C. 416; Wellesley v. Beaufort, 2 Russ. g; Fuller v. Fuller, 23 Fla. 236; Windon v. Stewart, 43 W. Va. 711. And see Suttle v. Calwell, 34 Ga. 551; *In re Lizman*, 14 Lanc. L. Rev. (Pa.) 38.

**3. Where Allowance Will Be Made to Father** — *England.* — *Ex p.* Williams, 2 Coll. Ch. Cas. 740; Buckworth v. Buckworth, 1 Cox Ch. 80. *United States.* — Bourne v. Maybin, 3 Woods (U. S.) 724.

*Alabama.* — Watts v. Steele, 19 Ala. 656, 54 Am. Dec. 207; Alston v. Alston, 34 Ala. 15; Beasley v. Watson, 41 Ala. 234; Baines v. Barnes, 64 Ala. 375; Waldron v. Waldron, 76 Ala. 285; Englehardt v. Yung, 76 Ala. 534.

*Florida.* — Fuller v. Fuller, 23 Fla. 236.

*Georgia.* — Prine v. Mapp, 80 Ga. 137.

*Illinois.* — Bedford v. Bedford, 136 Ill. 354.

*Indiana.* — Kinsey v. State, 71 Ind. 32; Corbaley v. State, 81 Ind. 62.

*Kentucky.* — Chapline v. Moore, 7 T. B. Mon. (Ky.) 150; Crooks v. Turpen, 1 B. Mon. (Ky.) 183; Patton v. Patton, 3 B. Mon. (Ky.)

161; Clement v. Hughes, (Ky. 1891) 16 S. W. Rep. 358; Overfield v. Overfield, (Ky. 1895) 30 S. W. Rep. 994.

*Massachusetts.* — Dawes v. Howard, 4 Mass. 97.

*Michigan.* — Chubb v. Bradley, 58 Mich. 268.

*Missouri.* — Otte v. Becton, 55 Mo. 99; State v. Martin, 18 Mo. App. 468.

*New Jersey.* — Morris v. Morris, 15 N. J. Eq. 239; Tompkins v. Tompkins, 18 N. J. Eq. 303.

*New York.* — Clark v. Montgomery, 23 Barb. (N. Y.) 464; Harring v. Coles, 2 Bradf. (N. Y.) 349; Voëssing v. Voëssing, 4 Redf. (N. Y.) 360; Matter of Burke, 4 Sandf. Ch. (N. Y.) 617.

*Pennsylvania.* — Newport v. Cook, 2 Ashm. (Pa.) 332; Seaver's Estate, 11 Phila. (Pa.) 1, 32 Leg. Int. (Pa.) 28.

*Tennessee.* — Trimble v. Dodd, 2 Tenn. Ch. 500.

*Texas.* — Buckley v. Howard, 35 Tex. 565; Kendrick v. Wheeler, 85 Tex. 247.

*Virginia.* — Cunningham v. Cunningham, 4 Gratt. (Va.) 43.

**No Allowance for Support of Others than Ward.** — The father will not be allowed sufficient to support other children and a second wife in a condition suited to the ward's fortune; to allow his ward's proportionate part of such an establishment is the utmost that will be done. McKnight v. Walsh, 23 N. J. Eq. 136.

**Income Bequeathed with Directions for Accumulation.** — An order will be made to apply the ward's income to his support where his father is unable to support him, though the income was bequeathed with directions for accumulation. But the order will be granted only after judicial inquiry into the facts. Tompkins v. Tompkins, 18 N. J. Eq. 303.

**4. Order Must Precede Expenditure.** — Hughes v. Hughes, 1 Bro. C. C. 387; Hill v. Chapman, 2 Bro. C. C. 231; Simon v. Barber, Tamlyn 22; Darter v. Speirs, 61 Miss. 148; *Ex p.* George, 63 Miss. 143; Burke v. Turner, 85 N. Car. 500; Presley v. Davis, 7 Rich. Eq. (S. Car.) 105, 62 Am. Dec. 396; Myers v. Wade, 6 Rand. (Va.) 444.

**Past Maintenance** will be allowed only in a special case, *Ex p.* Bond, 2 Myl. & K. 439; under very particular circumstances, Andrews v. Partington, 3 Bro. C. C. 60, 2 Cox Ch. 223; only upon the clearest proof that justice requires it, Evans v. Pearce, 15 Gratt. (Va.) 513, 78 Am. Dec. 635; Stigler v. Stigler, 77 Va. 163.

better rule is to make such allowance in the account, if the expenditure is found to be justified by the relative circumstances of the father and of the ward, though no order had been obtained.<sup>1</sup>

(d) **Allowance of Support to Mother.** — The rule of allowance for the ward's support is more favorable to the mother than to the father; she is under no obligation to support from her own resources a child who has means of his own, and she is therefore permitted to charge the ward's estate for the expenses of his board and education.<sup>2</sup> This extends, in a proper case, to expenditures

**1. Justifiable Expenditures Allowed though No Order Was Obtained** — *England.* — *Reeves v. Brymer*, 6 Ves. Jr. 425; *Sherwood v. Smith*, 6 Ves. Jr. 454; *Maberly v. Turton*, 14 Ves. Jr. 499 (*overruling Hill v. Chapman*, and *Andrews v. Parrington*, cited in preceding note).

*Alabama.* — *Alston v. Alston*, 34 Ala. 15; *Beasley v. Watson*, 41 Ala. 234; *Baines v. Barnes*, 64 Ala. 384.

*Florida.* — *Fuller v. Fuller*, 23 Fla. 236.

*Missouri.* — *Otte v. Becton*, 55 Mo. 99; *State v. Martin*, 18 Mo. App. 468.

*New York.* — *Voëssing v. Voëssing*, 4 Redf. (N. Y.) 360; *Matter of Miller*, 34 Hun (N. Y.) 268; *Matter of Bostwick*, 4 Johns. Ch. (N. Y.) 105.

*Tennessee.* — *Trimble v. Dodd*, 2 Tenn. Ch. 500.

But see *Matter of Kane*, 2 Barb. Ch. (N. Y.) 375.

**Expenditures by the Father Before His Appointment as Guardian** may be allowed in his account, where he was not able to support the ward. *Matter of Wright*, 1 Connoly (N. Y.) 281.

Such expenditures were allowed though the father was of abundant means when they were made, he being bankrupt at the time of the allowance. *Bourne v. Maybin*, 3 Woods (U. S.) 724. *Contra*, *Griffith v. Bird*, 22 Gratt. (Va.) 73.

**The Burden of Proof** is upon the parent to establish such a state of facts as entitles him to the allowance, and the proof should be clear when the allowance is at all extravagant. *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Hoose v. Roehrscheid*, 6 Ind. 66.

**Expenditures Not Charged in Account Regarded as Gratuitous.** — *Reynolds v. Reynolds* (Ky. 1892) 18 S. W. Rep. 517.

**Father's Right in Suit on His Bond.** — In certain cases the father has been allowed to set up his equity to have the support of the ward credited to him, even in a suit on the bond, though no order had been made. *Kinsey v. State*, 71 Ind. 32; *Corbaley v. State*, 81 Ind. 62; *Overfield v. Overfield*, (Ky. 1895) 30 S. W. Rep. 904.

**2. Mother Allowed for Board and Education** — *England.* — *Fawkner v. Watts*, 1 Atk. 406; *Ex p. Swift*, 1 Russ. & M. 575; *Billingsly v. Critchet*, 1 Bro. C. C. 269; *Haley v. Bannister*, 4 Madd. 275; *Fentiman v. Fentiman*, 13 Sim. 171; *Roach v. Garvan*, 1 Ves. 158; *Ex p. Petre*, 7 Ves. Jr. 403.

*Alabama.* — *Stewart v. Lewis*, 16 Ala. 734; *Englehardt v. Yung*, 76 Ala. 534.

*California.* — *Matter of Beisel*, 110 Cal. 267.

*Florida.* — *Osborne v. Van Horn*, 2 Fla. 360.

*Illinois.* — *Mowbry v. Mowbry*, 64 Ill. 383.

*Kentucky.* — *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150.

*Louisiana.* — *Tutorship of Crane*, 47 La. Ann. 896.

*Massachusetts.* — *Whipple v. Dow*, 2 Mass. 418; *Dawes v. Howard*, 4 Mass. 97; *Melanefy v. O'Driscoll*, 164 Mass. 422.

*New York.* — *Gladding v. Follett*, 2 Dem. (N. Y.) 58; *Matter of Winsor*, 5 Dem. (N. Y.) 340; *Wilkes v. Rogers*, 6 Johns. (N. Y.) 507.

*Pennsylvania.* — *Bellas's Estate*, 6 Kulp (Pa.) 189.

*Texas.* — *Freybe v. Tiernan*, 76 Tex. 286. But compare *Alling v. Alling*, 52 N. J. Eq. 92, *distinguishing Pyatt v. Pyatt*, 46 N. J. Eq. 285.

In *South Carolina* it has been held that a mother having means sufficient only for herself may have an allowance from the estates of children which are considerable; but that this should look only to her expenditures, and not to repaying her for care and attention. *Heyward v. Cuthbert*, 4 Desaus. (S. Car.) 445. See also *Alling v. Alling*, 52 N. J. Eq. 92.

**Excessive Charges Disallowed.** — See *Matter of Guernsey*, 21 Ill. 443.

The mother cannot claim for past support more than might then have been reasonably allowed, though the ward has since received a greater fortune. *Chaplin v. Chaplin*, 3 P. Wms. 365; *Alling v. Alling*, 52 N. J. Eq. 92. Nor may she claim more than she actually expended, though the ward's means would have warranted a larger allowance. *Bruin v. Knott*, 1 Phil. 572, 9 Jur. 979.

Where the guardian paid over a pension of twelve dollars a month to the ward's mother, who was very poor, and supported the entire family with it, only the ward's proportion was allowed to the guardian. *Hume v. Wartens*, 13 Lea (Tenn.) 554.

**No Allowance Unless Claimed by Mother.** — Where a mother voluntarily maintains and educates her children and wards at her own cost, she cannot be compelled to charge them therefor in the interest of her creditors. *Hanford v. Prouty*, 133 Ill. 339. Nor can her administrator claim an allowance, where there is no evidence that she intended to make a charge. *Guion v. Guion*, 16 Mo. 48, 57 Am. Dec. 223.

Where a guardian loans money to the mother on her promise to charge the wards for board and apply the amount on the loan, such agreement gives to the guardian no right against the wards, and if the mother makes no charge the guardian cannot claim an allowance. *Wyckoff v. Hulse*, 32 N. J. Eq. 607.

Where a guardian wrongfully takes the ward's share of insurance to the mother, he cannot recoup by claiming credit for board furnished by her, which she never claimed. *Taylor v. Hill*, 86 Wis. 99.



made without an order of court, or before such order, as well as after it.<sup>1</sup>

(e) To Other Persons in Loco Parentis. — If the guardian takes the ward into his own family,<sup>2</sup> or if he lives in the family of a stepfather,<sup>3</sup> an uncle or aunt,<sup>4</sup>

1. Proper Expenditures Made Without Order Allowed — *England*. — *Fentiman v. Fentiman*, 13 Sim. 171; *Ex p. Petre*, 7 Ves. Jr. 403.

*Alabama*. — *Stewart v. Lewis*, 16 Ala. 734.

*California*. — *Matter of Beisel*, 110 Cal. 267.

*Kentucky*. — *Hughart v. Spratt*, 78 Ky. 313.

*Louisiana*. — *Tutorship of Crane*, 47 La. Ann. 896 (but see *Samuels's Succession*, 21 La. Ann. 15).

*New York*. — *Browne v. Bedford*, 4 Dem. (N. Y.) 304; *Matter of Winsor*, 5 Dem. (N. Y.) 340; *Wilkes v. Rogers*, 6 Johns. (N. Y.) 567; *Matter of Bostwick*, 4 Johns. Ch. (N. Y.) 100; *Matter of Ogg*, 1 Connolly (N. Y.) 10.

*Texas*. — *Freye v. Tiernan*, 76 Tex. 286.

In Iowa it has been held that an order of allowance to the mother for past support will be made only under special circumstances, which must appear in the application. *Welch v. Burris*, 29 Iowa 186.

Under the Statutes of California the Probate Court (as distinguished from chancery) had no authority to compel a guardian to repay necessary disbursements made for the ward by the mother, though the ward's income was ample. *Swift v. Swift*, 40 Cal. 456.

The Mother May Support the Child Gratuitously; but if she has the control of the property her expenditures will be charged thereon unless there is proof of her intent to make no charge. *Englehardt v. Yung*, 76 Ala. 534. See also *Bellas's Estate*, 6 Kulp (Pa.) 189.

2. Where Guardian Takes Ward into His Own Family. — *Reynolds v. Jones*, 63 Ark. 259; *Campbell v. Clark*, 63 Ark. 450; *Stout v. Wood*, 59 Ill. App. 122; *Marquess v. La Baw*, 82 Ind. 550 (but see *Doan v. Dow*, 8 Ind. App. 324); *Snover v. Prall*, 38 N. J. Eq. 207; *Otis v. Hall*, 117 N. Y. 131; *Shuey's Estate*, 1 Pa. Super. Ct. 405; *Booth v. Sineath*, 2 Strobb. Eq. (S. Car.) 31.

Where a ward's services, after she reached ten years of age, were worth her maintenance, and an uncle offered to take care of her without charge, the court refused to allow the guardian for her maintenance. *Simon's Appeal*, (Pa. 1887) 8 Atl. Rep. 34.

More Gratuitous Declarations of an intention not to charge for board, not made to any one having authority, nor to secure appointment, will not estop the guardian from making such charge in a proper case. *Cunningham v. Pool*, 9 Ala. 615; *Armstrong v. Walkup*, 9 Gratt. (Va.) 372; *Hooper v. Royster*, 1 Munf. (Va.) 119.

Declarations Made in Court to Secure Appointment. — But where there was a contest over the appointment, and the person afterwards appointed guardian declared in court that if he were appointed he would maintain and educate the ward gratuitously, charges for such expenses were disallowed. *Barg's Estate*, Myr. Prob. (Cal.) 69; *State v. Baker*, 8 Md. 44.

The Charge for Board on Annual Accounts is a sufficient evidence of the guardian's intent to justify an allowance therefor on final account. *Bond v. Lockwood*, 33 Ill. 212; *Latham v. Myers*, 57 Iowa 519.

If a Guardian, Without Informing the Court that the Ward Has Lived in His Family, Charges Him for Board, the settlement is liable to be set aside. *Doan v. Dow*, 8 Ind. App. 324.

Where the Guardian Is Insolvent, and by bad management has become liable for the ward's entire estate, the court will allow credit to him for actual disbursements, though he stood *in loco parentis*. *Tucker v. Bond*, 74 Mo. App. 331. See also *Alsop v. Barbee*, 14 B. Mon. (Ky.) 419.

3. Where Ward Lives with Stepfather — *England*. — *Cooper v. Martin*, 4 East 77.

*Alabama*. — *Englehardt v. Yung*, 76 Ala. 534.

*Illinois*. — *Brush v. Blanchard*, 18 Ill. 46; *Bond v. Lockwood*, 33 Ill. 212; *Mowbry v. Mowbry*, 64 Ill. 383; *Rawson v. Corbett*, 43 Ill. App. 127; *Meyer v. Temme*, 72 Ill. 574.

*Indiana*. — *Glidewell v. Snyder*, 72 Ind. 528.

*Iowa*. — *Bradford v. Bodfish*, 39 Iowa 681.

*Michigan*. — *Matter of Ward*, 73 Mich. 220.

*Minnesota*. — *Matter of Besondy*, 32 Minn. 385, 50 Am. Rep. 579.

*New York*. — *Matter of Ackerman*, 116 N. Y. 654, 26 N. Y. St. Rep. 666; *Hill v. Hanford*, 11 Hun (N. Y.) 536.

*Oregon*. — *Gerber v. Bauerline*, 17 Oregon 115.

*Pennsylvania*. — *Brown's Appeal*, 112 Pa. St. 18; *Douglas's Appeal*, 82 Pa. St. 169.

Application of Rule to Particular Circumstances. — A stepfather maintained a child between the ages of four and fifteen years as his own; he received as guardian its pension, and mingled this with his own funds, keeping no account. It was held that he was entitled to charge board against the amount received, especially since the ward left his home when his services became valuable. *Pratt v. Baker*, 56 Vt. 70. But board was disallowed on very similar facts in *Dissenger's Case*, 39 N. J. Eq. 227.

A stepfather who takes the children into his own family, supports them by his labor, and uses real estate in which they own an interest, will not be charged with rent, nor allowed for board or for ordinary education; but he may be allowed for education in a boarding school elsewhere. *Mulhern v. McDavitt*, 16 Gray (Mass.) 404.

Board Furnished by Stepfather Before His Appointment as Guardian. — In *North Carolina* it has been held that where a stepfather becomes guardian he cannot charge for board furnished prior to his appointment. *Barnes v. Ward*, Busb. Eq. (45 N. Car.) 93, 57 Am. Dec. 590.

After a Stepfather Has Been Removed from the Guardianship, it is too late to claim an allowance for the first time. *State v. Preetorius*, 11 Mo. App. 593.

4. Where Ward Lives with Uncle or Aunt. — *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150; *Flynn v. Walsh*, (Md. 1885) 3 Atl. Rep. 245; *Moyer v. Fletcher*, 56 Mich. 508; *Jacobia v. Terry*, 92 Mich. 275; *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526; *Horton's Appeal*, 94 Pa. St. 62; *Crosby v. Crosby*, 1 S. Car. 337; *Olsen v. Thompson*, 77 Wis. 666.

or other person assuming a parental relation to him,<sup>1</sup> the question is one of more difficulty. *Prima facie* the obligation to support the ward does not rest upon such persons, and they may be allowed for the expenses of his maintenance; but if from the relationship of the parties, the mode in which the ward was treated, the benefit received from his labor, the statements of the one caring for him, and the other circumstances of the case, an intention not to charge for the maintenance is reasonably to be imputed to the *quasi* parent, he will not be allowed afterwards to recall the gift and claim an allowance.

(f) **Items of Support Allowed.** — The items of expenditure allowed for the ward's maintenance and education differ so much with the amount of the estate and the circumstances of the ward that no general rules can be stated. Economy is not to be regarded as the sole or primary consideration, but rather, if the estate permits it, the bringing the ward up so as to be fitted for the position in life which he is to fill.<sup>2</sup> Where the circumstances and fortune of the ward warrant it, traveling expenses,<sup>3</sup> the purchase of a piano,<sup>4</sup> and the purchase or hiring of a horse<sup>5</sup> are proper items of expenditure. But a guardian will not

**1. A Ward's Grandmother**, also guardian, who received moneys, but spent very much more for board, education, and medical care, but kept no account, and also provided by will for the ward's future support, will not be charged with the sums received. *Lafferty's Estate*, 147 Pa. St. 283.

**Brother-in-law.** — A guardian cannot charge for board furnished to his sisters-in-law, where he invited them to live with him gratuitously. *M'Dowell v. Caldwell*, 2 McCord Eq. (S. Car.) 43, 16 Am. Dec. 635.

**Brother.** — Where a brother, before appointment as guardian, had supported the wards, and after appointment received the proceeds of land, the past support may be taken into account in fixing the allowance for the future, where he did not intend to donate the support. *Hovell v. Noll*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 546.

**Where One Cared for Children Out of Friendship to Their Mother** for fifteen years, keeping no account thereof, and was then appointed guardian, it was held that no allowance for the past support would be made. *Davis v. Roberts*, Smed. & M. Ch. (Miss.) 543.

**Bringing Ward Up as Member of Family Without Expectation of Reward.** — A payment of board to one who took the ward and brought her up as a member of his family, without claim or expectation of reward, will not be allowed. *Folger v. Heidel*, 60 Mo. 285.

**Guardian Not Allowed for Money Paid for Board Where None Was Claimed.** — If a guardian, by loaning money without security, has become responsible for its loss, he cannot defend on the ground that the borrower had boarded the ward, where she never made any claim for such board. *Post's Estate*, Myr. Prob. (Cal.) 230.

So where a guardian, on being cited to account, gave to his brother, with whom the ward had lived, a note for her board, where there had been no agreement to pay, nor any demand for it, the note was disallowed. *Matter of Eschrich*, 85 Cal. 68.

**2. Items of Support — Primary Consideration.** — *Farrance v. Viley*, 9 Eng. L. & Eq. 219; *Ex p. Pejre*, 7 Ves. Jr. 403; *Ex p. Swift*, 1 Russ. & M. 575; *Barnes v. Ross*, (1896) A. C.

625; *Bybee v. Tharp*, 4 B. Mon. (Ky.) 313; *Gott v. Culp*, 45 Mich. 265; *Alling v. Alling*, 52 N. J. Eq. 92; *Matter of Burke*, 4 Sandf. Ch. (N. Y.) 617.

The Louisiana Code declares that "the expenses for the support and education of the minor ought to be so regulated that nothing decent or necessary shall be wanting to him according to his condition in life." Tutorship of Crane, 47 La. Ann. 906.

**A Guardian Cannot Defend Extravagant Expenditures Out of the Principal** by the fact that the ward's eldest sister and their physician advised and urged the expenditures. *Fielder v. Harbison*, 93 Ky. 482.

**Guardian or Parent Not Permitted to Make Profit.** — *Alling v. Alling*, 52 N. J. Eq. 92; *Phillips v. Towles*, 73 Ala. 406; *Bannister v. Bannister*, 44 Vt. 624.

**With Whom Determination of Amount of Expenditures Rests.** — In *Mississippi* it has been held that the amount of the expenditures is not in the discretion of the guardian, but is in that of chancery. *Dalton v. Jones*, 51 Miss. 525.

In *England* it has been held that where the infant's maintenance has been settled by the court and the guardian exceeds the allowance, the court will not allow the extra expenditure except under special circumstances. It was allowed, however, in this case. *Rainsford v. Freeman*, 1 Cox Ch. 417.

But in *New York* it has been held that an order by which the guardian is to pay bills incurred by the ward for tuition and school expenses to a specified limit cannot be sustained, since the incurring of the bills must be on the guardian's discretion and not on the ward's. *Matter of Plumb*, 52 Hun (N. Y.) 119.

**3. Traveling Expenses.** — *In re Clarke*, 17 Eng. L. & Eq. 599; *Clay v. Pennington*, 8 Sim. 359; *Cummins v. Cummins*, 29 Ill. 452.

**4. Piano.** — *Pierce v. Prescott*, 128 Mass. 140.

**5. Purchase or Hiring of Horse.** — *Harbin v. Bell*, 54 Ala. 389; *Owen v. Peebles*, 42 Ala. 338; *Owens v. Walker*, 2 Strobb. Eq. (S. Car.) 289; *Wallis v. Neale*, 43 W. Va. 529. See also *Ruble v. Cottrell*, 57 Ark. 190.

**Though the Purchase of a Slave was unauthorized**, yet if the ward has received the slave,



be allowed for cash given to the ward during his minority, unless there is clear proof that the ward ratified the act after reaching his majority.<sup>1</sup>

(3) *Repairs, Taxes, and Insurance.* — Since it is the guardian's duty to keep the ward's estate from depreciation, proper expenditures for repairs, taxes, and insurance will be allowed to him.<sup>2</sup>

(4) *Improvements.* — The guardian has no inherent right to expend the ward's money for improvements, and if he makes such improvements without an order it is at his own risk; yet in many cases such expenditures, though not ordered, have been allowed, where they appeared to have been judicious and beneficial to the ward.<sup>3</sup>

the sum paid should be allowed to the guardian. *Brown v. Mullins*, 24 Miss. 204.

1. *Cash Given to Ward.* — *Hesch v. Calvert*, 32 W. Va. 215; *Kelahe v. McCahill*, 26 Hun (N. Y.) 148.

A guardian can recover from the ward money advanced for furnishing a house, if after majority the articles were accepted, so as to ratify the loan. *Matter of Plumb*, (Surrogate Ct.) 24 Misc. (N. Y.) 249.

*Money Furnished to a Ward to Engage in Business*, impairing his capital, will not be allowed. *Shaw v. Coble*, 63 N. Car. 377; *In re Mells*, 64 Iowa 391.

But in *Indiana* it has been held that a guardian has some discretion in allowing to the ward money to spend; and where the estate was one hundred and seventy dollars, and the ward was cared for by relatives gratuitously, the guardian was held not liable for giving to him sums of five dollars, by which the entire estate was exhausted in six and a half years. *Karney v. Vale*, 56 Ind. 542.

2. *Allowance to Guardian for Repairs, Taxes, and Insurance.* — *Waldrup v. Tulley*, 48 Ark. 297; *Matter of Beisel*, 110 Cal. 267; *Mahony v. Mahony*, 41 La. Ann. 135; *Cromwell v. Kirk*, 1 Dem. (N. Y.) 599; *Hobbs v. Harlan*, 10 Lea (Tenn.) 268.

Where the Guardian Expends Money in Repairs Without an Order, he runs the risk of the expenditures being approved; but if they are found to be proper, the expense will be allowed. *Cheney v. Roodhouse*, 32 Ill. App. 49; *Frankenfield's Appeal*, 102 Pa. St. 589.

If the Guardian Is a Life Tenant and primarily liable to make repairs, he will not be permitted to charge them to the ward. *In re Wordell*, (N. J. 1888) 12 Atl. Rep. 133. But the court may order repairs made, though the ward is a remainderman after the mother's life estate, where the life tenant is willing to join in the expenditures. *Hood v. Bridport*, 11 Eng. L. & Eq. 271.

3. *United States.* — *Williams v. Barrett*, 2 Cranch (C. C.) 673.

*California.* — *Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518; *Matter of Beisel*, 110 Cal. 267.

*Georgia.* — *Royston v. Royston*, 29 Ga. 82. *Illinois.* — *Cheney v. Roodhouse*, 32 Ill. App. 49, 135 Ill. 257.

*Maryland.* — *Brodess v. Thompson*, 2 Har. & G. (Md.) 120.

*New Jersey.* — *Haggerty v. McCanna*, 25 N. J. Eq. 48.

*New York.* — *Hassard v. Rowe*, 11 Barb. (N. Y.) 22; *Cromwell v. Kirk*, 1 Dem. (N. Y.) 599.

*Oregon.* — *Gerber v. Bauerline*, 17 Oregon 115.

*Pennsylvania.* — *Matter of Kearnes*, 1 Pa. St. 326; *Eberts v. Eberts*, 55 Pa. St. 110; *Killpatrick's Appeal*, 113 Pa. St. 46.

*Virginia.* — *Jackson v. Jackson*, 1 Gratt. (Va.) 143.

*Where Court Fixes Limit of Improvements.* — The making of improvements may be authorized by the Probate Court; and if that court orders improvements to a certain limit, the limit fixes the extent of the guardian's authority, but is not an absolute prohibition to go beyond it, and if the guardian exceeds the limit, and the court finds the excess to have been necessary and useful, it will be allowed. *May v. Skinner*, 149 Mass. 375, 152 Mass. 328.

But where the amount of expenditure for improvements was fixed by the court, and the guardian made contracts to that limit, which omitted many necessary things, and afterwards supplied them beyond the limit fixed, credit for the excess was not allowed. *Snodgrass's Appeal*, 37 Pa. St. 377.

*Interest Allowed on Money Borrowed under Order Afterwards Reversed.* — *Kingsbury v. Powers*, 131 Ill. 182.

*Guardian's Right to Rent for Building Put on Ward's Land.* — Where a guardian put up a building on his ward's land for his business, and the court disallowed the charge, the guardian was treated as owning the building, and was allowed to charge rental to the ward therefor if it was valuable to the estate. *Murphy v. Walker*, 131 Mass. 341.

*Right to Cost of Profitable Improvements from Increased Income Obtained Thereby.* — Where the guardian makes profitable improvements, he can charge the cost to the increased income obtained thereby, but not to the principal, nor can he have a judgment for the sum. *Hobbs v. Harlan*, 10 Lea (Tenn.) 268.

*Power of Court to Order Continuance of Partnership and Completion of Works.* — It is within the power of the Probate Court to order a continuance of a partnership, and the expenditure of funds to complete an unfinished distillery; and the order will justify prudent expenditures therefor. *Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513.

*Where the Guardian Paid the Ward's Stepmother for Improvements which she had made on the land, the payment cannot be allowed, though made bona fide, unless the stepmother had a legal lien for her expenditures.* *Cassedy v. Casey*, 58 Iowa 326.

*Improvements on Land Fraudulently Bought from Wards.* — A guardian will not be allowed for improvements on land which he fraudu-



(5) *Losses Not Attributable to Guardian's Negligence* — (a) *Rule Stated*. — If funds of the ward are lost by reasons not chargeable to the guardian's fault, he can credit his account with the amount of the losses;<sup>1</sup> but if the loss resulted from a failure to exercise that measure of diligence and prudence required of the guardian, he will not be permitted to throw it upon the ward by charging it in his account.<sup>2</sup>

(b) *Applications of Rule* — *aa. LOANS WITHOUT SUFFICIENT SECURITY*. — A loan of the ward's funds, on the sole credit of the borrower, without security, is never proper, and the guardian is liable for any loss therefrom.<sup>3</sup> So if the security was inadequate.<sup>4</sup>

*bb. LOANS ON PERSONAL SECURITY*. — All loans on personal security were disapproved in the older cases,<sup>5</sup> but the application of this rule has ceased with the

lently bought from the wards. *Eberts v. Eberts*, 55 Pa. St. 110.

**A Guardian Who Is Cotenant with His Wards** has no right to charge them with contribution to improvements made by him. *Lane v. Taylor*, 40 Ind. 495.

A guardian who owns a half interest with his ward cannot expend sums wholly disproportionate to the ward's means, and charge half of them to the ward. But on partition sale he may have the increased amount resulting from the improvements credited to him. *Jessup v. Jessup*, 102 Ill. 480.

**1. Credit Allowed to Guardian for Losses Not Attributable to His Fault** — *Alabama*. — *Newman v. Reed*, 50 Ala. 297; *Thompson v. Thompson*, 92 Ala. 545.

*California*. — *Post's Estate*, Myr. Prob. (Cal.) 230; *Cousin's Estate*, 111 Cal. 441; *Curtis v. Devoe*, 121 Cal. 468.

*Georgia*. — *Haddock v. Planters' Bank*, 66 Ga. 496.

*Indiana*. — *Slauter v. Favorite*, 107 Ind. 291.

*Kentucky*. — *Durrett v. Com.*, 90 Ky. 312.

*Maryland*. — *O'Hara v. Shepherd*, 3 Md. Ch. 306.

*North Carolina*. — *Christman v. Wright*, 3 Ired. Eq. (38 N. Car.) 549; *State v. Foy*, 65 N. Car. 265; *Covington v. Leak*, 65 N. Car. 594.

*Pennsylvania*. — *Ogle's Estate*, 5 Pa. St. 15; *Jack's Appeal*, 94 Pa. St. 367.

*South Carolina*. — *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408.

**2. Credit Not Allowed for Losses Resulting from Negligence**. — *McLean v. Hosea*, 14 Ala. 194, 48 Am. Dec. 94; *State v. Washburn*, 67 Conn. 187; *Skelton v. Ordinary*, 32 Ga. 266; *Slauter v. Favorite*, 107 Ind. 291; *Garner v. Hendry*, 95 Iowa 44; *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238; *French v. Currier*, 47 N. H. 88; *Hurdle v. Leath*, 63 N. Car. 597; *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451; *Worrell's Appeal*, 9 Pa. St. 508; *Evan's Estate*, 7 Pa. Super. Ct. 142. See *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward* — *Obligations of Guardian* — *Generally* — *Measure of Care Required*.

**A Guardian Appointed in Another State** will not be held to a stricter rule of investment than that prescribed by the law of the ward's domicile. *Lamar v. Micou*, 114 U. S. 218.

**3. Guardian Liable for Losses Arising from Loans Without Security** — *Alabama*. — *Slauter v. Cook*, 40 Ala. 498; *Harbin v. Bell*, 54 Ala. 389; *Lee v. Lee*, 55 Ala. 590; *May v. Duke*, 61 Ala. 53.

*Illinois*. — *Gilbert v. Guptill*, 34 Ill. 112.

*Kentucky*. — *Clay v. Clay*, 3 Met. (Ky.) 548. *Massachusetts*. — *Clark v. Garfield*, 8 Allen (Mass.) 427; *Richardson v. Boynton*, 12 Allen (Mass.) 138.

*North Carolina*. — *Boyett v. Hurst*, 1 Jones Eq. (54 N. Car.) 166; *Covington v. Leak*, 65 N. Car. 594; *Freeman v. Wilson*, 74 N. Car. 368; *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284.

*Pennsylvania*. — *Dietterich v. Heft*, 5 Pa. St. 87.

*South Carolina*. — *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184; *Nance v. Nance*, 1 S. Car. 209; *Allen v. Gaillard*, 1 S. Car. 279.

**Mere Promise to Give Security Not Sufficient**. — *Post's Estate*, Myr. Prob. (Cal.) 230, 57 Cal. 273.

In *Vermont* it has been held that a guardian is not liable for loss by the bankruptcy of a borrower, though he took an unsecured note, and included sums due to himself and to the ward, if the referee finds no negligence or want of care. *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

And in *North Carolina* a guardian who *bona fide* sold the ward's cotton on twenty days' credit, taking an unsecured note, and sold his own in the same way, was held not liable for loss. *State v. Morrison*, 68 N. Car. 162.

**4. Inadequate Security**. — *Lee v. Lee*, 55 Ala. 590; *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457; *Harding v. Larned*, 4 Allen (Mass.) 426; *Hindle v. Leath*, 63 N. Car. 597; *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451.

**In Lending the Ward's Money on Mortgage**, the guardian should see not only that the security is sufficient, but that the money will probably be paid without litigation, or else he should provide in the mortgage for the expenses of a suit. *Brewer v. Ernest*, 81 Ala. 435.

**The Taking of a Second Mortgage** is not conclusively a breach of trust, but throws on the guardian the burden of showing that his act was prudent or unavoidable. *Monroe v. Osborne*, 43 N. J. Eq. 248.

**Where Borrower and Surety Are Partners**. — Where the law requires investments to be secured by the bond and note of some person other than the borrower, it does not constitute actionable negligence that the borrower and surety were partners, where both were solvent, and both afterwards failed. *Watson v. Holton*, 115 N. Car. 36.

**5. Loans on Personal Security Formerly Disapproved**. — *Smith v. Smith*, 7 J. J. Marsh. (Ky.)

modern changes in business.<sup>1</sup>

*cc. INVESTMENTS WITHOUT ORDER OF COURT.* — So also it has been held in some cases that any investment not reported to and approved by the court is at the guardian's risk,<sup>2</sup> but this rule has not been generally adopted.<sup>3</sup>

*dd. INVESTMENTS OUTSIDE OF JURISDICTION.* — It is ordinarily more prudent for the guardian to invest funds within the jurisdiction, where they are under his own observation and the jurisdiction of the domestic courts; and by statute in some states this has been made an absolute requirement, so that investments out of the state, unless ordered by the court, are a violation of duty, making the guardian liable for any loss.<sup>4</sup>

*ee. INVESTMENTS IN GUARDIAN'S OWN NAME.* — If the guardian makes investments or deposits funds in his own name, he will not be permitted to charge them to the ward upon their loss.<sup>5</sup>

*ff. INVESTMENTS IN CONFEDERATE FUNDS.* — Peculiar difficulties arose in the Southern states by reason of the total extinction of the Confederate currency and bonds, in which many trust estates were held. It was formerly held by the Supreme Court of the United States and by the courts of a few of the states that a guardian would not be allowed to credit his account with investments in Confederate bonds, on the ground that such an investment was illegal, as being an act in aid of rebellion. Statutes of the states in rebellion expressly sanctioning such investments, and decrees of court sanctioning them, were alike held to be null and to afford no protection to the guardian.<sup>6</sup> But the now universally accepted doctrine is that the receipt of Confederate money in the ordinary course of business, or even the purchase of Confederate bonds, while they were a valuable and usual investment, sanctioned by the *de facto* law of the state, were not necessarily wrongful acts.<sup>7</sup> This rule has very

238; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *Torry v. Frazer*, 2 Redf. (N. Y.) 486; *Nance v. Nance*, 1 S. Car. 209; *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184.

1. *Guardian May Now Accept Personal Security.* — *Newman v. Reed*, 50 Ala. 297; *Thompson v. Thompson*, 92 Ala. 545; *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238; *Lovell v. Minot*, 20 Pick. (Mass.) 116.

Where a testator left funds invested in notes, and the guardian continues the practice, and the notes are still perfectly good at the time of accounting, the guardian will not be required to account for them in cash. *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281.

2. *Investments Without Order of Court.* — *Matter of Carver*, 118 Cal. 73; *McIntyre v. People*, 103 Ill. 142; *Bates v. Dunham*, 58 Iowa 308; *Carlyle v. Carlyle*, 10 Md. 440.

3. See *Beasley v. Watson*, 41 Ala. 234; *Durrett v. Com.*, 90 Ky. 312; *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355, where the necessity of procuring an order is expressly denied; and the cases cited in the previous notes, *passim*, where it is not required for the guardian's justification.

4. *Investment Out of Jurisdiction.* — *Lyne v. Perrin*, 97 Ky. 738 (under statute); *Welch v. Baxter*, 45 La. Ann. 1062; *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284. See also *State v. Washburn*, 67 Conn. 187.

5. *Investments and Deposits in Guardian's Own Name.* — *Matter of Bane*, 120 Cal. 533 (under statute); *Allen v. Leach*, 7 Del. Ch. 83; *McWhorter v. Tarpley*, 54 Ga. 291; *Byne v. Anderson*, 67 Ga. 466; *Speer v. Tinsley*, 55 Ga. 89; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218; *Knowlton v. Bradley*, 17 N. H. 458;

*Otto v. Van Riper*, 31 N. Y. App. Div. 278; *White v. Parker*, 8 Barb. (N. Y.) 48; *Cummings v. Mebane*, 63 N. Car. 315; *Stanley's Appeal*, 8 Pa. St. 431; *Booth v. Wilkinson*, 78 Wis. 652, 23 Am. St. Rep. 443.

It Makes No Difference that by an Indorsement on the Certificate of Deposit he has declared it to be the ward's. *Jenkins v. Walter*, 8 Gill & J. (Md.) 218.

Where a Sum Was Bequeathed to a Father and Guardian on condition of his giving bond to pay the principal, but without interest, to the son when he should come of age, if he places the money at interest, since the investment is for his own benefit only, he will bear the risk and be liable for it if lost. *Walker v. Walker*, 42 Ga. 135. See *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. 3. a. (3) (a) *What Constitutes Conversion*.

Contra — *Loss Resulting from War.* — In *Virginia* where the guardian deposited money in his own name, but without mingling it with his own funds, and it was lost by the general collapse of the war, the form of the deposit not affecting it, he was held not liable. *Parsley v. Martin*, 77 Va. 376, 46 Am. Rep. 733.

6. *Investments in Confederate Funds.* — *Horn v. Lockhart*, 17 Wall. (U. S.) 570, followed in *Lamar v. Micou*, 112 U. S. 452; *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *Houston v. Deloach*, 43 Ala. 364, 94 Am. Dec. 689; *Powell v. Knighton*, 43 Ala. 626; *Newman v. Reed*, 50 Ala. 297; *Corbitt v. Carroll*, 50 Ala. 315; *Bailey v. Fitz Gerald*, 56 Miss. 578, 58 Miss. 658, reversing *Trotter v. Trotter*, 40 Miss. 704.

7. *Investments in Confederate Funds Not Necessarily Wrongful* — *Alabama.* — *Watson v. Stone*,



recently been accepted by the Supreme Court of the United States, reversing its former position.<sup>1</sup> The question then becomes one of negligence; and it is held that to accept Confederate funds unnecessarily after they had become discredited by the course of the war, was such a lack of prudence as to make the guardian liable for loss.<sup>2</sup>

**Statutory Scales of Depreciation.** — In some states there are statutory scales of depreciation to ascertain the amount for which the guardian should be held liable for the loss of Confederate funds.<sup>3</sup> And the same method was also resorted to in cases of loss by the Continental currency.<sup>4</sup>

(6) *Compensation for Services.* — The guardian is entitled to credit himself with a reasonable compensation for his services.<sup>5</sup> In some jurisdictions the compensation is a fixed commission, provided by statute.<sup>6</sup> In the absence of

40 Ala. 451, 91 Am. Dec. 484; Neilson v. Cook, 40 Ala. 498; Beasley v. Watson, 41 Ala. 234; Owen v. Peebles, 42 Ala. 338; Walthall v. Walthall, 42 Ala. 450; Elston v. Wyley, 42 Ala. 640; Hoffman v. Stoudemire, 42 Ala. 593; Newman v. Reed, 50 Ala. 297; Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718; Stewart v. McMurray, 82 Ala. 269; Bentley v. Dailey, 87 Ala. 406.

*Georgia.* — Nelms v. Summers, 54 Ga. 605; Baldy v. Hunter, 98 Ga. 170; Franklin v. McElroy, 99 Ga. 123.

*Mississippi.* — Coffin v. Bramlitt, 42 Miss. 194.

*North Carolina.* — State v. Foy, 65 N. Car. 265; Cummings v. Mebane, 63 N. Car. 315; Longmire v. Herndon, 72 N. Car. 629; Freeman v. Wilson, 74 N. Car. 368; Green v. Roundtree, 88 N. Car. 164.

*South Carolina.* — Wilson v. Braddy, 16 S. Car. 517; Brabham v. Crosland, 25 S. Car. 525. Compare Waller v. Cresswell, 4 S. Car. 353.

1. Baldy v. Hunter, 171 U. S. 388, which limits Lamar v. Micou, 112 U. S. 452, to the precise facts of that case, that of a resident of New York, who removed his residence and the ward's funds into the Confederacy from sympathy therewith, and ignores Horn v. Lockhart, 17 Wall. (U. S.) 570.

2. **Guardian Liable if He Did Not Exercise Proper Prudence.** — Neilson v. Cook, 40 Ala. 498; Venable v. Howard, 68 Ga. 167; Gibbs v. Gibbs, Phil. L. (61 N. Car.) 471; Purser v. Simpson, 65 N. Car. 497; Sudderth v. McCombs, 65 N. Car. 186, 79 N. Car. 398; Robertson v. Wall, 85 N. Car. 283; Coggins v. Flythe, 113 N. Car. 102; McNeill v. Hodges, 83 N. Car. 504; Cureton v. Watson, 3 S. Car. 451; McClure v. Johnson, 14 W. Va. 432.

**That Debts Collected in Confederate Money Were Ante-Bellum Debts** is an important fact against the allowance. Purser v. Simpson, 65 N. Car. 497; Robertson v. Wall, 85 N. Car. 283; Brabham v. Crosland, 25 S. Car. 525; Ammon v. Wolfe, 26 Gratt. (Va.) 621; Crawford v. Shover, 29 Gratt. (Va.) 69.

In *Georgia* it was held that though a guardian might be justified in collecting a note in Confederate money, he would not be permitted to make a sale for such money, without an order of court. Johnson v. McCullough, 59 Ga. 212.

**Burden of Proof.** — The receipt of Confederate funds throws on the guardian the burden of showing due care and prudence. Lewis v. Allred, 57 Ala. 628; Westbrook v. Davis, 48

Ga. 471; King v. Hughes, 52 Ga. 600; Johnson v. McCullough, 59 Ga. 212; Byne v. Anderson, 67 Ga. 466.

**The Confederate Bonds or Money Must Be Clearly Identified as Those of the Ward,** and must have been kept separate from the guardian's own funds. Byne v. Anderson, 67 Ga. 466; McWhorter v. Tarpley, 54 Ga. 291; McCook v. Harp, 81 Ga. 236; Burke v. Turner, 85 N. Car. 500; Adams v. Lathan, 14 Rich. Eq. (S. Car.) 304; Ammon v. Wolfe, 26 Gratt. (Va.) 621.

3. Stewart v. McMurray, 82 Ala. 269; McNeill v. Hodges, 83 N. Car. 504; Coggins v. Flythe, 113 N. Car. 102; Barton v. Bowen, 27 Gratt. (Va.) 849.

4. Hooper v. Royster, 1 Munf. (Va.) 119; Sallee v. Yates, 1 Wash. (Va.) 226; Call v. Ruffin, 1 Call (Va.) 333.

5. **Commissions on Receipts and Disbursements.** — A guardian is entitled, on final settlement, to commissions on his receipts and disbursements; and no vouchers except the record are necessary. Newman v. Reed, 50 Ala. 297.

**Where the Guardian Dies, and His Administrator Pays Over the Sum Due to the Ward,** he cannot charge a guardian's commission on the payment. Floyd v. Priestester, 8 Rich. Eq. (S. Car.) 248.

**Agreement to Charge No Commission.** — The fact that the guardian, in the ward's interest, left the management of the funds to the ward's father, agreeing to charge no commission, will not prevent him from receiving reasonable compensation for the services that he did perform. Williams's Appeal, 119 Pa. St. 87.

**When Commissions Will Be Credited.** — Allowances for guardian's compensation should be made annually. Matlock v. Rice, 6 Heisk. (Tenn.) 33; or from time to time, as they are earned, Huffer's Appeal, 2 Grant Cas. (Pa.) 311.

**If Interest Is Compounded Against the Guardian,** he should have credit for commissions, on each annual rest. Vanderheyden v. Vanderheyden, 2 Paige (N. Y.) 287, 21 Am. Dec. 86; Fisher v. Britton, 2 Redf. (N. Y.) 524.

6. **Statutory Provisions Construed — Commissions on Receipts and Disbursements.** — Where the statutory commission is two per cent. on receipts and disbursements, it will not be allowed on the amount remaining in the guardian's hands for distribution, that not being a disbursement. Allen v. Martin, 34 Ala. 442.

The reinvestment of the ward's funds is not such a receipt and disbursement as entitles the guardian to commissions, under the *New York*



a statutory rule, it is in the discretion of the court to which the account is rendered, in view of the services rendered and the circumstances of the estate.<sup>1</sup> If the guardian has grossly violated his duty, by failing to render the accounts required by statute or by the order of the court,<sup>2</sup> or by other serious breach of his duty,<sup>3</sup> commissions will be disallowed.

statutes. *Matter of Kellogg*, 7 Paige (N. Y.) 265.

**Allowance for Services Usually Confined to Statutory Commission.**—Where the commission is based on the receipts and disbursements, an extra charge for the mere custody of the estate will not be allowed. *Alexander v. Alexander*, 8 Ala. 796.

Nor for lending out the funds, and computing the interest. *Allen v. Martin*, 34 Ala. 442, 36 Ala. 330.

A guardian may employ a clerk or agent at the estate's expense, where the circumstances require it; but for his own services he is confined to the statutory commission. *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287, 21 Am. Dec. 86.

Thus the guardian cannot charge for his own services as an attorney, nor for personal services in repairing buildings, etc., and an allowance of such charges by the surrogate's court is invalid. *Morgan v. Hannas*, (Ct. App.) 13 Abb. Pr. N. S. (N. Y.) 361, *affirmed* 49 N. Y. 667. But see *Morgan v. Morgan*, 39 Barb. (N. Y.) 20.

But the guardian's compensation as fixed by the *South Carolina* statute does not contemplate his going beyond the state, and if he is required to do so he is entitled to extra compensation. *Huson v. Wallace*, 1 Rich. Eq. (S. Car.) 1.

**1. Amount of Compensation Discretionary with Court — Guiding Considerations.**—*Richardson v. State*, 55 Ind. 381; *May v. May*, 109 Mass. 252; *Pierce v. Prescott*, 128 Mass. 140; *Gott v. Culp*, 45 Mich. 265; *State v. Foy*, 65 N. Car. 265; *Scott's Estate*, 15 Pa. Co. Ct. 316; *Matlock v. Rice*, 6 Heisk. (Tenn.) 33. See also *McElhenny's Appeal*, 46 Pa. St. 347.

**Commissions on Payments.**—A guardian is entitled to commissions on payments made to a firm of which he was a member, but not on his own charges for board. *Williamson v. Williams*, 6 Jones Eq. (59 N. Car.) 62. *Contra* as to board. *Jetter's Estate*, 14 Phila. (Pa.) 319, 38 Leg. Int. (Pa.) 392.

A guardian will not be allowed to charge commissions on any payments made after the ward became of age. *McNeill v. Hodges*, 83 N. Car. 504.

**Whether in Case the Guardian Does Not Allow Interest on the Ward's Funds** in his account, and the court adds the interest, commissions on the addition should be allowed to him, is a question on which there is some conflict of authority. In *Georgia* and *New York* it has been held that such commissions should be allowed. *Cartledge v. Cutliff*, 29 Ga. 758; *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 399. But a contrary rule prevails in *Pennsylvania*. *Say v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679.

**Where the Same Person Is Both Trustee and Guardian** of the same estate, full compensation in both capacities will not be allowed. *Blake v. Pegram*, 101 Mass. 592.

**An Agreement Between the Guardian and the Ward Immediately After the Ward's Majority**, as to the amount of the guardian's compensation, will be scrutinized suspiciously; but if the court finds it to be fair and reasonable, it will be followed. *Huff v. Wolfe*, 48 Ill. App. 589.

**2. Commissions Disallowed Where Guardian Fails to Render Account.**—*Starrett v. Jameson*, 29 Me. 504; *Blake v. Pegram*, 109 Mass. 542; *Matter of Marcy*, 24 N. J. Eq. 451; *Matter of Dissenger*, 39 N. J. Eq. 227; *Pyatt v. Pyatt*, 44 N. J. Eq. 491; *Topping v. Windley*, 99 N. Car. 4; *Albert's Appeal*, 128 Pa. St. 613; *Trimble v. Dodd*, 2 Tenn. Ch. 500; *In re Pierce*, 68 Vt. 639; *Hescht v. Calvert*, 32 W. Va. 215.

**But if the Failure to File Accounts Was Due to Mere Negligence**, and there was no fraud or bad faith, and no loss resulted to the estate, commissions will not be forfeited. *Neilson v. Cook*, 40 Ala. 498; *Spies v. Stikes*, 112 Ala. 584; *Magruder v. Darnall*, 6 Gill (Md.) 269; *Matter of Ward*, 73 Mich. 220; *Matter of Bowie*, 74 Mo. App. 191; *Elston v. Carpenter*, (N. J. 1885) 3 Atl. Rep. 357; *McNeill v. Hodges*, 83 N. Car. 504; *Baker v. Lafitte*, 4 Rich. Eq. (S. Car.) 392.

**3. Guardian Guilty of Gross Violation of Duty Not Allowed Commissions**—*Arkansas*.—*Reed v. Ryburn*, 23 Ark. 47.

*Illinois*.—*Bond v. Lockwood*, 33 Ill. 212.

*Iowa*.—*Foteaux v. Lepage*, 6 Iowa 123.

*Missouri*.—*State v. Richardson*, 29 Mo. App. 595; *State v. Gilmore*, 50 Mo. App. 353.

*New York*.—*Martin v. Hann*, 32 N. Y. App. Div. 602.

*North Carolina*.—*Burke v. Turner*, 85 N. Car. 500.

*Pennsylvania*.—*Watson's Estate*, 8 Kulp (Pa.) 280; *Schurr's Estate*, 13 Phila. (Pa.) 353, 37 Leg. Int. (Pa.) 194; *Haviland's Appeal*, (Pa. 1887) 8 Atl. Rep. 858; *McCahan's Appeal*, 7 Pa. St. 56; *Seguin's Appeal*, 103 Pa. St. 139; *Mulholland's Estate*, 175 Pa. St. 411; *In re Noble*, 178 Pa. St. 460.

*Vermont*.—*Farwell v. Steen*, 46 Vt. 678.

**Where the Guardian Was Also Executor of the Ward's Ancestor**, and lost the funds by defaults as executor, commissions as guardian will not be allowed to him, since as guardian it was his duty to see that the executor's account was properly settled and the amount collected from him. *Fish's Appeal*, (Pa. 1886) 7 Atl. Rep. 222.

**Disallowance of Commissions in the Surrogate's Discretion.**—In *New York* it has been held that in case of maladministration, the disallowance of commissions is in the surrogate's discretion. *In re Kopp*, (Surrogate Ct.) 15 Civ. Pro. (N. Y.) 282.

**If the Guardian, by Keeping No Accounts, Involves the Account in Obscurity**, only the least compensation will be allowed. *M'Dowell v. Caldwell*, 2 McCord Eq. (S. Car.) 43.

**In a Case of Gross Negligence and Extravagant Wasting of the Estate**, all compensation to the guardian, except to forbear charging him

(7) *Interest on Credits.* — If the guardian has advanced funds to the estate, interest thereon will be allowed to him;<sup>1</sup> and in any case when interest is charged upon the funds received by him, it should also be credited on his disbursements.<sup>2</sup>

(8) *Indebtedness of Ward to Guardian.* — The allowance on account of a debt due to the guardian from the ward will be made only where the obligation is unquestionable, and no unfair advantage will be obtained by the guardian by the allowance. Thus, an unliquidated claim for a tort committed by the ward will not be allowed, but must be accomplished by suit, and must then take its course with other debts.<sup>3</sup> But a liquidated debt,<sup>4</sup> or an incumbency on the ward's estate,<sup>5</sup> as of dower,<sup>6</sup> if clearly proved, may be credited against the funds held by the guardian.

**Expenditures Made and Support Furnished Prior to Guardianship.** — It has generally been held that charges for expenditures made by the guardian for the ward prior to the guardianship cannot be allowed,<sup>7</sup> except where such expenditures were made for necessities.<sup>8</sup> And where the relative of a child has supported it, and is afterwards appointed its guardian, he will not be allowed to charge for such prior support.<sup>9</sup>

(9) *Transactions After Ward's Majority.* — Generally the accounting covers only transactions during the ward's minority, and not later dealings between the guardian and the ward;<sup>10</sup> but in some cases transactions after the ward's majority, but while the guardian still retained the funds, and in completion of the guardianship trust, have been taken into the account.<sup>11</sup> The

with compound interest, was denied. *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150.

**Where Guardian Uses Ward's Money in His Own Business.** — A guardian, after vain efforts to invest the ward's money, used it in his own business, rendering accounts and paying interest. Commissions for the care of the money were refused, but they were allowed for the care of the person. It was held that the ward had no cause of complaint. *Spath's Estate*, 144 Pa. St. 383.

1. *Hayward v. Ellis*, 13 Pick. (Mass.) 272.

2. *Cunningham v. Pool*, 9 Ala. 615; *Bryant v. Craig*, 12 Ala. 354; *Johnston v. Haynes*, 68 N. Car. 514.

Where a guardian of a large estate made a monthly balance, and charged each time a month's interest on the balance due to him the previous month, it was allowed. *May v. May*, 109 Mass. 252. This ruling was, in *May v. Skinner*, 152 Mass. 328, commented upon unfavorably, but was allowed to stand.

3. *Brown v. Howe*, 9 Gray (Mass.) 84.

4. *Wallis v. Neale*, 43 W. Va. 529.

5. *Snowhill v. Snowhill*, 2 N. J. Eq. 38.

6. *Mathes v. Bennett*, 21 N. H. 204; *Matter of Lenahan*, (Supm. Ct.) 21 Abb. N. Cas. (N. Y.) 282.

7. **Charges for Expenditures Prior to Guardianship Not Allowed.** — *Spedden v. State*, 3 Har. & J. (Md.) 251; *Clowes v. Van Antwerp*, 4 Barb. (N. Y.) 416.

In a *Kentucky* case it was held that one who himself had a half interest in an estate, and traveled to another state and spent much time looking after it, could not afterwards, upon his own appointment to succeed to the guardianship, charge half of his time and expense to the minor heirs of the other half, who had a guardian in the state where the estate was. *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150.

8. *Matter of Miller*, 34 Hun (N. Y.) 267.

9. **Support Furnished by Relative Subsequently**

**Appointed Guardian.** — *Flynn v. Walsh*, (Md. 1885) 3 Atl. Rep. 245; *Hovell v. Noll*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 546; *Barnes v. Ward*, Busb. Eq. (45 N. Car.) 93, 57 Am. Dec. 590; *Crosby v. Crosby*, 1 S. Car. 337; *Olsen v. Thompson*, 77 Wis. 666.

**Gift Made by Relative Prior to Appointment as Guardian.** — Where one purchased shares in a building and loan association in his own name as guardian for a nephew, and made the payments thereon, and when the shares matured was appointed guardian to the ward, he cannot convert the gift to a debt, and charge his payments. *Matter of Beirne*, (Surrogate Ct.) 57 N. Y. St. Rep. 714; *Matter of Mulligan*, (Surrogate Ct.) 6 Misc. (N. Y.) 546.

**Debt Barred by Statute of Limitations.** — A guardian cannot charge his ward with a debt existing prior to the guardianship, but which has been barred by the statute of limitations. *Bondie v. Bourassa*, 46 Mich. 321.

10. **Accounting Generally Covers Only Transactions During Ward's Minority.** — *Matter of Allgier*, 65 Cal. 228; *Matter of Kincaid*, 120 Cal. 203; *Woodbury v. Hammond*, 54 Me. 332; *Pyatt v. Pyatt*, 44 N. J. Eq. 491 (*reversed* in *Pyatt v. Pyatt*, 46 N. J. Eq. 285, *cited* next note); *In re Kopp*, (Surrogate Ct.) 15 Civ. Pro. (N. Y.) 282; *Crowell's Appeal*, 2 Watts (Pa.) 295; *Leonard's Appeal*, 95 Pa. St. 196.

**Sureties Not Responsible for Funds Received After Ward's Majority.** — If a husband, appointed guardian for his wife, receives no funds until after her majority, he does not receive them as guardian, and his sureties are not responsible therefor. *Re Marck's Estate*, 8 Lanc. L. Rev. (Pa.) 306. See *infra*, this volume, § 11.

**and Effect — What Funds Are Covered by Bond.**  
11. **Transactions After Majority in Completion of Trust.** — *Mellish v. Mellish*, 1 Sim. & St. 138; *Pyatt v. Pyatt*, 46 N. J. Eq. 285.

But transactions after the guardian has



later transactions create the relation of debtor and creditor, and any balance in favor of the guardian is a proper set-off to the balance established against him by the accounting.<sup>1</sup>

**C. REQUIREMENT OF VOUCHERS AND PROOF.** — The burden is upon the guardian to prove the credits claimed by him;<sup>2</sup> but if he has proved the furnishing of board, which the ward claims to have been fully offset by his labor, the burden on this latter claim is on the ward.<sup>3</sup> Full items, with vouchers, of all expenditures claimed will ordinarily be required, and credits will not be allowed without them;<sup>4</sup> though they may be dispensed with in a clear case, where there is no doubt of the expenditures having been made, nor of the guardian's good faith.<sup>5</sup>

If the Guardian Held Many Notes, the inventory of which gives no information as to their goodness, and he has collected some of them, but cannot tell the amount, the total sum will be charged to him.<sup>6</sup>

The Statute of Limitations will not bar the guardian from claiming a credit to which he is entitled in his account.<sup>7</sup>

**Guardian Not Concluded by Consideration in Deed.** — A guardian who buys land for his ward is not concluded by the consideration in the deed, but may prove the true amount paid.<sup>8</sup>

**Account Obviously Improper Not Allowed.** — The Probate Court will refuse to allow any account obviously improper, though no opposition is made.<sup>9</sup>

**3. Accounting in Case of Guardian's Death or Disability.** — Where the guardian has died, or become *non compos*, before settlement of his account, it is the duty of his administrator or other representative to file an account of the guardianship in probate, and procure settlement thereof;<sup>10</sup> and the Probate Court has power to summon him to make such account.<sup>11</sup>

ceased to have possession of the ward's property should not be included. *Pyatt v. Pyatt*, 46 N. J. Eq. 285.

**It Is the Duty of a Guardian Who Is Removed** to turn over all funds, including choses in action, to his successor; and if he continues to prosecute a claim, and finally collects it, he must account therefor as guardian, though it was received after the ward's majority. *Sage v. Hammonds*, 27 Gratt. (Va.) 651.

1. *Crowell's Appeal*, 2 Watts (Pa.) 295; *Garratt v. Carr*, 1 Rob. (Va.) 208.

2. **Burden on Guardian to Prove Credits Claimed.** — *Newman v. Reed*, 50 Ala. 297; *Hutton v. Williams*, 60 Ala. 133; *May v. Duke*, 61 Ala. 53; *Bentley v. Dailey*, 87 Ala. 406; *Hescht v. Calvert*, 32 W. Va. 215. See *infra*, this title, *Guardian's Bonds* — *Suit upon Guardian's Bond* — *Burden of Proof*.

3. *Thompson v. Hartline*, 84 Ala. 65.

4. **Full Items with Vouchers of All Expenditures Ordinarily Required.** — *Alexander v. Alexander*, 8 Ala. 796; *Dowling v. Feeley*, 72 Ga. 557; *Hudson v. Hawkins*, 79 Ga. 274; *Emerson, Appellant*, 32 Me. 159; *In re Bushnell*, (Surrogate Ct.) 4 N. Y. Supp. 472; *Boyett v. Hurst*, 1 Jones Eq. (54 N. Car.) 166; *Carr's Estate*, 14 Phila. (Pa.) 265, 38 Leg. Int. (Pa.) 102; *Haviland's Appeal*, (Pa. 1887) 8 Atl. Rep. 858; *Albert's Appeal*, 128 Pa. St. 613; *Hescht v. Calvert*, 32 W. Va. 215; *Conant v. Souther*, 80 Wis. 656.

**Where Guardian Kept No Accounts until Long After Transactions.** — When a guardian made no pretense of keeping accounts until long after transactions had taken place, he will be charged to the last cent, and will not be permitted to receive any benefit from the uncer-

tainty. *Elston v. Carpenter*, (N. J. 1885) 3 Atl. Rep. 357.

5. *La Follette v. Higgins*, 129 Ind. 412; *Matter of Livernois*, 78 Mich. 330; *Tudhope v. Avery*, 106 Mich. 149; *Matter of Plumb*, (Surrogate Ct.) 24 Misc. (N. Y.) 249.

6. *Crump v. Gerock*, 40 Miss. 765.

7. *Cunningham v. Pool*, 9 Ala. 615.

8. *Smith v. Davis*, 49 Md. 470.

9. *Crow v. Reed*, 38 Ark. 482.

10. **Administrator or Other Representative Must File Account in Probate.** — *Modawell v. Holmes*, 40 Ala. 391; *Connelly v. Weatherly*, 33 Ark. 658; *Ordway v. Phelps*, 45 Iowa 279; *Pennell's Estate*, 2 Pa. Co. Ct. 436; *Waterman v. Wright*, 36 Vt. 164.

**The Administrator of a Deceased Guardian Has No Right to Invest the Ward's Funds**, and where, after the guardian's death, he collected a note and invested the proceeds in Confederate bonds, he was held liable for the resulting loss. *Moorehead v. Orr*, 1 S. Car. 304.

**Creditors of a Deceased Guardian** can attack the settlement made by his administrator and have it opened. *Alsop v. Barbee*, 14 B. Mon. (Ky.) 419.

11. **Probate Court May Summon Guardian to Account.** — *Tudhope v. Potts*, 91 Mich. 490; *Peel v. McCarthy*, 38 Minn. 451, 8 Am. St. Rep. 681; *Matter of Wiley*, 119 N. Y. 642, *affirming* 55 Hun (N. Y.) 248; *Miller's Estate*, 26 Pittsb. L. J. N. S. (Pa.) 344; *Waterman v. Wright*, 36 Vt. 164.

**Accounting in Case of Guardian's Death.** — An action for an account may be brought against the executor of a foreign guardian deceased. *Ong v. Whipple*, 3 Wash. Ter. 233.



Where the Guardian Leaves No Funds, his surety may be summoned to file the account.<sup>1</sup>

But in Some Jurisdictions the remedy in case of the guardian's death is only by bill in equity.<sup>2</sup>

4. **Judgment Rendered on Accounting.** — A specific order of payment of the balance found due is not essential, but is implied from the finding of the balance;<sup>3</sup> but the payment may be ordered, and the order enforced by contempt proceedings.<sup>4</sup>

5. **Payment of Balance.** — The guardian is not discharged from liability until he has paid over the balance found, either in cash<sup>5</sup> or in securities in which the estate had been properly invested,<sup>6</sup> to the ward or his legal agent.<sup>7</sup>

If the Ward Is Still a Minor, payment should be made to the successor in the guardianship.<sup>8</sup>

1. *Miller's Estate*, 26 Pittsb. L. J. N. S. (Pa.) 344.

And the Administrator of a Surety may settle the guardian's account, where the guardian will not. *Curtis v. Bailey*, 1 Pick. (Mass.) 198.

2. **Bill in Equity Only Remedy.** — *Matter of Allgier*, 65 Cal. 228; *Peck v. Braman*, 2 Blackf. (Ind.) 141.

Formerly this was the rule in *Alabama* and *New York*. *Snedicor v. Carnes*, 8 Ala. 655; *Farnsworth v. Oliphant*, 19 Barb. (N. Y.) 30. But under the statutes now in force in those states the accounting is had in probate. See the preceding notes.

3. *Smith v. Smithson*, 48 Ark. 261; *Jarrett v. State*, 5 Gill & J. (Md.) 27.

4. *Seaman v. Duryea*, 10 Barb. (N. Y.) 523, affirmed 11 N. Y. 324.

But such an order cannot be enforced by attachment or contempt where the amount due was not for moneys received, but a debt due to the ward from the guardian, which the guardian was not able to pay. *Browning v. Hadley*, 33 Ga. 271.

5. **A Succeeding Guardian's Having Charged Himself with the Amount** will not discharge the predecessor, unless he makes actual payment. *Byrd v. State*, 44 Md. 492.

**The Acceptance of the Guardian's Report, and His Discharge**, constitute no evidence that the amount was actually paid to the ward. *Naugle v. State*, 101 Ind. 284.

**The Release of a Surety upon Payment of a Part** does not discharge the guardian, except to the amount of the payment. *Carroll v. Corbitt*, 57 Ala. 579.

6. *Falconer's Estate*, 11 Pa. Co. Ct. 354; *Matlock v. Rice*, 6 Heisk. (Tenn.) 33.

**Turning Over a Note Payable to the Guardian Individually Is Not a Proper Payment**, unless it clearly appears that it was part of the ward's estate. *Cranford v. Brewster*, 57 Ga. 227.

**But Where Notes Had Been Properly Taken by the Guardian, as Such**, he may discharge himself by turning them over. *State v. Foy*, 71 N. Car. 527.

**If the Guardian Turned Over to His Successor the Latter's Note**, which the latter accepted, and there was no collusion, and the note was considered perfectly good, the first guardian is not liable, though the successor becomes insolvent. *Hill v. Lancaster*, 88 Ky. 338. *Contra*, *Manning v. Manning*, 61 Ga. 137.

**Payment in Confederate Notes Was No Settlement**, where the ward refused to receive them,

and the judge received them "to hold until the question whether he is bound to take them or not is decided." *Shackleford v. Cunningham*, 41 Ala. 203.

**The Transfer to the Ward on the Day of Majority, of County Bonds**, though they afterwards became worthless, was held binding on him. *Hardin v. Taylor*, 78 Ky. 593.

**Invested Funds Improperly Inventoried as Cash.** — A guardian who has received invested funds should be credited with the same funds turned over to his successor, though he improperly inventoried them as cash. *Patton's Appeal*, 62 Pa. St. 143.

7. *Wardell's Estate*, 14 Phila. (Pa.) 290, 38 Leg. Int. (Pa.) 214.

**Payment to Ward's Husband.** — At common law, payment may be made to the ward's husband. *Mobley v. Leopahrt*, 47 Ala. 257; *State v. Joest*, 46 Ind. 235. *Aliter*, where the husband is an infant. *State v. Joest*, 46 Ind. 235.

Where the husband was trustee of his wife's property under a marriage settlement, payment to him by the guardian by a note is a discharge, if he accepted, and he and the wife gave a receipt in full. *Coleman v. Davies*, 45 Ga. 489.

**Persons to Whom Payment Cannot Be Made.** — But payment without legal authority to the county clerk, *State v. Fleming*, 46 Ind. 206, or to one not legally qualified but acting as successor to the guardianship in good faith, *Jennings v. Copeland*, 90 N. Car. 572, is no defense.

**If the Guardian Has Funds of a Deceased Ward**, he must account for them to her administrator, though he claims to be himself the heir, and there are no debts. *Bean v. Bumpus*, 22 Me. 519.

8. *Cheney v. Roodhouse*, 135 Ill. 257, reversing 32 Ill. App. 49; *Finney v. State*, 9 Mo. 229; *Favorite v. Booher*, 17 Ohio St. 548.

**In Louisiana**, though an undertutor is the proper person to contest and settle the accounts, a new tutor must be appointed to receive payment. *Holmes v. Hemken*, 6 Rob. (La.) 53.

But in *Alabama* it has been held that an order granting execution for the balance due on the account should not be to the successor, but to the ward. *M'Leod v. Mason*, 5 Port. (Ala.) 223.

**Burden of Proof to Show Payment to Successor.** — In a suit by a succeeding guardian, the burden of proving payment is on the former

If the Guardian Gives His Note, or in Any Other Way Postpones the Actual Payment of the Balance, his liability is not released.<sup>1</sup>

Where Guardian Is Appointed Ward's Executor or Administrator. — If the guardianship ceases by the ward's death, and the guardian is appointed administrator or executor, the duty implies its performance, and payment will be considered to have been made for the purpose of holding him liable as administrator,<sup>2</sup> but he will not be discharged as guardian.<sup>3</sup>

6. Effect of Account as Res Judicata — *a.* AS TO ANNUAL ACCOUNTS. — The annual or other stated accounts which are required to be made during the guardianship have not the characteristics of a *lis inter partes*. The party in adverse interest is still a minor, there is usually no requirement of notice and hearing, and the account filed is primarily for the information of the court. The settlement on such account is not, therefore, *res judicata*, and on final account the ward has a right to investigate the guardian's dealings with the estate from the beginning.<sup>4</sup> But the annual settlements are *prima facie*

guardian, and no demand and refusal need be proved by the plaintiff. *Baldrige v. State*, 69 Ind. 166.

1. *Neel v. Com.*, (Pa. 1886) 7 Atl. Rep. 74; *Wardlaw v. Gray*, 2 Hill Eq. (S. Car.) 644; *Hamlin v. Atkinson*, 6 Rand. (Va.) 574. But see *Wise v. Norton*, 48 Ala. 214.

But if the Guardian's Note Is Accepted, and the Account Discharged, without fraud or imposition, it will be a binding settlement. *Pierce v. Irish*, 31 Me. 254; *Coleman v. Davies*, 45 Ga. 489.

Loss of Tacit Mortgage by Acceptance of Individual Obligation. — By acceptance of the guardian's individual obligation, the ward loses her right to a tacit mortgage, as against third persons. *Kelly v. Sandridge*, 30 La. Ann. 1190.

Guardian Not Liable for Compound Interest on Funds Left in His Hands. — If the ward, without fraud, gave to the guardian a receipt in full, and then left the funds in his hands, he is not liable for compound interest, as for a wrongful act. *Kattelman v. Guthrie*, 142 Ill. 357.

Payment of Note Partly in Lumber Ordered by Successor. — Where a guardian gave his note to a successor, and afterwards paid part in cash, and part in lumber ordered by the successor for the ward's real estate, he is entitled to credit, and is not responsible for the successor's expenditures. *Mortimer v. People*, 49 Ill. 473.

Redeposit in Same Bank by Reappointed Guardian. — If a guardian obtains sureties by agreeing to deposit the funds with certain bankers, and to resign at the end of a year, which he does, and he is then reappointed with new sureties, settling his account, the fact that the bankers then tender to him the amount, which he at once redeposits by agreement, constitutes no payment of the balance; and the original sureties are still liable. *Lee v. Lee*, 67 Ala. 406.

2. *Baker v. Wood*, 42 Ala. 664; *Hutton v. Williams*, 60 Ala. 107.

3. *State v. Branch*, 112 Mo. 661, 126 Mo. 448, 134 Mo. 592, 56 Am. St. Rep. 533, *overruling* *Tittman v. Green*, 108 Mo. 22.

4. Settlement on Annual Accounts Not Res Judicata — *United States*. — *Bourne v. Maybin*, 3 Woods (U. S.) 724 (applying the law of *Mississippi*).

*Alabama*. — *Cunningham v. Pool*, 9 Ala. 615; *Lewis v. Allred*, 57 Ala. 628; *Hutton v. Williams*, 60 Ala. 133; *May v. Duke*, 61 Ala. 53; *Radford v. Morris*, 66 Ala. 283. By the statute in force in Alabama between 1843 and 1850, annual settlements, if made upon proper hearing, were conclusive, unless impeached for fraud, mistake, or error. *Moore v. Baker*, 39 Ala. 704; *Ashley v. Martin*, 50 Ala. 537.

*California*. — *Cardwell's Guardianship*, 55 Cal. 137.

*Georgia*. — *Johnson v. McCullough*, 59 Ga. 212; *Adams v. Reviere*, 59 Ga. 793.

*Illinois*. — *Bond v. Lockwood*, 33 Ill. 212.

*Indiana*. — *Bescher v. State*, 63 Ind. 302; *Candy v. Hanmore*, 76 Ind. 125.

*Louisiana*. — *Stafford v. Villain*, 10 La. 329; *Bry v. Dowell*, 1 Rob. (La.) 112; *Barnard v. Erwin*, 2 Rob. (La.) 407; *McGehee v. Dupuy*, 7 Rob. (La.) 229; *Tucker's Succession*, 13 La. Ann. 464; *Lay v. O'Neil*, 29 La. Ann. 725; *Tutorship of Scarborough*, 43 La. Ann. 315.

*Maryland*. — *Jenkins v. Whyte*, 62 Md. 427.

*Massachusetts*. — *Blake v. Pegram*, 101 Mass. 592, 109 Mass. 541. But see *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

*Missouri*. — *Folger v. Heidel*, 60 Mo. 285; *State v. Hoster*, 61 Mo. 544; *Kidd v. Guibar*, 63 Mo. 342; *West v. West*, 75 Mo. 204; *State v. Roeper*, 9 Mo. App. 21, *affirmed* 82 Mo. 57; *Flach v. Fassen*, 3 Mo. App. 561; *State v. Booth*, 9 Mo. App. 583; *State v. Richardson*, 29 Mo. App. 595; *State v. Miller*, 44 Mo. App. 118; *Windleton v. O'Brien*, 68 Mo. App. 675.

*New York*. — *Diaper v. Anderson*, 37 Barb. (N. Y.) 168; *Matter of Hawley*, 104 N. Y. 250.

*Pennsylvania*. — *Bowman v. Herr*, 1 P. & W. (Pa.) 282; *Yeager's Appeal*, 34 Pa. St. 173; *Foltz's Appeal*, 55 Pa. St. 428; *Douglas's Appeal*, 82 Pa. St. 169.

*Texas*. — *Oldham v. Brooks*, (Tex. Civ. App. 1894) 25 S. W. Rep. 648.

*Wisconsin*. — *Willis v. Fox*, 25 Wis. 646; *Olsen v. Thompson*, 77 Wis. 666.

In Maine it has been held that if a matter in a guardian's account was before the judge and was passed upon in a prior account, it cannot be re-examined later; but if an item actually received by the guardian, or for which he is liable, was omitted, the account is not *res judicata* as to that. *Starrett v. Jameson*, 29 Me. 504.



evidence of the state of the account.<sup>1</sup>

*b. AS TO FINAL ACCOUNT.* — On the other hand, the settlement of the final account, if regularly made, constitutes a judgment conclusive between the ward on one side and the guardian and his sureties on the other, unless it is impeached by proof of fraud or such other defect as would invalidate judgments of other courts.<sup>2</sup>

In Mississippi it has been held that annual accounts are conclusive against the guardian, unless set aside by direct proceedings. If they show a certain balance in dollars and cents, he cannot show that it was in Confederate money. *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449. But see *Austin v. Lamar*, 23 Miss. 189; *Heard v. Daniel*, 26 Miss. 451.

Under the Ohio Act of 1858, biennial accounts were final between the parties, unless regularly opened for cause. *Woodmansie v. Woodmansie*, 32 Ohio St. 18.

**Palpable Clerical Errors in Prior Account May Be Corrected.** — *Crump v. Gerock*, 40 Miss. 765; *Stark v. Gamble*, 43 N. H. 465. See also *Blake v. Pegram*, 109 Mass. 541.

Triennial Accounts are not conclusive on the ward, though they may be on the guardian. *Yeager's Appeal*, 34 Pa. St. 173.

**1. Annual Account Prima Facie Evidence of State of Account** — *Alabama*. — *Radford v. Morris*, 66 Ala. 283; *Bentley v. Dailey*, 87 Ala. 406; *Thompson v. Thompson*, 92 Ala. 545.

*California*. — *Cardwell's Guardianship*, 55 Cal. 137.

*Georgia*. — *Johnson v. McCullough*, 59 Ga. 212.

*Illinois*. — *Bond v. Lockwood*, 33 Ill. 212.

*Louisiana*. — *Stafford v. Villain*, 10 La. 329.

*Mississippi*. — *Austin v. Lamar*, 23 Miss. 189; *Heard v. Daniel*, 26 Miss. 451; *Roach v. Jelks*, 40 Miss. 754.

*Missouri*. — *State v. Jones*, 89 Mo. 470; *State v. Engelke*, 6 Mo. App. 356; *State v. Roeper*, 9 Mo. App. 21; *State v. Booth*, 9 Mo. App. 583; *State v. Richardson*, 29 Mo. App. 595.

*Wisconsin*. — *Olsen v. Thompson*, 77 Wis. 666.

**Ex Parte Statement Without Hearing or Adjudication.** — A partial settlement already made is presumed to be correct, but if it be merely an *ex parte* statement, filed and recorded without hearing or adjudication, it creates not even a *prima facie* presumption. *Gravett v. Malone*, 54 Ala. 19; *Radford v. Morris*, 66 Ala. 283; *State v. Roeper*, 82 Mo. 57; *Burnham v. Dalling*, 16 N. J. Eq. 144. But see *Hutton v. Williams*, 60 Ala. 107.

**Interlocutory Reports Are Only Prima Facie Correct**, subject to revision on final settlement; but they cannot be attacked collaterally. *Candy v. Hammons*, 76 Ind. 127.

**2. Settlement on Final Account** — *Alabama*. — *Chilton v. Parks*, 15 Ala. 671; *Hughes v. Mitchell*, 19 Ala. 268; *Foust v. Chamblee*, 51 Ala. 75; *Lewis v. Allred*, 57 Ala. 628; *Jones v. Fellows*, 58 Ala. 343; *Waldron v. Waldron*, 76 Ala. 285; *Crumpler v. Deens*, 85 Ala. 149. Compare *Gravett v. Malone*, 54 Ala. 19.

*Arkansas*. — *Reed v. Ryburn*, 23 Ark. 47; *Norton v. Miller*, 25 Ark. 108.

*California*. — *Brodrick v. Brodrick*, 56 Cal. 563; *Lataillade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219; *Trumpler v. Cotton*, 109 Cal. 250.

*Georgia*. — *Poullain v. Poullain*, 76 Ga. 420. Compare *Rolfe v. Rolfe*, 15 Ga. 452.

*Illinois*. — *Ammons v. People*, 11 Ill. 6; *Wickiser v. Cook*, 85 Ill. 68; *Kattelman v. Guthrie*, 142 Ill. 357; *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587; *Ryan v. People*, 165 Ill. 143, *affirming* 62 Ill. App. 355; *Ream v. Lynch*, 7 Ill. App. 161; *Seago v. People*, 21 Ill. App. 283.

*Indiana*. — *State v. Peckham*, 136 Ind. 198; *Holland v. State*, 48 Ind. 391; *Briscoe v. Johnson*, 73 Ind. 573; *Candy v. Hanmore*, 76 Ind. 125; *State v. Slaughter*, 80 Ind. 597; *Castetter v. State*, 112 Ind. 445; *State v. Bond*, 121 Ind. 187. Compare *State v. Strange*, 1 Ind. 538; *Glidewell v. Snyder*, 72 Ind. 528.

*Iowa*. — *McWilliams v. Kalbach*, 55 Iowa 110; *Knox v. Kearns*, 73 Iowa 286; *Knepper v. Glenn*, 73 Iowa 730.

*Kentucky*. — *Cameron v. Branden*, 15 Ky. L. Rep. 777. Compare *Campbell v. Williams*, 3 T. B. Mon. (Ky.) 122.

*Louisiana*. — *Kellar v. O'Neal*, 13 La. Ann. 472; *Lay v. O'Neil*, 29 La. Ann. 722.

*Mississippi*. — *Austin v. Lamar*, 23 Miss. 189; *Hooker v. Hooker*, 31 Miss. 448; *Johnson v. Miller*, 33 Miss. 553. Compare *State v. Hull*, 53 Miss. 626.

*Missouri*. — *Oldham v. Trimble*, 15 Mo. 225; *Mitchell v. Williams*, 27 Mo. 399; *Brent v. Grace*, 30 Mo. 253; *Smith v. Denny*, 34 Mo. 219; *State v. Drury*, 36 Mo. 281; *Garton v. Botts*, 73 Mo. 274; *State v. Leslie*, 83 Mo. 60; *State v. Bilby*, 50 Mo. App. 162. Compare *Brown v. Chadwick*, 79 Mo. 587; *State v. Grace*, 26 Mo. 87; *State v. Rosswaag*, 3 Mo. App. 11; *State v. Martin*, 18 Mo. App. 468.

*New York*. — *Dodge v. St. John*, 96 N. Y. 260; *Smith v. Lusk*, 2 Dem. (N. Y.) 595; *Douglass v. Low*, 36 Hun (N. Y.) 497, *affirmed* 107 N. Y. 628.

*Ohio*. — *Braiden v. Mercer*, 44 Ohio St. 339; *Lynch v. Cogswell*, 7 Ohio Cir. Dec. 12. Compare *Davis v. Ford*, Wright (Ohio) 200.

*Pennsylvania*. — *Shollenberger's Appeal*, 21 Pa. St. 337 [*overruling* *Richard's Case*, 6 S. & R. (Pa.) 465; *McCormick v. Joyce*, 7 Pa. St. 248; *Com. v. Moltz*, 10 Pa. St. 527, 51 Am. Dec. 499]; *Com. v. Gracey*, 96 Pa. St. 70.

*Wisconsin*. — *Shepard v. Peebles*, 38 Wis. 373.

In Connecticut it has been held that the acceptance of an account by the Probate Court is not conclusive that the guardian has not been guilty of negligence in failing to collect a note. *Putney v. Himes*, 30 Conn. 320.

In Maryland and Tennessee it has been held that a guardian's final settlement is *prima facie*, but not conclusively, correct. *Crapster v. Griffith*, 2 Bland (Md.) 5; *Gunby v. Selby*, 2 Har. & J. (Md.) 244; *State v. Baker*, 8 Md. 44; *McClellan v. Kennedy*, 3 Md. Ch. 234; *Matlock v. Rice*, 6 Heisk. (Tenn.) 33; *McCown v. Moores*, 12 Lea (Tenn.) 635; *Henley v. Robb*,



**7. Opening Account.** — The account of the guardian may be reopened and corrected or set aside in equity if its approval was obtained by misstatement<sup>1</sup> or concealment<sup>2</sup> of material facts, and if it is erroneous and inequitable.<sup>3</sup> But if the ward has acquiesced in the account for a long period, a clear case of fraud must be made out to justify opening the account.<sup>4</sup>

**VIII. GUARDIAN'S BONDS — 1. Their Construction and Effect — a. INFORMALITIES IN BOND.** — Though the guardian's bond be irregular, and not in the

86 Tenn. 474; *Newton v. Poole*, 12 Leigh (Va.) 112.

But in Maryland it has been held that such settlement is conclusive against the guardian, if he exceeded the income, and that he will be estopped thereby from claiming that the excess should have been greater. *Spedden v. State*, 3 Har. & J. (Md.) 251.

In North Carolina it has been held that an *ex parte* settlement accepted by the court is *prima facie*, but not conclusively, correct. *Luton v. Wilcox*, 83 N. Car. 20; *Turner v. Turner*, 104 N. Car. 566.

In South Carolina it has been held that the final settlement concludes the guardian, but not his surety. *Pratt v. McJunkin*, 4 Rich. L. (S. Car.) 5.

**A Settlement of the Guardian's Account Assented to by Both Parties** and established by the decree of court is conclusive by reason of the agreement of the parties, though the judgment was irregular. *Brown v. Snell*, 57 N. Y. 286.

**How Far Fraud Invalidates Settlement.** — Fraud in the settlement invalidates it only so far as the fraud extends. *Bonner v. Evans*, 89 Ga. 656.

**A Matter Not Raised or Considered in the settlement of the guardian's account is not concluded thereby.** *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573.

**Collateral Matters Not Properly Before Court Not Concluded.** — *Patterson v. Booth*, 103 Mo. 402.

**Requisites of the Account.** — A guardian's account which does not state the ward's age, ask a discharge, nor claim commissions cannot be regarded as a final account and settlement. *Bennett v. Hanifin*, 87 Ill. 31.

A final account filed by the guardian, but never accepted by the court, is not admissible in behalf of the guardian. *Beedle v. State*, 62 Ind. 26.

If the notice of the final account required by law was not given, the account does not conclude the ward. *Murphy v. Murphy*, 2 Mo. App. 156.

**Where Guardian of Deceased Ward Is His Administrator.** — A judgment settling the account of the guardian of a deceased ward is a nullity, if he is also the administrator of the ward, as the same party was on both sides; the remedy is by bill of equity against him in both capacities, asking adjustment of both accounts. *Carswell v. Spencer*, 44 Ala. 204.

**1. Where Approval of Account Was Obtained by Misstatement of Material Facts.** — *Campbell v. Clark*, 63 Ark. 450; *Favorite v. Slaughter*, 79 Ind. 562; *Slaughter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106; *Wainwright v. Smith*, 106 Ind. 239, 117 Ind. 414; *Line v. Lawder*, 122 Ind. 548; *Klemp v. Winter*, 23 Kan. 699; *State v. Leslie*, 83 Mo. 60.

The fact that a guardian credited his ward with only six per cent. interest, when he re-

ceived ten per cent., is sufficient cause for an action to set aside the settlement. *Doan v. Dow*, 8 Ind. App. 324.

**2. Where Approval Was Obtained by Concealment.** — *Slaughter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106; *Doan v. Dow*, 8 Ind. App. 324; *Marquess v. La Baw*, 82 Ind. 550.

**3. Account Will Not Be Opened Unless It Is Erroneous and Inequitable.** — *Purslow v. Brune*, 43 Kan. 175; *Stevenson's Appeal*, 32 Pa. St. 318. Compare *Ellis v. Scott*, 75 N. Car. 108.

**Settlement Will Not Be Set Aside Because of Ward's Inexcusable Ignorance.** — A ward cannot set aside a settlement by simply showing that he was ignorant that the rentals of certain land were too low, but he must show that his ignorance was excusable. *Stoudenmire v. De Bardelaben*, 72 Ala. 300.

**Where a Ward Immediately After His Majority entered in the Probate Court his satisfaction with the guardian's account, and the court thereupon approved it without examination or hearing, the ward can have it opened and set aside.** *Mead v. Bakewell*, 8 Mo. App. 549.

**Burden of Proof.** — Where a guardian contracts with his ward, the burden is on him to show affirmatively that he dealt fairly; but in a suit to set aside a settlement, no such burden rests on the guardian. *Wainwright v. Smith*, 106 Ind. 239.

**4. After Long Acquiescence Account Will Be Opened Only for Fraud.** — *High v. Snedcor*, 57 Ala. 403; *Brown v. McWilliams*, 29 Ga. 194; *Durell v. Gibson*, (Me. 1887) 9 Atl. Rep. 353; *Morganstern v. Shuster*, 66 Md. 250; *McAvoy's Estate*, 2 Pa. Dist. 509; *Epes v. Williams*, (Va. 1897) 27 S. E. Rep. 427.

**The Settlement Is Binding if the Ward Accepted It with Full Knowledge, and without mistake, imposition, or fraud; if he was ignorant of the facts, or mistaken, or defrauded, he will not be concluded.** *Adams v. Reviere*, 59 Ga. 793. Compare *Monnin v. Beroujon*, 51 Ala. 196.

**Where the Ward Waives His Right to Settle the Account Himself, and joins the guardian in application for his discharge, which is heard and granted, the account cannot be opened without proof of fraud.** *Marr's Appeal*, 78 Pa. St. 66.

**Limitation of Bill to Open Account.** — Under the *North Carolina* statute a bill to reopen a settlement of a guardian's account must be brought within three years. *Timberlake v. Green*, 84 N. Car. 658.

**Action Barred After Guardian's Discharge and Settlement of Ward's Estate by Administration.** — Where a guardian has filed his report and has been discharged, and an administrator has been appointed for the ward, who has settled his estate and been discharged, an action upon the guardian's bond, or to set aside his report, is barred. *Horton v. Hastings*, 128 Ind. 103.

form prescribed by the statute, it will nevertheless be held effective as a common-law bond, to the extent of its terms.<sup>1</sup>

**b. WHAT CONSTITUTES BREACH.** — The obligation of the guardian's bond is (1) to preserve and manage the ward's property; (2) properly to appropriate so much as is necessary for his support; (3) to account for the balance to the Probate Court when required, and to the ward when of age. A failure to do any of these things will be a breach of the bond.<sup>2</sup>

**c. WHAT FUNDS ARE COVERED BY BOND.** — The bond of a guardian covers all funds received by him as guardian during the existence of the guardianship<sup>3</sup> except those derived from the sale of real estate. A special bond is required upon making such a sale,<sup>4</sup> and the general bond is not holden for the proceeds thereof.<sup>5</sup>

1. *State v. Britton*, 102 Ind. 214; *Britton v. State*, 115 Ind. 55; *Ordinary v. Heishon*, 42 N. J. L. 15; *Probate Ct. v. Strong*, 27 Vt. 202, 65 Am. Dec. 190; *Pratt v. Wright*, 13 Gratt. (Va.) 175, 67 Am. Dec. 767.

A Guardian's Bond Is Not Rendered Invalid by Provisions Not Required by Statute, but within the duty of a guardian as defined by law. *McFadden v. Hewett*, 78 Me. 24.

**Voluntary Substitution of Sufficient for Insufficient Bond.** — If a guardian, upon complaint being made of the insufficiency of the bond, gives another voluntarily, it is as binding as if substituted by an order of court. *Potter v. State*, 23 Ind. 550; *Elam v. Barr*, 14 La. Ann. 682.

**2. Obligations of Bond.** — *Matter of Allgier*, 65 Cal. 228; *Olmsted v. Olmsted*, 38 Conn. 317; *People v. Seelye*, 146 Ill. 189, affirming 40 Ill. App. 449; *Moody v. State*, 84 Ind. 433; *Black v. Kaiser*, 91 Ky. 422; *Pierce v. Irish*, 31 Me. 254; *Schoenleber v. Burkhardt*, 94 Wis. 575. See *supra*, this title, *Accounting by Guardian*, subdiv. 1. c. (2) *Obligation to Account*.

**Failure to Notify Creditors** to exhibit their claims under an order of court is a breach of the bond. *Probate Ct. v. Caswell*, 18 R. I. 201.

**Failure to Pay Debt Contracted by Guardian.** — Sureties of the guardian are not liable for his failure to pay a debt contracted by him for the ward's board and tuition. *McKinnon v. McKinnon*, 81 N. Car. 201.

**Judgment on Note.** — Nor are sureties liable for a judgment rendered against the guardian individually on a note signed by him in his own name, but saying, "I, as guardian, promise." *Lovelace v. Smith*, 39 Ga. 130.

**3. Funds Covered by Bond.** — *Davenport v. Olmstead*, 43 Conn. 67; *Huson v. Green*, 88 Ga. 722; *Potter v. State*, 23 Ind. 607; *Hunt v. State*, 53 Ind. 321; *Hartman v. Com.*, (Pa. 1888) 13 Atl. Rep. 780.

**Under the New Jersey Statutes** a guardian is liable on his bond only for sums actually received. *Ordinary v. Hopler*, (N. J. 1896) 36 Atl. Rep. 769.

**The Bond Secures Funds Received from Another State.** *McDonald v. Meadows*, 1 Met. (Ky.) 507; though the guardian was required to give a bond in that state for the funds, *State v. Williams*, 77 Mo. 463.

**The Bond Secures a Sum Received After Appointment, but Before Signing the Bond.** — *McDowell v. Caldwell*, 2 McCord Eq. (S. Car.) 43, 16 Am. Dec. 635. And see *Bockenstedt v. Perkins*, 73 Iowa 23, 5 Am. St. Rep. 652.

**And if a Guardian When Appointed Owed the Ward, and Was Solvent**, his sureties are liable for the amount as if it had been paid. *Black v. Kaiser*, 91 Ky. 422.

**Illegal Possession and Disposition of Ward's Estate by Guardian Before Appointment.** — While the sureties are not responsible for the guardian's acts before appointment, yet if before that time he had illegally taken possession of the ward's estate and disposed of it, and when appointed charged himself with the amount, he will be assumed to have paid it to himself, and the sureties will be liable. *Sargent v. Wallis*, 67 Tex. 483. See *supra*, this title, *Accounting by Guardian*, subdiv. 2. a. (2) (b) *Sums Due from Himself*.

**Money Received Without Legal Authority.** — A surety is not liable for any money which the guardian received without legal authority, and to which the minor had no right during his minority. *Gunther v. State*, 31 Md. 21; *Perkins v. Tooley*, 74 Mich. 220; *Allen v. Crosland*, 2 Rich. Eq. (S. Car.) 68.

But if, by order of court, the executor paid over to the guardian funds which by the will were to go to the ward on reaching majority, the payment is legal and the funds are covered by the bond. *Gunther v. State*, 31 Md. 21.

But sureties are not liable for funds given to wards by a will which has been set aside, though the guardian collected and converted the amount. *State v. Radcliff*, 99 Mo. 609.

**4. See *supra***, this title, *Powers and Duties of Guardian*, subdiv. 2. f. (4) (e) *Requisites of Valid Sale*.

**5. General Bond Not Liable for Proceeds of Sale of Real Estate — Indiana.** — *Warwick v. State*, 5 Ind. 350; *Colburn v. State*, 47 Ind. 310; *Bescher v. State*, 63 Ind. 302; *Yost v. State*, 80 Ind. 350.

*Iowa.* — *Madison County v. Johnston*, 51 Iowa 152; *Bunce v. Bunce*, 65 Iowa 106.

*Kansas.* — *Morris v. Cooper*, 35 Kan. 156.

*Kentucky.* — *Irvine v. McDowell*, 4 Dana (Ky.) 629; *Grimes v. Com.*, 4 Litt. (Ky.) 1. Compare *Withers v. Hickman*, 6 B. Mon. (Ky.) 294; *Taylor v. Taylor*, 6 B. Mon. (Ky.) 561.

*Maine.* — *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229.

*Missouri.* — *State v. Harbridge*, 43 Mo. App. 16.

*Nevada.* — *Henderson v. Coover*, 4 Nev. 429.

*New Jersey.* — *Smith v. Gummere*, 39 N. J. Eq. 27.

*Pennsylvania.* — *Blauser v. Diehl*, 90 Pa. St. 350; *Com. v. Pray*, 125 Pa. St. 542. Compare



Funds Received by the Guardian After the Termination of His Trust are not covered by the bond.<sup>1</sup>

*d. ADDITIONAL AND SUBSTITUTED BONDS.* — Where additional bonds are required and given, the former bond continues to be security for the entire management of the estate.<sup>2</sup> If the new bond is a substitution for the old, instead of an addition to it, though the old bond may be discharged upon the substitution, the sureties continue to be liable for any default already committed,<sup>3</sup> but not for subsequent defaults.<sup>4</sup> The carrying forward into later

Com. v. Loyd, 12 Phila. (Pa.) 22r, 34 Leg. Int. (Pa.) 248.

*Tennessee.* — Shelton v. Smith, 3 Baxt. (Tenn.) 82; Andrews's Case, 3 Humph. (Tenn.) 592.

*West Virginia.* — Findley v. Findley, 42 W. Va. 372; Kester v. Hill, 42 W. Va. 61r.

But in some jurisdictions the general bond is held to secure the proceeds of real estate in the guardian's hands. State v. Hull, 53 Miss. 626; State v. Cox, 62 Miss. 786; Tuttle v. Northrop, 44 Ohio St. 178; Gray v. Brown, 1 Rich. L. (S. Car.) 351; Pratt v. McJunkin, 4 Rich. L. (S. Car.) 5.

**Settlement of an Account in Which the Guardian Charges Himself with Proceeds of Real Estate** does not discharge the sale bond, nor make the general bond liable; the question is still from what source the money came. Lyman v. Conkey, 1 Met. (Mass.) 317; Mattoon v. Cowing, 13 Gray (Mass.) 387. *Contra*, Fay v. Taylor, 11 Met. (Mass.) 529, and Brooks v. Brooks, 11 Cush. (Mass.) 18, under a statute expressly requiring the general bond to include the proceeds of all real estate sold by the guardian.

**Where Funds Are So Mixed that They Cannot Be Separated.** — Regularly the general bond secures general funds, and the sale bond the proceeds of sale; but if the funds are mixed so that they cannot be separated, both bonds are liable, at least for a *pro rata* share. Yost v. State, 80 Ind. 350. And see *Bescher v. State*, 63 Ind. 302.

**Proceeds of Partition Sale.** — Sureties on a guardian's general bond are not liable for the proceeds of land received by him as guardian *ad litem* in a partition suit. Muir v. Wilson, Hopk. (N. Y.) 512. But the general bond is liable where another person applied for and made the sale, and paid the proceeds to the general guardian, Colburn v. State, 47 Ind. 310; or where the guardian was ordered by the court to transfer the proceeds to the general account, Smith v. Gummere, 39 N. J. Eq. 27; or where the land was sold before the bond was given, McClendon v. Harlan, 2 Heisk. (Tenn.) 337; or where the proceeds of the sale were ordered paid to the guardian without a special bond, Reed v. Hedges, 16 W. Va. 167.

**Single Bond Substituted for General and Sale Bonds.** — Where a guardian had given a general bond and also a sale bond, and afterwards a single bond was substituted for both, and the two former bonds were discharged, the sureties in the last one were held liable for all the funds, whether they came from real or personal estate. Moody v. State, 84 Ind. 433.

**If the Legislature Authorized a Sale Without Special Bond,** the general bond will be liable. State v. Bilby, 50 Mo. App. 162.

**Where Guardian Fails to Give Special Bond.** — The guardian is not liable on his general

bond though he failed to give a special bond. Warwick v. State, 5 Ind. 350; Williams v. Morton, 38 Me. 47, 61 Am. Dec. 229; Shelton v. Smith, 3 Baxt. (Tenn.) 82. *Contra* in Illinois, Wann v. People, 57 Ill. 202.

Nor can the failure to give the special bond be set up as a breach of the general bond. Williams v. Morton, 38 Me. 47, 61 Am. Dec. 229.

**1. Funds Received After Termination of Guardianship.** — Merrells v. Phelps, 34 Conn. 109; Garrett v. Reese, 99 Ga. 494; People v. Seelye, 146 Ill. 189; Shelton v. Smith, 3 Baxt. (Tenn.) 82; Stinson v. Leary, 69 Wis. 269.

In Louisiana it has been held that if after the ward's marriage the tutor collects sums due to the ward, and there is no necessary connection between the transaction and the tutorship, but the tutor had implied authority from the former ward to make the collection, the sum collected is not secured by the tutorship mortgage. Romero's Succession, 31 La. Ann. 721.

In Virginia it has been held that if the guardian has possession of the ward's funds as such, the bond secures interest and profits received by him, as well after as before majority; but after termination of the trust the account will be settled as between debtor and creditor, and only simple interest charged. Armstrong v. Walkup, 12 Gratt. (Va.) 608.

See also *supra*, this title, *Accounting by Guardian*, subdiv. 2. *b. (9) Transactions After Ward's Majority.*

**2. Additional Bond Does Not Relieve Former Bond.** — State v. Mitchell, 132 Ind. 461; Hutchcraft v. Shrout, 1 T. B. Mon. (Ky.) 208; 15 Am. Dec. 100; Loring v. Bacon, 3 Cush. (Mass.) 465; Jones v. Hays, 3 Ired. Eq. (38 N. Car.) 502, 44 Am. Dec. 78; Jones v. Blanton, 6 Ired. Eq. (41 N. Car.) 115, 51 Am. Dec. 415; Tennessee Hospital v. Fuqua, 1 Lea (Tenn.) 608; McGlothlin v. Wyatt, 1 Lea (Tenn.) 717; Collins v. Knight, 3 Tenn. Ch. 183.

**3. Liability under Old Bond Where There Is a Substitution.** — Justices v. Woods, 1 Ga. 84; Bryant v. Owen, 1 Ga. 355; State v. Page, 63 Ind. 209; State v. Paul, 21 Mo. 51; Matter of Conover, 35 N. J. Eq. 108; Eichelberger v. Gross, 42 Ohio St. 549.

Nor is the liability of sureties on the old bond affected by judgment, without satisfaction, on the new one. State v. Page, 63 Ind. 209; State v. Drury, 36 Mo. 281.

But in Virginia it has been held that if the guardian voluntarily appears in court and files a new bond with sureties, it supersedes the former one, and relates back to the appointment of the guardian, and the sureties in former bonds are discharged. Sayers v. Cassell, 23 Gratt. (Va.) 525.

**4. Spencer v. Houghton**, 68 Cal. 82.



balances sums already converted or lost will not relieve the sureties on the former bond from liability.<sup>1</sup> In either case the new bondsmen are liable for all defaults which occur after the giving of their bond, and if the guardian still has the funds in his power, though he had already wrongfully invested or converted them, he will be liable for them on the new bond;<sup>2</sup> so he will be liable on such bond for a former misappropriation if he carried forward the balance to his later accounts.<sup>3</sup> But whether the guardian is in any event liable on the new bond for the entire funds of the estate, though the loss occurred before the giving of the new bond, and though the balance was not carried forward to the later accounts, is a question upon which the authorities are not entirely harmonious. The prevailing rule holds him liable on the ground of his obligation to make true account,<sup>4</sup> but in a few jurisdictions the contrary rule prevails.<sup>5</sup> In the case of substituted bonds, the sureties on the successive bonds, as between themselves, are liable to indemnify each other, in the inverse order of their bonds;<sup>6</sup> but if the new bonds are merely additional, both bonds are primary and of concurrent obligation.<sup>7</sup>

*c. JOINT BONDS — (1) Of Several Guardians for Same Ward.* — If several guardians for the same ward execute a bond together, they are not sureties for each other, but each is liable only for his own defaults.<sup>8</sup> But a surety to the joint bond is responsible for the acts of all the guardians.<sup>9</sup>

*(2) One Guardian for Several Wards.* — A bond is valid though given for the estates of several wards,<sup>10</sup> and secures the obligation of the guardian to

1. *Yost v. State*, 80 Ind. 350; *Bell v. Rudolph*, 70 Miss. 234; *State v. Drury*, 36 Mo. 281.

**Liability for Waste of Sureties on Former Bond.** — The fact that a guardian, upon new sureties being required, was of means sufficient to pay the sums he then owed to the ward for waste already committed, is not to be regarded as a payment so as to discharge the former sureties. *Foye v. Bell*, 1 Dev. & B. L. (18 N. Car.) 475.

But where the guardian invested part of the ward's funds in bank stock, and deposited the rest in her own name, and afterwards her bond was released and a new one given, after which she wasted the funds, the second one only was held liable, since the funds were in existence and traceable when given. *Cassilly v. Cochran*, (Ky. 1890) 13 S. W. Rep. 844.

2. *Parker v. Medsker*, 80 Ind. 155; *State v. Dennis*, 58 Mo. App. 568; *Clark v. Wilkinson*, 59 Wis. 543.

3. *State v. Bilby*, 50 Mo. App. 162.

**But in Indiana** it has been held that where at the date of a supplemental bond the guardian had no assets in his hands, having already converted them, the surety is not liable, though the guardian charged himself with the funds as if in his possession. *Lowry v. State*, 64 Ind. 421, *overruling* *State v. Grammer*, 20 Ind. 530; *Bagot v. State*, 33 Ind. 262; *Wilmer v. State*, 44 Ind. 223, and *State v. Prather*, 44 Ind. 287.

4. **New Bond Covers All Prior Losses** — *Arkansas*. — *State v. Buck*, 63 Ark. 218. Compare *Sebastian v. Bryan*, 21 Ark. 447.

*Connecticut*. — *Merrells v. Phelps*, 34 Conn. 109.

*Georgia*. — *Justices v. Woods*, 1 Ga. 84; *Bryant v. Owen*, 1 Ga. 355.

*Iowa*. — *Douglass v. Kessler*, 57 Iowa 63; *Knox v. Kearns*, 73 Iowa 286.

*Massachusetts*. — *Loring v. Bacon*, 3 Cush. (Mass.) 465.

*Missouri*. — *State v. Paul*, 21 Mo. 51.

*North Carolina*. — *Bell v. Jasper*, 2 Ired. Eq. (37 N. Car.) 597; *Jones v. Hays*, 3 Ired. Eq. (38 N. Car.) 502, 44 Am. Dec. 78.

*Pennsylvania*. — *Com. v. Cox*, 36 Pa. St. 442.

*South Carolina*. — *Field v. Pelot*, McMull. Eq. (S. Car.) 369.

*Tennessee*. — *Crook v. Hudson*, 4 Lea (Tenn.) 448; *Steele v. Reese*, 6 Yerg. (Tenn.) 263.

*Virginia*. — *Sayers v. Cassell*, 23 Gratt. (Va.) 525.

5. *Parker v. Medsker*, 80 Ind. 155; *State v. Shackelford*, 56 Miss. 648; *McWilliams v. Norfleet*, 60 Miss. 987. Compare *Armstrong v. State*, 7 Blackf. (Ind.) 81; *State v. Hull*, 53 Miss. 626.

6. *Tennessee Hospital v. Fuqua*, 1 Lea (Tenn.) 608; *Crook v. Hudson*, 4 Lea (Tenn.) 448; *Collins v. Knight*, 3 Tenn. Ch. 183.

7. *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673; *State v. Mitchell*, 132 Ind. 461; *Loring v. Bacon*, 3 Cush. (Mass.) 465; *McGlothlin v. Wyatt*, 1 Lea (Tenn.) 717; *Hutchcraft v. Shrout*, 1 T. B. Mon. (Ky.) 208, 15 Am. Dec. 100.

8. **Guardians Not Sureties for Each Other.** — *Kirby v. Turner*, Hopk. (N. Y.) 309; *Hocker v. Woods*, 33 Pa. St. 466; *Hurlburt v. State*, 71 Ind. 154. In this last case two guardians for different heirs gave a single bond.

**But in Alabama and Georgia** the contrary rule prevails. *Williams v. Harrison*, 19 Ala. 277; *Freeman v. Brewster*, 93 Ga. 648.

See also *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. I. a. (4) (a) *Of Several Guardians for Same Estate*.

9. *People v. Byron*, 3 Johns. Cas. (N. Y.) 53; *Hocker v. Woods*, 33 Pa. St. 466.

10. **Single Bond for the Estates of Several Wards Valid.** — *Brunson v. Brooks*, 68 Ala. 248; *Winslow v. People*, 117 Ill. 152; *Walsh v. State*, 53 Md. 539; *Deegan v. Deegan*, 22 Nev. 202; *Probate Ct. v. Sprague*, 3 R. I. 205; *Call v. Ruffin*, 1 Call (Va.) 333.

each one, as if it were a separate bond.<sup>1</sup> But neither one can enforce the bond for more than his proportion of the penalty, unless the others are made parties and it appears that they will not be prejudiced.<sup>2</sup>

*f. SALE BONDS.* — A bond given on the sale of real estate is not subsidiary to the general bond, but is a primary obligation, attaching to the proceeds of sale and securing their proper management until final accounting and disbursement.<sup>3</sup>

**2. Suit upon Guardian's Bond** — *a. CANNOT BE MAINTAINED IN ANOTHER STATE.* — A guardian's bond required and given under the laws of one state is purely local in its obligation, and will not be enforced by suit in another state.<sup>4</sup>

*b. SETTLEMENT OF ACCOUNT MUST PRECEDE SUIT.* — The prevailing rule is that a suit cannot ordinarily be maintained on the guardian's bond to recover the balance due to the ward until the account has been settled and the balance due to the ward determined in the Probate Court. A contrary rule would bring those questions which are particularly committed to the jurisdiction, and in some cases to the discretion, of the Probate Court, such as the guardian's diligence and the proper charges and allowances, before the regular law courts for decision.<sup>5</sup> In certain exceptional cases, however, suit may be brought on the bond before the settlement.<sup>6</sup> But the rule stated

**Where a Guardian for Three Wards Gave a Bond Naming Only Two,** the third cannot recover upon it, though the guardian had acted and filed accounts for all. *Greenly v. Daniels*, 6 Bush (Ky.) 41.

**1.** *Winslow v. People*, 117 Ill. 152; *Bescher v. State*, 63 Ind. 302; *Cotton v. State*, 64 Ind. 573; *Walsh v. State*, 53 Md. 539; *Probate Ct. v. Sprague*, 3 R. I. 205; *Roberson v. Tonn*, 76 Tex. 535. See *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. 1. *a.* (4) (*b.*) *Of One Guardian for Several Wards.*

**2.** *Bescher v. State*, 63 Ind. 302; *Hooks v. Evans*, 68 Iowa 52; *Knox v. Kearns*, 73 Iowa 286; *Edmonds v. Edmonds*, 73 Iowa 427.

**3. Obligation of Sale Bond.** — *State v. Steele*, 21 Ind. 207, 83 Am. Dec. 346; *Cogswell v. State*, 65 Ind. 1; *McKim v. Morse*, 130 Mass. 439; *State v. Colman*, 73 Mo. 684.

If a license to sell is properly granted, the bond covers all acts of the guardian, as well as neglects and omissions to proceed legally in the sale, but not any irregularities prior to the sale. *Schlee v. Darrow*, 65 Mich. 362.

If a guardian receives purchase money before the sale is confirmed, it is without authority, and sureties who are released on the making of the sale are not liable therefor. *State v. Cox*, 62 Miss. 786.

**4.** *Probate Judge v. Hibbard*, 44 Vt. 597, 8 Am. Rep. 396.

**5. Suit Cannot Be Maintained until Account Is Settled** — *Alabama.* — *Eiland v. Chandler*, 8 Ala. 781; *Chapman v. Chapman*, 32 Ala. 106; *Hailey v. Boyd*, 64 Ala. 399.

*Arkansas.* — *Sebastian v. Bryan*, 21 Ark. 447; *Norton v. Miller*, 25 Ark. 109; *Connelly v. Weatherly*, 33 Ark. 658; *Vance v. Beattie*, 35 Ark. 93; *Moore v. Nichols*, 39 Ark. 145; *Padgett v. State*, 45 Ark. 495; *Smith v. Smithson*, 48 Ark. 261.

*California.* — *Graff v. Mesmer*, 52 Cal. 636. *Iowa.* — *O'Brien v. Strang*, 42 Iowa 643; *Vermilya v. Bunce*, 61 Iowa 605; *Gillespie v. See*, 72 Iowa 345.

*Louisiana.* — *McHugh v. Stewart*, 12 La. Ann. 361; *Lay v. O'Neal*, 27 La. Ann. 643; *Edwards's Succession*, 32 La. Ann. 457.

*Massachusetts.* — *Cobb v. Kempton*, 154 Mass. 266; *Thorndike v. Hinckley*, 155 Mass. 263.

*Michigan.* — *Tudhope v. Potts*, 91 Mich. 490.

*Minnesota.* — *Hantch v. Massolt*, 61 Minn. 361.

*Nebraska.* — *Ball v. La Clair*, 17 Neb. 33; *Bisbee v. Gleason*, 21 Neb. 534.

*New Jersey.* — *Ordinary v. Heishon*, 42 N. J. L. 15.

*New York.* — *Perkins v. Stimmel*, 114 N. Y. 359, 11 Am. St. Rep. 659; *Bieder v. Steinhauer*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 428; *Stilwell v. Mills*, 19 Johns. (N. Y.) 304. *Compare Salisbury v. Van Hoesen*, 3 Hill (N. Y.) 77.

*North Carolina.* — *Barret v. Munroe*, 4 Dev. & B. L. (20 N. Car.) 194.

*Ohio.* — *Newton v. Hammond*, 38 Ohio St. 430 [*overruling State v. Humphreys*, 7 Ohio (pt. 1.) 224]; *Gorman v. Taylor*, 43 Ohio St. 86.

*Pennsylvania.* — *Com. v. Raser*, 62 Pa. St. 436.

*South Carolina.* — *Anderson v. Maddox*, 3 McCord L. (S. Car.) 237.

*Vermont.* — *Probate Ct. v. Slason*, 23 Vt. 306.

*Wisconsin.* — *Kugler v. Prien*, 62 Wis. 248. But see *Robb v. Perry*, 35 Fed. Rep. 102.

**6. Where Guardian Died Hopelessly Insolvent.** — Suit will lie on the bond without settlement of the accounts if the guardian is dead and his estate is hopelessly insolvent. *Cummings v. Erwin*, 15 La. Ann. 269; *Farrington v. Secor*, 91 Iowa 606.

But in *New York* it has been held that action on the bond cannot be maintained without an accounting though the guardian has died without assets, and no administrator has been appointed, unless some special circumstances take the case out of the general rule. *Bieder v. Steinhauer*, (Supm. Ct. Spec. T.) 15



above has been denied in some jurisdictions, and it has been held that suit may be brought on the bond, and the liability of the guardian and sureties determined, without a precedent settlement of account in probate.<sup>1</sup>

*c. SURETIES MAY BE SUED WITHOUT PRIOR SUIT AND JUDGMENT AGAINST GUARDIAN.* — It is not necessary that suit should be brought against the guardian, and a judgment obtained against him, before suing the sureties on the bond.<sup>2</sup>

*d. BURDEN OF PROOF.* — In an action on the bond the ward cannot rest his case after producing the bond, without other evidence; but when he has proved the receipt of property by the guardian, the onus is on the guardian to show the disposition of it.<sup>3</sup>

*e. MEASURE OF DAMAGES.* — When the indebtedness of the guardian to the ward has already been fixed by an accounting in probate, the amount so fixed is the measure of recovery on the bond,<sup>4</sup> limited, of course, by the penalty of the bond.<sup>5</sup> Where it is permitted to bring suit on the bond without a previous accounting, the same rules will be applied to determine the amount due on the bond as are applied in settling the account in probate, subject to the limit of the penalty.<sup>6</sup>

*f. DEFENSES* — (1) *Statute of Limitations.* — The statute of limitations runs against a suit on the guardian's bond from the termination of the

Abb. N. Cas. (N. Y.) 428. Compare *Perkins v. Stumm*, 42 Hun (N. Y.) 520.

**Where Liability Can Be Definitely Determined.** — An accounting is not necessary before suit where the liability can be as definitely determined as by an accounting, as where the guardian has tortiously converted the entire fund, *Long v. Long*, 142 N. Y. 545; *Girvin v. Hickman*, 21 Hun (N. Y.) 316, 58 How. Pr. (N. Y.) 244; or where there is only one item, the amount whereof is definite, *Sage v. Hammond*, 27 Gratt. (Va.) 651.

**Where the Guardian Died Immediately After Filing an Inventory**, and before any other act, suit may be brought without a settlement. *Wolfe v. State*, 59 Miss. 338.

**Suit for Specific Fraud.** — The rule that a guardian's bond cannot be sued without an accounting does not apply to a suit for a specific fraud, as where the guardian and his surety conspired to sell the ward's estate below value and share the profits of a resale. *Koch v. Le Frois*, 61 Hun (N. Y.) 205.

**1. Suit May Be Brought Without Precedent Settlement of Account** — *Colorado*. — *Gebhard v. Smith*, 1 Colo. App. 342.

*Connecticut*. — *Davenport v. Olmstead*, 43 Conn. 67.

*Georgia*. — *Ragland v. Justices*, 10 Ga. 65.

*Illinois*. — *Wann v. People*, 57 Ill. 202; *Bonham v. People*, 102 Ill. 434; *McIntyre v. People*, 103 Ill. 142; *Winslow v. People*, 117 Ill. 152.

*Indiana*. — *Bescher v. State*, 63 Ind. 302; *English v. State*, 81 Ind. 455.

*Missouri*. — *Garton v. Botts*, 73 Mo. 274; *State v. Roeper*, 9 Mo. App. 21, affirmed 82 Mo. 57; *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526; *Flach v. Fassen*, 3 Mo. App. 561; *State v. Miller*, 44 Mo. App. 118.

*Tennessee*. — *Justices v. Willis*, 3 Yerg. (Tenn.) 461.

As to maintaining assumpsit before a settlement see *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*

— *Remedies of Ward* — *Ward's Right of Action Against Guardian* — *Upon Termination of Guardianship*.

**2.** *State v. Strange*, 1 Ind. 538 [overruling *Hunt v. White*, 1 Ind. 105]; *Cuddeback v. Kent*, 5 Paige (N. Y.) 92; *Foster v. Maxey*, 6 Yerg. (Tenn.) 224; *Call v. Ruffin*, 1 Call (Va.) 333.

**After the Guardian's Death** it is not necessary that the wards should pursue the estate of the principal before suing the sureties. *State v. Thorn*, 28 Ind. 306; *Spottswood v. Dandridge*, 4 Munf. (Va.) 289.

**But Sureties Will Not Be Held Liable for Loss by Loaning on Insufficient Security** until the loss has been determined by foreclosure. *State v. Slevin*, 12 Mo. App. 321.

**In Georgia** it has been held that there must be a binding judgment against the guardian individually, before the sureties can be sued, unless the guardian be joined in the suit, or be absent or dead. *Forrester v. Vason*, 71 Ga. 49.

**3.** *Howell v. Williamson*, 14 Ala. 419; *Peelle v. State*, 118 Ind. 512. See *supra*, this title, *Accounting by Guardian*, subdiv. 2. *c. Requirement of Vouchers and Proof*.

**4.** As to the conclusiveness of the final account upon the surety, see *supra*, this title, *Accounting by Guardian* — *Effect of Account as Res Judicata* — *As to Final Account*.

**5.** *Anthony v. Estes*, 101 N. Car. 541.

**6. Same Rules Applied as in Settling Account in Probate.** — Thus the rules stated in the previous section as applicable to accounting by guardians have been applied in suits on bond in regard to allowances for support, *State v. Miller*, 44 Mo. App. 118; allowances where the guardian is a near relative, *Kinsey v. State*, 71 Ind. 32; *Corbaley v. State*, 81 Ind. 62; *Overfield v. Overfield*, (Ky. 1895) 30 S. W. Rep. 994; *Shurtleff v. Rile*, 140 Mass. 213; to expenditures before appointment, *Spedden v. State*, 3 Har. & J. (Md.) 251; to improvident investments, *Richardson v. Boynton*, 12 Allen (Mass.) 138, 90 Am. Dec. 141.



guardianship<sup>1</sup> or the settlement of the guardian's account.<sup>2</sup>

(2) *Waiver or Laches.* — The ward may waive his rights against the sureties,<sup>3</sup> and in some cases unreasonable delay in instituting suit has been held to be itself a waiver.<sup>4</sup>

(3) *Ward's Acts During Minority.* — Neither the consent of the ward, during minority, to improper expenditures<sup>5</sup> nor his agreement to release the guardian for a less sum than the full amount<sup>6</sup> will be any protection to the guardian.

(4) *Default of Successor.* — Nor will additional defaults on the part of a succeeding guardian excuse his predecessor.<sup>7</sup>

(5) *Release of Some of Sureties.* — A release of a part of the sureties by the court does not discharge the others.<sup>8</sup>

**3. Estoppel by Bond.** — Where one has given bond as guardian, and has received the funds and acted as such, the bond will estop both him and the sureties from denying his legal capacity as guardian,<sup>9</sup> even if the question involved be of the jurisdiction of the court.<sup>10</sup> Though the bond, if regarded simply as a part of the guardianship proceedings, might be void if the appointment itself was void, its validity as a common-law contract is sufficient to create the estoppel.<sup>11</sup> So also the guardian and sureties cannot attack the validity of a sale in a suit on the bond to recover the proceeds,<sup>12</sup> and a surety

1. *State v. Buck*, 63 Ark. 218; *Loring v. Alline*, 9 Cush. (Mass.) 68; *McKim v. Mann*, 141 Mass. 507; *Johnson v. Taylor*, 1 Hawks (8 N. Car.) 271; *Hodges v. Council*, 86 N. Car. 181; *Magruder v. Goodwyn*, 2 Patt. & H. (Va.) 561.

2. *People v. Seelye*, 146 Ill. 189; *State v. Hughes*, 15 Ind. 104; *State v. Parsons*, 147 Ind. 579; *Bell v. Rudolph*, 70 Miss. 234.

Where a Bond Was Conditioned for Rendering a True Account to the Court of Probate, the statute will not begin to run if such an accounting is not had, nor will the laches of the judge of probate impair the remedy. *Olmsted v. Olmsted*, 38 Conn. 323.

**Suit for Omitting Certain Items from Account.** — Where a guardian resigns and files an account, from which he omits certain items, the statute runs from the filing of the account. *State v. Parsons*, 147 Ind. 579.

**The Death of the Ward Does Not Constitute a Discharge** within a statute limiting a period after discharge, but a discharge by a court is meant. *Marlow v. Lacy*, 68 Tex. 154. Compare *Hudson v. Bishop*, 32 Fed. Rep. 519.

**Ward Is Bound to Know Facts of Record.** — A ward, after reaching majority, is bound by notice of facts which appear on the probate records, and cannot reply to a plea of the statute ignorance of facts appearing thereon. *Robert v. Morrin*, 27 Mich. 306. See *Parish v. Alston*, 65 Tex. 194.

**A Ward, by Affirming a Sale** and giving a confirming deed, upon receipt of an additional consideration from the purchaser, does not lose his right to hold the guardian on the bond for the purchase money. *Schlee v. Darrow*, 65 Mich. 362.

**3. What Constitutes Waiver.** — Settlement of the account with the guardian in probate and acceptance from him of a note in payment will constitute a waiver of the ward's rights against the sureties. *Pierce v. Irish*, 31 Me. 254; *State v. Cordon*, 8 Ired. L. (30 N. Car.) 179.

Acceptance of an agreed sum from the sureties, by a ward who has reached majority, in the presence of her mother and on legal advice, justifies a verdict for the sureties in a later action. *Dean v. Ragsdale*, 80 N. Car. 215.

**Foreclosure of Mortgage Given as Additional Security No Bar.** — The foreclosure by a ward of a mortgage given to him by the guardian as additional security is no bar to an action on the bond. *Lanier v. Griffin*, 11 S. Car. 565.

**4. Unreasonable Delay in Instituting Suit.** — *Aaron v. Mendel*, 78 Ky. 427, 39 Am. Rep. 248; *Hardin v. Taylor*, 78 Ky. 593; *Brandes v. Carpenter*, 68 Minn. 388. Compare *Matter of Walling*, 35 N. J. Eq. 105.

**5. Probate Judge v. Cook**, 57 N. H. 450; *Matter of Teyn*, 2 Redf. (N. Y.) 306.

**6. Magruder v. Goodwyn**, 2 Patt. & H. (Va.) 561.

**7. State v. Gilmore**, 50 Mo. App. 353; *Com. v. Julius*, 173 Pa. St. 322.

**8. Frederick v. Moore**, 13 B. Mon. (Ky.) 470.

**9. Estoppel to Deny Legal Capacity as Guardian.** — *Corbitt v. Carroll*, 50 Ala. 315; *State v. Mills*, 82 Ind. 126; *Welch v. Van Auken*, 76 Mich. 464; *Field v. Pelot*, *McMull. Eq.* (S. Car.) 369; *M'Alister v. Olmstead*, 1 *Humph. (Tenn.)* 210; *Findley v. Findley*, 42 W. Va. 372; *Vincent v. Starks*, 45 Wis. 458. Compare *Shroyer v. Richmond*, 16 Ohio St. 455.

**An Order of Court Appointing the Judge as Guardian** is good as against his surety. *Barnes v. Lewis*, 73 N. Car. 138. See also *supra*, this title, *Rights and Duties Arising from Relation of Guardian and Ward*, subdiv. I. a. (3) *Estoppel to Deny His Appointment or His Acts Thereunder*.

**10. U. S. v. Bender**, 5 Cranch (C. C.) 620; *Edmonds v. Morrison*, 5 Dana (Ky.) 223; *McClure v. Com.*, 80 Pa. St. 167; *Hazelton v. Douglas*, 97 Wis. 214.

**11. Alston v. Alston**, 34 Ala. 15; *Cotton v. Wolf*, 14 Bush (Ky.) 238.

**12. Williamson v. Woodman**, 73 Me. 163;

in a bond conditioned for the rendering of a just and true account by the guardian cannot attack the settlement of the guardian's account for the fraud of the guardian.<sup>1</sup>

**IX. GUARDIAN DE SON TORT.** — One who without legal authority takes the possession and management of the property of an infant will be regarded as holding it in a fiduciary capacity, and will be subject to all the obligations and liabilities of a guardian.<sup>2</sup> His rights will also be recognized so far as to entitle him to an equitable credit for expenditures which he made for the ward, and which would have been allowed if he had been a legal guardian.<sup>3</sup>

**GUBERNATORIAL.** — See the title GOVERNOR, vol. 14, p. 1095.

**GUEST.** — See the title INNS AND INNKEEPERS.

**GUIDON.** — A guidon is a small flag or streamer used for a variety of purposes, among others as a flag of a guild or fraternity. It is broad at the end next the staff, and pointed, rounded, or notched at the other end.<sup>4</sup>

**GUILTY.** (See ENCYC. OF PL. AND PR., titles GENERAL ISSUE, vol. 9, p. 881; ASSIGNMENT AND PLEA, vol. 2, p. 770; and see in this work the title VERDICT.) — The word "guilty" is defined to mean having guilt; justly chargeable with a crime; not innocent; criminal. Hence it is said that a man is guilty of an offense when he has committed such an offense.<sup>5</sup>

**GULF.** (See also the titles MARINE INSURANCE; NAVIGABLE WATERS.) — A gulf is usually an arm of the sea which seems to encroach upon the land, such as the Gulf of Mexico.<sup>6</sup>

**GUN.** (See also the titles ASSAULT AND BATTERY, vol. 2, p. 952; CARRYING WEAPONS, vol. 5, p. 729; EXPLOSIONS AND EXPLOSIVES, vol. 12, p. 499; HOMICIDE; SELF-DEFENSE.) — A gun, in the usual sense of the word, is a

Schlee v. Darrow, 65 Mich. 362; State v. Weaver, 92 Mo. 673; Dodge v. St. John, 96 N. Y. 260.

1. Corbin v. Westcott, 2 Dem. (N. Y.) 559.

2. *Guardian de Son Tort—England.* — Quinton v. Frith, Ir. R. 2 Eq. 396; Morgan v. Morgan, 1 Atk. 489; Newburgh v. Bickerstaffe, 1 Vern. 296.

*Illinois.* — Wadsworth v. Connell, 104 Ill. 369; Bedford v. Bedford, 136 Ill. 354.

*Kentucky.* — Hanna v. Spotts, 5 B. Mon. (Ky.) 365; Bush v. White, 3 T. B. Mon. (Ky.) 100.

*Maryland.* — Chaney v. Smallwood, 1 Gill (Md.) 367.

*Missouri.* — Johnson v. Smith, 27 Mo. 591.

*New Jersey.* — Pennington v. L'Hommedieu, 7 N. J. Eq. 343.

*New York.* — Sherman v. Ballou, 8 Cow. (N. Y.) 304; Cromwell v. Kirk, 1 Dem. (N. Y.) 599; Van Epps v. Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

*Virginia.* — Evans v. Pearce, 15 Gratt. (Va.) 513, 78 Am. Dec. 635; Peale v. Thurmond, 77 Va. 753.

**One Whose Appointment Was Void for Lack of Jurisdiction,** but who acted in good faith, will be treated as an ordinary trustee, so far as his liability is concerned. Crooks v. Turpen, 1 B. Mon. (Ky.) 183.

**A Receiver Appointed to Hold a Ward's Estate** pending an action on the guardian's bond is a *quasi* guardian, and responsible as such. Collins v. Gooch, 97 N. Car. 186, 2 Am. St. Rep. 284.

**An Executor Who as Such Has Rightful Possession of an Infant's Property** cannot be charged

as guardian *de son tort*. Bibb v. M'Kinley, 9 Port. (Ala.) 636.

3. Matter of Beisel, 110 Cal. 267. Compare Aldrich v. Willis, 55 Cal. 81; Gilfillen's Estate, 170 Pa. St. 185, 50 Am. St. Rep 760; Peale v. Thurmond, 77 Va. 753.

4. Caldwell v. Powell, 71 Fed. Rep. 971. This was a patent case.

5. Com. v. Walter, 83 Pa. St. 108, in which case the court distinguished the term from "convicted."

**Guilty Circumstances.** — In People v. Abbott, 101 Cal. 645, it was held that it was no error to instruct that the unexplained possession of stolen property was a *guilty* circumstance. The court said: "These two instructions are in effect the same. The principle embodied therein covers the same ground, and we think the law is correctly declared. People v. Etting, 99 Cal. 577. 'A circumstance tending to show guilt' would be a more appropriate expression than the phrase 'a *guilty* circumstance,' yet their manifest meaning is the same. The one is the equivalent of the other, and this court has so declared in People v. Rodundo, 44 Cal. 541."

**Guilty Possession.** — See such titles as BURGLARY, vol. 5, p. 44; COUNTERFEITING, vol. 7, p. 875; LARCENY; RECEIVING STOLEN PROPERTY.

6. The Orient, 16 Fed. Rep. 920, in which case it was held that the *Gulf* of Mexico was a part of the Atlantic Ocean. And for a holding that the *Gulf* of Finland is a part of the Baltic, see Uhde v. Walters, 3 Campb. 16.

Under a grant of a *gulf* both the water and the land were held to pass. Goodrich v. Eastern R. Co., 37 N. H. 164, citing Co. Litt. 5.

weapon which throws a projectile or missile to a distance; a firearm for throwing a projectile with gunpowder.<sup>1</sup>

**GUNPOWDER.** (See also the titles EXPLOSIONS AND EXPLOSIVES, vol. 12, p. 499; NUISANCES.) — See note 2.

**GUTTER — GUTTERING.** (See also the titles DRAINS AND SEWERS, vol. 10, p. 220; SPECIAL OR LOCAL ASSESSMENTS; STREETS AND SIDEWALKS.) — See note 3.

1. Harris v. Cameron, 81 Wis. 243.

**Airgun.** — An airgun is a *gun*. Campbell v. Hadley, 40 J. P. 756.

2. **Gunpowder — Insurance.** (See also the title FIRE INSURANCE, vol. 13, p. 292.) — A policy of insurance permitted the insured to keep seventy-five pounds of *gunpowder* for sale. In construing this provision the court said: "Perhaps the word *gunpowder*, as used in this policy, should be regarded as a generic term, including also blasting powder, both being highly explosive. But it is not necessary to determine that point." State Ins. Co. v. Hughes, 10 Lea (Tenn.) 468.

3. **Grading.** — The term "grading" includes

curbing, *guttering*, and grubbing. Spokane v. Brown, 8 Wash. 322.

**Gutter.** — A statute provided that the expense of repairing sidewalks should be assessed upon the abutters, but no part of the expense of grading the street, setting the curbstones, or paving the *gutters*, should be so assessed. In construing this provision the court said: "By 'curbstones and *gutters*' in the ordinance are meant the curbstones and *gutters* which lie between the sidewalk and the part of the street devoted to carriage travel." Dickinson v. Worcester, 138 Mass. 562. The term was held not to include a blind ditch or culvert.



# HABEAS CORPUS.

BY CHARLES PORTERFIELD.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *HABEAS CORPUS*, vol. 9, p. 998.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ABDUCTION*, vol. 1, p. 162; *APPRENTICES*, vol. 2, p. 488; *ARREST*, vol. 2, p. 832; *BAIL AND RECOGNIZANCE (IN CRIMINAL CASES)*, vol. 3, p. 651; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *ELECTIONS*, vol. 10, p. 815; *GUARDIAN AND WARD*, *ante*; *HUSBAND AND WIFE*, *post*; *INFANTS*; *PARENT AND CHILD*; *SENTENCE AND IMPRISONMENT*.

**I. DEFINITION.** — The writ of habeas corpus is defined as a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.<sup>1</sup>

The Name Is Derived from the Significant Words which it contained when the writs issued by the English courts were in the Latin language.<sup>2</sup>

**II. HISTORY OF WRIT** — 1. In England — *a.* HISTORY OF HABEAS CORPUS AT COMMON LAW. — The date of the origin of the writ of habeas corpus cannot be precisely ascertained. It seems that until Magna Charta was assented to by King John at Runnymede (June 15, 1215), and for some time thereafter, various other writs were used for the purpose of enforcing the right of personal liberty, such as the writs *de odio et atia*, *de homine replegiando*, and *de manucapione capienda*, or the writ of mainprize. After the date of Magna Charta these ancient writs were gradually superseded by the more summary and effective writ of habeas corpus, which is now regarded as the greatest and most important remedy known to the law. Traces of its existence are found in the reign of Edward III. (1326–1377), and in the time of Henry VI. (1422–1461) it seems to have been well known and in common use; but at that time, and until the reign of Henry VII. (1485–1509), it was used only in cases where one subject was restrained of his liberty by another subject, that is, it was a remedy only for private restraints. In the last-mentioned reign occur the first instances of its use as between the subject and the crown, and it was finally admitted to be a constitutional remedy.<sup>3</sup> In the course of time the efficiency of the remedy was greatly impaired by certain decisions of the Court of King's Bench as to the cases to which the writ was applicable. Thus it was held early in the reign of Charles I. that the court could not, on habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the Privy Council.<sup>4</sup>

1. Habeas Corpus Defined. — Bouv. L. Dict. "An habeas corpus is a writ for bringing the body of him who is imprisoned before the court, *cum causa detentionis*." Com. Dig., tit. Habeas Corpus, A.

2. The Latin Form of the Writ is as follows: "Præcipimus tibi quod *corpus* A B, in custodia vestra detentum, ut dicitur una cum causa captionis et detentionis suæ, quocunque nomine idem A B censeatur in eadem, *habeas* coram nobis apud Westm.," etc., "ad subjiciendum et recipiendum ea quæ curia nostra de eo ad tunc et ibidem ordinari contigerit in hac parte," etc. Bouv. Law Dict., tit. Habeas Corpus.

3. Early History of Writ. — 3 Black. Com. 129 et seq.; 2 Kent's Com. 26 et seq.; Hurd on Habeas Corpus 145; Church on Habeas Corpus 3, 4; Bouv. L. Dict.

In *U. S. v. Williamson*, 4 Am. L. Reg. 5,

5 Pa. L. J. 377, 28 Fed. Cas. No. 16,726, Kane, J., speaking of the origin of the writ, said: "The writ of habeas corpus is of immemorial antiquity. It is deduced by the standard writers on the English law from the great charter of King John. It is unquestionable, however, that it is substantially of much earlier date; and it may be referred, without improbability, to the period of the Roman invasion. Like the trial by jury, it entered into the institutions of Rome before the Christian era, if not as early as the times of the republic. \* \* \* It commanded, almost in the words of the Roman edict, *de libero homine exhibendo*, \* \* \* that the party under detention should be produced before the court, there to await its decree."

4. Commitment by Special Command of King or Privy Council. — See 3 Black. Com. 134. The case referred to in the text is the famous

*b. HISTORY OF HABEAS CORPUS UNDER ENGLISH STATUTES.* — A parliamentary inquiry followed the decision that the court could not discharge or bail a person committed by special command of the king or Privy Council, and resulted in the Petition of Right (3 Car. I.), which recited the illegal judgment in the case above referred to, and enacted that no freeman should thereafter be so imprisoned or detained. To this important statute the king gave his assent on June 7, 1628.<sup>1</sup> In the following year, however, Mr. Selden and others were committed by the lords of the Privy Council, in pursuance of the king's special command, under the general charge of "notable contempts and stirring up sedition against the king and government." The judges delayed for two terms to deliver an opinion as to how far such a charge was bailable, and when at length they agreed that it was bailable they annexed a condition of finding sureties for good behavior, which still protracted the imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that "if they were again remanded for that cause, perhaps the court would not afterwards grant an habeas corpus, being already made acquainted with the cause of the imprisonment."<sup>2</sup> There were other abuses which came into frequent practice which in some measure defeated the benefit of the remedy. Thus the party imprisoning was at liberty to delay his obedience to the first writ, and wait until a second and third, called an *alias* and *pluries*, were issued, before he produced the prisoner.<sup>3</sup> These evasions gave rise to a statute enacted in the year 1640, providing that if any person be committed by the king himself in person, or by his Privy Council or by any members thereof, he shall have granted unto him, without any delay, upon any pretense whatsoever, a writ of habeas corpus, upon demand or motion made, by the Court of King's Bench or Common Pleas, who shall thereby, within three days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain in delivering, bailing, or remanding such prisoner.<sup>4</sup> After the enactment of this statute, and in the year 1676, one Jenks was committed by the king in council for an alleged turbulent speech at Guildhall, and new devices were resorted to for the purpose of preventing his enlargement on habeas corpus. Both the chancellor and the chief justice refused to grant the writ in vacation.<sup>5</sup> Following closely on this case was the famous Habeas Corpus Act of 31 Car. II., c. 2 (1680), by which the right of the subject to that remedy was affirmed and secured, and the practice in obtaining it was minutely prescribed.<sup>6</sup> This

Knights' Case, in which Sir Thomas Darnel, Sir John Corbet, Sir Wallace Earl, Sir John Heveningham, and Sir Edmund Hampden were committed for refusal to comply with the order of Charles I. in regard to the "forced loans." For the particulars of this case the reader is referred to 3 How. St. Tr. 1; 1 Hallam's Const. Hist. Eng. 375 *et seq.*; Hale's Hist. C. L. 268.

1. *Petition of Right.* — 1 Black. Com. 128; 1 Hallam's Const. Hist. Eng. 383.

2. *Contempt Case of Mr. Selden and Others.* — 3 Black. Com. 134; 7 How. St. Tr. 240. For a full account of this memorable case, see 2 Cobbett's Parl. Hist. Eng. 487 *et seq.*

3. *Delay in Obeying Writ.* — 3 Black. Com. 135.

4. Stat. 16 Car. I., c. 10, § 8; 3 Black. Com. 134.

5. *The Jenks Case.* — 7 How. St. Tr. 471; 6 Cobb. St. Tr. 1193; Amos Eng. Const. 184; 3 Black. Com. 135.

6. *Habeas Corpus Act of 31 Car. II., c. 2.* — This great and important statute provides in substance as follows: 1. That on complaint and

request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit treason or felony; or any suspicion of such petit treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or an affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up within a limited time,



statute, says the learned author of Blackstone's Commentaries, was the result of the Jenks case;<sup>1</sup> but a different view is taken by Mr. Hallam in his Constitutional Law of England, and he shows that the real cause of the act is to be found in the arbitrary proceedings of Lord Clarendon, and that the Jenks affair was in fact trifling in its influence.<sup>2</sup> The attention of Parliament having been called, in the latter part of the reign of George II., to the insufficiency of the Act of 31 Car. II., in that it applied only to cases of commitment on a charge of crime, a bill was proposed extending the act to all cases of illegal confinement. This bill failed to pass in the House of Lords. The judges were then directed by the lords to prepare a bill in the place of this one that had just been defeated. A bill was brought in accordingly, but no action was taken on it. This was in the year 1758. Fifty-eight years afterwards the matter was again taken up, and a bill substantially the same as that proposed by the judges in 1758 was passed.<sup>3</sup>

**2. In the United States** — *a.* HABEAS CORPUS IN THE COLONIES. — The rights, liberties, and immunities of the subject under the English law have always been considered as a birthright by the English people, and this birthright, including the remedy by habeas corpus, was always claimed by the American colonists.<sup>4</sup> Instances of the use of the writ are to be found in early

according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offense forfeit one hundred pounds, and for the second offense two hundred pounds, to the party aggrieved, and be disabled to hold office. 5. That no person once delivered by habeas corpus shall be recommitted for the same offense, on penalty of five hundred pounds. 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail, unless the king's witnesses cannot be produced at that time; and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offense; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by habeas corpus until after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his habeas corpus, as well out of the Chancery or Exchequer as out of the King's Bench or Common Pleas; and the lord chancellor or judges denying the writ, on sight of the warrant, or oath that the same is refused, forfeit severally to the party aggrieved the sum of five hundred pounds. 8. That this writ of habeas corpus shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting or convicts praying to be transported, or having committed some capital offense in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the

king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than five hundred pounds, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the king's pardon.

**No New Principle Introduced or Right Conferred.** — "The Habeas Corpus Act was in fact but a confirmation and extension of the common-law writ of habeas corpus to all cases of imprisonment on every charge except that of treason or felony; but it was drawn up in such a definite manner as to remove all the doubts that had existed in the former reign." Crabb's Hist. Eng. Law 525. See also 3 Hallam's Const. Hist. Eng. 19.

1. 3 Black. Com. 135.

2. 3 Hallam's Const. Hist. Eng. 18.

3. Amendment of 31 Car. II., c. 2. — Stat. 56 Geo. III., c. 100.

The circumstances which brought up the discussion leading to the amendment of 31 Car. II., c. 2, were as follows: A gentleman had been impressed before the commissioners under a pressing act passed in the preceding session. His friends made application for a writ of habeas corpus, which produced some hesitation and difficulty, for, according to the statute, the privilege related only to persons committed for criminal, or supposed criminal, matters, and this gentleman did not stand in that predicament. Before the question could be determined, he was discharged in consequence of an application to the secretary of war. Bac. Abr., tit. Habeas Corpus, B 13.

This statute is not in force in *Canada*. *In re* Hawkins, 9 U. C. L. J. 298; *In re* Bigger, 10 U. C. L. J. 329.

**4. Habeas Corpus Brought to America by Colonists.** — "The right of deliverance from all unlawful imprisonment, to the full extent of the remedy provided by the Habeas Corpus Act, is a common-law right; and it is undoubtedly true \* \* \* that the common law of England, so far as it was applicable to



colonial history,<sup>1</sup> though it has been asserted that the colonists did not possess this remedy until the privilege of the writ was expressly extended to them during the reign of Queen Anne (1702-1714).<sup>2</sup>

b. HABEAS CORPUS IN THE STATES. — When the American colonies renounced their allegiance to the British crown, and became independent states, the right of the citizen to his remedy by habeas corpus in case of unlawful imprisonment was recognized by constitutional provisions and secured by various statutes modeled on the English statute of 31 Car. II.<sup>3</sup>

III. SEVERAL KINDS OF HABEAS CORPUS ENUMERATED. — There are several different kinds of habeas corpus, as follows: (1) Habeas corpus *ad respondendum*, which is employed when a man has a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him in the new action in the court above. (2) Habeas corpus *ad satisfaciendum*, which is used when a prisoner had a judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. (3) Habeas corpus *ad prosequendum, testificandum, deliberandum*, etc., which issue when necessary to remove a prisoner in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. (4) Habeas corpus *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster Hall when a person is sued in some inferior jurisdiction and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated a habeas corpus *cum causa*), to do and receive whatever the king's court shall consider in that behalf. This writ is grantable of common right, with-

our circumstances, was brought over by our ancestors upon their emigration to this country." 2 Kent's Com. 27. See also Cooley's Const. Law 6-8; Hurd on Habeas Corpus (2d ed.) 116; and the title COMMON LAW, vol. 6, pp. 277, 286.

The Colonial Charters generally contained an express declaration that the colonists and their descendants should be entitled to all the liberties and immunities of natural-born British subjects. Poore's Fed. and State Constitutions and Colonial Charters.

The Pennsylvania Charter granted to William Penn seems to have omitted this declaration, but it was not considered that the omission affected the rights of the Pennsylvania colonists, because the reservation of allegiance to the crown implied that they were all subjects, and therefore entitled to all the rights of subjects. Church on Habeas Corpus, § 38, citing 1 Story's Constitution, § 122.

1. Instances of Habeas Corpus in the Colonies. — For an interesting account of the writ of habeas corpus in the American colonies, and instances of its early use, see Church on Habeas Corpus, § 38 *et seq.*

2. Habeas Corpus in Colonies Questioned. — Hurd on Habeas Corpus (2d ed.) 109, citing 1 Chalmers's Annals 677.

3. Statutes Relating to Habeas Corpus in United States. — 2 Kent's Com. 27; Church on Habeas Corpus, § 47 *et seq.* See also the constitutions and statutes of the several states.

The Articles of Confederation contained no provision in regard to the writ of habeas corpus. Church on Habeas Corpus, § 44.

Constitution of the United States. — The only provision in the Federal Constitution relating

to the writ of habeas corpus is that contained in art. I, § 9, subdiv. 2, that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

In regard to this provision of the constitution, Kane, J., said: "When the federal convention was engaged in framing a constitution for the United States, a proposition was submitted to it by one of the members, that 'the privileges and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions.' See the Madison Papers, vol. 3, p. 1365. The committee to whom this was referred for consideration would seem to have regarded the privilege in question as too definitely implied in the idea of free government to need any formal assertion or confirmation, for they struck out that part of the proposed article in which it was affirmed, and retained only so much as excluded the question of its suspension from the ordinary range of congressional legislation. The convention itself must have concurred in their views; for in the constitution as digested and finally ratified, and as it stands now, there is neither enactment nor recognition of the privilege of this writ, except as it is implied in the provision that it shall not be suspended. It stands, then, under the Constitution of the United States, as it was under the common law of English America, an indefeasible privilege, above the sphere of ordinary legislation." U. S. v. Williamson, 4 Am. L. Reg. 5, 5 Pa. L. J. 377, 28 Fed. Cas. No. 16,726.

out any motion in court, and it instantly supersedes all proceedings in the court below. (5) Habeas corpus *ad subjiciendum* is the great and efficacious writ in all manner of illegal confinement. It is directed to the person detaining another, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, and to submit to and receive whatever the judge or court issuing such writ shall consider in that behalf.<sup>1</sup>

**IV. JURISDICTION — 1. In England — a. JURISDICTION AT COMMON LAW.** — The writ of habeas corpus *ad subjiciendum*, being one of the high prerogative writs, issued at common law out of either the Court of King's Bench or the Court of Chancery.<sup>2</sup> It seems to be well settled that the writ could be issued by the Court of King's Bench, not only in term time, but also during vacation,<sup>3</sup> but there are authorities to the contrary.<sup>4</sup> It was also said that the Court of Chancery had authority to issue the writ in vacation, as well as in term time, because that court is always open.<sup>5</sup> The Court of Common Pleas and the Court of Exchequer also have power, at common law, to grant the writ of habeas corpus *ad subjiciendum*, but, according to some authorities, only in cases in which the party was privileged in those courts. In case the imprisonment was palpably illegal, they might have discharged him, but if he were committed for any criminal matter they could only have remanded him or taken bail for his appearance in the Court of King's Bench, which occasioned the Court of Common Pleas sometimes to discountenance such application.<sup>6</sup>

**1. Several Kinds of Habeas Corpus Enumerated.** — 3 Black. Com. 129-131.

**2. Jurisdiction of Court of King of Bench and Court of Chancery.** — 3 Black. Com. 131, 132; Com. Dig., tit. Habeas Corpus, A; Bac. Abr., tit. Habeas Corpus, B. 1.

A writ of habeas corpus *ad subjiciendum*, granted by a judge of the Queen's Bench, must issue from the crown side of the court, where the prisoner is in custody for a criminal matter. Easton's Case, 4 Per. & Dav. 558, 12 Ad. & El. 645, 40 E. C. L. 147, 9 Dowl. P. C. 207, 1 Woll. P. C. 49, 5 Jur. 117.

**3. Power of King's Bench to Issue Writ in Vacation Asserted.** — 3 Black. Com. 131.

"Lord Coke, 4 Inst. 81, indeed, and Lord Hale, 2 Pl. Cr. 147, and Lord Chief Baron Comyns, tit. Habeas Corpus, A, as text writers upon this subject, appear to confine to chancery, which is at all times open, the *officina justitie*, the power of issuing a habeas corpus in time of vacation. But Tremaine's Pleas of the Crown contain four precedents of writs in the exact form of that now before us, earlier than 31 Car. II., one as early as 43 Eliz." Lord Denman, C. J., in Watson's Case, 9 Ad. & El. 731, 36 E. C. L. 278, *sub nom.* Reg. v. Batchelor, 2 W. W. & H. 19, 1 Per. & Dav. 516. See also Rex v. Mead, 1 Burr. 542.

Lord Chief Justice Rainsford refused to grant a writ of habeas corpus in vacation in the famous Jenks case, but Lord Denman says that it is far more likely that he refused to grant the writ because he did not choose to enter into a controversy with the Privy Council, by whom Jenks had been committed, than because he doubted his power to do so. "In fact," says the last-mentioned judge, "there is no decision against this doctrine [as to the power of court in vacation], and in its favor great authority, principle, necessity, and very

early precedents, continued to the present hour." Watson's Case, 9 Ad. & El. 731, 36 E. C. L. 279.

**4. Power of King's Bench to Issue Writ in Vacation Denied.** — Bac. Abr., tit. Habeas Corpus, B. 1; Com. Dig., tit. Habeas Corpus, A; 2 Hale P. C. 147; 4 Co. Inst. 81.

**5. The Court of Chancery in England has, by its common-law jurisdiction, authority as general as the common-law courts have to issue a writ of habeas corpus.** *Re Belson*, 7 Moo. P. C. 114, 14 Jur. 631.

If the Courts of Common Law Are Sitting at the time when an application to the chancellor for a writ of habeas corpus *ad subjiciendum* is made, though the chancellor may not refuse the application, he will refer it to the courts of law, because the time of the Court of Chancery belongs peculiarly to suitors in equity. Such practice is approved as reasonable and convenient, not for the ease of the chancellor, but to facilitate the administration of justice. *Rowe's Case*, 1 Molloy 280.

**Writ Issued by Court of Chancery in Vacation.** — *Re Belson*, 7 Moo. P. C. 114, 14 Jur. 631; *Crowley's Case*, 2 Swanst. 1, 1 Buck 264; Bac. Abr., tit. Habeas Corpus, B. 1; 4 Co. Inst. 182; 2 Hale P. C. 147.

The lord chancellor can issue the writ of habeas corpus at common law in vacation. *Crowley's Case*, 2 Swanst. 1, 1 Buck 264.

**6. Jurisdiction of Exchequer and Common Pleas.** — 3 Black. Com. 131; 2 Co. Inst. 55; 4 Co. Inst. 290; 2 Hale P. C. 144.

In Jones's Case, 2 Mod. 198, the chief justice doubted whether a habeas corpus could be granted by the Court of Common Pleas in a criminal cause, of which that court had no jurisdiction, and he referred to the opinion of Lord Coke (2 Inst. 55), where it was said that the writ lies for any officer or privileged person of the court. The doubt, however, has



*b. JURISDICTION UNDER ENGLISH STATUTES.* — Various statutes have been enacted from time to time declaring by what courts or judges the writ of habeas corpus may be granted, and settling the disputes which had arisen in regard thereto. The first of these statutes, passed in the reign of King Charles I., provided that the application might be made to the King's Bench or Common Pleas, and it was held to give to the subject the right to apply for relief to either of those courts at his option.<sup>1</sup> Afterwards the power of the judges in vacation was settled by the Habeas Corpus Act passed in the reign of Charles II., providing that the application might be made to the lord chancellor, or lord keeper, or any one of his majesty's justices, either of the one bench or the other, or the barons of the exchequer of the degree of the coif.<sup>2</sup>

*c. PLACES TO WHICH WRIT RUNS.* — The writ of habeas corpus, being one of the high prerogative writs, at common law runs into any part of the king's dominions, including the channel islands, the colonies, and other possessions which do not constitute a part of the realm of England, and the jurisdiction of the English courts has in some instances been confirmed and extended by statute.<sup>3</sup> In regard to the foreign possessions, it is now provided by statute that no writ of habeas corpus shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the crown where her majesty has any lawfully established court or courts of justice having authority to grant and issue the said writ and to insure the due execution thereof throughout such colony or dominion.<sup>4</sup>

**2. In Canada.** — In Canada the judges of the superior courts of law may issue writs of habeas corpus *ad subjiciendum*, returnable either in term time or in vacation.<sup>5</sup>

been resolved in favor of the jurisdiction of the court. In *Bushell's Case*, Vaugh. 155, it was held that the Court of Common Pleas had the power to issue the writ at common law even though no privilege were involved. See also *Wood's Case*, 3 Wils. C. Pl. 172; *Crowley's Case*, 2 Swanst. 1; *Wilson's Case*, 7 Q. B. 984, 53 E. C. L. 984.

If a Prisoner Is in Custody under Process of the Court of Chancery, the Court of Common Pleas has no power to discharge him on habeas corpus, or to entertain any question as to the irregularity of such process. *Matter of Andrews*, 4 C. B. 226, 56 E. C. L. 226; *Matter of Cobbett*, 7 Q. B. 187, 53 E. C. L. 187.

**1. Statutory Jurisdiction of Common Pleas.** — Stat. 16 Car. I., c. 10, § 6.

**The Court of Common Pleas Has a General Jurisdiction under 16 Car. I., c. 10, § 6, to grant writs of habeas corpus in all cases whatsoever.** *Wood's Case*, 3 Wils. C. Pl. 172, 2 W. Bl. 745. See also *Rex v. Wilkes*, 2 Wils. C. Pl. 151.

**2. Power Conferred on Judges in Vacation.** — Stat. 31 Car. II., c. 2.

**A Baron of the Exchequer may, in vacation time, under 1 & 2 Vict., c. 45, § 1, and in exercise of the common-law power possessed before that statute by the Queen's Bench, issue such writ under the seal of that court, returnable in term time.** *Wilson's Case*, 7 Q. B. 984, 53 E. C. L. 984, 14 L. J. Q. B. 105, 9 Jur. 393.

**3. Writ Runs to Any Part of King's Dominions.** — *Bourn's Case*, Cro. Jac. 543; *Rex v. Pell*, 3 Keb. 279; *Rex v. Cowle*, 2 Burr. 856; *Anonymous*, 1 Vent. 357; *Vin. Abr.*, tit. Habeas Corpus, E 2, pl. 2, 3.

**Canada.** — At common law the superior courts in England had a right to issue a habeas corpus into the colonies, to bring up persons illegally imprisoned, unless their jurisdiction was taken away by statute. The court therefore issued a habeas corpus to Canada. *In re Anderson*, 7 Jur. N. S. 122, 30 L. J. Q. B. 129, 3 El. & El. 487, 107 E. C. L. 487, 9 W. R. 255, 3 L. T. N. S. 622. But see the statute 25 Vict., c. 20.

**Island of Jersey.** — The writ of habeas corpus *ad subjiciendum* runs into Jersey. *Wilson's Case*, 7 Q. B. 984, 53 E. C. L. 984, 9 Jur. 393, 14 L. J. Q. B. 105; *Re Belson*, 7 Moo. P. C. 114, 14 Jur. 631.

**Statutory Provisions.** — The Habeas Corpus Act, 31 Car. II., c. 2, § 10, provides that the writ of habeas corpus, within the meaning of that act, may be directed and run into any county palatine, the cinque ports, or other privileged places within England, Wales, or the town of Berwick-upon-Tweed, and the islands of Jersey and Guernsey, any law or usage to the contrary notwithstanding.

**In the Isle of Man,** the writ runs from the English courts. Habeas Corpus Act 1816, § 8 Geo. III., c. 100; *In re Brown*, 10 Jur. N. S. 945, 33 L. J. Q. B. 193, 12 W. R. 821, 10 L. T. N. S. 458; *Matter of Crawford*, 13 Q. B. 613, 66 E. C. L. 613, 13 Jur. 955, 18 L. J. Q. B. 225.

**4. Power to Issue Writ to Foreign Dominions Abrogated.** — Stat. 25 Vict., c. 20.

**5. Jurisdiction in Canada.** — *In re Paton*, 4 Grant Ch. (U. C.) 147; *Matter of Hawkins*, 3 Ont. Pr. 239.

**A Judge in the Practice Court cannot grant a writ *ad subjiciendum*.** *Reg. v. Smith*, 24 U. C. Q. B. 480.



**3. In the United States — a. FEDERAL COURTS — (1) Source of Federal Jurisdiction.** — The jurisdiction of the federal courts and judges to grant writs of habeas corpus is purely of statutory creation, having been conferred on them by the Judiciary Act of September 24, 1789, and subsequent acts amendatory thereof and supplementary thereto,<sup>1</sup> for the declared purposes of enabling them first to exercise their respective jurisdictions, and second to inquire into the cause of the detention of a person who should be deprived of his liberty.<sup>2</sup> The power of these courts to inquire, by means of the writ of habeas corpus, into the cause of the detention of a person, was extremely limited under the original Judiciary Act, being confined to cases where the detention was under or by color of federal authority, and did not extend, in any case, to persons who were in custody under the process of a state court; but their powers were extended in this direction by successive statutes, the scope and effect of which will be considered presently.<sup>3</sup>

(2) *Extent of Federal Jurisdiction in General.* — The provisions of the Judi-

**In New Brunswick** the judges of the Supreme Court are given the exclusive power to issue writs of habeas corpus to inquire into the legality of the imprisonment of a person confined in the Dominion penitentiary, though he was committed by the court of another province. *Ex p. Stather*, 25 New Bruns. 374.

**1. Federal Jurisdiction Is Statutory.** — *Ex p. Bollman*, 4 Cranch (U. S.) 93; *Ex p. Dorr*, 3 How. (U. S.) 103; *In re McDonald*, 9 Am. L. Reg. 661, 16 Fed. Cas. No. 8,751; *Ex p. Farley*, 40 Fed. Rep. 66; Judiciary Act of Sept. 24, 1789, § 14, 1 U. S. Stat. at L. 81.

"No principle can be more definitively settled than that the courts of the Union, from the highest to the lowest, are courts of limited jurisdiction, in the sense that they can call into action no powers not expressly conferred by law or incidental to those granted." *Ex p. Everts*, 1 Bond (U. S.) 197, 7 Am. L. Reg. 79, 8 Fed. Cas. No. 4,581.

**2. Terms of Judiciary Act.** — The 14th section of the Judiciary Act provides that the "courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law; and that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Act of Sept. 24, 1789, § 14, 1 U. S. Stat. at L. 81; *In re McDonald*, 9 Am. L. Reg. 661, 16 Fed. Cas. No. 8,751.

**Authority to Grant Habeas Corpus When Necessary to Exercise of Jurisdiction.** — When the provisions of the Judiciary Act relating to the writ of habeas corpus came under judicial consideration in an early case it was argued that the power given by the first clause of the statute to all the federal courts was not limited by the restrictive words "which may be necessary for the exercise of their respective jurisdictions," but that such restrictive words

applied only to the clause immediately preceding them, viz.: "all other writs not specially provided for by statute." But the question was not disposed of. *Ex p. Bollman*, 4 Cranch (U. S.) 75. See also *In re McDonald*, 9 Am. L. Reg. 661, 16 Fed. Cas. No. 8,751.

In a later case this question came under consideration, and it was expressly held that the intent of the first clause of the statute was to give to all the federal courts jurisdiction to grant writs of habeas corpus when necessary to enable them to exercise their respective jurisdictions, and that the writs authorized under that clause were such only as were necessary to the just exercise of the jurisdiction of those courts. *Ex p. Everts*, 1 Bond (U. S.) 197, 7 Am. L. Reg. 79, 8 Fed. Cas. No. 4,581.

**Authority to Grant Habeas Corpus to Inquire into Cause of Detention.** — The second clause of section 14 of the Judiciary Act relates to the writ of habeas corpus *ad subjiciendum*, authorizing an inquiry into the cause of detention; and jurisdiction to grant this writ is conferred by the statute on the Circuit and District Courts in the exercise of their original jurisdiction, on the Supreme Court in the exercise of its appellate jurisdiction, and on the justices and judges of said courts. *Ex p. Bollman*, 4 Cranch (U. S.) 75; *Ex p. Everts*, 1 Bond (U. S.) 197, 7 Am. L. Reg. 79, 8 Fed. Cas. No. 4,581.

Though this provision of the statute names only the justices and judges of the federal courts, and not the courts as such, the purpose and intent of the statute is to vest the power either in the court or in a judge or justice thereof in a proper case. *Ex p. Bollman*, 4 Cranch (U. S.) 75.

**The United States Statutes as They Now Stand** provide that the Supreme Court and the Circuit and District Courts and the several justices and judges of the said courts shall have power to issue writs of habeas corpus, and the classes of cases in which this jurisdiction exists are particularly specified. Rev. Stat. U. S., §§ 751-753, and see § 716.

As to the effect of the rearrangement in the Revised Statutes of the provisions of the Judiciary Act touching writs of habeas corpus, see *King v. McLean Asylum*, 21 U. S. App. 503.

**3. See *infra*, this section, *Limitation of Federal Jurisdiction.***

ciary Act relating to the writ of habeas corpus were always regarded as possessing some obscurity.<sup>1</sup> At first it was denied that the writs specified in that statute included the great writ *ad subjiciendum*; then it was claimed that the writ could be made use of by the federal courts only as incidental to their jurisdiction in pending causes; and finally it was contended that their jurisdiction was limited to cases of custody under legal process. All these questions were, however, decided in favor of the jurisdiction of the courts, and it is now well settled that they have full authority to issue the writ in all cases falling properly within the jurisdiction of the national government.<sup>2</sup> At a later period a question arose as to whether the power given to the federal courts could be invoked where the right to the custody of the person by virtue of the relation of master and servant, guardian and ward, parent and child, or husband and wife was claimed, and the parties were citizens of different states, within the provision of the statute relating to the jurisdiction of the federal courts, or whether it was intended to protect against only those invasions of personal liberty which are perpetrated under color of official authority; and several cases arose involving this question, but they were decided on other points.<sup>3</sup> The decisions in the few cases wherein the point has been directly presented are not harmonious,<sup>4</sup> but the latest adjudication in a case before the United States Circuit Court of Appeals is to the effect that the jurisdiction of the federal courts to issue writs of habeas corpus extends to every class of restraint to which the judicial power of the United States extends, including that based on the mere matter of diverse citizenship.<sup>5</sup> But it has been held by the Supreme Court of the United States that when an application has been made to a state court the matter cannot be afterwards removed to a federal court on the ground of diverse citizenship.<sup>6</sup>

**1. Judiciary Act Regarded as Obscure.**—*Ex p. Burford*, 3 Cranch (U. S.) 448; *King v. McLean Asylum*, 21 U. S. App. 481; *In re Burrus*, 136 U. S. 586.

**2. Extent of Federal Jurisdiction in General.**—*Ex p. Bollman*, 4 Cranch (U. S.) 75; *Ex p. Yerger*, 8 Wall. (U. S.) 85; *Bennett v. Bennett*, Deady (U. S.) 299, 3 Fed. Cas. No. 1,318; *King v. McLean Asylum*, 21 U. S. App. 481. In the case last cited Judge Putnam, in an elaborate opinion, gives the history of the development of the doctrine touching the jurisdiction of the federal courts to issue writs of habeas corpus.

**The Power to Issue Habeas Corpus ad Subjiciendum** was settled in *Ex p. Bollman*, 4 Cranch (U. S.) 75.

**Detention under Criminal Process** was formerly considered the only species of unlawful restraint that could be remedied by the federal courts by means of the writ of habeas corpus, under the Judiciary Act. *Ex p. Wilson*, 6 Cranch (U. S.) 52. But this narrow interpretation was afterwards held to be untenable in a case where the Circuit Court discharged the petitioner from custody in which he was held under a treasury warrant. *Ex p. Randolph*, 2 Brock. (U. S.) 447, 20 Fed. Cas. No. 11,558.

**The Change of Phraseology** effected by substituting, in the Revised Statutes, the words "cause of restraint of liberty," in place of the words "cause of commitment" contained in the Judiciary Act, authorizes the use of the writ of habeas corpus for all unlawful restraints, whether under color of process or through the acts of individuals, or otherwise. *King v. McLean Asylum*, 21 U. S. App. 505.

**3. Power to Grant Habeas Corpus on Ground of Diverse Citizenship Left Unsettled.**—In *Ex p.*

*Barry*, 2 How. (U. S.) 65, 5 How. (U. S.) 103, an application to the Supreme Court was refused on the ground of want of original jurisdiction.

In *U. S. v. Green*, 3 Mason (U. S.) 482, the writ was granted in the Circuit Court by Judge Story, but the question of jurisdiction was not presented, and before final action by the court there was a settlement by the parties. See also the remarks of Miller, J., in *In re Burrus*, 136 U. S. 586.

**4. Earlier Decisions.**—*Ex p. Everts*, 1 Bond (U. S.) 197, 7 Am. L. Reg. 79, 8 Fed. Cas. No. 4,581 [*disapproving U. S. v. Williamson*, (U. S. Dist. Ct. 1855) 4 Am. L. Reg. 5], a case in the Circuit Court in 1858, denies such jurisdiction to the federal courts. A few years later the opposite conclusion was reached in a case before a district court. *Bennett v. Bennett*, Deady (U. S.) 299. See also *Lee v. Lee*, 8 Pet. (U. S.) 44; *Pratt v. Fitzhugh*, 1 Black. (U. S.) 271; *De Kraft v. Barney*, 2 Black. (U. S.) 704.

**5. Rule Laid Down by Circuit Court of Appeals.**—*King v. McLean Asylum*, 21 U. S. App. 481. In this case the jurisdiction of federal courts to issue a writ of habeas corpus on the ground of diverse citizenship was carefully limited to an inquiry into the right of custody, and it was expressly declared that such courts could not exercise any duties ordinarily vested in a superior court of common law, or in the chancellor as *parens patriæ*; and previous decisions denying the jurisdiction of the federal courts were distinguished on this ground.

**6. Removal from State to Federal Court.**—In *Kurtz v. Mofitt*, 115 U. S. 487, it was held that a habeas corpus proceeding could not be removed from a state court to a federal court



(3) *Limitation of Federal Jurisdiction* — (a) **Former Rule.** — The power given to the federal courts by the Judiciary Act to issue writs of habeas corpus to inquire into the cause of detention was originally restricted to very narrow limits. That act provided that the writ should in no case extend to prisoners in jail, unless they were in custody under or by color of the authority of the United States, or were committed for trial before some court thereof, or were necessary to be brought into court to testify; so that those courts could not grant the writ where a person was in custody under the process of a state court, except in the single case when he was required as a witness in a federal court.<sup>1</sup>

(b) **Present Rule** — *aa. CUSTODY UNDER FEDERAL AUTHORITY.* — In the course of time it became obvious that it was necessary to extend the power of the federal courts in this respect, to avoid embarrassments and hindrances that sometimes occurred in the conduct of the federal government, and accordingly statutes were passed at various periods removing some of the restrictions contained in the Judiciary Act, or, speaking more exactly, enlarging the power of the federal courts, so that in certain specified cases they could grant the writ of habeas corpus to inquire into the cause of the detention of a person under the process of the state court, as well as when he was detained under the authority of the United States. There are now five classes of cases in which the statutes extend the writ to a prisoner in jail, "for the purpose of an inquiry into the cause of restraint of liberty." The *first*, which was one of those specified in the original Judiciary Act of 1789, is where the prisoner is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof.<sup>2</sup> This class includes detention

under the Act of March 3, 1875, c. 137, § 2, because that statute, by its terms, applies only to a "suit of a civil nature, at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and therefore includes no case in which the right of neither party is capable of being valued in money. See also *Jones v. Seward*, 3 Grant Cas. (Pa.) 431.

1. **Original Limitation of Jurisdiction of Federal Courts.** — *In re McDonald*, 9 Am. L. Reg. 661, 16 Fed. Cas. No. 8,751; *U. S. v. French*, 1 Gall. (U. S.) 1; *Whitten v. Tomlinson*, 160 U. S. 231; *In re Burrus*, 136 U. S. 586; *Ex p. Dorr*, 3 How. (U. S.) 103; Act of Sept. 24, 1789, § 14, 1 U. S. Stat. at L. 81.

The Phrase "Prisoner in Jail" refers to imprisonment in a proceeding in which the state is interested, and this restriction of the authority of the federal courts to grant a writ of habeas corpus is not applicable where the imprisonment is in a civil proceeding in which private citizens only, and not the state, are interested, as in the case of imprisonment of an absconding debtor under execution. *In re Mineau*, 45 Fed. Rep. 188.

2. **Custody under or by Color of Federal Authority or Commitment by Federal Court.** — Rev. Stat. U. S., § 753; *Ex p. Terry*, 128 U. S. 289; *Ex p. Parks*, 93 U. S. 18; *Ex p. Siebold*, 100 U. S. 371; *Ex p. Virginia*, 100 U. S. 339; *Robb v. Connolly*, 111 U. S. 624; *Ex p. Dorr*, 3 How. (U. S.) 103; *Ex p. Milligan*, 4 Wall. (U. S.) 2; *Ex p. Yerger*, 8 Wall. (U. S.) 85; *Ex p. Lange*, 18 Wall. (U. S.) 163; *U. S. v. Hamilton*, 3 Dall. (U. S.) 17; *Ex p. Burford*, 3 Cranch (U. S.) 448; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *Ex p. Kearney*, 7 Wheat. (U. S.) 39; *Ex p. Watkins*, 3 Pet. (U. S.) 193; *In re*

*Kaine*, 14 How. (U. S.) 146; *Ex p. Wells*, 18 How. (U. S.) 307; *Ex p. Farley*, 40 Fed. Rep. 66; *U. S. v. Hanchett*, 18 Fed. Rep. 26; *In re Doo Woon*, 18 Fed. Rep. 808; *In re Stupp*, 12 Blatchf. (U. S.) 501; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439.

**An Alien Immigrant Detained by Order of the Collector of the Port** on board the ship in which he had come to this country, because he did not have a proper certificate entitling him to land, is in custody under and by color of the authority of the United States, so as to give to the United States courts jurisdiction to issue a writ of habeas corpus; and this jurisdiction is not affected by the fact that the collector of the port had passed on the question of allowing such alien to land, or that the treaty between his government and the United States provided for diplomatic action in case of hardship in the operation of the immigration laws of the United States. *U. S. v. Jung Ah Lung*, 124 U. S. 621; *U. S. v. Chung Shee*, 71 Fed. Rep. 277; *Nishimura Ekiu v. U. S.*, 142 U. S. 651.

**A Person Imprisoned in a State Prison under Federal Sentence** is in federal custody, and the state courts cannot interfere therewith by habeas corpus. *Ex p. Le Bur*, 49 Cal. 159.

**A Person Imprisoned for Contempt** by a federal court is in custody under federal authority, and a state court cannot discharge him on habeas corpus whether the federal court had or had not jurisdiction. *Williamson's Case*, 26 Pa. St. 9, 12 Leg. Int. (Pa.) 246, 3 Am. L. Reg. 741.

**Custody Obtained in Extradition Proceedings.** — In the case of interstate extradition, it is held that the right of one state of the Union to demand from another the delivery of a person



by the military authority of the United States. It is now settled that in such cases the federal courts have exclusive jurisdiction,<sup>1</sup> though it was formerly claimed that the state courts had jurisdiction to issue a writ of habeas corpus to release a person unlawfully detained in such custody.<sup>2</sup>

*bb. CUSTODY FOR ACTS DONE OR OMITTED BY FEDERAL AUTHORITY.*—The *second class* is where the prisoner is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof. This provision, now contained in the Revised Statutes of the United States, is substantially a re-enactment of the Act of Congress of 1833, commonly known as the "Force Bill," which was adopted in view of nullification laws of South Carolina, by which an attempt had been made to punish officers of the United States for executing the laws of Congress in that state; but it is now settled that it gives relief to one in state custody, not only when he is held under the laws of the state which seek expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the state which applies to all persons equally, where it appears that he is justified for the act done because it was done in pursuance of federal authority.<sup>3</sup>

who has fled from justice depends on the Constitution of the United States, and the mode of proceeding and the evidence necessary to support such a demand are prescribed by the statutes of the United States. Consequently, it is a case arising under the Constitution and laws of the United States in which the prisoner is in custody under or by color of the authority of the United States, and a writ of habeas corpus may be issued by a federal court to discharge him before he has been returned to the state by which he was demanded, if the extradition proceedings were not in accordance with the law. So far there does not seem to be any conflict of authority. *In re Doo Woon*, 18 Fed. Rep. 898; *Ex p. Smith*, 3 McLean (U. S.) 121, 22 Fed. Cas. No. 12,968.

But the agent of the demanding state appointed to receive and transport the prisoner is not an officer of the United States, and therefore the federal courts have not exclusive jurisdiction to grant a writ of habeas corpus to inquire into the validity of the detention. *Robb v. Connolly*, 111 U. S. 624, *approving In re Robb*, 64 Cal. 431, and *disapproving In re Robb*, 19 Fed. Rep. 26. See also the title EXTRADITION, vol. 12, p. 608.

**After the Prisoner Has Been Returned to the Demanding State** and placed in the custody of its officers, another question arises, viz., whether he can be taken out of that custody by a writ of habeas corpus from a federal court, in case the extradition proceeding was invalid, or in case the state assumes to try him for an offense other than that specified in the requisition. This question will be considered presently. See *infra*, this section, *Custody in Violation of Constitution, Laws, or Treaties of the United States*.

**While the Prisoner Is in Transit** from the state in which he was arrested to the state by which he was extradited, the courts of another state through which he is being carried have no power to discharge him on habeas corpus. *In re Burke*, 19 Alb. L. J. 509, 4 Fed. Cas. No. 2,158.

**Custody in International Extradition Proceedings.**—Where a person is in the custody of a United States marshal in a proceeding of in-

ternational extradition, he is in custody under federal authority, and the state courts have no jurisdiction. *People v. Fiske*, (Supm. Ct. Spec. T.) 45 How. Pr. (N. Y.) 294.

**1. Custody under Military Authority of United States—Jurisdiction of Federal Courts Exclusive.**—*Tarble's Case*, 13 Wall. (U. S.) 397; *In re Neill*, 8 Blatchf. (U. S.) 156. See also *Matter of Beswick*, (Supm. Ct.) 25 How. Pr. (N. Y.) 149. Compare *In re Reynolds*, 20 Fed. Cas. No. 11,721, citing and reviewing numerous authorities, federal and state.

**2. Jurisdiction in Cases of Detention by Military Authority Formerly Claimed by State Courts—Connecticut.**—*Lanahan v. Birge*, 30 Conn. 438.

*Iowa.*—*Ex p. Anderson*, 16 Iowa 595; *Ex p. Holman*, 28 Iowa 88, 4 Am. Rep. 159.

*Massachusetts.*—*McConologue's Case*, 107 Mass. 157.

*New York.*—*People v. Gaul*, 44 Barb. (N. Y.) 98; *Matter of Barrett*, 42 Barb. (N. Y.) 479; *Matter of Carlton*, 7 Cow. (N. Y.) 471; *Matter of Dobbs*, (N. Y. Super. Ct.) 21 How. Pr. (N. Y.) 68.

*Ohio.*—*Matter of Disinger*, 12 Ohio St. 256.

*Pennsylvania.*—*Com. v. Blake*, 8 Phila. (Pa.) 523.

*Wisconsin.*—*In re Tarble*, 25 Wis. 390, 3 Am. Rep. 85; *In re Higgins*, 16 Wis. 351.

**3. Acts Done or Omitted Pursuant to Federal Law, Etc.**—Rev. Stat. U. S., § 753; *In re Fitton*, 45 Fed. Rep. 471; *Ex p. Conway*, 48 Fed. Rep. 77; *In re Huttman*, 70 Fed. Rep. 699; *Ex p. Turner*, 3 Woods (U. S.) 603; *Ex p. Robinson*, 1 Bond (U. S.) 39; *In re Buli*, 4 Dill. (U. S.) 323; *Matter of Titus*, 8 Ben. (U. S.) 411; *Ex p. Smith*, 3 McLean (U. S.) 121; *Ex p. Jenkins*, 2 Wall. Jr. (C. C.) 521; *Ex p. Sifford*, (U. S. Dist. Ct. 1856) 5 Am. L. Reg. 659; *U. S. v. Jailer*, 2 Abb. (U. S.) 265; *Electoral College Case*, 1 Hughes (U. S.) 571; *U. S. v. Morris*, (U. S. Dist. Ct. 1854) 2 Am. L. Reg. 348.

**Force Bill of 1833.**—*U. S. v. Jailer*, 2 Abb. (U. S.) 277; *Ex p. Thompson*, (U. S. Dist. Ct. 1876) 15 Am. L. Reg. N. S. 522. See also *In re Neagle*, 135 U. S. 1.

**Commitment for Contempt by a State Court.**—Federal courts have jurisdiction to grant a writ of habeas corpus in case of a commitment by a

The Arrest of United States Marshals by State Authority for acts done in the performance of the duties of their office, but alleged to be in violation of the laws of the state, furnishes one of the ordinary instances of the exercise of the federal jurisdiction under this head.<sup>1</sup>

cc. CUSTODY IN VIOLATION OF CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES.

— The *third class* of cases is where the prisoner is in custody in violation of the Constitution, or of a law or treaty, of the United States. This provision was added by the Act of Congress of February 5, 1867. It gives power to inquire into the validity of any imprisonment, whether under state or federal authority, and was designed to protect the citizen in his enjoyment of the rights, privileges, and immunities given by the Constitution and laws of the United States, and to secure the paramount authority of the federal courts in all matters where the jurisdiction of the United States is exclusive.<sup>2</sup> This class

state court for contempt, where the acts constituting the alleged contempt were committed in the performance of duties created by the laws of the United States. Electoral College Case, 1 Hughes (U. S.) 571.

1. United States Marshals Arrested by State Authority for Official Acts. — In Kelly v. Georgia, 68 Fed. Rep. 652, it was held that where a United States marshal found it necessary to kill a person on whom he was attempting to serve the process of a federal court, in consequence of which he was arrested by state authority on a charge of murder, the federal courts had jurisdiction to grant a writ of habeas corpus and summarily hear and dispose of the accusation against the marshal as law and justice might require. See also Matter of Engle, 1 Hughes (U. S.) 592; *Ex p.* Jenkins, 2 Wall. Jr. (C. C.) 521; *Ex p.* Sifford, (U. S. Dist. Ct. 1856) 5 Am. L. Reg. 659; U. S. v. Jailer, 2 Abb. (U. S.) 265; U. S. v. Kirby, 7 Wall. (U. S.) 482; U. S. *ex rel.* of Weeden, 2 Flipp. (U. S.) 76; U. S. v. Fullhart, 47 Fed. Rep. 802.

The Mere Fact that an Act Is Done by One as a United States Marshal does not authorize the federal courts to grant him a writ of habeas corpus when he is arrested by state authority because of such act, but the act must have been done under the authority of some law of the United States. Thus it was held that where a marshal, without an order of deportation, seized a Chinaman and carried him out of the country, for which act he was arrested on a charge of kidnapping under the laws of the state, the federal court would not grant a writ of habeas corpus, because such act was not authorized by the laws of the United States. *In re Marsh*, 51 Fed. Rep. 277.

The Neagle Case. — *In re Neagle*, 39 Fed. Rep. 833, *affirmed* 135 U. S. 1, is one of the latest cases in regard to the power of the federal courts to discharge from state custody federal officers held on criminal charges based on official acts, as well as one of the most important and far-reaching in its effect. In this case, Neagle was a deputy United States marshal specially commissioned under orders from the department of justice to protect Mr. Justice Field from any violence on the part of Judge Terry, who had threatened to take his life. Neagle was instructed that he should protect Justice Field at all hazards, and, knowing the violent and desperate character of Terry, that he should be active and alert,

and fully prepared for any emergency, but not to be rash. While Neagle was accompanying Justice Field in this capacity, a meeting with Terry occurred, in which Terry made a violent assault on Justice Field, striking two heavy blows in quick succession. Neagle called on him to desist and as he was striking the third time shot and killed him. Neagle was arrested by the state authorities of California, in which state the homicide occurred, and applied to the Circuit Court of the United States for a writ of habeas corpus. The writ was granted and Neagle was discharged on the ground that the killing of Judge Terry was an act which was to be deemed a part of the performance of a duty devolved on him by the laws of the United States, and therefore was not an offense against the state of California. The decision in the Neagle case has been severely criticised. See Spelling on Extraordinary Relief, § 1172.

2. Custody in Violation of Constitution, etc., of United States. — Rev. Stat. U. S., § 753; *In re Frederick*, 149 U. S. 70; *Ex p.* Terry, 128 U. S. 289; *Ex p.* Royall, 117 U. S. 241; *Ex p.* Fonda, 117 U. S. 516; *In re Loney*, 134 U. S. 372; *In re Wood*, 140 U. S. 278; *Cook v. Hart*, 146 U. S. 183; *New York v. Eno*, 155 U. S. 89; *Pepke v. Cronan*, 155 U. S. 100; *Whitten v. Tomlinson*, 160 U. S. 232; *Griffin's Case*, Chase (U. S.) 364; *In re Devoe*, 1 Lowell (U. S.) 251; *Whitehouse*, Petitioner, 1 Lowell (U. S.) 429; *Matter of Seymour*, 1 Ben. (U. S.) 348; *Ex p.* Kenyon, 5 Dill. (U. S.) 385; *Ex p.* Reynolds, 3 Hughes (U. S.) 559; *In re Rosdeitscher*, 33 Fed. Rep. 657; *Ex p.* Farley, 40 Fed. Rep. 66; *Ex p.* Conway, 48 Fed. Rep. 77; *Ex p.* Hanson, 28 Fed. Rep. 127; *Ex p.* Yung Jon, 28 Fed. Rep. 308; *In re Spickler*, 43 Fed. Rep. 653; U. S. v. Chapel, 54 Fed. Rep. 140; *In re Flinn*, 57 Fed. Rep. 496; *In re Neagle*, 135 U. S. 1, *affirming* 39 Fed. Rep. 833.

State Custody in Violation of Treaty. — *Wildenhus's Case*, 120 U. S. 1, *affirming* 28 Fed. Rep. 924; *In re Race Horse*, 70 Fed. Rep. 598; *In re Wong Yung Quy*, 6 Sawy. (U. S.) 237.

In *Wildenhus's Case*, 120 U. S. 1, *affirming* 28 Fed. Rep. 924, Joseph Wildenhus stabbed and killed one Fijens on board a Belgian ship moored to her wharf in Jersey City. Both parties were subjects of the kingdom of Belgium and domiciled therein. The affair occurred below the deck of the vessel, and no one but members of the crew was present. Wildenhus was arrested and committed to jail



includes prisoners in state custody for violating state laws or municipal ordinances which conflict with the Constitution or any law or treaty of the United States,<sup>1</sup> persons who are restrained of their liberty by a state without due process of law,<sup>2</sup> and persons imprisoned by state authority for crimes within the exclusive jurisdiction of the courts of the United States.<sup>3</sup>

by the public authorities of Jersey City, and an application was made to the Circuit Court of the United States for a writ of habeas corpus to procure his surrender to the Belgian authorities, but it was held that the homicide was an offense against the laws of the state of New Jersey, within whose territorial limits it occurred, and that Wildenhuis was not within the provisions of the statute recited in the text, and also that he was not in custody in violation of the treaty between the United States and the king of Belgium. See further the titles CONSULS, vol. 7, p. 19, note; ALIENS, vol. 2, p. 66, note.

**Persons Held in Slavery by Alaska Indians** are restrained of their liberty contrary to the Constitution and laws of the United States, and may be discharged by the courts of the United States on habeas corpus. *In re Sah Quah*, 31 Fed. Rep. 327. See further the title CONSTITUTIONAL LAW, vol. 6, p. 964, note 1.

**1. Custody under State Statutes in Conflict with Federal Constitution.**—*Minnesota v. Barber*, 136 U. S. 313, affirming 39 Fed. Rep. 641; *Medley*, Petitioner, 134 U. S. 160; *Savage*, Petitioner, 134 U. S. 176; *Ex p. Royall*, 117 U. S. 241; *In re Wong Yung Quy*, 6 Sawy. (U. S.) 237; *In re Brosnahan*, 18 Fed. Rep. 62; *In re Van Vliet*, 43 Fed. Rep. 764; *Ex p. Jervey*, 66 Fed. Rep. 957; *In re Christian*, 39 Fed. Rep. 636.

**If a State Statute Is ex Post Facto**, a person sentenced under it may obtain a writ of habeas corpus from the federal court, because in such case his detention is in violation of the Constitution of the United States. *In re Murphy*, 87 Fed. Rep. 549.

**Where a Constitutional Act Is Amended by One That Is Unconstitutional**, and the amending act does not in terms repeal the original act, a federal court will not discharge a person convicted under the original act, because it will not assume that the state courts will hold the amending act constitutional. *Ex p. Davis*, 21 Fed. Rep. 396.

**Custody by the State Authorities under a Statute in Conflict with the State Constitution** does not authorize the federal courts to grant a writ of habeas corpus, unless the statute also conflicts with the Constitution of the United States. *Andrews v. Swartz*, 156 U. S. 272; *In re Brosnahan*, 18 Fed. Rep. 62, 4 McCrary (U. S.) 1.

**The Imprisonment, by State Authority, of Pilots who have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through South Pass**, though they are not duly licensed and commissioned branch pilots under the laws of Louisiana is imprisonment in violation of the laws of the United States. U. S. *ex rel. Spink*, 19 Fed. Rep. 631.

**An Irreconcilable Antagonism Between the Federal Law and the State Law** under which the prisoner is in custody must be shown in order to authorize the United States court to grant a

writ of habeas corpus to procure his discharge on that ground. *In re Hoover*, 30 Fed. Rep. 51.

**Custody under Municipal Ordinances in a Conflict with Federal Constitution.**—*Yick Wo v. Hopkins*, 118 U. S. 356; *In re Ah Jow*, 29 Fed. Rep. 181; *Stockton Laundry Case*, 26 Fed. Rep. 611; *In re Lee Tong*, 9 Sawy. (U. S.) 333; *In re Parrott*, 6 Sawy. (U. S.) 349; *Laundry Ordinance Case*, 7 Sawy. (U. S.) 526; *In re Wan Yin*, 10 Sawy. (U. S.) 532.

**2. Imprisonment Without Due Process of Law** by state authority deprives the person of his liberty in violation of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law. *Laundry License Case*, 22 Fed. Rep. 701. See also *In re Parrott*, 6 Sawy. (U. S.) 376, 1 Fed. Rep. 481; *In re Ah Lee*, 6 Sawy. (U. S.) 410, 5 Fed. Rep. 899; *Laundry Ordinance Case*, 7 Sawy. (U. S.) 526, 13 Fed. Rep. 229; *In re Lee Tong*, 18 Fed. Rep. 255; *In re Monroe*, 46 Fed. Rep. 52.

But the denial of due process of law must be such that, by reason thereof, the sentencing court was without jurisdiction to pronounce the sentence, and not such as to constitute a mere error which could be cured by an appeal or writ of error. *In re McKnight*, 52 Fed. Rep. 799. See also *In re Taylor*, 12 Chicago Leg. N. 17, 13 West. Jur. 505, 23 Fed. Cas. No. 13,774; *In re Wood*, 140 U. S. 278; *In re Jigiro*, 140 U. S. 291.

**An Error in Passing Sentence** in a criminal case as to the construction of statutes, etc., is not a denial of due process of law which can be corrected by habeas corpus in a federal court. *In re Maldonado*, 63 Fed. Rep. 825.

**A Denial of Due Process of Law** or a deprivation of any right, privilege, or immunity secured by the Constitution of the United States which will authorize interference by habeas corpus from a federal court does not occur where a reprieve extending beyond the time authorized by the state constitution has been granted to a person under sentence of death, and the sentence is afterwards ordered to be carried out. *Lambert v. Barrett*, 157 U. S. 697.

**Custody After the Vacation of the Judgment of the State Court** under which the prisoner was held is not in violation of a law of the United States, whatever may have been the ground of the judgment. *In re Shaner*, 39 Fed. Rep. 869.

**Defective Indictment in State Court.**—The insufficiency of an indictment in a state court to charge the crime of which the defendant was convicted is not a ground for a federal court to interfere by writ of habeas corpus. *Kohl v. Lehlback*, 160 U. S. 293; *Bergemann v. Backer*, 157 U. S. 655.

**3. Imprisonment by State Authorities for Crime Committed in a Navy Yard** over which the United States has exclusive jurisdiction is a deprivation of liberty under the laws of the United States, and the prisoner will be released by a



**Custody Obtained in Extradition Proceedings.** — Where a state has obtained the custody of a prisoner under proceedings of interstate extradition, the question has frequently been raised whether the federal courts have power to discharge him by means of a writ of habeas corpus, on the ground that he is held in violation of the Constitution and laws of the United States, in case the extradition proceedings were illegal, or in case the state assumes to try the prisoner on a charge other than that specified in the requisition. There has been some conflict of opinion in regard to this question, but it now seems to be the well-settled rule that in such case the federal courts have no jurisdiction, but that the remedy of the prisoner, if any, is by appeal or writ of error.<sup>1</sup>

In a Case of International Extradition the matter is usually regulated by the extradition treaty.<sup>2</sup>

*dd.* **CUSTODY OF FOREIGNERS WHERE LAW OF NATIONS IS INVOLVED.** — The *fourth class*, created by the Act of Congress of August 29, 1842, is where a person who is a subject or citizen of a foreign state, and domiciled therein, is in custody for any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations.<sup>3</sup>

federal court on habeas corpus. *Ex p.* Tatem, 1 Hughes (U. S.) 588.

**Counterfeiting United States Money** is a crime of which the federal courts have exclusive jurisdiction, and a person imprisoned under a conviction of this crime by a state court will be discharged on habeas corpus. *Ex p.* Houghton, 7 Fed. Rep. 657.

**Perjury Committed in a Judicial Proceeding under Federal Authority** is within the same principle. *Ex p.* Dock Bridges, 2 Woods (U. S.) 428, 4 Fed. Cas. No. 1,862. See also *In re* Loney, 134 U. S. 372.

**1. Custody Obtained in Extradition Proceedings.** — The case of *Lascelles v. Georgia*, 148 U. S. 537, affirming 90 Ga. 347, seems to settle authoritatively the proposition that where a person has been extradited from one state to another and put on trial in the demanding state on a charge other than that specified in the requisition he is not held in custody by the state in violation of the Constitution and laws of the United States. See also the title EXTRADITION, vol. 12, p. 606.

In *In re Moore*, 75 Fed. Rep. 821, a District Court of the United States refused to grant a writ of habeas corpus to discharge the petitioner from custody on the ground that his extradition had been obtained by means of false affidavits showing that he was a fugitive from justice, because, said the court, "the executive warrant has performed its office. The petitioner is not held in virtue of it. His imprisonment is not illegal unless his extradition makes it so, and an illegal extradition is no greater violation of his rights of person than his forcible abduction. If a forcible abduction from another state, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged, as held in *Mahon v. Justice*, 127 U. S. 712, and in *Ker v. Illinois*, 119 U. S. 437, no more is the objection allowed if the abduction has been accomplished under the forms of law." See also *U. S. v. Johnson*, 1 N. J. L. J. 162, 26 Fed. Cas. No. 15,487; *Eaton v. West Virginia*, 91 Fed. Rep. 760; *Ex*

*p.* Skiles, 50 Fed. Rep. 524. In the case last cited it was held that where the prisoner has been convicted in the state court on a charge other than that specified in the requisition, his remedy is by appeal or writ of error and not by a writ of habeas corpus to a federal court.

As to the opposite view, see *In re Fitton*, 45 Fed. Rep. 471; *In re Baruch*, 41 Fed. Rep. 472; *U. S. v. Lawrence*, 13 Blatchf. (U. S.) 295.

**For a Full Discussion** of the question as to whether a person who has been extradited from one state to another can be tried for an offense other than that for which he was extradited, see the title EXTRADITION, vol. 12, p. 606.

**2. International Extradition.** — *Cosgrove v. Winney*, 174 U. S. 64. See also *U. S. v. Rauscher*, 119 U. S. 407.

**3. Custody of Foreigners Where Law of Nations Is Involved.** — Rev. Stat. U. S., § 753.

This provision arose out of the celebrated case of *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328, 25 Wend. (N. Y.) 483, in which Alexander McLeod, charged in a state court of New York with murder, had pleaded that he was a British subject; that what he had done was under the authority of his government, and should be a matter of international adjustment; and that he was not subject to be tried by a court of New York. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was afterwards tried and acquitted. Congress then passed the act conferring on the federal courts power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended on the law of nations. *In re Neagle*, 135 U. S. 1.

**Acts Done under Extradition Warrant.** — In *In re Bull*, 4 Dill. (U. S.) 323, it was held that carrying a person out of a state under a warrant of interstate extradition was an act done

*cc.* HABEAS CORPUS AD TESTIFICANDUM. — The *fifth and last class*, which, like the first, was one of those specified in the original Judiciary Act, is where it is necessary to bring the prisoner into court to testify.<sup>1</sup>

*ff.* STATE CUSTODY IN OTHER CASES INVOLVING RIGHTS UNDER UNITED STATES CONSTITUTION, ETC. — The power of the United States courts, by means of a writ of habeas corpus, to discharge a person imprisoned under the process of a state court, rests solely on the special grounds enumerated above;<sup>2</sup> and those special grounds do not exist merely because the case involves questions arising under the Constitution and laws of the United States, if the state court has jurisdiction of the person of the prisoner and of the offense with which he is charged, because the state courts are under the same high obligation to support, construe, and give effect to the Constitution of the United States that the federal courts are, and an erroneous decision of such questions no more affects the jurisdiction of the court than would an erroneous ruling on any other question of law arising in the case.<sup>3</sup> The difference between cases falling within this rule, and cases where the prisoner is held for trial in a state court under a state statute which conflicts with the Constitution of the United States, is that in the one case the denial by the state court of any right which the prisoner may have under the Constitution or laws of the United States involves only an error of law which he may have corrected by an appeal or writ of error in the highest court of the state, and finally in the Supreme Court of the United States; while in the other the state court is entirely without jurisdiction to detain him, because an unconstitutional law is absolutely void, and a conviction under it is not merely erroneous, but is illegal and void.<sup>4</sup>

in pursuance of a law of the United States within the meaning of the laws relating to the writ of habeas corpus. In this case the relator was the messenger appointed to receive one Blair, under a requisition made by the governor of Illinois on the governor of Nebraska. Instead of taking Blair directly to Illinois, the relator carried him to the city of St. Louis, Mo., thence to New York, and thence to England, where he was arrested. On his discharge by the English authorities, Blair returned to Nebraska and procured an indictment against the relator on a charge of kidnapping. The relator thereupon obtained a writ of habeas corpus from a judge of the District Court of the United States, and he was discharged from the custody of the state authorities on the ground that what he did in the state of Nebraska was done under the authority of the extradition proceedings, the evidence showing, in the opinion of the district judge, that the relator's subsequent act in carrying Blair to England was pursuant to a plan conceived after he had taken Blair out of Nebraska.

**Acts Done by Military Officer of Confederate States.** — In *Ex p. McCann*, 5 Am. L. Reg. N. S. 158, note, 15 Fed. Cas. No. 8,679, the petitioner, McCann, was a major in the Confederate army, and after the war took the oath prescribed in the amnesty proclamation of the President, of May 29, 1865. Subsequently he was arrested and committed to jail by the state authorities of Tennessee to answer an indictment for the murder of one Haun, who during the war was tried by a court martial of which the petitioner was a member, and was executed for being a secret active enemy of the Confederate states, and as such having engaged in acts not of regular warfare. Mc-

Cann thereupon applied to the District Court of the United States for a writ of habeas corpus, but the application was denied on the ground that none of the circumstances existed which would give jurisdiction to a federal court where the custody was under the process of a state court.

**1. Bringing Prisoner into Court to Testify.** — Rev. Stat. U. S., § 753; *Ex p. Dorr*, 3 How. (U. S.) 103.

United States commissioners, under the Act of 1812, c. 25, § 1, and the Act of 1817, c. 203, have no power to issue a writ of habeas corpus *ad testificandum*. *Ex p. Barnes*, 1 Sprague (U. S.) 133.

**2. Federal Courts May Issue Writ Only in Cases Specified by Statute.** — *In re Humason*, 46 Fed. Rep. 388.

**3. Federal Question Alone Does Not Give Jurisdiction to Discharge Prisoner Held by State Authority.** — *Robb v. Connolly*, 111 U. S. 624; *Ex p. Bigelow*, 113 U. S. 328; *Ex p. Harding*, 120 U. S. 782; *Ex p. Ulrich*, 43 Fed. Rep. 661. See also *Ex p. Watkins*, 3 Pet. (U. S.) 193; *Ex p. Parks*, 93 U. S. 18; *Ex p. Yarbrough*, 110 U. S. 651; *Ex p. Crouch*, 112 U. S. 178; *In re Enslow*, 45 Fed. Rep. 351.

For a further discussion of the proposition that the writ of habeas corpus will not lie to correct mere errors in a judgment or proceeding, where the court had jurisdiction, see *infra*, this title, *Grounds of Remedy* — *Custody under the laws of the United States*.

**4. Distinction Between Cases Involving Federal Question and Cases under Unconstitutional State Statutes.** — *Ex p. Royall*, 117 U. S. 241; *Ex p. Bigelow*, 113 U. S. 328; *Ex p. Yarbrough*, 110 U. S. 651; *Ex p. Siebold*, 100 U. S. 371; *Ex p. Ulrich*, 43 Fed. Rep. 661.



(4) *Discretionary Power to Refuse Writ.* — While the courts of the United States have power on habeas corpus to inquire into the cause of the detention of any one claiming to be restrained of his liberty in violation of the Constitution, laws, or treaties of the United States, it was not intended by Congress that they should thereby obstruct the ordinary administration of the criminal laws of the states through their own tribunals; and therefore, where a person is in custody under process from a state court of original jurisdiction, for an alleged offense against a statute of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, because such state statute is unconstitutional, the federal court has a discretion, subordinate to any special circumstances requiring immediate action, whether it will discharge him on habeas corpus in advance of his trial in the state court. When the state court shall have finally acted on the case, the federal court still has a discretion whether, under all the circumstances, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States. And so, too, after the final disposition of the case by the highest court of the state, the federal court may in its discretion put the party to whom has been denied a right, privilege, or immunity claimed under the Constitution or laws of the United States, to his writ of error from the Supreme Court of the United States, rather than interfere by writ of habeas corpus.<sup>1</sup> Especially is this true where the federal court to which the application for the writ is made is in doubt as to whether the petitioner has been deprived of his liberty in violation of the Constitution of the United States.<sup>2</sup> And where the petitioner is in custody under a state statute which has never been declared constitutional by the state courts, the federal court may in its discretion refuse to grant a writ of habeas corpus until relief has been denied in the state courts;<sup>3</sup> but if the state courts have already held that the statute is constitutional, a person imprisoned under it is entitled to his remedy by habeas corpus from a federal court without resorting to an appeal to or writ of error from the court of last resort of the state.<sup>4</sup> In other cases, where the federal courts have jurisdiction, and it is shown that the petitioner is illegally restrained of his liberty, it seems that no discretion can

1. *Discretionary Power of Federal Courts to Refuse Writs of Habeas Corpus.* — *In re Wood*, 140 U. S. 278; *Whitten v. Tomlinson*, 160 U. S. 231; *Ex p. Royall*, 117 U. S. 241; *McElvaine v. Brush*, 142 U. S. 155; *In re Friedrich*, 51 Fed. Rep. 747, 149 U. S. 70; *New York v. Eno*, 155 U. S. 89; *Bergemann v. Backer*, 157 U. S. 655; *Pepke v. Cronan*, 155 U. S. 100; *In re Duncan*, 139 U. S. 449; *Ex p. Hanson*, 28 Fed. Rep. 127; *Ex p. Yung Jon*, 28 Fed. Rep. 308; *In re Ah Jow*, 29 Fed. Rep. 181; U. S. v. *Fiscus*, 42 Fed. Rep. 395; *In re King*, 51 Fed. Rep. 434; U. S. v. *Chapel*, 54 Fed. Rep. 140; *In re Flinn*, 57 Fed. Rep. 496; *Nesbit v. Hert*, 91 Fed. Rep. 123; *Eaton v. West Virginia*, 91 Fed. Rep. 760; U. S. v. *McAleese*, 93 Fed. Rep. 656.

When no reason is shown why the prisoner may not fully and fairly present the question by appeal or otherwise to the state courts, and carry it thence, should the decision be adverse, to the United States Supreme Court by writ of error, the writ of habeas corpus will be denied. *Ex p. Fonda*, 117 U. S. 516; *In re Wood*, 140 U. S. 286; *Cook v. Hart*, 146 U. S. 183; *In re Welch*, 57 Fed. Rep. 576.

It is certainly the better practice in cases of this kind to put the prisoner to his remedy by

writ of error from the Supreme Court of the United States, under Rev. Stat. U. S., § 709, than to award him a writ of habeas corpus. *In re Frederich*, 149 U. S. 70. See also *Baker v. Grice*, 169 U. S. 284, and the remarks of Mr. Chief Justice Waite in *Ex p. Crouch*, 112 U. S. 178. Compare *Medley, Petitioner*, 134 U. S. 160, in which a proceeding by habeas corpus was entertained, though a writ of error could have been prosecuted.

As to What Constitute Special Circumstances within the rule stated in the text, so as to justify a federal court in granting a writ of habeas corpus to a person who is in custody under a process of a state court, on a charge of violating the state laws, see *In re Loney*, 134 U. S. 372; *Ex p. Kieffer*, 40 Fed. Rep. 399; *Ex p. Jervey*, 66 Fed. Rep. 957.

2. Doubt as to Whether State Custody Is in Violation of United States Constitution. — *In re Spickler*, 43 Fed. Rep. 653.

3. Exhausting Remedy in State Courts When Statute Has Not Been Held Constitutional. — U. S. v. *Ronan*, 33 Fed. Rep. 117. See also *Baker v. Grice*, 169 U. S. 285.

4. Rule when Statute Has Been Upheld by State Courts. — *Dreyer v. Pease*, 88 Fed. Rep. 978. See also *Crowley v. Christensen*, 137 U. S. 86.



be exercised against granting the writ;<sup>1</sup> but the rule is laid down by the federal courts that it is with hesitation that they will interfere at any time with convictions which have been had before state courts of general jurisdiction.<sup>2</sup>

(5) *What Federal Courts May Issue Writ* — (a) **Circuit, District, and Territorial Courts.** — The Circuit and District Courts of the United States are expressly authorized by statute to issue writs of habeas corpus.<sup>3</sup>

Most, if Not All, of the Territories have enacted statutes conferring such authority on their courts,<sup>4</sup> and the existence of this jurisdiction is recognized by a provision of the Revised Statutes of the United States for the review by the Supreme Court of the decisions of the territorial court or judges in habeas corpus cases.<sup>5</sup>

(b) **Circuit Court of Appeals.** — The statute creating the Circuit Court of Appeals does not mention the writ of habeas corpus,<sup>6</sup> but the court has declared that it has jurisdiction to issue the writ.<sup>7</sup>

(c) **Supreme Court.** — In order to determine the jurisdiction of the Supreme Court of the United States to issue writs of habeas corpus, the acts of Congress relating to the subject must be considered in connection with the provision of the constitution defining the jurisdiction of that court. The statutes provide merely that the Supreme Court and the Circuit and District Courts and the several justices and judges of said courts shall have power to issue writs of habeas corpus.<sup>8</sup> The constitution, in declaring the judicial power of the United States, and the original and appellate jurisdiction of the Supreme Court,<sup>9</sup> makes no mention of the writ of habeas corpus, but its existence as a remedy in a proper case is recognized by the provision in regard to its suspension.<sup>10</sup> It is accordingly held that the jurisdiction of the Supreme Court to issue writs of habeas corpus, except in "cases affecting ambassadors or other public ministers and consuls," etc., is appellate in its nature; that is, its jurisdiction exists only where the detention of the party is under the authority of a tribunal whose proceedings are subject to review by the

1. **When Court Has No Discretion to Refuse Writ.** — *In re* Farley, 40 Fed. Rep. 66, the petitioner was indicted by a grand jury impaneled by the federal court, without authority of law. It was held that a conviction under such indictment and a sentence of imprisonment constituted a restraint of liberty without due process of law and contrary to the Constitution and laws of the United States, that the writ of habeas corpus in such case became a writ of right, and that the court having the power to issue it could exercise no discretion in regard thereto.

2. *In re* Jordan, 49 Fed. Rep. 238.

3. **Jurisdiction of Circuit and District Courts.** — *Baker v. Grice*, 169 U. S. 284; *Ex p.* Milligan, 4 Wall. (U. S.) 2; *In re* Bryant, Deady (U. S.) 118; *Matter of McDonald*, 9 Am. L. Reg. 661; *Ex p.* Kenyon, 5 Dill. (U. S.) 385, 14 Fed. Cas. No. 7,720; *Laundry License Case*, 22 Fed. Rep. 701; *Ex p.* Reardon, 2 Cranch (C. C.) 639; *Matter of Allen*, 13 Blatchf. (U. S.) 271; *Bennett v. Bennett*, Deady (U. S.) 299; *U. S. v. Crook*, 5 Dill. (U. S.) 453; *Matter of Quong Woo*, 9 Pac. Coast L. J. 815; *In re* Buell, 3 Dill. (U. S.) 116; *Matter of Winder*, 2 Cliff (U. S.) 79; *Nelson v. Cutter*, 1 McAll. (U. S.) 127; *Ex p.* Des Rochers, 1 McAll. (U. S.) 68.

4. **Jurisdiction of Territorial Courts.** — See the various territorial codes and statutes. See also *U. S. v. Burdick*, 1 Dak. 142; *U. S. v. Imoda*, 4 Mont. 38.

**District of Columbia.** — Any justice of the Su-

preme Court of the District of Columbia may issue a writ of habeas corpus at chambers and in vacation. *In re* Poole, 2 MacArthur (D. C.) 583, 29 Am. Rep. 628.

5. **Jurisdiction of Territorial Courts Recognized by Federal Statutes.** — Rev. Stat. U. S., § 1909; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263; *Ex p.* Kenyon, 5 Dill. (U. S.) 385.

6. **Circuit Court of Appeals — Not Expressly Authorized by Statute to Issue Writ of Habeas Corpus.** — 26 U. S. Stat. at L. 826, c. 517.

7. **Jurisdiction of Circuit Court of Appeals to Issue Writ Asserted.** — *In re* Buskirk, 25 U. S. App. 613. See the earlier case of *In re* Boles, 15 Fed. Rep. 75, where the question was raised but not determined.

8. **Supreme Court Authorized by Statute to Issue Writs of Habeas Corpus.** — Rev. Stat. U. S., §§ 751, 752; *Ex p.* Bollman, 4 Cranch (U. S.) 75; *Ex p.* Watkins, 3 Pet. (U. S.) 193. See also *U. S. v. Hamilton*, 3 Dall. (U. S.) 17; *Ex p.* Kearney, 7 Wheat. (U. S.) 38; *Ex p.* Milburn, 9 Pet. (U. S.) 704; *Ex p.* Watkins, 3 Pet. (U. S.) 193.

9. Const. U. S., art. 3, § 2, paragraphs 1 and 2. See the title UNITED STATES COURTS.

10. The Only Mention of the Writ in the Constitution is contained in the clause which provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Const. U. S., art. 1, § 9, par. 2.

Supreme Court,<sup>1</sup> and not where the detention is by a private person in his or her individual capacity.<sup>2</sup> It is not necessary, however, that the commitment should have been made by a tribunal whose decisions are subject to review by the Supreme Court, but it is sufficient if such inferior tribunal has examined into the cause of detention and remanded the prisoner in custody, though the original detention was not by the authority of any tribunal over which the Supreme Court exercised revisory powers.<sup>3</sup> Neither is it necessary that the proceeding against the prisoner in the inferior court should be one which may be reviewed on an appeal or writ of error. It is the general revisory power of the Supreme Court which gives jurisdiction to it to review the acts of inferior courts in depriving persons of their liberty, in order to see that none may be unlawfully detained.<sup>4</sup>

But the Writ Cannot Be Used as a Mere Writ of Error for the correction of errors in the judgment or proceedings under and by virtue of which a party has been imprisoned.<sup>5</sup>

**1. Supreme Court Issues Writs of Habeas Corpus Only in Exercise of Appellate Jurisdiction.**—*Ex p. Kearney*, 7 Wheat. (U. S.) 38; *Ex p. Milburn*, 9 Pet. (U. S.) 704; *Ex p. Hung Hang*, 108 U. S. 552; *Ex p. Siebold*, 100 U. S. 371; *Ex p. Virginia*, 100 U. S. 339; *Ex p. Parks*, 93 U. S. 18; *Ex p. Lange*, 18 Wall. (U. S.) 163; *Ex p. Yerger*, 8 Wall. (U. S.) 85; *Ex p. Watkins*, 3 Pet. (U. S.) 193, 7 Pet. (U. S.) 568; *Marbury v. Madison*, 1 Cranch (U. S.) 175; *Ex p. Burford*, 3 Cranch (U. S.) 448; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *Ex p. Barry*, 2 How. (U. S.) 65; *Matter of Metzger*, 5 How. (U. S.) 189; *Ex p. Wilson*, 114 U. S. 417, 4 Am. Crim. Rep. 283; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738; *Ex p. Madrazzo*, 7 Pet. (U. S.) 627; *U. S. v. Hamilton*, 3 Dall. (U. S.) 17; *In re Kaine*, 14 How. (U. S.) 103.

The doctrine of the constitution and of the decisions under it as to the exercise of appellate jurisdiction by means of the writ of habeas corpus may be summed up in these propositions: (1) The original jurisdiction of the court cannot be extended by Congress to any other cases than those expressly defined by the constitution. (2) The appellate jurisdiction conferred by the constitution extends to all other cases within the judicial power of the United States. (3) This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations, as Congress, in the exercise of its discretion, has made or may see fit to make. (4) Congress not only has not excepted writs of habeas corpus and mandamus from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs. *Ex p. Yerger*, 8 Wall. (U. S.) 85.

**Commitment by United States Commissioner.**—In *In re Kaine*, 14 How. (U. S.) 103, it was said that since the Supreme Court of the United States has no appellate jurisdiction by means of an appeal, writ of error, or other proceeding over a United States commissioner, acting under the authority of an Act of Congress, or under color of such authority, it has no power to issue a writ of habeas corpus on the application of a person committed by such commissioner. But see *Ex p. Yerger*, 8 Wall. (U. S.) 85, in which case it was said that in *Kaine's* case all the judges except one asserted directly or indirectly the jurisdiction of the Supreme Court to give relief in a case where the deten-

tion was by order of a United States commissioner.

**Commitment by District Judge Exercising Special Powers.**—In *Matter of Metzger*, 5 How. (U. S.) 176, it was held that a writ of habeas corpus could not be allowed by the Supreme Court to examine a commitment by a district judge at chambers under the extradition treaty between the United States and France, because such judge, in ordering the commitment, exercised a special authority and the law had made no provision for a revision of his judgment.

**2. Detention by Private Persons.**—In *Ex p. Barry*, 2 How. (U. S.) 65, the petitioner, a British subject, applied to the Supreme Court of the United States for a writ of habeas corpus to bring up the body of his infant daughter alleged to be unlawfully detained from him by Mrs. Mary Mercein, a grandmother of the child, in New York. It was held that inasmuch as the case was one of a private individual who was an alien seeking redress for the supposed wrong done to him by another private individual who was a citizen of New York, it was plain that the Supreme Court had no jurisdiction, because the case did not come within either of the classes of cases in which the constitution gives original jurisdiction to the Supreme Court.

**3. Detention by Tribunal Not Reviewable by Supreme Court—Court Martial.**—*Ex p. Yerger*, 8 Wall. (U. S.) 85.

**4. Judgment Not Reviewable on Appeal or Error.**—*Ex p. Siebold*, 100 U. S. 371. See also *Ex p. Reed*, 100 U. S. 13.

**In Criminal Cases** the Supreme Court of the United States has no jurisdiction to review, on appeal or writ of error, judgments of the Circuit or District Courts of the United States. Such judgments may be reviewed by writs of habeas corpus, but the jurisdiction of the Supreme Court is limited to the question of the power of the court below to try or commit the prisoner for the act of which he has been convicted, and mere errors or irregularities in the proceeding or the judgment cannot be considered. *Ex p. Curtis*, 106 U. S. 371; *Ex p. Carll*, 106 U. S. 521; *Ex p. Reed*, 100 U. S. 13; *Ex p. Virginia*, 100 U. S. 339; *Ex p. Harding*, 120 U. S. 782; *Ex p. Rowland*, 104 U. S. 604; *Ex p. Lange*, 18 Wall. (U. S.) 163.

**5. Habeas Corpus Cannot Be Used for Purposes**



If a Justice of the Supreme Court Grants the Writ in a case involving the exercise of appellate power, and he finds the questions involved to be of great moment and difficulty, he may postpone the case for the consideration of the whole court, instead of hearing and disposing of it himself.<sup>1</sup>

**Discretionary Power to Refuse Writ.** — Since the enactment of the statute authorizing appeals to the Supreme Court from the judgments of the Circuit Courts in habeas corpus cases, the Supreme Court will not issue such a writ, even if it has power, in cases where it may as well be done in the proper Circuit Court, if there are no special circumstances in the case making direct action or intervention by the Supreme Court necessary or expedient.<sup>2</sup> Nor will the writ be awarded where it appears on the petitioner's own showing that if he were brought into court and the cause of his commitment inquired into, he would be remanded to prison.<sup>3</sup>

(6) *Power of Federal Judges Out of Court.* — The Revised Statutes of the United States expressly provide that the several justices and judges of the Supreme Court and the Circuit and District Courts shall have power within their respective jurisdictions to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty, and this provision gives to them the power to issue the writ in vacation and at chambers.<sup>4</sup>

*b. STATE COURTS* — (1) *In General.* — The state courts of general original jurisdiction are common-law courts of record, and, therefore, have jurisdiction to issue writs of habeas corpus independently of any statutory authorization,<sup>5</sup> wherein they differ from the federal courts, which, as has already been observed, are purely of statutory creation and have only such powers as are conferred on them by statute.<sup>6</sup> But in most if not in all of the states of the Union the various constitutions and statutes expressly designate the courts and judicial officers by whom the writ may be issued.<sup>7</sup>

(2) *State Courts and Judicial Officers Authorized to Issue Writ* — (a) *Courts of Original Jurisdiction and Judges Thereof.* — It is generally provided by the various state constitutions and statutes that all the courts of general original jurisdiction and the judges thereof at chambers or in vacation may issue writs of habeas corpus, and this power is usually conferred on inferior courts and judges also.<sup>8</sup> In some states the statutes do not specify the cases in which

of Writ of Error. — See *infra*, this title, *Grounds of Remedy — Custody under Judgments or Order of Court — Errors and Irregularities.*

1. *Justices of Supreme Court — Postponing Case for Consideration of Whole Court.* — *Ex p. Clarke*, 100 U. S. 399.

2. *Discretionary Power to Refuse Writ — Effect of Statute Authorizing Appeals.* — *Ex p. Mirzan*, 119 U. S. 584; *In re Huntington*, 137 U. S. 63; See also *Wales v. Whitney*, 114 U. S. 564; *Ex p. Royall*, 117 U. S. 241.

3. *Refusal When It Appears that Writ Will Be Unavailing.* — *Ex p. Terry*, 128 U. S. 289; *Ex p. Kearney*, 7 Wheat. (U. S.) 38; *Ex p. Watkins*, 3 Pet. (U. S.) 193; *Ex p. Milligan*, 4 Wall. (U. S.) 2.

4. *Power of Federal Judges in Vacation and at Chambers.* — Matter of McDonald, 9 Am. L. Reg. 661; *Ex p. Clarke*, 100 U. S. 403; Rev. Stat. U. S., § 752.

*Jurisdiction of Judges Out of Court Limited to Their Geographical Divisions.* — *Ex p. Graham*, 4 Wash. (U. S.) 211; Rev. Stat. U. S., § 752. Compare *Ex p. Sloan*, 4 Sawy. (U. S.) 330; *Collier's Case*, 6 Op. Atty Gen. 101; *Ex p. Howard*, 4 Dill. (U. S.) 380; *Ex p. Kenyon*, 5 Dill. (U. S.) 385.

*Circuit Judge Has Power to Issue the Writ at*

*Chambers and in Vacation.* — *In re Callicot*, 8 Blatchf. (U. S.) 89.

A Justice of the Supreme Court is not subject to any geographical limitation in his power to issue the writ of habeas corpus, but he may exercise such power wherever he may hear the case, though he is not in the circuit to which he has been assigned. If questions of great moment and difficulty are involved and the case is one within the jurisdiction of the Supreme Court, he may postpone it to be heard by the court, but he has the power to hear and determine it alone. *Ex p. Clarke*, 100 U. S. 399. See also *Ex p. Barnes*, 1 Sprague (U. S.) 133; *In re Kaine*, 14 How. (U. S.) 103.

5. *Jurisdiction of State Courts of General Original Jurisdiction.* — See the title JURISDICTION.

6. See *supra*, this section, *Federal Courts — Source of Federal Jurisdiction.*

7. See *infra*, this section, *State Courts and Judicial Officers Authorized to Issue Writ.*

8. *State Courts of Original Jurisdiction — Alabama.* — Power to issue the writ of habeas corpus is given, by the Alabama statute, to the judges of the following courts, the Circuit Court, *Ex p. State*, 51 Ala. 60; *Ex p. Chaney*, 8 Ala. 424; the Court of Chancery, *Ex p.*



the writ may be granted, but merely name the courts and judges who may

Chaney, 8 Ala. 424; and the County Court, *Morrow v. Bird*, 6 Ala. 834; except in the case of a prisoner committed for a felony, *State v. Guest*, 6 Ala. 778. The probate judge also is authorized to issue the writ. *Ex p. Champion*, 52 Ala. 311; *Ex p. Ray*, 45 Ala. 15; *Ex p. Hill*, 38 Ala. 429; *Ex p. Mahone* 30 Ala. 49, 68 Am. Dec. 111. *Compare Hale v. State*, 24 Ala. 80.

*Arkansas*.—A judge of the Circuit Court has full power, either as a chancellor or a common-law judge, to issue, hear, and determine a habeas corpus either in vacation or term time. *Wright v. Johnson*, 5 Ark. 687; *Ex p. Jackson*, 45 Ark. 158.

*California*.—Jurisdiction in habeas corpus proceedings is given to the judge of every court of record in California. *Matter of Perkins*, 2 Cal. 424.

*Colorado*.—General jurisdiction in habeas corpus cases is given to the District Courts of Colorado and the judges thereof. *Cooper v. People*, 13 Colo. 368. By a statute of 1879 power to issue the writ was conferred on the County Courts in certain specified cases. *Evans v. Bowers*, 13 Colo. 511.

*Florida*.—The Circuit Court or a judge thereof may issue the writ under the Florida statute. *Ex p. Harfourd*, 16 Fla. 283.

*Georgia*.—Besides the judges of the Superior Courts to whom is given general jurisdiction in the matter (2 Code Ga. 1895, § 4321, subd. 1), writs of habeas corpus may be issued by County Court judges, *Chapman v. Woodruff*, 34 Ga. 91; *Broomhead v. Chisholm*, 47 Ga. 390; and the Ordinaries, *Moore v. Roberson*, 63 Ga. 506. But the power of the Ordinary does not include cases of persons charged with felony, and it is not vested in the Court of Ordinary, but is vested in the Ordinary as an inferior judicatory or special habeas corpus court. *Moore v. Roberson*, 63 Ga. 506.

*Idaho*.—The district judges at chambers have power to issue the writ. *In re Dowling*, (Idaho 1896) 43 Pac. Rep. 871.

*Illinois*.—The Illinois statutes confer jurisdiction on the Circuit Courts and the judges thereof in vacation. *Matson v. Swanson*, 131 Ill. 255.

The Criminal Court of Cook county also has jurisdiction to issue the writ in cases of persons held under criminal charges. *People v. Bradley*, 60 Ill. 390.

*Indiana*.—The Circuit, Superior, and Criminal Courts of Indiana, and the judges thereof, are authorized to issue the writ of habeas corpus. *John v. Emmert*, 62 Ind. 533; *Copeland v. State*, 60 Ind. 394; *Ex p. Wiley*, 36 Ind. 528; *Horner's Stat. Ind.* (1896), §§ 1109, 1110. Formerly this power was vested in the Court of Common Pleas, whose jurisdiction was transferred to the Circuit Court by *Horner's Stat. Ind.* (1896), § 1335. *Miller v. Snyder*, 6 Ind. 1.

*Kansas*.—The Probate Court of Kansas has full authority to allow writs of habeas corpus and to inquire into the legality of proceedings under which a person is restrained of his liberty. In that respect it has equal power with the District and the Supreme Courts. *In re Crandall*, 59 Kan. 671.

*Kentucky*.—The Habeas Corpus Act pro-

vides that the writ may be issued by a judge of a Circuit Court, or any Chancery Court, during the sitting of the respective courts, or in vacation. *Bethuram v. Black*, 11 Bush (Ky.) 628.

If there is no judge of the Circuit or Chancery Court at the time in the county, a police judge of any city or town, or a judge of the County Court, is authorized to issue the writ. *Haggard v. Com.*, 79 Ky. 366; *Bethuram v. Black*, 11 Bush (Ky.) 628. But a police judge has no power to discharge a prisoner who has been convicted in the Circuit Court. *Haggard v. Com.*, 79 Ky. 366.

Justices of the peace, in the absence from the county of all the judges enumerated above, may grant the writ in Kentucky, and formerly they could do so though the circuit judge was in the county at the time when the application was made. *Com. v. Leight*, 1 B. Mon. (Ky.) 107; *Ready v. Com.*, 9 Dana (Ky.) 38. But under the present statute they can exercise this power only when all the judges named in the statute are absent from the county. *Bethuram v. Black*, 11 Bush (Ky.) 628; *Bullitt's Crim. Code Ky.* (1895), § 399.

As to the courts and judges generally to whom power to issue the writ of habeas corpus is given by the Kentucky statutes, see *Bullitt's Crim. Code Ky.* (1895), § 399.

*Louisiana*.—Judges of the District Court may issue the writ. *In re Strickland*, 41 La. Ann. 324.

*Maryland*.—The Circuit Courts for the respective counties of the state and the several judges thereof out of court, the Superior Court of the city of Baltimore, the Court of Common Pleas of said city, the Circuit Court of said city, and the Baltimore City Court, and the judges of said courts out of court, are authorized to issue writs of habeas corpus. *Glenn's Petition*, 54 Md. 572; *Ex p. Maulsby*, 13 Md. 625; *Ex p. O'Neill*, 8 Md. 227; *State v. Mace*, 5 Md 337; *Pub. Gen. Laws Md.* (1888), art. 42, § 1.

*Massachusetts*.—The Revised Statutes, c. 111, § 8, gave authority to a judge of a Court of Common Pleas, a judge of probate, or two justices of the quorum to issue writs of habeas corpus, returnable before the Supreme Judicial Court, or any justice thereof; but a judge of a Court of Common Pleas could issue the writ only when no one of the justices of the Supreme Judicial Court was known to be within ten miles. *Com. v. Moore*, 19 Pick. (Mass.) 339; *Wyeth v. Richardson*, 10 Gray (Mass.) 240.

The present statute is substantially the same; that is, it provides that the writ may be issued by the Supreme Judicial Court or Superior Court, by a Probate, Police, District, or Municipal Court, or by a judge of either of the before-mentioned courts, or by a justice of the peace if no one of the judges before referred to is known to such justice to be within five miles of the place where the party is imprisoned or restrained. *Pub. Stat. Mass.* (1882), c. 185, § 3.

*Michigan*.—The circuit judges are authorized to issue the writ. *Goodchild v. Foster*, 51 Mich. 599; *Faust v. Calhoun Circuit Judge*, 30

Mich. 266; *Matter of Buddington*, 29 Mich. 472.

The action of a circuit judge in a habeas corpus proceeding is strictly judicial where no jury is required and the judge acts personally, and it need not be in open court or during a term. *Goodchild v. Foster*, 51 Mich. 599. Compare *Matter of Buddington*, 29 Mich. 472; *Matter of Burger*, 39 Mich. 203.

The recorder of the city of Detroit is not authorized to take from the reform school a prisoner who has been legally sentenced thereto, except to testify as a witness. *Matter of Mason*, 8 Mich. 70.

Circuit Court commissioners have power to issue the writ in certain cases, but not where the inquiry contemplates the review and investigation of the proceedings of a court. *Matter of Buddington*, 29 Mich. 472; *Matter of Burger*, 39 Mich. 203. Nor can such commissioner issue the writ for the purpose of determining the right to the custody of minor children. *Rowe v. Rowe*, 28 Mich. 353.

Justices of the peace are not authorized to issue writs of habeas corpus to admit to bail by the Michigan statute which provides that a person who has been convicted of being disorderly and committed for not finding sureties for good behavior may be discharged by any of the justices of the peace on giving sureties as were originally required. *Matter of Fowler*, 49 Mich. 234.

*Minnesota*. — A District Court, or any judge thereof in vacation, may issue the writ. *Matter of Doll*, 47 Minn. 518; *State v. Bechdel*, 38 Minn. 278; *State v. Hill*, 10 Minn. 63.

Judges of probate are invested with no powers which authorize them to issue writs of habeas corpus in Minnesota. *Ex p. Lee*, 1 Minn. 60.

*Mississippi*. — Every judge in the state is authorized to issue and try writs of habeas corpus. *Ex p. Hamilton*, 65 Miss. 98; *Steele v. Shirley*, 9 Smed. & M. (Miss.) 382; *Ex p. Hickey*, 4 Smed. & M. (Miss.) 751.

*Missouri*. — The Circuit Court, or a judge thereof in vacation, has authority to issue the writ of habeas corpus. *Martin v. State*, 12 Mo. 471.

The Criminal Court of the city of St. Louis may issue the writ. *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250.

The St. Louis Court of Criminal Correction is authorized to issue writs of habeas corpus, but this power is withheld, in the case of a person indicted for murder, if either of the judges of the Criminal Court is in the city. *State v. Murphy*, 132 Mo. 382, 53 Am. St. Rep. 491.

*New Jersey*. — Justices of the Supreme Court, the chancellor, and the vice-chancellors have power to issue the writ. *Buckley v. Perrine*, 54 N. J. Eq. 285. But a judge at chambers will not grant the writ where the process on which the prisoner is held in custody is legal and proper. *Peltier v. Pennington*, 14 N. J. L. 312.

*New York*. — The Supreme Court, at a general or special term thereof, may grant a writ of habeas corpus where the prisoner is detained within the judicial district in which the term is held. *Ex p. Beatty*, 12 Wend. (N. Y.) 229; *People v. Cooper*, (Supm. Ct. Spec. T.) 8

How. Pr. (N. Y.) 288; Code Civ. Pro. N. Y., § 2017.

A justice of the Supreme Court in any part of the state may allow the writ though he is not sitting in the county where the prisoner is detained. *People v. Cowles*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 287; *People v. Clarke*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 7, 4 N. Y. L. Bul. 85; Jurisdiction of Justices, 3 How. Pr. (N. Y.) 39; *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; *People v. Jefferds*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 518; *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 6 Johns. (N. Y.) 337, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290.

The judges of the Superior Court of New York were authorized to grant writs of habeas corpus. *People v. Porter*, 1 Duer (N. Y.) 709.

The county judges have the same jurisdiction in habeas corpus as the justices of the Supreme Court at chambers. Powers of County Judges, 3 How. Pr. (N. Y.) 32; *People v. Tucker*, (Supm. Ct. Spec. T.) 16 Civ. Pro. (N. Y.) 126; *Wattles v. Marsh*, 5 Cow. (N. Y.) 176.

The city judge of the city of New York was not authorized to issue writs of habeas corpus by the act creating that office and conferring on the city judge all the judicial powers vested by law in the recorder of the city, where such power did not belong to the office of the recorder *per se*, but was given to him only by virtue of a statute giving to all city recorders the powers of Supreme Court commissioners. *Nash v. People*, 36 N. Y. 607, *overruling* *People v. Russell*, 46 Bart. (N. Y.) 27, 29 How. Pr. (N. Y.) 177, 1 Abb. Pr. N. S. (N. Y.) 230. See Laws N. Y. 1882, c. 410, § 1521.

The city judge of Brooklyn was authorized to issue a writ of habeas corpus running into another county only on proof that there was, in such county, no person authorized to grant the writ. *Dooley's Case*, (Supm. Ct. Gen. T.) 8 Abb. Pr. (N. Y.) 188.

Under the statutes giving to city recorders the powers of Supreme Court justices at chambers, they were authorized to issue writs of habeas corpus. *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414.

The Court of Oyer and Terminer had exclusive jurisdiction, during the sessions thereof, where the prisoner was detained in the common jail on any criminal charge; that is, the writ must either have been issued by the Court of Oyer and Terminer or made returnable before it; but this provision did not apply where the prisoner was in custody in execution of a sentence already pronounced on him by the court. *People v. Heftner*, (N. Y. Super. Ct.) 38 How. Pr. (N. Y.) 402. But where the party was in custody of a sheriff under an extradition warrant issued by the governor, the Court of Oyer and Terminer could not issue the writ. *People v. Reilly*, 11 Hun (N. Y.) 89. See also, as to the jurisdiction of the Court of Oyer and Terminer, *People v. Fancher*, 2 Hun (N. Y.) 226, 4 Thomp. & C. (N. Y.) 467, *reversing* 15 Abb. Pr. N. S. (N. Y.) 38; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159; *People v. Jefferds*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 518; *People v. Ruloff*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 77; *People v. Leonard*, 74 N. Y. 443.

Where the custody of minor children is in-



act in the matter,<sup>1</sup> while in other states the statutes also specify the cases in which the writ will lie.<sup>2</sup>

(b) **Appellate Courts and Judges Thereof.** — In probably all of the states of the Union the appellate courts and the judges thereof are authorized to issue

involved, neither a justice of the Supreme Court nor a county judge has jurisdiction. In such cases the jurisdiction is exclusively in the Supreme Court. *People v. Parr*, 121 N. Y. 679; *People v. Humphreys*, 24 Barb. (N. Y.) 521; *People v. Wilcox*, 22 Barb. (N. Y.) 178, 14 N. Y. 575; *People v. Ward*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 174; *People v. Osborne*, (Supm. Ct. Spec. T.) 6 Civ. Pro. (N. Y.) 299.

*North Carolina.* — The superior judges, either at term time or in vacation, may grant the writ. *In re Schenck*, 74 N. Car. 607.

*Ohio.* — The judges of the several courts separately and at chambers may allow the writ. *Matter of Collier*, 6 Ohio St. 58; *Bates's Annot. Stat. Ohio* (1897), § 5727. See also *Ex p. Shean*, 25 Ohio St. 440.

The Court of Common Pleas and not the Superior Court has jurisdiction to grant a writ of habeas corpus in case of a commitment for contempt by the Probate Court, because the power to review the orders of the Probate Court is in the Court of Common Pleas. *Butterfield v. O'Connor*, 2 Wkly. L. Gaz. 192, 3 Ohio Dec. (Reprint) 34.

*Oklahoma.* — Any court of record or any judge thereof, either in term time or in vacation, may grant the writ. *Stat. Okla.* (1893), § 4569; *Matter of McMaster*, 2 Okla. 435.

*Pennsylvania.* — A single judge of the Court of Common Pleas has no power, on habeas corpus, to discharge a defendant in execution on process from that court, without notice to the plaintiff. *Hecker v. Jarret*, 3 Binn. (Pa.) 404; *Gosline v. Place*, 32 Pa. St. 520.

The jurisdiction of the Superior Court to grant a writ of habeas corpus on the application of a person who is imprisoned under a judgment or order of an inferior court exists only where it has revisory powers. *Com. v. McAleer*, 10 Pa. Super. Ct. 286, 44 W. N. C. (Pa.) 207.

The several courts and judges authorized to grant the writ in Pennsylvania are specified in *Bright. Purd. Dig. Laws Pa.* (1894), p. 976. See also *Com. v. Gibbons*, 9 Pa. Super. Ct. 527.

*South Carolina.* — Justices of the peace have jurisdiction where the party is in custody for "criminal or supposed criminal matter." *Harvey v. Huggins*, 2 Bailey L. (S. Car.) 266.

The Court of Common Pleas has no power to discharge on habeas corpus a person in custody under a writ of *ne exeat* issued from the Court of Equity. *Ex p. Gilchrist*, 4 McCord L. (S. Car.) 233.

*Tennessee.* — The writ may be granted by any judge of the Circuit, common law, or criminal courts, or by any chancellor in cases of equitable cognizance. *Annot. Code Tenn.* (1896), § 5503; *McLendon v. State*, 92 Tenn. 520; *State v. Galloway*, 5 Coldw. (Tenn.) 336, 98 Am. Dec. 404.

*Texas.* — The District and County Courts and the judges thereof in vacation are authorized by the Constitution of Texas to issue the writ. *Legate v. Legate*, 87 Tex. 248; *Holman*

*v. Austin*, 34 Tex. 668; *Ex p. Trader*, 24 Tex. App. 393; *Ex p. Lynn*, 19 Tex. App. 120; *Ex p. Japan*, 36 Tex. Crim. 482; *Leicher v. Crandell*, 18 Tex. Civ. App. 62.

The application may be made to the Court of Criminal Appeals in any case where it could not be made to the County Court. *Ex p. Japan*, 36 Tex. Crim. 482. Accordingly, the Court of Criminal Appeals has jurisdiction to issue the writ at the instance of a person who has been committed by a District Court for a contempt in the trial of a civil cause in such District Court. *Ex p. Warfield*, (Tex. Crim. 1899) 50 S. W. Rep. 933.

*Virginia.* — The writ may be granted by any Circuit, Corporation, or County Court, or any judge of either in vacation (Code Va. 1887, § 3029), except in the case of minors committed to the Prison Association of Virginia, in which case exclusive jurisdiction is given by Act Feb. 27, 1896, to the Circuit Court of the city of Richmond. *Prison Assoc. v. Ashby*, 93 Va. 667.

*Washington.* — Every judge in the state is authorized to issue the writ. *Matter of Graham*, 7 Wash. 237.

*West Virginia.* — The Circuit Court or any judge thereof in vacation may issue the writ. *Rust v. Vanvacter*, 9 W. Va. 600.

*Wisconsin.* — The Circuit and County Courts and the judges thereof may issue the writs. *Matter of Booth*, 3 Wis. 157; *Bagnall v. Ableman*, 4 Wis. 163; *Matter of Blair*, 4 Wis. 522.

See also the provisions of the constitutions and statutes of the several states relevant to the subject.

**1. Common-law Power of Courts of Record.** — In *People v. Sebring*, (Supm. Ct.) 14 Misc. (N. Y.) 31, it was said that the power of the court to issue a writ of habeas corpus to bring up a prisoner to testify in a proceeding pending before it did not come into existence by virtue of any statute of the state, but is an original power inherent in the court. See also the constitutions and statutes of the various states.

**2. The Illinois Statute** names seven classes of cases in which the writ of habeas corpus may be issued. *Matson v. Swanson*, 131 Ill. 255.

The **Kansas Statute** provides that "no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him, when the term of commitment has not expired, in either of the cases following." *Ex p. Phillips*, 7 Kan. 48; *Gen. Stat. Kan.* (1897), c. 96, § 91.

**Maryland.** — If the jurisdiction of a court is limited and defined by the constitution of the state, and power is not given thereby to issue writs of habeas corpus, a statute assuming to confer such power is unconstitutional. *State v. Mace*, 5 Md. 337.

**Under the South Carolina Statute**, an application for the writ must be denied where a person is committed or detained by the final order, judgment, or decree of a competent tribunal of civil or criminal jurisdiction, or by



writs of habeas corpus. In some states this power exists only by virtue of their appellate jurisdiction; that is, they may issue the writ for the purpose of reviewing the decisions of inferior tribunals in proper cases, or when it may be necessary to the exercise of their appellate powers;<sup>1</sup> while in many states original jurisdiction to issue the writ is expressly given to such courts and judges.<sup>2</sup>

virtue of an execution issued upon such final order, judgment, or decree, and under this statute it has been held that a person who was sentenced to the penitentiary instead of to the county jail was not entitled to the writ, though the court had no power to impose such sentence. *In re Schenck*, 74 N. Car. 607.

See also the various local codes and statutes in the United States.

**1. Appellate Courts and Judges Authorized to Issue Habeas Corpus by Virtue of Appellate Jurisdiction — Alabama.** — *Ex p.* Brown, 63 Ala. 187; *Ex p.* Burnett, 30 Ala. 461; *Ex p.* Croom, 19 Ala. 561; *Ex p.* Chaney, 8 Ala. 424; *Ex p.* Simonton, 9 Port. (Ala.) 383; *Ex p.* Cleveland, 36 Ala. 306. See also *Ex p.* Jones, 94 Ala. 33; *Kirby v. State*, 62 Ala. 51; *Ex p.* Hunter, 39 Ala. 560.

**Arkansas.** — *Ex p.* Marr, 12 Ark. 84; *Ex p.* Allis, 12 Ark. 101; *Carnall v. Crawford County*, 11 Ark. 617; *Ex p.* Robins, 15 Ark. 402; *Ex p.* Good, 19 Ark. 410; *Ex p.* Kittrel, 20 Ark. 499; *Ex p.* Harbour, 39 Ark. 126; *Ex p.* Jackson, 45 Ark. 158; *State v. Neel*, 48 Ark. 283. See also *Ex p.* White, 9 Ark. 222; *Ex p.* Royster, 6 Ark. 28; *Washaw v. Gimble*, 50 Ark. 351. Compare *Matter of Beard*, 4 Ark. 9; *Ex p.* Hunt, 10 Ark. 284.

**Illinois.** — *People v. Taylor*, 2 Ill. 202, holding that the Supreme Court has no jurisdiction unless in the exercise of its appellate powers to issue the writ of habeas corpus, but that original jurisdiction may be exercised by one of the judges of that court. See also *People v. Pirfenbrink*, 96 Ill. 68.

**Maryland.** — *Sevinsky v. Wagus*, 76 Md. 335; *Ex p.* O'Neill, 8 Md. 227. But the individual judges of the Court of Appeals, whether the court is in session or not, may grant the writ of habeas corpus during the vacation of the Circuit Courts. *Ex p.* O'Neill, 8 Md. 227. See also *Ex p.* Maulsby, 13 Md. 625.

**North Carolina.** — *In re Schenck*, 74 N. Car. 607; *Matter of Bryan*, 1 Winst. L. (60 N. Car.) 1.

**2. Appellate Courts and Judges Having Original Jurisdiction to Issue Habeas Corpus — California.** — *People v. Booker*, 51 Cal. 317; *Tyler v. Houghton*, 25 Cal. 26; *Ex p.* Ellis, 11 Cal. 222. As to the former rule in California, see *People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295.

**Colorado.** — *Matter of Farrell*, 22 Colo. 461. Formerly single justices of the Supreme Court out of term could not issue writs of habeas corpus, or hear matters arising thereon. *In re Garvey*, 7 Colo. 502.

**District of Columbia.** — *In re Poole*, 2 MacArthur (D. C.) 583, 29 Am. Rep. 628.

**Florida.** — *Ex p.* Pells, 28 Fla. 67; *Ex p.* Egan, 18 Fla. 194; *Ex p.* J. C. H., 17 Fla. 362; *State v. Johnson*, 13 Fla. 33; *State v. Gleason*, 12 Fla. 190, citing and distinguishing *Ex p.* White, 4 Fla. 101.

**Kan.** — *Matter of Gantt*, 33 Kan. 19; *Ex p.* Phillips, 7 Kan. 48.

**Louisiana.** — *State v. Levy*, 38 La. Ann. 918; *In re Strickland*, 41 La. Ann. 324; *State v. Scott*, 39 La. Ann. 943, 43 La. Ann. 857; *State v. Duson*, 36 La. Ann. 855; *State v. Fagin*, 28 La. Ann. 887; *State v. Parish Prison Keeper*, 15 La. Ann. 347. See also *State v. Judge*, 48 La. Ann. 92; *State ex rel. Johnson*, 48 La. Ann. 1405; *State v. Langridge*, 44 La. Ann. 1014; *State v. Sauvnet*, 24 La. Ann. 119, 13 Am. Rep. 115. But it is held that the Supreme Court of Louisiana has no power to issue a writ of habeas corpus in cases not appealable to it. *State v. Maubert*, 47 La. Ann. 334; *State v. Houston*, 35 La. Ann. 1194; *Matter of Ross*, 38 La. Ann. 523; *State v. Rose*, 29 La. Ann. 755.

**Massachusetts.** — *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676; *Sanborn v. Carleton*, 15 Gray (Mass.) 399; *Sanborn's Case*, 23 Law Rep. (Mass.) 7 and 20, 22 Law Rep. (Mass.) 730.

**Michigan.** — *Matter of Jackson*, 15 Mich. 417. The Supreme Court may also use the writ as one means of exercising its supervisory power. *Hamilton's Case*, 51 Mich. 174. See also *Corrie v. Corrie*, 42 Mich. 509.

**Minnesota.** — *In re Snell*, 31 Minn. 110; *State v. Bechdel*, 38 Minn. 278; *State v. Grant*, 10 Minn. 39.

**Mississippi.** — In Mississippi any one of the judges of the High Court of Errors and Appeals was authorized to issue the writ, but they did not have power to act thereon as a court in the first resort. *Ex p.* Hickey, 4 Smed. & M. (Miss.) 751.

**Missouri.** — *Ex p.* Jilz, 64 Mo. 205, 27 Am. Rep. 218; *Ex p.* Bethurum, 66 Mo. 545; *Lowe v. Summers*, 69 Mo. App. 637; *Matter of McDonald*, 19 Mo. App. 370.

**Nebraska.** — *In re White*, 33 Neb. 812, holding that the Supreme Court, but not a judge thereof out of court, has original jurisdiction.

**Ohio.** — *Ex p.* Shean, 25 Ohio St. 440; *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55.

**Oklahoma.** — *Matter of McMaster*, 2 Okla. 435.

**Pennsylvania.** — *Gosline v. Place*, 32 Pa. St. 520; *Ex p.* Walton, 2 Whart. (Pa.) 501; *Com. v. Holloway*, 5 Binn. (Pa.) 512; *Com. v. Sheriff*, 7 W. & S. (Pa.) 108. And see *Com. v. Hoey*, 3 Brews. (Pa.) 514; *Const. Pa.*, art. 5, § 105; *Bright. Purd. Dig. Laws Pa.* (1894), p. 976.

**Texas.** — *Holman v. Austin*, 34 Tex. 668; *Ex p.* Lambert, 37 Tex. Crim. 435; *Ex p.* Kearby, 35 Tex. Crim. 531; *Ex p.* Lynn, 19 Tex. App. 120; *Const. Tex.*, art. 5, § 3; *Rev. Stat. Tex.* (1895), art. 946.

**Vermont.** — *In re Cooper*, 32 Vt. 258; *Hathaway v. Holmes*, 1 Vt. 405.

**Virginia.** — *Const. Va.*, art. 6, § 2; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 676; *Leftwich v. Com.*, 20 Gratt. (Va.) 716; *Ex p.* Meredith, 33 Gratt. (Va.) 119, 36 Am. Rep. 771.

(c) **Court Officers.** — In some states, in addition to the several courts and judges, certain court officers, as commissioners, clerks, and masters, are authorized by statute to issue writs of habeas corpus.<sup>1</sup>

c. **CONFLICTING JURISDICTION** — (1) *Custody under Federal Authority.* — At one period of the judicial history of the United States there was a sharp conflict of opinion between the federal judges and some of the state judges as to how far the jurisdiction of the federal courts in matters of habeas corpus was exclusive of that possessed by the state courts. In some states it was held that state courts had jurisdiction in any case where a person was held in custody within the state, even though such custody was under the authority of the United States.<sup>2</sup> The Circuit and District Courts of the United States, on the other hand, denied that the state courts had jurisdiction to discharge a prisoner who was held in custody under federal authority, and asserted that in such cases the jurisdiction of the federal courts was exclusive;<sup>3</sup> and the

*Washington.* — Matter of Graham, 7 Wash. 237; Matter of Rafferty, 1 Wash. 382.

*West Virginia.* — Rust v. Vanvacter, 9 W. Va. 600.

*Wisconsin.* — *In re* Pierce, 44 Wis. 411; *In re* Crow, 60 Wis. 349; Bagnall v. Ableman, 4 Wis. 163; Matter of Booth, 3 Wis. 1; Matter of Booth, 3 Wis. 157; State v. Ryan, 99 Wis. 123.

*Wyoming.* — *Ex p.* Bergman, 3 Wyo. 396.

1. **Court Officers Authorized to Issue Writs of Habeas Corpus** — *Illinois.* — Masters in chancery may order the clerk of the Circuit Court of the proper county to issue the writ. *People v. Town*, 4 Ill. 19; Starr & Curt. Annot. Stat. Ill. (1896), c. 90, par. 6.

*Indiana.* — Clerks of the Circuit Courts of Indiana were formerly authorized to issue the writ (Act January 3, 1852), but that statute has since been repealed and the clerks have now no such power. *Gregg v. Wynn*, 22 Ind. 373.

*Michigan.* — Circuit Court commissioners have power to issue writs of habeas corpus. Matter of Burger, 39 Mich. 203. They cannot, however, under such writ adjudicate the right to custody of children. *Rowe v. Rowe*, 28 Mich. 353. Nor can they issue the writ where the inquiry contemplates the review or investigation of the proceedings of a judicial tribunal, or on any grounds involving judicial action. Matter of Buddington, 29 Mich. 472; Matter of Burger, 39 Mich. 203.

*Minnesota.* — Court commissioners are authorized by the Minnesota statute to issue the writ. *State v. Bechdel*, 38 Minn. 278; *State v. Barnes*, 17 Minn. 341; *State v. Hill*, 10 Minn. 63.

*Oklahoma.* — The clerk of the Supreme Court may issue writs of habeas corpus on the order of the court. Matter of McMaster, 2 Okla. 435.

*South Carolina.* — The clerk of the Circuit Court may issue the writ under the order of the chief justice. *State v. Jones*, 32 S. Car. 583.

*Wisconsin.* — Power to issue writs of habeas corpus is given by the Wisconsin statute to Circuit Court commissioners. *In re* Crow, 60 Wis. 349.

2. **Jurisdiction Asserted by State Courts to Inquire into Detention by Federal Authority** — *Georgia.* — *State v. Wederstrandt*, T. U. P. Charl. (Ga.) 213. But see *State v. Plime*, T. U. P. Charl. (Ga.) 142.

*Iowa.* — *Ex p.* Holman, 28 Iowa 88, 4 Am. Rep. 159.

*Massachusetts.* — *Com. v. Downes*, 24 Pick. (Mass.) 227; *Ex p.* Kimball, 9 Law Rep. (Mass.) 500; Kenniston's Case, 9 Law Rep. (Mass.) 548; *Com. v. Harrison*, 11 Mass. 63; *Com. v. Cushing*, 11 Mass. 67, 6 Am. Dec. 156; *Sims's Case*, 7 Cush. (Mass.) 285; *Sanborn v. Carleton*, 15 Gray (Mass.) 399.

*New Hampshire.* — *State v. Dimick*, 12 N. H. 194, 37 Am. Dec. 197.

*New Jersey.* — *State v. Brearly*, 5 N. J. L. 639.

*New York.* — Matter of Carlton, 7 Cow. (N. Y.) 471; *Ex p.* Wilson, 4 City Hall Rec. (N. Y.) 47; Almeida's Case, 2 Wheel. Crim. (N. Y.) 576; Matter of Ferguson, 9 Johns. (N. Y.) 239.

*North Carolina.* — *Ex p.* Mason, 1 Murph. (5 N. Car.) 336.

*Ohio.* — Matter of Collier, 6 Ohio St. 55.

*Pennsylvania.* — Olmsted's Case, Bright. (Pa.) 9; Lockington's Case, Bright. (Pa.) 269; *Com. v. Blake*, 8 Phila. (Pa.) 523; *Com. v. Camac*, 1 S. & R. (Pa.) 87; *Com. v. Gamble*, 11 S. & R. (Pa.) 93; *Com. v. Wright*, 3 Grant Cas. (Pa.) 437; *Com. v. Gane*, 3 Grant Cas. (Pa.) 447; *Com. v. Murray*, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; *Com. v. Barker*, 5 Binn. (Pa.) 423; *Com. v. Callan*, 6 Binn. (Pa.) 255; *Com. v. Fox*, 7 Pa. St. 336; *Williamson v. Lewis*, 39 Pa. St. 9.

*Virginia.* — *Ex p.* Pool, 2 Va. Cas. 276.

*Wisconsin.* — Matter of Booth, 3 Wis. 1; *In re* Higgins, 16 Wis. 351; *In re* Tarble, 25 Wis. 390, 3 Am. Rep. 85.

**For a Strong Argument** in favor of concurrent state jurisdiction, see the opinion of Chief Justice Tilghman in Lockington's Case, Bright. (Pa.) 269.

3. **Jurisdiction of State Courts Denied by Federal Courts.** — *Ex p.* Robinson, 1 Bond (U. S.) 39; Matter of Farrand, 1 Abb. (U. S.) 140; *Ex p.* Jenkins, 2 Wall. Jr. (C. C.) 521; *In re* Veremaitre, 3 Am. L. J. N. S. 438, 28 Fed. Cas. No. 16,915; *In re* Neill, 8 Blatchf. (U. S.) 156; *Norris v. Newton*, 5 McLean (U. S.) 92; *U. S. v. Rector*, 5 McLean (U. S.) 174; *Thomas v. Crossin*, (Pa. 1854) 3 Am. L. Reg. 207; *Ex p.* Sifford, (U. S. Dist. Ct. 1856) 5 Am. L. Reg. 659; Matter of Keeler, Hempst. (U. S.) 306; Collier's Case, 6 Op. Atty.-Gen. 103; Belligerent Asylum, 7 Op. Atty.-Gen. 123; *Williamson's Case*, 7 Op. Atty.-Gen. 482.



decisions of some of the state courts were to the same effect.<sup>1</sup> The law remained in this condition until the year 1858, when the matter came before the Supreme Court of the United States, and that court held that while state courts and judges have the power to issue a writ of habeas corpus in any case where the party is imprisoned within the territorial limits of the state to inquire for what cause and by what authority he is confined, provided it does not appear when the application is made that the prisoner is in custody under "the authority of the United States," they have no power to issue the writ when the application shows that the custody is under such authority, and a return showing that fact, when it did not appear by the application, terminates their jurisdiction in the matter.<sup>2</sup> This case, however, did not entirely settle the dispute, but various questions were raised as to the meaning of the court in the use of the words "authority of the United States." In some cases it was held that these words contemplated only lawful and undisputed authority,<sup>3</sup> and that the state courts still possessed the power, by means of the writ of habeas corpus, to discharge from custody persons who were illegally detained by federal officers acting under a claim or color of authority of the United States, but without judicial process or other warrant of law;<sup>4</sup> while in other states the decision of the Supreme Court of the United States, above referred to, was accepted as establishing the exclu-

"It is a matter of notoriety that in the District Courts of the United States the jurisdiction of a state court to discharge on habeas corpus a soldier or sailor held under a law of the United States has generally, if not uniformly, been denied." *Matter of Hopson*, 40 Barb. (N. Y.) 51.

**The Opinion of the Federal Judiciary Has Not Always Been Unanimous**, however, in respect to this matter. See the dissenting opinion of the chief justice of the United States in *Tarble's Case*, 13 Wall. (U. S.) 412.

**1. Jurisdiction Refused by State Courts Where Detention Was by Federal Authority.** — *State v. Plime*, T. U. P. Charl. (Ga.) 142; *Matter of Spangler*, 11 Mich. 298; *State v. Zulich*, 29 N. J. L. 409; *Ex p. Hill*, 5 Nev. 154; *Ex p. Rhodes*, 2 Wheel. Crim. (N. Y.) 559; *Husted's Case*, 1 Johns. Cas. (N. Y.) 136; *Roberts' Case*, 2 Am. L. J. 192. See also *Ex p. Le Bur*, 49 Cal. 159, 2 Cent. L. J. 122; *Ex p. Kelly*, 37 Ala. 474; *State v. M'Bride*, Rice L. (S. Car.) 400.

In *Ex p. Hill*, 38 Ala. 429, the same question was raised as between a state court and the Confederate government.

**2. Decision of Supreme Court Against State Jurisdiction.** — *Ableman v. Booth*, 21 How. (U. S.) 506.

**3. Limited Interpretation of Ableman v. Booth.** — In Ohio, etc., *R. Co. v. Fitch*, 20 Ind. 493, it was held that the rule laid down in the case of *Ableman v. Booth*, 21 How. (U. S.) 506, cited in the next preceding note, applied only where a person was in custody on process duly issued by the judicial authority of the United States.

In *Com. v. Wright*, 3 Grant Cas. (Pa.) 437, *Lowrie, C. J.*, said that the case of *Ableman v. Booth*, 21 How. (U. S.) 506, "decides only that a prisoner cannot be taken out of the custody of the judicial department of the federal government by means of a habeas corpus issued by a state court," and that if the chief justice of the United States, who delivered the opinion in that case, meant more than this, "he meant more than the case called for, and all beyond is mere *obiter dictum* and cannot be

taken by itself as sufficient authority for so important a principle." See also *Ex p. Kelly*, 37 Ala. 474; *McConologue's Case*, 107 Mass. 154; *Matter of Barrett*, 42 Barb. (N. Y.) 479.

**4. Custody by Federal Officers Without Judicial Process — Jurisdiction Claimed by State Courts.** — Numerous cases arising both before and after the decision of the Supreme Court of the United States in *Ableman v. Booth*, 21 How. (U. S.) 506, presented the question whether a state court had the power, by habeas corpus, to take a person out of the custody of a federal officer who acted by virtue of his office in detaining the prisoner, but without judicial process or express statutory authority, and the detention appearing to be illegal and unauthorized. This question was frequently raised where minors unlawfully enlisted in the army or navy of the United States were detained by their commanding officers, and it was held, almost without exception, that in such cases the state courts had jurisdiction.

*Connecticut.* — *Lanahan v. Birge*, 30 Conn. 438.

*Indiana.* — *Skeen v. Monkmeier*, 21 Ind. 1; *Griffin v. Wilcox*, 21 Ind. 370.

*Iowa.* — *Ex p. Anderson*, 16 Iowa 595; *Ex p. Holman*, 28 Iowa 89, 4 Am. Rep. 159.

*Massachusetts.* — *Com. v. Harrison*, 11 Mass. 63; *Com. v. Cushing*, 11 Mass. 67, 6 Am. Dec. 156; *Com. v. Downes*, 24 Pick. (Mass.) 227.

*New Hampshire.* — *State v. Dimick*, 12 N. H. 194, 37 Am. Dec. 197.

*New Jersey.* — *State v. Brearly*, 5 N. J. L. 639.

*New York.* — *Matter of Barrett*, 42 Barb. (N. Y.) 479; *People v. Gaul*, 44 Barb. (N. Y.) 98; *Matter of Martin*, 45 Barb. (N. Y.) 142; *Matter of Dobbs*, (N. Y. Super. Ct.) 21 How. Pr. (N. Y.) 68; *Matter of Webb*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 247; *Phelan's Case*, (C. Pl.) 9 Abb. Pr. (N. Y.) 286; *Dabb's Case*, (N. Y. Super. Ct.) 12 Abb. Pr. (N. Y.) 113; *U. S. v. Wyngall*, 5 Hill (N. Y.) 16; *Matter of Stacy*, 10 Johns. (N. Y.) 328; *Matter of Carlton*, 7 Cow. (N. Y.) 471; *Matter of Jordan*, (N. Y. 1863) 2 Am. L. Reg. N. S. 749. In an earlier decision in New York the jurisdiction



sive jurisdiction of the federal courts in all cases where the custody was under the authority of the United States, whether by judicial process or otherwise.<sup>1</sup> This conflict was finally settled by a decision of the Supreme Court of the United States in 1871, holding that state courts have no authority on habeas corpus to discharge a person who is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government.<sup>2</sup>

(2) *Custody under State Authority.* — If a person is in custody under state authority, the federal courts have power to interfere on habeas corpus only in cases where the power to do so has been given by statute. Where a person had been committed to jail by a state court, the federal courts, under the Judiciary Act of 1789, had jurisdiction only when they required the presence of the prisoner as a witness.<sup>3</sup> By various statutes the power of the federal courts has been extended, and they may now discharge a prisoner who has been committed to jail by a state court in any case where the commitment was for an act done or omitted in pursuance of a law of the United States, or

of the state courts was doubted. *Matter of Ferguson*, 9 Johns. (N. Y.) 239. And in a later case the jurisdiction of the state courts in this respect was denied. *Rielly's Case*, (C. Pl. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 334.

*Ohio.* — *Matter of Disinger*, 12 Ohio St. 256.

*Pennsylvania.* — *Com. v. Fox*, 7 Pa. St. 336; *Com. v. Gamble*, 11 S. & R. (Pa.) 93; *Com. v. Murray*, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; *Com. v. Callan*, 6 Binn. (Pa.) 255; *Com. v. Camac*, 1 S. & R. (Pa.) 87; *Com. v. Wright*, 3 Grant Cas. (Pa.) 437; *Com. v. Gane*, 3 Grant Cas. (Pa.) 447; *Com. v. Selfridge*, 7 Phila. (Pa.) 76; *Com. v. Blake*, 8 Phila. (Pa.) 523.

*Wisconsin.* — *Matter of Gregg*, 15 Wis. 479; *In re Higgins*, 16 Wis. 351; *In re Tarble*, 25 Wis. 390, 3 Am. Rep. 85.

In *Skeen v. Monkeimer*, 21 Ind. 1, the state courts of Indiana discharged on habeas corpus a person who was arrested by the military authorities of the United States under a special order of the commanding general to arrest and send to headquarters all persons engaged in stealing, concealing, or preventing the delivery of any government property.

**Soldiers and Sailors Held for Trial by Court Martial.** — Within the rule laid down in *Ableman v. Booth*, 21 How. (U. S.) 506, it has been held that even though the enlistment of a soldier is void because he was under the prescribed age, yet if he has been arrested by the military authorities for a military offense, *e. g.*, desertion, and is held for trial by court martial, he is in custody under "the authority of the United States," and therefore a state court has no power, so long as he is held on such charge, to discharge him from the custody of the military authorities on the ground that his enlistment was void, because in such case the prisoner is in custody by virtue of the process issued under the laws of the United States for an offense against those laws. *Ex p. Anderson*, 16 Iowa 595; *State v. Zulich*, 29 N. J. L. 409; *Matter of Beswick*, (Supm. Ct.) 25 How. Pr. (N. Y.) 149; *Matter of Hopson*, 40 Barb. (N. Y.) 34; *Shirk's Case*, 5 Phila. (Pa.) 333, 20 Leg. Int. (Pa.) 260. See also *Com. v. Gamble*, 11 S. & R. (Pa.) 93.

Previously, however, the state courts exercised the power to discharge a soldier who was held under an invalid enlistment, even though he was in custody awaiting trial by court mar-

tial for a military offense. *Com. v. Cushing*, 11 Mass. 67, 6 Am. Dec. 156.

**The Enlistment Acts of 1862 and 1864**, authorizing a secretary of war to discharge enlisted minors on certain terms and conditions, were construed as giving to the secretary of war exclusive power in the matter, and to take away the jurisdiction formerly exercised by state courts to grant writs of habeas corpus in order to procure the discharge of minors who had enlisted under age. *Matter of O'Connor*, 48 Barb. (N. Y.) 258. But these enlistment acts did not affect the jurisdiction of the federal courts in such cases. *In re McDonald*, 1 Lowell (U. S.) 100, 16 Fed. Cas. No. 8,752.

**1. Doctrine of Ableman v. Booth Accepted by State Courts.** — *Matter of Spangler*, 11 Mich. 208; *Matter of Hopson*, 40 Barb. (N. Y.) 34; *Matter of Beswick*, (Supm. Ct.) 25 How. Pr. (N. Y.) 149. See also *Ex p. Hill*, 5 Nev. 154.

**2. Tarble's Case**, 13 Wall. (U. S.) 397. The effect of this case is to overrule all the cases cited in the preceding part of this section which assert the power of state courts, in any case, to discharge a person from the custody of a federal officer who, in detaining the prisoner, acts under the authority, or under a claim or color of the authority, of the United States.

**Decision in Tarble's Case Acquiesced in by State Courts.** — In *In re Copenhaver*, 118 Mo. 377, 40 Am. St. Rep. 382, Black, C. J., delivering the opinion of the court, after referring to *Tarble's Case*, 13 Wall. (U. S.) 397, and *Ableman v. Booth*, 21 How. (U. S.) 506, said: "From the foregoing authorities it must be taken as now well-established law that state courts and the judges thereof have no jurisdiction or power to discharge persons who are held in custody by authority of the federal courts, or by the authority of the commissioners of such courts, or by officers of the United States acting under the laws thereof; and this is true though the judgments or orders of the federal courts or commissioners are illegal. The remedy in all such cases is in the courts of the United States. Adherence to these rules is absolutely necessary to prevent conflict of jurisdiction and to maintain and uphold the stability of both the national and state governments."

**3. Custody under State Process — Original Jurisdiction of Federal Courts.** — See *supra*, this section, *Limitation of Federal Jurisdiction—Former Rule*.

an order, process, or decree of a court or judge thereof, or where the custody is in violation of the Constitution, laws or treaties of the United States, or where the prisoner is a citizen or subject of a foreign state and his detention involves questions of international law; and so, too, they may temporarily take a prisoner out of state custody where he is needed as a witness.<sup>1</sup> But while the federal courts are undoubtedly vested with this power,<sup>2</sup> it is held that it should be exercised only in a clear case, and when justice demands prompt action.<sup>3</sup>

If a Person Held to Bail in a Federal Court Is Imprisoned by State Authority, it would seem that the power of the federal court to proceed with the prosecution is not thereby postponed to the proceeding in the state court, the general rule being that where both a state and a federal court have jurisdiction of the same person or thing, the jurisdiction is exclusive in the court by which it was first acquired.<sup>4</sup> But the priority of the federal jurisdiction in such case may be insisted on only by the federal authorities, and habeas corpus will not lie in the federal court as a matter of personal right, at the instance of the prisoner or of his bail, for his release from such custody, on the ground that his case in the federal court is first triable.<sup>5</sup>

*d.* **CONCURRENT JURISDICTION.**—Cases in which the federal and state courts have concurrent jurisdiction to issue the writ of habeas corpus are of frequent occurrence. This concurrent jurisdiction exists in all cases except where a party is held in custody under the authority of the United States.<sup>6</sup> Thus, either a state or a federal court may issue the writ to inquire into the legality of the detention of a person who is held under a warrant of interstate

**1. Extension of Federal Jurisdiction to Cases of Custody under State Authority.**—See *supra*, this section, *Limitation of Federal Jurisdiction—Present Rule*.

**2. The Question of the Power or Jurisdiction of a Federal Court to inquire into the cause of the commitment of a person, and to discharge him if he be restrained of his liberty in violation of the Constitution of the United States, cannot be affected by the fact that he is held under the authority of a state.** *Ex p. Royall*, 117 U. S. 241.

**3. Paramount Power of Federal Courts to Be Exercised with Caution.**—See *Taylor v. Carryl*, 20 How. (U. S.) 583; *Covell v. Heyman*, 111 U. S. 176.

**The Courts of the United States Have Great Respect for State Authority**, and it is only after full and most careful investigation and consideration, although acting within the undoubted scope of its jurisdiction, that a federal court will take from a state officer a person committed to him by a state court and charged with an offense against state laws which are attacked as in conflict with the Federal Constitution. *In re Jordan*, 49 Fed. Rep. 238. See also *Whitten v. Tomlinson*, 160 U. S. 232; *Pepke v. Cronan*, 155 U. S. 100; *Cook v. Hart*, 146 U. S. 183; *In re Duncan*, 139 U. S. 449; *Ex p. Fonda*, 117 U. S. 516; *New York v. Eno*, 155 U. S. 89; *In re Wood*, 140 U. S. 278; *In re Maldonado*, 63 Fed. Rep. 825; *In re Flinn*, 57 Fed. Rep. 496; *In re King*, 51 Fed. Rep. 434; *Ex p. Yung Jon*, 28 Fed. Rep. 308; *Ex p. Hanson*, 28 Fed. Rep. 127.

**4. Jurisdiction Exclusive in Court First Acquiring It.**—*Taylor v. Taintor*, 16 Wall. (U. S.) 366. See also the titles JURISDICTION; UNITED STATES COURTS.

**5. Priority of Federal Jurisdiction Not Available to Prisoner or His Bail.**—*In re Fox*, 51 Fed.

Rep. 427; *U. S. v. French*, 1 Gall. (U. S.) 1; *Mackin v. People*, (Ill. 1886) 8 N. E. Rep. 178.

**No Principle of Comity** requires a federal court from which a writ of habeas corpus has been obtained by a person arrested under a state law alleged to be in violation of the Constitution of the United States, to remand the prisoner to the custody of the state officers. It is only when no special circumstances exist which justify federal interference that the questions involved will be left with the determination of the state court, and that is a matter within the discretion of the federal court. *Ex p. Jervey*, 66 Fed. Rep. 957.

**6. Concurrent Jurisdiction of Federal and State Courts.**—See *Robb v. Connolly*, 111 U. S. 624, *disapproving In re Robb*, 19 Fed. Rep. 26.

**When Federal Jurisdiction Is Exclusive.**—The right of state courts is subject to the exclusive and paramount authority of the national government by its own judicial tribunals to determine whether persons are legally held in custody by the authority of the courts of the United States, or by the commissioners of such courts, or by the officers of the general government acting under the laws of the United States. *Robb v. Connolly*, 111 U. S. 639; *Ex p. Holman*, 28 Iowa 88, 4 Am. Rep. 159. See also *supra*, this section, *Conflicting Jurisdiction*.

**When State Jurisdiction Is Exclusive.**—Custody under the process of a state court cannot be interfered with by a federal court, unless such custody is in violation of the Constitution, laws, or treaties of the United States, or unless the prisoner is required as a witness in a federal court. *In re Brosnahan*, 18 Fed. Rep. 62. See also *Ex p. Ulrich*, 43 Fed. Rep. 661; *U. S. v. Rector*, 5 McLean (U. S.) 174; *In re Enslow*, 45 Fed. Rep. 351; *In re Taylor*, 13 West. Jur. 505, 25 Int. Rev. Rec. 321; *In re*



extradition,<sup>1</sup> or where the detention under state authority is alleged to be in violation of the Constitution or laws of the United States;<sup>2</sup> and, where a person who is a citizen of one state is restrained of his liberty by a citizen of another state, but the custody is not under the process of a state court, the diverse citizenship of the parties gives to the federal courts jurisdiction which may be exercised concurrently with the courts of the state.<sup>3</sup> Cases also occur in which concurrent jurisdiction over the same subject-matter exists in several state courts or in several federal courts, and in such cases the jurisdiction of the court which first takes cognizance of the matter becomes exclusive, and no other court will interfere so long as that proceeding is pending.<sup>4</sup>

**V. NATURE AND SCOPE OF REMEDY** — 1. **In General.** — The writ of habeas corpus is a high prerogative writ,<sup>5</sup> given by the common law,<sup>6</sup> and of authority

Alsberg, 16 Nat. Bankr. Reg. 116; U. S. v. French, 1 Gall. (U. S.) 1; *Ex p.* Touchman, 1 Hughes (U. S.) 601.

1. **Concurrent Jurisdiction in Extradition Cases** — *United States.* — *Roberts v. Reilly*, 116 U. S. 80; *Ex p.* Reggel, 114 U. S. 642; *Robb v. Connolly*, 111 U. S. 624; *Matter of Titus*, 8 Ben. (U. S.) 411; *Ex p.* Whitten, 67 Fed. Rep. 230; *In re Cook*, 49 Fed. Rep. 833; *In re Fitton*, 45 Fed. Rep. 471; *Ex p.* Brown, 28 Fed. Rep. 654; *In re Roberts*, 24 Fed. Rep. 133; *Ex p.* Morgan, 20 Fed. Rep. 298; *In re Doo Woon*, 18 Fed. Rep. 898; *Ex p.* McKean, 3 Hughes (U. S.) 23; *Ex p.* Smith, 3 McLean (U. S.) 121; *Ex p.* Jenkins, 2 Wall. Jr. (C. C.) 521. See also *Iasigi v. Van De Carr*, 166 U. S. 391.

*Alabama.* — *Ex p.* State, 73 Ala. 503, 49 Am. Rep. 63.

*Massachusetts.* — *Com. v. Hall*, 9 Gray (Mass.) 262, 69 Am. Dec. 285.

*Ohio.* — *Wilcox v. Nolze*, 34 Ohio St. 520.

*Texas.* — *Ex p.* Thornton, 9 Tex. 635.

**When Federal Courts Will Not Interfere.** — That the federal courts have jurisdiction in cases of interstate extradition has never been questioned. Undoubtedly the courts of the United States have jurisdiction, on habeas corpus, to discharge from custody a person who is restrained of his liberty in violation of the Constitution or laws of the United States, although he may be held under state process for an alleged offense against the laws of such state. A federal court will not, however, on habeas corpus, discharge a prisoner charged with a violation of the laws of one state, and apprehended in another, where it appears by the recitals the warrant under which he was arrested, and the record of the extradition proceedings, that no constitutional right, will be violated by remanding him to the custody of the agent of the state demanding him. *Ex p.* Dawson, 83 Fed. Rep. 306, 49 U. S. App. 674.

**Exhausting Remedy in State Court Before Interference by Federal Court.** — In *Ex p.* Whitten, 67 Fed. Rep. 230, it was held that where a person in state custody had been extradited from another state, a federal court would not interfere to discharge him on habeas corpus on the ground that the extradition proceedings were invalid, it being claimed that the indictment was procured by mistake, and that the prisoner was not in fact a fugitive from justice until that question had been raised and determined in the state court.

2. **Custody by State Authority in Violation of the Constitution or Laws of United States.** — *In re Wo Lee*, 26 Fed. Rep. 471. See also *supra*,

this section, *Limitation of Federal Jurisdiction* — *Custody in Violation of Constitution, Laws, or Treaties of the United States.*

3. **Concurrent Jurisdiction in Case of Diverse Citizenship.** — *King v. McLean Asylum*, 21 U. S. App. 481.

4. **Jurisdiction of Court First Acting Is Exclusive** — *United States.* — *Mahon v. Justice*, 127 U. S. 700; *Horner v. U. S.*, 143 U. S. 570; *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Taylor v. Carryl*, 20 How. (U. S.) 583; *Ex p.* Whitten, 67 Fed. Rep. 230; U. S. v. Jailer, 2 Abb. (U. S.) 265; U. S. v. Rector, 5 McLean (U. S.) 174; *Ex p.* Robinson, 6 McLean (U. S.) 355; U. S. v. Doss, (U. S. Dist. Ct. 1872) 11 Am. L. Reg. N. S. 320; *Ex p.* Sifford, (U. S. Dist. Ct. 1856) 5 Am. L. Reg. 659.

*Colorado.* — *Cooper v. People*, 13 Colo. 337; *Matter of Farrell*, 22 Colo. 461; *People v. District Ct.*, 28 Colo. App. 519. See also *In re Doyle*, (Colo. 1899) 55 Pac. Rep. 1080.

*Iowa.* — *Ex p.* Holman, 28 Iowa 88, 4 Am. Rep. 159; *Ex p.* McRoberts, 16 Iowa 600.

*Louisiana.* — *State v. Levy*, 38 La. Ann. 918; *State v. Morales*, 38 La. Ann. 919; *In re Strickland*, 41 La. Ann. 324; *State v. Scott*, 43 La. Ann. 857.

*Missouri.* — *State v. Murphy*, 132 Mo. 382, 53 Am. St. Rep. 491.

*New York.* — *People v. Fiske*, (Supm. Ct. Spec. T.) 45 How. Pr. (N. Y.) 294.

*North Carolina.* — *State v. Miller*, 97 N. Car. 451.

*Ohio.* — *Ex p.* Bushnell, 8 Ohio St. 600; *Keating v. Spink*, 3 Ohio St. 105.

*South Carolina.* — *Ex p.* Gilchrist, 4 McCord L. (S. Car.) 233.

**As to the General Rule** that where two courts have concurrent jurisdiction over the same subject-matter the court in which the case is first commenced is entitled to retain it, see the title COURTS, vol. 8, p. 33, and the title JURISDICTION. See also the title JURISDICTION, 12 ENCYC. OF PL. AND PR. 151.

5. **Habeas Corpus a Prerogative Writ.** — *Crowley's Case*, 2 Swanst. 68; *Ex p.* Watkins, 3 Pet. (U. S.) 193; *In re Barry*, 42 Fed. Rep. 113; *Case of Twelve Commitments*, (C. Pl.) 19 Abb. Pr. (N. Y.) 394, 1 Daly (N. Y.) 512; 3 Black. Com. 131; Bac. Abr., tit. Habeas Corpus, A; 2 Kent's Com. 26; 2 Story on Const. 207.

**Appellate Character of Writ.** — Proceedings under a writ of habeas corpus, as in all prerogative writs, were regarded as appellate in their character. *Case of Twelve Commitments*, (C. Pl.) 19 Abb. Pr. (N. Y.) 394, 1 Daly (N. Y.) 512.

6. **Habeas Corpus of Common-law Origin.** — *Ex*



paramount to that of all other writs,<sup>1</sup> for the purpose of effecting a speedy release of the subject or citizen, whether an infant or a person of full age, from any illegal restraint of his liberty;<sup>2</sup> but it is not designed to punish the person imposing the restraint, or to furnish redress for the unlawful detention,<sup>3</sup> nor can it be used as a writ of *quo warranto*,<sup>4</sup> or as a writ of error or an

*p. Basset*, 1 N. Sess. Cas. 337, 6 Q. B. 481, 51 E. C. L. 481, 14 L. J. M. C. 17, 9 Jur. 66; *Matter of Keeler*, Hempst. (U. S.) 306; *Kirby v. State*, 62 Ala. 51; *Deckard v. State*, 38 Md. 186; *Dickinson v. State Bank*, 16 N. J. L. 354; *Morris Canal, etc., Co. v. Vannatta*, 17 N. J. L. 159; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. See also *supra*, this title, *History of Writ*.

**When Jurisdiction Need Not Appear on Face of Proceeding.**—Since the writ of habeas corpus is a common-law remedy, it is held that, though it is summary in character, it is not a special proceeding under the *Maryland* statute conferring jurisdiction on the courts of that state, in the sense that an attachment is a special proceeding; and therefore the jurisdiction of the court or judge issuing the writ need not appear on the face of the proceeding in order to authorize a prosecution for perjury in testifying falsely on the hearing. *Deckard v. State*, 38 Md. 186.

**1. Authority of Habeas Corpus Paramount to That of All Other Writs.**—*Haley's Case*, 1 Mod. 195; *Fazacharly v. Baldo*, 1 Salk. 352; *Matson v. Swanson*, 131 Ill. 255, *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 200.

By the production of a prisoner under a writ of habeas corpus the court acquires absolute jurisdiction of the person, and the original cause of commitment is suspended until the case is disposed of. *State v. Sparks*, 27 Tex. 705. And the custody is not on the original warrant, but is under the authority of the writ of habeas corpus. *Rex v. Bethel*, 5 Mod. 22; *Barth v. Clise*, 12 Wall. (U. S.) 401; *In re Kaine*, 14 How. (U. S.) 103; *Matson v. Swanson*, 131 Ill. 255, *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 200. See also *Bac. Abr.*, tit. *Habeas Corpus*, B. 13; *Hurd on Habeas Corpus* (2d ed.) 324.

**2. Purpose of Writ—Release from Any Illegal Detention.**—*Alabama*.—*Kirby v. State*, 62 Ala. 51; *Ex p. McKivett*, 55 Ala. 236.

*Arkansas*.—*State v. Neel*, 48 Ark. 283; *Ex p. Jones*, 27 Ark. 349.

*California*.—*Ex p. McCullough*, 35 Cal. 97; *Ex p. Queen of the Bay*, 1 Cal. 157.

*Louisiana*.—*State v. Duson*, 36 La. Ann. 856; *State v. Morales*, 38 La. Ann. 919.

*Pennsylvania*.—*Com. v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37.

*South Carolina*.—*Matter of Kottman*, 2 Hill L. (S. Car.) 363, 27 Am. Dec. 390.

*Canada*.—*Morency v. Fortier*, 12 Quebec Super. Ct. 68.

**"The Writ of Habeas Corpus Is Applicable to Two Distinct Classes of Cases.**—First, where the restraint or detention is by private authority; and, second, when the detention is by commitment under legal process." *Ex p. Mooney*, 26 W. Va. 36, 53 Am. Rep. 59, *citing* *Ex p. Bollman*, 4 Cranch (U. S.) 75.

**Temporary Custody** after conviction and before a sentence of imprisonment is passed for nonpayment of the fine imposed will not

authorize the prisoner's discharge on habeas corpus. *Ex p. Russellville*, 95 Ala. 19.

**Aliens** are entitled to the benefit of the writ, when unlawfully restrained of their liberty. *Ex p. Besset*, 6 Q. B. 481, 51 E. C. L. 481, 9 Jur. 66, 14 L. J. M. C. 17, 1 N. Sess. Cas. 337. See also *The Hottentot Venus's Case*, 13 East 195.

**Alien Enemies**, however, who are prisoners of war cannot be discharged on habeas corpus, however ill-used or deceived. *Anonymous*, 2 W. Bl. 1324, 2 Ken. K. B. 473; *Rex v. Schiever*, 2 Burr. 765.

**Use of Writ for Purpose of Discovery.**—It is an abuse of the writ of habeas corpus to use it with the knowledge that the child, control of which is sought, was not in the custody of him against whom the writ is taken out, the only object of the petitioner being to obtain evidence as to the whereabouts of the child. *Matter of Larson*, 31 Hun (N. Y.) 539.

**Immediate Action Not Always Required.**—The duty of the court, in a habeas corpus proceeding, is to do what is right between the prisoner and the public; and though the writ issues as a matter of right, the prisoner is not entitled to immediate action on it, without regard to the circumstances. *State v. Roger*, 7 La. Ann. 382. See also *People v. Donohue*, 14 Hun (N. Y.) 133.

**3. Punishment of Offender and Redress of Injury Not Within Scope of Writ.**—*Ex p. Coupland*, 26 Tex. 386.

**4. Habeas Corpus Not Available as Writ of Quo Warranto—United States.**—*Griffin's Case*, Chase (U. S.) 364.

*Iowa*.—*Ex p. Strahl*, 16 Iowa 369.

*Kentucky*.—*Hoglan v. Carpenter*, 4 Bush (Ky.) 89.

*Louisiana*.—*State v. Pertsdorf*, 33 La. Ann. 1411; *State v. Fenderson*, 28 La. Ann. 82.

*Massachusetts*.—*Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374.

*Michigan*.—*Matter of Corrigan*, 37 Mich. 66.

*Montana*.—*Parks, Petitioner*, 3 Mont. 426.

*New Jersey*.—*Miles v. Westcott*, 15 N. J. L. J. 178.

*New York*.—*Matter of Wakker*, 3 Barb. (N. Y.) 162; *Matter of Prime*, 1 Barb. (N. Y.) 340; *People v. Carrique*, 2 Hill (N. Y.) 93; *People v. Stevens*, 5 Hill (N. Y.) 630; *Green v. Burke*, 23 Wend. (N. Y.) 490; *People v. White*, 24 Wend. (N. Y.) 520.

*North Carolina*.—*Russell v. Whiting*, 1 Winst. L. (60 N. Car.) 463.

*Ohio*.—*Ex p. Strang*, 21 Ohio St. 610.

*Pennsylvania*.—*Clark v. Com.*, 29 Pa. St. 129.

*Texas*.—*Ex p. Call*, 2 Tex. App. 497.

*Wisconsin*.—*State v. Bloom*, 17 Wis. 521; *In re Boyle*, 9 Wis. 264.

*Compare* *Richmond Mayoralty Case*, 1 Gratt. (Va.) 673; *Ex p. Meredith*, 33 Gratt. (Va.) 119, 36 Am. Rep. 771.

**Acts of Usurpers.**—If the person under the warrant under which the prisoner is restrained

appeal,<sup>1</sup> or to determine the right of guardianship,<sup>2</sup> or to try rights of property, as where the question of slavery *vel non* was to be tested by a negro against a person who claimed the negro as a slave,<sup>3</sup> or where a master seeks to recover the custody of his apprentice.<sup>4</sup> Neither is it within the province of this writ to determine a dispute as to a state boundary line,<sup>5</sup> or to decide as to conflicting rights to personal custody,<sup>6</sup> though where infants of tender years are wrongfully detained from their parents or guardians it is the practice of the courts not only to remove the illegal restraint, but to order the delivery of the infant to the person entitled to its custody, because such infants are regarded as incapable of exercising any will as to the selection of their

is a mere usurper, without color of office, the rule that official authority cannot be questioned on habeas corpus does not apply. *Ex p. Strahl*, 16 Iowa 369. See also *Matter of Baker*, (Supm. Ct.) 11 How. Pr. (N. Y.) 418; *Devlin's Case*, (C. Pl.) 5 Abb. Pr. (N. Y.) 281.

**1. Functions of Appeal or Writ of Error Not Within Scope of Writ.**—See *infra*, this title, *Grounds of Remedy*—*Custody under Judgments or Orders of Court*.

**2. Right of Guardianship Not Triable on Habeas Corpus—England.**—*Rex v. Delaval*, 3 Burr. 1434; *Rex v. Johnson*, 1 Stra. 579, 2 Ld. Raym. 1333; *Rex v. Smith*, 2 Stra. 982, 7 Mod. 234, Ridg. Rep. 200; *Villareal v. Mellish*, 2 Swanst. 538; *Rex v. Hopkins*, 7 East 579; *Ex p. Hopkins*, 3 P. Wms. 155; *De Manneville v. De Manneville*, 10 Ves. Jr. 52; *Ex p. Skinner*, 9 Moo. 278, 17 E. C. L. 122; *In re Taylor*, 4 Ch. D. 157; *Matter of Andrews*, L. R. 8 Q. B. 153.

*District of Columbia.*—*In re Poole*, 2 MacArthur (D. C.) 583, 29 Am. Rep. 628.

*Indiana.*—*Children's Guardians v. Shutter*, 139 Ind. 268; *State v. Banks*, 25 Ind. 495.

*Iowa.*—*Burger v. Frakes*, 67 Iowa 400.

*Massachusetts.*—*Com. v. Hamilton*, 6 Mass. 273; *Com. v. Hammond*, 10 Pick. (Mass.) 274; *McConologue's Case*, 107 Mass. 171.

*Mississippi.*—*Foster v. Alston*, 6 How. (Miss.) 406.

*Missouri.*—*Ferguson v. Ferguson*, 36 Mo. 197; *Ex p. Toney*, 11 Mo. 662.

*New Jersey.*—*State v. Clover*, 16 N. J. L. 419; *State v. Cheeseman*, 5 N. J. L. 511.

*New York.*—*People v. Wilcox*, 22 Barb. (N. Y.) 178; *Mercein v. People*, 25 Wend. (N. Y.) 91, 35 Am. Dec. 653; *People v. Mercein*, 8 Paige (N. Y.) 47; *Matter of Wollstonecraft*, 4 Johns. Ch. (N. Y.) 80.

*Pennsylvania.*—*Com. v. Smith*, 1 Brews. (Pa.) 547; *Com. v. Barney*, 4 Brews. (Pa.) 408; *Com. v. Addicks*, 5 Binn. (Pa.) 520, 2 S. & R. (Pa.) 174.

*Texas.*—*Fitts v. Fitts*, 21 Tex. 511.

*Virginia.*—*Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*West Virginia.*—*Mathews v. Wade*, 2 W. Va. 464.

**3. Right of Property Not Triable on Habeas Corpus—Slavery Vel Non—Alabama.**—*Field v. Walker*, 17 Ala. 80.

*Florida.*—*Clark v. Gautier*, 8 Fla. 360.

*Georgia.*—*State v. Fraser, Dudley* (Ga.) 42.

*Kentucky.*—*Weddington v. Sloan*, 15 B. Mon. (Ky.) 154.

*Mississippi.*—*Foster v. Alston*, 6 How. (Miss.) 406; *Thornton v. Demoss*, 5 Smed. &

M. (Miss.) 617; *Sam v. Fore*, 12 Smed. & M. (Miss.) 413.

*South Carolina.*—*Huger v. Barnwell*, 5 Rich. L. (S. Car.) 277.

*Virginia.*—*Shue v. Turk*, 15 Gratt. (Va.) 256; *Ruddle v. Ben*, 10 Leigh (Va.) 487; *DeLacy v. Antoine*, 7 Leigh (Va.) 438.

But see *contra*, *State v. Lyon*, 1 N. J. L. 462, in which case a negro woman was discharged on habeas corpus from a person who claimed her as a slave.

**A White Person Claimed as a Slave** could establish his freedom by habeas corpus, because such a person could not be a slave, and therefore no question of property could be involved. *Guilford v. Hicks*, 36 Ala. 95.

**In Mississippi** the owner of a slave which had been taken and was detained from him by force, stratagem, or fraud, was allowed, by statute, to recover possession by means of the writ of habeas corpus. See as to the remedy and its limitations, *Steele v. Shirley*, 13 Smed. & M. (Miss.) 196; *Scudder v. Seals*, Walk. (Miss.) 154; *Hardy v. Smith*, 3 Smed. & M. (Miss.) 316; *Buckingham v. Levi*, 23 Miss. 590; *Nations v. Alvis*, 5 Smed. & M. (Miss.) 338; *Covington v. Arrington*, 32 Miss. 144.

**4. Master and Apprentice—Right of Property Not Triable on Habeas Corpus.**—*Com. v. Robinson*, 1 S. & R. (Pa.) 353.

**5. Dispute as to Boundary Line of State.**—*In re Chavez*, 72 Fed. Rep. 1006, the prisoner was sentenced in Arizona to the penitentiary of that territory, situated at Yuma. He applied to the Circuit Court of the United States in California for a writ of habeas corpus, on the ground that Yuma was not in fact within the territory of Arizona, but was about five hundred feet across the line and in the state of California. The writ was denied on the ground that a dispute in respect to such boundary line could not be determined in a habeas corpus proceeding.

**6. Determination of Conflicting Rights to Person.**—The object of the writ of habeas corpus is to relieve from restraint and imprisonment. Wherever there is no imprisonment, there is no ground for the writ, and it is said that no case can be cited where this writ was used to determine either a question of property or conflicting rights to the possession of the person; but if there is illegal restraint, the writ steps in and relieves from the restraint, leaving the contest as to the right of custody between the parties to be decided in another mode. *State v. Cheeseman*, 5 N. J. L. 511. See also *Morency v. Fortier*, 12 Quebec Super. Ct. 68; *Com. v. Addicks*, 5 Binn. (Pa.) 520.

custodian.<sup>1</sup> The writ issues *ex debito justitiæ*, as a matter of right,<sup>2</sup> but not as a matter of course, for the authorities are uniform in holding that sufficient probable cause must be shown to enable the court to form some judgment in the case, and if it appears from the petitioner's statement that there is no sufficient ground for his discharge, the court should not issue the writ.<sup>3</sup>

**2. Civil or Criminal Proceeding.**—A proceeding by habeas corpus is considered by some authorities as a civil proceeding for the enforcement of a civil right, viz., the right of personal liberty, whether the detention in the particular case is on a criminal charge or is a private restraint, as where a third person detains an infant from its parent or guardian, and it has sometimes been designated as a "cause" or "action,"<sup>4</sup> though it seems that ordinarily this designation is applied in a somewhat qualified sense.<sup>5</sup> On the other hand,

**1. Awarding Custody of Infants.**—See *infra*, this title, *Grounds of Remedy—Custody of Infants*.

**2. Writ Issues Ex Debito Justitiæ—Alabama.**—*Ex p. Campbell*, 20 Ala. 89.

*Illinois.*—*People v. Bradley*, 60 Ill. 390.

*Mississippi.*—*White v. State*, 1 Smed. & M. (Miss.) 149.

*Missouri.*—*State v. Dobson*, 135 Mo. 1.

*New York.*—*People v. Mayer*, 16 Barb. (N. Y.) 362.

*Virginia.*—*Cardoza v. Epps*, (Va. 1895) 23 S. E. Rep. 296.

**3. Probable Cause for Writ Must Be Shown—England.**—*Rex v. Hobbouse*, 2 Chit. 207, 8 E. C. L. 309, 3 B. & Ald. 420, 5 E. C. L. 330; *Rex v. Suddis*, 1 East 314; *Ex p. Partington*, 13 M. & W. 682.

*Canada.*—*Ex p. Gauvreau*, 1 Montreal Leg. N. 53.

*United States.*—*In re Boardman*, 169 U. S. 39; *In re Kaine*, 14 How. (U. S.) 103; *Ex p. Milligan*, 4 Wall. (U. S.) 110; *Ex p. Watkins*, 3 Pet. (U. S.) 193; *In re Jordan*, 49 Fed. Rep. 238; *U. S. v. Ronan*, 33 Fed. Rep. 117; *U. S. v. Lawrence*, 4 Cranch (C. C.) 518; *Ex p. Robinson*, 6 McLean (U. S.) 360; *Ex p. Davis*, 14 Law Rep. 301, 9 West. L. J. 14, 7 Fed. Cas. No. 3,613; *Ex p. Vallandigham*, 5 West. L. Month. 37, 28 Fed. Cas. No. 16,816; *Matter of Winder*, 2 Cliff. (U. S.) 89; *Matter of Keeler*, Hempst. (U. S.) 311.

*Alabama.*—*Ex p. Campbell*, 20 Ala. 89.

*Georgia.*—*Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *State v. Philpot*, Dudley (Ga.) 46.

*Kentucky.*—*Bethuram v. Black*, 11 Bush (Ky.) 629.

*Maine.*—*O'Malia v. Wentworth*, 65 Me. 129.

*Massachusetts.*—*Sims's Case*, 7 Cush. (Mass.) 291.

*Minnesota.*—*Hoskins v. Baxter*, 64 Minn. 226.

*Missouri.*—*State v. Dobson*, 135 Mo. 1.

*Nevada.*—*Ex p. Deny*, 10 Nev. 212.

*New York.*—*Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; *Husted's Case*, 1 Johns. Cas. (N. Y.) 136; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Matter of Ferguson*, 9 Johns. (N. Y.) 239.

*Ohio.*—*Ex p. Bushnell*, 8 Ohio St. 599.

*Pennsylvania.*—*Williamson's Case*, 26 Pa. St. 15, 67 Am. Dec. 374.

*Texas.*—*Jordan v. State*, 14 Tex. 436; *Ex p. Ainsworth*, 27 Tex. 731.

*Virginia.*—*Cardoza v. Epps*, (Va. 1895) 23 S. E. Rep. 296.

*West Virginia.*—*Quarrier's Case*, 5 W. Va. 48.

*Wisconsin.*—*In re Griner*, 16 Wis. 423; *Matter of Gregg*, 15 Wis. 479; *Bagnall v. Ableman*, 4 Wis. 163; *McCormick's Petition*, 24 Wis. 492, 1 Am. Rep. 197; *Semler's Petition*, 41 Wis. 517.

*Wyoming.*—*Ex p. Bergman*, 3 Wyo. 396.

**Where It Appears that the Prisoner Must Necessarily Be Remanded** if the writ is granted and he is brought into court, it will be refused.

*England.*—*Penrice's Case*, 2 Mod. 306; *Slater v. Slater*, Lev. 1; *Rex v. Marsh*, 3 Bulst. 27; *White v. Wiltshire*, 2 Rolle 138.

*United States.*—*Ex p. Terry*, 128 U. S. 289; *Ex p. Milburn*, 9 Pet. (U. S.) 706; *Ex p. Watkins*, 3 Pet. (U. S.) 201; *Ex p. Milligan*, 4 Wall. (U. S.) 2; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *Ex p. Kearney*, 7 Wheat. (U. S.) 38; *In re King*, 51 Fed. Rep. 434; *In re Barry*, 42 Fed. Rep. 113.

*Massachusetts.*—*Sims's Case*, 7 Cush. (Mass.) 285; *Ex p. Bushnell*, 8 Ohio St. 599.

See also *Comp. Abr.*, tit. Habeas Corpus, B 4; *Com. Dig.*, tit. Habeas Corpus, C; *Hallam's Const. Law* 20.

**4. Habeas Corpus Considered a Civil Proceeding.**—*Ex p. Tom Tong*, 108 U. S. 556; *State v. Collins*, 54 Iowa 441; *Drumb v. Keen*, 47 Iowa 435; *People v. Dewey*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 267; *In re Barker*, 56 Vt. 1.

Where the defendant in a criminal prosecution has obtained a writ of habeas corpus to inquire into the legality of his detention it is not a proceeding in such criminal prosecution, but is a new suit to enforce a civil right. *Ex p. Tom Tong*, 108 U. S. 556.

A habeas corpus proceeding being a civil action and not a criminal proceeding, the prisoner may testify in his own behalf under Act Cong. July 2, 1864. *In re Reynolds*, 20 Fed. Cas. No. 11,721.

**Proceeding by Habeas Corpus Held a "Cause."**—*Ex p. Milligan*, 4 Wall. (U. S.) 2; *Robb v. Connolly*, 111 U. S. 624; *Barranger v. Baum*, 103 Ga. 465.

In *Kline v. Kline*, 57 Iowa 386, 42 Am. Rep. 47, a petition for habeas corpus was said to be an action at law.

**5. Qualification of Designation.**—In *Kurtz v. Moffitt*, 115 U. S. 487, it was held that a habeas corpus proceeding was not within the Act of Congress of March 3, 1875, providing for the removal of causes from state to federal courts.

In *Com. v. Lancaster County, v. Blinn*, 184 5, it was held that a statute relating to the jurisdiction of a certain court in "civil cases"



there are cases holding that when the object of the writ is to procure the discharge of the defendant in a criminal prosecution, it is not a civil case, but a criminal proceeding, or a proceeding incident to criminal or *quasi*-criminal matters.<sup>1</sup>

3. **Original Legality or Illegality of Detention.** — A detention which was illegal in its inception may afterwards become legal, and thus bar the prisoner's right to a discharge on habeas corpus.<sup>2</sup> This is the case where a defective warrant of commitment is replaced by a valid and sufficient warrant before service of the writ,<sup>3</sup> or where a valid amended mittimus is substituted in place of a defective mittimus issued pursuant to a valid conviction, though the amended mittimus was received by the officer after a writ of habeas corpus had issued,<sup>4</sup> or where a fugitive from justice is kidnapped or otherwise unlawfully taken in a foreign country or state, and delivered to the authorities of the country or state in which the alleged crime was committed.<sup>5</sup> So, too, detention which was lawful in its inception may afterwards become unlawful, and the prisoner is then entitled to be discharged on habeas corpus.<sup>6</sup> But where a person is lawfully

related only to actions and did not include writs of habeas corpus and the like.

1. **Habeas Corpus Considered Criminal Proceeding.** — *People v. Bradley*, 60 Ill. 390; *Milligan v. State*, 97 Ind. 355; *McGlennan v. Margjowski*, 90 Ind. 150; *Garner v. Gordon*, 41 Ind. 92; *Baker v. Gordon*, 23 Ind. 204; *Sturgeon v. Gray*, 96 Ind. 166; *Willis v. Bayles*, 105 Ind. 363; *Hutchinson v. Trauerman*, 112 Ind. 21.

A habeas corpus proceeding is not a civil action within the *Indiana* statute authorizing a change of venue, nor within the bill of rights relating to trial by jury. *Garner v. Gordon*, 41 Ind. 92; *Baker v. Gordon*, 23 Ind. 204.

2. **The Legality or Illegality of the Original Caption** does not determine the right of a person to a writ of habeas corpus, but such right depends on the character of the detention. *Ex p. Coupland*, 26 Tex. 386.

**Subsequent Legalization of Detention.** — In *Ex p. Clark*, 85 Cal. 203, while the petitioner was imprisoned in the state prison on a conviction of felony had in the county of San Diego, he was taken therefrom by an order of the Superior Court of San Francisco county, brought before a magistrate, and committed for trial on a charge of murder. He was afterwards tried on that charge, convicted, and sentenced to be hanged, and he was then committed to the jail of San Francisco to await the execution of the death sentence. On an application for a writ of habeas corpus it was held that he was lawfully in the custody of the keeper of the jail of San Francisco under the sentence of the Superior Court of that county, and that it was immaterial whether that court had the right to order the petitioner out of the custody of the warden of the state prison or not. See also *People v. Grant*, 50 Hun (N. Y.) 243, reversing 13 Civ. Pro. N. Y. 305, and holding that a person is not entitled to a discharge on habeas corpus merely because he was taken by the wrong person, if he was rightfully under arrest when the application for the writ was made.

3. **Substituting Valid Warrant in Place of Invalid Warrant.** — *Reg. v. Richards*, 5 Q. B. 926, 48 E. C. L. 926. See also *Ex p. Cross*, 2 H. & N. 354, 26 L. J. M. C. 201; *Matter of Elmy*, 1 Ad. & El. 843, 28 E. C. L. 224; *Ex p. Welsh*, 4 Rev. de Jur. (Can.) 437.

**The Detention Must Be Legal at the Time of Service**, in order to withstand the writ, and a return showing a detention under valid process issued after the writ was served is not sufficient. *In re Doo Woon*, 18 Fed. Rep. 898.

4. **Amendment of Insufficient Mittimus.** — *Kelley v. Thomas*, 15 Gray (Mass.) 192.

5. **Fugitive Kidnapped, etc.** — *Ex p. Ker*, 18 Fed. Rep. 167. For the same point presented in this litigation in a different way, see *Ker v. Illinois*, 119 U. S. 436, affirming *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706. See also *Ex p. Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *People v. Pratt*, 78 Cal. 345; *State v. Brooks*, 92 Mo. 542; *Kingen v. Kelley*, 3 Wyo. 566. And see the title EXTRADITION, vol. 12, pp. 598, 607.

6. **Detention Becoming Unlawful After Its Inception.** — In *Matter of Lewinski*, (Supm. Ct.) 66 How. Pr. (N. Y.) 175, it was held that if the house of refuge refuses to receive a child under sixteen years of age who has been sentenced to imprisonment there, such child cannot be detained in the city jail, but must be discharged. See also *Kirby v. State*, 62 Ala. 51; *Ex p. State*, 76 Ala. 482; *Ex p. Cameron*, 81 Ala. 87, holding the writ of habeas corpus grantable in the case of a prisoner detained beyond a reasonable time in a county jail after sentence to the penitentiary. With these cases compare *Pember's Case*, 1 Whart. (Pa.) 439; *Reddill's Case*, 1 Whart. (Pa.) 445; *Ex p. Geary*, 2 Biss. (U. S.) 485.

**The Refusal of the County Judge to Hire a Convict** who has been imprisoned for nonpayment of a fine does not entitle him to a discharge on habeas corpus. *Ex p. Thompson*, 32 Tex. Crim. 274.

**The Unreasonable Detention of a Witness**, where there have been several continuances of the case which have not been satisfactorily accounted for, entitles him to his discharge on habeas corpus. *Ex p. Dressler*, 67 Cal. 257.

**As to Failure to Indict or Try the Accused Within the Time Limited by Statute**, see *infra*, this title, *Grounds of Remedy — Custody under Warrant or Commitment on Criminal Charge*.

**For Other Instances** of the application of the rule stated in the text, see *infra*, this title, *Grounds of Remedy — Judgments Becoming Inoperative After Rendition*.

in custody, the existence of facts which will entitle him to a discharge on a petition and showing, as prescribed by statute, will not entitle him to a writ of habeas corpus, unless he has exhausted the statutory remedy.<sup>1</sup>

**4. Necessity of Actual Restraint.** — In order to make a case for habeas corpus, there must be an actual confinement, or the present means of enforcing it, as distinguished from mere moral restraint.<sup>2</sup> It is not sufficient, for instance, that the prisoner has entered into a recognizance or given a bond to appear at a certain time and place in a proceeding against him;<sup>3</sup> but there is actual restraint, within this rule, if he is taken by his bail and delivered into custody,<sup>4</sup> though the rule is different in case a person on bail voluntarily surrenders himself and is taken into actual custody.<sup>5</sup>

**5. Anticipating Decision of Trial Court.** — The writ will not be granted on the application of a person who is not under restraint, for the purpose of making a moot case, in order that a speedy decision may be obtained on a question of the validity of the proceeding against the petitioner.<sup>6</sup>

**1. Necessity of Pursuing Statutory Remedy.** — *Bass v. Hightower*, 94 Ga. 602.

**2. Necessity of Actual Restraint** — *United States*. — *Wales v. Whitney*, 114 U. S. 564; *Matter of Esseiborn*, 20 Blatchf. (U. S.) 1; *In re Grice*, 79 Fed. Rep. 627. See also *Wilson v. District of Columbia*, 1 Cranch (C. C.) 608.

*California*. — *Ex p. Henion*, (Cal. 1898) 55 Pac. Rep. 326.

*Louisiana*. — *Dodge's Case*, 6 Mart. (La.) 569.

*Nebraska*. — *Spring v. Dahlman*, 34 Neb. 692, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 178.

*New York*. — *Matter of Lampert*, 21 Hun (N. Y.) 154; *People v. Biggart*, 25 N. Y. App. Div. 20.

*Pennsylvania*. — *Respublica v. Arnold*, 3 Yeates (Pa.) 263; *Com. v. Glenn*, 48 Leg. Int. (Pa.) 34; *Com. v. Doran*, 15 Pa. Co. Ct. 385; *Com. v. Connell*, 13 Pa. Co. Ct. 103; *Com. v. Gill*, 10 Pa. Co. Ct. 71, 27 W. N. C. (Pa.) 311.

*South Carolina*. — *State v. Buyck*, 1 Brev. (S. Car.) 460.

*Texas*. — *Ex p. Cole*, 14 Tex. App. 579; *Ex p. Peyton*, 2 Tex. App. 296; *Ex p. Cohn*, 2 Tex. App. 380; *Dirks v. State*, 33 Tex. 227; *Griffin v. State*, 5 Tex. App. 457.

*Utah*. — *Ex p. Mearns*, 3 Utah 50.

See also *Rex v. Davis*, 1 Burr. 638, note.

**Men in the Military or Naval Forces** are necessarily subject to restraint by their superiors, and the writ will not be issued in the case of a person so situated unless it is made clear that some unusual restraint upon liberty of personal movement exists. *Wales v. Whitney*, 114 U. S. 564. In this case it was held not sufficient that the petitioner had been ordered by his superior officer to remain within designated limits, if he could disregard such order at will.

**Mere Nominal Custody**, not enforced in good faith by the proper officer, does not afford ground for a writ of habeas corpus. *In re Dill*, (Kan. 1886) 11 Pac. Rep. 672.

**A Prisoner Released on His Parol** is not under such restraint as entitles him to a writ of habeas corpus. *Ex p. Cole*, 14 Tex. App. 579. See also *Com. v. Doran*, 15 Pa. Co. Ct. 385.

**A Person Allowed to Go at Large Subject to Re-arrest if Ordered** is not entitled to a writ of habeas corpus. *Matter of Esselborn*, 20 Blatchf. (U. S.) 1.

**Wherever There Is No Imprisonment** there is no ground for the writ of habeas corpus. *State v. Cheeseman*, 5 N. J. L. 511; *State v. Baird*, 18 N. J. Eq. 195; *State v. Ward*, 8 N. J. L. 120. See also *Matter of Troutman*, 24 N. J. L. 634; *State v. Farlee*, 1 N. J. L. 49.

**3. Persons at Large on Bail or Recognizance Not Entitled to Habeas Corpus** — *United States*. — *Ex p. Burford*, 1 Cranch (C. C.) 456.

*Mississippi*. — *Ex p. Walker*, 53 Miss. 366.

*Nebraska*. — *Spring v. Dahlman*, 34 Neb. 692, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 178.

*New York*. — *People v. Biggart*, 25 N. Y. App. Div. 20; *Matter of Lampert*, 21 Hun (N. Y.) 154.

*Pennsylvania*. — *Com. v. Connell*, 13 Pa. Co. Ct. 103; *Com. v. Sheriff*, 2 Pa. Dist. 319; *Com. v. Gill*, 10 Pa. Co. Ct. 71, 27 W. N. C. (Pa.) 311.

*South Carolina*. — *State v. Buyck*, 1 Brev. (S. Car.) 460.

**A Debtor Who Has Given Bond** not to leave the state is under mere moral restraint, and is not entitled to habeas corpus to test the regularity of the proceedings against him. *Dodge's Case*, 6 Mart. (La.) 570.

**In Case of an Appeal** by the petitioner in a habeas corpus proceeding, actual imprisonment is necessary, in *Texas*, in order to give jurisdiction to the appellate court. If the petitioner procures his enlargement on bail, he cannot maintain an appeal. *Ex p. Branch*, 36 Tex. Crim. 384; *Ex p. Talbutt*, (Tex. Crim. App. 1898) 41 S. W. Rep. 832.

**4. Surrender by Bail.** — *Ex p. Burford*, 1 Cranch (C. C.) 456; *Com. v. McFadden*, 9 Lanc. Bar (Pa.) 129; *Ex p. Hensley*, (Tex. Crim. App. 1893) 24 S. W. Rep. 295.

It is immaterial that the petitioner's surrender was by collusion with his sureties. *In re Grice*, 79 Fed. Rep. 627.

**Surrender After Date of Petition.** — In *In re Brydon*, (N. Mex. 1889) 43 Pac. Rep. 691, it was held, where the petitioner was at large at the date of the petition and did not surrender himself into custody until afterwards, that he was not entitled to a discharge.

**5. Voluntary Surrender by Person on Bail.** — *Com. v. Fenicle*, 20 Pa. Co. Ct. 68; *Com. v. Green*, 185 Pa. St. 641.

**6. Moot Case.** — *Ex p. Henion*, (Cal. 1898) 55 Pac. Rep. 326.



6. **Custody under Civil Process.** — It seems to have been considered at one time that when the custody was under the process of a court, it was only in criminal cases that relief could be had on habeas corpus,<sup>1</sup> but it is now well settled by the authorities that the writ will be granted to relieve from imprisonment in civil cases as well as where the imprisonment is under criminal process.<sup>2</sup>

**VI. GROUNDS OF REMEDY — 1. In General.** — The writ of habeas corpus is a remedy designed to remove illegal restraints of liberty, of whatever kind, character, or description, whether the restraint be under color of official authority or by private persons.<sup>3</sup> Various doubts and uncertainties which arose at an

1. **Custody under Civil Process — Former Opinion.** — *Ex p. Wilson*, 6 Cranch (U. S.) 52; *Cable v. Cooper*, 15 Johns. (N. Y.) 152.

2. **Imprisonment in Civil Cases Relievable by Habeas Corpus — England.** — Matter of Eggington, 2 El. & Bl. 717, 75 E. C. L. 717, 18 Jur. 224, 23 L. J. M. C. 41; *Ex p. Griffiths*, 5 B. & Ald. 730, 7 E. C. L. 243.

*Canada.* — *Graham v. Kingsmill*, 6 U. C. Q. B. O. S. 584.

*United States.* — *Ex p. Randolph*, 2 Brock. (U. S.) 447, 20 Fed. Cas. No. 11,558.

*Alabama.* — *Morrow v. Bird*, 6 Ala. 834.

*California.* — *In re Vinich*, 86 Cal. 70; *Ex p. McCullough*, 35 Cal. 97.

*Connecticut.* — *Chapman v. Welles, Kirby* (Conn.) 137.

*Louisiana.* — *Hyde v. Jenkins*, 6 La. 436.

*Massachusetts.* — *Com. v. Moore*, 19 Pick. (Mass.) 339; *Mowry's Case*, 112 Mass. 394.

*New York.* — *People v. Willett*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 213. *Compare Cable v. Cooper*, 15 Johns. (N. Y.) 152.

*Pennsylvania.* — *Hecker v. Jarret*, 3 Binn. (Pa.) 404; *Martin's Case*, *Purd. Pa. Dig.* (10th ed.) 851.

*South Carolina.* — *Gilliam v. McJunkin*, 2 S. Car. 442.

*Vermont.* — *Ex p. Kellogg*, 6 Vt. 509; *In re Cazin*, 56 Vt. 297.

3. **Grounds of Remedy in General — Any Illegal Restraint — Alabama.** — *Kirby v. State*, 62 Ala. 51; *Ex p. McKivett*, 55 Ala. 236.

*Arkansas.* — *State v. Neel*, 48 Ark. 283; *Ex p. Jones*, 27 Ark. 349.

*California.* — *Ex p. Queen of the Bay*, 1 Cal. 157.

*Indiana.* — *Ex p. Lawler*, 28 Ind. 241.

*Kansas.* — *Matter of Chapman*, 4 Kan. App. 49.

*Louisiana.* — *State v. Duson*, 36 La. Ann. 856; *State v. Morales*, 38 La. Ann. 919.

*Massachusetts.* — *Com. v. Sumner*, 5 Pick. (Mass.) 360; *Stone v. Carter*, 13 Gray (Mass.) 575.

*Mississippi.* — *White v. State*, 1 Smed. & M. (Miss.) 149.

*New Jersey.* — *Peltier v. Pennington*, 14 N. J. L. 312, *Hornblower, C. J.*

*Pennsylvania.* — *Com. v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37; *Williamson v. Lewis*, 39 Pa. St. 9; *Com. v. Ridgway*, 2 Ashm. (Pa.) 247.

*South Carolina.* — *Matter of Kottman*, 2 Hill L. (S. Car.) 353, 27 Am. Dec. 390.

*West Virginia.* — *Ex p. Mooney*, 26 W. Va. 36, 53 Am. Rep. 59.

*Canada.* — *Reg. v. Mosier*, 4 Ont. Pr. 64.

**A Person Arrested Without Warrant**, on the

faith of a telegram from an officer of another state, may be discharged on habeas corpus. *Simmons v. Vandyke*, 138 Ind. 380, 46 Am. St. Rep. 411. See the title **ARREST**, vol. 2, p. 882.

**Unauthorized Delegation of Authority to Make Arrest** may entitle the arrested person to discharge on habeas corpus. *Sanborn v. Carleton*, 15 Gray (Mass.) 399. See the title **ARREST**, vol. 2, p. 868.

**A Person Who Is Arrested in Violation of Privilege** may be discharged on habeas corpus. *Ex p. Dakins*, 16 C. B. 77, 81 E. C. L. 77, 1 Jur. N. S. 378, 24 L. J. C. Pl. 131, 3 C. L. R. 602; *Wood v. Neale*, 5 Gray (Mass.) 538; *May v. Shumway*, 16 Gray (Mass.) 86, 77 Am. Dec. 401; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *State v. Holden*, 64 N. Car. 829. But see *contra*, *State v. Polacheck*, 101 Wis. 427.

**If a Debtor Who Has Been Discharged under the Insolvent Law** be arrested upon a *capias ad satisfaciendum* for a debt accruing before his discharge, he may be discharged on habeas corpus. *Ex p. Reardon*, 2 Cranch (C. C.) 639, 20 Fed. Cas. No. 11,615; *State v. Ward*, 8 N. J. L. 120. See also *Peltier v. Pennington*, 14 N. J. L. 312. *Compare Whitehouse, Petitioner*, 1 Lowell (U. S.) 429; *Minon v. Van Nostrand*, 1 Lowell (U. S.) 458; *Cable v. Cooper*, 15 Johns. (N. Y.) 152.

**Taking a Convicted Prisoner Temporarily Out of a State**, in order to reach the state penitentiary, does not entitle him to a discharge on habeas corpus in the state through which he passes. *Matter of Maney*, 20 Wash. 509.

**Mistake as to Person.** — The court will dismiss a prisoner at once, where it clearly appears that he has been arrested by mistake. *Respublica v. Gaoler*, 2 Yeates (Pa.) 258. See also *Ex p. Durocher*, 7 Rev. Leg. 436.

**Lunatics.** — A person who has been wrongfully committed to a lunatic asylum, or who has recovered his sanity since his commitment, may be set at liberty on habeas corpus. *Palmer v. Buck*, 83 Mich. 528; *Matter of Dixon*, (Supm. Ct.) 11 Abb. N. Cas. (N. Y.) 118, 4 N. Y. L. Bul. 84. But not while proceedings are pending to determine the question of sanity, with the aid of a jury. *Matter of Laurent*, (Supm. Ct.) 11 Abb. N. Cas. (N. Y.) 120.

**Inebriates.** — A voluntary patient in the state inebriate asylum cannot be forcibly detained therein, though he has signed an agreement to remain for a certain time. *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 485.

**An Apprentice Held under an Invalid Indenture** will be discharged from the custody of his master on habeas corpus. *Rex v. Delaval*, 3 Burr. 1434; *Cannon v. Stuart*, 3 Houst. (Del.)



early day in *England* in regard to the cases to which the writ was applicable, resulting in some instances from wilful perversions of the law by servile judges, were removed by statutes, the most important of which was enacted in the reign of King Charles the Second (31 Car. II., c. 2). This statute, by its terms, relates only to cases where the imprisonment was by official authority, for criminal or supposed criminal matters; but subsequent statutes included other grounds of detention by such authority.<sup>1</sup> In the *United States* the habeas corpus acts are generally modeled on the English statute of 31 Car. II., though some of them particularly enumerate the grounds on which the writ may be issued.<sup>2</sup>

**2 Custody under Warrant or Commitment on Criminal Charge**—*a. BEFORE INDICTMENT.*—A person who is in custody under a warrant or commitment on a criminal charge, before indictment, may have a writ of habeas corpus for the purpose of an inquiry into the legality of his detention and to procure his release, in case it appears that he is illegally detained.<sup>3</sup> The grounds, among

223; *Comas v. Reddish*, 35 Ga. 236; *Ballenger v. McLain*, 54 Ga. 159; *Matter of M'Dowle*, 8 Johns. (N. Y.) 328; *Matter of Brennan*, 1 Sandf. (N. Y.) 711; *Musgrove v. Kornegay*, 7 Jones L. (52 N. Car.) 71; *Com. v. Atkinson*, 8 Phila. (Pa.) 375. See also *People v. Weissenbach*, 60 N. Y. 385.

As to the discharge from custody of third persons at the instance of the master, see *infra*, this section, *Custody of Infants—Detention of Apprentices from Masters*.

**Forcible Detention by Relatives.**—An aged person who has been removed from her residence by her relatives, forcibly and against her remonstrance, will be relieved by habeas corpus. *Com. v. Curby*, 3 Brewst. (Pa.) 610, 8 Phila. (Pa.) 372.

As to Prisoners Kidnapped or Otherwise Brought from Foreign Jurisdictions, see *supra*, this title, *Nature and Scope of Remedy—Original Legality or Illegality of Detention*; and *infra*, this section, *Custody in Extradition Proceedings*.

**1. Scope of English Habeas Corpus Acts.**—*In re Shaughnessy*, 21 N. Bruns. 182. See also *supra*, this title, *History of Writ—In England*.

A person in custody under a commission of rebellion, issued out of a court of equity, is not in custody for any criminal or supposed criminal matter within 31 Car. II., c. 2. *Cobbett v. Slowman*, 4 Exch. 747, 19 L. J. Exch. 276, affirmed 9 Exch. 633, 23 L. J. Exch. 144.

**2. Habeas Corpus Acts in the United States.**—See *supra*, this section, *History of Writ—In the United States*; and the various local codes and statutes.

**In Illinois** a person imprisoned or detained by virtue of legal process can be discharged on habeas corpus only on some one or more of the grounds enumerated in the habeas corpus act. *People v. Foster*, 104 Ill. 156; *People v. Jonas*, 173 Ill. 316.

**3. Custody under Commitment Before Indictment—England.**—*Rex v. Marks*, 3 East 157; *Van Boven's Case*, 9 Q. B. 676, 58 E. C. L. 676; *Rex v. Horner*, 1 Leach C. C. 270.

*United States.*—*U. S. v. Lawience*, 4 Cranch (C. C.) 518; *Ex p. Bennett*, 2 Cranch (C. C.) 612; *Ex p. Jenkins*, 2 Wall. Jr. (C. C.) 528; *U. S. v. Johns*, 4 Dall. (U. S.) 412; *Ex p. Rickelt*, 61 Fed. Rep. 203; *In re Barber*, 75 Fed. Rep. 980; *Horner v. U. S.*, 143 U. S. 570;

*Ex p. Burford*, 3 Cranch (U. S.) 448; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *Ex p. Watkins*, 3 Pet. (U. S.) 201; *Ex p. Jones*, 96 Fed. Rep. 200.

*Alabama.*—*Ex p. Mahone*, 30 Ala. 49, 68 Am. Dec. 111; *Ex p. Champion*, 52 Ala. 311; *Ex p. Riley*, 94 Ala. 82; *Ex p. Charleston*, 107 Ala. 688; *Ex p. West*, 100 Ala. 65.

*Arkansas.*—*Ex p. Rohe*, 5 Ark. 104; *Ex p. Jackson*, 45 Ark. 158.

*California.*—*People v. Smith*, 1 Cal. 9; *Ex p. Walpole*, 85 Cal. 362.

*Florida.*—*Ex p. Harfourd*, 16 Fla. 283.

*Georgia.*—*State v. Asselin*, T. U. P. Charlt. (Ga.) 184.

*Indiana.*—*Davis v. Bible*, 134 Ind. 108.

*Mississippi.*—*State v. Doty*, Walk. (Miss.) 230.

*New York.*—*Ex p. Tayloe*, 5 Cow. (N. Y.) 39; *People v. Fullerton*, 10 Hun (N. Y.) 63; *People v. McLoed*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; *People v. Cassels*, 5 Hill (N. Y.) 164; *People v. Sheriff*, 29 Barb. (N. Y.) 622; *People v. Kelly*, 35 Barb. (N. Y.) 444; *People v. Rawson*, 61 Barb. (N. Y.) 619; *People v. Willett*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 210; *People v. Riley*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 451; *People v. Martin*, (Supm. Ct.) 1 Park Crim. (N. Y.) 187; *People v. Tompkins*, (Supm. Ct.) 1 Park Crim. (N. Y.) 224; *People v. McCormack*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 9; *People v. Richardson*, (Supm. Ct.) 4 Park. Crim. (N. Y.) 656, 18 How. Pr. (N. Y.) 92; *People v. Divine*, (Supm. Ct.) 5 Park. Crim. (N. Y.) 62, 21 How. Pr. (N. Y.) 80, 11 Abb. Pr. (N. Y.) 90.

*Pennsylvania.*—*Com. v. Ridgway*, 2 Ashm. (Pa.) 247.

*Texas.*—*Ex p. Hensley*, (Tex. Crim. 1893) 24 S. W. Rep. 295.

*Virginia.*—*Ex p. Pool*, 2 Va. Cas. 276.

*Wisconsin.*—*State v. Bloom*, 17 Wis. 521.

See also *infra*, this title, *Hearing and Determination—Extent of Inquiry on Hearing—Where Custody Is under Judicial Process*.

**A Bastardy Proceeding**, being quasi criminal, is within the *Alabama* statute which provides that "any person who is imprisoned or restrained of his liberty in this state, on any criminal charge or accusation, or under any other pretense whatever, except," etc., "may prosecute the writ of habeas corpus according

others, on which a discharge will be granted under this head are want of jurisdiction or power in the committing magistrate to make the commitment;<sup>1</sup> failure to indict for the offense charged within the time prescribed by statute;<sup>2</sup> that no criminality is attached by law to the acts charged;<sup>3</sup> and radical defects in the commitment.<sup>4</sup> But a discharge will not be granted merely on the ground that the commitment is irregular,<sup>5</sup> or, as a general rule, on any ground that anticipates the determination by the grand jury of matters within its province, or involves a review of the action of the committing magistrate in determining questions within his jurisdiction,<sup>6</sup> though in some jurisdictions

to the provisions of this chapter, to inquire into the cause of such imprisonment and restraint." *Ex p.* Charleston, 107 Ala. 688.

**Accusation Before Magistrate — Failure to Give Bond for Jury Trial.** — A person who, accused before a justice of the peace, demands a trial by jury, but fails to give the bond required by the *Alabama* statute for his appearance at the next term of court, and who is therefore committed to jail, is not entitled to a writ of habeas corpus. *Ex p.* Dunklin, 72 Ala. 241.

**Commitment on Charge of Perjury.** — A person is not subject to a prosecution for perjury until the suit in which the perjury was alleged to have been committed has been determined, and if he is arrested before such time he may be discharged on habeas corpus. *Com. v.* Dickinson, 5 Pa. L. J. 164, 3 Clark (Pa.) 265; *Com. v.* Davis, 10 Pa. Co. Ct. 596.

**1. Want of Jurisdiction in Committing Magistrate.** — *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Matter of Wooldridge*, 30 Mo. App. 612; *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 66; *In re Barker*, 56 Vt. 14.

**Prejudice of Magistrate.** — A prisoner committed on a preliminary examination by a magistrate against whom a sufficient affidavit of prejudice has been filed may be discharged on habeas corpus in *Missouri*. *Ex p.* Bedard, 106 Mo. 616.

**Want of Legal Capacity to Act.** — If a person who has been commissioned as a justice of the peace is a minor, he is disqualified, and a commitment made by him is void. *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 66.

**2. Failure to Indict Within Limited Time — California.** — *Ex p.* Bull, 42 Cal. 196.

*Mississippi.* — *Byrd v. State*, 1 How. (Miss.) 163; *Ex p.* Caples, 58 Miss. 358; *Ex p.* Jefferson, 62 Miss. 223.

*Nevada.* — *Ex p.* Isbell, 11 Nev. 295.

*Ohio.* — *State v. Lott*, Prob. Ct. 5 Ohio N. P. 469.

*South Carolina.* — *State v. Fasket*, 5 Rich. L. (S. Car.) 255.

As to the rule in *Louisiana*, see *State v. Criminal Sheriff*, 37 La. Ann. 617.

**The State Must Be in Default** in order to bring a case within the rule that the accused is entitled to be discharged on habeas corpus if two terms of court have elapsed without an indictment being found against him; and if no terms of court have been held the state is not in default, and the prisoner is not entitled to a discharge. *Byrd v. State*, 1 How. (Miss.) 163.

See also the various local codes and statutes in the United States.

**3. Commitment Charging Acts Not Criminal in Law.** — *Ex p.* Bailey, 39 Fla. 734; *Dodd's Case*, 2 De G. & J. 510, 4 Jur. N. S. 291.

**4. Defects in Warrant of Commitment.** — *Ex p.* Sprout, 1 Cranch (C. C.) 424; *Sipple v. Adams*, 5 Harr. (Del.) 149; *People v. Reese*, (Surrogate Ct.) 24 Misc. (N. Y.) 528.

**Failure of Commitment to State Offense.** — *Ex p.* Rohe, 5 Ark. 104; *Com. v. Jones*, 1 Lack. L. Rec. (Pa.) 415.

**Commitment for Examination at Future Day.** — *Ex p.* Ah Kee, 22 Nev. 374, *applying* Gen. Stat. Nev. (1885), § 4032.

**An Exception to the rule that a discharge will be granted in case of a defective commitment exists where the court is satisfied from the evidence that the prisoner ought to be committed for the offense charged, or any other.** In such a case he will be remanded into custody, and a proper order will be made in regard to the matter. *Jackson v. Boyd*, 53 Iowa 536.

**5. Mere Irregularity in Commitment Not Ground for Discharge.** — *Ex p.* McGlawh, 75 Ala. 38; *Davis v. Bible*, 134 Ind. 108; *State v. Harmon*, 47 La. Ann. 949; *Hamilton's Case*, 51 Mich. 174; *Snowden v. State*, 8 Mo. 483; *In re Bouquette*, 14 Mo. App. 576; *Matter of Percy*, 2 Daly (N. Y.) 530.

**Surplusage in the Commitment does not entitle the prisoner to discharge.** *People v. Smith*, 1 Cal. 9.

**So the Omission of the Name of the Deceased in a commitment on a charge of murder under the California statute.** *Ex p.* Bull, 42 Cal. 196.

**A Commitment Which Does Not Run in the Name of the State is void in Arkansas, and the prisoner will be discharged on habeas corpus.** *Ex p.* Rohe, 5 Ark. 104.

**If Sufficient Grounds Are Shown** for detaining the prisoner, he is not to be discharged for defects in the original arrest or commitment. *Nishimura Ekiu v. U. S.*, 142 U. S. 651.

See also *infra*, this section, *Errors and Irregularities*.

**6. Matters Properly Determinable by Committing Magistrate or Grand Jury.** — *Ex p.* Rickelt, 61 Fed. Rep. 203; *In re Barber*, 75 Fed. Rep. 980, *Horner v. U. S.*, 143 U. S. 570; *Ex p.* Barnett, 51 Ark. 215; *Turner v. Conkey*, 132 Ind. 248, 32 Am. St. Rep. 251, *overruling* *Smelzer v. Lockhart*, 97 Ind. 315; *Smith v. Clausmeier*, 136 Ind. 105, 43 Am. St. Rep. 311; *Matter of Balcom*, 12 Neb. 316; *Ex p.* Winston, 9 Nev. 71; *In re Peraltareavis*, 8 N. Mex. 27.

**Only Radical or Jurisdictional Defects in the warrant are available on habeas corpus.** *State v. Harmon*, 47 La. Ann. 949.

**If the Warrant and Affidavits Are Sufficient**, a prisoner regularly committed for a felony will not be discharged on habeas corpus on the ground that no felony has been committed. *State v. Asselin*, T. U. P. Charlt. (Ga.) 184.

**If the Prisoner Is Regularly in Custody under a**



the court will consider the evidence before the committing magistrate,<sup>1</sup> at least to the extent of determining whether there was any evidence before the magistrate on which he might properly hold the accused.<sup>2</sup> In no case, however, can the writ be granted while the proceeding is pending before the examining magistrate, but the remedy by habeas corpus is available only where the magistrate has, after examination, refused to discharge the accused.<sup>3</sup> The writ will also be issued in favor of a person who has been committed on a criminal charge, for the purpose of bringing him up, in order that he may give bail, if the offense charged be bailable.<sup>4</sup>

*b. AFTER INDICTMENT* — (1) *In General*. — Even after an indictment has been found, and the party is held in custody to respond to the charge against him, he may still question the legality of such detention by means of the writ of habeas corpus, and may procure his discharge if it appears that he is illegally detained, as where the offense charged was not committed within the jurisdiction where the indictment was found,<sup>5</sup> or where the court in which the prosecution is pending has no jurisdiction of the offense charged;<sup>6</sup> but no matter of defense on the facts, however clear, can be thus determined in advance.<sup>7</sup>

The fact that the accused had been admitted to bail after his commitment on his preliminary examination does not entitle him to a discharge, where an indictment is afterwards found against him, and he is taken into custody under it.<sup>8</sup>

(2) *Defects or Irregularities in Drawing Grand Jury*. — Defects or irregularities in making up the list from which grand jurors are drawn, or in drawing the names, must be taken advantage of in the trial court by the proper procedure, and cannot be questioned by habeas corpus.<sup>9</sup>

(3) *Insufficiency of Indictment*. — In the case of a defective or insufficient indictment, there is some confusion of opinion as to when the prisoner will be discharged on habeas corpus. There are authorities which seem to indicate

commitment duly issued by a police judge, he will not be discharged, where no good reason is shown therefor. *Ex p. Ho Quan*, 59 Cal. 404; *Ex p. Ah Sing*, 59 Cal. 404; *Ex p. Lee Bang*, 59 Cal. 405.

*Refusal to Grant a Change of Venue* by the committing magistrate is not ground for the discharge of the accused. *Matter of Garst*, 10 Neb. 78.

*Clerical Errors*. — Inserting the phrase "grand larceny" instead of "petit larceny" is a harmless error which might have been corrected on motion before the committing magistrate, and cannot be attacked collaterally by habeas corpus. *Davis v. Bible*, 134 Ind. 108.

1. *Review of Evidence Given Before Committing Magistrate*. — See *Ex p. Allen*, 12 Nev. 87, applying the Nevada statute. Compare the statutes in other jurisdictions.

2. *If No Evidence Was Given* before the committing magistrate that the accused committed the crime with which he is charged, he may be discharged on habeas corpus under the *New York* statute, but if there be any evidence that he committed the crime it is sufficient. *Matter of Henry*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 734; *People v. Hagan*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 125. See also *State v. Hayden*, 35 Minn. 283. And see *infra*, this title, *Hearing and Determination — Extent of Inquiry on Hearing*.

3. *Pendency of Proceeding Before Examining Magistrate*. — *Ex p. Kittrel*, 20 Ark. 499; *Matter of Peoples*, 47 Mich. 626; *Ex p. McCorkle*, 29 Tex. App. 20, 25 Am. St. Rep. 715; *Robertson v. State*, 36 Tex. 346.

4. See *infra*, this section, *Habeas Corpus to Admit to Bail*.

5. *Offense Not Committed Within Jurisdiction Where Indictment Was Found*. — *U. S. v. Fowkes*, 49 Fed. Rep. 50, affirmed 53 Fed. Rep. 13, 3 U. S. App. 247; *U. S. v. Rogers*, 23 Fed. Rep. 658; *In re Buell*, 3 Dill. (U. S.) 116; *Ex p. Slater*, 72 Mo. 102.

6. *Want of Jurisdiction in Court in Which Prosecution Is Pending*. — *Com. v. Ketner*, 92 Pa. St. 372, 37 Am. Rep. 692.

7. *Interfering with Province of Jury*. — Where an indictment for homicide has been found, the court will not discharge on habeas corpus though death was the result of justifiable violence, because that is a question for a jury. *Com. v. Megary*, 8 Phila. (Pa.) 607, *disapproving* *Com. v. Crawford*, 8 Phila. (Pa.) 490, and *Com. v. Mann*, 2 Leg. Gaz. (Pa.) 329, in which a judge discharged on such ground, without trial.

*However Clear the Proof of Innocence*, a person who has been committed on an indictment for murder cannot be discharged on habeas corpus without trial. *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328. See also *People v. Ruloff* (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 77.

8. *Effect of Bail Taken After Commitment but Before Indictment*. — *Ex p. Cook*, 35 Cal. 107.

9. *Defects or Irregularities in Drawing Grand Jury*. — *Ex p. Warris*, 28 Fla. 371; *State v. Fenderson*, 28 La. Ann. 82; *In re Betts*, 36 Neb. 282. See also *Ex p. Prince*, 27 Fla. 196, 26 Am. St. Rep. 67; *Ex p. Bowen*, 25 Fla. 214; *Potsdamer v. State*, 17 Fla. 895; *Gallaher v. State*, 17 Fla. 379; *Burroughs v. State*, 17 Fla.



that where an essential ingredient of an offense intended to be charged is omitted from the indictment, the writ of habeas corpus is the proper remedy for relief from imprisonment under it;<sup>1</sup> but the true rule seems to be that it is only where the facts stated in the indictment are not and cannot be so stated as to charge an offense that the prisoner may be discharged, and where the matters are of such a character that the indictment, though defective for lack of a statement of an essential ingredient of the offense, may be perfected into a sufficient accusation of crime, the prisoner should be held to abide the judgment or order of the court.<sup>2</sup>

If There Was No Legal Evidence Before the Grand Jury to support the indictment, it has been held in *New York* that it is void, and that the accused may be discharged on habeas corpus.<sup>3</sup>

(4) *Delay in Bringing Indictment to Trial.* — It is the right of every person accused of crime to demand a speedy trial,<sup>4</sup> and if this right is denied, after a demand therefor has been made by the accused, it becomes unlawful to hold him longer in custody, and he may obtain his discharge on habeas corpus;<sup>5</sup>

643; *Gladden v. State*, 13 Fla. 623; *Savage v. State*, 18 Fla. 909.

1. *Matter of Corryell*, 22 Cal. 178; *Church on Habeas Corpus*, § 245.

2. *Rule as to Defective Indictments* — *United States*. — *Bergemann v. Backer*, 157 U. S. 655; *In re Hacker*, 73 Fed. Rep. 464; *In re Johnson*, 46 Fed. Rep. 477; *In re Greene*, 52 Fed. Rep. 104; *Matter of Clark*, 2 Ben. (U. S.) 540.

*Alabama*. — *Ex p. Whitaker*, 43 Ala. 323.

*California*. — *Ex p. Maier*, 103 Cal. 476, 42 Am. St. Rep. 129; *Ex p. McNulty*, 77 Cal. 164; *Ex p. Kearny*, 55 Cal. 212; *Ex p. Harrold*, 47 Cal. 129. See also *Ex p. Rosenheim*, 83 Cal. 388.

*Florida*. — *Ex p. Prince*, 27 Fla. 196, 26 Am. St. Rep. 67.

*Idaho*. — *In re Marshall*, (Idaho 1899) 56 Pac. Rep. 470.

*Mississippi*. — *Emanuel v. State*, 36 Miss. 627.

*Nevada*. — *Ex p. Kitchen*, 19 Nev. 178.

*Ohio*. — *Ex p. McKnight*, 3 Ohio N. P. 255, 4 Ohio Dec. 284.

*Allegation of Place of Commitment of Crime.* — In *In re Buell*, 3 Dill. (U. S.) 116, it was held that where a prisoner had been indicted in the District of Columbia for libel, and was committed by a United States commissioner in Missouri for removal for trial in the District of Columbia, it was a ground for his discharge on habeas corpus that the indictment did not allege a publication of the libel in the District of Columbia.

*Failure to Allege Offense Within Jurisdiction of Court.* — A person in custody under an indictment is entitled to be discharged on habeas corpus if the indictment does not sufficiently describe an offense of which the court in which it is to be tried has jurisdiction. *In re Coy*, 127 U. S. 731.

3. *Indictment Not Founded on Any Legal Evidence.* — *Matter of Klein*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 107.

4. *Right of Accused to Special Trial.* — See the title CONSTITUTIONAL LAW, vol. 6, p. 992.

5. *Delay in Bringing Indictment to Trial* — *England*. — *Reg. v. Bowen*, 9 C. & P. 509, 38 E. C. L. 199; *Stat. 31 Car. II., c. 2, § 7*.

*Arkansas*. — *Ex p. Jones*, 49 Ark. 110.

*Colorado*. — *In re Garvey*, 7 Colo. 502.

*Georgia*. — *State v. Segar*, T. U. P. Charl. (Ga.) 24.

*Indiana*. — *McGuire v. Wallace*, 109 Ind. 284.

*Kansas*. — *Matter of McMicken*, 39 Kan. 406.

*Massachusetts*. — *Glover's Case*, 109 Mass. 340.

*Mississippi*. — See *Ex p. Jefferson*, 62 Miss. 223.

*Montana*. — *U. S. v. Fox*, 3 Mont. 512.

*New York*. — *People v. Jeffers*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 518. Compare *People v. Ruloff*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 77.

*New Jersey*. — *Patterson v. State*, 49 N. J. L. 326, 50 N. J. L. 421.

*South Carolina*. — *State v. Fasket*, 5 Rich. L. (S. Car.) 255.

See, however, *Ex p. McGehan*, 22 Ohio St. 444, decided under a statute providing for an entire discharge from liability, and not for a discharge from imprisonment merely.

If There Has Been No Demand for a Trial, and failure or refusal on the part of the prosecution to comply therewith, the prisoner has not been denied any constitutional right, and is, therefore, not entitled to be discharged on the ground of delay in bringing his case to trial. *Patterson v. State*, 49 N. J. L. 326, 50 N. J. L. 421; *Hernandez v. State*, 4 Tex. App. 425.

*Failure of Statute to Provide for Time of Holding Court.* — Where a person indicted based his application for a habeas corpus on the fact that a statute purporting to divide the county into two parts failed to provide a time for holding court in the part where his case would be triable, and so deprived him of a speedy trial, the court held the statute unconstitutional and null and refused to discharge him. *Ex p. Jones*, 49 Ark. 110.

*Failure of the Government to Make an Appropriation to Pay for Serving Process* entitles a prisoner whose trial is postponed as a result to his discharge. *U. S. v. Fox*, 3 Mont. 512.

*Dismissal of Indictment Was Held a Prerequisite to Discharge on Habeas Corpus* for failure to bring to trial after indictment in *Ex p. Strong*, (Cal. 1892) 31 Pac. Rep. 574, construing *Pen. Code Cal., § 1382*. Compare *Ex p. Vinton*, (Cal. 1897) 47 Pac. Rep. 1019.

but this rule does not so operate as to deny to the prosecution a reasonable time to prepare for trial,<sup>1</sup> nor does it deprive the legislative department of the power to enact laws which will guard against undue haste to the detriment of the public interests, as well as prevent procrastination to the denial of the substantial rights of the accused, and he is not entitled to a discharge on account of the failure of the law, while reasonably adapted to secure a speedy trial, to provide against every contingency which may occasion delay in any particular case, or on account of any delay made necessary by the law itself.<sup>2</sup> It is also held that the statutes and constitutional provisions giving the right to a speedy trial are intended to provide against the abuse of delay on the part of the prosecution, but not to shield a prisoner from the consequences of any delay of which he was himself the cause,<sup>3</sup> or any delays for which the prosecution was not in any wise responsible.<sup>4</sup>

**If One Trial Has Been Had,** resulting in a conviction, and a new trial is granted on the application of the prisoner, or if a mistrial has resulted, the rule as to speedy trial is satisfied, and delay in bringing on a second trial is not ordinarily a ground of discharge.<sup>5</sup>

**Forfeiture of Right to Speedy Trial.** — The accused, by evading arrest and becoming a fugitive from justice, forfeits his right to be tried within the time designated by statute, because it is contrary to the policy of the law that he should be thus permitted to select the time for his trial.<sup>6</sup>

(5) *Former Jeopardy.* — If the accused has been once in jeopardy, it is held that his immunity from another trial on the same charge is a matter of defense which can be presented for adjudication only by a proper plea, and does not furnish a ground for his release on habeas corpus,<sup>7</sup> especially after a trial has

**Trial on One of Two Indictments.** — In *State v. Stalnaker*, 2 Brev. (S. Car.) 44, there were two indictments against the defendant for a felony. He demanded trial on both, but was tried on one only, upon which he was convicted and sentenced, but he was afterwards pardoned. Being again arrested, it was held that he could not be tried on the other indictment, having been entitled either to trial or discharge at the second court after his original demand for trial, and he was liberated on habeas corpus.

**1. Reasonable Time for Prosecution to Prepare for Trial.** — *Matter of McMicken*, 39 Kan. 406; *Ex p. Jefferson*, 62 Miss. 223; *Logan v. State*, 3 Brev. (S. Car.) 415, 1 Treadw. (S. Car.) 493.

**Statutory Authority to Postpone Trial.** — It is usually provided by statute that the court may for just cause allow further time for the trial. *Matter of McMicken*, 39 Kan. 406; *Patterson v. State*, 49 N. J. L. 326, 50 N. J. L. 421. See also the statutes in other jurisdictions.

**2. Validity of Laws Authorizing Reasonable Delay.** — *Ex p. State*, 76 Ala. 482. See also *Com. v. Sheriff*, 16 S. & R. (Pa.) 304; *Clark v. Com.*, 29 Pa. St. 129. Compare *Com. v. Prophet*, 1 Browne (Pa.) 135, which Judge Woodward, in the case last cited, says is "an unreasoned judgment," which "scarcely deserves to be mentioned."

**3. Delay Caused by Prisoner Does Not Entitle to Discharge.** — *McGuire v. Wallace*, 109 Ind. 289; *Matter of McMicken*, 39 Kan. 406 (under the *Kansas* statute expressly excepting delay caused by the prisoner).

So where the accused prevents the attendance of witnesses for the prosecution, *Republica v. Arnold*, 3 Yeates (Pa.) 263; or where the delay is by the request or with the consent

of the accused, *Ex p. Walton*, 2 Whart. (Pa.) 501; *Com. v. County Prison*, 97 Pa. St. 211.

**4. Delay Without Fault of Prosecution Not Ground of Discharge.** — *Com. v. Sheriff*, 16 S. & R. (Pa.) 304; *Ex p. Walton*, 2 Whart. (Pa.) 501; *Com. v. Jailer*, 7 Watts (Pa.) 366; *Clark v. Com.*, 29 Pa. St. 129; *Com. v. Philadelphia County Prison*, 4 Brewst. (Pa.) 320; *Com. v. Brown*, 32 Leg. Int. (Pa.) 430, 2 W. N. C. (Pa.) 153.

This rule applies in case of the fraudulent absence of a witness, though the prisoner had nothing to do with it. *Com. v. Carter*, 11 Pick. (Mass.) 277.

**Inability to Obtain a Jury,** and a consequent delay, have been held to constitute no ground for release on habeas corpus. *Ex p. Stanley*, 4 Nev. 113.

**If No Term of Court Has Been Held** since the commitment at which the prisoner could have been tried, he is not entitled to a discharge because of the delay. *Com. v. Brown*, 11 Phila. (Pa.) 370, 32 Leg. Int. (Pa.) 430; unless no time for holding court has been provided for by statute, *Ex p. Jones*, 49 Ark. 110.

**5. New Trial After Conviction.** — *Com. v. County Prison*, 97 Pa. St. 211, 9 W. N. C. (Pa.) 402. See also *Ex p. Bowen*, 46 Cal. 112.

**Mistrial — Subsequent Delay Not Ground of Discharge.** — *State v. Spergen*, 1 McCord L. (S. Car.) 563. See also *Glover's Case*, 109 Mass.

**6. Forfeiture of Right — Fugitive from Justice.** — *Com. v. Hale*, 13 Phila. (Pa.) 452, 36 Leg. Int. (Pa.) 285; *Com. v. Pulte*, 14 Phila. (Pa.) 398, 37 Leg. Int. (Pa.) 493.

**7. Former Jeopardy Not Ground for Habeas Corpus.** — *United States v. Brown*, 134 U. S. 328; *In re Bogart*, 2 Sawy. (U. S.) 396.



been had without raising such defense.<sup>1</sup> On the other hand, there seems to be authority for the proposition that, when the accused has been once put in jeopardy, to hold him for trial on the same charge is an unlawful restraint of his liberty, for which the writ of habeas corpus is an appropriate remedy.<sup>2</sup>

*c. AFTER ACQUITTAL OR THE EQUIVALENT THEREOF.* — Where the accused has been acquitted, or a verdict rendered which is the equivalent of an acquittal, but no order is made for his discharge, his remedy is by motion and not by habeas corpus.<sup>3</sup>

**3. Custody under Judgments or Orders of Court** — *a. GENERAL RULE.* — It is generally provided by the habeas corpus acts in the various jurisdictions that the writ shall not lie to discharge a prisoner who is in custody by virtue of a judgment, sentence, order, or decree of a court of competent jurisdiction.<sup>4</sup>

*b. VOID JUDGMENTS AND PROCESS* — (1) *In General.* — A person who is in custody by virtue of any judgment or order of court may be discharged therefrom on habeas corpus in any case where the court, whether it was one of general or of limited jurisdiction, did not for any reason have jurisdiction of the person of the defendant, or of the subject-matter involved, civil or criminal, so that the judgment would be held void on collateral attack,<sup>5</sup> or if

*Kansas.* — *In re Terrill*, 58 Kan. 815, 49 Pac. Rep. 158; *Matter of Miller*, 7 Kan. App. 686.

*Louisiana.* — *State v. Klock*, 45 La. Ann. 316.

*Missouri.* — *Ex p. Ruthven*, 17 Mo. 541; *Ex p. Snyder*, 29 Mo. App. 256.

*Nevada.* — *Ex p. Maxwell*, 11 Nev. 428.

*Texas.* — *Ex p. Crofford*, (Tex. Crim. 1898) 47 S. W. Rep. 533; *Pitner v. State*, 44 Tex. 578; *Perry v. State*, 41 Tex. 488; *Brill v. State*, 1 Tex. App. 152; *Griffin v. State*, 5 Tex. App. 457.

*Washington.* — *Steiner v. Nerton*, 6 Wash. 23.

**For a Full Discussion of former jeopardy, see the title JEOPARDY, in this work, and FORMER CONVICTION OR ACQUITTAL, 9 ENCYC. OF PL. AND PR. 630.**

**1. Trial Without Raising Defense of Former Jeopardy.** — *In re Maughan*, 6 Utah 167; *In re Barton*, 6 Utah 264.

**2. Habeas Corpus Entertained on Ground of Former Jeopardy.** — See *Ex p. McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272, where the prisoner's discharge was refused because it was held that the facts of the case did not show former jeopardy, but no question seems to have been made as to the propriety of the remedy.

**If It Appears on the Record that there has been a former conviction for the same offense, the prisoner may be discharged on habeas corpus.** *Nielsen*, Petitioner, 131 U. S. 176; *In re Snow*, 120 U. S. 274.

**3. Custody After Acquittal, or the Equivalent Thereof.** — *Wright v. State*, 7 Ind. 324.

**4. Custody under Judgment, etc., of Competent Court Not Relievable by Habeas Corpus** — *England.* — *Ex p. Lees*, El. Bl. & El. 828, 96 E. C. L. 828, 6 W. R. 660, 27 L. J. Q. B. 403.

*Canada.* — *Reg. v. Crabbe*, 11 U. C. Q. B. 447.

*United States.* — *Ex p. Bigelow*, 113 U. S. 328.

*Alabama.* — *Ex p. Roberson*, (Ala. 1899) 26 So. Rep. 645.

*Minnesota.* — *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305.

*Mississippi.* — *Ex p. Phillips*, 57 Miss. 357.

*Missouri.* — *Stoner v. State*, 4 Mo. 614.

*Nevada.* — *Ex p. Gafford*, (Nev. 1899) 57 Pac. Rep. 484; *Ex p. Smith*, 2 Nev. 338.

*New Jersey.* — *Clifford v. Heller*, (N. J. 1899) 42 Atl. Rep. 155.

*New York.* — *People v. Baker*, 89 N. Y. 460; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Wilson*, 88 Hun (N. Y.) 258; *People v. New York Soc., etc.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 457.

*North Carolina.* — *Matter of Brittain*, 93 N. Car. 587; *In re Schenck*, 74 N. Car. 607.

*Ohio.* — *Matter of Collier*, 6 Ohio St. 55.

*Oklahoma.* — *Matter of Patswald*, 5 Okla. 789.

*Pennsylvania.* — *Williamson v. Lewis*, 39 Pa. St. 9; *Com. v. Jail Keeper*, 26 Pa. St. 279; *Dickinson v. Purvis*, 8 S. & R. (Pa.) 71; *Respublica v. Gaol Keeper*, 2 Yeates (Pa.) 349; *Com. v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37; *Graham's Petition*, 46 Leg. Int. (Pa.) 88.

*South Carolina.* — *State v. Everett*, Dudley L. (S. Car.) 295.

*Texas.* — *Ex p. Ezell*, 40 Tex. 451, 19 Am. Rep. 32; *Ex p. Fuller*, 19 Tex. App. 241; *Ex p. Pate*, 21 Tex. App. 190.

*Utah.* — *Ex p. Hays*, 15 Utah 77.

*Washington.* — *Matter of Lybarger*, 2 Wash. 131.

**What Constitutes Judgment.** — A commitment to a charitable institution, pursuant to the *New York* statute, of a child under the age of sixteen years who is employed as a gymnast and acrobat, is a final judgment, not reviewable by habeas corpus. *Matter of Donohue*, (Supm. Ct.) 52 How. Pr. (N. Y.) 251, 1 Abb. N. Cas. (N. Y.) 1.

**The English Statute** excepts from the benefit of the writ a person who "is convicted or charged in execution by legal process." See *supra*, this title, *History of Writ* — *History of Habeas Corpus under English Statutes*.

See also the habeas corpus acts of the several states, and *infra*, this section, *Errors and Irregularities*.

**5. Custody under Void Judgment — Release on Habeas Corpus** — *England.* — *In re Authers*, 58 L. J. M. C. 62, 22 Q. B. D. 345, 60 L. T. N. S. 454, 37 W. R. 320, 16 Cox C. C. 588, 53 J. P.



the process under which the party is in custody is void for any reason; <sup>1</sup> but in criminal cases the mere fact that the mittimus is defective is not a ground

116; *Reg. v. Tordoft*, 5 Q. B. 933, 48 E. C. L. 933; *Matter of Hammond*, 9 Q. B. 92, 58 E. C. L. 92.

*Canada*. — *McNeice v. Foss*, 9 Quebec 64; *Ex p. Dallaire*, 4 Quebec 201; *Ex p. Gauthier*, 10 Rev. Leg. 536; *Ex p. Martin*, 22 L. C. Jur. 88.

*United States*. — *In re Bonner*, 151 U. S. 242; *In re Swan*, 150 U. S. 637; *Nielsen*, Petitioner, 131 U. S. 176; *Ex p. Wilson*, 114 U. S. 417; *Ex p. Yarbrough*, 110 U. S. 651; *Ex p. Rowland*, 104 U. S. 604; *Ex p. Virginia*, 100 U. S. 339; *Ex p. Siebold*, 100 U. S. 371; *Ex p. Verger*, 8 Wall. (U. S.) 85; *Ex p. Lange*, 18 Wall. (U. S.) 163; *U. S. v. Patterson*, 29 Fed. Rep. 775; *In re Greenwald*, 77 Fed. Rep. 590; *In re Christian*, 82 Fed. Rep. 199.

*Alabama*. — *Ex p. Hardy*, 68 Ala. 303; *Ex p. Brown*, 63 Ala. 187; *Ex p. Moore*, 62 Ala. 471; *Ex p. McKivett*, 55 Ala. 236; *Ex p. Burnett*, 30 Ala. 461; *Morrow v. Bird*, 6 Ala. 834.

*Arkansas*. — *Ex p. Martin*, 27 Ark. 467.

*California*. — *Ex p. Mirande*, 73 Cal. 365; *Ex p. Kearny*, 55 Cal. 212; *Ex p. Hollis*, 59 Cal. 405.

*Colorado*. — *In re Allison*, 13 Colo. 525; *Garvey's Case*, 7 Colo. 384, 49 Am. Rep. 358; *Ex p. Farnham*, 3 Colo. 545.

*Florida*. — *Ex p. Bowen*, 25 Fla. 214; *Ex p. Hunter*, 16 Fla. 575; *Ex p. Martini*, 23 Fla. 343.

*Georgia*. — *Daniels v. Towers*, 79 Ga. 785.

*Illinois*. — *People v. Foster*, 104 Ill. 156; *People v. Whitson*, 74 Ill. 20.

*Indiana*. — *Miller v. Snyder*, 6 Ind. 1.

*Iowa*. — *Ex p. Grace*, 12 Iowa 208, 79 Am. Dec. 529.

*Louisiana*. — *State v. Washington*, 33 La. Ann. 1473.

*Massachusetts*. — *Herrick v. Smith*, 1 Gray (Mass.) 50; *Jones v. Robbins*, 8 Gray (Mass.) 330.

*Michigan*. — *Hamilton's Case*, 51 Mich. 174.

*Mississippi*. — *Ex p. Phillips*, 57 Miss. 357; *Scott v. State*, 70 Miss. 247, 35 Am. St. Rep. 649.

*Missouri*. — *Ex p. Page*, 49 Mo. 291; *Ex p. Renshaw*, 6 Mo. App. 474; *Ex p. Craig*, 130 Mo. 590; *Ex p. Kaufman*, 73 Mo. 588.

*Nevada*. — *Ex p. Webb*, (Nev. 1898) 51 Pac. Rep. 1027; *Ex p. Roberts*, 9 Nev. 44, 16 Am. Rep. 1.

*New Hampshire*. — *State v. Towle*, 42 N. H. 540.

*New Jersey*. — *David v. Blundell*, 39 N. J. L. 617.

*New York*. — *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, *reversing* 3 Hun (N. Y.) 760, 6 Thomp. & C. (N. Y.) 258; *People v. Stock*, 26 N. Y. App. Div. 564; *People v. New York Catholic Protectory*, 106 N. Y. 604, 5 N. Y. Crim. 499, *affirming* (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 142; *People v. Sadler* (Supm. Ct.) 2 N. Y. Crim. 438; *People v. Stock*, 26 N. Y. App. Div. 564, *affirmed* 51 N. E. Rep. 1092; *People v. Walters*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 461, 7 Civ. Pro. (N. Y.) 406.

*Ohio*. — *Ex p. McKnight*, 48 Ohio St. 588;

*In re George*, 5 Ohio Cir. Ct. 207, 3 Ohio Cir. Dec. 104.

*Oklahoma*. — *Matter of Patswald*, 5 Okla. 789.

*Pennsylvania*. — *Com. v. Irwin*, 2 Pa. L. J. 329, 1 Clark (Pa.) 344; *Com. v. Smith*, 11 W. N. C. (Pa.) 34; *Com. v. Keeper*, 11 W. N. C. (Pa.) 341; *Com. v. Scott*, 8 Pa. Dist. 367; *Geyger v. Stoy*, 1 Dall. (Pa.) 135.

*Tennessee*. — *McLendon v. State*, 92 Tenn. 520.

*Texas*. — *Ex p. Degener*, 30 Tex. App. 566; *Ex p. Slaren*, 3 Tex. App. 662; *Ex p. Branch*, 36 Tex. Crim. 384; *Ex p. Schwartz*, 2 Tex. App. 75.

*Vermont*. — *Re Harris*, 68 Vt. 243; *Ex p. Tracy*, 25 Vt. 93.

*Virginia*. — *Cropper v. Com.*, 2 Rob. (Va.) 842.

*West Virginia*. — *Ex p. Evans*, 42 W. Va. 242.

*Wisconsin*. — *State v. Sloan*, 65 Wis. 651; *Semler's Petition*, 41 Wis. 523; *Crandall's Petition*, 34 Wis. 177.

See further the titles JUDGMENTS; JURISDICTION.

The prohibition by a statute of any inquiry on habeas corpus into the legality or justice of any process, judgment, decree, or execution does not preclude an inquiry as to whether the judgment or process emanated from a court of competent jurisdiction, and whether the court had power to render the judgment or issue the process. *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

**Arrest of Foreign Seamen for Deserting.** — A magistrate has no power, in the absence of statutory authority, to arrest a seaman shipped in a foreign port who has deserted in a port of the United States, and commit him to prison until he finds security to proceed on the voyage, though he has contracted to submit to certain statutes which, in the foreign country, authorize such imprisonment. The Act of Congress of July 20, 1790 (1 U. S. Stat. at L. 134, § 7), authorizing the arrest of deserting seamen who enlisted in a port of the United States, has no application to such a case. *Com. v. Holloway*, 1 S. & R. (Pa.) 392.

**The Court Which Rendered the Void Judgment** may discharge the prisoner on habeas corpus. *In re Greathouse*, 4 Sawy. (U. S.) 487, 2 Abb. (U. S.) 382, 10 Fed. Cas. No. 5,741; *Ex p. Joyce*, 23 Int. Rev. Rec. 297, 25 Pittsb. Leg. J. (Pa.) 17, 13 Fed. Cas. No. 7,556.

**Omission to Adjudge Defendant Guilty.** — The fact that a judgment of conviction, entered on a verdict of guilty, merely adjudges that the defendant be confined in the state penitentiary, without any recital as to his guilt, does not render it void. The sentence involves a determination of the defendant's guilt. *Ex p. Roberson*, (Ala. 1899) 26 So. Rep. 645.

**1. Void Process.** — *People v. Willett*, 26 Barb. (N. Y.) 78, 15 How. Pr. (N. Y.) 210; *People v. Kelly*, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405; *Ex p. Davis*, 18 Vt. 401; *Ex p. Hatch*, 2 Aik. (Vt.) 28. See also *Blake's Case*, 106 Mass. 101; *Wood v. M. Laughlin*, 2 Vt. 100.

for discharge, if it appears from the judgment or sentence that the imprisonment is legal,<sup>1</sup> and a valid amended mittimus received by the officer who has the prisoner in custody after the writ was issued renders the imprisonment valid.<sup>2</sup>

If the Prisoner Is Detained under Several Judgments, one of which is valid, he is not entitled to be discharged on account of the invalidity of the others, until he has served out the valid judgment.<sup>3</sup>

(2) *Defective Organization of Court.* — A duly constituted court is essential to the validity of a judgment of conviction, and if this requisite does not exist a prisoner in custody under the judgment will be discharged.<sup>4</sup>

(3) *Unauthorized Time and Place of Holding Court.* — Where the court is

**The Provision of the New York Statute** that a person detained by an execution or other process issued on a judgment shall not be entitled to a writ of habeas corpus does not apply to the case of a void execution. *Winne v. Houghtaling*, 84 Hun (N. Y.) 166.

**Illustrations.** — In accordance with this principle, the prisoner may be discharged when the order for his arrest was issued on an insufficient affidavit. *In re Vinich*, 86 Cal. 70. Or in case of arrest on unauthorized process to enforce a judgment, when the statute prescribed a different remedy. *Hanson on Habeas Corpus*, 36 Me 425. *Compare* *Phinney, Petitioner*, 32 Me. 440. Or where the arrest was on an escape warrant illegally issued. *M'Clintic v. Lockridge*, 11 Leigh (Va.) 262. Or in case of illegal imprisonment for debt. *Matter of Blair*, 4 Wis. 522. See also *David v. Blundell*, 39 N. J. L. 612.

**Warrant for Militia Fine.** — If a warrant for the collection of a militia fine shows no foundation for the proceeding, the relator will be discharged. *Com. v. Alexander*, 6 Binn. (Pa.) 176.

**Time of Return of Execution.** — If an execution is returnable in one hundred and twenty days, when it should by law be returnable in sixty days, and the arrest is made after the sixty days, the prisoner will be discharged on habeas corpus. *Ex p. Hatch*, 2 Aik. (Vt.) 28.

**Want of Jurisdiction or Power to Issue Process.** — If the court or officer by which the process was issued was without jurisdiction or power to issue it, the prisoner will be discharged on habeas corpus. *Butterfield v. O'Connor*, 2 Wkly. L. Gaz. 195, 3 Ohio Dec. (Reprint) 37; *Gilliam v. McJunkin*, 2 S. Car. 442; *Bagnall v. Ableman*, 4 Wis. 163; *In re Eldred*, 46 Wis. 530. See also *Adams v. Vose*, 1 Gray (Mass.) 51.

The fact that an incorrect copy of an execution was delivered to the jailer does not afford ground for the discharge on habeas corpus of a defendant committed on the execution where a correct copy was afterwards furnished. *Com. v. Waite*, 2 Pick. (Mass.) 445.

**A Commitment by an Inferior Court** must show on its face that the court had jurisdiction; otherwise the person arrested thereon may be discharged. *Clayborn v. Tompkins*, 141 Ind. 19.

**1. Defective Mittimus Issued on Valid Sentence.** — *Howard v. U. S.*, 75 Fed. Rep. 986, 43 U. S. App. 678; *Ex p. Wilson*, 114 U. S. 422; *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344; *Ex p. Johnson*, 15 Neb. 512; *People v. Baker*, 89 N. Y. 461; *In re Thayer*, 69 Vt. 314.

**Variance Between Mittimus and Judgment.** —

The fact that the mittimus commands the jailer to receive the defendant into the cell of the jail, while the judgment merely directs that he be confined in the jail until payment of the fine imposed, does not entitle him to a discharge on habeas corpus, on the ground that the confinement was illegal, if he was not actually imprisoned in a cell, or otherwise than as prisoners are usually confined. *Ex p. Maule*, 19 Neb. 273.

**2. Amendment of Mittimus After Issue of Habeas Corpus.** — *Ex p. Cross*, 2 H. & N. 354; *Reg. v. House*, (Manitoba 1885) 6 Crim. L. Mag. 500; *Kelley v. Thomas*, 15 Gray (Mass.) 192. *Compare* *Matter of Elmy*, 1 Ad. & El. 843, 28 E. C. L. 224, in which case, under peculiar circumstances, a second commitment was not allowed.

**3. Detention under Several Judgments.** — *Ex p. Gibson*, 89 Ala. 174.

**4. Duly Constituted Court Essential.** — *Ex p. Stout*, 5 Colo. 509.

**Where a Jury Is a Necessary Constituent Part of the Court**, a conviction by a judge without a jury, though a jury was demanded by the defendant, is void, and the defendant will be discharged from custody on habeas corpus. *Ex p. Wong You Ting*, 106 Cal. 206. See also *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285.

But it is otherwise if a jury is not a necessary constituent part of the court, as in the case of petty offenses under municipal ordinances, which offenses may be tried in a summary manner. *Ex p. Brandon*, 49 Ark. 143; *In re Fife*, 110 Cal. 8; *Ex p. Miller*, 82 Cal. 454. See also *infra*, this section, *Errors and Irregularities*.

**Absence of Member of Court.** — In *Rex v. Carlike*, 4 C. & P. 415, 19 E. C. L. 450, it was held that a conviction at a commission of oyer and terminer was not void where only one of the commissioners composing the court was present when the verdict was returned, instead of two.

But in *Matter of Divine*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 80, 11 Abb. Pr. (N. Y.) 90, it was held that where one of the three justices composing a court of special sessions was absent when the prisoner was arraigned, tried, and sentenced, a conviction and commitment were void, and that the prisoner should be discharged on habeas corpus, though the commitment named such justice as present.

**De Facto Judge.** — There is not a want of jurisdiction because the judge presiding was not such *de jure*, where he was the judge *de*



held at a time or place not authorized by law, all of its proceedings are void, and a person sentenced to the penitentiary on a trial and conviction at such time and place will be discharged from the custody of the keeper of the penitentiary, and remanded to the custody of the sheriff, to be proceeded against according to law.<sup>1</sup>

(4) *Conviction Without Indictment.* — A person may be discharged on habeas corpus, where he is in custody under a judgment of conviction rendered without the constitutional requisite of an indictment or an information by a grand jury,<sup>2</sup> or under an indictment which is void.<sup>3</sup>

(5) *Former Jeopardy.* — It has been held that where there had been a former conviction of the same offense, and that fact appears of record, the accused may be discharged on habeas corpus from custody under the second conviction,<sup>4</sup> though the general rule is that former jeopardy is a defense which must be raised at the trial and cannot be made the ground of an application for a writ of habeas corpus.<sup>5</sup>

(6) *Conviction under Unconstitutional Statute.* — A conviction under an unconstitutional statute is generally considered void, so that the prisoner may be discharged from custody under it by habeas corpus.<sup>6</sup>

(7) *Conviction under Void Municipal Ordinance.* — A conviction under a void municipal ordinance is void, and a person imprisoned under it will be discharged on habeas corpus.<sup>7</sup>

(8) *Conviction of Acts Not Criminal in Law.* — If the acts of which the defendant was convicted are not criminal in law, the judgment is void, and a

fact, acting under color of his office; and therefore a person in custody in pursuance of the sentence of such judge is not entitled to be discharged on habeas corpus. *Ex p.* Ward, 173 U. S. 452; *Griffin's Case*, Chase (U. S.) 364; *Matter of Wakker*, 3 Barb. (N. Y.) 162; *Ex p.* Strang, 21 Ohio St. 610; *Ex p.* Call, 2 Tex. App. 497; *In re Boyle*, 9 Wis. 264.

For a Full Discussion as to the validity and effect of the acts of *de facto* officers, see the title DE FACTO OFFICERS, vol. 8, p. 771.

1. *Time and Place of Holding Court.* — *Ex p.* Jones, 27 Ark. 349; *Ex p.* Stow, 27 Ark. 354; *In re Allison*, 13 Colo. 525.

2. *Conviction Without Presentment or Indictment by Grand Jury.* — *Ex p.* Wilson, 114 U. S. 417; *Lott v. State*, 18 Tex. App. 627. See also *Ex p.* Bain, 121 U. S. 1 (indictment changed by court without resubmission to grand jury); *Ex p.* Farley, 40 Fed. Rep. 66 (indictment by grand jury impaneled by court not authorized to do so).

3. *Conviction under Void Indictment — Discharge on Habeas Corpus.* — *Ex p.* Reynolds, 35 Tex. Crim. 437, 60 Am. St. Rep. 54. But see *contra*, *Ex p.* Fuller, 19 Tex. App. 241.

4. *Former Conviction Apparent of Record.* — *Nielsen*, Petitioner, 131 U. S. 176; *In re Snow*, 120 U. S. 274. See also *Ex p.* McLaughlin, 41 Cal. 211, 10 Am. Rep. 272.

Commitment for Nonpayment of Alimony After Taking Insolvent Oath. — An order committing the defendant in a divorce suit for nonpayment of alimony and counsel fees, after he had been discharged from a previous order of commitment on taking the oath of insolvency, is void and he will be discharged on habeas corpus. *Ex p.* Batchelder, 96 Cal. 233.

5. *Former Jeopardy — General Rule.* — See *supra*, this section, *Former Jeopardy*.

6. *Conviction under Unconstitutional Statutes — Discharge on Habeas Corpus.* — *Ex p.* Smith, 135

Mo. 223, 58 Am. St. Rep. 576, *overruling* *Matter of Harris*, 47 Mo. 164; *Ex p.* Boenninghausen, 21 Mo. App. 267, *affirmed* 91 Mo. 301; *Ex p.* Bowler, 16 Mo. App. 14; *Ex p.* Rosenblatt, 19 Nev. 439, 3 Am St. Rep. 901; *Ex p.* Rodriguez, 39 Tex. 705; *State v. Ryan*, 70 Wis. 676.

In Exceptional Cases questions of constitutionality may be considered. *Bishop*, Petitioner, 172 Mass. 35; *Com. v. Huntley*, 156 Mass. 236. See also *infra*, this title, *Hearing and Determination — Extent of Inquiry on Hearing — Constitutionality of Statutes*. See *contra*, *People v. Jonas*, 173 Ill. 316, holding that, under the *Illinois* statute specifying the grounds on which a writ of habeas corpus may be granted where the custody is under legal process, the remedy in case of a conviction under an unconstitutional statute is by writ of error or appeal, and that habeas corpus will not lie.

7. *Conviction under Void City Ordinance — Arkansas.* — *Ex p.* Martin, 27 Ark. 467.

*California.* — *Ex p.* Keeney, 84 Cal. 304.

*Minnesota.* — *In re White*, 43 Minn. 250.

*Ohio.* — *Ex p.* Clamp, 16 Cinc. L. Bul. 229, 9 Ohio Dec. (Reprint) 672.

*Oklahoma.* — *Matter of Gribben*, 5 Okla. 370.

*Texas.* — *Ex p.* Grace, 9 Tex. App. 381.

But see *contra*, *Platt v. Harrison*, 6 Iowa 79, 71 Am. Dec. 389.

If a complaint for violating a city ordinance states facts which constitute a public offense, both under the ordinance and under the general statute, and both the offense and the penalty are within the jurisdiction of the court, and the judgment is not in excess of that authorized by the general statute, a person committed for such offense cannot be discharged on habeas corpus, whether the ordinance was valid or not. *Ex p.* Taylor, 87 Cal. 91.



person who is imprisoned under it may be discharged on habeas corpus.<sup>1</sup>

(c) *Want of Power to Render Particular Judgment.* — Jurisdiction is said to be of two kinds: first, the power to hear and determine the particular matter and render some judgment thereon, and second, the power to render the particular judgment which was rendered;<sup>2</sup> and the idea seems formerly to have prevailed that the jurisdiction of courts consisted entirely of the former of these powers, and that a discharge on habeas corpus could not be granted merely because the court had no power to render the particular judgment, if it had jurisdiction of the offense and of the person accused.<sup>3</sup>

The Modern Rule is that even where a court has jurisdiction of the offense charged and of the person of the accused, it may so far transcend its powers in assessing the penalty for the offense, by imposing a punishment of a character different from that prescribed by law, or otherwise, that the sentence will be void and furnish no authority for holding the accused in custody, though the conviction on which the sentence was entered was valid and correct; and in such a case the accused may be discharged on habeas corpus.<sup>4</sup> But it is only when the court pronounces a judgment which is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by it,<sup>5</sup> and a judgment is not considered void, according to what seems to be the preponderance of authority, merely because it is excessive, if it is of the kind or character authorized by law,<sup>6</sup> though it has been said that an excessive judgment is one that the court did not have power to render, and is therefore void.<sup>7</sup> The discharge, however, in case a void sentence has been entered on a valid conviction, should be without prejudice to the right of the prosecution to have the prisoner sentenced according to law,<sup>8</sup> unless the case

1. **Imprisonment for Acts Not Criminal in Law.** — *Ex p.* Kearny, 55 Cal. 212; *Ex p.* Mirande, 73 Cal. 365.

2. **Kinds of Jurisdiction Stated.** — *Ex p.* Degener, 30 Tex. App. 566.

3. **Former Rule—Want of Power to Render Particular Judgment Not Ground for Discharge.** — *Ex p.* Watkins, 3 Pet. (U. S.) 193; *Ex p.* Parks, 93 U. S. 18; *In re* Callicot, 8 Blatchf. (U. S.) 89; *People v.* Shea. (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 562; *Ex p.* Bond, 9 S. Car. 80, 30 Am. Rep. 20; *Jordan v.* State, 14 Tex. 441; *Casey v.* State, 25 Tex. 380; *State v.* Thurmond, 37 Tex. 340.

*In Ex p.* Bond, 9 S. Car. 80, 30 Am. Rep. 20, it was held that a sentence of imprisonment in the penitentiary for an offense which was not so punishable was merely erroneous and not void, and therefore the prisoner was not entitled to be discharged on habeas corpus.

4. **Modern Rule—Want of Power to Render Particular Judgment Held Ground for Discharge—United States.** — *In re* Bonner, 151 U. S. 242; *In re* Coy, 127 U. S. 731; *Ex p.* Rowland, 104 U. S. 604; Nielsen, Petitioner, 131 U. S. 184.

*Florida.* — *Ex p.* Bowen, 25 Fla. 214.

*Idaho.* — *Ex p.* Cox, (Idaho 1893) 32 Pac. Rep. 197.

*Oklahoma.* — *Matter of* Patswald, 5 Okla. 789.

*Texas.* — *Ex p.* Degener, 30 Tex. App. 566.

*Wisconsin.* — *State v.* Sloan, 65 Wis. 647.

**Variance Between Sentence and Statute Prescribing Punishment.** — Judgment in a criminal case must conform strictly to the provisions of the statute prescribing the punishment, and any

variation therefrom will render the judgment void.

*United States.* — *In re* Mills, 135 U. S. 263; *In re* Graham, 138 U. S. 461; Nielsen, Petitioner, 131 U. S. 176; *Ex p.* Karstendick, 93 U. S. 396; *In re* Johnson, 46 Fed. Rep. 477; Harman v. U. S., 50 Fed. Rep. 922; *In re* Christian, 82 Fed. Rep. 199.

*California.* — *Ex p.* Kelly, 65 Cal. 154; *Ex p.* Bulger, 60 Cal. 438.

**Imprisonment in Default of Payment of a Fine** is impliedly authorized by the Revised Statutes of the United States. *In re* Greenwald, 77 Fed. Rep. 590. See also the title FINES AND PENALTIES, vol. 13, p. 66.

5. **When Judgment Is Void for Want of Power to Render It—United States.** — *Ex p.* Lange, 18 Wall. (U. S.) 163.

*California.* — *Ex p.* Gibson, 31 Cal. 628, 91 Am. Dec. 546.

*New York.* — *People v.* Liscomb, 60 N. Y. 571, 91 Am. Rep. 211.

*Wisconsin.* — *In re* Eckart, 85 Wis. 681; *State v.* Sloan, 65 Wis. 647; Semler's Petition, 41 Wis. 517; Crandall's Petition, 34 Wis. 177; Hauser v. State, 33 Wis. 678; *In re* Perry, 30 Wis. 268.

6. See *infra*, this section, *Excessive Judgments.*

7. **Excessive Judgment Considered Void for Want of Power to Render It.** — *Ex p.* Cox, (Idaho 1893) 32 Pac. Rep. 197.

8. **Power to Resentence After Discharge.** — In such a case, jurisdiction of the prisoner may be reassumed by the court that imposed sentence in order that its defect may be corrected,

is such that the prisoner cannot be remanded for resentence.<sup>1</sup>

c. JUDGMENTS BECOMING INOPERATIVE AFTER RENDITION. — A person in custody under a judgment is entitled to be discharged on habeas corpus if the judgment has ceased to be operative because of any matter *ex post facto*,<sup>2</sup> as where the prisoner has been pardoned,<sup>3</sup> or the period of imprisonment to which he was sentenced has expired,<sup>4</sup> or where the judgment by virtue of which he was confined has been reversed or otherwise superseded.<sup>5</sup>

d. EXCESSIVE JUDGMENTS. — In the case of a judgment or sentence which is merely excessive, it seems to be well settled that, if the court was one of general jurisdiction, such judgment or sentence is not void *ab initio* because of the excess, but that it is good so far as the power of the court extends, and is invalid only as to the excess, and therefore that a person in custody under such a sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it was within the power of the court to impose. This condition exists whenever the punishment imposed is of the nature or kind prescribed by law and merely exceeds the quantity authorized, as where the offender is sentenced to a longer term of imprisonment than is prescribed for the particular offense, or where he is condemned to pay a fine *and* be imprisoned for an offense which is punishable by fine *or* imprisonment; or where the sentence is severable, and a part of it is of the nature prescribed by law and the other part is not, as where an offender is sentenced to imprisonment in the penitentiary and to pay a fine, when the punishment authorized by law for the particular offense is a fine and imprison-

and the discharge should be delayed for such reasonable time as may be necessary to have the prisoner taken before the court for that purpose. *In re Bonner*, 151 U. S. 242. See also *In re Mills*, 135 U. S. 263; *In re Christian*, 82 Fed. Rep. 199; *Garvey's Case*, 7 Colo. 384, 49 Am. Rep. 358; *Wentworth v. Alexander*, 66 Ind. 39; *People v. Kelly*, 97 N. Y. 212.

1. Discharge Granted if Sentence Cannot Be Corrected. — *People v. Riseley*, 38 Hun (N. Y.) 280.

2. Matters Arising Since Commitment. — It is always competent to inquire whether anything to put an end to the imprisonment has arisen since the commitment. *Ex p. Maulsby*, 13 Md. 625; *People v. Cassels*, 5 Hill (N. Y.) 164; *People v. Cavanagh*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 650, 2 Abb. Pr. (N. Y.) 84.

Permitting Day of Execution of Death Sentence to Pass. — One convicted of murder and sentenced to be executed will not be discharged on habeas corpus because the sheriff permitted the day assigned for the execution to elapse. *Ex p. Nixon*, 2 S. Car. 4.

3. Pardon of Prisoner. — *Greathouse's Case*, 2 Abb. (U. S.) 382, 4 Sawy. (U. S.) 487; *Ex p. Wells*, 18 How. (U. S.) 307; *Ex p. Gregory*, 56 Miss. 164; *In re Edymoin*, 8 How. Pr. (N. Y.) 478. Compare *In re Callicot*, 8 Blatchf. (U. S.) 89.

4. Expiration of Period of Imprisonment. — *In re Greenwald*, 77 Fed. Rep. 590.

Even Though the Prisoner Has Not Suffered Actual Imprisonment, if it happened without his fault, the expiration of the full term of imprisonment is ground for a writ of habeas corpus. *In re Crow*, 60 Wis. 349.

Commutation for Good Behavior. — The court will not, on habeas corpus, interfere with a discretion granted to the inspectors of the penitentiary to discharge a convict before the expiration of his sentence in case of good

behavior. *Com. v. Halloway*, 42 Pa. St. 446, 82 Am. Dec. 526.

When Several Sentences Have Been Passed at the Same Time, if they run concurrently, the prisoner is entitled to his discharge at the expiration of the longest one. *U. S. v. Patterson*, 29 Fed. Rep. 775; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. But if the sentences are successive, that is, if they run one after the other, the prisoner is not entitled to his discharge until the aggregate time has run. *Ex p. Peters*, 4 Dill. (U. S.) 169, 19 Fed. Cas. No. 11,027; *Ex p. Peters*, 12 Fed. Rep. 461; *In re Greenwald*, 77 Fed. Rep. 590; *Ex p. Dalton*, 49 Cal. 463; *In re Packer*, 18 Colo. 525; *In re Walsh*, 37 Neb. 454; *Matter of Wilson*, 11 Utah 114.

As to the effect of serving so much of a term of imprisonment as is authorized by law when the term imposed is greater than the law allows, see *infra*, this section, *Excessive Judgments*. As to when several sentences are cumulative and when concurrent, see the title SENTENCE.

5. Reversal of Judgment. — *Leftwich v. Com.*, 20 Gratt. (Va.) 716.

Writ of Error from Supreme Court of United States. — A writ of error from the Supreme Court of the United States to a state court operates as a supersedeas of the judgment of the state court, but a person imprisoned under such judgment will not be discharged on habeas corpus where it appears that the case was not reviewable by that court, and that the writ of error must be dismissed as improvidently granted. *Fleming v. Clark*, 12 Allen (Mass.) 191; *Nauer v. Thomas*, 13 Allen (Mass.) 572.

If an Order Granting a New Trial Is Void, habeas corpus will not lie because the sentence of a penitentiary refused to deliver the pris-



ment in the county jail.<sup>1</sup> On the other hand, there are authorities holding that an excessive sentence is invalid *in toto*, and a discharge on habeas corpus has been granted on that ground,<sup>2</sup> but the cases in which such sentences have been declared wholly invalid have generally been on a writ of error or appeal.<sup>3</sup>

An Excessive Judgment Rendered by a Court of Inferior Jurisdiction, however, is void, because the powers of such courts are limited and may be exercised only within the limits prescribed.<sup>4</sup>

c. ERRORS AND IRREGULARITIES. — The authorities are uniform and very numerous in holding that the writ of habeas corpus cannot be made to perform the functions of a writ of error or an appeal, and that a person in custody under a judgment or order of a court of competent jurisdiction, whether it be a superior or an inferior court, in either a criminal or a civil proceeding, cannot obtain his discharge on habeas corpus on account of mere errors or irregularities, however gross, in the judgment or in the proceedings on which the judgment was founded, or in the process under which he is held, but that this is the appropriate remedy only where the court was without jurisdiction in the premises, or where it exceeded its jurisdiction in making the order or rendering the judgment by virtue of which the party is imprisoned, so that the judgment is not merely erroneous, but is absolutely void.<sup>5</sup> While this doctrine

oner to the county authorities as directed by the order. *Ex p.* Holmes, 21 Neb. 324.

1. **Excessive Sentence, Valid Except as to Excess — Performance of Valid Portion — United States.** — *U. S. v. Pridgeon*, 153 U. S. 48; *In re Bonner*, 151 U. S. 258; *In re Swan*, 150 U. S. 637; *In re Greenwald*, 77 Fed. Rep. 590; *Ex p.* Watkins, 7 Pet. (U. S.) 568; *Ex p.* Parks, 93 U. S. 18; *Ex p.* Lange, 18 Wall. (U. S.) 163; *Bigelow v. Forrest*, 9 Wall. (U. S.) 339.

*California.* — *Ex p.* Henshaw, 73 Cal. 486; *Ex p.* Max, 44 Cal. 579; *People v. Markham*, 7 Cal. 208.

*Massachusetts.* — *Feeley's Case*, 12 Cush. (Mass.) 598; *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344.

*Missouri.* — *Ex p.* Crenshaw, 80 Mo. 447.

*Nebraska.* — *In re Fanton*, 55 Neb. 703.

*New York.* — *People v. Jacobs*, 66 N. Y. 8; *People v. Baker*, 89 N. Y. 460; *People v. Kelly*, 97 N. Y. 212; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, 11 Alb. L. J. 396; *People v. Kinney*, 24 N. Y. App. Div. 309; *People v. Woodworth*, 78 Hun (N. Y.) 586.

*North Carolina.* — *In re Schenck*, 74 N. Car. 607.

*Ohio.* — *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex p.* Van Hagan, 25 Ohio St. 427.

*South Carolina.* — *State v. Lundy*, 19 S. Car. 601.

*Vermont.* — *Re Harris*, 68 Vt. 243.

*West Virginia.* — *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

*Wisconsin.* — *Crandall's Petition*, 34 Wis. 177; *In re Graham*, 74 Wis. 450, 76 Wis. 366, 138 U. S. 461; *In re Pikulik*, 81 Wis. 158.

If the Unauthorized Portion of the Sentence Is Inseparable from that which the court had authority to impose, the whole judgment is without jurisdiction and void, and therefore the prisoner may be discharged on habeas corpus. *Ex p.* Kelly, 65 Cal. 154.

**Discretion of Court.** — Under the *Massachusetts* statute the court may, in its discretion, discharge a prisoner who has been sentenced to a punishment not warranted by law, as fine and imprisonment instead of fine or imprisonment,

when the fine has been paid. *Feeley's Case*, 12 Cush. (Mass.) 598.

2. **Excessive Sentence Held Void on Habeas Corpus.** — *Ex p.* Page, 49 Mo. 291. This case was decided under a statute providing that when a prisoner is brought up on habeas corpus, if it appears that he is in custody by virtue of or process from any court or judicial officer, he can be discharged only in one of the following cases: "First, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person. \* \* \* Sixth, where the process is not authorized by any judgment, order, or decree, nor by any provision of law." See also the comments on the case last above cited in *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

In *Ex p.* Cox, (Idaho 1893) 32 Pac. Rep. 197, the validity of a sentence for a longer period than that authorized by law was exhaustively considered and many authorities were cited. The conclusion reached by the court was that such a sentence was absolutely void within the modern rule that jurisdiction to render the particular judgment is as essential to its validity as jurisdiction of the person or the subject-matter, and that the party imprisoned under it should be discharged on habeas corpus.

3. **Invalidity of Excessive Sentences Generally Declared on Writ of Error or Appeal.** — See *Ex p.* Page, 49 Mo. 291.

For a Full Discussion as to the validity and effect of an excessive sentence, see the title SENTENCE.

4. **Excessive Judgment or Sentence of Inferior Court.** — *People v. Riseley*, 38 Hun (N. Y.) 280, 4 N. Y. Crim. 109; *People v. Carter*, 48 Hun (N. Y.) 165, 14 Civ. Pro. (N. Y.) 241; *In re Fury*, 19 N. J. L. J. 14.

5. **Mere Errors or Irregularities Not Reviewable on Habeas Corpus — England.** — *Matter of Newton*, 16 C. B. 97, 81 E. C. L. 97, 24 L. J. C. Pl. 148, 3 C. L. R. 1122, 1 Jur. N. S. 591; *In re Dunn*, 5 Dowd. & L. 345, 5 C. B. 215, 57 E. C. L. 215, 12 Jur. 99, 17 L. J. C. Pl. 105; *Rex v. Carlile*, 4 C. & P. 415, 19 E. C. L. 450; *Dodd's Case*, 2 De G. & J. 510, 4 Jur. N. S. 291;



has long since passed beyond the domain of dispute, and is now reckoned among the fundamentals of the law relating to the subject in hand, cases involving its application are of frequent occurrence. All of these cases present for determination the question whether the judgment or process under which the party is imprisoned is absolutely void, or whether it is only void-

*Brenan's Case*, 10 Q. B. 492, 59 E. C. L. 492; *Bethell's Case*, 1 Salk. 348; *In re Baines*, 1 Cr. & Ph. 31.

*Canada*.—*Ex p. Thompson*, 1 Montreal Leg. N. 102; *Matter of Munn*, 25 U. C. Q. B. 24; *Reg. v. Powell*, 21 U. C. Q. B. 215; *Ex p. Jones*, 1 Dorion (Quebec) 100; *Ex p. Pollock*, 2 Dorion (Quebec) 60, 5 Montreal Leg. N. 293; *Ex p. Healy*, 1 Montreal Leg. N. 103; *Ex p. Cutler*, 22 L. C. Jur. 85; *In re Bigger*, 10 U. C. L. J. 329; *Runciman v. Armstrong*, 2 U. C. L. J. N. S. 165; *Reid v. Drake*, 4 Ont. Pr. 141; *Ex p. Sanderson*, 8 Rev. Leg. 108.

*United States*.—*Andersen v. Treat*, 172 U. S. 24; *In re Boardman*, 169 U. S. 39; *In re Lennon*, 166 U. S. 548; *Kohl v. Lehlback*, 160 U. S. 293; *In re Belt*, 159 U. S. 95; *Andrews v. Swartz*, 156 U. S. 272; *In re Swan*, 150 U. S. 637; *In re Frederick*, 149 U. S. 70; *In re Tyler*, 149 U. S. 164; *In re Jugiro*, 140 U. S. 291; *In re Wood*, 140 U. S. 278; *In re Wilson*, 140 U. S. 575; *In re Graham*, 138 U. S. 461; *In re Lancaster*, 137 U. S. 393; *In re Luis Oteiza y Cortes*, 136 U. S. 330; *Stevens v. Fuller*, 136 U. S. 468; *In re Lane*, 135 U. S. 443; *In re Wight*, 134 U. S. 136; *In re Green*, 134 U. S. 377; *Davis v. Beason*, 133 U. S. 333; *Nielsen, Petitioner*, 131 U. S. 176; *Savin, Petitioner*, 131 U. S. 267; *Ex p. Terry*, 128 U. S. 289; *In re Coy*, 127 U. S. 731; *In re Snow*, 120 U. S. 274; *Ex p. Harding*, 120 U. S. 782; *Ex p. Royall*, 117 U. S. 241; *Ex p. Fonda*, 117 U. S. 516; *Ex p. Wilson*, 114 U. S. 417; *Wales v. Whitney*, 114 U. S. 564; *Ex p. Bigelow*, 113 U. S. 328; *Ex p. Crouch*, 112 U. S. 178; *Ex p. Yarbrough*, 110 U. S. 651; *Ex p. Curtis*, 106 U. S. 371; *Ex p. Carll*, 106 U. S. 521; *Ex p. Reed*, 100 U. S. 13; *Ex p. Siebold*, 100 U. S. 371; *Ex p. Parks*, 93 U. S. 18; *Ex p. Lange*, 18 Wall. (U. S.) 163; *Ex p. Milligan*, 4 Wall. (U. S.) 2; *Ex p. Kearney*, 7 Wheat. (U. S.) 38; *Ex p. Watkins*, 3 Pet. (U. S.) 193, 7 Pet. (U. S.) 568; *Ableman v. Booth*, 21 How. (U. S.) 506; *Matter of Metzger*, 5 How. (U. S.) 176; *Ex p. Parks*, 1 Hughes (U. S.) 604; *In re Callicot*, 8 Blatchf. (U. S.) 89; *Ex p. Shaffenburg*, 4 Dill. (U. S.) 271; *Johnson v. U. S.*, 3 McLean (U. S.) 89; *In re Boyd*, 4 U. S. App. 73; *In re King*, 51 Fed. Rep. 434; *In re Blackbird*, 66 Fed. Rep. 541; *Ex p. Ulrich*, 43 Fed. Rep. 661.

*Alabama*.—*Ex p. Chandler*, 114 Ala. 8; *Ex p. Gayles*, 108 Ala. 514; *Ex p. Brizzell*, 112 Ala. 210; *Ex p. State*, 71 Ala. 371; *Dover v. State*, 75 Ala. 40; *Ex p. Hubbard*, 65 Ala. 473; *Ex p. Montgomery*, 64 Ala. 463; *Ex p. Whitaker*, 43 Ala. 323; *Ex p. Simmons*, 62 Ala. 416; *Ex p. Sam*, 51 Ala. 34.

*Arizona*.—*In re Waldrup*, 1 Ariz. 482.

*Arkansas*.—*Ex p. Adams*, 60 Ark. 93; *Ex p. Brandon*, 49 Ark. 143; *State v. Neel*, 48 Ark. 283; *In re Burrow*, 55 Ark. 275; *Ex p. Barnett*, 51 Ark. 215.

*California*.—*Ex p. Wright*, 119 Cal. 401; *Ex p. Miller*, 109 Cal. 643; *In re Fife*, 110 Cal. 8; *Ex p. Wong You Ting*, 106 Cal. 296; *Ex p. Gallagher*, 101 Cal. 113; *Ex p. Noble*, 96 Cal.

362; *Ex p. Liddell*, 93 Cal. 633; *Ex p. Miller*, 89 Cal. 41; *Ex p. Walpole*, 85 Cal. 362; *Ex p. Rosenheim*, 83 Cal. 388; *Ex p. McConnell*, 83 Cal. 558; *Ex p. Ah Sam*, 83 Cal. 620; *Ex p. Miller*, 82 Cal. 454; *Ex p. Sternes*, 77 Cal. 156; *Ex p. Wilson*, 73 Cal. 94; *Matter of Kowalsky*, 73 Cal. 120; *Ex p. Mirande*, 73 Cal. 365; *Ex p. Henshaw*, 73 Cal. 486; *Ex p. Lehmkuhl*, 72 Cal. 53; *Ex p. Moan*, 65 Cal. 216; *Ex p. Cottrell*, 59 Cal. 420; *Ex p. Granice*, 51 Cal. 375; *Ex p. Max*, 44 Cal. 579; *Ex p. Hartman*, 44 Cal. 32; *Ex p. Murray*, 43 Cal. 455; *Ex p. McCullough*, 35 Cal. 98; *Ex p. Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *Ex p. Bird*, 19 Cal. 130.

*Colorado*.—*In re Tyson*, 21 Colo. 78; *Ex p. Farnham*, 3 Colo. 545; *People v. District Ct.*, 22 Colo. 422.

*Connecticut*.—*In re Bion*, 59 Conn. 372.

*District of Columbia*.—*Ex p. Dries*, 3 App. Cas. (D. C.) 165.

*Florida*.—*Ex p. Bowen*, 25 Fla. 214; *Ex p. Prince*, 27 Fla. 196, 26 Am. St. Rep. 67.

*Georgia*.—*Lark v. State*, 55 Ga. 435.

*Illinois*.—*People v. Allen*, 160 Ill. 400; *People v. Foster*, 104 Ill. 156; *Ex p. Smith*, 117 Ill. 63; *Ex p. Thompson*, 93 Ill. 89; *People v. Whitson*, 74 Ill. 20.

*Indiana*.—*Smith v. Clausmeier*, 136 Ind. 105, 43 Am. St. Rep. 311; *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. Rep. 658; *Lucas v. Hawkins*, 102 Ind. 64; *Holderman v. Thompson*, 105 Ind. 112; *Willis v. Bayles*, 105 Ind. 363; *Smith v. Hess*, 91 Ind. 424; *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90, 7 Ind. 324.

*Iowa*.—*State v. Orton*, 67 Iowa 554; *Shaw v. McHenry*, 52 Iowa 182; *Platt v. Harrison*, 6 Iowa 79, 71 Am. Dec. 389.

*Kansas*.—*Matter of Black*, 52 Kan. 64, 39 Am. St. Rep. 331; *Matter of Morris*, 39 Kan. 28, 7 Am. St. Rep. 512; *Matter of Edwards*, 35 Kan. 99; *In re Petty*, 22 Kan. 477; *Prohibitory Amendment Cases*, 24 Kan. 700; *Matter of Rolfs*, 30 Kan. 759; *Matter of Dill*, 32 Kan. 682, 49 Am. Rep. 505; *In re Payson*, 23 Kan. 757; *Matter of Chapman*, 4 Kan. App. 49.

*Louisiana*.—*State ex rel. Courtney*, 49 La. Ann. 685; *State v. Klock*, 45 La. Ann. 316; *State v. Fenderson*, 28 La. Ann. 82.

*Maine*.—*O'Malia v. Wentworth*, 65 Me. 129; *Phinney, Petitioner*, 32 Me. 440.

*Maryland*.—*Glenn's Petition*, 54 Md. 572; *Bell v. State*, 4 Gill (Md.) 301, 45 Am. Dec. 130.

*Massachusetts*.—*Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344; *Com. v. Whitney*, 10 Pick. (Mass.) 434; *Riley's Case*, 2 Pick. (Mass.) 172; *Nauer v. Thomas*, 13 Allen (Mass.) 572; *Fleming v. Clark*, 12 Allen (Mass.) 191; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Adams v. Vose*, 1 Gray (Mass.) 56.

*Michigan*.—*Matter of Bushey*, 105 Mich. 64; *Matter of Ellis*, 79 Mich. 322; *Hamilton's Case*, 11 Mich. 114; *Boswell's Case*, 11 Mich. 63; *Matter of Coffeen*, 38 Mich. 311; *Matter of Eaton*, 27 Mich. 1.

able because of some error or irregularity which, according to well-known principles, must be corrected either by a motion for that purpose or by the appropriate revisory process; and unless there is a defect of a radical and

*Minnesota.* — *State v. McMahon*, 69 Minn. 265; *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305; *State v. Sheriff*, 24 Minn. 87.

*Mississippi.* — *Murrah v. State*, 51 Miss. 652; *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375; *Emanuel v. State*, 36 Miss. 627.

*Missouri.* — *In re Copenhaver*, 118 Mo. 377, 40 Am. St. Rep. 382; *State v. Dobson*, 135 Mo. 1; *Ex p. Kenney*, 105 Mo. 535; *Ex p. Mitchell*, 104 Mo. 121, 24 Am. St. Rep. 324; *Ex p. Clay*, 98 Mo. 578; *Ex p. Kaufman*, 73 Mo. 588; *Ex p. Jilz*, 64 Mo. 205, 27 Am. Rep. 218; *In re Truman*, 44 Mo. 181; *Matter of Spradlind*, 38 Mo. 547; *Ex p. Ruthven*, 17 Mo. 541; *Ex p. Toney*, 11 Mo. 661; *Stoner v. State*, 4 Mo. 614; *Ex p. Snyder*, 29 Mo. App. 256; *Ex p. Boenninghausen*, 21 Mo. App. 267.

*Montana.* — *In re Thompson*, 9 Mont. 381.

*Nebraska.* — *In re Ream*, 54 Neb. 667; *In re Fanton*, 55 Neb. 703; *In re Langston*, 55 Neb. 310; *In re Betts*, 36 Neb. 282; *In re Havlik*, 45 Neb. 747; *State v. Leidigh*, 47 Neb. 126; *Ex p. Davis*, 17 Neb. 436; *Ex p. Fisher*, 6 Neb. 309.

*Nevada.* — *Ex p. Bergman*, 18 Nev. 331; *Ex p. Twohig*, 13 Nev. 302; *Ex p. Maxwell*, 11 Nev. 428; *Ex p. Edgington*, 10 Nev. 215; *Ex p. Winston*, 9 Nev. 71; *Ex p. Smith*, 2 Nev. 338.

*New Hampshire.* — *State v. Shattuck*, 45 N. H. 205.

*New Jersey.* — *State v. Heller*, (N. J. 1899) 42 Atl. Rep. 155; *Peltier v. Pennington*, 14 N. J. L. 313; *Selz v. Presburger*, 49 N. J. L. 396.

*New Mexico.* — *Matter of Sloan*, 5 New Mex. 590.

*New York.* — *People v. Baker*, 89 N. Y. 460; *People v. Markell*, 92 Hun (N. Y.) 286; *People v. Norton*, 76 Hun (N. Y.) 7; *People v. Seaton*, 25 Hun (N. Y.) 305; *Benedict*, etc., Mfg. Co. v. Thayer, 20 Hun (N. Y.) 547; *People v. Neilson*, 16 Hun (N. Y.) 214; *People v. Oyer*, etc., Ct., 14 Hun (N. Y.) 21; *Peck v. Schantz*, (County Ct.) 13 Misc. (N. Y.) 563; *People v. Dunn*, 38 N. Y. App. Div. 112; *People v. Sheriff*, 29 Barb. (N. Y.) 622, 7 Abb. Pr. (N. Y.) 96; *Bennac v. People*, 4 Barb. (N. Y.) 31; *Wiles v. Brown*, 3 Barb. (N. Y.) 37; *Matter of Prime*, 1 Barb. (N. Y.) 340; *Matter of Miller*, 1 Daly (N. Y.) 562; *Stewart's Case*, (C. Pl.) 1 Abb. Pr. (N. Y.) 210; *Davidson's Case*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 129; *Matter of Moses*, (Supm. Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 189, 66 How. Pr. (N. Y.) 296; *People v. Penitentiary Keeper*, (N. Y. Super. Ct. Spec. T.) 37 How. Pr. (N. Y.) 494; *People v. Walters*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 461; *Matter of Nichols*, (Supm. Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 138; *People v. McCormack*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 9; *People v. Shea*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 562; *People v. Cavanagh*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 650, 2 Abb. Pr. (N. Y.) 84, reversing 1 Park. Crim. (N. Y.) 588, 10 How. Pr. (N. Y.) 27; *People v. Cassels*, 5 Hill (N. Y.) 164; *U. S. Bank v. Jenkins*, 18 Johns. (N. Y.) 305; *Yates's Case*, 4 Johns. (N. Y.) 317; *People v. Goodhue*, 2 Johns. Ch. (N. Y.) 198.

*North Carolina.* — *In re Schenck*, 74 N. Car. 607.

*North Dakota.* — *State v. Barnes*, 3 N. Dak. 131.

*Ohio.* — *Ex p. Van Hagan*, 25 Ohio St. 426; *Ex p. McGehan*, 22 Ohio St. 442; *Ex p. Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex p. Wagoner*, 1 Disney (Ohio) 10; *Madden v. Smeltz*, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

*Oklahoma.* — *Ex p. Harlan*, 1 Okla. 48; *Ex p. Murphy*, 1 Okla. 288.

*Oregon.* — *Barton v. Saunders*, 16 Oregon 51, 8 Am. St. Rep. 261; *Merriman v. Morgan*, 7 Oregon 68; *Norman v. Zieber*, 3 Oregon 197; *Fleming v. Bells*, 3 Oregon 286.

*Pennsylvania.* — *Com. v. Wright*, 126 Pa. St. 464; *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *Com. v. McCabe*, 22 Pa. St. 450; *Com. v. Deacon*, 8 S. & R. (Pa.) 72; *Mertz's Case*, 8 W. & S. (Pa.) 374; *Com. v. Jail Keeper*, 26 Pa. St. 279; *Com. v. Keeper*, 1 Ashm. (Pa.) 10; *Com. v. Lecky*, 1 Watts (Pa.) 68, 26 Am. Dec. 37; *Com. v. Clemons*, 2 Lack. Leg. N. (Pa.) 327, 18 Pa. Co. Ct. 447, 5 Pa. Dist. 670.

*South Carolina.* — *Ex p. Keeler*, 45 S. Car. 537, 55 Am. St. Rep. 785; *State v. Lundy*, 19 S. Car. 601; *Ex p. Bond*, 9 S. Car. 80, 30 Am. Rep. 20; *Ex p. Nixon*, 2 S. Car. 4.

*Texas.* — *Darrah v. Westerland*, 44 Tex. 388; *Pitner v. State*, 44 Tex. 578; *Perry v. State*, 41 Tex. 488; *Matter of Griffin*, 25 Tex. Supp. 623, 5 Tex. App. 457; *Ex p. Matthews*, (Tex. Crim. 1899) 49 S. W. Rep. 623; *Ex p. Barfield*, (Tex. Crim. 1898) 44 S. W. Rep. 1095; *Ex p. Ketton*, (Tex. Crim. 1895) 30 S. W. Rep. 798; *Ex p. Dickerson*, 30 Tex. App. 448; *Ex p. Boland*, 11 Tex. App. 159; *Ex p. McGill*, 6 Tex. App. 498; *Ex p. Mabry*, 5 Tex. App. 93; *Ex p. Oliver*, 3 Tex. App. 345; *Ex p. Slaren*, 3 Tex. App. 662; *Ex p. Schwartz*, 2 Tex. App. 74; *Ex p. Call*, 2 Tex. App. 497; *Ex p. Eckhart*, (Tex. Crim. 1899) 50 S. W. Rep. 349.

*Utah.* — *Ex p. Hays*, 15 Utah 77; *Ex p. Douglass*, 1 Utah 108.

*Vermont.* — *In re Greenough*, 31 Vt. 285; *In re Dougherty*, 27 Vt. 325; *In re Hosley*, 22 Vt. 363; *Ex p. Davis*, 18 Vt. 401; *Ex p. Kellogg*, 6 Vt. 509.

*Virginia.* — *Ex p. Rollins*, 80 Va. 314.

*Washington.* — *Ex p. Williams*, 1 Wash. Ter. 240; *Matter of Rafferty*, 1 Wash. 382; *In re Nolan*, (Wash. 1899) 58 Pac. Rep. 222.

*West Virginia.* — *Ex p. Evans*, 42 W. Va. 242.

*Wisconsin.* — *In re French*, 81 Wis. 597; *In re Graham*, 76 Wis. 366; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388; *In re Milburn*, 59 Wis. 24; *Semler's Petition*, 41 Wis. 517; *Crandall's Petition*, 34 Wis. 177; *In re Perry*, 30 Wis. 268; *In re O'Connor*, 6 Wis. 288; *Matter of Blair*, 4 Wis. 522.

*Wyoming.* — *In re McDonald*, 4 Wyo. 150.

If a Body Execution Is in Due Form, the defendant cannot be discharged on habeas corpus because the judgment was irregular, but his remedy is to move to correct the judgment. *People v. Gorman*, (Supm. Ct. Gen. T.) 38 N. Y. St. Rep. 891, affirmed 129 N. Y. 638.



jurisdictional character habeas corpus will not lie.<sup>1</sup>

Generally Speaking, the erroneous determination by the court of any question within its province, or any irregularity of procedure, falls within the rule above stated, and habeas corpus is not the proper remedy.<sup>2</sup>

Objections to Indictment, etc. — A discharge from imprisonment under a criminal conviction cannot be granted on habeas corpus because the indictment, information, or complaint was defective,<sup>3</sup> or was found on improper evidence<sup>4</sup> or by an improperly constituted grand jury.<sup>5</sup>

1. *Ex p. Tice*, 32 Oregon 179.

Only Defects of a Jurisdictional Character, which render the proceedings absolutely void, are available on habeas corpus. *State v. McMahon*, 69 Minn. 265. See also *infra*, this title, *Hearing and Determination — Extent of Inquiry on Hearing*.

2. Mere Errors and Irregularities Do Not Authorize Discharge on Habeas Corpus — Illustrations. — It has been held that a judgment was merely erroneous, and not void so as to authorize the discharge on habeas corpus of a person in custody under it, where the offense charged was committed at a place out of the jurisdiction of the court. *Matter of Newton*, 16 C. B. 97, 81 E. C. L. 97, 24 L. J. C. Pl. 148, 3 C. L. R. 1122, 1 Jur. N. S. 591. Compare *In re Terrill*, 58 Kan. 815, 49 Pac. Rep. 158. Or where the defendant was denied compulsory process for witnesses. *Ex p. Harding*, 120 U. S. 782. Or where the record of a judgment of a United States court, sentencing a person convicted in one state to imprisonment in another state, did not show that there was no suitable prison in the state where the conviction was had. *Ex p. Wilson*, 114 U. S. 417. Or where there is an apparent defect of jurisdiction for lack of a matter in controversy of sufficient pecuniary value. *In re Tyler*, 149 U. S. 164. Or where the writ and the judgment on which it was issued run in the wrong name. *Hammond v. People*, 32 Ill. 446, 83 Am. Dec. 286; *Sturgeon v. Gray*, 96 Ind. 166.

The same ruling has been made where a minor was bound out as an apprentice without notice to his parents. *Ackley v. Tinker*, 26 Kan. 485.

In the Following Cases Habeas Corpus Has Been Not the Proper Remedy:

Where, Though a Statute Required the Testimony of Two Witnesses to Convict, a conviction was had on the testimony of only one. *State v. Phillips*, 73 Minn. 77.

Where Proceedings Were Had in the Absence of the Prisoner, in a Criminal Case. *Turney v. Barr*, 75 Iowa 758; *State v. Sheriff*, 24 Minn. 87; *People v. Ruloff*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 77.

Where the Jury Was Discharged Before Verdict. *Ex p. McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. See also *State v. Sheriff*, 24 Minn. 87; *Ex p. Tice*, 32 Oregon 179. As to the effect of discharging the jury in a criminal case because the time fixed by law for the continuance of the term had expired, see *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90.

Where There Was a Failure to Record the Certificate of Conviction, as required by the New York statute. *In re Dorfman*, (Supm. Ct. Spec. T.) 1 N. Y. Supp. 154; *People v. Baker*, (Buffalo Super. Ct. Spec. T.) 3 N. Y. Supp. 536.

Where a Slip or Misprision of the Clerk Occurred in Recording the Sentence. *Com. v. Wright*, 126 Pa. St. 464.

Where a Change of Venue Was Improperly Granted or Refused. *Zelle v. McHenry*, 51 Iowa 572; *In re Terrill*, 58 Kan. 815, 49 Pac. Rep. 158; *State v. Crinklaw*, 40 Neb. 759.

Where an Officer Selling Intoxicating Liquors under Execution was convicted of an illegal sale. *Adams v. Vose*, 1 Gray (Mass.) 51.

Where There Was a Failure to Issue Execution in Time. *Ex p. Burns*, 7 Mo. App. 563.

Where There Was a Failure to Allow the Prisoner a Preliminary Examination in accordance with the North Dakota statute. *State v. Barnes*, 3 N. Dak. 131.

Where After the Accused Was Acquitted as Insane, He Was Committed to Prison. *Matter of Underwood*, 30 Mich. 502. See also *In re Maguire*, 114 Mich. 80.

Where the Conviction Was Had under Law Not Legally Adopted. *Ex p. Mitchell*, 104 Mo. 121, 24 Am. St. Rep. 324.

Where the Court Errs Merely in Regard to the Punishment. *Bishop, Petitioner*, 172 Mass. 35.

Where the Length of Imprisonment for Non-payment of a Fine Is Not Specified. *Elsner v. Shrigley*, 50 Iowa 30; *Matter of Johnson*, 104 Mich. 343.

Where the Court Fails to Impose Solitary Confinement in a case where it is required by law. *Stalker, Petitioner*, 167 Mass. 11.

Where a Juvenile Offender Is Committed to the Wrong Institution. *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344. See also *Ex p. Williams*, 87 Cal. 78; *Ex p. Kaufman*, 73 Mo. 588; *Buchanan v. Mallalieu*, 25 Neb. 201.

3. Defective Indictment Not Ground for Discharge on Habeas Corpus. — Prohibitory Amendment Cases, 24 Kan. 700; *Emanuel v. State*, 36 Miss. 627; *Ex p. Harlan*, 1 Okla. 48.

Within this principle the prisoner is not entitled to a discharge because the degree of the crime, when divided into degrees, with punishment varying according to the degree, was not specified in the indictment. *In re Eckart*, 166 U. S. 481. Nor can he be discharged because of a misjoinder of offenses. *In re Green*, 134 U. S. 377; *In re Lane*, 135 U. S. 443; *Ex p. Peters*, 12 Fed. Rep. 461.

4. Indictment Found on Improper Evidence. — *Harkrader v. Wadley*, 172 U. S. 148.

5. Improper Constitution of Grand Jury Not a Ground for Discharge on Habeas Corpus. — *Ex p. Harding*, 120 U. S. 782; *In re Wilson*, 140 U. S. 575.

Arbitrary Exclusion from the Panel of persons of the race of the accused does not defeat the jurisdiction of the court so as to warrant a writ of habeas corpus, though such persons were excluded solely because of their race. *Andrews v. Swartz*, 156 U. S. 272.



The Denial of a Trial by Jury is merely an error, and not a jurisdictional defect in the proceeding, if a jury is not a necessary constituent part of the court, that is, in any case in which a jury trial may be waived;<sup>1</sup> and the result is the same in any case where the court erroneously overrules challenges for cause, in consequence of which the defendant is deprived of his constitutional right to a trial by an impartial jury.<sup>2</sup>

An Excessive Sentence is generally considered to be merely erroneous, and a person in custody under it cannot obtain relief by habeas corpus.<sup>3</sup>

Existence of Remedy by Appeal, etc., as Affecting Habeas Corpus. — It has been said that, ordinarily, the writ of habeas corpus will not lie where there is a remedy by writ of error or appeal, though in rare and exceptional cases it may be issued notwithstanding the existence of such remedy;<sup>4</sup> but this seems to be only another way of stating the rule, noticed above, that mere errors or irregularities cannot be corrected by this process, because a judgment may be erroneous because it is void, and therefore reversible by the proper appellate proceeding,<sup>5</sup> while it is well settled, as has already been seen, that whenever a judgment is void for want of power or jurisdiction in the court to render it, a person who is imprisoned under such judgment may be discharged on habeas corpus.<sup>6</sup>

The Distinction Between Void and Voidable Judgments will be fully discussed elsewhere in this work.<sup>7</sup>

f. JUDGMENTS OF COURTS MARTIAL. — A court martial is a special tribunal, with jurisdiction of a particular class of cases. If such a court has no jurisdiction over the subject-matter of the charge which it has been convened to try, or inflicts a punishment forbidden by law, though its sentence be approved by the reviewing officers, the civil courts may, on habeas corpus, inquire into the question of jurisdiction and discharge the prisoner. To warrant a discharge, however, the sentence must be absolutely void, and not merely erroneous and voidable. Where courts martial have jurisdiction, their proceedings cannot be collaterally impeached on habeas corpus for any mere error or irregularity committed within the sphere of their authority.<sup>8</sup>

1. Denial of Trial by Jury — When Not Ground for Discharge on Habeas Corpus — *Arkansas*. — *Ex p.* Brandon, 49 Ark. 143.

*California*. — *In re Fife*, 110 Cal. 8; *Ex p.* Miller, 82 Cal. 454; *Ex p.* Wong You Ting, 106 Cal. 296.

*Iowa*. — *Zelle v. McHenry*, 51 Iowa 572.

*Ohio*. — *Madden v. Smeltz*, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

As to waiver of trial by jury under a statute which is claimed to be unconstitutional, see *In re Belt*, 159 U. S. 95.

Fixing the Punishment for Murder Without the Intervention of a Jury is erroneous, but not void, where the judgment of conviction was entered on a plea of guilty, and therefore it cannot be attacked collaterally on habeas corpus. *Lowery v. Howard*, 103 Ind. 440.

2. Deprivation of Right to Trial by Impartial Jury — Erroneously Overruling Challenges for Cause. — *In re Schneider*, 148 U. S. 162.

3. See *supra*, this section, *Excessive Judgments*.

4. Effect of Remedy by Writ of Error or Appeal. — *In re Blackbird*, 66 Fed. Rep. 541; *In re Belt*, 159 U. S. 95; *Ex p.* Matthews, (Tex. Crim. 1899) 49 S. W. Rep. 623; *Ex p.* Barfield, (Tex. Crim. 1898) 44 S. W. Rep. 1095.

*In Bell v. State*, 4 Gill (Md.) 305, 45 Am. Dec. 130, cited with approval in *State v. Mace*, 5 Md. 337, it was said that where an appeal will lie, habeas corpus will not lie.

In *Sellers v. People*, 6 Ill. 183, it was said that where the accused voluntarily pleads guilty with full knowledge of all the facts, and is sentenced to a term in the penitentiary, habeas corpus will not issue, a writ of error not being yet barred.

5. Review of Void Judgments and Orders. — See ENCYC. OF PL. AND PR., titles APPEALS, vol. 2, p. 103; ERROR, WRIT OF, vol. 7, p. 835.

"A judgment may be erroneous and not void, and it may be erroneous because it is void." *Ex p. Lange*, 18 Wall. (U. S.) 175.

In *People v. Riseley*, 38 Hun (N. Y.) 280, the court admitted that the accused could have the judgment of conviction set aside on appeal, but it granted a discharge on habeas corpus on the ground that the judgment was void.

6. See cases cited *supra*, this section, note *Custody under Void Judgment — Release on Habeas Corpus*, pp. 84, 85.

7. Distinction Between Void and Voidable Judgments. — See the titles JUDGMENTS; SENTENCE.

8. Custody under Judgment of Court Martial — *United States*. — *Ex p.* Milligan, 4 Wall. (U. S.) 2; *Ex p.* Reed, 100 U. S. 13; *Ex p.* Mason, 105 U. S. 696; *Wise v. Withers*, 3 Cranch (U. S.) 331; *Barrett v. Hopkins*, 2 McCrary (U. S.) 129; *Ex p.* Henderson, 11 Fed. Cas. No. 6,349; *Ex p.* Hewitt, 3 Am. L. Rev. 382, 12 Fed. Cas. No. 6,442; *In re Bogart*, 2 Sawy. (U. S.) 396; *In re Crain*, 84 Fed. Rep. 788; *In re Davison*, 21 Fed. Rep. 618.

**g. COMMITMENTS FOR CONTEMPT**—(1) *In General*.—Every court of justice has inherent power to punish for contempts committed in its presence or against its process,<sup>1</sup> and its decision in exercising such power cannot be attacked collaterally by habeas corpus in any case where the commitment is regular on its face and the court had jurisdiction.<sup>2</sup> No matter how erroneous an order, judgment, or decree of a court may be, a person committed for contempt in refusing to comply with it cannot attack it on habeas corpus.<sup>3</sup>

*District of Columbia*.—*In re Esmond*, (D. C. 1886) 8 Crim. L. Mag. 455.

*Massachusetts*.—*In re Wall*, 12 Law Rep. (Mass.) 322.

*New York*.—*People v. Fullerton*, 10 Hun (N. Y.) 63; *People v. Warden*, 100 N. Y. 20, reversing 34 Hun (N. Y.) 393; *Meade v. Deputy Marshal*, 2 Wheel. Crim. (N. Y.) 569.

*Pennsylvania*.—*Com. v. Cornman*, 4 S. & R. (Pa.) 83; *Com. v. Gamble*, 11 S. & R. (Pa.) 93.

Civil courts may discharge a prisoner who is in custody under a judgment of a court martial, if it appears that he was not amenable to its jurisdiction or that the court transcended its powers. *In re Grimley*, 137 U. S. 147.

**The Question of Jurisdiction** is the only one open to inquiry by the civil courts. *In re Esmond*, (D. C. 1886) 8 Crim. L. Mag. 455.

It has been held, however, that a judgment of a court martial, when questioned collaterally, is of no force or effect, unless accompanied by proof of the jurisdiction of facts on which authority to render the judgment depends, and that the mere recital of such facts of record is not sufficient. *People v. Warden*, 100 N. Y. 20, 7 Crim. L. Mag. 534, reversing 34 Hun (N. Y.) 393.

1. **Power to Punish for Contempt**.—See the title CONTEMPT, vol. 7, p. 25.

2. **Commitment for Contempt Not Impeachable by Habeas Corpus Where Court Had Jurisdiction**—*England*.—*Crosby's Case*, 3 Wils. C. Pl. 204, and cases cited; *Murray's Case*, 1 Wils. C. Pl. 299; *Hobhouse's Case*, 3 B. & Ald. 420, 5 E. C. L. 330; *Sheriff's Case*, 11 Ad. & El. 273, 39 E. C. L. 80; *Rex v. Carlile*, 4 C. & P. 415, 19 E. C. L. 450; *Chamber's Case*, Cro. Car. 168.

*United States*.—*Ex p. Yarbrough*, 110 U. S. 651; *Ex p. Terry*, 128 U. S. 289; *Cuddy, Petitioner*, 131 U. S. 280; *U. S. v. Pidgeon*, 153 U. S. 48; *In re Swan*, 150 U. S. 637; *In re Tyler*, 149 U. S. 164; *Ex p. Kearney*, 7 Wheat. (U. S.) 43.

*Alabama*.—*Ex p. Hardy*, 68 Ala. 305.

*California*.—*Ex p. Vance*, 88 Cal. 281; *Ex p. Acock*, 84 Cal. 50; *Ex p. Perkins*, 18 Cal. 60; *Ex p. Cottrell*, 59 Cal. 417; *Ex p. Smith*, 53 Cal. 204; *Ex p. Cohn*, 55 Cal. 193; *Matter of Cohen*, 5 Cal. 494; *In re Clarke*, 125 Cal. 388.

*Florida*.—*Ex p. Edwards*, 11 Fla. 174.

*Illinois*.—*Ex p. Smith*, 117 Ill. 63.

*Iowa*.—*Platt v. Harrison*, 6 Iowa 79, 71 Am. Dec. 389; *Ex p. Holman*, 28 Iowa 88, 4 Am. Rep. 159; *Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211.

*Kansas*.—*Matter of Gunn*, 50 Kan. 155.

*Michigan*.—*Bissell's Case*, 40 Mich. 63.

*Mississippi*.—*Ex p. Adams*, 25 Miss. 583, 59 Am. Dec. 234.

*Missouri*.—*Ex p. Goodin*, 67 Mo. 637; *Ex p. McKee*, 18 Mo. 599; *Ex p. Mason*, 16 Mo. App. 41; *Ex p. Millett*, 37 Mo. App. 76.

*Nevada*.—*Phillips v. Welch*, 12 Nev. 158.

*New Hampshire*.—*State v. Towle*, 42 N. H. 540.

*New York*.—*People v. Spalding*, 10 Paige (N. Y.) 284, affirmed 7 Hill (N. Y.) 301; *People v. Sheriff*, 29 Barb. (N. Y.) 622; *People v. Casseles*, 5 Hill (N. Y.) 164; *Kahn's Case*, (N. Y. Super. Ct. Spec. T.) 11 Abb. Pr. (N. Y.) 147, 19 How. Pr. (N. Y.) 475; *People v. Fancher*, 2 Hun (N. Y.) 226; *Matter of Percy*, 2 Daly (N. Y.) 530; *Kearney's Case*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 459; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *People v. Tamsen*, (Supm. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 141, 15 Misc. (N. Y.) 364, 17 Misc. (N. Y.) 212.

*Pennsylvania*.—*Jack v. Twyford*, 10 Pa. Super. Ct. 475.

*South Carolina*.—*Ex p. Keeler*, 45 S. Car. 537, 55 Am. St. Rep. 785.

*Texas*.—*Jordan v. State*, 14 Tex. 436; *Ex p. Warfield*, (Tex. Crim. 1899) 50 S. W. Rep. 933.

*Utah*.—*Matter of Whetstone*, 9 Utah 156; *In re Harris*, 4 Utah 5.

*Vermont*.—*In re Cooper*, 32 Vt. 253.

*Wisconsin*.—*In re Perry*, 30 Wis. 268; *Matter of Blair*, 4 Wis. 522; *In re Milburn*, 59 Wis. 24; *In re Rosenberg*, 90 Wis. 581.

**If the Jurisdiction Is Undoubted and the Commitment Is Sufficient in Form**, in a contempt case, a writ of habeas corpus will be discharged and the prisoner remanded, because the court has no power to inquire into the justice or the propriety of the commitment. *People v. Sheriff*, 29 Barb. (N. Y.) 622; *Matter of Percy*, 2 Daly (N. Y.) 530; *Kearney's Case*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 459.

**It Is Expressly Provided by Statute** in some jurisdictions that no court or judge shall inquire into the legality of any judgment or process for any contempt of court. *Matter of Dill*, 32 Kan. 668, 49 Am. Rep. 505; *Ex p. O'Brien*, 127 Mo. 477; *People v. Hannah*, 92 Hun (N. Y.) 476; *In re Van Alstine*, (Wash. 1899) 57 Pac. Rep. 348. See also the various local codes and statutes in the United States.

3. **Commitment for Disobeying Erroneous Judgment or Order**—*California*.—*Ex p. Cottrell*, 59 Cal. 417; *Ex p. Cohn*, 55 Cal. 193; *Ex p. Perkins*, 18 Cal. 60; *Matter of Wilson*, 75 Cal. 580.

*Iowa*.—*Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211, 6 Am. L. Rev. 320; *Ex p. Holman*, 28 Iowa 88, 4 Am. Rep. 159; *Ex p. Grace*, 12 Iowa 208, 79 Am. Dec. 529.

*Kansas*.—*Matter of Morris*, 39 Kan. 28, 7 Am. St. Rep. 512.

*Michigan*.—*Bissell's Case*, 40 Mich. 63.

*Mississippi*.—*Watson v. Williams*, 36 Miss. 331.

*Missouri*.—*In re Copenhaver*, 118 Mo. 377, 40 Am. St. Rep. 382; *Ex p. Goodin*, 67 Mo. 637.

*Nevada*.—*Phillips v. Welch*, 11 Nev. 187, 12 Nev. 117.



But if the Court Did Not Have Jurisdiction of either the party or the subject-matter, or if, having jurisdiction in both respects, it exceeded its powers in making any order or determination the disobedience of which was the contempt charged, or in making a commitment, habeas corpus is the proper mode of obtaining relief, as in case of other void judgments.<sup>1</sup> Thus, where a contempt is predicated on the disobedience of an order or process of the court, the commitment is void if the court did not have jurisdiction of the proceeding in which the order was made or the process issued;<sup>2</sup> or if it exceeded its powers in making the order which the party disobeyed,<sup>3</sup> or in making the commitment;<sup>4</sup> or if the act charged was not one which the court

*New Hampshire.* — *State v. Towle*, 42 N. H. 540.

*New York.* — *People v. Jacobs*, 66 N. Y. 8, 5 Hun (N. Y.) 428, reversing 49 How. Pr. (N. Y.) 370; *Anonymous*, (Supm. Ct.) 18 Abb. N. Cas. (N. Y.) 216; *Kearney's Case*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309; *Davison's Case*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 129; *Kahn's Case*, (N. Y. Super. Ct. Spec. T.) 11 Abb. Pr. (N. Y.) 147; *Wicker v. Dresser*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 331; *People v. Nevins*, 1 Hill (N. Y.) 154.

*South Carolina.* — *Gilliam v. McJunkin*, 2 S. Car. 442.

*Vermont.* — *In re Cooper*, 32 Vt. 253.

*Wisconsin.* — *In re Perry*, 30 Wis. 268; *Matter of Blair*, 4 Wis. 522.

**1. Commitment Void for Want of Jurisdiction** — *United States.* — *Ex p. Terry*, 128 U. S. 289; *In re Ayers*, 123 U. S. 443; *Ex p. Rowland*, 104 U. S. 604; *Ex p. Perkins*, 29 Fed. Rep. 900.

*Alabama.* — *Ex p. Hardy*, 68 Ala. 303.

*California.* — *Ex p. Hollis*, 59 Cal. 406; *Ex p. Rowe*, 7 Cal. 181.

*Colorado.* — *In re Brown*, 4 Colo. 438; *Wyatt v. People*, 17 Colo. 252.

*Illinois.* — *People v. Pirfenbrink*, 96 Ill. 68.

*Iowa.* — *Ex p. Grace*, 12 Iowa 208, 79 Am. Dec. 529.

*Maryland.* — *Ex p. Maulsby*, 13 Md. 625.

*Massachusetts.* — *Com. v. Sumner*, 5 Pick. (Mass.) 360.

*Michigan.* — *Matter of Morton*, 10 Mich. 208; *Matter of Hall*, 10 Mich. 210.

*Missouri.* — *Ex p. Crenshaw*, 80 Mo. 447.

*New York.* — *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Oyer*, etc., Ct., 101 N. Y. 245, 54 Am. Rep. 691; *People v. Gilmore*, 26 Hun (N. Y.) 1; *Matter of Watson*, 3 Lans. (N. Y.) 408, affirmed 5 Lans. (N. Y.) 466; *Shanks's Case*, (Supm. Ct.) 15 Abb. Pr. N. S. (N. Y.) 38.

*Pennsylvania.* — *Com. v. Perkins*, 124 Pa. St. 36.

*Rhode Island.* — *Matter of Hammel*, 9 R. I. 248.

*South Carolina.* — *James v. Smith*, 2 S. Car. 183; *Gilliam v. McJunkin*, 2 S. Car. 442.

*Tennessee.* — *State v. Galloway*, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

*Vermont.* — *In re Leach*, 51 Vt. 630.

*Wisconsin.* — *Matter of Blair*, 4 Wis. 522.

Jurisdiction is not obtained merely by asserting it. *Holman v. Austin*, 34 Tex. 668.

**Conflicting State and Federal Jurisdiction.** — Where a state court assumes to act in a matter as to which the federal courts have exclusive jurisdiction, a commitment for contempt

therein is void, and the federal courts will discharge the prisoner on habeas corpus. *Electoral College Case*, 1 Hughes (U. S.) 571; *Ex p. Turner*, 3 Woods (U. S.) 603; *In re Neill*, 8 Blatchf. (U. S.) 156; *Ex p. Robinson*, (U. S. Dist. Ct. 1856) 4 Am. L. Reg. 617.

But a state court cannot interfere with the commitment made by a federal court. *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *Ex p. Holman*, 28 Iowa 88, 4 Am. Rep. 159. See also *supra*, this title, *Jurisdiction—Conflicting Jurisdiction*.

**2. Order Made in Proceeding of Which Court Had No Jurisdiction.** — *In re Burrus*, 136 U. S. 586; *In re Ayers*, 123 U. S. 443; *Ex p. Wimberly*, 57 Miss. 437; *James v. Smith*, 2 S. Car. 183; *Ex p. Kilgore*, 3 Tex. App. 247.

**3. Contempt Predicated on Disobedience of Unauthorized Order.** — *Ex p. Fisk*, 113 U. S. 713; *In re Spencer*, 82 Cal. 110; *Ex p. Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557; *People v. Riley*, 25 Hun (N. Y.) 587; *In re Brainerd*, 56 Vt. 495; *In re Remington*, 7 Wis. 643.

Where a Contempt Has Been Purged and the Party Discharged Without Bail, the court is without jurisdiction to take any further action in, or make any further order on, the contempt proceeding, and a subsequent order committing the party to prison is without authority of law and utterly void. *In re Brown*, 4 Colo. 438.

**Nunc pro Tunc Order.** — A court has no authority to make a *nunc pro tunc* order so as to render persons liable to punishment for contempt in committing acts which were not prohibited before the order was made, and a commitment for contempt under the order, because of such previous acts, may be relieved against on habeas corpus. *Ex p. Buskirk*, 72 Fed. Rep. 14, 25 U. S. App. 613.

**4. Unauthorized Commitment—Release on Habeas Corpus** — *United States.* — *In re Swan*, 150 U. S. 637.

*Florida.* — *Ex p. Edwards*, 11 Fla. 174.

*Kansas.* — *Matter of Smith*, 52 Kan. 13.

*Massachusetts.* — *Clarke's Case*, 12 Cush. (Mass.) 320.

*Missouri.* — *Ex p. O'Brien*, 127 Mo. 477.

*Nebraska.* — *In re Havlik*, 45 Neb. 747.

*New York.* — *Matter of Swenarton*, 40 Hun (N. Y.) 41, 9 Civ. Pro. (N. Y.) 402.

*Texas.* — *Ex p. Degener*, 30 Tex. App. 566; *Ex p. Kilgore*, 3 Tex. App. 247.

*Vermont.* — *Ex p. Langdon*, 25 Vt. 680.

*Wisconsin.* — *In re Pierce*, 44 Wis. 411.

If the Commitment Was for a Greater Period than the court could lawfully impose, the prisoner is not entitled to a discharge until the authorized period has expired. *In re Swan*,



had power to punish as a contempt, that is, if it did not, as a matter of law, constitute a contempt.<sup>1</sup>

If a Public Officer Is Directed to Perform, in His Official Capacity, an act which the law relating to his office does not require, a commitment for contempt in disobeying such a mandate of the court is void, and he will be discharged on habeas corpus.<sup>2</sup>

(2) *Refusal of Witness to Take Oath or to Testify.*—A witness who has been committed for contempt in refusing to take a proper oath, or to answer any legal and proper question about a matter over which the court had jurisdiction, cannot obtain relief on habeas corpus;<sup>3</sup> but it is otherwise if the court had no jurisdiction of the proceeding,<sup>4</sup> or, according to some authorities, if the question which the witness refuses to answer was impertinent or one which could not properly be asked,<sup>5</sup> though some cases hold that no dis-

150 U. S. 637. See also *supra*, this section, *Excessive judgments*.

Where a Commitment Is by an Inferior Court, the person committed may show that the court acted without authority, and he may attack the jurisdictional recitals in the commitment. *Ex p. O'Brien*, 127 Mo. 477.

1. Acts Not Constituting Contempt—*Florida*.—*Ex p. Senior*, 37 Fla. 1.

*Iowa*.—*State v. Seaton*, 61 Iowa 563.

*Kansas*.—*Matter of Dill*, 32 Kan. 668, 49 Am. Rep. 505.

*Mississippi*.—*Ex p. Hickey*, 4 Smed. & M. (Miss.) 751.

*Tennessee*.—*State v. Galloway*, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

The Sufficiency of the Facts to justify punishment as for contempt for acts committed in the presence of the court cannot ordinarily be inquired into on a writ of habeas corpus. *Ex p. Terry*, 128 U. S. 289.

But an act cannot be made a contempt by a court or judge simply by styling it as such. *Ex p. Grace*, 12 Iowa 208, 79 Am. Dec. 529.

And if the facts on which the contempt is predicated are stated, and they appear on the face of the return to be clearly insufficient, the prisoner is entitled to his discharge. *Burdett v. Abbott*, 14 East 1811; *Bushell's Case*, Vaugh 156; *Stockdale v. Hansard*, 9 Ad. & El. 1, 36 E. C. L. 13; *Sheriff's Case*, 11 Ad. & El. 273, 39 E. C. L. 80. See also *Reg. v. Paty*, 2 Ld. Raym. 1105, 2 Salk. 504. But see *Rex v. Hobbhouse*, 2 Chit. 210, 18 E. C. L. 310.

Unless it appears as a matter of law that the act constituting the alleged contempt was not a contempt, habeas corpus will not lie. *State v. Seaton*, 61 Iowa 563. See also *In re Cheeseman*, 49 N. J. L. 115, 60 Am. Rep. 596.

2. Requiring Officers to Perform Acts Beyond Scope of Official Duty.—*Ex p. Rowland*, 104 U. S. 604.

3. Refusal of Witness to Answer Legal and Proper Questions.—*People v. Fisk*, 18 Cal. 60; *Ex p. Rowe*, 7 Cal. 175; *Ex p. McDonald*, (Cal. 1888) 17 Pac. Rep. 234.

*Mississippi*.—*Ex p. Adams*, 25 Miss. 883, 59 Am. Dec. 234.

*New Hampshire*.—*State v. Towle*, 42 N. H. 540.

*New York*.—*People v. Kelly*, 24 N. Y. 74; *People v. Sheriff*, (Supm. Ct. Gen. T.) 7 Abb. Pr. (N. Y.) 96, 29 Barb. (N. Y.) 622; *People v. Kelly*, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 54.

*Pennsylvania*.—*Com. v. Bell*, 145 Pa. St. 374. *Texas*.—*Holman v. Austin*, 34 Tex. 668.

Compare *Ex p. Kearney*, 7 Wheat. (U. S.) 39.

Refusal of Witness to Take Oath.—*Lockwood v. State*, 1 Ind. 161.

Refusal to Testify Before Grand Jury—*Illinois*.—*Ex p. Smith*, 117 Ill. 63.

*Missouri*.—*Ex p. McKee*, 18 Mo. 599.

*New York*.—*People v. Kelly*, 24 N. Y. 74.

*Utah*.—*Ex p. Harris*, 4 Utah 5.

A Person Refusing to Testify Before a Grand Jury recognized by the court as a lawful grand jury cannot show on habeas corpus that it was not a lawfully constituted body. *Ex p. Haymond*, 91 Cal. 545.

A Person Who Fails to Attend as a Witness for the commonwealth in a criminal case before a justice of the peace cannot be committed for contempt by such magistrate after the original case has been finally heard and determined. *Clarke's Case*, 12 Cush. (Mass.) 320.

4. If the Court Had No Jurisdiction of the proceeding in which the witness was required to testify, the commitment because of his refusal is unauthorized and void. *Matter of Morton*, 10 Mich. 208; *Matter of Hall*, 10 Mich. 210; *People v. Hannah*, 92 Hun (N. Y.) 476.

Even though the Jurisdictional Facts Be Set Forth in the Commitment, a witness committed for contempt in refusing to answer may show the absence of jurisdiction. *People v. Casels*, 5 Hill (N. Y.) 164; *Myers v. Janes*, (Supm. Ct.) 3 Abb. Pr. (N. Y.) 301.

An Order for the Examination of a Witness Before Trial, Made by a Federal Court, which has no authority to make such an order, though sitting in a state where such an order is authorized under the local statute, will not warrant imprisonment for contempt for disobedience, and one so imprisoned may be discharged on habeas corpus. *Ex p. Fisk*, 113 U. S. 713.

After a Suit Has Abated, there is no case in which a question can be asked, and a witness committed for refusing to answer a question at a previous examination in the case may then be discharged on habeas corpus. *Ex p. Rowe*, 7 Cal. 175.

5. Refusal to Answer Improper Questions—Discharge on Habeas Corpus.—*Ex p. Zeckhandelaar*, 71 Cal. 238; *Bradley v. Veazie*, 47 Me. 85. See also *In re Beardsley*, 37 Kan. 666; *Ex p. Krieger*, 7 Mo. App. 367; *Holman v. Austin*, 34 Tex. 668.

A Witness Refusing to Testify as to Irrelevant

charge can be granted on the ground that the questions asked were not proper.<sup>1</sup>

(3) *Indefinite Commitments*. — Commitments for an indefinite time, as "until discharged by due course of law," or "until further order of the court," and the like, are generally bad, and the prisoner will usually be discharged on habeas corpus, unless the due course of law, or other good reason for his detention, is shown to exist.<sup>2</sup>

(4) *Commitments by Legislative Bodies*. — Legislative bodies have power to make commitments for contempts in certain cases,<sup>3</sup> and the validity of such a commitment may be inquired into on habeas corpus, and a discharge granted if the commitment was unauthorized.<sup>4</sup>

h. DECISIONS OF QUASI-JUDICIAL OFFICERS. — Sometimes the functions of boards or officers involve the exercise of powers which are, in a measure, of a judicial nature, and in such cases the same rule applies to their decisions as to the judgments, orders, or decrees of courts and judges. Thus it has been held that where the officer charged under the immigration laws with the duty of excluding objectionable persons refuses to allow an immigrant to land, or orders that he be deported on the ground that he is within the prohibition of the law, the courts, on habeas corpus, can only inquire whether such officer acquired jurisdiction of the matter, whether he exceeded his jurisdiction, and whether he had before him any legal or competent evidence of facts on which to exercise his judgment.<sup>5</sup> But if it is found that such conditions exist and that the immigrant has the right to land, such right may be enforced by habeas corpus.<sup>6</sup> It is now provided by an Act of Congress that in every

Matter has been discharged on habeas corpus. *Ex p. Jennings*, 60 Ohio St. 319.

**Imprisonment for a Refusal to Appear and Make an Affidavit**, when lawfully subpoenaed by a justice of the peace, under the *Iowa* statute, cannot be relieved against by habeas corpus. *Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211. See also *State v. Seaton*, 61 Iowa 563. But the statute contemplates process to obtain affidavits only in the case of proceedings actually pending. *Dudley v. McCord*, 65 Iowa 671.

1. **Impropriety of Question Held Not Ground for Discharge**. — *People v. Cassels*, 5 Hill (N. Y.) 164; *People v. Fancher*, 2 Hun (N. Y.) 226, reversing 15 Abb. Pr. N. S. (N. Y.) 38.

2. **Indefinite Commitments** — *England*. — *Rex v. James*, 1 Dowl. & R. 559, 5 B. & Ald. 894, 7 E. C. L. 292; *Hollingshead's Case*, 1 Salk. 351; *Rex v. Hall*, 3 Burr. 1636; *Goff's Case*, 3 M. & S. 203; *Matter of Crawford*, 13 Q. B. 629, 66 E. C. L. 629; *Rex v. Hobhouse*, 2 Chit. 207, 18 E. C. L. 309; *Bracy's Case*, 1 Ld. Raym. 100; *Reg. v. Paty*, 2 Ld. Raym. 1108. *Compare Stockdale v. Hansard*, 9 Ad. & El. 1, 36 E. C. L. 13; *Burdett v. Abbott*, 14 East 1811; *Sheriff's Case*, 11 Ad. & El. 273, 39 E. C. L. 80.

*Colorado*. — *In re Brown*, 4 Colo. 438. *District of Columbia*. — *Matter of Marsh*, *MacArthur & M. (D. C.)* 32.

*Illinois*. — *People v. Pirlfenbrink*, 96 Ill. 68. *Kentucky*. — *Ex p. Alexander*, (Ky. 1853) 2 Am. L. Reg. 44.

*Maryland*. — *Ex p. Maulsby*, 13 Md. 625. *New York*. — *Shanks's Case*, (Supm. Ct.) 15 Abb. Pr. N. S. (N. Y.) 38.

*Rhode Island*. — *Matter of Hammel*, 9 R. I. 248.

*Vermont*. — *In re Leach*, 51 Vt. 630.

3. See the title CONTEMPT, vol. 7, p. 25.

4. **Commitment by Legislative Bodies** — *United States*. — *Kilbourn v. Thompson*, 103 U. S. 199. *Kansas*. — *Matter of Gunn*, 50 Kan. 155. *Massachusetts*. — *Emery's Case*, 107 Mass. 180, 9 Am. Rep. 22; *Burnham v. Morrissey*, 11 Gray (Mass.) 226, 74 Am. Dec. 676, 681, notes. *Ohio*. — *Ex p. Dalton*, 44 Ohio St. 142, 58 Am. Rep. 800.

*Wisconsin*. — *In re Falvey*, 7 Wis. 630.

*Compare Yates's Case*, 4 Johns. (N. Y.) 318; *Yates v. People*, 6 Johns. (N. Y.) 337; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290, commented on in *Ex p. Alexander*, (Ky. 1853) 2 Am. L. Reg. 44.

5. **Decisions of Quasi-judicial Officers** — **Exclusion of Immigrants**. — *U. S. v. Don On*, 49 Fed. Rep. 569; *In re Leo Hem Bow*, 47 Fed. Rep. 302; *In re Cummings*, 32 Fed. Rep. 75; *People v. Hurlburt*, (Supm. Ct.) 67 How. Pr. (N. Y.) 356.

"The General Doctrine of the law in such cases is that where the determination of the facts is lodged in a particular officer or tribunal, the decision of that officer or tribunal is conclusive, and cannot be reviewed except as authorized by law." *In re Day*, 27 Fed. Rep. 678.

6. **Habeas Corpus to Enforce Right of Immigrant to Land**. — *In re O'Sullivan*, 31 Fed. Rep. 447.

**Persons Claiming Citizenship**. — Where a person claiming to be a citizen of the United States is refused permission to land on his return after an absence, he may have a writ of habeas corpus to procure a judicial determination of the matter involved. See *Fook Sing v. U. S.*, 49 Fed. Rep. 146, 7 U. S. App. 27; *Lem Hing Dun v. U. S.*, 49 Fed. Rep. 148, 7 U. S. App. 31.



case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury;<sup>1</sup> and this statute has been construed by the Supreme Court of the United States as entirely taking away the authority of the courts to review the decisions of the executive officers charged with the duty of carrying out the law.<sup>2</sup>

**4. Custody of Husband or Wife — a. REMEDY OF HUSBAND OR WIFE AGAINST THIRD PERSONS.** — A husband may have a writ of habeas corpus to procure the release of his wife from the custody of a third person, if she is detained from him by such person against her will.<sup>3</sup> The only function of the writ in such case, however, is to remove the illegal restraint, if any, and put the woman at liberty to go where she pleases. It cannot be used as a means of compelling a wife to perform her marital duties; and therefore where she is voluntarily, of her own desire, and without any restraint, living apart from her husband, the court will not grant a habeas corpus on his application for the purpose of restoring her to his custody.<sup>4</sup>

If a Husband Is Unlawfully Restrained of His Liberty, so that his society is denied to his wife, she may have a writ of habeas corpus to obtain his release.<sup>5</sup>

**b. REMEDY OF WIFE AGAINST HUSBAND.** — A husband has the undoubted right, at common law, to the custody of his wife, and to control her actions in certain respects, so long as he has not relinquished his marital authority by any contract or agreement, and has not forfeited it by misconduct.<sup>6</sup> But where she refuses to live with him he has no right to compel her, by imprisonment or confinement, to do so, and she may be released from such imprisonment or confinement on habeas corpus,<sup>7</sup> though a different view of this question was formerly taken by the English courts.<sup>8</sup> It has long been settled that a wife who, after the execution of a deed of separation, was

1. 28 U. S. Stat. at L. 390, c. 301.

2. Power of Courts to Review Decisions of Immigration Officers Taken Away by Statute. — *Lem Moon Sing v. U. S.*, 158 U. S. 538. But see *In re Leong Yonk Tong*, 90 Fed. Rep. 648; *In re Gin Fung*, 87 Fed. Rep. 153; *In re Gottfried*, 89 Fed. Rep. 9; *In re Kornmehl*, 87 Fed. Rep. 314; *In re Maiola*, 67 Fed. Rep. 114; *In re Monaco*, 86 Fed. Rep. 117. See also the title IMMIGRATION.

3. Habeas Corpus by Husband to Obtain Custody of Wife. — *In re Newton*, 2 Smith 617; *Rex v. Wiseman*, 2 Smith 617; *Rex v. Winton*, 5 T. R. 89; *Rex v. Mead*, 1 Burr. 542; *Rex v. Clarkson*, 1 Stra. 445; *Sanders v. Rodway*, 13 Eng. L. & Eq. 463, 16 Jur. 1005; *U. S. v. Anderson*, Cooke (Tenn.) 143.

Detention Must Be Against Wife's Will. — *Rex v. Wiseman*, 2 Smith 617.

Where the Ill Treatment of the Wife by the Husband led to her leaving him and taking refuge with her mother and uncle, the court refused on habeas corpus to order the mother and uncle to deliver her to the husband. *Rex v. Brooke*, 4 Burr. 1091.

4. Husband Cannot Coerce Wife by Habeas Corpus. — *Reg. v. Jackson*, [1891] 1 Q. B. 671; *Ex p. Sandilands*, 12 Eng. L. & Eq. 463, 17 Jur. 317, 21 L. J. Q. B. 312; *Reg. v. Leggatt*, 18 Q. B. 781, 83 E. C. L. 781; *Rex v. Mead*, 1 Burr. 542; *Rex v. Wiseman*, 2 Smith 617; *Rex v. Clarkson*, 1 Stra. 444. And see *Berkley's Case*, 3 St. Tr. 78.

5. Remedy of Wife for Unlawful Detention of

Husband. — *Ex p. Sandilands*, 12 Eng. L. & Eq. 463; *Reg. v. Leggatt*, 18 Q. B. 781, 83 E. C. L. 781; *Rex v. Mead*, 1 Burr. 542.

6. Right of Husband to Custody and Control of Wife. — See the title HUSBAND AND WIFE, *post*.

7. Habeas Corpus Issued in Behalf of Wife Restrained by Husband. — *Reg. v. Jackson*, [1891] 1 Q. B. 671, *overruling In re Cochrane*, 8 Dowl. P. C. 630. In delivering judgment in *Reg. v. Jackson*, Lord Halsbury, L. C., disclaimed saying down that there might not be "acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom."

8. In *In re Cochrane*, 8 Dowl. P. C. 630, the court refused on habeas corpus to release a wife who, after absenting herself from her husband, had been taken by him by stratagem and was being kept in confinement until she should return to a performance of her conjugal duties. As stated in the last note, this case is now overruled. *In re Price*, 2 F. & F. 263, seems in accord with the *Cochrane* case.

Refusal to Allow Persons to See Wife — In *Rex v. Middleton*, 1 Chit. 654, 18 E. C. L. 192, it was held that the court would not grant a habeas corpus to bring up the body of a *feme covert* on an affidavit that she was desirous of disposing of her separate property, that her husband would not admit the necessary persons to see her, and that she was confined by illness, and not likely to live long.



restrained by her husband, might have a writ of habeas corpus against him.<sup>1</sup>

5. **Custody of Infants** — *a*. **DETENTION OF CHILDREN FROM PARENTS.** — As a general rule, a father has the right to the custody and control of his infant children, and at common law this right was unlimited, subject only to the control of the courts in cases of gross breach of duty. When the father abused his right to the detriment of the child, the court would protect the child, but where no such abuse was shown, the father was entitled to have his child restored to him. Modern legislation has made some innovations on this paternal right, which will be fully treated in another part of this work.<sup>2</sup> One of the well-recognized and often applied purposes of the writ of habeas corpus is to remove children at the instance of their parents from the custody of any person by whom they may be wrongfully detained, and since the father is the person usually entitled, the proceeding is more frequently brought by him,<sup>3</sup> but it may be brought by the mother in any case where the right of custody is in her,<sup>4</sup> and when the parents are living apart either parent may proceed against the other by means of this writ to obtain the custody of their infant children.<sup>5</sup> In such a proceeding the court is bound only to free the

1. **Effect of Separation.** — *Lister's Case*, 8 Mod. 22; *Vane's Case*, 13 East 173, note.

2. **Right to Custody of Infant Children.** — See the title **PARENT AND CHILD**.

3. **Habeas Corpus by Father of Infant Child** — *United States*. — *In re Barry*, 42 Fed. Rep. 113. *Alabama*. — *Brinster v. Compton*, 68 Ala. 299; *Ex p. Boaz*, 31 Ala. 425.

*Connecticut*. — *Lanahan v. Birge*, 30 Conn. 438.

*Georgia*. — *Matter of Mitchell*, R. M. Charl. (Ga.) 489.

*Indiana*. — *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545; *McGlennan v. Margowski*, 90 Ind. 150; *Speer v. Davis*, 38 Ind. 271; *Lee v. Back*, 30 Ind. 148; *State v. Banks*, 25 Ind. 495.

*Iowa*. — *Ex p. Anderson*, 16 Iowa 595.

*Massachusetts*. — *Holyoke v. Haskins*, 5 Pick. (Mass.) 26, 16 Am. Dec. 372; *Day v. Everett*, 7 Mass. 145.

*New Hampshire*. — *State v. Ray*, 63 N. H. 406, 56 Am. Rep. 529; *State v. Richardson*, 40 N. H. 272.

*New Jersey*. — *State v. Stigall*, 22 N. J. L. 286; *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399.

*New York*. — *People v. Moss*, 6 N. Y. App. Div. 414; *Matter of Bliss*, 39 Hun (N. Y.) 594; *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; *Dabb's Case*, (N. Y. Super. Ct.) 12 Abb. Pr. (N. Y.) 113, 21 How. Pr. (N. Y.) 68; *Phelan's Case*, (C. Pl.) 9 Abb. Pr. (N. Y.) 286; *Matter of Webb*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 247; *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; *People v. Gaul*, 44 Barb. (N. Y.) 98.

*Ohio*. — *Matter of Disinger*, 12 Ohio St. 256.

*Pennsylvania*. — *Com. v. Fox*, 7 Pa. St. 336; *Com. v. Callan*, 6 Binn. (Pa.) 255; *Com. v. Addicks*, 5 Binn. (Pa.) 520, 2 S. & R. (Pa.) 174; *Com. v. Blatt*, 165 Pa. St. 213.

*Rhode Island*. — *Vetterlein's Petition*, 14 R. I. 378.

*South Carolina*. — *Ex p. Williams*, 11 Rich. L. (S. Car.) 452; *Ex p. Schumpert*, 6 Rich. L. (S. Car.) 344.

*Tennessee*. — *State v. Paine*, 4 Humph. (Tenn.) 523; *U. S. v. Anderson*, Cooke (Tenn.) 443.

*West Virginia*. — *Rust v. Vanvacter*, 9 W. Va. 600.

*Wisconsin*. — *In re Tarble*, 25 Wis. 390, 3 Am. Rep. 85; *In re Higgins*, 16 Wis. 351.

4. **Habeas Corpus by Mother of Infant Child** — *England*. — *Reg. v. Clarke*, 21 Jur. 335.

*Connecticut*. — *Macready v. Wilcox*, 33 Conn. 328.

*Indiana*. — *Curtis v. Curtis*, 131 Ind. 489; *Copeland v. State*, 60 Ind. 394; *Wishard v. Medaris*, 34 Ind. 168; *Sears v. Dessar*, 28 Ind. 472.

*Kansas*. — *Matter of Freeman*, 54 Kan. 493.

*Massachusetts*. — *Com. v. Hammond*, 10 Pick. (Mass.) 274.

*Mississippi*. — *Moore v. Chrisitan*, 56 Miss. 408, 31 Am. Rep. 375; *Maples v. Maples*, 49 Miss. 393.

*New Jersey*. — *Buckley v. Perrine*, 54 N. J. Eq. 285, 55 N. J. Eq. 514; *State v. Clover*, 16 N. J. L. 419.

*New York*. — *People v. Manley*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 61; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Matter of Larson*, 31 Hun (N. Y.) 539, 96 N. Y. 381.

*Pennsylvania*. — *Com. v. Barney*, 4 Brews. (Pa.) 408.

*Virginia*. — *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*West Virginia*. — *State v. Reuff*, 29 W. Va. 751, 6 Am. St. Rep. 676.

**The Mother of a Bastard** is entitled to its custody as against all other persons, including the putative father, and in a proper case the custody of it will be awarded to her on habeas corpus. *Rex v. Moseley*, 5 East 224, note *a*; *Copeland v. State*, 60 Ind. 394. *Bustamento v. Analla*, 1 N. Mex. 255. *Compare Matthews v. Hobbs*, 51 Ala. 210, holding that the court of chancery is the proper forum to determine the right to the custody of a bastard child as between the mother and the putative father.

5. **Habeas Corpus by One Parent Against the Other** — *United States*. — *In re Barry*, 42 Fed. Rep. 113.

*Connecticut*. — *Nickols v. Giles*, 2 Root (Conn.) 461.

*Florida*. — *Miller v. Miller*, 35 Fla. 227, 56 Am. St. Rep. 166.

child from any illegal restraint to which it may be subject, and not to decide who is entitled to the custody. When the child is old enough and has sufficient mental capacity to determine for itself with whom it will go, the court will only remove the restraint, without making any order as to the right of custody; but if the child, because of its tender years or for other cause, cannot make such determination, the court may decide as to the right of custody and alter the custody in its discretion.<sup>1</sup>

**Transfer or Forfeiture of Parental Right.** — The custody of infant children is given to the parent not for his gratification, but on account of his duties, and it is generally held that contracts for the surrender of the care and custody of children are void, as against public policy, and do not bar an attempt by the parent, on habeas corpus, afterwards to regain the custody. So, too, it is held that an abandonment of the custody does not bar the parent's right.<sup>2</sup> In many cases, however, where a parent has made a contract transferring the custody of the child, or where he has relinquished or abandoned it, and by his conduct has allowed a condition of affairs to arise which cannot be altered without risking the happiness and best interests of the child, he cannot afterwards recover the custody of it on habeas corpus; but the refusal of the court to assist him in such case is not based on the contract or on the loss of his right, but on equitable grounds relating to the welfare of the child.<sup>3</sup> And this principle (the welfare of the child) has been carried so far that even where

*Georgia.* — *Lindsey v. Lindsey*, 14 Ga. 657; *Lowrey v. Lowrey*, (Ga. 1899) 33 S. E. Rep. 421; *Haire v. McCordle*, (Ga. 1899) 33 S. E. Rep. 683.

*Maine.* — *State v. Smith*, 6 Me. 462, 20 Am. Dec. 324.

*Massachusetts.* — *Com. v. Briggs*, 16 Pick. (Mass.) 203; *Pool v. Gott*, 14 Law Rep. (Mass.) 269.

*Mississippi.* — *McShan v. McShan*, 56 Miss. 413.

*New York.* — *People v. Sternberger*, 12 N. Y. App. Div. 398, 153 N. Y. 684; *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; *Davis v. Davis*, 75 N. Y. 221.

*Pennsylvania.* — *Com. v. Sage*, 160 Pa. St. 399.

*South Carolina.* — *Ex p. Reed*, 19 S. Car. 604.

**The New York Statute** (1 Laws 1896, c. 272, § 40, p. 222) expressly provides that either a husband or wife, residents of the state, who are living separately, may, by habeas corpus proceedings, recover the custody of their children from the other. *Matter of Colebrook*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 139.

1. See *infra*, this division of this section, *Principles Governing Award of Custody on Habeas Corpus*.

2. **Custody of Child Recoverable on Habeas Corpus Notwithstanding Transfer or Surrender** — *England.* — *Reg. v. Smith*, 16 Eng. L. & Eq. 221.

*Canada.* — *Barlow v. Kennedy*, 17 L. C. Jur. 253.

*Arkansas.* — *Verser v. Ford*, 37 Ark. 27.

*Indiana.* — *Dalton v. State*, 6 Blackf. (Ind.) 357; *Wishard v. Medaris*, 34 Ind. 168; *Cope-land v. State*, 60 Ind. 394; *Speer v. Davis*, 38 Ind. 271.

*Kansas.* — *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321.

*Maine.* — *State v. Smith*, 6 Me. 462, 20 Am. Dec. 324.

*Massachusetts.* — *Pool v. Gott*, 14 Law Rep. (Mass.) 269.

*New Hampshire.* — *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223.

*New Jersey.* — *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399; *State v. Clover*, 16 N. J. L. 419. See also *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399.

*Texas.* — *Legate v. Legate*, 87 Tex. 248.

In *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223, the custody of the child was restored to the father on the father's refunding certain money expended for the child by the person to whom the father had delivered her.

See also the title **PARENT AND CHILD**, where a full discussion of the proposition stated in the text will be found.

3. **Restoration of Custody After Release or Abandonment Denied** — *England.* — *Lyons v. Blenkin*, Jac. 245; *In re Turner*, 41 L. J. Q. B. 142.

*United States.* — *U. S. v. Greene*, 3 Mason (U. S.) 482.

*Alabama.* — *Brinster v. Compton*, 68 Ala. 299.

*Arkansas.* — *Washaw v. Gimble*, 50 Ark. 351; *Verser v. Ford*, 37 Ark. 27.

*Georgia.* — *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48; *Smith v. Bragg*, 68 Ga. 650; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *James v. Cleghorn*, 54 Ga. 9; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202.

*Illinois.* — *People v. Porter*, 23 Ill. App. 196.

*Indiana.* — *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309; *Kerwin v. Wright*, 59 Ind. 369; *Young v. State*, 15 Ind. 480.

*Iowa.* — *Bonnett v. Bonnett*, 61 Iowa 199, 47 Am. Rep. 810; *Drumb v. Keen*, 47 Iowa 435.

*Kansas.* — *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Matter of Beckwith*, 43 Kan. 159.

*Kentucky.* — *Ellis v. Jesup*, 11 Bush (Ky.) 403.

*Massachusetts.* — *Com. v. Hammond*, 10 Pick. (Mass.) 274; *Curtis v. Curtis*, 5 Gray (Mass.) 535.

the parent lost the control of his child through no fault of his own, he was not allowed to reclaim the custody, where the child had formed new relations that could not be severed without detriment to it.<sup>1</sup>

*b. DETENTION OF WARDS FROM GUARDIANS.* — A writ of habeas corpus lies at the instance of a guardian to inquire into the legality of his ward's detention by a third person. In such a proceeding it is in the discretion of the court to award the custody of the infant to the guardian, if he is a proper person, and if the court is not of opinion that it is for the best interests of the infant to remain with such third person, though a transfer of custody is not a part of the relief to which the guardian is entitled,<sup>2</sup> because it is well settled

*Michigan.* — Matter of Stockman, 71 Mich. 180; *Sword v. Keith*, 31 Mich. 248.

*Mississippi.* — *McShan v. McShan*, 56 Miss. 413.

*Nebraska.* — *Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349.

*New Hampshire.* — *State v. Barrett*, 45 N. H. 15.

*New Jersey.* — *Richards v. Collins*, 45 N. J. Eq. 283.

*New York.* — Matter of Waldron, 13 Johns. (N. Y.) 418; *Wilcox v. Wilcox*, 14 N. Y. 575; Matter of Murphy, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 513; *Paddock v. Eager* (Supm. Ct. Gen. T.) 10 N. Y. Supp. 710; *People v. Erbert*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 395.

*North Carolina.* — *Spears v. Snell*, 74 N. Car. 210.

*Ohio.* — *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593.

*Pennsylvania.* — *Com. v. Gilkeson*, 1 Phila. (Pa.) 194, 8 Leg. Int. (Pa.) 86; *Com. v. Dougherty*, 1 Leg. Gaz. (Pa.) 63; *Com. v. Barney*, 4 Brews. (Pa.) 408; *Com. v. Ashton*, 8 W. N. C. (Pa.) 563, 22 Alb. L. J. 183.

*Rhode Island.* — *Hoxsie v. Potter*, 16 R. I. 374.

*South Carolina.* — *Ex p. Schumpert*, 6 Rich. L. (S. Car.) 344.

*Tennessee.* — *Gardenhire v. Hinds*, 1 Head (Tenn.) 402.

*Virginia.* — *Coffee v. Black*, 82 Va. 567; *Merritt v. Swimley*, 82 Va. 433, 3 Am. St. Rep. 115; *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*West Virginia.* — *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843.

*Wisconsin.* — Matter of Goodenough, 19 Wis. 274; *Sheers v. Stein*, 75 Wis. 44.

See further the title PARENT AND CHILD.

**1. Custody Lost Without Fault of Parent.** — Matter of O'Neal, (Mass.) 3 Am. L. Rev. 578. See also *Dumain v. Gwynne*, 10 Allen (Mass.) 270. In this case a father was imprisoned for felony, and the mother, being unable to support her children, gave her daughter (two years old) to a charitable institution to be placed in some good family. Some years afterwards the father was discharged and acquired some property, and an application was then made by both parents for the restoration of the child, but the application was denied on the ground that the welfare of the child required that there should not be a change of the custody.

**2. Habeas Corpus by Guardian — England.** — Matter of Andrews, L. R. 8 Q. B. 153, 4 Moak 261; *Rex v. Smith*, 7 Mod. 234; *Villareal v. Mellish*, 2 Swanst. 533.

*Arkansas.* — *Wright v. Johnson*, 5 Ark. 687.

*Connecticut.* — *Macready v. Wilcox*, 33 Conn. 321.

*Georgia.* — *Ex p. Ralston*, R. M. Charl. (Ga.) 119; *Payne v. Payne*, 39 Ga. 174.

*Indiana.* — *Bounell v. Berryhill*, 2 Ind. 613, *Garner v. Gordon*, 41 Ind. 92; *Gregg v. Wynn*, 22 Ind. 373; *Hovey v. Morris*, 7 Blackf. (Ind.) 559.

*Massachusetts.* — *Com. v. Downes*, 24 Pick. (Mass.) 227; *Com. v. Hammond*, 10 Pick. (Mass.) 274.

*Michigan.* — Matter of Jackson, 15 Mich. 417; Matter of Heather, 50 Mich. 261.

*Minnesota.* — *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534.

*Mississippi.* — *Foster v. Alston*, 6 How. (Miss.) 406.

*Missouri.* — *Ferguson v. Ferguson*, 36 Mo. 197.

*New Jersey.* — *State v. Cheeseman*, 5 N. J. L. 511; *State v. Clover*, 16 N. J. L. 419.

*New York.* — *People v. Wilcox*, 22 Barb. (N. Y.) 178; Matter of Ferguson, 9 Johns. (N. Y.) 239; Matter of Stacy, 10 Johns. (N. Y.) 328; *People v. Pillow*, 1 Sandf. (N. Y.) 672; *People v. Walts*, 122 N. Y. 238.

*Pennsylvania.* — *Com. v. Dugan*, 13 Pa. Co. Ct. 83; *Com. v. Smith*, 1 Brews. (Pa.) 547; *Com. v. Barney*, 4 Brews. (Pa.) 408; *Com. v. Addicks*, 5 Binn. (Pa.) 520, 2 S. & R. (Pa.) 174; *Com. v. Reed*, 59 Pa. St. 425.

*Tennessee.* — *Ward v. Roper*, 7 Humph. (Tenn.) 111.

*West Virginia.* — *Mathews v. Wade*, 2 W. Va. 464.

**A Nonresident Guardian** may by habeas corpus obtain the custody of his wards, where they are taken from his home by third persons without authority. *Wells v. Andrews*, 60 Miss. 373.

**The Guardian of an Illegitimate Orphan Child** is entitled to its custody, and may recover the same, by a writ of habeas corpus, as against one with whom the mother had intrusted the child until majority. *Johns v. Emmert*, 62 Ind. 533.

**A Corporation Authorized to Take Charge of Destitute Children** and provide homes for them transferred to the defendant, by written contract, the care and custody of a child, and afterwards, under its statutory authority, deeming the home unsuitable, made demand for the return of the child, which the defendant refused. It was held that the corporation was entitled to recover the custody of the child by habeas corpus. *Milligan v. State*, 97 Ind. 355.

**A Testamentary Guardian** may recover the



that the right of guardianship cannot be tried on habeas corpus.

c. DETENTION OF APPRENTICES FROM MASTERS. — The authorities are not uniform as to whether a master may have a writ of habeas corpus where his apprentice is unlawfully detained from him. Some cases hold that the writ cannot issue at the instance of the master, but that he will be left to his remedy by an action at law for damages.<sup>2</sup> On the other hand, there are cases in which this remedy has been allowed to the master;<sup>3</sup> but the extent of the relief which may be had seems to be the removal of the restraint, so that the apprentice may return to his master if he so desires.<sup>4</sup>

d. PRINCIPLES GOVERNING AWARD OF CUSTODY ON HABEAS CORPUS. — Since the proper office of the writ of habeas corpus is merely to remove unlawful restraints that may be put on the liberty of the subject or citizen, the court will ordinarily go no further than to place an infant at liberty to go with whom he pleases, if he is of sufficient age and intelligence to choose for himself, or it may award the custody to the person so chosen;<sup>5</sup> but consulting the

custody of his ward on habeas corpus, if he be a fit person and the child too young to choose for itself. But if the validity of the testamentary appointment is disputed, the court will direct the issue to be tried by a jury. *Matter of Andrews*, L. R. 8 Q. B. 153, 4 Moak 261. See also *Reg. v. Clarke*, 7 El. & Bl. 186, 90 E. C. L. 186, 26 L. J. Q. B. 169.

1. See *supra*, this title, *Nature and Scope of Remedy* — *In General*, note *Right of Guardianship Not Triable on Habeas Corpus*.

2. Rule that Master Cannot Have Habeas Corpus for Apprentices. — In *Ex p. Landsdown*, 5 East 38, Lord Ellenborough said: "The writ of habeas corpus is for the protection of the personal liberty of the subject. If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action if his apprentice have been improperly taken from him." In this opinion the other judges concurred; two of them observed that of late years similar applications had been repeatedly refused. See also *Rex v. Reynolds*, 6 T. R. 497, *Rex v. Edwards*, 7 T. R. 741; *Lea v. White*, 4 Sneed (Tenn.) 73, 67 Am. Dec. 599.

3. Habeas Corpus Allowed to Master for Detention of Apprentice — *Massachusetts*. — *Com. v. Harrison*, 11 Mass. 63.

*New Jersey*. — *State v. Brearly*, 5 N. J. L. 639.

*New York*. — *People v. Pillow*, 1 Sandf. (N. Y.) 672.

*Pennsylvania*. — *Com. v. Beck*, 1 Browne (Pa.) 277; *Graham v. Graham*, 1 S. & R. (Pa.) 331; *Com. v. Beck*, 1 Browne (Pa.) 277; *Com. v. Barker*, 5 Binn. (Pa.) 423. Compare *Com. v. Harris*, 7 Pa. L. J. 283.

4. See the cases cited in the next preceding note; and *infra*, this division of this section, *Principles Governing Award of Custody on Habeas Corpus*.

5. Removal of Restraint — Right of Infant to Choose Custodian — *England*. — *Rex v. Delaval*, 3 Burr. 1434; *Rex v. Smith*, 2 Stra. 982; *Blisset's Case*, Lofft 748.

*Canada*. — *Reg. v. Hull*, 3 Quebec 136.

*United States*. — *U. S. v. Green*, 3 Mason (U. S.) 482.

*District of Columbia*. — *In re Poole*, 2 MacArthur (D. C.) 583, 29 Am. Rep. 628.

*Florida*. — *Miller v. Miller*, 38 Fla. 227, 56 Am. St. Rep. 166.

*Georgia*. — *Roberts v. Walker*, 18 Ga. 5; *Ex p. Ralston*, R. M. Charl. (Ga.) 119; *Matter of Mitchell*, R. M. Charl. (Ga.) 489.

*Indiana*. — *State v. Banks*, 25 Ind. 495.

*Iowa*. — *Shaw v. Nachtwey*, 43 Iowa 653.

*Maine*. — *State v. Smith*, 6 Me. 462, 20 Am. Dec. 324.

*Massachusetts*. — *Com. v. Hammond*, 10 Pick. (Mass.) 274; *Com. v. Hamilton*, 6 Mass. 273.

*Mississippi*. — *Foster v. Alston*, 6 How. (Miss.) 406.

*Missouri*. — *Dowling v. Todd*, 26 Mo. 267; *In re Doyle*, 16 Mo. App. 159.

*New Jersey*. — *State v. Cheeseman*, 5 N. J. L. 511; *State v. Stigall*, 22 N. J. L. 286; *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399; *Bennet v. Bennet*, 13 N. J. Eq. 114.

*New York*. — *Matter of Wollstonecraft*, 4 Johns. Ch. (N. Y.) 80; *Matter of M'Dowle*, 8 Johns. (N. Y.) 328; *Matter of Waldron*, 13 Johns. (N. Y.) 418; *People v. Mercein*, 8 Paige (N. Y.) 47; *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; *People v. Pillow*, 1 Sandf. (N. Y.) 672; *People v. Wilcox*, 22 Barb. (N. Y.) 187; *Matter of Hansen*, 1 Edm. Sel. Cas. (N. Y.) 9.

*Pennsylvania*. — *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374.

*South Carolina*. — *Ex p. Schumpert*, 6 Rich. L. (S. Car.) 344.

*Virginia*. — *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*Wisconsin*. — *Matter of Goodenough*, 19 Wis. 274.

See also Forsyth on Custody of Infants 54; McPherson on Infants 152.

**Jurisdiction to Award Custody of Infants.** — The power of the court on habeas corpus to determine the right of custody, and, in proper cases, to award it accordingly, is well established by adjudged cases in both the English and American courts. *State v. Richardson*, 40 N. H. 272. See also *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399; *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; *Com. v. Barney*, 4 Brews. (Pa.) 408. But the exercise of this power is discretionary. *People v. Manley*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 61; *Matter of Waldron*, 13 Johns. (N. Y.) 418; *People v. Kling*, 6 Barb. (N. Y.) 366; *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; *Com. v. Ad-*

wishes of the infant seems to be merely a rule of procedure which the court will follow or not at its discretion, and is not founded on any legal right.<sup>1</sup>

No Exact Rule Can Be Laid Down as to the Age at which an infant's wishes in regard to its custodian will be consulted. In *England* the general practice is to consider the child as not of sufficient discretion to choose for itself until it attains the age of nurture, viz., fourteen years.<sup>2</sup> In the *United States* the rule is somewhat different. Whether the court will regard the child's preferences or not depends on the reasonableness of its wishes and the intelligence which it manifests, mental capacity and not age being the criterion for determining whether an infant has sufficient judgment and discretion to choose for itself.<sup>3</sup>

Custody of the Child Is Withheld from the person entitled to it, and habeas corpus will issue, wherever a third person harbors it and prevents the parent or guardian from using proper authority to compel its return, though the child is at liberty to return and stays from preference.<sup>4</sup> If a child is of very tender years the detention of it from the person entitled to its custody amounts to an illegal restraint,<sup>5</sup> and in such a case, as the child is not competent to make a judicious selection for itself, the court, representing the sovereign or the state, as *parens patriæ*, and acting on the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes on

dicks, 5 Binn. (Pa.) 520; Com. v. Williams, 9 Kulp (Pa.) 289.

1. No Absolute Right in Infant to Choose Custodian. — A writ of habeas corpus proceeds on the ground of an illegal restraint, and if such restraint is found to exist it is the duty of the court to free the person; but it is not bound to deliver the custody of an infant to any particular person, though this will be done in any case where it ought to be done under the circumstances. *State v. Banks*, 25 Ind. 495. See also *Rex v. Delaval*, 3 Burr. 1436; *Rex v. Isley*, 5 Ad. & El. 441, 31 E. C. L. 376; *U. S. v. Sauvage*, 91 Fed. Rep. 490.

In *Ex p. Williams*, 11 Rich. L. (S. Car.) 452, it was held that even where the infant was of the age of choice, the court might order that he be delivered to his father, who had brought habeas corpus to obtain possession.

2. Age of Discretion in England. — *Reg. v. Clarke*, 7 El. & Bl. 186, 90 E. C. L. 186, 40 Eng. L. & Eq. 109. See also *In re Lloyd*, 3 M. & G. 547, 42 E. C. L. 288; *Rex v. Johnson*, 1 Stra. 579; *In re Preston*, 5 Dowl. L. 247; *Rex v. Greenhill*, 4 Ad. & El. 624, 31 E. C. L. 153; *In re Moore*, 11 It. C. L. 1; *In re Connor*, 16 Ir. C. L. 112.

3. Age of Discretion in United States — *Dela-ware*. — *State v. Bratton*, (Del. 1876) 15 Am. L. Reg. N. S. 359.

*District of Columbia*. — *In re Poole*, 2 MacArthur (D. C.) 583, 29 Am. Rep. 628.

*Georgia*. — *Ex p. Ralston*, R. M. Charl. (Ga.) 119.

*Indiana*. — *State v. Banks*, 25 Ind. 495.

*Iowa*. — *Shaw v. Nachtwey*, 43 Iowa 653.

*Kentucky*. — *Ellis v. Jesup*, 11 Bush (Ky.) 403.

*Maine*. — *State v. Smith*, 6 Me. 462, 20 Am. Dec. 336.

*Massachusetts*. — *Com. v. Hamilton*, 6 Mass. 273; *Com. v. Hammond*, 10 Pick. (Mass.) 274.

*Mississippi*. — *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375.

*New Hampshire*. — *State v. Richardson*, 40 N. H. 272; *State v. Scott*, 30 N. H. 274.

*New Jersey*. — *State v. Stigall*, 22 N. J. L.

286; *State v. Baird*, 18 N. J. Eq. 194; *Bennet v. Bennet*, 13 N. J. Eq. 114.

*New Mexico*. — *Bustamento v. Analla*, 1 N. Mex. 255.

*New York*. — *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Matter of Wollstonecraft*, 4 Johns. Ch. (N. Y.) 80; *People v. Mercein*, 8 Paige (N. Y.) 47; *Matter of Hansen*, 1 Edm. Sel. Cas. (N. Y.) 9; *People v. Porter*, 1 Duer (N. Y.) 709; *People v. Weissenbach*, 60 N. Y. 385.

*Ohio*. — *Gishwiler v. Dodez*, 4 Ohio St. 615.

*South Carolina*. — *Ex p. Schumpert*, 6 Rich.

L. (S. Car.) 344.

*Virginia*. — *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*Wisconsin*. — *Matter of Goodenough*, 19 Wis. 274.

In *People v. Chegaray*, 18 Wend. (N. Y.) 637, three children, fifteen, thirteen, and nine years old respectively, were allowed to choose with whom they would go. See also *People v. Pillow*, 1 Sandf. (N. Y.) 672. To the same effect was *Matter of M'Dowle*, 8 Johns. (N. Y.) 328.

In *State v. Richardson*, 40 N. H. 276, the court refused to be controlled by the wishes of a girl ten years old. Where the infant is old enough to choose, the court will often advise and instruct him as to the choice he should make; but if he is under that age, or is, from mental incapacity, incapable of choosing, it will substitute its discretion for his choice. *Ex p. Schumpert*, 6 Rich. L. (S. Car.) 344.

If the Court Does Not Deem the Child Competent to Make a Judicious Selection, in any case, the court will not regard its wishes. *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288.

4. What Constitutes Withholding Custody — Harboring Absconding Child. — *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375.

5. Detention of Young Child from Person Entitled to Custody Held Illegal Restraint. — *Rex v. Johnson*, 2 Ld. Raym. 1333; *Rex v. Delaval*, 3 Burr. 1436; *Verser v. Ford*, 37 Ark. 27; *State v. Banks*, 25 Ind. 495; *People v. Kling*, 6 Barb. (N. Y.) 366; *Church on Habeas Corpus*, § 439.

itself the power and the right to dispose of the custody of the child as it shall judge best for the child's welfare.<sup>1</sup>

The Welfare of the Infant Is the Primary Consideration which governs the court in taking the custody of an infant from one person and giving it to another, and the decision will always be made in view thereof, though it operates as a denial of the right of custody to the person who is entitled to it by law;<sup>2</sup> but due regard will always be given to this right, especially in the case of a parent,<sup>3</sup> and if other things are equal, the legal right will prevail and the court will make an order accordingly.<sup>4</sup>

**1. Custody of Young Children Awarded on Habeas Corpus — Georgia.** — *Ex p. Ralston*, R. M. Charl. (Ga.) 119; *Matter of Mitchell*, R. M. Charl. (Ga.) 489.

*Indiana*. — *State v. Banks*, 25 Ind. 495.

*New Jersey*. — *State v. Baird*, 18 N. J. Eq. 104.

*New York*. — *People v. Kling*, 6 Barb. (N. Y.) 366; *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; *Matter of Wollstonecraft*, 4 Johns. Ch. (N. Y.) 80.

*Pennsylvania*. — *Com. v. Barney*, 4 Brews. (Pa.) 408.

*Virginia*. — *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*West Virginia*. — *Rust v. Vanvacter*, 9 W. Va. 600.

**Court Acts as Parens Patriæ in Adjudicating Right to Custody of Infants.** — *Wellesley v. Wellesley*, 2 Bligh N. S. 124, 31 Rev. Rep. 15, 2 Russ. 1; *De Manneville v. De Manneville*, 10 Ves. Jr. 52; *Butler v. Freeman*, Amb. 302; *Blisset's Case*, Loft 748; *In re Barry*, 42 Fed. Rep. 113; *People v. Chagaray*, 18 Wend. (N. Y.) 642.

**2. Welfare of Infant Is Primary Consideration — England.** — *Rex v. De Manneville*, 5 East 223; *Ex p. Skinner*, 9 Moo. 278, 17 E. C. L. 122; *Lyons v. Blenkin*, Jac. 245; *Rex v. Smith*, 2 Stra. 982; *Rex v. Delaval*, 3 Burr. 114.

*Alabama*. — *Brinster v. Compton*, 68 Ala. 299.

*Connecticut*. — *Nickols v. Giles*, 2 Root (Conn.) 461; *Macready v. Wilcox*, 33 Conn. 328.

*Florida*. — *Miller v. Miller*, 38 Fla. 227, 56 Am. St. Rep. 166.

*Georgia*. — *State v. King*, Ga. Dec. (pt. i.) 93; *Haire v. McCardle*, (Ga. 1899) 33 S. E. Rep. 683.

*Indiana*. — *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309; *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545; *Joab v. Sheets*, 99 Ind. 328.

*Iowa*. — *Fouts v. Pierce*, 64 Iowa 71; *Shaw v. Nachtwey*, 43 Iowa 653; *Drumb v. Keen*, 47 Iowa 435; *Bonnett v. Bonnett*, 61 Iowa 199, 47 Am. Rep. 810; *Jenkins v. Clark*, 71 Iowa 552.

*Kansas*. — *In re Bullen*, 28 Kan. 781.

*Maine*. — *State v. Smith*, 6 Me. 462, 20 Am. Dec. 324.

*Massachusetts*. — *Com. v. Briggs*, 16 Pick. (Mass.) 203; *Wares, Petitioner*, 161 Mass. 70.

*Michigan*. — *Matter of Heather*, 50 Mich. 261. See also *Corrie v. Corrie*, 42 Mich. 509.

*Mississippi*. — *Maples v. Maples*, 49 Miss. 393; *Foster v. Alston*, 6 How. (Miss.) 406; *McShan v. McShan*, 56 Miss. 413.

*Missouri*. — *In re Doyle*, 16 Mo. App. 159; *Matter of Delano*, 37 Mo. App. 185; *Matter of Nofsinger*, 25 Mo. App. 116.

*New Jersey*. — *State v. Stigall*, 22 N. J. L. 286.

*New Mexico*. — *Bustamento v. Analla*, 1 N. Mex. 255.

*New York*. — *People v. Weissenbach*, 60 N. Y. 385; *People v. Kling*, 6 Barb. (N. Y.) 366; *People v. Mercein*, 8 Paige (N. Y.) 47; *Matter of Waldron*, 13 Johns. (N. Y.) 418; *Matter of Hansen*, 1 Edm. Sel. Cas. (N. Y.) 9; *Mercein v. People*, 25 Wend. (N. Y.) 73, 35 Am. Dec. 653; *People v. Landt*, 2 Johns. (N. Y.) 375.

*North Carolina*. — *Matter of Lewis*, 88 N. Car. 31.

*Ohio*. — *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197.

*Pennsylvania*. — *Com. v. Sage*, 160 Pa. St. 399, 34 W. N. C. (Pa.) 225; *Com. v. Smith*, 1 Brews. (Pa.) 547; *Com. v. Barney*, 4 Brews. (Pa.) 408; *Com. v. Addicks*, 5 Binn. (Pa.) 520; *Com. v. Williams*, 9 Kulp (Pa.) 289; *Fitzpatrick's Case*, 9 Kulp (Pa.) 309; *Com. v. Wise*, 3 Pa. Dist. 289; *Com. v. Dougherty*, 1 Leg. Gaz. (Pa.) 63; *Com. v. Moore*, 1 Pitts. (Pa.) 312; *Wharton's Case*, 9 Kulp (Pa.) 435.

*Tennessee*. — *State v. Paine*, 4 Humph. (Tenn.) 523.

*Virginia*. — *Merritt v. Swimley*, 82 Va. 433, 3 Am. St. Rep. 115.

*West Virginia*. — *State v. Reuff*, 29 W. Va. 751, 6 Am. St. Rep. 676; *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843.

The character of the respective parents, the age, health, sex, and number of the children, and the pecuniary resources liable to contribution for their maintenance and education are all considerations to exert more or less influence on the judicial result. *State v. Baird*, 21 N. J. Eq. 384.

**Only the Temporal Welfare of the Child Will Be Considered**, all questions of religion, as affecting its spiritual interests, being disregarded; but if the temporal interests of the child may be as well conserved by giving it in charge of a person of the same religious belief as its parents, it will be so disposed of. *In re Doyle*, 16 Mo. App. 159.

**3. Rights of Parents Considered.** — *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309; *Shaw v. Nachtwey*, 43 Iowa 653; *Foster v. Alston*, 6 How. (Miss.) 406; *Merritt v. Swimley*, 82 Va. 433, 3 Am. St. Rep. 115. See also *Brinster v. Compton*, 68 Ala. 299.

This is true, however poor and humble the father may be, if he is able to support the child in his own style of living, and is of good moral character. *Verser v. Ford*, 37 Ark. 27. But if a parent is unable to support his child, the court will not interfere in his behalf. *Com. v. Miller*, 8 Pa. Co. Ct. 525.

**4. Award of Custody to Person Having Legal Right.** — *Matter of Mitchell*, R. M. Charl.



**6. Custody in Extradition Proceedings.** — A person who is in custody under process in extradition proceedings, whether international or interstate, may always test the validity of his detention by a writ of habeas corpus,<sup>1</sup> and he will be discharged if there was not a sufficient charge of crime against him made by the papers, because this is a question of law and is always open on the face of the papers to judicial inquiry on an application for a writ of habeas corpus.<sup>2</sup> In regard to any question of fact which must be determined in an extradition case, it is obvious that if there is no competent evidence of the fact, a finding that such fact existed can furnish no just ground for holding the accused; but if any competent evidence has been adduced, the rule established by the cases seems to be that a discharge cannot be granted on the ground that it was insufficient,<sup>3</sup> though there have been decisions in which the opposite view was taken.<sup>4</sup>

(Ga.) 489; *Ex p. Ralston*, R. M. Charl. (Ga.) 119. See also *Bounell v. Berryhill*, 2 Ind. 613.

**1. Custody in Extradition Proceedings — Remedy by Habeas Corpus — United States.** — *Roberts v. Reilly*, 116 U. S. 80; *Benson v. McMahon*, 127 U. S. 457; *In re Luis Oteiza y Cortes*, 136 U. S. 330; *Ornelas v. Ruiz*, 161 U. S. 502; *Robb v. Connolly*, 111 U. S. 624; *In re Stupp*, 12 Blatchf. (U. S.) 501; *Matter of Vandervelpen*, 14 Blatchf. (U. S.) 137; *Matter of Wiegand*, 14 Blatchf. (U. S.) 370; *Matter of Wahl*, 15 Blatchf. (U. S.) 334; *Matter of Fowler*, 18 Blatchf. (U. S.) 430; *Ex p. McKean*, 3 Hughes (U. S.) 23; *Ex p. Smith*, 3 McLean (U. S.) 130; *In re Wadge*, 16 Fed. Rep. 332; *In re Doo Woon*, 18 Fed. Rep. 898; *Ex p. Morgan*, 20 Fed. Rep. 298; *In re Behrendt*, 22 Fed. Rep. 699; *In re Roberts*, 24 Fed. Rep. 133; *Ex p. Brown*, 28 Fed. Rep. 654; *In re Cook*, 49 Fed. Rep. 833.

*Alabama.* — *Ex p. State*, 73 Ala. 503, 49 Am. Rep. 63.

*California.* — *Matter of Manchester*, 5 Cal. 237; *In re Robb*, 64 Cal. 434.

*Iowa.* — *Jones v. Leonard*, 50 Iowa 106, 32 Am. Rep. 116.

*Michigan.* — *People v. Fairman*, 59 Mich. 570.

*New York.* — *People v. Brady*, 56 N. Y. 183; *People v. Pinkerton*, 77 N. Y. 245; *People v. Donohue*, 84 N. Y. 441.

*Ohio.* — *Work v. Corrington*, 34 Ohio St. 73, 32 Am. Rep. 345; *Wilcox v. Nolze*, 34 Ohio St. 520.

*Texas.* — *Hibler v. State*, 43 Tex. 197.

**Custody Pending Requisition.** — A federal court will not issue a writ of habeas corpus for the discharge of a prisoner who is held pending a requisition from another state in which he is charged with a criminal offense. *In re Hoyle*, 9 Am. L. Rec. 65, 1 Crim. L. Mag. 472, 12 Chicago Leg. N. 279.

**2. Sufficiency of Charge of Crime in International Extradition.** — *In re Macdonnell*, 11 Blatchf. (U. S.) 79; *In re Farez*, 7 Blatchf. (U. S.) 345; *In re Henrich*, 5 Blatchf. (U. S.) 414; *In re Adutt*, 55 Fed. Rep. 376; *In re Charleston*, 34 Fed. Rep. 531; *In re Roth*, 15 Fed. Rep. 506; *Ex p. Van Hoven*, 4 Dill. (U. S.) 411, 3 Cent. L. J. 366. See also the title EXTRADITION, 8 ENCYC. OF PL. AND PR. 805.

**Sufficiency of Charge of Crime in Interstate Extradition.** — A requisition for interstate extradition must show that a crime against the laws of the demanding state has been charged

either by an indictment or by an affidavit made before a magistrate, so that the court may determine the fact on the face of the papers, though the technical sufficiency of an indictment will not be considered on habeas corpus.

*United States.* — *Robert v. Reilly*, 116 U. S. 80; *Ex p. Reggel*, 114 U. S. 642; *Pearce v. Texas*, 155 U. S. 311; *In re Roberts*, 24 Fed. Rep. 133.

*California.* — *Ex p. Spears*, 88 Cal. 640; *In re Robb*, 64 Cal. 433.

*Massachusetts.* — *Davis's Case*, 122 Mass. 324. *Michigan.* — *People v. Fairman*, 59 Mich. 570.

*Minnesota.* — *State v. O'Connor*, 38 Minn. 243.

*New Jersey.* — *Matter of Voorhees*, 32 N. J. L. 141.

*New York.* — *People v. Conlin*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 303; *People v. Brady*, 56 N. Y. 182; *People v. Pinkerton*, 77 N. Y. 247; *People v. Donohue*, 84 N. Y. 441; *Matter of Briscoe*, (Supm. Ct.) 51 How. Pr. (N. Y.) 422.

*Ohio.* — *Ex p. Sheldon*, 34 Ohio St. 319; *Wilcox v. Nolze*, 34 Ohio St. 524; *Work v. Corrington*, 34 Ohio St. 73, 32 Am. Rep. 345.

**Insufficient Affidavit.** — An alleged fugitive from justice may be discharged on habeas corpus if the affidavit on which the requisition is founded is defective and insufficient. *People v. Brady*, 56 N. Y. 182.

**The Fact that an Indictment Has Been Found in the demanding state is taken as *prima facie* evidence, at least, that the accused is charged with a crime under the laws of that state.** *State v. Schlemm*, 4 Harr. (Del.) 577; *In re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730; *Matter of Fetter*, 23 N. J. L. 320; *Ex p. Swearingen*, 13 S. Car. 74; *In re Greenough*, 31 Vt. 279; *In re Hooper*, 52 Wis. 699.

**3. Insufficiency of Evidence Not Ground for Discharge.** — *Ornelas v. Ruiz*, 161 U. S. 502; *Bryant v. U. S.*, 167 U. S. 104; *In re Luis Oteiza y Cortes*, 136 U. S. 330; *Sternaman v. Peck*, 80 Fed. Rep. 883; *Ex p. Van Aernam*, 3 Blatchf. (U. S.) 160; *State v. Schlemm*, 4 Harr. (Del.) 577; *Matter of Veremaitre*, 9 N. Y. Leg. Obs. 137; *In re Kaine*, 10 N. Y. Leg. Obs. 257; *In re Heilbronn*, 12 N. Y. Leg. Obs. 65.

**For a Full Discussion as to what matters may be considered on the hearing, see *infra*, this title, *Hearing and Determination*.**

**4. Insufficiency of Evidence Considered Ground for Discharge.** — *In Ex p. Kaine*, 3 Blatchf. (U.

Trial for an Offense Other than That for Which the Fugitive Was Surrendered, and the effect of such a proceeding both in cases of international and interstate extradition, have been considered elsewhere.<sup>1</sup>

**7. Custody by Military Officers.** — A person who is held in custody by military or naval officers as an enlisted soldier or sailor may have a writ of habeas corpus to inquire into the validity of his detention, and if it appears that he is held without warrant of law, because the enlistment was void, or for any other reason, he will be discharged.<sup>2</sup> But imprisonment by the commanding officer of a person regularly in the service is a matter for the determination of the military authorities, and the civil authorities cannot interfere by habeas corpus.<sup>3</sup>

**8. Habeas Corpus to Admit to Bail.** — At common law the writ of habeas corpus was the proper remedy for the purpose of bringing up the body of a prisoner in order that he might be admitted to bail in any bailable case,<sup>4</sup> and such is still the practice, in both criminal and civil cases,<sup>5</sup> even in those juris-

S.) 1, the opinion of Mr. Justice Nelson was to the effect that the court had the power to discharge on the ground of the insufficiency of the evidence, though that point was not decided. See also *In re Henrich*, 5 Blatchf. (U. S.) 414.

1. See the title EXTRADITION, vol. 12, pp. 596, 636.

**2. Illegal Detention by Military or Naval Officers.** — *United States*. — *Schmeider v. Barney*, 13 Blatchf. (U. S.) 37; *Ex p. Schmeid*, 1 Dill. (U. S.) 587; *In re McDonald*, 1 Lowell (U. S.) 100; *U. S. v. Hanchett*, 18 Fed. Rep. 26; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439; *Stingle's Case*, 23 Fed. Cas. No. 13,458; *In re Reynolds*, 20 Fed. Cas. No. 11,721.

*Alabama*. — *Ex p. Hill*, 38 Ala. 458.

*Connecticut*. — *Lanahan v. Birge*, 30 Conn. 438.

*District of Columbia*. — *In re Von Dieselskie*, 5 Mackey (D. C.) 485.

*Georgia*. — *Nims v. Wimberly*, 33 Ga. 587.

*Indiana*. — *Skeen v. Monkeimer*, 21 Ind. 1; *Griffin v. Wilcox*, 21 Ind. 370.

*Iowa*. — *Ex p. Anderson*, 16 Iowa 595; *Ex p. Holman*, 28 Iowa 89, 4 Am. Rep. 159.

*Massachusetts*. — *Com. v. Harrison*, 11 Mass. 63; *Com. v. Cushing*, 11 Mass. 67, 6 Am. Dec. 156; *Com. v. Downes*, 24 Pick. (Mass.) 227.

*New Hampshire*. — *State v. Dimick*, 12 N. H. 194, 37 Am. Dec. 197.

*New Jersey*. — *State v. Brearly*, 5 N. J. L. 639.

*New York*. — *Matter of Barrett*, 42 Barb. (N. Y.) 479; *People v. Gaul*, 44 Barb. (N. Y.) 98; *Matter of Martin*, 45 Barb. (N. Y.) 142; *Matter of Dobbs*, (N. Y. Super. Ct.) 21 How. Pr. (N. Y.) 68; *Matter of Webb*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 247; *Phelan's Case*, (C. Pl.) 9 Abb. Pr. (N. Y.) 286; *U. S. v. Wyngall*, 5 Hill (N. Y.) 16; *Matter of Stacy*, 10 Johns. (N. Y.) 328; *Matter of Carlton*, 7 Cow. (N. Y.) 471; *Matter of Jordan*, (N. Y. 1863) 2 Am. L. Reg. N. S. 749.

*Ohio*. — *Matter of Disinger*, 12 Ohio St. 256.

*Pennsylvania*. — *Com. v. Fox*, 7 Pa. St. 336; *Com. v. Gamble*, 11 S. & R. (Pa.) 93; *Com. v. Murray*, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; *Com. v. Callan*, 6 Binn. (Pa.) 255; *Com. v. Camac*, 1 S. & R. (Pa.) 87; *Com. v. Wright*, 3 Grant Cas. (Pa.) 437; *Com. v. Gane*, 3 Grant Cas. (Pa.) 447; *Com. v. Selfridge*, 7 Phila. (Pa.) 76; *Com. v. Blake*, 8 Phila. (Pa.) 523.

*Tennessee*. — *U. S. v. Anderson*, Cooke (Tenn.) 143.

*Virginia*. — *Mann v. Parke*, 16 Gratt. (Va.) 443.

*Wisconsin*. — *Matter of Gregg*, 15 Wis. 479; *In re Higgins*, 16 Wis. 351; *In re Tarble*, 25 Wis. 390, 3 Am. Rep. 85.

The enlistment acts of 1862 and 1864, authorizing the secretary of war to discharge enlisted minors on certain terms and conditions, did not affect the jurisdiction of the federal courts in such cases to grant a discharge on habeas corpus. *In re McDonald*, 1 Lowell (U. S.) 100; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439.

As to cases of detention under the judgment of a court martial, see *supra*, this section, *Custody under Judgments or Orders of Court—Judgments of Courts Martial*.

**3. Imprisonment by Commanding Officer Not Relievable by Habeas Corpus.** — *Closson v. U. S.*, 7 App. Cas. (D. C.) 460; *Ex p. Anderson*, 16 Iowa 595; *Cox v. Gee*, 2 Winst. L. (60 N. Car.) 131; *Matter of Graham*, 8 Jones L. (53 N. Car.) 416.

**4. Habeas Corpus to Admit to Bail at Common Law.** — 4 Co. Inst. 290; 4 Black. Com. 297.

The Right to Give Bail is fully treated under the titles BAIL (IN CIVIL CASES), vol. 3, p. 587, and BAIL AND RECOGNIZANCE (IN CRIMINAL CASES), vol. 3, p. 651.

**5. Habeas Corpus to Admit to Bail in Modern Practice.** — *Alabama*. — *Ex p. Ray*, 45 Ala. 15.

*Arkansas*. — *Ex p. White*, 9 Ark. 223.

*California*. — *Ex p. Curtis*, 92 Cal. 188; *Ex p. Smith*, 89 Cal. 79; *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77; *People v. Smith*, 1 Cal. 9.

*Indiana*. — *Ex p. Heffren*, 27 Ind. 87; *State v. Best*, 7 Blackf. (Ind.) 611; *Ex p. Sutherland*, 56 Ind. 595; *Ex p. Hock*, 68 Ind. 206; *Lumm v. State*, 3 Ind. 293.

*Massachusetts*. — *Belgard v. Morse*, 2 Gray (Mass.) 406.

*New York*. — *Gorsline's Case*, (Supm. Ct.) 10 Abb. Pr. (N. Y.) 282, 21 How. Pr. (N. Y.) 85; *People v. Folmsbee*, 60 Barb. (N. Y.) 480.

*North Carolina*. — *State v. Edney*, 2 Winst. L. (60 N. Car.) 71.

*Oklahoma*. — *Matter of Raidler*, 4 Okla. 417.

*South Carolina*. — *State v. Everett*, Dudley L. (S. Car.) 295; *State v. Potter*, Dudley L.



dictions where the habeas corpus acts do not seem to contemplate the use of the writ for this purpose,<sup>1</sup> and the right to sue out a writ of habeas corpus in order to give bail is not affected by the fact that the matter may be raised by motion.<sup>2</sup>

### 9. Habeas Corpus to Procure Temporary Enlargement for Special Purposes —

*a. IN GENERAL.* — There are many cases in which the writ of habeas corpus is used, not for the purpose of procuring a prisoner's discharge on the ground that he is wrongfully in custody, nor to enable him to give bail, but in order that he may be brought up temporarily for some special purpose, either at his own instance or at the instance of a third person;<sup>3</sup> but in all such cases the writ is allowed only for the purpose of securing some legal right, or in order to assist in the administration of justice.<sup>4</sup>

If the Presence of a Prisoner in Court is Necessary in any proceeding against him or to which he is otherwise a party, he may be brought up on a writ of habeas corpus;<sup>5</sup> but the granting of the writ is in the discretion of the court or judge, and not a matter of course,<sup>6</sup> unless the prisoner has a legal right to appear personally,<sup>7</sup> or satisfies the court that substantial justice cannot be

(S. Car.) 296; *State v. Jones*, 32 S. Car. 583, 36 S. Car. 607.

*Texas.* — *Ex p. Walker*, 3 Tex. App. 668.

*Vermont.* — *In re Cazin*, 56 Vt. 297.

Where Bail Has Been Denied such denial may be reviewed on a writ of habeas corpus. *Ex p. Croom*, 19 Ala. 561.

Where Excessive Bail Has Been Required, habeas corpus will lie to admit the prisoner to bail in a proper amount.

*California.* — *People v. Schuster*, 40 Cal. 627; *Ex p. Duncan*, 54 Cal. 75.

*Illinois.* — *People v. Town*, 4 Ill. 19.

*Louisiana.* — *State v. Ancoin*, 47 La. Ann. 1677; *State ex rel. Chandler*, 45 La. Ann. 696.

*Massachusetts.* — *Jones v. Kelly*, 17 Mass. 116; *Whiting v. Putnam*, 17 Mass. 175.

*Mississippi.* — *Luckett v. State*, 51 Miss. 799.

*New Hampshire.* — *Evans v. Foster*, 1 N. H. 374.

*Texas.* — *Miller v. State*, 43 Tex. 579; *Ex p. Wilson*, 20 Tex. App. 498; *Ex p. Hutchings*, 11 Tex. App. 28.

1. Habeas Corpus Acts Not Authorizing Writ to Admit to Bail. — Under the habeas corpus acts of certain of the states, it is doubtful whether habeas corpus can be resorted to in all cases to admit to bail. See Hurd on Habeas Corpus (2d ed.) 435.

As to the Matters Which May Be Considered on the hearing of a writ of habeas corpus to admit to bail, see the title BAIL and RECOGNIZANCE (IN CRIMINAL CASES), vol. 3, p. 651.

2. Remedy by Motion. — *Ex p. Walker*, 3 Tex. App. 669. See also the title BAIL and RECOGNIZANCE (IN CRIMINAL CASES), vol. 3, p. 651.

3. Habeas Corpus for Special Purposes. — See *supra*, this title, *Several Kinds of Habeas Corpus Enumerated*.

4. Habeas Corpus to Change the Place of Confinement was refused when asked on the ground that, the prisoners being divided into different classes by statute, the prisoner was improperly classed. *Ex p. Rogers*, 7 Jur. 992; *Ex p. Cobbett*, 5 C. B. 418, 57 E. C. L. 418.

Habeas Corpus to Enable a Prisoner in a County Jail to Vote at an election of a member of Parliament will not lie. *Matter of Jones*, 4 N. &

M. 340, 2 Ad. & El. 436, 29 E. C. L. 136, 1 Hurl. & W. 7.

5. Right to Appear in Court Enforceable by Habeas Corpus. — *Atty.-Gen. v. Cleave*, 2 Dowl. P. C. 668; *Donnelly v. State*, 26 N. J. L. 463.

In *Walsh v. Wilson*, 2 Ir. Ch. 79, where a solicitor was in custody under an attachment, the court granted a writ of habeas corpus directed to the marshal to bring him before the taxing master, to enable him to attend the taxation of bills of costs.

6. Discretion of Court to Grant or Refuse Writ. — *Ford v. Graham*, 10 C. B. 369, 70 E. C. L. 69, 1 L. M. & P. 604; *Ex p. Cobbett*, 3 H. & N. 155, 27 L. J. Exch. 199, 4 Jur. N. S. 145, 6 W. R. 282.

In *Ford v. Nassau*, 9 M. & W. 793, 6 Jur. 374, 11 L. J. Exch. 287, a writ of habeas corpus to bring up the body of the plaintiff in order that he might be enabled to move in person to set aside two writs of attachment under which he was in custody was denied, the court saying that the writ must be for some specified purpose, either *ad testificandum* or *ad respondendum*, as the case might be, and that there was no general form for the writ.

The writ has been denied when sought to enable the prisoner to appear in person and conduct his defense in court. *Atty.-Gen. v. Hunt*, 9 Price 147; *Rex v. Parkyns*, 3 B. & Ald. 679, note. See also *Benns v. Mosley*, 2 C. B. N. S. 116, 89 E. C. L. 116, 3 Jur. N. S. 694, and compare *Atty.-Gen. v. Cleave*, 2 Dowl. P. C. 668.

So the writ was denied where it was asked to secure the prisoner's presence before the grand jury for identification, it appearing that the prisoner could be otherwise identified. *Matter of Cook*, 7 Q. B. 653, 53 E. C. L. 653, 9 Jur. 869. But compare *Atty.-Gen. v. Fadden*, 1 Price 403, where the prisoner, the defendant to an information, was brought up on habeas corpus *ad testificandum*, his identity being in question, to be present at the trial, he paying the costs.

7. Legal Right to Appear Personally in Court. — *Donnelly v. State*, 26 N. J. L. 463. See also *Weldon v. Neal*, 54 L. J. Q. B. 399, 15 Q. B. D. 471, 33 W. R. 581.



done without his presence;<sup>1</sup> and if the prisoner is in custody under judicial process, the application must be made to the court by whose authority he is confined, and not to the court in which his presence is desired.<sup>2</sup>

**Habeas Corpus to Charge Prisoner in Civil Proceeding.** — Among the grounds at common law for the writ of habeas corpus was the bringing up of a prisoner in order to charge him in a new action or with process of execution in a superior court.<sup>3</sup>

**Habeas Corpus to Surrender Prisoner in Discharge of Bail.** — Where a prisoner who has given bail in one proceeding against him is afterwards arrested and imprisoned in another proceeding, his bail may have a writ of habeas corpus to bring him up in order that they may surrender him in discharge of their obligation.<sup>4</sup>

**Habeas Corpus to Bring Up Accused in Pending Criminal Proceedings.** — A prisoner in custody may be removed by habeas corpus to try him in a criminal case,<sup>5</sup> or to examine him from day to day respecting any criminal charge,<sup>6</sup> or to impose a proper sentence in case the sentence under which he is confined is defective,<sup>7</sup> but not in order to take him before a magistrate in another county to prefer another charge against him.<sup>8</sup>

**b. HABEAS CORPUS AD TESTIFICANDUM.** — One of the well-known forms of the writ of habeas corpus is the writ *ad testificandum*,<sup>9</sup> the purpose of which is to bring into court as a witness any person who is a prisoner, or is in the military or naval service.<sup>10</sup> It is available where the person under detention wishes to testify for himself, as well as where his testimony is desired by

1. Necessity of Personal Appearance to Secure Substantial Justice. — *Clark v. Smith*, 3 C. B. 982, 54 E. C. L. 982.

2. Detention under Judicial Process — What Court May Grant Writ. — *Atty.-Gen. v. Hunt*, 9 Price, 147; *Rogers v. Kirkpatrick*, 3 Ves. Jr. 573.

3. Habeas Corpus to Charge Prisoner in Civil Proceeding. — See *supra*, this section, *Several Kinds of Habeas Corpus Enumerated*.

A Debtor under Military Arrest cannot be brought up on habeas corpus for the purpose of charging him in execution. *Jones v. Danvers*, 5 M. & W. 234, 7 Dowl. P. C. 394, 2 H. & H. 84.

4. Habeas Corpus to Surrender Prisoner in Discharge of Bail. — *Bigelow v. Johnson*, 16 Mass. 218; Anonymous, 2 N. J. L. 368.

In *Folkein v. Critero*, 13 East 457, where a person was in the custody of a messenger under an order of the secretary of state, for the purpose of being sent out of the kingdom by virtue of the Alien Act (43 Geo. III., c. 155), the court refused to issue a habeas corpus on the application of his bail to bring him up to be rendered, on account of the public inconvenience, and of the probable risk of losing his passage, which had been taken in a ship immediately about to sail.

5. Habeas Corpus to Bring Up Prisoner for Trial. — *Re Wetton*, 1 Tyrw. 385, 1 Crompt. & L. 459; *Reg. v. Day*, 3 F. & F. 526; *In re Hardwick*, W. W. & D. 167; *State v. Wilson*, 38 Conn. 126; *People v. Mason*, 9 Wend. (N. Y.) 505.

When a person was committed for trial by the magistrates at the assizes, but after committal was removed by them to the county lunatic asylum, the judge of assize had power to issue a habeas corpus to bring him up for trial. *Reg. v. Peacock*, 12 Cox C. C. 21.

If the Defendant in an Attachment Be in Arrest in Execution the court will award a habeas cor-

pus to bring up the body. Anonymous, 22 Wend. (N. Y.) 635.

6. Examination of Accused Held under Civil Process. — *Ex p. Griffiths*, 5 B. & Ald. 730, 7 E. C. L. 243.

7. Habeas Corpus to Resentence Prisoner. — *Cornwall v. Reg.*, 33 U. C. Q. B. 106.

8. Prisoner Not Removable on Habeas Corpus to Have Criminal Charge Preferred Against Him. — *Reg. v. Day*, 3 F. & F. 526; *In re Hardwick*, W. W. & D. 167.

9. See *supra*, this title, *Several Kinds of Habeas Corpus Enumerated*.

10. Habeas Corpus ad Testificandum — *England*. — *Rex v. Burbage*, 3 Burr. 1440; *Rex v. Roddam*, 2 Cowp. 672; *Browne v. Gisborne*, 2 Dowl. N. S. 963; *Rex v. Pilgrim*, 4 Dowl. P. C. 89; *Graham v. Glover*, 5 El. & Bl. 591, 85 E. C. L. 591; *Geery v. Hopkins*, 2 Ld. Raym. 851; *Marsden v. Overbury*, 18 C. B. 34, 86 E. C. L. 34.

*United States*. — *Ex p. Barnes*, 1 Sprague (U. S.) 133.

*Arkansas*. — *Giboney v. Rogers*, 32 Ark. 462.

*California*. — *Willard v. Superior Ct.*, 82 Cal. 456; *People v. Willard*, 92 Cal. 482.

*Maryland*. — *State v. Mace*, 5 Md. 337.

*Missouri*. — *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250.

*New York*. — *Shanks's Case*, (Supm. Ct.) 15 Abb. Pr. N. S. (N. Y.) 38.

*North Carolina*. — *State v. Adair*, 68 N. Car. 68; *Ex p. Harris*, 73 N. Car. 65.

See also *Bac. Abr.*, tit. Habeas Corpus, A; 3 Black. Com. 130.

**Testimony Before Legislative Committee.** — The writ of habeas corpus *ad testificandum* may be granted to bring up a prisoner to give evidence before a committee of a legislative body. *Matter of Price*, 4 East 587, 1 Smith 284; *Matter of Pilgrim*, 3 Ad. & El. 485, 30 E. C. L. 133, 1 Hurl. & W. 319.

**Prisoner in Custody for High Treason.** — In

another,<sup>1</sup> and unless otherwise provided by statute, where the prisoner is undergoing sentence, as well as where he is in custody awaiting trial.<sup>2</sup> All courts have power to issue it, because such a power is indispensable to the trial of causes,<sup>3</sup> but its exercise rests in the discretion of the court, and the writ is not a writ of right, like the habeas corpus *ad subjiciendum*.<sup>4</sup>

**VII. THE APPLICATION — 1. Requisites and Sufficiency.** — The requisites and sufficiency of applications for habeas corpus have been fully considered in another place.<sup>5</sup>

**2. Who May Apply for Writ — a. PERSON UNDER RESTRAINT.** — Since the writ of habeas corpus is a remedy designed for the removal of any unlawful restraint of liberty, it is obvious that an application therefor may be made by the person under restraint, unless the restraint is of such a character as to deprive him of all opportunity to move in the matter.<sup>6</sup>

**b. APPLICATION BY THIRD PERSON ON BEHALF OF PERSON DETAINED.** — The detention or imprisonment may sometimes be of such character that it is inconvenient or impossible for the person detained to make the application, and in that event it may be made by any person on his behalf.<sup>7</sup> But it has been held that a third person may apply only at the request or with the

Langston *v.* Cotton, Peake Add. Cas. 21, it was held that a habeas corpus *ad testificandum* should not be granted to bring up a prisoner in custody for high treason.

**Prisoner under Sentence of Death.** — In *State v. Adair*, 68 N. Car. 68, it was held that the state was entitled to a writ of habeas corpus *ad testificandum* to bring up a felon under sentence of death to testify on behalf of the state, though it was said that parties litigant would not be entitled to the writ in such a case. See also *Ex p. Harris*, 73 N. Car. 65.

**A Prisoner Confined on Civil Process** may be brought up on a writ of habeas corpus *ad testificandum*. *Chapman v. Welles, Kirby* (Conn.) 137.

**Where Minor Witnesses Are Lawfully at School in Another State**, and have not been sent away to avoid service of a subpoena, their attendance cannot be enforced by writ of habeas corpus *ad testificandum*, directed to their father. *Koecker v. Koecker*, 7 Phila. (Pa.) 364, 371.

**In California** the court in a criminal case may make an order in the nature of a habeas corpus *ad testificandum*, requiring a prisoner in a state prison to attend and testify in behalf of either the defendant or the state. *Willard v. Superior Ct.*, 82 Cal. 456; *People v. Willard*, 92 Cal. 482.

The statute 43 Geo. III., c. 140, § 1, applies only to judicial inquiries, and does not authorize the court to grant a habeas corpus for the purpose of bringing a military officer, in prison for debt, before a medical board which is to report on his health. *In re Galway*, 19 L. T. N. S. 262.

**1. Prisoner Desiring to Testify in His Own Behalf.** — *Ex p. Cobbett*, 27 L. J. Exch. 199, 4 Jur. N. S. 145, 3 H. & N. 155; *Wattles v. Marsh*, 5 Cow. (N. Y.) 176.

**2. Habeas Corpus ad Testificandum to Bring Up Prisoner Undergoing Sentence.** — *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250.

**Under the Missouri Statute** a convict in the penitentiary undergoing a sentence for felony cannot be brought up on a writ of habeas corpus *ad testificandum*, except where a fellow convict is charged with a crime, though the common-law disqualification has been removed

in that state. *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250.

**3. All Courts Have Power to Issue Habeas Corpus ad Testificandum.** — *State v. Mace*, 5 Md. 337; *Matter of Mason*, 8 Mich. 70.

**4. Discretion of Court.** — *Giboney v. Rogers*, 32 Ark. 462; *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250.

**5. Requisites and Sufficiency of Application.** — See the title HABEAS CORPUS, 9 ENCYC. OF PL. AND PR. 1018.

**6. Application by Person Restrained.** — The right of a person under restraint to apply, in his own name, for a writ of habeas corpus has probably never been questioned, and it is sufficient for the support of the proposition advanced in the text to refer to the numerous cases cited throughout this article in which such applications have been entertained.

**Not Only the Subject or Citizen**, but any person who may be unlawfully deprived of his liberty, may apply for the writ of habeas corpus. Thus an American Indian is held to be "a person" within the meaning of the habeas corpus act, and therefore entitled to make the application. *U. S. v. Crook*, 5 Dill. (U. S.) 453.

**Application by Alien.** — *Ex p. Besset*, 6 Q. B. 481, 51 E. C. L. 481, 9 Jur. 66, 14 L. J. M. C. 17, 1 N. Sess. Cas. 337; *Hottentot Venus's Case*, 13 East 195.

**But Alien Enemies** who are prisoners of war have no standing to apply for the writ. *Anonymous*, 2 W. Bl. 1324, 2 Ken. K. B. 473; *Rex v. Schiever*, 2 Burr. 765.

**7. Application by Third Person on Behalf of Person Detained — England.** — *In re Daley*, 2 F. & F. 258; *Cobbett v. Hudson*, 15 Q. B. 988, 69 E. C. L. 988; *In re Thompson*, 30 L. J. M. C. 19.

**United States.** — *U. S. v. Williamson*, 4 Am. L. Reg. 5, 28 Fed. Cas. No. 16,726; *Matter of Ferrens*, 3 Ben. (U. S.) 442, 8 Fed. Cas. No. 4,746.

**Georgia.** — *Broomhead v. Chisolm*, 47 Ga. 390.

**Kentucky.** — *Weddington v. Sloan*, 15 B. Mon. (Ky.) 147.

**Pennsylvania.** — *Com. v. Killacky*, 3 Brews. (Pa.) 565; *Com. v. Hoffman*, 4 Kulp (Pa.) 428.



consent of the person in whose behalf he assumes to act, and that a mere stranger has no standing to ask for the writ,<sup>1</sup> though there are also cases holding that such request or consent is not necessary.<sup>2</sup>

**c. APPLICATION BY THIRD PERSON HAVING RIGHT OF CUSTODY.** — One who has, or claims to have, the right to the custody of another who is restrained or taken from him may have a writ of habeas corpus to inquire into the legality of the detention.<sup>3</sup> Thus the writ will lie at the instance of a husband whose wife is kept away from him against her will,<sup>4</sup> of a parent for his child,<sup>5</sup> of a guardian for his ward,<sup>6</sup> of a master for his servant or apprentice,<sup>7</sup> or of an officer holding a warrant for the prisoner's arrest in another proceeding.<sup>8</sup>

**3. Court or Judge to Whom Application Must Be Made.** — The question as to

*Virginia.* — *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

*Hawaii.* — *Matter of Tatsu*, 10 Hawaii 701, 1 Am. Pr. Rep. 104; *Matter of Ukichi*, 10 Hawaii 710, 1 Am. Pr. Rep. 115.

**Third Person Acting from Motives of Humanity.**

— "The American books are full of cases — they are within the experience of every practitioner at the bar — in which the writ has issued at the instance of third parties who had no other interest or right in the matter than what every man concedes to sympathy with the oppressed." *U. S. v. Williamson*, 4 Am. L. Reg. 5, 28 Fed. Cas. No. 16,726. See *Hottentot Venus's Case*, 13 East 195.

**A Wife** may apply for the writ on behalf of her husband. *Cobbett v. Hudson*, 15 Q. B. 988, 69 E. C. L. 988; *Matter of Ferrens*, 3 Ben. (U. S.) 442, 8 Fed. Cas. No. 4,746.

**The Sister of an Orphan** confined in an asylum may apply for the writ. *In re Daley*, 2 F. & F. 258.

**The Next Friend of an Infant** may apply for the writ. — *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

**Application by Counsel.** — In *Matter of Newton*, 16 C. B. 97, 81 E. C. L. 97, 3 C. L. R. 1122, 24 L. J. C. Pl. 148, the court declined to allow a motion for a habeas corpus to be made by the father of a prisoner in custody, but required it to be made by counsel.

**A Duly Appointed Attorney in Fact** may institute a habeas corpus proceeding for the benefit of his principal, and make the necessary affidavit, etc. *State v. Giroux*, 15 Mont. 137.

**The English Statute** 31 Car. II. authorizes the granting of the writ on request in writing by the prisoner "or any on his, her, or their behalf." See *In re Carmichael*, 1 U. C. L. J. N. S. 243.

**In Georgia** any person may sue out a writ of habeas corpus to inquire into the legality of the detention of another, under the statute which provides that any person alleging that another in whom, for any cause, he is interested is restrained of his liberty may sue out the writ. Interest arising from humanity alone, it is said, comes within both the letter and the spirit of the law. *Broomhead v. Chisolm*, 47 Ga. 390. And see 3 Code Ga. (1895), § 1210.

See also the various local codes and statutes in the United States.

**1. Consent of Party in Interest Required.** — *Ex p. Child*, 15 C. B. 238, 80 E. C. L. 238.

No person has a right to sue out a writ of habeas corpus on behalf of a minor, unless

he has a right to the custody or control of the minor, or has been invited by the minor or by his guardian or parents, or by some one entitled to interfere with his custody, to sue out the writ. *In re Poole*, 2 MacArthur (D. C.) 583, 29 Am. Rep. 628.

**If the Party in Interest Disclaims** after the writ has been issued on his behalf at the instance of a third person, it will be quashed. *Com. v. Killacky*, 3 Brews. (Pa.) 565.

**2. Knowledge of Party in Interest Not Required.** — *Weddington v. Sloan*, 15 B. Mon. (Ky.) 147.

**3. Custody of Poor Orphans by County Supervisors.** — In *Lowndes County v. Leigh*, 69 Miss. 754, it was held that where the county board made an order directing one of its members to procure a home for certain poor orphans in the county, and their custody was withheld from him, he could, under the *Mississippi* statute, obtain the custody of the children by habeas corpus, in order that they might be dealt with according to law.

**Application by Bail.** — Bail whose principal has been taken out of his custody may apply for the writ. *Holsey v. Trevillo*, 6 Watts (Pa.) 402.

**The Lessee of the State Penitentiary** may have a writ of habeas corpus to obtain the custody of convicts unlawfully hired out by a previous lessee. *State v. Neel*, 48 Ark. 283.

**An Indian Agent** has no right to the custody of the children of Indians who have never surrendered to the United States the right to compel their children to attend school; and therefore it was held that a writ of habeas corpus would not lie in his favor to recover the custody of such Indian children taken from an agency school by a priest, when it did not appear that they had been taken without the consent of their parents. *U. S. v. Imoda*, 4 Mont. 38.

**4. Application by Husband.** — See the cases cited *supra*, this title, *Grounds of Remedy — Custody of Husband or Wife*.

**5. Application by Parent.** — See *supra*, this title, *Grounds of Remedy — Custody of Infants — Detention of Children from Parents*.

**6. Application by Guardian.** — See *supra*, this title, *Grounds of Remedy — Custody of Infants — Detention of Children from Parents*.

**7. Application by Master.** — See *supra*, this title, *Grounds of Remedy — Custody of Infants — Detention of Apprentices from Masters*.

**8. Officer Holding Warrant for Arrest of Prisoner in Another Proceeding.** — *In re Mineau*, 45 Fed. Rep. 188.



what courts and judges have power to issue writs of habeas corpus has already been considered from one point of view, and it has been shown that, as a general rule, the power is vested in all the judges of the superior courts, and in some instances in the judges of inferior courts also.<sup>1</sup> But it is not ordinarily permissible to present the application to any judge of a court of original jurisdiction anywhere in the state; it should be made to a court or judge in the county where the party is imprisoned or detained,<sup>2</sup> unless there is no judge or other officer in that county to whom the application may be made, in which event the application may be made in another county.<sup>3</sup>

**VIII. TO WHOM WRIT IS TO BE DIRECTED.** — A writ of habeas corpus must be directed to whomsoever has the custody of the person alleged to be illegally imprisoned or detained, whether the imprisonment or detention be by virtue of official authority or by a private person.<sup>4</sup>

**IX. THE RETURN** — 1. **Necessity.** — The officer or individual to whom a writ of habeas corpus is directed must, when service has been had on him, make a return showing the cause of the detention,<sup>5</sup> and, until a proper return is made,

1. See *supra*, this title, *Jurisdiction*.

2. **Application to Local Court or Judge Required** — *California*. — *Ex p.* Ellis, 11 Cal. 222; *Ex p.* Curtis, 92 Cal. 188.

*Florida*. — *Roberts v. State*, 27 Fla. 244.

*Georgia*. — *Hunt v. Hunt*, 94 Ga. 257.

*Indiana*. — *Ex p.* Wiley, 36 Ind. 528.

*Iowa*. — *Thompson v. Oglesby*, 42 Iowa 598; *Rivers v. Mitchell*, 57 Iowa 193.

*Minnesota*. — *Matter of Doll*, 47 Minn. 518.

*Missouri*. — *State v. Field*, 112 Mo. 554.

*Nevada*. — See *Ex p.* Deny, 10 Nev. 212.

*New York*. — *People v. Burtnett*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 8, 5 Park. Crim. (N. Y.) 113; *Shanks's Case*, (Supm. Ct.) 15 Abb. Pr. N. S. (N. Y.) 38. In *People v. Cowles*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 287, it was held that the restriction as to locality is not applicable where the writ is sought from the Supreme Court or a justice thereof.

*North Dakota*. — *Carruth v. Taylor*, (N. Dak. 1898) 77 N. W. Rep. 617.

*Ohio*. — *Ex p.* Everts, 2 Disney (Ohio) 33.

*South Carolina*. — *Ex p.* Parker, 6 S. Car. 472.

*South Dakota*. — *In re Hammill*, 9 S. Dak. 390.

*Texas*. — *Ex p.* Lynn, 19 Tex. App. 120. See also *Ex p.* Trader, 24 Tex. App. 393; *Ex p.* Springfield, 28 Tex. App. 27; *Ex p.* Angus, 28 Tex. App. 293.

*Wyoming*. — *Ex p.* Brenner, 3 Wyo. 412.

See also the title HABEAS CORPUS, 9 ENCYC. OF PL. AND PR. 1015.

**A Different Rule Obtains in Maryland**, where it is held that under the statutes of that state a judge of the Circuit Court has jurisdiction to grant the writ, though directed to the superintendent of a prison beyond the limits of his circuit. *Glenn's Petition*, 54 Md. 572.

3. **Absence or Disqualification of Local Judge** — *California*. — *Ex p.* Ellis, 11 Cal. 222.

*Florida*. — *Roberts v. State*, 27 Fla. 244.

*Indiana*. — *Ex p.* Wiley, 36 Ind. 528.

*Minnesota*. — *Matter of Doll*, 47 Minn. 518.

*New York*. — *People v. Burtnett*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 8; *Jurisdiction of Justices*, 3 How. Pr. (N. Y.) 39; *People v. Folmsbee*, 60 Barb. (N. Y.) 480.

If the Local Judge Refuses to Act, then resort

may be had to officers out of the county. *Ex p.* Ellis, 11 Cal. 222.

**Proof of Disqualification.** — To authorize an application for a habeas corpus to an officer of an adjoining county, it must be shown that the proper county judge was absent or incapable of acting, at the time of the application, and an affidavit sworn to three days previously is not sufficient. *People v. Burtnett*, (N. Y. Super. Ct.) 5 Park. Crim. (N. Y.) 113, 13 Abb. Pr. (N. Y.) 8. But see *Jurisdiction of Justices*, 3 How. Pr. (N. Y.) 39; *People v. Folmsbee*, 60 Barb. (N. Y.) 480.

**Nonexistence of Local Court.** — In *Ex p.* Kenyon, 5 Dill. (U. S.) 385, it was held that a writ of habeas corpus from the Circuit Court for the Western District of Arkansas would run to the Indian Territory to inquire into the cause of imprisonment of a person convicted by an Indian court without jurisdiction.

**Application to Trial Court.** — An application for a discharge on the ground that the prisoner has not had a speedy trial, as provided by law, should first be made to the trial court. *Ex p.* Fennessy, 5 Pac. Coast L. J. 496, 1 Crim. L. Mag. 532; *Patterson v. State*, 49 N. J. L. 326. See also *In re Lancaster*, 137 U. S. 393.

4. **To Whom Writ Is to Be Directed.** — *Nichols v. Cornelius*, 7 Ind. 611; *Com. v. Ridgway*, 2 Ashm. (Pa.) 247; *Matter of Booth*, 3 Wis. 1; *Bac. Abr.*, tit. Habeas Corpus, B 6.

**If a Prisoner Is Transferred** from the jail of the county in which his trial is to be had, a writ of habeas corpus must be directed to the sheriff of the county to which he was so transferred. *Holcombe v. State*, 99 Ala. 185.

**Under Officers.** — The writ may be directed to the sheriff and the keeper of the jail where the prisoner is confined, but service on the jailer alone is not sufficient, unless the sheriff cannot be found, because the sheriff has the legal custody of the prisoner. *People v. Walsh*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 19.

**Persons Assisting in Wrongful Detention.** — A habeas corpus lies against a person who aids the mother of a child in wrongfully detaining it from its father. *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644.

5. **Necessity of Return.** — *Bac. Abr.*, tit.

the court cannot take any action on the writ.<sup>1</sup>

If the Writ Is Issued by a State Court Where the Detention Is by Federal Authority, it is still necessary that a return should be made showing such authority.<sup>2</sup>

The Body of the Person Detained Must Be Produced with the return,<sup>3</sup> unless the return shows that the person is not in the custody of the respondent,<sup>4</sup> or that for any other reason the production of the body is impossible or impracticable,<sup>5</sup> or has been dispensed with by agreement.<sup>6</sup>

**2. By Whom Made.** — Since the return is the answer to the writ, it obviously must be made by the person to whom the writ is directed.<sup>7</sup>

**3. Time and Mode of Making** — *a.* **WHEN MADE.** — It has already been seen that the effectiveness of the writ of habeas corpus was, at one time, much impaired in England by the practice which grew up there of permitting the person to whom it was directed to disregard it until a *pluries* writ had been served on him. This abuse was corrected by the statute of 31 Car. II., c. 2,<sup>8</sup>

Habeas Corpus, B 7; *Ex p.* Zeehandelaar, 71 Cal. 238.

If the writ is issued by an officer of competent authority and is not void on its face, the person to whom it is directed is bound to obey it. *Wattles v. Marsh*, 5 Cow. (N. Y.) 176.

**1. Return Necessary to Enable Court to Act on Writ.** — *Lowndes County v. Leigh*, 69 Miss. 754; *Matter of Haller*, (Supm. Ct.) 3 Abb. N. Cas. (N. Y.) 65.

**2. Return to State Writ by Federal Officer.** — *Tarble's Case*, 13 Wall. (U. S.) 397; *Ableman v. Booth*, 21 How. (U. S.) 506; *Ex p.* Sifford, (U. S. Dist. Ct. 1856) 5 Am. L. Reg. 659; *Shirk's Case*, 5 Phila. (Pa.) 333, 20 Leg. Int. (Pa.) 260; *Bagnall v. Ableman*, 4 Wis. 163; *Matter of Booth*, 3 Wis. 1.

**3. Producing Body of Person Detained.** — *Robb v. Connolly*, 111 U. S. 624, *affirming In re Robb*, 64 Cal. 431; *Ed p.* Young, 50 Fed. Rep. 526; *Rivers v. Mitchell*, 57 Iowa 193; *Lowndes County v. Leigh*, 69 Miss. 754; *People v. Heffernan*, (N. Y. Super. Ct.) 38 How. Pr. (N. Y.) 402; *People v. Winston*, 31 N. Y. App. Div. 121, 25 Misc. (N. Y.) 676; *Com. v. Friends' Home for Children*, 7 Pa. Dist. 653; *Ex p.* Coupland, 26 Tex. 386.

**4. Production of Body Dispensed With — Persons Not in Custody of Respondent** — *England.* — *Barnardo v. Ford*, (1892) A. C. 326, 61 L. J. Q. B. 728; *Barnardo v. McHugh*, 61 L. J. Q. B. 721; *Ex p.* Benedict, 4 West. L. Month. 449, 3 Fed. Cas. No. 1,292.

*Alabama.* — *Ex p.* Shaudies, 66 Ala. 134.

*Kansas.* — *Territory v. Cutler*, McCahon (Kan.) 152.

*New York.* — *Matter of Forsyth*, (Supm. Ct.) 66 How. Pr. (N. Y.) 180.

*Ohio.* — *Ammon v. Johnson*, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

*Pennsylvania.* — *Com. v. Hoffman*, 4 Kulp (Pa.) 428; *Com. v. Kirkbride*, 1 Brews. (Pa.) 541, 7 Phila. (Pa.) 2.

The rule stated in the text has been applied even where the person to whom the writ was directed had, before the proceedings were begun, illegally disposed of the custody. *Barnardo v. Ford*, (1892) A. C. 326, 61 L. J. Q. B. 728, *disapproving Reg. v. Barnardo*, 24 Q. B. D. 283; *Reg. v. Barnardo*, 23 Q. B. D. 305, 58 L. J. Q. B. 553, 61 L. T. N. S. 547, 37 W. R. 789, 54 J. P. 132. Unless it was in anticipation of the issuing of the writ, and for the purpose of defeating the jurisdiction of the

court, that the party disposed of the custody. *U. S. v. Davis*, 5 Cranch (C. C.) 622; *Ex p.* Young, 50 Fed. Rep. 526. See also *Com. v. Friends' Home for Children*, 7 Pa. Dist. 653; *Matter of Jackson*, 15 Mich. 417.

**Ability to Regain Custody.** — In *Rivers v. Mitchell*, 57 Iowa 193, it was held that where a writ was sought to recover the custody of a child from its father, it was not a sufficient answer that he had sent the child out of the state, but it did not appear that he could not secure its return if he desired to do so.

**Where Minor Witnesses Are Lawfully at School in Another State**, and have not been sent away to avoid service of a subpoena, their attendance cannot be enforced by writ of habeas corpus *ad testificandum*, directed to their father. *Koecker v. Koecker*, 7 Phila. (Pa.) 371.

**5. A Sick Prisoner** need not be produced in court, if his illness is such that he cannot be brought up without endangering his life. *Ex p.* Bryant, 2 Tyler (Vt.) 269.

**Instructions from Superior Officer Not to Obey Writ.** — In *Ex p.* Kerr, 64 N. Car. 816, it was held that a military officer was not liable to be attached for not producing the body of a person arrested in a county declared to be in insurrection, where he made return to the writ that he held the prisoner under the order of the governor, who had ordered him not to obey the writ.

**The Production of a Lunatic** may be excused where the return shows that a commission of lunacy is about to issue. *Rex v. Clarke*, 3 Burr. 1362.

**6. Production of Body Dispensed With by Agreement of Counsel.** — *Medley*, Petitioner, 134 U. S. 160.

**7. Return Must Be Made by Person to Whom Writ Is Directed.** — *Bac. Abr.*, tit. Habeas Corpus, B 7.

**8. Speedy Return Required by Statute in England.** — See *supra*, this title, *History of Writ — History of Habeas Corpus under English Statutes*, note *Habeas Corpus Act of 31 Car. II., c. 2*. See also *Stockdale v. Hansard*, 8 Dowl. P. C. 474.

**Enlarging Time of Return.** — In *Rex v. Clarke*, 3 Burr. 1362, it was held that an affidavit from the attending physician of a private lunatic asylum, that the person sought was a lunatic and not fit to be brought into court, could be used to enlarge the time of the return.



and the American habeas corpus acts, probably without exception, contain the same or similar provisions.<sup>1</sup>

*b. AT WHAT PLACE.* — The place at which the return is to be made, as well as the court or judge who is to hear the case, is specified in the writ.<sup>2</sup>

*c. TO WHAT COURT OR JUDGE.* — The return must be made to the court, judge, or officer designated in the writ, and this ordinarily is the one by whom the writ was granted,<sup>3</sup> though convenience or necessity often requires that the return should be made to another, and provision is usually made therefor by statute.<sup>4</sup>

**4. Requisites and Sufficiency.** — The requisites and sufficiency of the return do not fall within the scope of this work.<sup>5</sup>

**5. Effect of Return**—*a. RULE AT COMMON LAW.* — It seems to have been the rule at common law, to which, however, there were some exceptions, that no one could in any case controvert the truth of the return to a writ of habeas corpus, or plead or suggest any matter repugnant to it, whether the imprisonment or restraint was for criminal or supposed criminal matters or not,<sup>6</sup> except in cases where the writ was sued out for the purpose of giving bail in a criminal case,<sup>7</sup> though even in such cases extrinsic evidence was not always admitted.<sup>8</sup>

The Only Remedy of the Party Injured, according to this rule, was by an action for a false return, in which he might recover damages commensurate with the injury done him.<sup>9</sup>

But One Might Confess and Avoid the Return by admitting the truth of the matters contained in it and suggesting others not repugnant which take off the effect of them.<sup>10</sup>

**1. Speedy Return Required by Statute in United States.** — See the habeas corpus acts of the several states. See also *U. S. v. Bollman*, 1 Cranch (C. C.) 373; *Rev. Stat. U. S.*, § 756.

**2. Place of Return Designated in Writ.** — See the Latin form of the writ given *supra*, this title, *Definition*, note 2. See also the forms given in the habeas corpus acts of the several states of the Union.

The Mississippi Statute provides that the writ of habeas corpus in criminal cases shall be returnable within the county where the crime was committed, unless it interferes with the holding of a term of court by the judge or chancellor granting it. *Patterson v. State*, 71 Miss. 675.

Under the Texas Statute the writ must be made returnable in a criminal case in the county in which the alleged offense was committed. *Ex p. Trader*, 24 Tex. App. 393; *Ex p. Springfield*, 28 Tex. App. 27.

**3. Return Ordinarily to Court or Judge Issuing Writ.** — *Ex p. Angus*, 28 Tex. App. 293.

**4. Return to Court or Judge Other than One Granting Writ.** — *People v. Booker*, 51 Cal. 317; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159; *Shanks's Case*, (Supm. Ct.) 15 Abb. Pr. N. S. (N. Y.) 38; *Morganfield v. Archibald*, 10 Ohio Cir. Ct. 40, 6 Ohio Cir. Dec. 391; *Com. v. Hoey*, 3 Brews. (Pa.) 514; *Com. v. Sheriff*, 7 W. & S. (Pa.) 108. See also *Ex p. Deny*, 10 Nev. 212.

A Justice of the Supreme Court of the United States may make the writ returnable to the whole court, if there are important or difficult questions involved, instead of making it returnable before himself. *Ex p. Clarke*, 100 U. S. 399.

See further the various local codes and statutes.

**5. Requisites and Sufficiency of Return.** — For a full treatment of these matters, see the title HABEAS CORPUS, 9 ENCYC. OF PL. AND Pr. 1034.

**6. Effect of Return at Common Law — Conclusiveness as to Facts.** — 2 Hawk. P. C., c. 15, § 78; *Bac. Abr.*, tit. Habeas Corpus, B 11; *Renney v. Mayfield*, 4 Hayw. (Tenn.) 165. See also *Rex v. Clerk*, 1 Salk. 349; *Rex v. Suddis*, 1 East 306; *Ex p. Krans*, 1 B. & C. 258, 8 E. C. L. 110; *Crowley's Case*, 2 Swanst. 82; *Goldswain's Case*, 2 W. Bl. 1207; *Ex p. Oliver*, 2 Ves. & B. 245; *De Vine's Case*, cited in *Hutchins v. Player*, O. Bridg. 288; *Chancey's Case*, 12 Coke 82; *Swallow v. London*, 1 Sid. 287.

**Exceptions to General Rule.** — In *Hutchins v. Player*, O. Bridg. 272, the court looked into numerous matters extrinsic to the return to see whether the custom set out in the return was good.

**7. Controverting Return on Habeas Corpus for Bail.** — 2 Hawk. P. C., c. 15, § 79.

**8. Extrinsic Evidence Not Always Admitted on Habeas Corpus for Bail.** — 1 Chitty's Crim. Law 130.

**9. Remedy by Action for False Return.** — *Com. v. Biddle*, Bright. (Pa.) 447, 4 Clark (Pa.) 35, 6 Pa. L. J. 287; *Renney v. Mayfield*, 4 Hayw. (Tenn.) 165.

**10. Confession and Avoidance of Return.** — 2 Hawk. P. C., c. 15, § 78. See also *Saint John's Case*, 5 Coke 716, *sub nom.* *Gardener's Case*, Cro. Eliz. 821; *Rex v. Gardner*, Trem. P. C. 354; *Swallow v. London*, 1 Sid. 287.

In *Ex p. Dakins*, 29 Eng. L. & Eq. 331, 16 C. B. 77, 81 E. C. L. 77, 3 C. L. R. 602, 1 Jur. N. S. 378, 24 L. J. C. Pl. 131, it was held that a person who had been arrested under execution of debt could show that he was privileged from arrest in civil cases.



**b. RULE UNDER ENGLISH STATUTES.** — It will be observed that the statute of 31 Car. II., c. 2, so far as it relates to cases of commitments for criminal or supposed criminal matters, contemplates only a discharge of the party on bail, and, therefore, in such cases the court may go behind the return to ascertain whether the party ought to be admitted to bail.<sup>1</sup> The practice in England was settled by a later statute passed to supply and remedy omissions and defects in the statute of 31 Car. II., and providing that "in all cases provided for by this act \* \* \* it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return in a summary way by affidavit or affirmation (in cases where by law affirmation is allowed), and to order and determine touching the discharging, bailing, or remanding the party."<sup>2</sup>

**c. RULE IN CANADA.** — In *Ontario* the rule seems to be that the prisoner may contradict the return to a writ of habeas corpus.<sup>3</sup>

**d. RULE IN UNITED STATES** — (1) *In Federal Courts.* — Under the Judiciary Act of 1789, by which the federal courts were given power to issue writs of habeas corpus "agreeable to the principles and usages of law," the federal courts, following the rule of common law, held that a return showing a commitment under judicial process was conclusive;<sup>4</sup> but subsequent Acts of Congress extended the power of the federal courts in regard to this writ, the first of which was the Force Bill of 1833,<sup>5</sup> and since the enactment of that statute it has been held that the return may be controverted on the hearing.<sup>6</sup>

(2) *In State Courts.* — In some of the states of the Union, the rule of the common law that the truth of the return to a writ of habeas corpus cannot be controverted has been recognized,<sup>7</sup> but the subject is now generally regulated by statutes which provide, in one form or another, that the return to the writ shall not be taken to be conclusive as to the facts stated therein, but that the party imprisoned or restrained may deny any of the facts set forth in the return and may allege any other facts that may be material in the case, and that the court may hear evidence, both in support of the imprisonment or restraint, or against it, and thereupon dispose of the party as law and justice may require.<sup>8</sup> If, however, the return is not denied or contradicted in any way, its recitals are to be taken as true, and the case will be determined in accordance therewith.<sup>9</sup>

In *Matter of Eggington*, 2 El. & Bl. 717, 75 E. C. L. 717, 18 Jur. 224, 24 Eng. L. & Eq. 146, it was held that where the return showed a commitment under civil process the prisoner could show that the warrant of arrest was executed on Sunday.

**1. Rule under Statute 31 Car. II., c. 2.** — See *supra*, this title, *History of Habeas Corpus under English Statutes*, where the substance of the statute of 31 Car. II. is set out. See also *Church on Habeas Corpus*, § 166; *Bac. Abr.*, tit. *Habeas Corpus*, B 11.

**2. Statute 56 Geo. III., c. 100, § 3.**

**3. Rule in Canada.** — *Reg. v. Boyle*, 4 Ont. Pr. 256, in which the prisoner was allowed to show that one of the persons who signed the warrant under which he was arrested was not a duly qualified justice of the peace.

**4. Former Rule in Federal Courts — Return Held Conclusive.** — *Ex p. Jenkins*, 2 Wall. Jr. (C. C.) 521; *Ex p. Sifford*, (U. S. Dist. Ct. 1856) 5 Am. L. Reg. 659.

**5. Extension of Power of Federal Courts.** — See *supra*, this title, *Jurisdiction* — *In the United States* — *Federal Courts*.

**6. Present Rule in United States — Return May Be Contradicted.** — *U. S. v. Williamson*, 3 Am. L. Reg. 729, 5 Pa. L. J. Rep. 365; *Nelson v.*

*Cutter*, 3 McLean (U. S.) 326; *Ex p. Smith*, 3 McLean (U. S.) 121; *U. S. v. Green*, 3 Mason (U. S.) 482; *Ex p. Jenkins*, 2 Wall. Jr. (C. C.) 521.

**7. Common-law Rule Recognized by State Courts.** — *Com. v. Biddle*, *Bright*, (Pa.) 447, 4 Clark (Pa.) 35, 6 Pa. L. J. 287; *Renney v. Mayfield*, 4 Hayw. (Tenn.) 165.

**8. Contradicting Return Authorized by Statute** — *Florida.* — *Ex p. Pitts*, 35 Fla. 149; *Benjamin v. State*, 25 Fla. 675; *Holley v. State*, 15 Fla. 688; *Finch v. State*, 15 Fla. 633.

*Indiana.* — *Speer v. Davis*, 38 Ind. 271.

*Minnesota.* — *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525.

*New Hampshire.* — *State v. Scott*, 30 N. H. 274.

*New York.* — *People v. Martin*, 2 Edm. Sel. Cas. (N. Y.) 28.

*Oregon.* — *Ex p. Howe*, 26 Oregon 181; *Merriman v. Morgan*, 7 Oregon 68.

*Vermont.* — *In re Powers*, 25 Vt. 261; *In re Hardigan*, 57 Vt. 100.

*Wisconsin.* — *In re Milburn*, 59 Wis. 24.

See also the various local codes and statutes in the United States.

**9. Failure to Contradict Return.** — *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525;

**X. HEARING AND DETERMINATION — 1. Extent of Inquiry on Hearing — a. IN GENERAL.** — The subject of the grounds on which a writ of habeas corpus may be granted evidently includes in a measure a consideration of the matters which may be inquired into on the hearing, which subject has been discussed in another part of this article.<sup>1</sup> Comprehensively speaking, the power of the court extends to an inquiry into the legality of the detention, that is, for what cause and by what authority the party is detained, and also his identity, for the purpose of removing any illegal restraint that may be found to exist,<sup>2</sup> and the inquiry ordinarily extends no further than this,<sup>3</sup> though in certain cases the court may, on a writ of habeas corpus, adjudicate the right to the custody of infants, and restore the custody to the person legally entitled thereto.<sup>4</sup>

**b. WHERE CUSTODY IS UNDER JUDICIAL PROCESS — (1) Commitment on Criminal Charge Before Indictment.** — Where the return shows that the prisoner is in custody under a commitment by a magistrate or other proper officer on an accusation of crime, the court may always inquire into the jurisdiction or power of the committing officer,<sup>5</sup> and the validity of the commitment on its face;<sup>6</sup> but no inquiry can be had into any question which it was within the

*Ex p. Durbin*, 102 Mo. 100; *In re Milburn*, 59 Wis. 24.

If No Evidence Is Adduced by Either Party on the hearing on a habeas corpus, the return is presumed to be true; and the averments of the petition for the writ, though not denied or controverted by the return, cannot be considered as thereby admitted. *Ex p. Hunter*, 39 Ala. 560.

1. See *supra*, this title, *Grounds of Remedy*.

2. *Inquiry into Cause and Authority for Detention.* — *Ableman v. Booth*, 21 How. (U. S.) 506.

The court will examine into the legality of the prisoner's confinement, without regard to whether his right of appeal has been lost by delay. *Ex p. Thamm*, 10 Mo. App. 595. See also *supra*, this title, *Nature and Scope of Remedy*, and the various habeas corpus acts in the United States.

**The Identity of the Prisoner with the person named in the warrant is always open on habeas corpus.** *Matter of Leary*, 10 Ben. (U. S.) 197, 15 Fed. Cas. No. 8,162.

3. *Limitations as to Subject of Inquiry on Hearing.* — See *supra*, this title, *Nature and Scope of Remedy*.

**The Inquiry Is Generally Limited to the question whether the process under which the prisoner is held was issued by a court of competent jurisdiction and in a case allowed by law.** *Ex p. Mason*, 16 Mo. App. 41.

4. *Right to Custody of Infants.* — See *supra*, this title, *Grounds of Remedy — Custody of Infants*.

5. *Inquiry into Jurisdiction or Power of Committing Officer.* — *England.* — *Ex p. Gillespie*, 7 Quebec Q. B. 422.

*United States.* — *In re Kaine*, 10 N. Y. Leg. Obs. 257, 14 Fed. Cas. No. 7,598; *In re Li Sing*, 86 Fed. Rep. 896; *In re Morris*, 40 Fed. Rep. 824.

*Arkansas.* — See *State v. Neel*, 48 Ark. 289. *Massachusetts.* — *Herrick v. Smith*, 1 Gray (Mass.) 12.

*Missouri.* — *Ex p. Bedard*, 106 Mo. 616; *Matter of Wooldridge*, 30 Mo. App. 612.

*New Hampshire.* — *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 66.

*Vermont.* — *In re Barker*, 56 Vt. 14.

**Finding of Committing Officer in Favor of His Jurisdiction Not Conclusive.** — *In re Newman*, 79 Fed. Rep. 622.

**Evidence Aliunde the Record may be received to show the incompetency of the committing magistrate to grant the writ, or that the subject-matter was not brought within his jurisdiction, if these facts do not appear on the face of the proceeding.** *In re Kaine*, 10 N. Y. Leg. Obs. 257, 14 Fed. Cas. No. 7,598; *Com. v. Walker*, 14 Pa. Co. Ct. 586.

**But Where the Writ Is Issued under the Force Bill (Act March 2, 1833), the court may inquire whether the imprisonment is in fact for an act done or omitted under the authority of the United States.** *Ex p. Sifford*, 5 Am. L. Reg. 659, 22 Fed. Cas. No. 12,848.

6. *Validity of Commitment on Its Face — United States.* — *Ex p. Sprout*, 1 Cranch (C. C.) 424; *Ex p. Bennett*, 2 Cranch (C. C.) 612; *In re Li Sing*, 86 Fed. Rep. 896; *Nishimura Ekiu v. U. S.*, 142 U. S. 651.

*Alabama.* — *Ex p. Cameron*, 81 Ala. 87; *Ex p. McGlawn*, 75 Ala. 38.

*Arkansas.* — *Ex p. Jackson*, 45 Ark. 158; *Ex p. Rohe*, 5 Ark. 104.

*California.* — *Ex p. Bull*, 42 Cal. 196; *People v. Smith*, 1 Cal. 9.

*Delaware.* — *Sipple v. Adams*, 5 Harr. (Del.) 149.

*Indiana.* — *Davis v. Bible*, 134 Ind. 108.

*Iowa.* — *Jackson v. Boyd*, 53 Iowa 536.

*Louisiana.* — *State v. Harmon*, 47 La. Ann. 949.

*Michigan.* — *Hamilton's Case*, 51 Mich. 174.

*Missouri.* — *Snowden v. State*, 8 Mo. 483; *In re Bouquette*, 14 Mo. App. 576.

*New York.* — *People v. Reese*, (Surrogate Ct.) 24 Misc. (N. Y.) 528; *Squires's Case*, (N. Y. Super. Ct.) 12 Abb. Pr. (N. Y.) 38; *Matter of Percy*, 2 Daly (N. Y.) 530; *People v. Sheriff*, (County Ct.) 11 Civ. Pro. (N. Y.) 172.

*Pennsylvania.* — *Com. v. Jones*, 1 Lack. L. Rec. (Pa.) 415.

**Probable Cause.** — The court will inquire only whether the commitment states sufficient probable cause to believe the accused guilty of the offense charged. *U. S. v. Johns*, 4 Dall. (U. S.) 412; *U. S. v. Bates*, 24 Fed. Cas. No. 14,544.



province of the committing officer to determine in reaching the conclusion that the prisoner should be committed for trial<sup>1</sup> or which is a matter of defense to be determined by the trial court when the case shall come before it.<sup>2</sup>

**Examination of Evidence Before Committing Officer.** — It is well settled that the court, on the hearing in a habeas corpus proceeding, may inquire whether there is any legal evidence to support the commitment,<sup>3</sup> but the authorities are not in accord as to whether the weight and sufficiency of evidence tending to support the commitment may be considered. In the federal courts the present rule is that that matter cannot be inquired into,<sup>4</sup> though there have been decisions to the contrary.<sup>5</sup> In the state courts there are two lines of decisions on this subject, one holding that the weight and sufficiency of the evidence is not open to review,<sup>6</sup> while the other holds that the court may examine

And if it complies with this requirement, the court will not consider any mere irregularities or informalities. *Price v. McCarty*, 89 Fed. Rep. 84; *Ex p. Granice*, 51 Cal. 375; *Jones v. Timberlake*, 6 Rand. (Va.) 678; *State v. Plant*, 25 W. Va. 119 52 Am. Rep. 211.

**Commitment Charging Acts Not Criminal.** — The court in a habeas corpus case may consider whether the acts charged in the commitment constitute a crime in law. *Dodd's Case*, 2 De G. & J. 510, 4 Jur. N. S. 291; *Ex p. Bailey*, 39 Fla. 734.

**Failure to Show Venue.** — A commitment is fatally defective where it fails to show the venue. *Ex p. Brenner*, 3 Wyo. 412.

**1. Questions Determinable by Committing Officer.** — *In re Boyd*, 49 Fed. Rep. 48, 4 U. S. App. 73; *Ex p. Thompson*, 93 Ill. 89. See also *supra*, this title, *Grounds of Remedy—Custody under Warrant or Commitment on Criminal Charge—Before Indictment*, note, *Matters Properly Determinable by Committing Magistrate or Grand Jury*.

**2. Matters of Defense.** — *Ex p. Collier*, (Miss. 1893) 12 So. Rep. 597; *People v. Ruloff*, (Supm. Ct. Spec. T.) 3 Park. Crim. (N. Y.) 126.

**Which of Two Repugnant Sections of a Statute Applies** to a case is a question for the trial court to determine, and does not arise in a habeas corpus proceeding. *In re Bouquette*, 14 Mo. App. 576.

**3. Inquiry as to Whether Commitment Is Supported by Any Legal Evidence.** — *In re Stupp*, 12 Blatchf. (U. S.) 501, 23 Fed. Cas. No. 13,563; *State v. Hayden*, 35 Minn. 283; *People v. Hagan*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 125; *Matter of Henry*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 734; *Com. v. Kintzer*, 16 Pa. Co. Ct. 453; *Com. v. Warden*, 4 Pa. Dist. 605.

**If the Prisoner Waives a Preliminary Examination**, and is committed without the introduction of any testimony, he cannot be discharged on habeas corpus, on the ground that there is no evidence to sustain the commitment. *Ex p. Ah Bau*, 10 Nev. 264; *State v. Jones*, 113 N. Car. 669, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 197. But see *Cowell v. Patterson*, 49 Iowa 514.

**Proof of Corpus Delicti.** — In *Rex v. Marks*, 3 East 157, it was held that on the return to a writ of habeas corpus, the court might go beyond the warrant of commitment and look at the depositions to see whether there was a *corpus delicti* justifying the detention. See also *Matter of Anderson*, 20 U. C. Q. B. 162; *Ex p. Page*, 1 B. & Ald. 568.

**4. Sufficiency of Evidence Before Committing Officer Not Inquired into by Federal Courts.** — *Ex p. Jones*, 96 Fed. Rep. 200; *In re Morris*, 40 Fed. Rep. 824; *In re Byron*, 18 Fed. Rep. 722; *In re Kaine*, 10 N. Y. Leg. Obs. 257, 14 Fed. Cas. No. 7,598; *In re Macdonnell*, 11 Blatchf. (U. S.) 170, 16 Fed. Cas. No. 8,772; *In re Stupp*, 12 Blatchf. (U. S.) 501, 23 Fed. Cas. No. 13,563; *Ex p. Van Aernam*, 3 Blatchf. (U. S.) 160, 28 Fed. Cas. No. 16,824; *In re Veremaitre*, 3 Am. L. J. N. S. 438, 28 Fed. Cas. No. 16,915.

**5. Weight of Evidence Formerly Considered by Federal Courts.** — *U. S. v. Bates*, 24 Fed. Cas. No. 14,544; *Matter of Van Campen*, 2 Ben. (U. S.) 419, 28 Fed. Cas. No. 16,835; *In re Martin*, 5 Blatchf. (U. S.) 303, 16 Fed. Cas. No. 9,151. See also *In re Henrich*, 5 Blatchf. (U. S.) 414, 11 Fed. Cas. No. 6,369.

In *Ex p. Bennett*, 2 Cranch (C. C.) 612, the court decided that they would examine the witnesses as they were all present, but said that they would not consider themselves bound by this case as a precedent.

**6. State Decisions Holding Evidence Before Committing Officer Not Reviewable** — *Arkansas*. — *Ex p. Perdue*, 58 Ark. 285; *Ex p. Jackson*, 45 Ark. 158.

*Georgia*. — *State v. Asselin*, T. U. P. Charl. (Ga.) 184.

*Indiana*. — *Farmer v. Lewis*, 92 Ind. 444, 47 Am. Rep. 153. See also *Wentworth v. Alexander*, 66 Ind. 39; *Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739; *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90. But where the commitment is defective, the statute authorizes the judge who issues the writ to call witnesses before him, inquire into the guilt of the prisoner, and to remand, recognize, or discharge him, as he may judge proper. *State v. Best*, 7 Blackf. (Ind.) 611.

*Louisiana*. — *State v. Scott*, 39 La. Ann. 943.

*Maine*. — *Phinney*, Petitioner, 32 Me. 440.

*Missouri*. — *Matter of Harris*, 47 Mo. 164.

*Nebraska*. — *State v. Banks*, 24 Neb. 322; *Matter of Balcom*, 12 Neb. 316.

*New Jersey*. — *Peltier v. Pennington*, 14 N. J. L. 312.

*Oregon*. — *Merriman v. Morgan*, 7 Oregon 68.

*Pennsylvania*. — *Com. v. Kintzer*, 16 Pa. Co. Ct. 453; *Com. v. Warden*, 4 Pa. Dist. 605;

*Com. v. Carlisle*, Bright. (Pa.) 36; *Com. v. Taylor*, 11 Phila. (Pa.) 386, 32 Leg. Int. (Pa.) 142; *Schofield v. Root*, 12 Phila. (Pa.) 333, 35 Leg. Int. (Pa.) 384.

*Virginia*. — *Hathaway*, Holmes, 4 Va. 495;



the evidence given before the committing magistrate for the purpose of determining whether it was sufficient; <sup>1</sup> but this is generally by virtue of statutory provisions authorizing the court to inquire whether there is reasonable or probable cause for believing that the prisoner is guilty of the offense with which he is charged.<sup>2</sup>

(2) *After Indictment and Before Conviction.* — Where a person in custody under an indictment seeks relief by habeas corpus, the court on the hearing may inquire into the jurisdiction of the grand jury by which the indictment was found, and of the court in which the accused is held to answer, and may discharge him if a want of jurisdiction in either appears.<sup>3</sup> The court may also inquire whether the grand jury which found the indictment existed by authority of law,<sup>4</sup> but it will not consider any irregularities in making up the list of grand jurors, or in drawing the grand jury, or the alleged disqualification of any member thereof.<sup>5</sup>

The Sufficiency of the Indictment may be inquired into so far as to ascertain whether it charges the commission of any act which is an indictable offense in law,<sup>6</sup>

*Ex p.* Kellogg, 6 Vt. 509; *In re* Powers, 25 Vt. 261; *Ex p.* Tracy, 25 Vt. 96; *In re* Hosley, 22 Vt. 303; *In re* Hackett, 53 Vt. 354.

*Wisconsin.* — *State v.* Bloom, 17 Wis. 521; *In re* Eldred, 46 Wis. 530; *Matter of* Booth, 3 Wis. 1, 157; *Matter of* Blair, 4 Wis. 522; *In re* O'Connor, 6 Wis. 288; *In re* Falvey, 7 Wis. 630; *In re* Boyle, 9 Wis. 264; *In re* Tarble, 25 Wis. 390, 3 Am. Rep. 85; *In re* Perry, 30 Wis. 268; *Crandall's* Petition, 34 Wis. 177; *Semler's* Petition, 41 Wis. 517; *In re* Pierce, 44 Wis. 411.

1. **State Decisions Holding Evidence Before Committing Officer Reviewable** — *Alabama.* — *Ex p.* King, 102 Ala. 182; *Ex p.* Champion, 52 Ala. 311; *Ex p.* Mahone, 30 Ala. 49, 68 Am. Dec. 111.

*California.* — *Ex p.* Walpole, 85 Cal. 362; *Ex p.* Palmer, 86 Cal. 631; *Ex p.* Sternes, 82 Cal. 245; *Matter of* Troia, 64 Cal. 152; *People v.* Smith, 1 Cal. 9.

*Florida.* — *Ex p.* Harfourd, 16 Fla. 283.

*Illinois.* — *Matter of* McIntyre, 10 Ill. 422.

*Iowa.* — *Cowell v.* Patterson, 49 Iowa 514.

*Kansas.* — *Matter of* Clyne, 52 Kan. 441; *Matter of* Snyder, 17 Kan. 542.

*Minnesota.* — *In re* Snell, 31 Minn. 110.

*Nevada.* — *Ex p.* Allen, 12 Nev. 87.

*New York.* — *People v.* Martin, (Supm. Ct.) 1 Park. Crim. (N. Y.) 187, 2 Edm. Sel. Cas. (N. Y.) 28; *People v.* Tompkins, (Supm. Ct.) 1 Park. Crim. (N. Y.) 224; *People v.* Richardson, (Supm. Ct.) 4 Park. Crim. (N. Y.) 656, 18 How. Pr. (N. Y.) 92, 9 Abb. Pr. (N. Y.) 393, note; *People v.* Stanley, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 179; *People v.* McFarlane, 25 N. Y. App. Div. 629, 49 N. Y. Supp. 599; *Matter of* Henry, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 734.

*Texas.* — The *Texas* Statute (Code Crim. Pro., art. 195), provides that if it appears that there is probable cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or held for bail by the court or judge trying the application. But it is held that the court will not discuss the evidence in a habeas corpus case. *Sharp v.* State, 1 Tex. App. 299; *Williams v.* State, 1 Tex. App. 465; *Ex p.* Cook, 2 Tex. App. 388; *Ex p.* Rothschild, 2 Tex. App. 560; *Ex p.* Day, 3 Tex. App. 328;

*Ex p.* Rucker, 6 Tex. App. 81; *Ex p.* McKinney, 5 Tex. App. 500; *Ex p.* Winters, (Tex. Crim. 1895) 32 S. W. Rep. 897.

*Virginia.* — *Ex p.* Pool, 2 Va. Cas. 276, holding that it is a matter of discretion with the judge, to be regulated by the circumstances of the case, whether he will look beyond the warrant of commitment.

Where There Is Some Evidence Other than the Extrajudicial Admissions of the Accused that an offense has been committed, the accused charged will not be released on habeas corpus before trial on the ground of a want of reasonable or probable cause for the commitment. *Ex p.* Becker, 86 Cal. 402.

**Impeachment of Witnesses.** — The statute authorizing the court to review the evidence given before the committing magistrate does not give the accused the right to a writ of habeas corpus for the sole purpose of impeaching the witnesses who testified against him at his examination. *Ex p.* Allen, 12 Nev. 87.

2. **Statutory Authority to Review Evidence Before Committing Officer.** — See the cases cited in the next preceding note, and also the various local codes and statutes in the United States.

3. **Jurisdiction of Grand Jury — Locality of Commission of Crime.** — *U. S. v.* Fowkes, 49 Fed. Rep. 50, affirmed 53 Fed. Rep. 13, 3 U. S. App. 247; *U. S. v.* Rogers, 23 Fed. Rep. 658; *In re* Buell, 3 Dill. (U. S.) 116; *Ex p.* Slater, 72 Mo. 102.

**Want of Jurisdiction in Court in Which Accused Is Held to Answer.** — *U. S. v.* Fowkes, 53 Fed. Rep. 13, 3 U. S. App. 247, affirming 49 Fed. Rep. 50; *Com. v.* Ketner, 92 Pa. St. 372, 37 Am. Rep. 692.

4. **Legality of Grand Jury.** — *Ex p.* Farley, 40 Fed. Rep. 66.

5. **Irregularities or Defects in Constitution of Grand Jury.** — *Ex p.* Warris, 28 Fla. 371; *State v.* Fenderson, 28 La. Ann. 82; *In re* Betts, 36 Neb. 282. *Compare* *Stout v.* Utah, 20 U. S. (L. ed.) 512, in which the court were equally divided as to whether, on habeas corpus, the court could discharge a prisoner for irregularities in the summons of the grand jury.

6. **Sufficiency of Indictment — Charging Acts Not Criminal in Law.** — *In re* Hacker, 73 Fed. Rep. 467; *Ex p.* Maier, 103 Cal. 476, 42 Am. St. Rep. 129; *Ex p.* McNulty, 77 Cal. 164;

but mere defects of form will not be considered,<sup>1</sup> unless the indictment is so defective in the material averments that it would be the manifest duty of the court in which it might be brought to trial to decline to take any action on it.<sup>2</sup>

**The Guilt or Innocence of the Accused**, when an indictment has been found against him, is a question which the trial court alone can consider, and cannot be determined on habeas corpus, however clear the proof of innocence may be.<sup>3</sup>

**The Identity of an Offender** who has been indicted in a federal court and is arrested in another district, under a warrant issued on such indictment, is a matter for the determination of the United States commissioner before whom he is brought for trial, and is not open to inquiry on habeas corpus.<sup>4</sup>

**The Question of Former Jeopardy** as a ground of relief of a person under indictment has been treated in another part of this article.<sup>5</sup>

(3) *After Conviction*.—Where a prisoner in custody under a sentence of conviction seeks to be discharged on habeas corpus, it is well settled as a general rule that the inquiry is limited to the question whether the court in which the prisoner was convicted had jurisdiction in the premises,<sup>6</sup> and the

*Ex p. Kearny*, 55 Cal. 212; *Ex p. Harrold*, 47 Cal. 129; *Matter of Corryell*, 22 Cal. 178; *Ex p. Prince*, 27 Fla. 196, 26 Am. St. Rep. 67; *Com. v. Ketner*, 92 Pa. St. 372, 37 Am. Rep. 692. See also *U. S. v. McClay*, 4 Cent. L. J. 255, 26 Fed. Cas. No. 15,660. But see *Hatch v. St. Clair*, 1 Ohio Cir. Dec. 421, 2 Ohio Cir. Ct. 163, in which case it was held that the fact that an indictment charges no crime known to the law cannot be tried by habeas corpus from the Circuit Court, because a demurrer to the indictment would raise the question, and, if wrongly decided, it could be reviewed on error.

**Whether the Facts Alleged Constitute the Crime Charged**, as whether a scheme is a lottery and so constitutes an offense against the lottery law, is a question for the trial court, and will not be considered on habeas corpus. *Horner v. U. S.*, 143 U. S. 570.

**1. More Defects of Form Not Considered—United States**.—*Matter of Clark*, 2 Ben. (U. S.) 540. Compare *U. S. v. Fowkes*, 49 Fed. Rep. 50, affirmed 53 Fed. Rep. 13, 3 U. S. App. 247.

*Alabama*.—*Ex p. Whitaker*, 43 Ala. 323.

*Florida*.—*Ex p. Prince*, 27 Fla. 196, 26 Am. St. Rep. 67.

*Mississippi*.—*Emanuel v. State*, 36 Miss. 627.

*Nevada*.—*Ex p. Kitchen*, 19 Nev. 178.

*Oklahoma*.—*Matter of Le Roy*, 3 Okla. 322.

*Texas*.—*Ex p. Beverly*, 34 Tex. Crim. 644.

**The Texas Statute** expressly provides that the sufficiency or validity of an indictment cannot be appropriately presented by a writ of habeas corpus. *Parker v. State*, 5 Tex. App. 579.

**The Indiana Statute** forbids any inquiry in habeas corpus proceedings into the legality of any process issued from the Circuit Court on an indictment or information. *Kinney v. Dickey*, 125 Ind. 180.

**2. Indictment Fatally Defective in Material Averments**.—*Matter of Clark*, 2 Ben. (U. S.) 540.

**Uncertainty in the Description of the Offense Charged** has been held a proper matter for the court to consider in passing on the sufficiency of the indictment when questioned on habeas corpus. *Republic v. Bynum*, Dall. (Tex.) 376.

**3. Question of Guilt or Innocence Cannot Be Con-**

sidered. — *People v. McLeod*, 25 Wend. (N. Y.) 483, 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

**In New York** it is held that, on habeas corpus, an indictment may be held void on the ground that it was found on no legal evidence, as such objection raises a question of jurisdiction, and calls for a consideration as to whether there was any evidence. *Matter of Klein*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 107.

**4. Identity of Offender**.—*Horner v. U. S.*, 143 U. S. 207.

**5. Former Jeopardy**.—See *supra*, this title, *Grounds of Remedy—Custody under Warrant or Commitment on Criminal Charge—After Indictment—Former Jeopardy*.

**6. Extent of Inquiry on Habeas Corpus—Jurisdiction of Trial Court—United States**.—*Ex p. Parks*, 93 U. S. 18; *Ex p. Carll*, 106 U. S. 521; *Ex p. Yarbrough*, 110 U. S. 651; *Ex p. Bigelow*, 113 U. S. 328; *Cuddy, Petitioner*, 131 U. S. 280; *Ex p. Fisk*, 113 U. S. 713; *In re Mayfield*, 141 U. S. 107; *Craemer v. Washington*, 168 U. S. 124; *Ex p. Shaffenburg*, 4 Dill. (U. S.) 271.

*Alabama*.—*Ex p. Bizzell*, 112 Ala. 210.

*Arkansas*.—*Ex p. Brandon*, 49 Ark. 143.

*California*.—*Ex p. Hollis*, 59 Cal. 405; *Ex p. McCullough*, 35 Cal. 97; *Ex p. Cohn*, 55 Cal. 193; *Ex p. Sternes*, 77 Cal. 156; *Ex p. Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263; *Ex p. Spencer*, 83 Cal. 460; *People v. O'Neil*, 47 Cal. 109.

*Colorado*.—*People v. District Ct.*, 6 Colo. 534; *Teller v. People*, 7 Colo. 451.

*Iowa*.—*Turney v. Barr*, 75 Iowa 758.

*Massachusetts*.—*Clarke's Case*, 12 Cush. (Mass.) 321.

*Michigan*.—*Romeyn v. Caplis*, 17 Mich. 455.

*Minnesota*.—*State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305; *State v. McMahon*, 69 Minn. 265.

*Mississippi*.—*Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375.

*Missouri*.—*State v. Dobson*, 135 Mo. 1; *Ex p. O'Brien*, 127 Mo. 477; *Ex p. Snyder*, 64 Mo. 58; *Ex p. Bedard*, 106 Mo. 616.

*New York*.—*People v. Protestant Episcopal House of Mercy*, 128 N. Y. 180, 625, reversing (Supm. Ct. Gen. T.) 13 N. Y. Supp. 399, 401;



validity of the sentence or process on its face;<sup>1</sup> but no inquiry can be had into the sufficiency of the evidence to support the conviction,<sup>2</sup> or into any question which it was the province of the trial court to determine, because it is not the province of the writ to retry issues of fact or to review the rulings of the trial court.<sup>3</sup>

The Court May Go Behind the Record in its inquiry into this question where the

*People v. Durston*, 119 N. Y. 569, 16 Am. St. Rep. 859; *People v. Stout*, 81 Hun (N. Y.) 336; *People v. Wilson*, 88 Hun (N. Y.) 258; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Warden*, 100 N. Y. 20; *People v. Webster*, 75 Hun (N. Y.) 278; *People v. Rawson*, 61 Barb (N. Y.) 619; *People v. Divine*, (Supm. Ct.) 5 Park. Crim. (N. Y.) 62, 21 How. Pr. (N. Y.) 80, 11 Abb. Pr. (N. Y.) 90; *Decker v. Ekelman*, (County Ct.) 17 Misc. (N. Y.) 665; *Matter of Prime*, 1 Barb. (N. Y.) 340, 5 N. Y. Leg. Obs. 409; *Matter of Baker*, (Supm. Ct.) 11 How. Pr. (N. Y.) 418; *Matter of Moses*, (Supm. Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 189, 66 How. Pr. (N. Y.) 296, 1 N. Y. Crim. 509; *People v. Markell*, (County Ct.) 22 Misc. (N. Y.) 607; *People v. Neilson*, 16 Hun (N. Y.) 214; *People v. Bowe*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 393; *Matter of Place*, (C. Pl.) 34 How. Pr. (N. Y.) 259; *Gray's Case*, (Supm. Ct.) 11 Abb. Pr. (N. Y.) 56, *sub nom.* *People v. Gray*, (Supm. Ct.) 4 Park. Crim. (N. Y.) 616.

*Ohio*. — *Ex p. Bushnell*, 9 Ohio St. 77; *Ex p. Wagener*, 1 Disney (Ohio) 10.

*Pennsylvania*. — *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *Com. v. Debtors' Apartment*, 1 Ashm. (Pa.) 10.

*Texas*. — *Darrah v. Westerland*, 44 Tex. 388.

*Washington*. — *Matter of Lybarger*, 2 Wash. 131.

*Wisconsin*. — *In re McDonald*, 74 Wis. 450; *In re Eldred*, 46 Wis. 530. See also *supra*, this title, *Grounds of Remedy — Custody under Judgments or Orders of Court*.

**The Reasons of the Attorney-General for Appointing an Assistant to enforce the Kansas liquor law**, as he is authorized to do whenever the county attorneys cannot or will not act, are not open to examination on habeas corpus by a person tried and convicted on an information filed by such assistant. *Matter of Gilson*, 34 Kan. 641.

**1. Validity of Sentence — Defective Record.** — *Ex p. Phillips*, 57 Miss. 357; *Ex p. Gafford*, (Nev. 1899) 57 Pac. Rep. 484; *Bennac v. People*, 4 Barb. (N. Y.) 31; *Stewart's Case*, (C. Pl.) 1 Abb. Pr. (N. Y.) 210; *People v. New York Juvenile Asylum*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 92; *People v. Whitney*, (County Ct.) 22 Misc. (N. Y.) 226; *People v. Markell*, (County Ct.) 22 Misc. (N. Y.) 607; *People v. Willett*, 26 Barb. (N. Y.) 78, 6 Abb. Pr. (N. Y.) 37, 15 How. Pr. (N. Y.) 210; *People v. Kelly*, 35 Barb. (N. Y.) 444; *In re O'Connor*, 6 Wis. 288.

**Certainty and Definiteness of Sentence.** — *Ex p. Murray*, 43 Cal. 455.

**Contradictory Copies of Record of Judgment — Which Valid Not Determined on Habeas Corpus.** — *Ex p. Williams*, 89 Cal. 421.

**The Jurisdiction of a Judge of the Supreme Court of Canada in matters of habeas corpus**, where there has been a conviction in criminal cases, is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of

commitment. *Ex p. Macdonald*, 27 Can. Sup. Ct. 683.

**2. No Inquiry into Sufficiency of Evidence — United States.** — *In re Jordan*, 49 Fed. Rep. 238; *In re Haskell*, 52 Fed. Rep. 795.

*California*. — *Ex p. Long*, 114 Cal. 159; *Ex p. Spencer*, 83 Cal. 460.

*Connecticut*. — *In re Bion*, 59 Conn. 372.

*Minnesota*. — *State v. Norby*, 69 Minn. 451.

*Mississippi*. — *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375.

*Nevada*. — *Ex p. Winston*, 9 Nev. 71; *Ex p. Crawford*, (Nev. 1897) 49 Pac. Rep. 1038.

*New York*. — *People v. Markell*, (County Ct.) 22 Misc. (N. Y.) 607; *People v. Hagan*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 125; *Matter of Miller*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 4, note; *Matter of Prime*, 1 Barb. (N. Y.) 340; *Matter of Baker*, (Supm. Ct.) 11 How. Pr. (N. Y.) 418; *People v. New York Catholic Protectory*, 38 Hun (N. Y.) 127, 101 N. Y. 195; *Matter of Serafino*, (Supm. Ct.) 66 How. Pr. (N. Y.) 178; *People v. Protestant Episcopal House of Mercy*, 128 N. Y. 180, *reversing Matter of Danziger*, 59 Hun (N. Y.) 624, 37 N. Y. St. Rep. 50, and *Matter of Simon*, 59 Hun (N. Y.) 624, 37 N. Y. St. Rep. 48; *People v. Sisters of St. Dominick*, 34 Hun (N. Y.) 463, 2 N. Y. Crim. 528, 1 How. Pr. N. S. (N. Y.) 132; *In re Diss Debar*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 667; *Matter of Wright*, 29 Hun (N. Y.) 357, 65 How. Pr. (N. Y.) 119.

*Virginia*. — *Marx v. Milstead*, (Va. 1889) 9 S. E. Rep. 617; *Ex p. Marx*, 86 Va. 40.

*Compare Gerdemann v. Com.*, 11 Phila. (Pa.) 374, 32 Leg. Int. (Pa.) 13, holding that on an application for a writ of habeas corpus, the court will examine the proceedings and the evidence, but it is sufficient if the court can see that a verdict would be not without evidence to sustain it. See also *Com. v. M'Keagy*, 1 Ashm. (Pa.) 248.

**3. No Inquiry into Matters Within Province of Trial Court to Determine.** — See *supra*, this title, *Grounds of Remedy — Custody under Judgments or Orders of Court — Errors and Irregularities*.

**An Issue as to the Age of a person alleged to have been sentenced illegally because of his age cannot be considered on habeas corpus.** *Ex p. Kaufman*, 73 Mo. 588; *People v. House of Refuge*, (Supm. Ct. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 112.

**Validity of Statute Relating to Crime Charged.** — *In Ex p. Mitchell*, 104 Mo. 121, 24 Am. St. Rep. 324, it was held that it was a question for the trial court whether the statute relating to the offense charged had ever been legally adopted, and could not be considered on habeas corpus.

**As to Inquiry into the Constitutionality of Statutes**, see *infra*, this section, *Constitutionality of Statutes*.

**Whether an Indictment Was Ever Found by a Grand Jury cannot be considered on habeas**



tribunal is one of appellate jurisdiction in respect to the court by which the commitment was made,<sup>1</sup> or where the latter court was one of inferior and limited jurisdiction,<sup>2</sup> though it seems that in case of courts of co-ordinate jurisdiction, only the record of the trial can be considered.<sup>3</sup>

(4) *Commitments for Contempt.* — Where the party seeking relief by habeas corpus from imprisonment is in custody by virtue of a commitment for contempt, the court or judge by whom the matter is heard may inquire into the jurisdiction of the court or body by which the commitment was made, as in other cases of custody under judicial process,<sup>4</sup> and the inquiry may be extended to matters outside the record, but not inconsistent with it.<sup>5</sup> The presumption, however, in the absence of anything in the record, or of any showing by extrinsic evidence, is in favor of the validity of a commitment by a court of general jurisdiction,<sup>6</sup> but a decision by a court or judge in favor of his jurisdiction to make the commitment is not conclusive.<sup>7</sup>

The Form of the Commitment also, may be looked to, in order to see that it specially and plainly charges the contempt, and is otherwise sufficient to authorize the detention of the prisoner.<sup>8</sup>

corpus, where the indictment was regular upon its face. *Ex p.* Twohig, 13 Nev. 302.

As to the Insufficiency of the Indictment as a ground for discharge on habeas corpus, see *supra*, this title, *Grounds of Remedy—Custody under Warrant or Commitment on Criminal Charge.*

Whether a De Facto Penitentiary Is Such De Jure cannot be considered on habeas corpus. *Kingen v. Kelsey*, 3 Wyo. 566.

The Regularity of the Proceedings which resulted in the judgment under which the prisoner is detained cannot be inquired into on habeas corpus. *In re Truman*, 44 Mo. 181.

1. Going Behind Record — To Inquire as to Inferior Court's Jurisdiction. — *In re Mayfield*, 141 U. S. 107; *Cuddy*, Petitioner, 131 U. S. 280.

To Determine Whether Act Charged Was Criminal. — *Ex p.* Kearny, 55 Cal. 212. See also *Ex p.* Hollis, 59 Cal. 405; *Ex p.* Halsted, 89 Cal. 471.

A Person Who Was Not a Party to a proceeding cannot attack the jurisdiction of the court collaterally by evidence *dehors* the record on habeas corpus. *In re Lennon*, 166 U. S. 548.

Facts Inconsistent with the Record cannot be considered where the jurisdiction of the court is attacked on habeas corpus. *In re Mayfield*, 141 U. S. 107. See also *Murrah v. State*, 51 Miss. 652.

2. Commitment by Court of Inferior and Limited Jurisdiction. — *Smith v. Clausmeier*, 136 Ind. 105, 43 Am. St. Rep. 311.

3. Court of Co-ordinate Jurisdiction Not Authorized to Go Behind Record. — *Ex p.* Alexander, 14 Fed. Rep. 680.

After Affirmance of a Conviction by the Supreme Court, only a want of jurisdiction apparent on the face of the record can be considered on habeas corpus. *Daniels v. Towers*, 79 Ga. 785.

4. Inquiry into Jurisdiction of Court Making Commitment. — See *supra*, this title, *Grounds of Remedy—Custody under Judgments or Orders of Court—Commitments for Contempt—In General*, note *Commitment Void for Want of Jurisdiction*.

Commitment of Witness by Legislature — Legislative Powers Examined on Habeas Corpus. —

*In re Falvey*, 7 Wis. 630; *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

The Principle Applicable in case the custody is under a commitment for contempt is substantially the same as where it is under any other judgment, so far as concerns the question of collateral review or impeachment. *In re Jordan*, 49 Fed. Rep. 238.

5. Inquiry into Matters Outside Record. — *Cuddy*, Petitioner, 131 U. S. 280; *In re George*, 3 Ohio Cir. Dec. 104, 5 Ohio Cir. Ct. 207.

Record Imports Verity. — The record of a proceeding for contempt imports absolute verity and cannot be questioned on habeas corpus. *Ex p.* Bergman, 3 Wyo. 396.

Where the Commitment Is by an Inferior Court, the jurisdictional recitals in the commitment may be attacked on habeas corpus. *Ex p.* O'Brien, 127 Mo. 477.

6. Presumption as to Jurisdiction. — *Cuddy*, Petitioner, 131 U. S. 280; *Tolleson v. Greene*, 83 Ga. 499; *Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211.

Commitment by Inferior Court. — Where the commitment is by an inferior court, the jurisdictional facts recited may be contradicted. *Ex p.* O'Brien, 127 Mo. 477.

A Commitment by a Notary Public, taking depositions for a contempt on the part of a witness in refusing to answer interrogatories, raises no presumption of jurisdiction, and it is the duty of the court to examine whether the commitment is within the meaning and spirit as well as the letter of the law. *Ex p.* Krieger, 7 Mo. App. 367.

7. Decision of Court in Favor of Its Own Jurisdiction Not Conclusive. — *Devlin's Case*, (C. Pl.) 5 Abb. Pr. (N. Y.) 281.

A Judge at Chambers will not, on habeas corpus, review the decision of the general term of the court that it had jurisdiction of the action in which the order of commitment by it was made. *People v. Orser*, (Supm. Ct.) 12 How. Pr. (N. Y.) 550.

8. Form of Commitment. — *People v. Sheriff*, 29 Barb. (N. Y.) 622; *Matter of Percy*, 2 Daly (N. Y.) 530; *People v. Kelly*, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 54, 103, 24 N. Y. 74; *Matter of Baker*, (Supm. Ct.) 11 How. Pr. (N.

The Existence of the Facts Recited in the Commitment is deemed to be conclusively established and cannot be questioned on habeas corpus,<sup>1</sup> but the court may determine whether they are such as in law will constitute a contempt.<sup>2</sup>

**Contempts by Witnesses.** — Where the commitment is predicated on the refractory conduct of a witness, the court, on habeas corpus to procure his release, may inquire, as in other contempt cases, whether the court by which he was committed had jurisdiction of the proceeding in which the commitment was made.<sup>3</sup> It is generally held, also, that the court may inquire whether the question which the witness refuses to answer was pertinent or was one which could properly be asked,<sup>4</sup> though it has been held that the court cannot inquire whether the questions put to the witness were proper, or whether he was privileged from answering.<sup>5</sup>

(5) *Constitutionality of Statutes.* — The present weight of authority is to the effect that where a party is in custody by virtue of a statute or ordinance, the court may inquire into the constitutionality thereof on habeas corpus, whether the application was made before or after conviction, and may discharge the prisoner if it is of opinion that such statute or ordinance is unconstitutional, because an unconstitutional law is void, and a conviction under it is not merely erroneous, but is illegal and void,<sup>6</sup> though in some jurisdictions

Y.) 418. See also *supra*, this title, *Grounds of Remedy — Commitments for Contempt — Indefinite Commitments*.

**1. Facts Recited in Commitment Not Reviewable on Habeas Corpus — United States.** — *Ex p. Terry*, 128 U. S. 289.

*California.* — *Ex p. Clark*, 110 Cal. 405.

*Colorado.* — *In re Popejoy*, (Colo. 1899) 55 Pac. Rep. 1083.

*Florida.* — *Ex p. Senior*, 37 Fla. 1.

*New York.* — *People v. Cassels*, 5 Hill (N. Y.) 164; *People v. Fancher*, 2 Hun (N. Y.) 226, reversing 15 Abb. Pr. N. S. (N. Y.) 38.

*North Dakota.* — *State v. Barnes*, 5 N. Dak. 350.

**Sufficiency of Affidavits in Supplementary Proceedings.** — Where a defendant is committed for contempt in supplementary proceedings, the sufficiency of the affidavits cannot be reviewed on habeas corpus. *Matter of Smethurst*, 2 Sandf. (N. Y.) 724, 4 How. Pr. (N. Y.) 369.

**2. Sufficiency of Facts to Constitute Contempt — England.** — *Burdett v. Abbott*, 14 East 181; *Bushell's Case*, Vaugh. 156; *Stockdale v. Hansard*, 9 Ad. & El. 1, 36 E. C. L. 13; *Sheriff's Case*, 11 Ad. & El. 273, 39 E. C. L. 80.

*Florida.* — *Ex p. Senior*, 37 Fla. 1.

*Iowa.* — *State v. Seaton*, 61 Iowa 563.

*Kansas.* — *Matter of Dill*, 32 Kan. 668, 49 Am. Rep. 505.

*Mississippi.* — *Ex p. Hickey*, 4 Smed. & M. (Miss.) 751.

*Pennsylvania.* — *Com. v. Gibbons*, 9 Pa. Super. Ct. 527.

*Tennessee.* — *State v. Galloway*, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

**3. Inquiry into Jurisdiction to Commit Refractory Witnesses.** — *Ex p. Fisk*, 113 U. S. 713; *Ex p. Pearce*, 111 Ala. 99; *Matter of Hall*, 10 Mich. 210; *People v. Hannah*, 92 Hun (N. Y.) 476; *People v. Cassels*, 5 Hill (N. Y.) 164; *Myers v. Janes*, (Supm. Ct.) 3 Abb. Pr. (N. Y.) 301.

The Validity of an Indictment on the trial of which a witness has refused to testify cannot be considered on petition for a writ of habeas

corpus to release him from imprisonment under a commitment for contempt. *Com. v. Bell*, 145 Pa. St. 374.

**4. Inquiry into Propriety of Questions.** — *Ex p. Zeehandelaar*, 71 Cal. 238; *Bradley v. Veazie*, 47 Me. 85; *Holman v. Austin*, 34 Tex. 668.

Such an inquiry is necessary to insure the protection of the constitutional provision that no person "shall be compelled in any criminal case to be a witness against himself." *Counselman v. Hitchcock*, 142 U. S. 547; *Ex p. Irvine*, 74 Fed. Rep. 954.

**5. Rule Forbidding Inquiry into Propriety of Questions.** — *People v. Fancher*, 2 Hun (N. Y.) 226, reversing 15 Abb. Pr. N. S. (N. Y.) 38; *People v. Cassels*, 5 Hill (N. Y.) 164.

**6. Inquiry into Constitutionality of Statute Allowed — United States.** — *Ex p. Siebold*, 100 U. S. 371; *Ex p. Yarbrough*, 110 U. S. 651; *Medley, Petitioner*, 134 U. S. 160; *Savage, Petitioner*, 134 U. S. 176; *In re Brosnahan*, 18 Fed. Rep. 62, 4 McCrary (U. S.) 1; *Dreyer v. Pease*, 88 Fed. Rep. 978; *In re Wong Yung Quy*, 6 Sawy. (U. S.) 237, 47 Fed. Rep. 717; *Marks v. Pease*, 4 Chicago L. J. 75. But see *U. S. v. Ames*, 95 Fed. Rep. 453, in which *Jenkins, J.*, sitting in the Circuit Court, said that where it was a fairly debatable and doubtful question whether an Act of Congress was constitutional, he would sustain it, and let the parties carry the question to the Supreme Court.

*Florida.* — *Ex p. Pitts*, 35 Fla. 149.

*Iowa.* — *Brown v. Duffus*, 66 Iowa 193. Formerly the rule was otherwise in Iowa. See *Platt v. Harrison*, 6 Iowa 79, 71 Am. Dec. 389.

*Massachusetts.* — *Com. v. Huntley*, 156 Mass. 236.

*Mississippi.* — *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375.

*Missouri.* — *Ex p. Smith*, 135 Mo. 223, 58 Am. St. Rep. 576, overruling *Matter of Harris*, 47 Mo. 164; *Ex p. Boenninghausen*, 21 Mo. App. 267, affirmed 91 Mo. 301, and *Ex p. Bowler*, 16 Mo. App. 14, in which the opposite doctrine was laid down.



it is held that this is a question for the determination of the trial court.<sup>1</sup>

(6) *Custody in Extradition Proceedings.* — Where a prisoner in custody under a warrant of arrest in an extradition proceeding applies for a writ of habeas corpus, the court, on the hearing, may inquire into the validity of the warrant,<sup>2</sup> the jurisdiction of the officer by whom it was issued,<sup>3</sup> the identity of the prisoner,<sup>4</sup> whether he is substantially charged with a crime in the demanding state,<sup>5</sup> and generally whether the papers show sufficient cause for his detention.<sup>6</sup> The court may also inquire whether the prisoner was a fugitive from justice within the extradition laws, but this can be done only on evidence to overcome the finding of the governor as to that fact.<sup>7</sup>

*Nevada.* — *Ex p.* Rosenblatt, 19 Nev. 439, 3 Am. St. Rep. 901.

*New York.* — *People v. Durston*, (County Ct.) 7 N. Y. Crim. 350, *affirmed* 55 Hun (N. Y.) 64, 119 N. Y. 569, 16 Am. St. Rep. 859; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. See *contra*, *Matter of Donohue*, (Supm. Ct.) 1 Abb. N. Cas. (N. Y.) 1, 52 How. Pr. (N. Y.) 251.

*Ohio.* — *Matter of Kline*, 6 Ohio Cir. Ct. 215, 3 Ohio Cir. Dec. 422.

*Texas.* — *Ex p.* Rodriguez, 39 Tex. 705; *Ex p.* Mato, 19 Tex. App. 112; *Ex p.* Kramer, 19 Tex. App. 123. The above cases following the decision of the Supreme Court of the United States in *Ex p.* Siebold, 100 U. S. 371, without, however, assenting to its correctness, overrule the case of *Parker v. State*, 5 Tex. App. 579, which held that the constitutionality of a statute could not be inquired into on habeas corpus.

*Virginia.* — *Ex p.* Rollins, 80 Va. 314.

*Wisconsin.* — *Ex p.* Booth, 3 Wis. 145; *State v. Ryan*, 70 Wis. 676.

If a Conviction Might Have Been under Either One of Two Clauses of a Statute, but the record does not show which, the court will not inquire on habeas corpus into the constitutionality of one of such clauses, because it will not assume that the conviction was under that particular clause. *Ex p.* Morrison, 88 Cal. 112.

1. Inquiry into Constitutionality of Statutes Denied. — *People v. Jonas*, 173 Ill. 316; *Matter of Underwood*, 30 Mich. 502; *Ex p.* Fisher, 6 Neb. 309.

It was formerly held in *Iowa*, *Missouri*, *New York*, and *Texas* that the court could not on habeas corpus inquire into the constitutionality of a statute, but later cases in those states have established the rule to the contrary. See the next preceding note, *Inquiry into Constitutionality of Statute Allowed*.

2. Inquiry into Validity of Warrant. — *In re Macdonnell*, 11 Blatch. (U. S.) 79; *Com. v. McCandless*, 7 Pa. Co. Ct. 51; *Com. v. Trach*, 3 Pa. Co. Ct. 65; *Ex p.* Butler, 7 Luz. L. Reg. (Pa.) 209. See also *Ex p.* Van Hoven, 4 Dill. (U. S.) 415.

Revocation of Warrant. — If the warrant issued by the governor for the arrest of the alleged fugitive from justice has been revoked, as it may be, the grants of the revocation cannot be inquired into. *State v. Toole*, 69 Minn. 104.

3. Inquiry into Jurisdiction. — *In re Adutt*, 55 Fed. Rep. 376; *Sternaman v. Peck*, 80 Fed. Rep. 883.

4. Inquiry as to Identity of Prisoner. — *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

Recital of Return as to Identity. — If the identity of the prisoner is expressly alleged in the return, that question can only be tried in the state that issued the requisition. *Robinson v. Flanders*, 29 Ind. 10; *People v. Conlin*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 303; *People v. Warden*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 370; *Com. v. McCandless*, 7 Pa. Co. Ct. 51.

5. Whether the Alleged Fugitive Is Substantially Charged with a Crime — *United States.* — *Roberts v. Reilly*, 116 U. S. 95. See also *Pearce v. Texas*, 155 U. S. 311; *Ex p.* Reggel, 114 U. S. 643; *Webb v. York*, 79 Fed. Rep. 616.

*California.* — *Ex p.* Spears, 88 Cal. 640.

*Georgia.* — *Barranger v. Baum*, 103 Ga. 465.

*Massachusetts.* — See *Davis's Case*, 122 Mass. 324.

*Mississippi.* — *Ex p.* Devine, 74 Miss. 715, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 630 *et seq.*

*Nebraska.* — See *In re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730.

*New York.* — *People v. Conlin*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 303; *People v. Brady*, 56 N. Y. 182; *People v. Pinkerton*, 77 N. Y. 245. See also *Matter of Heilbonn*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 429.

*North Carolina.* — *Matter of Hughes*, Phil. L. (61 N. Car.) 57.

*Ohio.* — *Ex p.* Larney, (Cinc. Super. Ct.) 4 Ohio N. P. 304.

The Validity of the Affidavit on which the requisition in an extradition proceeding was founded cannot be impeached by the prisoner, if it distinctly charged the commission of an offense. *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

Mode of Proving Law of Demanding State. — In a judicial investigation as to whether the prisoner is substantially charged with the commission of a crime in the demanding state, the court should not be held down to the rigid rule of considering only such proof of the laws of that state as has been formerly tendered in evidence, but it may proceed on its knowledge of the laws of such state. *Barranger v. Baum*, 103 Ga. 465. See also *Craven v. Bates*, 96 Ga. 78; *Herschfeld v. Dixel*, 12 Ga. 582; *Chattanooga, etc., R. Co. v. Jackson*, 86 Ga. 676.

6. Sufficiency of Papers to Authorize Detention. — *Ex p.* Powell, 20 Fla. 806; *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

7. Inquiry as to Whether Prisoner Is a Fugitive from Justice. — *Reilly*, 116 U. S. 80; *Ex p.* Reggel, 114 U. S. 642; *In re Jackson*, 2 Flipp. (U. S.) 183; *In re Bloch*, 87 Fed. Rep. 981; *Ex p.* Smith, 3 Mc-



The Guilt or Innocence of the alleged fugitive, however, cannot be considered in a habeas corpus proceeding, because that question is exclusively for the determination of the court by which the charge is triable, and it cannot be thus decided in advance of the trial.<sup>1</sup>

(7) *Custody under Military Authority.* — Where a prisoner is in custody under a sentence of a court-martial, or is held for trial by such a court, the only inquiry on a writ of habeas corpus sued out by the prisoner or in his behalf, is as to the jurisdiction of the court and the regularity of its proceedings.<sup>2</sup> In the case of a person held in custody by an officer of the army or navy as an enlisted soldier or sailor, or otherwise in the military or naval service, the court, on habeas corpus, may inquire into the facts on which the claim of authority is predicated, *e. g.*, the validity of the enlistment.<sup>3</sup>

(8) *Custody under Civil Process.* — Where a party in custody under a body execution, or other process against the person in a civil action, applies for a writ of habeas corpus to obtain his discharge on the ground that he is illegally detained, the court by which the matter is heard may inquire into the jurisdiction of the court in which such civil action was brought,<sup>4</sup> and the validity of the process under which the party is detained,<sup>5</sup> but this does not involve an examination into the regularity of the proceedings in the action in which the process was issued.<sup>6</sup>

Lean (U. S.) 121. See also *In re Adutt*, 55 Fed. Rep. 376.

*Alabama.* — *Ex p.* State, 73 Ala. 503, 49 Am. Rep. 63, 5 Crim. L. Mag. 539.

*California.* — *Matter of Manchester*, 5 Cal. 237.

*Florida.* — *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

*Indiana.* — *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217.

*Iowa.* — *Jones v. Leonard*, 50 Iowa 106, 32 Am. Rep. 116.

*New York.* — *People v. Byrnes*, 33 Hun (N. Y.) 99, 2 N. Y. Crim. 398; *People v. Warden*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 370.

1. **No Inquiry into Guilt or Innocence of Prisoner** — *United States.* — *In re Roberts*, 24 Fed. Rep. 132; *In re Bryant*, 80 Fed. Rep. 282, 167 U. S. 104; *Ornelas v. Ruiz*, 161 U. S. 502; *In re Luis Oteiza y Cortes*, 136 U. S. 330; *In re Bloch*, 87 Fed. Rep. 981.

*Delaware.* — *State v. Schlemm*, 4 Harr. (Del.) 577.

*Indiana.* — *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217.

*Mississippi.* — *Ex p.* Devine, 74 Miss. 715.

*New York.* — *Matter of Clark*, 9 Wend. (N. Y.) 212.

*Ohio.* — *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345; *Ex p.* Larney, (Cinc. Super. Ct.) 4 Ohio N. P. 304.

2. **Imprisonment by Court Martial.** — See *supra*, this title, *Grounds of Remedy — Custody under Judgments or Orders of Court — Judgments of Courts Martial.*

3. **Validity of Enlistment in Army or Navy.** — See *supra*, this title, *Grounds of Remedy — Custody by Military Officers.*

**The Right of Exemption from Service May Be Considered.** — *Antrim's Case*, 5 Phila. (Pa.) 278, 20 Leg. Int. (Pa.) 300, 1 Fed. Cas. No. 495.

**Officer Acting under Orders of Superior.** — Where a military officer made return to the writ that he declined to obey it at the present time under orders from his superior, which were produced, the court refused to take further action in the matter. *Ex p.* McQuillon, 3

West. L. Month. 440, 9 Pittsb. Leg. J. (Pa.) 27, 16 Fed. Cas. No. 8,924.

4. **Custody under Civil Process — An Inquiry into Jurisdictions.** — See *supra*, this title, *Grounds of Remedy — Custody under Judgments or Orders of Court — Void Judgments and Process.*

5. **Inquiry into Validity of Civil Process** — *Maine.* — *Hanson on Habeas Corpus*, 36 Me. 425.

*Massachusetts.* — *Blake's Case*, 106 Mass. 501; *Com. v. Waite*, 2 Pick. (Mass.) 445.

*New York.* — *Winne v. Houghtaling*, 84 Hun (N. Y.) 166; *People v. Willett*, 26 Barb. (N. Y.) 78, 15 How. Pr. (N. Y.) 210; *People v. Kelly*, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405.

*South Carolina.* — *Gilliam v. McJunkin*, 2 S. Car. 442.

*Vermont.* — *Ex p.* Davis, 18 Vt. 401; *Ex p.* Hatch, 2 Aik. (Vt.) 28.

*Wisconsin.* — *Matter of Blair*, 4 Wis. 522; *Bagnall v. Ableman*, 4 Wis. 163.

**Evidence to Support Order for Capias Cannot Be Examined.** — *Selz v. Presburger*, 49 N. J. L. 396.

**The Sufficiency of the Affidavit on Which a Capias Was Issued will be considered on habeas corpus.** *Nelson v. Cutter*, 3 McLean (U. S.) 326, 17 Fed. Cas. No. 10,104; *In re Vinich*, 86 Cal. 70.

**Where a Bankrupt Is Imprisoned for Debt under state laws, and applies to a federal court for a writ of habeas corpus, that court must determine whether or not the debt is one which would be affected by a discharge in bankruptcy.** *In re Alsberg*, 16 Nat. Bankr. Reg. 116.

**The Commitment of a Defendant to Prison for Nonpayment of a Decree is void under the Constitution of Wisconsin, which provides that no person shall be imprisoned for a debt arising out of or founded on a contract, unless the defendant was first convicted of contempt in failing to make the payment.** *Matter of Blair*, 4 Wis. 522.

6. **No Inquiry into Regularity of Proceedings.** — See *supra*, this title, *Grounds of Remedy — Custody by Military Officers.*

(9) *Habeas Corpus for Admission to Bail.* — The extent of the inquiry on the hearing in a habeas corpus proceeding for admission to bail has been fully treated in another part of this work.<sup>1</sup>

c. **CONFLICTING STATE AND FEDERAL JURISDICTION.** — The federal courts determine the question of their own jurisdiction, and no state court can make any inquiry into it, after the return to a habeas corpus, apprising the state court or judge that the party is in custody under the authority of the United States.<sup>2</sup> But where a party is imprisoned by state authority for an act done in pursuance of a law of the United States, he may obtain relief by application to the federal tribunals; and those courts will inquire into the jurisdiction or power of a state court to sentence a party or to commit him to prison, under an act of the legislature creating or attempting to create the offense for which the prisoner is convicted and for which he is held in custody, and which is in violation of any provision of the Constitution of the United States, a law thereof, or the provisions of a valid treaty.<sup>3</sup> But if a person be imprisoned under the criminal or civil process of a state for acts which do not involve any such conflict of jurisdiction, a federal court cannot take him from such custody for any purpose whatever.<sup>4</sup>

2. **Evidence** — a. **IN GENERAL.** — Because of the summary character of habeas corpus proceedings, the ordinary rules of evidence which obtain in actions are not here applicable in all their strictness.<sup>5</sup> But this principle operates to relax the technical rules of evidence and not to render inadmissible any evidence which would ordinarily be admitted in a judicial proceeding. Thus, the presumption of the legality and regularity of judicial proceedings attaches

to judgments or orders of court — *Errors and Irregularities.*

**Due Service of Summons.** — The court, in a habeas corpus proceeding by a debtor in custody under a body execution, cannot examine into the question whether the summons was duly served on the defendant. *People v. Dunn*, (Supm. Ct. Spec. T.) 54 N. Y. Supp. 104.

**The Existence or Corporate Capacity of the Plaintiff** in whose name a judgment has been recovered cannot be inquired into on habeas corpus by the debtor to obtain his discharge from arrest under the execution. *Ex p. Sargeant*, 17 Vt. 425.

1. **Habeas Corpus for Admission to Bail.** — See the title **BAIL AND RECOGNIZANCE**, vol. 3, p. 666 *et seq.*

2. **Inquiring into Jurisdiction of Federal Courts.** — *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397.

3. **Inquiry into Jurisdiction of State Courts.** — *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397; *In re Wong Yung Quy*, 6 Sawy. (U. S.) 237; *Ex p. Jenkins*, 2 Wall. Jr. (C. C.) 521.

The question of jurisdiction is not affected by the fact that there has been no formal commitment or that the prisoner is not in jail, but the cause of detention will be inquired into although there has been no commitment. *In re McDonald*, 9 Am. L. Reg. 675, 16 Fed. Cas. No. 8,751.

**The Inquiry Is Limited**, where a federal officer petitions for a writ of habeas corpus for release from custody under state process, to the question whether the acts for which he was arrested were done in pursuance of his authority as such officer under the laws of the United States. *In re Marsh*, 51 Fed. Rep. 277.

4. **State Custody for Acts Not Involving Conflict**

**of Jurisdiction.** — *U. S. v. Jailer*, 2 Abb. (U. S.) 267.

The federal courts have no power to issue a writ of habeas corpus to bring up a party serving out a life sentence passed by a state court, for a state offense, for any other purpose than to be used as a witness. This fact appearing in the return, the inquiry ceases. Those courts interfere only where the party is in state custody for violating some federal law, constitution, or treaty. *Ex p. Dorr*, 3 How. (U. S.) 103.

5. **Strict Rules of Evidence Not Enforced in Habeas Corpus Proceedings.** — *Matter of Heyward*, 1 Sandf. (N. Y.) 701.

"The General Principle in the Admission of Evidence is not that courts are restricted by narrower rules in receiving testimony than juries are, but that they, being able to discriminate between that which ought to be listened to and that which should be disregarded, are not prohibited from hearing any evidence which they may think calculated to illustrate the subject before them." *State v. Lyon*, 1 N. J. L. 462. See also *Matter of Mason*, 8 Mich. 70; *Street v. State*, 43 Miss. 1; *People v. Hessing*, 28 Ill. 410; *Ex p. Brown*, 63 Ala. 187; *Ex p. Croom*, 19 Ala. 561. Compare *Copeland v. State*, 60 Ind. 394, in which a judgment in a habeas corpus proceeding was reversed because the judge on the hearing permitted the husband of the petitioner to testify in her behalf.

**Hearsay Evidence** may be admitted in a habeas corpus proceeding, under some circumstances. *Matter of Carleton*, 11 Neb. 99; *State v. McDonald*, 1 N. J. L. 382.

**The Best Evidence Obtainable** will be considered by the court on habeas corpus to determine whether the debt for which the petitioner was imprisoned under a state law was affected



when a party, imprisoned under an order or process of court, seeks relief therefrom on habeas corpus as well as in other cases.<sup>1</sup> So, too, a prisoner may testify in his own behalf under a statute authorizing the parties to civil actions to testify in their own behalf,<sup>2</sup> and the burden is on the petitioner to prove his allegation that the imprisonment or restraint is illegal.<sup>3</sup> As a general rule, however, all the testimony received on the hearing of a habeas corpus should be competent, material, relevant, and pertinent to all the issues of fact involved.<sup>4</sup>

*b.* AVERMENTS OF PETITION. — In a petition for a writ of habeas corpus, verified by the oath of the petitioner, facts duly alleged are ordinarily taken to be true, unless denied by the return or controlled by other evidence.<sup>5</sup>

*c.* AVERMENTS OF RETURN. — The effect of the return as evidence of the matters recited in it has already been considered.<sup>6</sup>

*d.* ORAL AND WRITTEN EVIDENCE. — Oral testimony as well as written may be received in habeas corpus proceedings,<sup>7</sup> but oral evidence is not admissible to contradict a record or to show error in a judicial proceeding.<sup>8</sup>

*e.* AFFIDAVITS. — The use of affidavits in evidence is now authorized by statute both in *England* and in the *United States*,<sup>9</sup> though the practice existed in *England* before the enactment of the statute.<sup>10</sup> Thus, affidavits may be used to enlarge the time of the return,<sup>11</sup> to fortify the return,<sup>12</sup> or to controvert the truth of its recitals;<sup>13</sup> but not to deny the existence of any

by his discharge in bankruptcy. *In re Alsberg*, 16 Nat. Bankr. Rep. 116.

1. Presumptions. — *Cuddy*, Petitioner, 131 U. S. 280; *Ex p. Bizzell*, 112 Ala. 210; *Ex p. Morrison*, 88 Cal. 112; *Ex p. Nicholas*, 91 Cal. 640; *In re Popejoy*, (Colo. 1899) 55 Pac. Rep. 1083; *State on Relation of Rhodes*, 48 La. Ann. 1363.

2. Right of Prisoner to Testify in His Own Behalf. — *In re Reynolds*, 20 Fed. Cas. No. 11,721.

3. Burden of Proof. — *Davis v. Bible*, 134 Ind. 108; *Ex p. Richards*, 102 Ind. 261; *Ex p. Heffren*, 27 Ind. 87; *Ex p. Jones*, 55 Ind. 176; *Matter of Heyward*, 1 Sandf. (N. Y.) 701; *State v. Jones*, 113 N. Car. 669; *Ex p. White*, (Tex. Crim. 1898) 46 S. W. Rep. 639.

4. The Evidence Should Be Competent, Material, Relevant, and Pertinent. — *Broomhead v. Chisholm*, 47 Ga. 390; *American Express Co. v. Patterson*, 73 Ind. 430; *Matter of Snyder*, 17 Kan. 542; *People v. McCormack*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 9.

The Identity of the Prisoner is established by the testimony of a detective that he was present at the session of the grand jury at which one J. was indicted, and that the said J. there referred to was the prisoner. *Matter of Leary*, 10 Ben. (U. S.) 197, 15 Fed. Cas. No. 8,162.

In an Extradition Case a recital in the governor's warrant that the party is a fugitive from justice is conclusive of that fact until it is rebutted by other evidence. *In re Bloch*, 87 Fed. Rep. 981; *People v. Pinkerton*, 77 N. Y. 245.

5. Averments of Petition. — *Whitten v. Tomlinson*, 160 U. S. 231. See also *Ex p. Hunter*, 39 Ala. 560.

6. Effect of Return. — See *supra*, this title, *The Return*.

7. Oral Evidence Admitted. — *Seavey v. Seymour*, 3 Cliff. (U. S.) 439; *Ex p. Jenkins*, 2 Wall. Jr. (C. C.) 546; *State v. Lyon*, 1 N. J. L. 462; *State v. Brearly*, 5 N. J. L. 639.

8. Oral Evidence Not Admissible to Contradict Record — *Alabama*. — *Ex p. Davis*, 95 Ala. 9.

*Connecticut*. — *Whitten v. Spiegel*, 67 Conn. 551.

*Florida*. — *Ex p. Powell*, 20 Fla. 806.

*Kansas*. — *Matter of Watson*, 30 Kan. 753.

*Mississippi*. — *Scott v. State*, 70 Miss. 247, 35 Am. St. Rep. 649.

*Missouri*. — *Ex p. Hollwedell*, 74 Mo. 395.

*Nevada*. — *Ex p. Smith*, 2 Nev. 338.

Where a certified copy of the minutes of the court gives an imperfect description of the crime of which the prisoner was convicted, the prisoner may, on the return of a writ of habeas corpus, show by the records of the court what the precise crime was, but he cannot do this by parol evidence. *People v. Baker*, 89 N. Y. 460.

9. English Statute Authorizing Use of Affidavits in Evidence. — 56 Geo. III., c. 100, § 3.

Statutes Authorizing Use of Affidavits in United States. — *Ex p. Pitts*, 35 Fla. 149; *Ex p. Marx*, 86 Va. 40. See also the various local codes and statutes in the United States.

10. Affidavit Used in Practice Before Enactment of Statute. — *Rex v. Delaval*, 3 Burr. 1434, 1 W. Bl. 412; *State v. Lyon*, 1 N. J. L. 462. See also 1 Tidd's Pr. 347.

11. Affidavits to Enlarge Time of Return. — *Rex v. Clarke*, 3 Burr. 1363.

12. Affidavits to Fortify Return. — *Reg. v. Roberts*, 2 F. & F. 272; *Matter of Power*, 2 Russ. 583; *Matter of Clarke*, 2 Gale & D. 780, 2 Q. B. 619, 42 E. C. L. 835; *People v. Baker*, 89 N. Y. 460.

13. Return May Be Contradicted by Affidavit. — *Watson's Case*, 9 Ad. & El. 731, 36 E. C. L. 254; *Reg. v. Batchelder*, 1 Per. & Dav. 516; *Ex p. Lampon*, 3 Deac. & C. 751; *Ex p. Beeching*, 3 App. from Mag. to K. B. 174, 4 B. & C. 136, 10 E. C. L. 293; *Matter of Eggington*, 2 El. & Bl. 717, 75 E. C. L. 717. See also the express provision of statute 56 Geo. III., c. 100, § 3.



facts found by the court.<sup>1</sup> So, too, affidavits are admissible in proof of facts which, conceding the return to be true, will show the detention to be illegal;<sup>2</sup> and the court may also examine the circumstances of a case where the prisoner has been indicted in order to determine whether or not it be reasonable to bail him.<sup>3</sup>

**3. Decision on Hearing** — *a.* REMAND OR DISCHARGE OF PARTY. — The general rule is that if there is no illegal detention, the court must remand the party to the custody from which release is sought, while in the contrary event he is, of course, entitled to be discharged;<sup>4</sup> and he is entitled to his discharge forthwith on the return to the writ, if no notice of any opposition to the motion for discharge has been given.<sup>5</sup> The various circumstances and conditions which characterize detention as legal or illegal, and therefore require the court to remand the party, or authorize it to discharge him, have already been considered at length.<sup>6</sup> It does not follow, however, from the fact that the process under or the cause for which a party is detained is insufficient to justify his detention, that he will be released as a matter of course. If the commitment on a criminal accusation be insufficient, but the evidence shows sufficient cause for holding the accused, either for the same or another crime, the court or judge before whom he is brought on habeas corpus may hold him

**1. Facts Found by Court Not to Be Contradicted by Affidavit.** — *Matter of Clarke*, 2 Q. B. 619, 42 E. C. L. 835, 2 Gale & D. 780.

**Facts Alleged in Articles of the Peace cannot be controverted on affidavits on a writ of habeas corpus bringing up a party committed by justices for not finding sureties of the peace.** *Reg. v. Dunn*, 12 Ad. & El. 599, 40 E. C. L. 124, 4 Per. & Dav. 405.

**2. Affidavits in Confession and Avoidance.** — *Bac. Abr.*, tit. Habeas Corpus, B 11. See also *London v. Swallow*, Sid. 287, 2 Keb. 50. *Compare Reg. v. Douglas*, 7 Jur. 39, 12 L. J. Q. B. 49.

**Facts Not Appearing on the Face of the Return may be shown by affidavit.** *In re Martin*, 4 Dowl. & L. 768.

**Proof by Affidavit of Circumstances of Arrest.** — Where a return states that a prisoner is detained under civil process, it is competent to him to show by affidavit that he was originally arrested on a Sunday. *Matter of Eggington*, 2 El. & Bl. 717, 75 E. C. L. 717, 18 Jur. 224, 23 L. J. M. C. 41.

**Arrest in Violation of Privilege.** — Where a return discloses a legal imprisonment of a person under civil process, it is competent to him to show by affidavit that the detainer is illegal by reason of his privilege from such arrest. *Ex p. Dakins*, 29 Eng. L. & Eq. 331, 16 C. B. 77, 81 E. C. L. 77, 3 C. L. R. 602, 1 Jur. N. S. 378, 24 L. J. C. Pl. 131.

**Want of Jurisdiction.** — It has been held that want of jurisdiction may be shown by affidavit. *Matter of Bailey*, 3 El. & Bl. 607, 77 E. C. L. 607, 25 Eng. L. & Eq. 240. But see *contra*, *In re Smith*, 3 H. & N. 227, 27 L. J. M. C. 186; *In re Baker*, 2 H. & N. 239; *Brenan's Case*, 10 Q. B. 492, 59 E. C. L. 492.

**3. Examination of Circumstances to Determine Propriety of Taking Bail.** — *Barney's Case*, 5 Mod. 323; *Kirk's Case*, 5 Mod. 454. See also *Bac. Abr.*, tit. Habeas Corpus, B 11.

**4. General Rule — No Illegality of Detention.** *Matter of Peoples*, 47 Mich. 626; *People v. Conlin*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 303; *Matter of Prime*, 1 Barb. (N. Y.) 340;

*People v. Spalding*, 10 Paige (N. Y.) 284, *affirmed* 7 Hill (N. Y.) 301, 4 How. (U. S.) 21.

**Irregular Imprisonment under a Valid Sentence** is not sufficient to entitle a prisoner to be discharged. The court should make such order as is consistent with law and justice. *Reg. v. Mount*, L. R. 6 P. C. 283, 12 Moak 181.

**Identity of Prisoner.** — Where the identity of the prisoner arrested as a deserter is established on a traverse to a return that he was a regularly enlisted soldier, he will be remanded. *Matter of Hamilton*, 1 Ben. (U. S.) 455, 11 Fed. Cas. No. 5,976.

**If the Petitioner Be Found Not Entitled to a Discharge**, the judge has no power to make any other order than one remanding him to his former custody. *People v. Cowles*, 4 Keyes (N. Y.) 38, 3 Abb. App. Dec. (N. Y.) 507, *reversing* (Supm. Ct. Gen. T.) 34 How. Pr. (N. Y.) 481.

**The Only Authority of the Court Is to Remand or Discharge** the prisoner restrained. It has no authority to determine the rights of the parties. *Ferguson v. Ferguson*, 36 Mo. 197; *Com. v. Carlisle*, Bright. (Pa.) 36; *Com. v. Megary*, 8 Phila. (Pa.) 607; *Gerdemann v. Com.*, 11 Phila. (Pa.) 374, 32 Leg. Int. (Pa.) 13.

**If There Be Two Causes of Imprisonment** the court may discharge as to one and remand as to the other. *Ex p. Badgley*, 7 Cow. (N. Y.) 472.

**If No Legal Right of Custody Is Shown or Claimed** in respect to persons brought before the court on return to a writ of habeas corpus, they will be discharged. *Ex p. Queen of the Bay*, 1 Cal. 157.

All questions which the writ presents may be fully examined by the court, and if the imprisonment be found to be illegal the prisoner may be discharged. *Matter of Booth*, 3 Wis. 177.

**5. Prisoner Entitled to Discharge Forthwith on Return to Writ.** — *In re Howard*, 2 Dowl. & L.

**6.** See *supra*, this title, *Grounds of Remedy*, and *supra*, this section, *Extent of Inquiry on Return*.

for further proceedings or may commit him *de novo*,<sup>1</sup> provided such court or judge has the power of a committing magistrate in respect to the offense shown, without which the accused must be discharged,<sup>2</sup> and generally to dispose of the party, in any case, as law and justice may require.<sup>3</sup>

In Case of a Void Conviction, and commitment to the penitentiary pursuant thereto, the commitment will be set aside on habeas corpus, but the prisoner will be remanded to the sheriff of the proper county to be proceeded against according to law for the offense with which he is charged.<sup>4</sup>

**1. Recommitment of Prisoner — England.** — *Rex v. Marks*, 3 East 157; *Bethell's Case*, 1 Salk. 348; *Ex p. Krans*, 1 B. & C. 258, 8 E. C. L. 110, 2 Dowl. & R. 411, 1 Chit. Crim. L. 132; *Rex v. Judd*, 2 T. R. 255; *Matter of Parker*, 5 M. & W. 32.

*United States.* — *Iasigi v. Van De Carr*, 166 U. S. 391; *Nishimura Ekiu v. U. S.*, 142 U. S. 651; *Ex p. Bennett*, 2 Cranch (C. C.) 612, 3 Fed. Cas. No. 1,311; *U. S. v. Johns*, 4 Dall. (U. S.) 412, 1 Wash. (U. S.) 363; *Ex p. Burford*, 3 Cranch (U. S.) 448; *U. S. v. Johnson*, 1 N. J. L. J. 162, 26 Fed. Cas. No. 15,487.

*California.* — *Ex p. Branigan*, 19 Cal. 133.

*Colorado.* — *In re Smith*, 4 Colo. 532.

*Florida.* — *Ex p. Harfourd*, 16 Fla. 283, 13 Am. L. Rev. 543.

*Indiana.* — *State v. Best*, 7 Blackf. (Ind.) 611.

*Iowa.* — *State v. Ross*, 21 Iowa 467.

*Maryland.* — *Parrish v. State*, 14 Md. 238.

*Nebraska.* — *Matter of Balcom*, 12 Neb. 316.

*Nevada.* — *Ex p. Ricord*, 11 Nev. 287.

*New Jersey.* — *Nicholls v. State*, 5 N. J. L. 621.

*New York.* — *Ex p. Tayloe*, 5 Cow. (N. Y.) 39; *Ex p. Smith*, 5 Cow. (N. Y.) 273; *Matter of Percy*, 2 Daly (N. Y.) 530; *People v. Rhoner*, (Supm. Ct.) 4 Park. Crim. (N. Y.) 166.

*Pennsylvania.* — *Com. v. Crans*, 3 Pa. L. J. 442, 2 Clark (Pa.) 172; *Com. v. Carlisle*, Bright. (Pa.) 36; *Dow's Case*, 18 Pa. St. 37.

*Wisconsin.* — *State v. Bloom*, 17 Wis. 521.

In order to enable a judge to remand a prisoner brought before him on habeas corpus, where the commitment is insufficient to authorize his detention, the testimony must be before the judge on the return of the writ or at the hearing thereon. It is too late to present the testimony on a subsequent day when the judge announces his decision to discharge the prisoner. *Matter of Heyward*, 1 Sandf. (N. Y.) 701.

If the Proceeding Is Brought in the Wrong County, the prisoner may be recognized to appear before the court having jurisdiction of the offense. *Parrish v. State*, 14 Md. 238.

Where an Indictment Is Quashed or a Nolle Provs Is Entered, the indictment, though *functus officio*, remains a sworn accusation, and is sufficient to warrant the court in remanding the prisoner to answer a new indictment. *In re Smith*, 4 Colo. 532.

**Holding Accused for Prosecution on New Charge.** — Where the petitioner was committed for kidnapping, and though there was no evidence thereof there was evidence of false imprisonment and assault, the court held him under the commitment pending the filing of proper informations by the district attorney. *Ex p. Keil*, 85 Cal. 309. See also *People v. Smith*, 1 Cal. 9; *Com. v. Hickey*, 2 Pars. Eq. Cas. (Pa.)

317, 1 Clark (Pa.) 436, 3 Pa. L. J. 86; *Ex p. Burriess*, (Tex. Crim. 1897) 40 S. W. Rep. 730.

**2. Power to Recommit Prisoner.** — *Ex p. Bes-set*, 6 Q. B. 481, 51 E. C. L. 481.

In Pennsylvania all the judges of the Court of Common Pleas are *ex officio* magistrates when authorized to hold to bail or commit any one charged with crime. *Com. v. Hickey*, 2 Pars. Eq. Cas. (Pa.) 317.

**3. Disposition of Party as Law and Justice Require.** — *Rev. Stat. U. S.*, § 761; *Gut Lun*, 84 Fed. Rep. 323; *Russell v. Tatum*, 104 Ga. 332; *Com. v. Wetherhold*, 2 Clark (Pa.) 476, 4 Pa. L. J. 265. See also the various local codes and statutes in the United States.

**Remanding Case to State Court.** — Where a habeas corpus is sued out of a federal court for the purpose of releasing persons confined under a state law alleged to be in violation of the Constitution of the United States, such court will not consider itself bound to remand the case to the state court, where the circumstances are such that delay in obtaining a decision on the validity of the law would cause great injury to commerce. *Ex p. Jervey*, 66 Fed. Rep. 957, following *Minnesota v. Barber*, 136 U. S. 313; *In re Van Vliet*, 43 Fed. Rep. 764.

**Lunatics Confined Without Legal Commitment.** — On habeas corpus for the release of a person who is confined on the ground of insanity without a legal commitment, the court may refuse to discharge him if his enlargement would be perilous to himself or others. *Matter of Shuttleworth*, 9 Q. B. 651, 58 E. C. L. 651.

This question has also been considered in *Pennsylvania*, where it was held that if there had not been any inquisition of lunacy, the judge should not remand the alleged lunatic, except upon an evident and stern necessity for continuing the confinement, which was not found to exist in either of the cases before the court. *Com. v. Kirkbride*, 2 Brews. (Pa.) 400; *Com. v. Kirkbride*, 2 Brews. (Pa.) 419. See also *King v. McLean Asylum*, 64 Fed. Rep. 331, 21 U. S. App. 481, holding that where a person had been committed to a lunatic asylum, the court should not discharge him because of defects in the commitment, unless it was shown that he was sane at the time of the hearing. And in *Ex p. Greenwood*, 1 Jur. N. S. 522, 24 L. J. M. C. 137, it was held that if a person is detained as an alleged lunatic, in a private house licensed for the reception of lunatics under 16 & 17 Vict., c. 96, sched. A, No. 2, by virtue of a medical certificate which is bad in form, he will be discharged on habeas corpus, on the ground that the detention is illegal, unless it is shown that it would be injurious to himself or others to set him at liberty.

**4. Void Conviction — Remand for Further Proceedings.** — *Ex p. Jones*, 27 Ark. 349.



If the Judgment Is Unauthorized, while the conviction is valid, the court, on habeas corpus, will not discharge the prisoner, but will remand him to the custody of the proper officer, in order that further proceedings may be had according to law, or at least will delay a discharge so as to allow a reasonable time for the prosecuting officer to have the judgment corrected.<sup>1</sup>

b. EFFECT OF DECISION — (1) *Remanding Prisoner*. — A decision, in a habeas corpus proceeding, refusing to discharge a prisoner and remanding him to custody, is generally held, in the absence of any statutory regulation of the subject, not to operate as *res judicata*, and therefore not to bar the issuing of other successive writs by any court or magistrate having jurisdiction,<sup>2</sup> and *a fortiori* is not a bar to a subsequent action based on the alleged illegality of the imprisonment;<sup>3</sup> though some authorities regard it as an open question whether or not the decision operates as *res judicata*,<sup>4</sup> while others hold that the decision is a bar to subsequent applications involving the same question,<sup>5</sup> and in some jurisdictions the matter is subject to statutory regulation.<sup>6</sup> But, notwithstanding the rule that the doctrine of *res judicata*

1. Void Sentence under Valid Conviction. — *In re Bonner*, 151 U. S. 242; *In re Mills*, 135 U. S. 263; *In re Christian*, 82 Fed. Rep. 199; *Garvey's Case*, 7 Colo. 384, 49 Am. Rep. 358; *Wentworth v. Alexander*, 66 Ind. 39; *People v. Kelly*, 97 N. Y. 212, *affirming* 32 Hun (N. Y.) 536; *Re Harris*, 68 Vt. 243.

If the Trial Court Becomes Functus Officio When the Sentence Is Pronounced, as in case of the Court of Special Sessions in New York, an excessive sentence is void, and, on habeas corpus, no other order than for the discharge of the prisoner can be made. *People v. Carter*, 48 Hun (N. Y.) 165, 14 Civ. Pro. (N. Y.) 241; *People v. Riseley*, 38 Hun (N. Y.) 280, 4 N. Y. Crim. 109. See also *In re Fury*, 19 N. J. L. J. 14.

2. Refusal to Discharge Not a Bar to Subsequent Applications. — *England*. — *Rex v. Suddis*, 1 East 306; *Ex p. Partington*, 2 Dowl. & L. 650, 13 M. & W. 679; *Cox v. Hakes*, 15 App. Cas. 506. *United States*. — *Ex p. Kaine*, 3 Blatchf. (U. S.) 1, 14 Fed. Cas. No. 7,597; *Matter of Reynolds*, (U. S. Dist. Ct.) 6 Park. Crim. (N. Y.) 276; *In re Reynolds*, 20 Fed. Cas. No. 11,721; *Ex p. Cuddy*, 40 Fed. Rep. 65.

*California*. — *Matter of Ring*, 28 Cal. 247; *Matter of Perkins*, 2 Cal. 424.

*Kentucky*. — *Ex p. Alexander*, (Ky. 1853) 2 Am. L. Reg. 44; *Maria v. Kirby*, 12 B. Mon. (Ky.) 542.

*Louisiana*. — *Ex p. Mitchell*, 1 La. Ann. 413.

*Maryland*. — *Coston v. Coston*, 25 Md. 500; *Bell v. State*, 4 Gill (Md.) 301, 45 Am. Dec. 139.

*Minnesota*. — *In re Snell*, 31 Minn. 110.

*Missouri*. — *Ex p. Turner*, 36 Mo. App. 75, reciting the Missouri statute which provides that if a prisoner who has been remanded shall obtain a second writ of habeas corpus, it shall be the duty of the officer or other person on whom the same shall be served to return therewith the order remanding the prisoner, and if it appears that the prisoner was remanded for an offense adjudged not bailable, the prisoner shall be forthwith remanded without further proceedings.

*New York*. — *People v. Brady*, 56 N. Y. 182; *People v. Hurlburt*, (Supm. Ct.) 67 How. Pr. (N. Y.) 362. See also *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. Some earlier decisions in New York hold that the principle of

*res judicata* applies to decisions in habeas corpus proceedings. *Matter of Da Costa*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 129; *People v. Burtnett*, (N. Y. Super. Ct.) 5 Park. Crim. (N. Y.) 113, 13 Abb. Pr. (N. Y.) 8; *Matter of Place*, (C. Pl.) 34 How. Pr. (N. Y.) 259. See also *People v. Fancher*, 1 Hun (N. Y.) 27, 3 Thomp. & C. (N. Y.) 189. On examination of these cases, however, it appears that all except the last one were decided on the authority of *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653, where the controversy related merely to the right to the custody of an infant child, and the subsequent decision of the Court of Appeals (*People v. Brady*, 56 N. Y. 182), laying down the rule stated in the text, calls attention to this distinguishing fact, and in effect overrules these cases.

*Pennsylvania*. — *Com. v. Biddle, Bright*, (Pa.) 447, 4 Clark (Pa.) 35, 6 Pa. L. J. 287. See also *Ex p. Lawrence*, 5 Binn. (Pa.) 304.

*Wisconsin*. — *Matter of Blair*, 4 Wis. 532.

3. Effect as to Subsequent Action. — *Bradley v. Beetle*, 153 Mass. 154.

4. Effect of Decision Refusing to Discharge Considered an Open Question. — *Ex p. Robinson*, 6 McLean (U. S.) 355, 20 Fed. Cas. No. 11,935, in which case Judge McLean said that every one who examines the authority in this country and in England will find that there has been diversity of judgments on the point whether the decision on a habeas corpus is final.

5. Refusal to Discharge Held a Bar to Subsequent Applications. — *In re Simmons*, 45 Fed. Rep. 241. See also *Ex p. West*, 100 Ala. 65.

6. Decision on Habeas Corpus Made Conclusive by Statute — *Mississippi*. — *Ex p. Pattison*, 56 Miss. 161; Annot. Code Miss. (1892), § 2247. But this statute applies only as to matters which were or might probably have been investigated on the hearing. A second application may be maintained on subsequently occurring facts, but not merely on a claim of newly discovered evidence as to old facts. *Ex p. Pattison*, 56 Miss. 161; *Ex p. Bridewell*, 57 Miss. 177; *Ex p. Hamilton*, 65 Miss. 98; *Ex p. Nichols*, 62 Miss. 158.

The *Texas* statute confers the right to make a second application in two classes of cases:



does not apply, it is held that the officer before whom the second application was made may take into consideration the fact that a previous application had been made and refused, and in some instances that may justify a refusal of the second.<sup>1</sup>

**Remedy by Appeal.** — When the right is given to appeal from the decision of the court in a habeas corpus case, it is held that such a judgment is *res judicata* as to all points which are necessarily involved in the general question of the legality or illegality of the detention, whether all of them were actually presented or not.<sup>2</sup>

(2) *Discharge of Prisoner.* — The decision of a court or judge discharging a prisoner on habeas corpus stands on an entirely different footing from a decision refusing to discharge him. The authorities, probably without exception, hold that when a discharge has been granted, the issues of law and fact involved are *res judicata*, and that the person so discharged cannot lawfully be again arrested for the same cause,<sup>3</sup> unless the discharge was void for some

first, where important testimony has been obtained, which, though not newly discovered, or which, though known to him, it was not in the power of the party to produce at the former hearing; second, where the evidence is newly discovered. *Ex p. Foster*, 5 Tex. App. 625, 32 Am. Rep. 577; *Ex p. Rosson*, 24 Tex. App. 226; Code Crim. Pro. Tex. (1895), art. 209.

**1. Effect of Previous Refusal Considered on Second Application.** — *Ex p. Cuddy*, 40 Fed. Rep. 62; *Ex p. Campbell*, 20 Ala. 89; *Ex p. Lawrence*, 5 Binn. (Pa.) 304. See also *Ex p. Alexander*, (Ky. 1853) 2 Am. L. Reg. 44.

**2. Effect of Remedy by Appeal.** — *Perry v. Mc-Lendon*, 62 Ga. 598; *Miller v. State*, 43 Tex. 581.

**3. Effect of Discharge — Res Judicata — United States.** — *U. S. v. Chung Shee*, 71 Fed. Rep. 277.

*Alabama.* — *Ex p. Cameron*, 100 Ala. 395.

*California.* — *Grady v. Superior Ct.*, 64 Cal. 155.

*Kansas.* — *In re Crandall*, 59 Kan. 671.

*Massachusetts.* — *McConologue's Case*, 107 Mass. 154.

*Minnesota.* — *State v. Holm*, 37 Minn. 405.

*Missouri.* — *Ex p. Jilz*, 64 Mo. 205, 27 Am. Rep. 218, overruling the decision of the Court of Appeals in the same case, 3 Mo. App. 243, so far as the two decisions are conflicting.

*New York.* — *Yates v. People*, 6 Johns. (N. Y.) 337; *Snyder v. Van Ingen*, 9 Hun (N. Y.) 569, holding that after a discharge from a commitment for contempt, it is error to re-convict for the same contempt and impose new penalties.

*Pennsylvania.* — *Com. v. McBride*, 2 Brews. (Pa.) 545.

*Wisconsin.* — *In re Crow*, 60 Wis. 349.

A person who has been discharged on habeas corpus by a valid order of a court having jurisdiction of the writ cannot lawfully be re-arrested under the same process. *Bagnall v. Ableman*, 4 Wis. 163.

**Exoneration of Officer.** — The officer having charge of a prisoner whose release has been ordered on habeas corpus may discharge him, and he will not be liable for so doing however improper or erroneous such order may be. *Martin v. State*, 12 Mo. 471. See also *Hathaway v. Holmes*, 1 Vt. 405.

**Discharge Because of Privilege from Arrest while in attendance at court** is no bar to a subse-

quent arrest for the same cause. *Eldred v. Wright*, 2 Vt. 462.

**The Discharge of a Prisoner for Delay in Bringing the Charge to Trial** operates as an acquittal of the offense, and he cannot afterwards be arrested on the same charge. *McGuire v. Wallace*, 109 Ind. 284.

**A Distinction in Extradition Cases** has been recognized, and it has been held that the principle of *res judicata* could not be applied where a fugitive from justice was arrested a second time on a second warrant issued by the governor in an extradition proceeding, though the offense charged in each warrant was the same. *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

**The Right of a Slave to Freedom in Virginia** was held not to be established by a discharge of the slave on habeas corpus in *Ohio*, where she was staying temporarily with the consent of her master. *Lewis v. Fullerton*, 1 Rand. (Va.) 15.

**The Right of a Chinese Person to Come into the United States** is conclusively adjudicated by a decision in habeas corpus discharging her from detention on board ship, where she was kept on the ground that she had no right to land. *U. S. v. Chung Shee*, 71 Fed. Rep. 277.

**Conflict of Jurisdiction.** — Where a United States marshal is discharged by a federal court from the custody of state officers by whom he is held for an alleged violation of state laws while acting in the performance of his duty as such marshal, his exemption from liability to prosecution in the state courts is thereby conclusively determined. *In re Neagle*, 135 U. S. 1.

**Statutes.** — The English Habeas Corpus Act of 31 Car. II. provides that no person once delivered by habeas corpus shall be recommitted for the same offense on a penalty of five hundred pounds. See *supra*, this title, *History of Habeas Corpus under English Statutes*.

But this provision applies only when the second arrest is substantially for the same cause as the first. *Atty.-Gen. v. Knock-a-Sing*, 42 L. J. C. Pl. 64, 29 L. T. N. S. 114.

Statutes with provisions more or less similar are found in the United States. See *Ex p. Cameron*, 100 Ala. 395; *Ex p. Jilz*, 64 Mo. 205, 27 Am. Rep. 218; *Barbee v. Weatherspoon*, 88 N. Car. 19. See also the various local codes and statutes in the United States.

reason.<sup>1</sup> But usually this rule is applicable only when the facts on which the charge is based are the same as those which had been adjudged insufficient in the habeas corpus proceeding, and this must appear.<sup>2</sup> The effect, as *res judicata*, of an order discharging a prisoner held on a criminal charge does not operate in any case as an acquittal of the crime, and, though it terminates the pending proceeding, it does not prevent the institution of a subsequent prosecution on the same charge.<sup>3</sup> Therefore, a discharge from a commitment after a preliminary examination will not bar a second commitment at another preliminary examination, unless it appears that the evidence was the same on both examinations.<sup>4</sup> So, too, a discharge from custody under a warrant or commitment which is void on its face will not bar another arrest and commitment under a valid and legal warrant.<sup>5</sup>

13) *Awarding Custody of Children.* — Where the purpose of a writ of habeas corpus is to obtain the custody of children, the decision of the court in regard to the right of custody becomes *res judicata* and bars a second application on the same facts,<sup>6</sup> but if a different state of facts and circumstances can be shown a second application may be entertained.<sup>7</sup>

**XI. CUSTODY PENDING HEARING.** — It has already been observed that the writ of habeas corpus is paramount to and supersedes all other writs and processes under which the party may be detained.<sup>8</sup> Therefore, the rule at com-

1. **Void Discharge Not Bar to Rearrest.** — *Ex p.* Montgomery, 64 Ala. 463; *Vorce v. Oppenheim*, 37 N. Y. App. Div. 69.

If a commissioner without authority to do so discharge a party from imprisonment for a contempt, his order is a nullity, and the court may direct a recommitment. *People v. Spalding*, 10 Paige (N. Y.) 284, *affirmed* 7 Hill (N. Y.) 301, 4 How. (U. S.) 21.

**Discharge from Custody under Civil Process.** — If a judge discharge a defendant in custody under execution in a civil suit, without notice to the plaintiff, the discharge is void and the defendant may be retaken in execution. *Hecker v. Jarret*, 3 Binn. (Pa.) 404.

2. **Limitation of Rule — Proof of Similar Facts.** — *Ex p.* Powell, 20 Fla. 806; *Walker v. Martin*, 43 Ill. 508; *Morganfield v. Archibald*, 10 Ohio Cir. Ct. 40, 6 Ohio Cir. Dec. 391.

In order for a discharge under habeas corpus to operate as *res judicata*, the process must be for the same offense and issued under the same judgment. *Res judicata*, in such case, cannot be pleaded when the discharge in any case has been ordered on account of the non-observance of any of the forms required by law, and the party is again arrested for imprisonment by legal process for sufficient cause, according to the forms required by law. *State v. Schierhoff*, 103 Mo. 47.

3. **Discharge Not a Bar to a Subsequent Prosecution on Same Charge.** — *Matter of Clync*, 52 Kan. 441; *State v. Fley*, 2 Brev. (S. Car.) 338, 4 Am. Dec. 583; *Ex p. Booth*, 3 Wis. 145.

A prisoner who has been discharged on habeas corpus, because the extradition commissioner had no jurisdiction to act judicially on the complaint before him, may be again arrested and tried before a commissioner having jurisdiction over the complaint. *Ex p.*

**If an Indictment Be Found Against the Prisoner After He Has Been Discharged on habeas corpus**, he may, by express statutory provision in some jurisdictions, be again arrested notwithstanding such discharge. *Ex p. Cameron*, 100 Ala. 395, *Walker v. Martin*, 43 Ill.

508. See also the various local codes and statutes in the United States.

4. **New Facts Arising After Discharge.** — *People v. Smith*, 79 Cal. 554.

**Where a Prisoner Is Discharged from Custody for Want of Sufficient Evidence**, if other evidence of the defendant's guilt is afterwards found and produced he may still be prosecuted, and the former proceeding constitutes no bar. *Matter of Clync*, 52 Kan. 441. See also *Weir v. Marley*, 99 Mo. 484.

5. **Discharge from Custody under Void Warrant or Commitment — Canada.** — *In re Carmichael*, 1 U. C. L. J. N. S. 243.

*Alabama.* — *Ex p. Cameron*, 100 Ala. 395.

*Michigan.* — *Matter of Reinheimer*, 97 Mich. 619.

*North Carolina.* — *Barbee v. Weatherspoon*, 88 N. Car. 19.

*Pennsylvania.* — *Com. v. Little*, 33 W. N. C. (Pa.) 486.

*Vermont.* — *In re Durant*, 60 Vt. 176.

6. **Decision as to Custody of Children — Operation as Res Judicata — District of Columbia.** — *Slack v. Perrine*, 9 App. Cas. (D. C.) 128.

*Iowa.* — *Kuhn v. Breen*, 101 Iowa 665; *Bonnett v. Bonnett*, 61 Iowa 199, 47 Am. Rep. 810; *Drumb v. Keen*, 47 Iowa 435; *Shaw v. Nachtwey*, 43 Iowa 653.

*Michigan.* — *Matter of Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435, *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 238.

*Minnesota.* — *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854.

*New York.* — *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; *People v. Moss*, 6 N. Y. App. Div. 414; *People v. Dewey*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 267, *Matter of Price*, 12 Hun (N. Y.) 508; *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec.

7. **Application Made on New Facts.** — *People v. Cooper*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644.

8. See *supra*, this title, *Nature and Scope of*



mon law is that on the return of the writ and the production of the body of the party by whom or for whose benefit it is sued out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safekeeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded.<sup>1</sup> In some jurisdictions the matter of the custody of a prisoner pending habeas corpus proceedings is regulated by statute.<sup>2</sup>

**XII. COMPELLING OBEDIENCE TO WRIT.** — Obedience to the writ of habeas corpus may always be compelled by the process of attachment for contempt, and, at common law, this was the only coercive process available.<sup>3</sup> The

**1. Writ of Habeas Corpus Terminates Original Custody.** — *Rex v. Bethel*, 5 Mod. 22; *Barth v. Clise*, 12 Wall. (U. S.) 400; *In re Kaine*, 14 How. (U. S.) 103; *Matter of Hamilton*, 1 Ben. (U. S.) 455; *Matson v. Swanson*, 131 Ill. 255, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 200; *State v. Sparks*, 27 Tex. 705. *Compare State v. Wilson*, 38 Conn. 126. In this case the prisoner, while in the state prison under sentence, killed the warden. An indictment for murder having been found against him, he was brought up, on a writ of habeas corpus, for trial on that indictment. In regard to the question whether the writ took the prisoner out of the custody of the warden, it was said that when an officer produces the body of a prisoner before the court, pursuant to the command of a writ of habeas corpus *cum causa*, both are subject to the order of the court, but the custody of the prisoner is unaffected until determined by an order of the court. If the court decides the custody to be lawful, there is usually, in form, an order of remand, but it is a form of dismissing the cases merely, for the officer in contemplation of law has not been deprived of that custody.

**Liability for Escape.** — In *Barth v. Clise*, 12 Wall. (U. S.) 400, it was held that where a sheriff produced the body of a prisoner before a judge, on a writ of habeas corpus, his duties as the custodian of the prisoner ceased until he was remanded, and the flight of the prisoner while before the judge was not an escape from the custody of the sheriff.

**The Power of the Court by which the Original Commitment Was Made** ceases on the return to a writ of habeas corpus, by express provision of the *Texas* statute, and such court cannot thereafter make any order in the matter. *Ex p. Kearby*, 35 Tex. Crim. 531.

**2. Statutory Provisions as to Custody.** — The *Idaho* statute (Rev. Stat. 1887, § 8361) provides that until judgment is given on the return, the court or judge before whom any party may be brought on a writ of habeas corpus may commit him to the custody of the sheriff of the county, or place him in such care or under such custody as his age or circumstances may require. *In re Dowling*, (Idaho 1896) 43 Pac. Rep. 871. See also *In re Miller*, (Idaho 1896) 43 Pac. Rep. 870.

To the same effect is the *New York* statute (Code Civ. Pro., § 2037). *People v. Grant*, (Supm. Ct.) 19 N. Y. St. Rep. 906.

See also the various local codes and statutes in the United States.

**Custody Pending Appeal to a Supreme Court of the United States.** — Rev. Stat. U. S., § 765, provides that the appeals allowed by the two preceding sections shall be taken under such regulations and orders, *inter alia*, for the custody and appearance of the person alleged to be in prison, or confined, or restrained of his liberty, as may be prescribed by the Supreme Court. Pursuant to this statute, rule 34 of the Supreme Court provides that pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, custody of the prisoner shall not be disturbed. Under this statute and rule of court, it has been held that where a person in a state prison under sentence of the state court has appealed to the Supreme Court of the United States from the refusal of the Circuit Court to grant a writ of habeas corpus, he cannot base a second application on the fact that he is kept by the warden at hard labor, an alleged violation of section 766 of the Revised Statutes. *In re McKane*, 61 Fed. Rep. 205.

**3. Compelling Obedience to Writ — Attachment for Contempt — England.** — *Ex p. Bosen*, Ken. K. B. 289; *Crowley's Case*, 2 Swanst. 68, 1 Buck. 264; *Reg. v. Barnardo*, 58 L. J. Q. B. 553, 23 Q. B. D. 305, 61 L. T. N. S. 547, 37 W. R. 789, 54 J. P. 132; *Ex p. Harrison*, 2 Smith 408.

*United States.* — *U. S. v. Green*, 3 Mason (U. S.) 482; *U. S. v. Bollman*, 1 Cranch (C. C.) 373; *U. S. v. Williamson*, (U. S. Dist. Ct. 1854) 3 Am. L. Reg. 729, 4 Am. L. Reg. 5.

*Georgia.* — *State v. Philpot*, Dudley (Ga.) 46.

*Indiana.* — *Speer v. Davis*, 38 Ind. 271.

*Nebraska.* — *Nebraska Children's Home Soc. v. State*, (Neb. 1899) 78 N. W. Rep. 267.

*New Jersey.* — *State v. Raborg*, 5 N. J. L. 628; *Patterson v. State*, 49 N. J. L. 326.

*New York.* — *U. S. Bank v. Jenkins*, 18 Johns. (N. Y.) 305; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Matter of Stacy*, 10 Johns. (N. Y.) 328; *People v. Winston*, 31 N. Y. App. Div. 121; *People v. Gaul*, 44 Barb. (N. Y.) 98.



attachment originally issued, it seems, immediately the disobedience occurred,<sup>1</sup> but in the course of time it became the practice to delay obedience until a *pluries* writ issued, and this practice continued until the passage of the great Habeas Corpus Act of 31 Car. II.<sup>2</sup> By that statute obedience within a time specified was required,<sup>3</sup> and since then it has been held that if the first writ be not obeyed, an attachment must issue immediately.<sup>4</sup> The English statutes also prescribe a penalty to go to the person injured,<sup>5</sup> and this provision is usually incorporated in the American statutes on the subject.<sup>6</sup>

**XIII. REMEDY FOR DENIAL OF WRIT.** — If the judge before whom a habeas corpus proceeding is pending refuses to proceed to hear and determine it, he may be compelled to act by a writ of mandamus,<sup>7</sup> and it has been held that mandamus will lie to compel the granting of a writ of habeas corpus,<sup>8</sup> apparently on the theory that granting the writ is merely a ministerial act.<sup>9</sup> This view would seem, however, to be at variance with the numerous cases cited elsewhere in this article, to the effect that the writ is not grantable of course, but only on probable cause shown,<sup>10</sup> and it has been expressly held that mandamus will not lie to compel a judge to grant a writ of habeas corpus.<sup>11</sup>

**Penalty for Refusal to Grant Writ.** — In *England* and in many of the *United States* it is provided by statute that if the judge refuses to grant the writ when he should have granted it, or is guilty of delay, he shall forfeit a certain sum to the person injured.<sup>12</sup> In some jurisdictions it is held that the penalty does

*Pennsylvania.* — *Com. v. Reed*, 59 Pa. St. 425.

*Wisconsin.* — *Matter of Booth*, 3 Wis. 1; *In re Kemp*, 16 Wis. 379.

**Peers Are Not Privileged to Disobey the Writ,** and an attachment may issue in such a case. *Rex v. Ferrers*, 1 Burr. 631.

**A Jailer Who Acted as a Mere Servant of the officer in disobeying the writ is not punishable for contempt.** *Ex p. Field*, 5 Blatchf. (U. S.) 63.

**Conflict Between Civil and Military Authority.** — In *Matter of Winder*, 2 Cliff. (U. S.) 89, where the service of a writ of habeas corpus was prevented by armed soldiers of the United States, under the command of the officer to whom the writ was directed, the court ordered that it be placed on the files to be served when opportunity might offer.

**1. Immediate Attachment at Common Law for Disobedience.** — *Ex p. Bosen*, 2 Ken. K. B. 289.

**2. Obedience Not Compelled until Issue of *Pluries* Writ.** — See *supra*, this title, *History of Habeas Corpus under English Statutes*.

**3. The Substance of the Habeas Corpus Act is set out *supra*,** this title, *History of Habeas Corpus under English Statutes*.

**4. Ruling that Attachment Must Issue on Disobedience of First Writ.** — *Rex v. Winton*, 5 T. R. 89; *Rex v. Ferrers*, 1 Burr. 631; *Rex v. Wright*, 2 Stra. 915.

**5. Penalty Prescribed by English Statute.** — See *supra*, this title, *History of Habeas Corpus under English Statutes*, where the substance of the provisions of 31 Car. II. is recited.

By 56 Geo. III., c. 100, power was given to the judge issuing the writ in vacation to issue his warrant for the arrest of the disobedient party, and to require him to enter into a recognizance with the sureties to appear and answer the matter of his contempt. See also *Ex p. Wyatt*, 5 Dowl. P. C. 389, W. W. & D. 76.

**6. Penalty for Disobedience Prescribed by Stat-**

**ute in United States.** — *Bethuram v. Black*, 11 Bush (Ky.) 628; *Hecker v. Jarrett*, 1 Binn. (Pa.) 374; *Schofield v. Root*, 12 Phila. (Pa.) 333, 35 Leg. Int. (Pa.) 384; *Beyer v. Vanderkuhlen*, 48 Wis. 320. See also the various local codes and statutes in the United States.

**7. Mandamus to Compel Judge to Hear and Determine Proceeding.** — *Ex p. Charleston*, 107 Ala. 688; *Ex p. Champion*, 52 Ala. 311; *Ex p. Mahone*, 30 Ala. 49, 68 Am. Dec. 111.

**8. Mandamus to Compel Issue of Habeas Corpus.** — *Wright v. Johnson*, 5 Ark. 687; *Ex p. Allis*, 12 Ark. 101; *Ex p. Good*, 19 Ark. 410.

**9. Issuing Writ of Habeas Corpus Considered Ministerial Act.** — *People v. Nash*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 473, 16 Abb. Pr. (N. Y.) 281, 25 How. Pr. (N. Y.) 307. But see *contra*, *People v. Russel*, (Supm. Ct. Gen. T.) 1 Abb. Fr. N. S. (N. Y.) 230.

**10. See *supra*,** this title, *Nature and Scope of Remedy* — *In General*.

**11. Rule that Granting of Writ Cannot Be Compelled by Mandamus.** — *Ex p. Jones*, 94 Ala. 33; *People v. Russel*, (Supm. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 230. See also *Wade v. Judge*, 5 Ala. 130; *Ex p. Champion*, 52 Ala. 311; *Ex p. Shaudies*, 66 Ala. 134; *Ex p. Dunklin*, 72 Ala. 241.

**12. Penalty Prescribed by Statutes in England.** — See *supra*, this title, *History of Habeas Corpus under English Statutes*, note *Habeas Corpus Act of 31 Car. II., c. 2*.

**Penalty Prescribed by Statutes in United States.** — *State v. Dobson*, 135 Mo. 1; *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *People v. Nash*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 473, 16 Abb. Pr. (N. Y.) 281, 25 How. Pr. (N. Y.) 307, 36 N. Y. 607; *Williamson v. Lewis*, 39 Pa. St. 9.

**It Is Only When the Writ May Lawfully Issue** that the *Missouri* statute makes the judge liable for a penalty for refusing to issue it. *State v. Dobson*, 135 Mo. 1.

not attach when the application is made in term,<sup>1</sup> while in others it is held that a refusal either in term time or in vacation renders the judge liable,<sup>2</sup> and some of the statutes expressly so provide.<sup>3</sup>

**XIV. SUSPENSION OF WRIT — 1. In England.** — Notwithstanding the jealous care with which the English people have always guarded the writ of habeas corpus as the great bulwark of personal liberty, and the firmness with which they have resisted all attempted encroachments on their right, by means of this writ, to have an inquiry into the legality of any imprisonment or restraint, still occasions have arisen when it was deemed necessary to suspend the operation of the habeas corpus laws for a limited time, and the Parliament has, accordingly, in several instances passed suspension acts.<sup>4</sup>

**2. In the United States — a. CONSTITUTIONAL PROVISIONS.** — It is provided by the Constitution of the United States that “the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it,”<sup>5</sup> and the same provision is ordinarily contained in the constitutions of the several states,<sup>6</sup> though in some instances suspensions are absolutely prohibited.<sup>7</sup> But in no case can the power be exercised, under either the federal constitution or the constitution of a state, unless the conditions specified therein exist.<sup>8</sup>

**b. IN WHOM AUTHORITY IS VESTED — (1) Under Constitution of United States.** — Though the federal constitution has been in operation for more than

**1. Rule that Penalty Does Not Attach for Refusal in Term Time.** — *Rex v. Hobhouse*, 2 Chit. 207, 18 E. C. L. 309, 3 B. & Ald. 420, 5 E. C. L. 330; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Matter of Ferguson*, 9 Johns. (N. Y.) 239; *Ex p. Ellis*, 11 Cal. 226.

**2. Penalty for Refusal Either in Term or in Vacation.** — *Williamson v. Lewis*, 39 Pa. St. 9.

**3.** See the various local codes and statutes in the United States.

**4. English Suspension Acts.** — The statute of 9 Geo. I., c. 1, suspended the habeas corpus act for a certain time and directed that no judge or justice should bail or try any prisoner without an order from the king. *Rex v. Orrery*, 8 Mod. 98.

**Other Instances of suspension acts** are 34 Geo. III., c. 54; 57 Geo. III., c. 3; 57 Geo. III., c. 55; 11 & 12 Vict., c. 35; 29 & 30 Vict., c. 1; 44 & 45 Vict., c. 4.

A suspension act is almost invariably followed by an act of indemnity, indemnifying persons who have acted in pursuance of the suspension act. See for example 41 Geo. III., c. 66.

**Power to Suspend Habeas Corpus Act in England Is Vested Exclusively in Parliament.** — 1 Black. Com. 136.

**Operation of English Suspension Acts.** — It will be observed that the practice in England is to suspend the habeas corpus act itself and not merely the privilege of the writ. See Stat. 9 Geo. I., c. 1. See also the several statutes referred to in 4 Green's Hist. Eng. 130, 315, 320.

**5. Suspension Authorized by Constitution of United States.** — Const. U. S., art. I, § 9, cl. 2.

This provision of the Federal Constitution relates exclusively to habeas corpus proceedings in federal courts, and does not authorize either the President or Congress to suspend the issuing of writs of habeas corpus by state courts. *Griffin v. Wilcox*, 21 Ind. 370; *Israel v. Silsbee*, 57 Wis. 222; *Bagnall v. Ableman*, 4 Wis. 163; *Matter of Booth*, 3 Wis. 157.

**Suspension of Habeas Corpus by Confederate Congress.** — See *Matter of Roseman*, 1 Winst. L. (60 N. Car.) 443; *Matter of Cain*, 2 Winst. L. (60 N. Car.) 141; *Matter of Long*, 2 Winst. L. (60 N. Car.) 150; *Matter of Rafter*, 2 Winst. L. (60 N. Car.) 153; *Matter of Spivey*, 2 Winst. L. (60 N. Car.) 156; *State v. Sparks*, 27 Tex. 705.

**6.** See the constitutions of the several states, except those mentioned in the next note *infra*.

**7.** See the constitutions of *Alabama, Georgia, Maryland, Missouri, North Carolina, Texas, West Virginia, Vermont*.

**In North Carolina** the governor is not authorized to suspend the writ of habeas corpus by the provision of the state constitution (art. 12, § 3) giving to him “power to call out the militia to execute the law [or] suppress riots or insurrection,” and Act 1869-70, c. 27, § 1, authorizing him to declare a county in a state of insurrection whenever, in his judgment, the civil authorities are unable to protect the citizens. *Ex p. Moore*, 64 N. Car. 802; *Ex p. Kerr*, 64 N. Car. 816.

**8. Power of Suspension Exists Only under Circumstances Named in Constitution.** — *Cannon v. Stuart*, 3 Houst. (Del.) 223; *Matter of Collier*, 6 Ohio St. 55.

**Reasonable Delay** that may be occasioned in the disposition of habeas corpus cases by proceedings in error on the original judgment is not a suspension of the benefit of the writ within the meaning of the constitutional provision. *Macready v. Wilcox*, 33 Conn. 321.

**Staying Operation of Writ.** — There is no inherent power in any court to make an order staying the operation of a writ of habeas corpus discharging one who has been illegally confined. *People v. Stout*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 247, *affirmed* 144 N. Y. 699.

**There Is a Distinction** between the suspension of the privilege of the writ of habeas corpus under the Constitution of the United States, art. I, § 9, and the right of a military com-



a century, it was only during the period of the civil war that the authority to suspend the privilege of the writ of habeas corpus was exercised by the government, and therefore this provision of the constitution has not been the subject of judicial consideration as frequently as have many of the other important provisions, and until the occasion just referred to there had been no adjudication as to whether the power of suspension was vested in Congress or in the President. Eminent jurists at an early day, however, had expressed the opinion that the power was committed to Congress alone,<sup>1</sup> and during President Jefferson's administration the necessity of suspending the privilege of the writ came under consideration, but no claim was then made that the President could exercise this power.<sup>2</sup> Up to this point, it seems, the only opinion that had been expressed was that the power could not be exercised by the President, but was vested exclusively in Congress. When the civil war broke out, the attorney-general of the United States gave it as his opinion that the President did have such power.<sup>3</sup> It was then, for the first time, asserted by Mr. Lincoln, acting on that opinion of the attorney-general, and in some cases the courts, influenced perhaps by the excitement of the times, sustained him.<sup>4</sup> Other and better-considered cases denied the existence of such authority,<sup>5</sup> though the decisions, so far as the cases in which

mander to refuse obedience to it when justified by the exigencies of war, or that *ipso facto* suspension which takes place where war actually exists. *In re Kemp*, 16 Wis. 379.

**1. Opinion of Chief Justice Marshall.**—In *Ex p. Bollman*, 4 Cranch (U. S.) 101, Chief Justice Marshall uttered a dictum to the effect that if at any time the public safety should require the suspension of the privilege of the writ of habeas corpus it is for the legislature to say so; that the question depends on political considerations on which the legislature is to decide.

**Opinion of Justice Story.**—Mr. Justice Story, speaking of the habeas corpus clause in the constitution, said: "It is obvious that cases of a peculiar emergency may arise which may justify, nay, even require, the temporary suspension of any right to the writ. But, as it has frequently happened in foreign countries, and even in England, that the writ has upon various pretexts and occasions been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. \* \* \* Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."

**2. Opinion During Jefferson's Administration.**—The incident referred to in the text was the conspiracy of which Aaron Burr was the head. When this became so formidable and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion

upon the subject and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it. *Per Taney*, C. J., in *Ed p. Merryman*, Taney (U. S.) 246.

**3. Power of Suspension Declared by Attorney-General to Be in President.**—Opinion of Attorney-General Edward Bates, 10 Op. Atty.-Gen. 74.

**4. Cases Asserting Authority of President.**—*Ex p. Field*, 5 Blatchf. (U. S.) 63; *In re Dugan*, 6 D. C. 131. In the case last cited the court, in reaching the conclusion that the constitution confers the power of suspension on the President, extensively reviews the history of the clause in question.

**5. Cases Denying Authority of President.**—*Ex p. Merryman*, Taney (U. S.) 246, 9 Am. L. Reg. 524, 17 Fed. Cas. No. 9,487; *McCall v. McDowell*, 1 Abb. (U. S.) 212, 15 Fed. Cas. No. 8,673; *Ex p. Benedict*, 4 West. L. Month. 449, 3 Fed. Cas. No. 1,292; *U. S. v. Porter*, 2 Hayw. & H. (D. C.) 394, 27 Fed. Cas. No. 16,074a. See also *Warren v. Paul*, 22 Ind. 276; *In re Kemp*, 16 Wis. 359.

*Ex p. Merryman*, Taney (U. S.) 246, 9 Am. L. Reg. 524, 17 Fed. Cas. No. 9,487, is the leading case on this question. In it Chief Justice Taney reached the conclusion that Congress alone had power under the constitution to suspend the privilege of the writ, because, *first*, the article containing the clause relating to the suspension of the writ is devoted to the legislative department of the United States and has no reference to the executive department, and *second*, because the article relating to the executive department enumerates powers conferred on it and prescribes its duty, but is entirely silent on the question of suspending the writ of habeas corpus. The chief justice was further of the opinion that no argument could be drawn from the nature of sovereignty or the necessity of government for self-defense in times of tumult and danger, because the government of the United States is one of delegated and



they were rendered were concerned, amounted to no more than a protest against usurpation, because the courts were powerless to enforce their process against the vast military forces then under the command of the President;<sup>1</sup> but the views of the judges by whom these cases were decided seem to have been accepted by the other departments of the government, as is evidenced by subsequent measures in reference to the subject.<sup>2</sup>

(2) *Under State Constitutions.* — It has already been shown, by a reference to the constitutions of the various states, that in the majority of them the provision in relation to the subject in hand is the same as that contained in the Constitution of the United States.<sup>3</sup> It would accordingly seem that in such states the power of suspension should be considered legislative, not executive, and it has been so held;<sup>4</sup> but in some states all doubt on this point is removed by the language of the constitutional provision which in terms declares that the power is to be exercised only by the legislature.<sup>5</sup>

c. **VALIDITY AND EFFECT OF SUSPENSION ACTS.** — The constitutionality of the Suspension Act of 1863 was questioned on the ground that, though the power of suspension is purely a legislative function, the act did not exercise the power directly, but provided that during "the present rebellion" the President of the United States might, whenever in his judgment the public safety should require it, suspend the privilege of the writ of habeas corpus; but it seems always to have been upheld either directly or indirectly.<sup>6</sup>

limited powers, deriving its existence and authority altogether from the constitution. See also *McCall v. McDowell*, 1 Abb. (U. S.) 212, 15 Fed. Cas. No. 8,673.

1. **Inability of Courts to Resist Executive Usurpation.** — In the *Merryman* case, cited in the next preceding note, the military officer in command of the fort where the petitioner was imprisoned refused to obey the writ issued by the chief justice of the United States, and prevented, by force, the service of a writ of attachment issued against him for contempt. Thereupon the chief justice, in view of the fact that his judicial power had been resisted by a force too strong for him to overcome, ordered that a copy of all the proceedings in the case and his opinion be transmitted to the President. See also *U. S. v. Porter*, 2 Hayw. & H. (D. C.) 394, 27 Fed. Cas. No. 16,074a, in which the court, finding itself without physical power to enforce its lawful process against the military subordinates of the President, entered on its records a protest against what it considered a usurpation of authority by the President.

2. **Subsequent Recognition of Want of Executive Authority.** — By Act of Congress of March 3, 1863, the President was authorized to suspend the privilege of the writ of habeas corpus whenever, in his judgment, the public safety required it, and he did, by proclamation, bearing date September 15, 1863, reciting, among other things, the authority of this statute, suspend it. *Ex p. Milligan*, 4 Wall. (U. S.) 2; *McCall v. McDowell*, 1 Abb. (U. S.) 212, 15 Fed. Cas. No. 8,673; *In re Fagan*, 2 Sprague (U. S.) 91, 8 Fed. Cas. No. 4,604. From this Act of Congress, and the President's proclamation under it, it would seem, in view of the fact that the authority of the President to declare a suspension had been asserted and had been sustained by force of arms notwithstanding the opinions of the judiciary to the contrary, that the executive and legislative departments of the government had finally

acquiesced in the proposition that this power did not pertain to the presidential office.

In *People v. Gaul*, 44 Barb. (N. Y.) 98, Peckham, J., referring to the suspension act passed after the chief justice of the United States had decided that the President did not possess, under the constitution, the power which he assumed of suspending the privilege of the writ of habeas corpus, said that "Congress, also, seemed to have coincided with the chief justice, and, recognizing the necessity of passing a law to that end, have substantially defined when and where the privilege of this writ, so vital to personal liberty, may be suspended."

3. See *supra*, this section, *Constitutional Provisions*.

Only in One Instance has the privilege of the writ of habeas corpus ever been suspended by state authority, and this was in *Massachusetts*, during Shays' Rebellion (1786-1787). Spelling on Extraordinary Relief, § 1160.

4. **Decisions of State Courts that Power of Suspension Is Legislative.** — *Wright v. Johnson*, 5 Ark. 687; *Cannon v. Stuart*, 3 Houst. (Del.) 223. But see *contra*, *In re Boyle*, (Idaho 1899) 57 Pac. Rep. 706.

5. **Power of Suspension Expressly Committed to Legislature.** — See the constitutions of *Arkansas*, *Connecticut*, *Massachusetts*, *Michigan*, *Mississippi*, *New Hampshire*, *Rhode Island*, and *Tennessee*.

6. **Constitutionality of Suspension Act.** — In *McCall v. McDowell*, 1 Abb. (U. S.) 212, the court considered the constitutionality of this statute, which, it is said, "must be admitted without argument." The court said further that, in the exercise of the power, Congress may suspend the writ generally, or may limit the suspension to particular cases, and that it may do this directly or commit the matter to the judgment of the President.

In *Ex p. Milligan*, 4 Wall. (U. S.) 2, the Supreme Court of the United States, though it did not pass directly on the question, seems to

**Duration of Act.** — The duration of the act was limited to the period of the existence of the conditions which were deemed to render it necessary, and when they ceased to exist, the privilege of the writ was *ipso facto* restored and the President no longer had any authority to suspend it.<sup>1</sup>

**What Is Suspended.** — Under the constitutional provisions in the United States regarding the suspension of "the benefit of the writ of habeas corpus," it is not the writ itself that is suspended,<sup>2</sup> but a suspension operates merely as a denial to the party of the effect of the writ, and therefore, where a writ had been granted before the suspension and came on for hearing afterwards, the court had no authority to grant a discharge.<sup>3</sup>

**Persons Affected by Suspension Act.** — The language of the Suspension Act of 1863 has been held broad enough to deprive of the privilege of the writ a person held for military duty as a soldier, when it is claimed that the detention is illegal, though a contrary opinion has been expressed.<sup>4</sup>

**HABENDUM.** — See the title DEEDS, vol. 9, p. 139 *et seq.*

**HABERE FACIAS POSSESSIONEM.** (See also ENCYC. OF PL. AND PR., titles EJECTMENT, vol. 7, p. 351; POSSESSION, WRIT OF, vol. 16, p. 744.) — "That you cause to have possession." The name of the process commonly resorted to by the successful party in an action of ejectment, for the purpose of being placed by the sheriff in the actual possession of the land recovered. It is commonly termed simply "habere facias," or "hab. fa."

**HABERE FACIAS SEISINAM.** (See also the title POSSESSION, WRIT OF, 16 ENCYC. OF PL. AND PR. 744.) — "That you cause to have seizin." The writ of execution in real actions, directing the sheriff to cause the demandant to have seizin of the lands recovered. It was the proper process for giving seizin of a freehold, as distinguished from a chattel interest in lands.

**HABERE FACIAS VISUM.** (See also ENCYC. OF PL. AND PR., title VIEW.)

have acted on the assumption that the act was constitutional.

In *Matter of Oliver*, 17 Wis. 681, it was said that serious doubts existed whether the act was not obnoxious to the objection that it only delegated a legislative power to the President. The court, after reviewing several cases involving the delegation of legislative powers, reached the conclusion, though with some hesitation, that on the doctrine of those cases the Act of Congress under consideration could be sustained.

**1. Duration of Suspension Act.** — By the terms of the act the power of suspension was made to depend on the fact of rebellion and its continuance, and this fact was held to be one to be judicially determined like any other fact. The President could not, by proclamation, determine that a rebellion existed and thus fix the status of the country. And therefore, when the rebellion ceased, the right of the President to continue the suspension ceased also, and the courts then became bound to give to the citizen his rights under the privilege. *Com. v. Frink*, (Pa. 1865) 4 Am. L. Reg. N. S. 700.

**2. Suspension of Privilege of Writ Not a Suspension of Writ Itself.** — *Ex p. Milligan*, 4 Wall. (U. S.) 2.

**3. Hearing After Suspension on Writ Previously Granted.** — *In re Fagan*, 2 Sprague (U. S.) 91; *In re Dunn*, (U. S. Dist. Ct.) 25 How. Pr. (N. Y.) 467, 8 Fed. Cas. No. 4,171.

**4. Suspension Held Operative as to Persons**

**Held for Military Service.** — *In re Fagan*, 2 Sprague (U. S.) 91; *Matter of Oliver*, 17 Wis. 681.

**To the Contrary**, see *People v. Gaul*, 44 Barb. (N. Y.) 98. In this case a writ of habeas corpus was sued out to procure the discharge of one Starkweather, who was held by the defendant, a major in the army, as an enlisted soldier, and obedience to the writ was refused by virtue of the President's proclamation under the Suspension Act of 1863. The court considered that the use of the word "prisoner" in the act excluded soldiers who had been either enlisted or drafted, and it accordingly held that the defendant was obliged to obey the writ and directed that an attachment issue against him to compel obedience. "The provisions of the whole act, taken together," said Peckham, J., "show that it was designed to enable the President to arrest and detain as prisoners persons charged with or suspected of some offense against the government, persons deemed dangerous to the government, and to suspend the privilege of the writ of habeas corpus as to all such persons. The act was obviously aimed at 'state or political prisoners.'" As further evidence that the act was not intended to apply to soldiers, it was said that otherwise they would have no relief, though they were kidnapped and their names forged to the enlistment papers, and that they would be worse off than criminals or persons charged with crime against the United States.



— "That you cause to have a view." The emphatic words in a writ directing the sheriff to have lands viewed by a jury.

**HABIT.** (See also **HABITUAL**, *post*; and see the titles **HABITUAL DRUNKARDS**, *post*; **USAGES AND CUSTOMS**.)—Habit is defined as fixed or established custom; ordinary course of conduct.<sup>1</sup>

**HABITABLE.**—See note 2.

**HABITATION—HABITANCY.**—See note 3.

**HABITUAL.** (See also **HABIT**, *ante*.)—The word "habitual" is defined as constant; customary; accustomed; usual; common; ordinary; regular; familiar.<sup>4</sup>

**HABITUAL CRIMINALS.**—See the titles **CUMULATIVE PUNISHMENT**, vol. 8, p. 479; **PRISONS**.

1. **Habit.**—*Tatum v. State*, 63 Ala. 152. See to the same effect, *State v. Skillicorn*, 104 Iowa 97; *State v. Savage*, 89 Ala. 8; *State v. Robinson*, 111 Ala. 482.

**Single Act.**—In *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 354, it was said: "It would be incorrect to say that a man has a *habit* of anything from a single act." See also *Conner v. Citizens' St. R. Co.*, 146 Ind. 430; *Lynch v. Bates*, 139 Ind. 206.

**Habits of Intemperance.**—See the titles **ACCIDENT INSURANCE**, vol. 1, p. 284; **LIFE INSURANCE**. And see generally the title **INSURANCE**.

**Habit and Repute to Establish Marriage.**—See the title **MARRIAGE**.

2. **Habitable Repair.**—In construing a covenant by a tenant to put the premises into "*habitable* repair," the court said: "It was difficult to suggest any material difference between the term '*habitable* repair' used in this agreement and the more common expression '*tenantable* repair;' they must both import such a state, as to repair, that the premises might be used 'and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom and for the sort of purposes for which they were to be occupied.'" *Belcher v. Mcintosh*, 2 M. & Rob. 186. See also *Proudfoot v. Hart*, 25 Q. B. D. 51. And see the titles **EVICITION**, vol. 11, p. 472; **LANDLORD AND TENANT**.

3. **Habitation.**—A *habitation* is a place of abode; a place to dwell in. *Holmes v. Oregon*, etc., R. Co., 5 Fed. Rep. 526. See also the title **DOMICIL**, vol. 10, p. 16; and see **INHABITANTS**.

A statute of *Virginia* provided as follows: "No nuncupative will shall be established unless it be made in the time of the last sickness of the deceased, at his or her *habitation*, or where he or she hath resided for ten days next preceding, except where the deceased is taken sick from home, and dies before he or she returns to such *habitation*; nor where," etc. It was held that *habitation*, as used in the act, meant "dwelling house." *Nowlin v. Scott*, 10 Gratt. (Va.) 64. See also 2 Black. Com. 4, and 4 Black. Com. 220, where the word is used in the same sense. And see the title **NUNCUPATIVE WILLS**.

**Habitancy.**—In *Lyman v. Fiske*, 17 Pick. (Mass.) 234, the court said: "It is difficult to give an exact definition of *habitancy*. In gen-

eral terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance."

4. *Peltz v. Printz*, 186 Pa. St. 347.

**Habitual—Residence.** (See also the title **RESIDENCE**.)—Residence is defined as meaning a person's *habitual* physical presence in a place or country. *In re Banff Provincial Election*, 19 Can. L. T. 123. The court said: "But in that definition the word *habitual* must not be given too restricted a sense. Dicey on Conflict of Laws, p. 80, says: 'The word *habitual*, in a definition of residence, does not mean presence in a place either for a long or short time, but the presence there for the greater part of the period, whatever that period may be (whether ten years or ten days), referred to in each particular case.'"

**Habitually—Exclusively.**—For construction of the term *habitually* as used in an exemption statute, see the title **EXEMPTIONS (FROM EXECUTION)**, vol. 12, p. 104, note 3.

**Adultery.** (See also the titles **ADULTERY (AS A CRIME)**, vol. 1, p. 752; **LEWD AND LASCIVIOUS COHABITATION AND CONDUCT**.)—A statute defined adultery as *habitual* carnal intercourse between a man and a woman, when either is lawfully married. Under this statute it was held no error that the trial court charged that the intercourse must have been *habitual*, "that is, frequent; occasional acts will not be sufficient," and left it to the jury to determine how frequently the act must be committed to make it *habitual*. *State v. Carroll*, 30 S. Car. 85. See also *Collum v. State*, 10 Tex. App. 708.

Where the proof showed only four acts of carnal intercourse and negatived any other, it was held that this was not *habitual* intercourse. *Hilton v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 115.



# HABITUAL DRUNKARDS.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *INSANE PERSONS* in the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 10, p. 1169.

As to other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CIVIL DAMAGE ACTS*, vol. 6, p. 43; *CRIMINAL LAW*, vol. 8, p. 296; *DIVORCE*, vol. 9, p. 813; *INSANITY*; *INTOXICATING LIQUORS*; *INTOXICATION*; *PUBLIC OFFICERS*; *SPENDTHRIFTS AND SPENDTHRIFT TRUSTS*; *TESTAMENTARY CAPACITY*; *TORTS*.

**I. SCOPE OF TITLE.** — It is designed to treat the topic with strict reference to the habitual drunkard himself, and not relatively as to the legal consequences to other persons of his infirmity and its resulting disability. The scope of the article is further restricted by reason of the fact that the substantive law and rules of evidence relating and applicable to certain important branches of the topic are fully treated in separate articles under appropriate titles. References to these articles and to all other titles bearing upon the subject will be found in the table of cross-references above.

**II. DEFINITIONS AND DISTINCTIONS.** — A *Habitual Drunkard* is a person given to inebriety, or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it.<sup>1</sup>

One *Who Has Become So Confirmed* in customary intoxication as to render him a proper subject of legal guardianship analogous to that exercised over insane persons.<sup>2</sup>

The Term "Inebriate," as commonly used, is synonymous with "habitual drunkard."<sup>3</sup>

In England the interchangeable character of the two expressions seems to be recognized by statute.<sup>4</sup>

"Common Drunkard" is a term often used as equivalent to "habitual drunkard," and "common drunkenness" to "habitual drunkenness." Such use perhaps lacks exactness, as under most statutes a common drunkard is a person of intemperate habits who is guilty of a public exhibition of intoxication to the scandal of the community. While, therefore, a common drunkard is usually a habitual drunkard in the legal sense of the term, a habitual drunkard is not

1. *Habitual Drunkard — Definition.* — Bouvier's L. Dict. This definition seems to be deduced from the rules in *Magahay v. Magahay*, 35 Mich. 210; *Com. v. Whitney*, 5 Gray (Mass.) 86; *Ludwick v. Com.*, 18 Pa. St. 172, and other leading cases. See also *Miller v. Gleason*, 10 Ohio Cir. Dec. 20.

2. *Abbott's L. Dict.* The definition is given as being that long in statutory use in *New York*. It seems now to be generally accepted. See *Griswold v. Butler*, 3 Conn. 231; *Rannells v. Gerner*, 80 Mo. 479; *Sill v. M'Knight*, 7 W. & S. (Pa.) 244; *Robertson v. Lyon*, 24 S. Car. 272; *Matter of Wetmore*, 6 Wash. 274.

In England, under the *Inebriates Acts* of 1879 (42 & 43 Vict., c. 19) and 1888 (51 & 52 Vict., c. 19), a habitual drunkard, for the pur-

poses of such acts, is "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquors, at times dangerous to himself or herself or others, or incapable of managing himself or herself and his or her affairs."

3. *Inebriate.* — *Century Dict.*; *Webster's Dict.*; *Com. v. Whitney*, 11 Cush. (Mass.) 479; *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 488.

4. *Habitual Drunkard — Inebriate — England.* — The *Habitual Drunkards Act* of 1879 (42 & 43 Vict., c. 19) was modified and made permanent by the *Inebriates Act* of 1888 (51 & 52 Vict., c. 19), and by a provision of the latter act both statutes are known as the *Inebriates Acts*.



necessarily a common drunkard, for the practice of habitual drunkenness may be pursued without publicity.<sup>1</sup>

The Terms "Habitual Drunkenness," "Habitual Intemperance," and "Habitual Intoxication," as ordinarily used and as construed when appearing in statutes, are equivalent and synonymous.<sup>2</sup>

**Lunatic and Habitual Drunkard.** — In most of the states the statutes and decisions closely assimilate habitual drunkards to lunatics.<sup>3</sup>

**Spendthrift.** — By statute in several states habitual drunkards are differentiated from lunatics or insane persons, and are included in the class designated "spendthrifts."<sup>4</sup>

"Habitual Drunkard" and "Dipsomaniac" are not equivalent terms.<sup>5</sup>

**III. WHAT CONSTITUTES HABITUAL DRUNKENNESS — 1. In General.** — The Term "Habitual Drunkenness," in both its legal and its popular signification, denotes not only the practice of intemperance in the use of alcoholic beverages, but also the consequences and effects of such excessive indulgence upon the mental and physical system of the person addicted to the habit.<sup>6</sup> Habitual drunken-

**1. Common Drunkard.** — To constitute the offense of common drunkenness the intoxication must be "under such circumstances as to amount to a violation of decency." *State v. Kelly*, 12 R. I. 535; *State v. Flynn*, 16 R. I. 10. See also *Com. v. Whitney*, 5 Gray (Mass.) 87; *Com. v. McNamee*, 112 Mass. 285; *State v. Ryan*, 70 Wis. 685.

In *Barnes v. State*, 19 Conn. 404, a distinction was recognized between "a person addicted to habits of intoxication" and "a common drunkard."

**Common Drunkard — New Hampshire.** — *State v. Otis*, 42 N. H. 71, held that the Act of 1860, c. 2371, § 1, providing that "no person shall be fined or imprisoned for drunkenness except as a common drunkard," repealed all former acts punishing, or apparently intended to punish, all public acts or exhibitions of drunkenness; but the court did not define the term "common drunkard" in any way.

**2. Habitual Drunkenness, Habitual Intemperance, Habitual Intoxication, Synonymous Terms.** — *Elam v. State*, 25 Ala. 55; *Stanley v. State*, 26 Ala. 27; *Mahone v. Mahone*, 19 Cal. 628, 81 Am. Dec. 91; *Gallagher v. People*, 120 Ill. 183; *Mack v. Handy*, 39 La. Ann. 498; *Miskey's Appeal*, 107 Pa. St. 626.

**3. Habitual Drunkard and Lunatic Assimilated.** — *Rannells v. Gerner*, 80 Mo. 478; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Imhoff v. Witmer*, 31 Pa. St. 244. See also *Ridgeway v. Darwin*, 8 Ves. Jr. 66; *Bac. Abr.*, tit. Idiots and Lunatics, A.

Dwight, in his *Law of Persons* (p. 307), says that when a person is adjudged a habitual drunkard, he is legally a lunatic, whether he is one in fact or not.

**4. Spendthrift.** — Such class is recognized by statute in *Illinois*, *Massachusetts*, *Michigan*, *Minnesota*, *Nebraska*, *New Hampshire*, *Oregon*, *Vermont*, and *Wisconsin*; also, perhaps, in *Alabama*. And see *Pinkston v. Semple*, 92 Ala. 564.

In *Illinois* lunatics, insane persons, idiots, drunkards, and spendthrifts are classed together, so far as the method of procedure in relation to them is concerned, and a conservator may be appointed for any person included within such class.

The definition of "spendthrift" is purely

statutory. The definition as given in the statutes of *Minnesota*, *Michigan*, and *Wisconsin* is substantially the same: "Every person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness, or debauchery." See *Stat. Wis.* (1898), § 3994.

In *Oregon* the statute (Hill's Annot. Laws 1892, § 2891) provides that "when any person by excessive drinking, gaming, idleness, or debauchery of any kind shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or the county to charge and expense for the support of himself and family, the County Court for such county of which such spendthrift is a resident or inhabitant shall present a complaint to the county judge," and have a guardian appointed.

The Idea of Mental Unsoundness does not prominently enter into the statutory definition of spendthrift. See in this connection *In re Brown*, 45 Mich. 326, where Cooley, J., distinguished between the appointment of a guardian for a person who "by reason of extreme old age or other cause is mentally incompetent to have the charge and management of his property," and such appointment for a "spendthrift."

In order to give to the Probate Court the right to appoint a guardian for an alleged spendthrift, the evidence must establish that such person comes within the statutory definition by being addicted to excessive drinking, gaming, idleness, debauchery, or other vicious habits. *Morey's Appeal*, 57 N. H. 54.

See also the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

**5. Dipsomania.** — Dipsomania may be caused by alcoholic intemperance, but it may also have its origin in the excessive use of fluid or nonfluid drugs or chemical preparations containing no alcohol, and, perhaps, received into the system hypodermically, by inhalation, or in some manner other than by swallowing or drinking. See *DIPSOMANIA*, vol. 9, p. 457. See also *Gen. Stat. Conn.* (1888), § 3688.

**6. What Constitutes Habitual Drunkenness — England.** — *Southcombe v. Merriman*, C. & M. 286, 41 E. C. L. 159.

*Alabama.* — *Elam v. State*, 25 Ala. 55; *Stanley v. State*, 26 Ala. 27; *Atkins v. State*, 60

ness is the fixed practice of intemperance in the use of liquid intoxicants having alcohol as their basis.<sup>1</sup> It is the custom of getting drunk;<sup>2</sup> not the ordinary use, but the habitual abuse, of alcoholic liquors.<sup>3</sup> It is likewise the effect or condition produced upon the body and mind of the inebriate by such continued excessive use of intoxicating liquors.<sup>4</sup> It is habituation to intemperance, resulting in the involuntary and irresistible propensity to become intoxicated whenever an opportunity offers.<sup>5</sup>

**2. No Numerical Rule as to Frequency of Intoxication.** — There is no rule of general application to determine how numerous must be the distinct instances of intoxication to justify a finding of habitual drunkenness. When the question of habitual drunkenness has been left to juries, the courts usually, although not uniformly, have declined to charge that a particular number of distinct acts or occurrences of intoxication did or did not establish habitual drunkenness.<sup>6</sup>

Ala. 49; *Tatum v. State*, 63 Ala. 149; *State v. Savage*, 89 Ala. 8; *State v. Robinson*, 111 Ala. 483.

*Arkansas*. — *Brown v. Brown*, 38 Ark. 328.

*California*. — *Dunn v. Dunn*, 62 Cal. 176.

*Florida*. — *Burns v. Burns*, 13 Fla. 376; *McGill v. McGill*, 19 Fla. 348.

*Illinois* — *Menkins v. Lightner*, 18 Ill. 285; *Murphy v. People*, 90 Ill. 60; *Youngs v. Youngs*, 130 Ill. 230, 17 Am. St. Rep. 313; *Richards v. Richards*, 19 Ill. App. 465.

*Indiana*. — *Devlin v. Scott*, 34 Ind. 70; *Gurley v. Butler*, 83 Ind. 501.

*Iowa*. — *Wheeler v. Wheeler*, 53 Iowa 512, 36 Am. Rep. 240; *Miller v. Mutual Ben. Ins. Co.*, 34 Iowa 224; *Miller v. Mutual Ben. L. Ins. Co.*, 39 Iowa 305.

*Kentucky*. — *Cook v. Newton*, 14 Ky. L. Rep. 860.

*Louisiana*. — *Mack v. Handy*, 39 La. Ann. 498; *Williams v. Goss*, 43 La. Ann. 872; *De Lesdernier v. De Lesdernier*, 45 La. Ann. 1366.

*Massachusetts*. — *Com. v. Whitney*, 11 Cush. (Mass.) 479; *Blaney v. Blaney*, 126 Mass. 205.

*Michigan*. — *Magahay v. Magahay*, 35 Mich. 210; *Berryman v. Berryman*, 59 Mich. 608.

*Missouri*. — *Rannells v. Gerner*, 80 Mo. 479; *Dawson v. Dawson*, 23 Mo. App. 173.

*New Hampshire*. — *Batchelder v. Batchelder*, 14 N. H. 380.

*New Jersey*. — *Crane v. Conklin*, 1 N. J. Eq. 355, 22 Am. Dec. 519.

*New York*. — *Gardner v. Gardner*, 22 Wend. (N. Y.) 533, 34 Am. Dec. 340; *Hanna v. Connecticut Mut. L. Ins. Co.*, (N. Y. Super. Ct. Gen. T.) 8 Misc. (N. Y.) 431; *Matter of Tracy*, 1 Paige (N. Y.) 582; *Matter of Hoag*, 7 Paige (N. Y.) 313.

*Ohio*. — *Brockway v. Jewell*, 52 Ohio St. 199.

*Oregon*. — *McBee v. McBee*, 22 Oregon 329, 29 Am. St. Rep. 615.

*Pennsylvania*. — *Ludwick v. Com.*, 18 Pa. St. 174; *Miskey's Appeal*, 107 Pa. St. 626.

*Texas*. — *Trigg v. State*, 49 Tex. 646.

*Vermont*. — *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 425; *State v. Pratt*, 34 Vt. 323.

*Washington*. — *Matter of Wetmore*, 6 Wash. 271.

**1. Fixed Practice of Intemperance.** — *Tatum v. State*, 63 Ala. 151; *State v. Savage*, 89 Ala. 8; *Brown v. Brown*, 38 Ark. 328; *Mahone v. Mahone*, 19 Cal. 628, 81 Am. Dec. 91; *Walton v. Walton*, 34 Kan. 198; *Ludwick v. Com.*, 18 Pa. St. 174; *Miskey's Appeal*, 107 Pa. St. 626.

**2. Custom of Getting Drunk.** — *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 353; *Northwestern L. Ins. Co. v. Muskegon Bank*, 122 U. S. 507; *Tatum v. State*, 63 Ala. 151; *Mack v. Handy*, 39 La. Ann. 498; *Union Mut. L. Ins. Co. v. Reif*, 36 Ohio St. 596, 38 Am. Rep. 613; *State v. Pratt*, 34 Vt. 323.

**3. Not Ordinary Use but Habitual Abuse.** — *United States*. — *Brockway v. Mutual Ben. L. Ins. Co.*, 9 Fed. Rep. 253; *Swick v. Home L. Ins. Co.*, 2 Dill. (U. S.) 164; *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 353; *Northwestern L. Ins. Co. v. Muskegon Bank*, 122 U. S. 507.

*Alabama*. — *Elam v. State*, 25 Ala. 55.

*Kansas*. — *Walton v. Walton*, 34 Kan. 198.

*Louisiana*. — *Mack v. Handy*, 39 La. Ann. 498.

*Michigan*. — *Meathe v. Meathe*, 83 Mich. 150.

*Nebraska*. — *Powers v. Powers*, 20 Neb. 536.

*Ohio*. — *Union Mut. L. Ins. Co. v. Reif*, 36 Ohio St. 596, 38 Am. Rep. 613.

*Oregon*. — *McBee v. McBee*, 22 Oregon 329, 29 Am. St. Rep. 615.

*Rhode Island*. — *Mowry v. Home L. Ins. Co.*, 9 R. I. 355; *Gourlay v. Gourlay*, 16 R. I. 706.

*Texas*. — *Trigg v. State*, 49 Tex. 664.

*Wisconsin*. — *Rude v. Nass*, 79 Wis. 330, 24 Am. St. Rep. 717.

**4. Effect Produced upon Mind and Body.** — *State v. Savage*, 89 Ala. 8; *Gurley v. Butler*, 83 Ind. 501; *Menkins v. Lightner*, 18 Ill. 284; *Stirling v. Hinckley*, (Pa. 1886) 2 Cent. Rep. 825; *Miskey's Appeal*, 107 Pa. St. 612; *Trigg v. State*, 49 Tex. 646; *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 425.

**5. Habituation to Intemperance.** — *Elam v. State*, 25 Ala. 55; *State v. Savage*, 89 Ala. 8; *Menkins v. Lightner*, 18 Ill. 284; *Magahay v. Magahay*, 35 Mich. 210; *McBee v. McBee*, 22 Oregon 329, 29 Am. St. Rep. 615; *Ludwick v. Com.*, 18 Pa. St. 174; *Miskey's Appeal*, 107 Pa. St. 626.

**6. No Numerical Rule as to Frequency of Intoxication.** — *United States*. — *Northwestern L. Ins. Co. v. Muskegon Bank*, 122 U. S. 507.

*Alabama*. — *Tatum v. State*, 63 Ala. 149.

*Arkansas*. — *Brown v. Brown*, 38 Ark. 328.

*California*. — *People v. People*, 62 Cal. 176.

*Kamman v. People*, 24 Ill. App. 389; *Birr v. People*, 24 Ill. App. 390; *Gallagher v. People*, 120 Ill. 183, affirming 29 Ill. App. 397.

*Massachusetts*. — *Com. v. Whitney*, 11 Cush. 479.

**Where Appellate Courts Have Decided Law and Fact in Habitual Drunkenness.** — There are cases where the highest appellate courts, exercising original jurisdiction, as judges of both law and fact, and without the assistance of a master, have determined how frequently intoxication occurred and decided whether or not a habit of drunkenness was established. By statute in some states such course is adopted in certain proceedings of impeachment and removal from public office.<sup>1</sup>

**Excess Should Be as Frequent as Opportunity — Habit Must Be Beyond Control.** — As a general proposition — without considering the instances of intoxication numerically — in order to constitute the fixed custom of intemperance, the intoxication of the individual should occur as frequently as does the opportunity of gratification. The unnatural craving to drink to excess must be so dominant and overmastering as to render its control beyond the power of the individual to resist. Where, therefore, the evidence shows that the intemperate person, although often drunk, can and does at times overcome temptation, and that he retains and exerts the power of abstinence from excess in the use of intoxicating drinks when the means and opportunity of indulging his propensity are offered, it is apparent that such appetite has not become so inordinate as to be irresistible.<sup>2</sup>

**Occasional Drunkard.** — An intemperate person who frequently controls his appetite belongs to the class of occasional drunkards, as distinguished from habitual drunkards, and is still to be intrusted with his civil rights.<sup>3</sup>

**3. Duration of Habit.** — The length of time such practice has existed is not usually important so long as the habit has become fixed and established.<sup>4</sup>

**4. What Is Meant by Intoxicating Liquor** — *a.* LIQUIDS TO BE DRUNK OR SWALLOWED. — By the term "intoxicating liquor," when used with reference to habitual drunkenness, in the absence of any statutory provision enlarging its legal acceptation, only such liquids are included as may be taken into the human system by the process of drinking or swallowing.<sup>5</sup>

*b.* LIMITED TO ALCOHOLIC BEVERAGES. — There seems to be no adjudication in habitual drunkenness where such habit was produced by any non-alcoholic beverage.

*c.* EXCESSIVE USE OF DRUGS. — Unless made so by statute, neither the excessive use of opium, narcotics, sedatives, or other drugs or chemical compounds in which alcohol does not form the basic or active principle, nor the effect produced by such deleterious indulgence, constitutes habitual drunkenness.<sup>6</sup> In a number of states the condition produced by the habitual and excessive use of opiates, cocaine, and other drugs of similar effect is declared to be habitual drunkenness, and a person so affected may be proceeded against as a habitual drunkard. Such statutes have usually been enacted either to

(Mass.) 87; *Com. v. McNamee*, 112 Mass. 285; *Blaney v. Blaney*, 126 Mass. 205.

*Pennsylvania.* — *Ludwick v. Com.*, 18 Pa. St. 174.

*Wisconsin.* — *Rude v. Nass*, 79 Wis. 330, 24 Am. St. Rep. 717.

**1. Where Appellate Courts Have Exercised Original Jurisdiction.** — See *State v. Savage*, 89 Ala. 8; *State v. Robinson*, 111 Ala. 483; See also *Trigg v. State*, 49 Tex. 646, where the evidence was carefully reviewed by the court.

**2. Excess Should Be as Frequent as Opportunity — Habit Beyond Control.** — *Menkins v. Lightner*, 18 Ill. 284; *Mack v. Handy*, 39 La. Ann. 493; *Magahay v. Magahay*, 35 Mich. 210; *Matter of Hoag*, 7 Paige (N. Y.) 313; *McBee v. McBee*, 22 Oregon 334. 29 Am. St. Rep. 615; *Miskey's Appeal*, 107 Pa. St. 626; *Ludwick v. Com.*, 18 Pa. St. 174. Compare *State v. Savage*, 89 Ala. 8.

**3. Occasional Drunkard.** — *State v. Savage*, 89

Ala. 8 (*dissenting opinion*); *State v. Robinson*, 111 Ala. 483; *Meathe v. Meathe*, 83 Mich. 151; *Trigg v. State*, 49 Tex. 646.

**4. Duration of Habit — When Important.** — In states where habitual drunkenness is ground for divorce, the statutes frequently prescribe how long the habit must continue in order legally to constitute such cause. See the title DIVORCE, vol. 9, p. 814.

**5. What Is Meant by Intoxicating Liquor.** — *Youngs v. Youngs*, 130 Ill. 232, 17 Am. St. Rep. 313, *affirming* 33 Ill. App. 223; *Dawson v. Dawson*, 23 Mo. App. 170; *Com. v. Whitney*, 11 Cush. (Mass.) 480. See generally the title INTOXICATING LIQUORS.

**6. Excessive Use of Drugs Not Habitual Drunkenness.** — *Youngs v. Youngs*, 130 Ill. 232, 17 Am. St. Rep. 313, *affirming* 33 Ill. App. 223; *Dawson v. Dawson*, 23 Mo. App. 170; *Barber v. Barber*, 14 Law Rep. 375; *Com. v.*



make "the drug habit" a cause for divorce or else to provide for the treatment of the person affected in an asylum or hospital.<sup>1</sup>

**IV. HABITUAL DRUNKENNESS UNDER CRIMINAL LAWS — 1. As a Criminal Offense — a. PUNISHABLE WHEN PUBLICLY EXHIBITED.** — Drunkenness is punishable under the general police power of the state whenever a person becomes intoxicated in public or openly exhibits his intoxication to the scandal of the community, in violation of public propriety and good order. Where such exhibition of drunkenness is frequently repeated, each exposure aggravates the offense, and the person so offending is amenable to the criminal law, not strictly, perhaps, as a habitual drunkard, but as a common and notorious drunkard whose habitual intoxication, by reason of its open and offensive exhibition, has become a public nuisance.<sup>2</sup>

**b. NOT PUNISHABLE WHEN PRACTICED IN PRIVATE.** — The practice of habitual drunkenness when practiced in private is regarded by the law as a deplorable vice, or in many jurisdictions as an indication or the result of mental disease, productive, under all circumstances, of consequences so calamitous as to warrant the interference and restraining action of any court having jurisdiction. But where such habit is privately indulged and practiced, and its exercise does not infringe upon nor outrage public propriety, it can be dealt with by civil tribunals alone; it is not then a misdemeanor cognizable by a criminal court.<sup>3</sup>

**2. As a Defense to Prosecution for Crime.** — Under what circumstances habitual drunkenness may properly be interposed as a defense to a prosecution for crime, and the partial or complete criminal immunity of habitual drunkenness, are fully treated under other titles.<sup>4</sup>

**V. JURISDICTION AND AUTHORITY OF CIVIL COURTS OVER HABITUAL DRUNKARDS — 1. Origin and History.** — The laws now existing in the United States, England, and Canada, relating to proceedings in habitual drunkenness, and

Whitney, 11 Cush. (Mass.) 480; Holland v. Holland, 4 Leg. Gaz. (Pa.) 372; Bean v. Bean, 11 Lanc. Bar (Pa.) 138; Harris's Appeal, 2 W. N. C. (Pa.) 331. Compare Burt v. Burt, 168 Mass. 205.

**1. "Drug Habit" Made Habitual Drunkenness by Statute.** — See, for example:

**Colorado.** — Laws 1895, c. 74, § 6. This act was held constitutional in *In re House*, 23 Colo. 94. See *infra*, this title, *Medical Treatment of Habitual Drunkard — Treatment in "Cures," Inebriate Hospitals, and Similar Institutions.*

**Connecticut.** — Gen. Stat. (1888), § 3638.

**Louisiana.** — Acts 1894, No. 157 (Wolff's Rev. Laws La. 1897, p. 424).

**Maryland.** — Laws 1894, c. 247, § 5. This act was held constitutional in *Baltimore v. Keeley Institute*, 81 Md. 107. See *infra*, this title, *Medical Treatment of Habitual Drunkard — Treatment in "Cures," Inebriate Hospitals, and Similar Institutions.*

**Massachusetts.** — Laws 1889, c. 447. See Burt v. Burt, 168 Mass. 205.

**Minnesota.** — Laws 1895, c. 156, § 6. This act was declared unconstitutional because of an unlawful delegation of power. *Foreman v. Hennepin County*, 64 Minn. 374. See *infra*, this title, *Medical Treatment of Habitual Drunkard — Treatment in "Cures," Inebriate Hospitals, and Similar Institutions.*

**Mississippi.** — Code (1892), § 2215.

**North Dakota.** — Laws 1895, c. 68, § 3. See the title *DIVORCE*, vol. 9, p. 814, in relation to habitual drunkenness by drugs as a cause of divorce in North Dakota.

**Oklahoma.** — Laws 1895, c. 29, § 4.

**Wisconsin.** — Laws 1895, c. 203, § 6. This act was declared unconstitutional in *Wisconsin Keeley Institute Co. v. Milwaukee*, 95 Wis. 161, 60 Am. St. Rep. 105, seemingly on the ground that public money could not be used for such purpose. See *infra*, this title, *Medical Treatment of Habitual Drunkard — Treatment in "Cures," Inebriate Hospitals, and Similar Institutions.*

**2. Drunkenness Must Be Publicly Exhibited — Indiana.** — Low v. Evans, 16 Ind. 489.

**Massachusetts.** — *Com. v. Boon*, 2 Gray (Mass.) 75; *Com. v. Whitney*, 5 Gray (Mass.) 88; *Com. v. Foley*, 99 Mass. 500.

**New Hampshire.** — *State v. Otis*, 42 N. H. 73. **New York.** — *People v. Mulkins*, (County Ct.) 25 Misc. (N. Y.) 599.

**North Carolina.** — *State v. Waller*, 3 Murph. (7 N. Car.) 229.

**Rhode Island.** — *State v. Kelly*, 12 R. I. 536; *State v. Flynn*, 16 R. I. 10.

**South Carolina.** — *O'Hanlon v. Myers*, 10 Rich. L. (S. Car.) 134.

**Tennessee.** — *Tipton v. State*, 2 Yerg. (Tenn.) 543; *Smith v. State*, 1 Humph. (Tenn.) 398.

**Wisconsin.** — *State v. Ryan*, 70 Wis. 686.

**Canada.** — *In re Livingstone*, 6 Ont. Pr. 17; *Reg. v. Blakeley*, 6 Ont. Pr. 244.

**3. Not Punishable When Practiced in Private.** — *State v. Otis*, 42 N. H. 73; *State v. Waller*, 3 Murph. (7 N. Car.) 229; *O'Hanlon v. Myers*, 10 Rich. L. (S. Car.) 134; *Tipton v. State*, 2 Yerg. (Tenn.) 543; *Smith v. State*, 1 Humph. (Tenn.) 398; *In re Livingstone*, 6 Ont. Pr. 17; *Reg. v. Blakeley*, 6 Ont. Pr. 244.

**4. See the titles INSAFETY; INTOXICATION.**

the control and management of the persons and estates of habitual drunkards, are developed from the principle of the English law by which the care of idiots and lunatics devolved upon the sovereign as *parens patriæ*, both as a prerogative of the crown and also as a duty that the king owed to his subjects.<sup>1</sup>

**Early Custom — Special Delegation in Each Case.** — Prior to and during the reign of Edward II. (A. D. 1307-1326), and perhaps for some years after such reign, when action was taken by the crown in respect to any lunatic, it was customary for the king in every instance to delegate his authority in the premises to some person in whom he had confidence. Ordinarily, the lord chancellor was, for obvious reasons, best qualified to act, and it usually was to him that special power under the sign manual was given to represent the king in the matter that had arisen. Such authority was occasionally conferred upon some other officer, and when granted to the lord chancellor was exercised by him as a personal trust and not as the head of the High Court of Chancery.<sup>2</sup>

**Later Rule — Delegation to Lord Chancellor Only.** — In process of time the appointment of the lord chancellor became the practice, and eventually, when a new lord chancellor entered into office, a general delegation of authority to act for the king in relation to inquiries into idiocy and lunacy and the appointment of guardians for persons found to be under mental disability was granted to him. The issuing of the commission under the sign manual in each case was discontinued.<sup>3</sup> Except during the existence of the Court of Wards — created by 32 Hen. VIII., c. 46, and abolished by 12 Car. II., c. 24 — the lord chancellor was for four centuries and upward the delegate of the crown to exercise in the first instance the royal prerogative over persons alleged to be idiots and lunatics, to determine the truth of the matter by means of a jury specially summoned, and, in the event of the finding of lunacy, to select and appoint a suitable guardian or guardians of such incompetent person.<sup>4</sup>

**Where Exclusive Jurisdiction of Chancellor Terminated.** — The question whether or not lunacy existed was for the lord chancellor to decide through the proper inquest or jury; likewise the selection of a guardian was for him alone; but after the finding of lunacy and the appointment of a committee for the incompetent person, the Court of Chancery had full jurisdiction over such committee, as over all other trustees.<sup>5</sup>

**In the United States** the principle of the English chancery in relation to the care and protection of persons *non compos mentis* is recognized, wholly or in part, in probably every state. Generally, all regulations relative to habitual drunkards are prescribed by statute.<sup>6</sup>

**2. What Courts Exercise Jurisdiction over Habitual Drunkards** — *a. GENERALLY REGULATED BY STATUTE.* — To ascertain what court, in any particular state, has jurisdiction over habitual drunkards, the statutes of such state should be consulted; the matter is almost always governed by statute.<sup>7</sup>

**1. Origin and History — Crown Charged with Care of Lunatic — England.** — Beverley's Case, 4 Coke 126; *Ex p. Grimstone*, Ambl. 707; *Ex p. Phillips*, 19 Ves. Jr. 123; *Eyre v. Shaftsbury*, 2 P. Wms. 120; *Burford v. Lenthall*, 2 Atk. 553.

*Illinois.* — *Dodge v. Cole*, 97 Ill. 354.

*Maine.* — *Hovey v. Harmon*, 49 Me. 271.

*New York.* — *Matter of Barker*, 2 Johns. Ch. (N. Y.) 237.

*North Carolina.* — *Latham v. Wiswall*, 2 Ired. Eq. (37 N. Car.) 298; *Dowell v. Jacks*, 5 Jones Eq. (58 N. Car.) 419.

*Pennsylvania.* — *Meurer's Appeal*, 119 Pa. St. 130.

See also the title *INSANITY*.

**2. *Ex p. Grimstone***, Ambl. 706; *Oxenden v. Compton*, 2 Ves. Jr. 72; *Ex p. Phillips*, 19 Ves. Jr. 122; *In re Devausney*, 52 N. J. Eq.

505; *Latham v. Wiswall*, 2 Ired. Eq. (37 N. Car.) 299; *Meurer's Appeal*, 119 Pa. St. 130; *Cathcart v. Sugenhimer*, 18 S. Car. 127. And see the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1173.

**3. *Latham v. Wiswall***, 2 Ired. Eq. (37 N. Car.) 299.

**4. *Burford v. Lenthall***, 2 Atk. 553; *Ex p. Phillips*, 19 Ves. Jr. 121; *Eyre v. Shaftsbury*, 2 P. Wms. 120.

**5. *Eyre v. Shaftsbury***, 2 P. Wms. 120.

**6. In United States.** — See *Matter of Barker*, 2 Johns. Ch. (N. Y.) 233; *Hughes v. Jones*, 116 N. Y. 75, 15 Am. St. Rep. 386. See also *Robertson v. Lyon*, 24 S. Car. 272. Compare *Whetstone v. Whetstone*, 75 Ala. 499; *In re Alexander*, 53 N. J. Eq. 97.

**7. See the title *INSANE PERSONS***, 10 ENCYC. OF PL. AND PR. 1173 *et seq.*

**b. COURTS HAVING JURISDICTION IN LUNACY USUALLY HAVE JURISDICTION OVER HABITUAL DRUNKARDS.** — The rule that the custody of habitual drunkards is intrusted to the tribunal having jurisdiction in cases of lunacy and insanity seems to be of general application.<sup>1</sup>

**c. COURTS OF CHANCERY.** — Where separate courts of chancery still exist, such courts have jurisdiction over habitual drunkards, in the absence of any statutory provision to the contrary.<sup>2</sup>

**d. COURTS OF PROBATE, OF ORDINARY, ORPHANS' COURTS, ETC.** — In many states, jurisdiction over habitual drunkards has been granted to courts of common pleas exercising equity through common-law forms;<sup>3</sup> to Courts of Probate, Courts of Ordinary, Orphans' Courts, County Courts, and similar tribunals of statutory creation, designation, and powers.<sup>4</sup>

**3. Purpose of Authority — To Benefit Drunkard.** — The jurisdiction of courts respecting habitual drunkenness is not ordinarily considered adverse to the habitual drunkard, but rather for his benefit. In chancery there are no parties litigant in a proceeding to determine habitual drunkenness.<sup>5</sup> The purpose of the court is beneficent. Its power is exerted in order to save the inebriate from his own evil propensities; to preserve his property from waste and destruction, so that it may inure to his benefit and that of those dependent upon him; and to protect his relatives, his creditors, and society from the destructive consequences of his pernicious habit. And this humane principle seems to pervade all statutes relating to habitual drunkards and to govern judicial action in the premises, irrespective of the fact whether the court is one of chancery powers, distinctively, or a creation of statute, unknown to the common law.<sup>6</sup>

**4. Nature of Authority — a. EQUITABLE IN CHARACTER AND ADMINISTRATION.** — The nature of the authority exercised by the courts in determining whether any person is or is not a habitual drunkard and in the course of the salutary supervision and control of inebriates is, therefore, essentially equitable in character, irrespective of the diversity in the designation, formation, and general powers of the tribunals exercising such authority.<sup>7</sup>

**Constitutionality of Statutes Granting Jurisdiction over Drunkenness.** — In *Devin v. Scott*, 34 Ind. 67, the Act of March 9, 1867 (Acts 1867, p. 109), "to provide for the care and custody of the person and estate of habitual drunkards," was held to be valid. The court said: "We think there is no doubt as to the power of the legislature to pass such a law, or as to the duty of the courts to enforce it in all proper cases."

**1. Courts Having Jurisdiction in Lunacy Usually Have Jurisdiction over Habitual Drunkards.** — *Cockrill v. Cockrill*, 79 Fed. Rep. 144; *Copenrath v. Kienby*, 83 Ind. 24; *Howard v. Howard*, 87 Ky. 617; *Tome v. Stump*, (Md. 1899) 42 Atl. Rep. 902; *Rannells v. Germer*, 80 Mo. 478; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Matter of McLaughlin*, 1 Clarke (N. Y.) 115; *Steel v. Young*, 4 Watts (Pa.) 459; *Imhoff v. Witmer*, 31 Pa. St. 244; *Matter of Wetmore*, 6 Wash. 274. And see generally the statutes of the particular state.

**2. Corrie's Case**, 2 Bland (Md.) 488; *Ashley v. Holman*, 15 S. Car. 107; *Nailor v. Nailor*, 4 Dana (Ky.) 341.

**3. Scribner v. Qualtrough**, 44 Barb. (N. Y.) 431; *Matter of Blewett*, 111 N. Y. 411; *Booth v. Purd*, Dig. Laws Pa. (1894), pp. 775, 1270; *Shaffer v. List*, 114 Pa. St. 488.

**4. See the title INSANE PERSONS**, 10 ENCYC. OF PSYCHOLOGY, 117.

**5. Purpose Is to Benefit Drunkard.** — *Pinkston*

*v. Semple*, 92 Ala. 564; *Griswold v. Butler*, 3 Conn. 231; *Hovey v. Harmon*, 49 Me. 272; *Matter of McLaughlin*, 1 Clarke (N. Y.) 115; *Matter of Lynch*, 5 Paige (N. Y.) 120; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 427, 22 Am. Dec. 655; *Wadsworth v. Sharpsteen*, 8 N. Y. 390, 59 Am. Dec. 499; *Ludwick v. Com.*, 18 Pa. St. 175; *Shaffer v. List*, 114 Pa. St. 488; *Matter of Wetmore*, 6 Wash. 274.

**6. Hovey v. Harmon**, 49 Me. 272; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 427, 22 Am. Dec. 655; *Matter of Lynch*, 5 Paige (N. Y.) 120; *Wadsworth v. Sharpsteen*, 8 N. Y. 390, 59 Am. Dec. 499.

**7. Authority Equitable in Character** — *Alabama*. — *Fore v. Fore*, 44 Ala. 483; *Pinkston v. Semple*, 92 Ala. 564.

*Connecticut*. — *Griswold v. Butler*, 3 Conn. 231. *Illinois*. — *Snyder v. Snyder*, 142 Ill. 64.

*Indiana*. — *Devin v. Scott*, 34 Ind. 67; *Copenrath v. Kienby*, 83 Ind. 24.

*Maine*. — *Hovey v. Harmon*, 49 Me. 272.

*New York*. — *Matter of Lynch*, 5 Paige (N. Y.) 122; *Matter of Barker*, 2 Johns. Ch. (N. Y.) 234.

*Pennsylvania*. — *Shaffer v. List*, 114 Pa. St. 488.

*Vermont*. — *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 425.

*Washington*. — *Matter of Wetmore*, 6 Wash. 274.

*Alabama*. — *Fore v. Fore*, 44 Ala. 483.



*b. ANALOGOUS TO THAT EXERCISED OVER LUNATICS.* — The jurisdiction and authority of civil courts over habitual drunkards, as developed from the common law respecting lunatics, and now regulated by statute, when not identical with that exercised over insane persons and lunatics, is closely analogous thereto.<sup>1</sup> In some states no distinction exists; a lunatic and an adjudged habitual drunkard are in the same class.<sup>2</sup> And even in states where the law does not regard a habitual drunkard as insane, generally, but rather as a person under statutory disability, the preponderance of decisions tends to show that such habitual drunkard is judicially considered a person of unsound mind, whenever such view is requisite to promote and sustain the humane purposes of the law, for the welfare of the drunkard himself and for the benefit of those legally dependent upon him.<sup>3</sup>

**Adjudications in Lunacy — When Applicable in Habitual Drunkenness.** — Adjudications in lunacy, ordinarily, are pertinent and applicable to habitual drunkards, in all matters of procedure to determine whether or not a person is a habitual drunkard, except where local practice governs; in the appointment of a committee for the adjudged inebriate; in much respecting the guardianship of the person of the inebriate, and in everything relative to the care and control of his estate, whether personalty or realty, as such guardianship is exercised by the court directly or through an individual guardian as its appointee; in all things concerning suits by, for, or against the drunkard; and, last, in every question or contention involving the suspension or removal of the contractual capacity and powers of such adjudged inebriate.<sup>4</sup>

**5. Over Whom Jurisdiction Extends** — *a. RESIDENTS.* — Every resident of a judicial district is of course amenable to the court having jurisdiction therein.

*b. NONRESIDENTS.* — Where a person *non compos mentis* owns real estate situated within the territorial jurisdiction of a court, but is himself a nonresident, an inquisition may be granted to inquire as to his sanity,<sup>5</sup> and the rule has been recognized where such nonresident owned personal property, only, within the district.<sup>6</sup> Apparently no instance is reported where jurisdiction

1. *Griswold v. Butler*, 3 Conn. 231; *Devin v. Scott*, 34 Ind. 70; *Rannells v. Gerner*, 80 Mo. 478; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Wadsworth v. Sharpsteen*, 8 N. Y. 392, 59 Am. Dec. 499. See the title *INSANITY*.

2. *Clark v. Caldwell*, 6 Watts (Pa.) 139; *Sill v. M'Knight*, 7 W. & S. (Pa.) 245; *Ruffner v. Luther*, 6 Pa. Dist. 588.

3. *Thackrah v. Haas*, 119 U. S. 500; *Pinkston v. Semple*, 92 Ala. 570; *Menkins v. Lightner*, 18 Ill. 284; *Crane v. Conklin*, 1 N. J. Eq. 355, 22 Am. Dec. 519; *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 425.

4. **Adjudications in Lunacy — Applicable in Habitual Drunkenness** — *United States.* — *Cockrill v. Cockrill*, 79 Fed. Rep. 144.

*Alabama.* — *Pinkston v. Semple*, 92 Ala. 570. *Connecticut.* — *Gates v. Bingham*, 49 Conn. 278.

*Illinois.* — *Menkins v. Lightner*, 18 Ill. 284.

*Indiana.* — *Devin v. Scott*, 34 Ind. 70; *Gurley v. Butler*, 83 Ind. 501.

*Kentucky.* — *Cook v. Newton*, 14 Ky. L. Rep. 860.

*Michigan.* — *Magahay v. Magahay*, 35 Mich. 210.

*Missouri.* — *Rannells v. Gerner*, 80 Mo. 479.

*New Jersey.* — *Crane v. Conklin*, 1 N. J. Eq. 355, 22 Am. Dec. 519.

*New York.* — *Wadsworth v. Sherman*, 14 Barb. (N. Y.) 173; *Griswold v. Miller*, 15 Barb.

(N. Y.) 520; *Matter of Tracy*, 1 Paige (N. Y.) 582; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Matter of Lynch*, 5 Paige (N. Y.) 122; *Matter of Hoag*, 7 Paige (N. Y.) 313.

*Oregon.* — *McBee v. McBee*, 22 Oregon 329, 29 Am. St. Rep. 615.

*Pennsylvania.* — *Hannum's Appeal*, 9 Pa. St. 472; *Ludwick v. Com.*, 18 Pa. St. 174; *Noel v. Karper*, 53 Pa. St. 99; *Imhoff v. Witmer*, 31 Pa. St. 243; *McGinnis v. Com.*, 74 Pa. St. 247; *Miskey's Appeal*, 107 Pa. St. 628; *Stirling v. Hinckley*, (Pa. 1886) 2 Cent. Rep. 825; *In re Sampson*, 5 Pa. Dist. 717; *Ruffner v. Luther*, 6 Pa. Dist. 589; *Clark v. Caldwell*, 6 Watts (Pa.) 139; *Sill v. M'Knight*, 7 W. & S. (Pa.) 245.

*South Carolina.* — *Robertson v. Lyon*, 24 S. Car. 272.

*Vermont.* — *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 425.

*Washington.* — *Matter of Wetmore*, 6 Wash. 274.

**5. Nonresident Lunatic Owning Real Estate Within Jurisdiction.** — *Ex p.* *Southcote*, Ambl. 109; *Matter of Child*, 16 N. J. Eq. 499; *In re Devausney*, 52 N. J. Eq. 502; *Matter of Perkins*, 2 Johns. Ch. (N. Y.) 124; *Matter of Petit*, 2 Paige (N. Y.) 174; *Matter of Fowler*, 2 Barb. Ch. (N. Y.) 305. See the title *INSANITY*.

**6. Nonresident Owning Personal Property.** — *Matter of Ganse*, 9 Paige (N. Y.) 416, wherein a commission issued against a person who

was exercised in this manner over a nonresident habitual drunkard, but the principle seems applicable to such a case.

**6. How Exercised to Determine Habitual Drunkenness.**—*a.* BY COURT OR JUDGE ALONE.—By statute in certain states authority to determine lunacy and habitual drunkenness is sometimes conferred upon courts alone, without requiring the assistance of a jury.<sup>1</sup> This is consistent with the principle that a proceeding in lunacy or habitual drunkenness does not partake of the nature of litigation before an application to traverse, to quash, or some motion of a like character is entertained and granted. It is an inquiry, not a judicial contest; a proceeding *in rem*, not a contention between adverse parties.<sup>2</sup> Courts, therefore, when duly empowered by statute, investigate and determine, sitting as judges of law and fact, whether a person is or is not a habitual drunkard or a lunatic. A jury trial is not demandable as of right where the statute intrusts the jurisdiction to the court alone.<sup>3</sup>

**By Chancellor Alone.**—In chancery the function and province of a jury in questions of lunacy is advisory only, and not indispensable. Nevertheless, for convenience, if for no other reason, a jury or inquisition is called to find the facts and inform the conscience of the court in perhaps every case brought directly for the purpose of ascertaining whether or not a person should be placed under the protection of the courts because of habitual drunkenness or lunacy.<sup>4</sup>

**Collateral Proceeding.**—In proceedings where the question arises collaterally, where the judgment affects only the matter and parties immediately before the court or chancellor and does not extend to a finding of incompetency generally, the court or chancellor acts alone.<sup>5</sup>

*b.* BY COURT AND JURY.—Jurisdiction to determine the existence of lunacy or habitual drunkenness is now commonly exercised through the instrumentality of court and jury, as in ordinary causes at law.<sup>6</sup> And even in states where commissions in lunacy or in the nature of lunacy issue, it is sometimes provided that under certain circumstances the court may call in a jury where such determination of the question is desired by applicants. Such a course is usually adopted where economy is an object to be considered.<sup>7</sup>

**Advantage of Trial over Inquisition.**—A trial before the court, with or without a jury, sometimes possesses a merit of inestimable value; the court hears the testimony as adduced, and in the event of an application for traverse can act with clear knowledge of the facts. The testimony taken at an inquisition generally forms no part of the record.<sup>8</sup>

while deranged wandered away to some place unknown, leaving personal property, but no real estate, within the jurisdiction of the court.

1. The subject is fully treated under the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1173.

2. *Hovey v. Harmon*, 49 Me. 272; *Wadsworth v. Sharpsteen*, 8 N. Y. 392, 59 Am. Dec. 499.

3. **Trial by Jury Not Demandable as of Right.**—At common law the right of trial by jury did not exist in cases of this nature, except in so far as an inquisition, being an inquiry made "by the oaths of good and lawful men," may be considered a trial by jury. *Hagany v. Cohnen*, 29 Ohio St. 82; *Shroyer v. Richmond*, 16 Ohio St. 467; *Matter of Bresee*, 82 Iowa 578.

**Trial by Jury or Commission—New York.**—Code Civ. Pro. N. Y., § 2327, provides that habitual drunkenness may be determined either by the issuing of a commission to inquire into the facts, the commissioners to direct the sheriff to summon the proper jury to

appear before them, or else that a trial by jury may be had before the proper court, in which such question shall be determined.

**Master in Lunacy.**—In *England* the general appointment and control of inquisitions, etc., and also in a large degree the control of the persons and estates of lunatics, are conferred upon masters in lunacy appointed by the lord chancellor. Lunacy Act, 1890.

4. *Matter of Tracy*, 1 Paige (N. Y.) 582; *Howard v. Howard*, 87 Ky. 617.

5. *Clarkson v. Hanway*, 2 P. Wms. 203; *Harding v. Handy*, 11 Wheat. (U. S.) 121; *Kennedy v. Kennedy*, 2 Ala. 624; *Alexander v. Alexander*, 5 Ala. 518; *Brown v. Miner*, 128 Ill. 154; *Smith v. Carll*, 5 Johns. Ch. (N. Y.) 118.

6. See the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1174.

7. See *Bright. Purd. Dig. Laws Pa.* (1894). p. 1270.

8. Neither the testimony of the witnesses before the inquisition nor the rulings of the commission in passing upon the competency



**VI. CIVIL STATUS OF HABITUAL DRUNKARD PRIOR TO INQUISITION — 1. Presumed to Be Sui Juris.** — While the presumption of law that every person is sane, and, if neither a *feme covert* nor a minor, is under no legal disability, is generally applicable to inebriates who have not been legally adjudged habitual drunkards, it is subject to certain exceptions and modifications.

**2. Incompetency Must Usually Be Specifically Established.** — Where mental incapacity arising from or caused by habitual drunkenness is alleged, the burden is upon the side asserting such incapacity to establish the existence of habitual drunkenness at the time claimed, unless the inebriate has been adjudged a habitual drunkard from a date anterior to the period of such alleged mental incapacity.<sup>1</sup>

**3. Exceptions to Application of Presumption of Competency.** — Apart from the Civil Damage Acts and statutes of similar nature and purpose, the interdiction interposed in some states upon saloon keepers and other dealers in alcoholic liquors by which they are debarred from selling or furnishing intoxicating drinks to any inebriate or intemperate person, although such person may not have been adjudged a habitual drunkard, constitutes an exception to the rule that every adult male and every unmarried woman of legal age are presumed to be *sui juris* until proved to be otherwise. Under the Civil Damage Acts and analogous statutes designed to render persons interested in the liquor traffic pecuniarily liable to those injured by illegal sales or gifts of intoxicating drinks, the prescribed notice to the liquor dealer, when properly served, apparently overcomes, at least for the purpose desired, the presumption of competency in the person to whom such liquor dealer is prohibited to sell, although such notice is usually and necessarily *ex parte*, and the allegation of intemperance therein contained may be exaggerated, or possibly without foundation.<sup>2</sup>

**4. Courts Will Extend Protection Prior to Adjudication of Disability.** — Under the beneficent and comprehensive equity powers of courts, whether exercised in chancery or through common-law forms and methods, judicial authority may, upon proper occasion, be invoked to avert the consequences of improvident acts and transactions performed or entered into by an inebriate, although he may not have been adjudged a habitual drunkard.<sup>3</sup> But courts are not disposed to intervene, unless in a case of palpable fraud and injustice, where the effect of the act or transaction complained of is beneficial to the inebriate by promoting his true interests and benefiting those dependent upon him.<sup>4</sup>

of the evidence form any portion of the record; therefore the court has no way of reviewing such testimony and rulings. *Re Burr*, (C. Pl.) 3 Lack. Leg. N. (Pa.) 162.

**1. Incompetency Must Be Proven — California.** — *Matter of Gharky*, 57 Cal. 278; *Matter of Johnson*, 57 Cal. 530; *Lang's Estate*, 65 Cal. 20.

*Missouri.* — *Wells v. Covenant Mut. Ben. Assoc.*, 126 Mo. 637; *Rhoades v. Fuller*, 139 Mo. 187.

*New Jersey.* — *Matthiesen, etc., Refining Co. v. McMahon*, 38 N. J. L. 536.

*New York.* — *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Van Wyck v. Brasher*, 81 N. Y. 261; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

*Pennsylvania.* — *Tozer v. Saturlee*, 3 Grant Cas. (Pa.) 163; *Wilson v. Bigger*, 7 W. & S. (Pa.) 124; *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24.

**2.** See the title CIVIL DAMAGE ACTS, vol. 6, p. 38.

**Pawnbrokers Forbidden to Deal with Habitual Drunkards.** — See *Grand Rapids v. Brady*, 105 Mich. 677, 55 Am. St. Rep. 472.

**3. Courts Will Protect Drunkard or His Heirs from Improvident Act — United States.** — *Thackrah v. Haas*, 119 U. S. 500.

*Alabama.* — *Hale v. Brown*, 11 Ala. 87; *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595.

*Illinois.* — *Ronan v. Bluhm*, 173 Ill. 277.

*Iowa.* — *Mansfield v. Watson*, 2 Iowa 115.

*New Jersey.* — *Crane v. Conklin*, 1 N. J. Eq. 357, 22 Am. Dec. 519.

*Pennsylvania.* — *Wilson v. Bigger*, 7 W. & S. (Pa.) 124; *Stirling v. Hinckley*, (Pa. 1886) 2 Cent. Rep. 825; *Miskey's Appeal*, 107 Pa. St. 612.

*Tennessee.* — *White v. Cox*, 2 Hayw. (Tenn.) 79. *Vermont.* — *Conant v. Jackson*, 16 Vt. 335; *Bliss v. Connecticut, etc., R. Co.*, 24 Vt. 425.

**4. When Courts Will Not Intervene.** — *Cockrill v. Cockrill*, 79 Fed. Rep. 144; *Reinicker v. Smith*, 2 Har. & J. (Md.) 421; *Wright v. Fisher*, 65 Mich. 279, 8 Am. St. Rep. 886; *Youn v. Lamont*, 56 Minn. 221; *Eaton v. Perry*, 29 Mo. 98; *Propst v. Cass County*, 51 Neb. 736; *Ritter's Appeal*, 59 Pa. St. 12; *Stockett v. Ryan*, 176 Pa. St. 71. See also *Hutchinson v. Tindall*, 3 N. J. Eq. 361; *Moore v. Carling*, 29 N. J. Eq. 435.



**VII. INQUISITION OF HABITUAL DRUNKENNESS — 1. Definition.** — An inquisition of habitual drunkenness is an inquiry made under an order of chancery, or court having jurisdiction, and by the oaths of competent men, to determine whether or not a person is a habitual drunkard; and if he is, to ascertain all such facts concerning the condition of such drunkard, his family and dependents, property and possessions, as shall enable the court to act intelligently and equitably in the premises.<sup>1</sup> An inquisition of habitual drunkenness is so closely assimilated to the ordinary inquisition of lunacy as in most cases to be apparently identical with it.<sup>2</sup>

**2. Petition or Application for Inquisition.** — The holding of an inquisition is discretionary with the court, unless the statute provides otherwise.<sup>3</sup> Ordinarily the proceeding is instituted only upon the proper and legally sufficient petition of some person related by blood or marriage to the supposed inebriate, or having a vested interest in his estate. The statutes have greatly extended this rule.<sup>4</sup> Quite generally, where the continued intoxication of a person will probably result in his becoming a public charge, or will pauperize any one whom it is his duty to support, the poor authorities are qualified to ask for an inquisition.<sup>5</sup> In order to warrant judicial action, a *prima facie* case of habitual drunkenness, actually existing, should be established, *ex parte*, to the satisfaction of the court.<sup>6</sup>

**3. Commission de Inebrieto Inquirendo.** — The writ directing the holding of the inquisition is usually designated a commission in habitual drunkenness.<sup>7</sup> This writ is not a writ of lunacy, but a writ in the nature of a writ of lunacy.<sup>8</sup> The commission is directed to one or more persons, selected by the court, as commissioner or commissioners; issues under the seal of the court; and clothes the person or persons to whom it is directed with the full power and authority of the court, to secure the impaneling of a jury by the sheriff or proper officer, to issue subpoenas for witnesses and the production of books and papers, in some cases to compel the appearance of the alleged inebriate before the inquisition, and, in general, to do and perform all things necessary to carry out the requirements of the writ.<sup>9</sup>

**4. Organization of Inquisition.** — The method of procedure to be followed in summoning the jury and organizing the inquisition is not within the scope of this title.<sup>10</sup>

**1. Inquisition.** — The statutes of the different states set forth the form and phraseology of the writ, and the full duties of the inquisition are generally expressed therein. For an illustration, see the form of the writ in Bright. *Purd. Dig. Laws Pa.* (1894), p. 1270.

**2. Wadsworth v. Sharpsteen**, 8 N. Y. 390, 59 Am. Dec. 499; *Sill v. McKnight*, 7 W. & S. (Pa.) 244. And see the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1169.

**3. Granting Inquisition Discretionary with Court.** — There seems to be no reported case in habitual drunkenness involving the point, but the principle recognized in lunacy cases undoubtedly applies. See the title *INSANITY*.

**4. See the title INSANE PERSONS**, 10 ENCYC. OF PL. AND PR. 1169.

**Dispensing with Legal Proceedings — Appointment of Committee — Sale of Lands by Court.** —

Under the *Maryland* Code one charged with habitual drunkenness may dispense with the legal proceedings to establish such condition, and with the court's approval appoint his own committee. And the court has authority to decree the sale of the lands of a habitual drunkard who has availed himself of this procedure equally as in the case of one regularly "declared" to be a habitual drunkard. *Tome v. Stump*, (Md. 1899) 42 Atl. Rep. 902.

**5. This is usually regulated by statute.** For illustrations, see *Pub. Stat. N. H.* (1891), c. 179, § 3; *Hill's Annot. Laws Oregon* (1892), § 2891.

**6. See, supra**, this title, *What Constitutes Habitual Drunkenness*. See also the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1179.

**7. Commission.** — The term "commission," like the word "inquisition," is inexact and loosely used. Strictly speaking, it means the writ issued out of chancery; but it is commonly employed to denote the commissioners or persons to whom the writ is directed, and by enlargement the commissioners, jurors, and *personnel* of the tribunal or body organized under such writ.

**8. The writ is not de lunatico inquirendo**, neither is the commission that of lunacy; the process is in the nature of a writ *de lunatico inquirendo*, and it is not necessary that lunacy should be established to warrant a finding under such writ; it is sufficient that the party is incapable of managing his own affairs. *Per* Chancellor Kent, in *Matter of Barker*, 2 Johns. Ch. (N. Y.) 235.

**9. For the form and nature of the commission in any particular state, the statutes of such state must be consulted.**

**10. See the title INSANE PERSONS**, 10 ENCYC. OF PL. AND PR. 1169.

**5. Right of Party to Appear** — *a.* IN PERSON. — The right of the person proceeded against to appear personally before the inquisition, in opposition to the proceeding, is unquestionable.<sup>1</sup>

**Not Obligated to Appear in Person.** — Unless the statutes require the personal presence of the party proceeded against, he need not appear before the inquisition. His appearance is within his own volition. Still it has been held that in all proceedings relating to mental disability it is eminently proper that the jury of inquest should see and hear the party proceeded against.<sup>2</sup>

*b.* BY COUNSEL. — The preponderance of recent authority has established the principle that, irrespective of any statute or rule of practice authorizing the appearance of counsel, the party proceeded against has a constitutional right to appear by counsel before the inquisition or court and interpose his defense through counsel; that as matter of personal and indefeasible right he is entitled to all the benefit which may accrue to him through the professional skill of his counsel; and that a refusal upon the part of the inquisition to permit counsel to cross-examine witnesses, to sum up, or to perform any other office legitimately adapted to the orderly and proper presentation of his client's cause, is unlawfully to deprive such client of an inherent right, and constitutes ground for setting aside a finding of incompetency.<sup>3</sup>

**Compensation of Counsel.** — The development of this doctrine has modified the former theory that since a finding of incompetency usually invalidates all contracts entered into by the lunatic from the inception of the proceeding, the right of counsel to recover for his services, when depending upon a supposed contractual relation within the period overreached by the finding, is defeated. The tendency now is to consider such services in the light of necessities furnished, and as such they are ordinarily regarded by the court. The principle that the property of a person *non sui juris* is liable upon a *quantum meruit* for necessities furnished in good faith to such lunatic or for his benefit is considered applicable.<sup>4</sup>

**6. Party Must Have Notice of Inquisition.** — The person proceeded against

**1. Right to Appear** — *Alabama.* — McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; Eslava v. Le Pretre, 21 Ala. 504, 56 Am. Dec. 266; Molton v. Henderson, 62 Ala. 430.

*Arkansas.* — Arrington v. Arrington, 32 Ark. 674.

*Connecticut.* — Hutchins v. Johnson, 12 Conn. 382, 30 Am. Dec. 622.

*Illinois.* — Eddy v. People, 15 Ill. 387; Behrensmeyer v. Kreitz, 135 Ill. 638.

*Kansas.* — Matter of Wellman, 3 Kan. App. 103.

*Kentucky.* — Mason v. Beazley, 10 Ky. L. Rep. 154.

*Louisiana.* — Stafford v. Stafford, 1 Mart. N. S. (La.) 552.

*Maine.* — Hovey v. Harmon, 49 Me. 271; Holman v. Holman, 80 Me. 142.

*Massachusetts.* — Chase v. Hathaway, 14 Mass. 222; Hathaway v. Clark, 5 Pick. (Mass.) 491.

*New Jersey.* — Matter of Whitenack, 3 N. J. Eq. 253; Matter of Jewell, 26 N. J. Eq. 298; Matter of Lindsley, 46 N. J. Eq. 358.

*New York.* — Matter of Dickie, (Supm. Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 422; Matter of Russell, 1 Barb. Ch. (N. Y.) 39; Matter of Janes, (Supm. Ct.) 30 How. Pr. (N. Y.) 453; Matter of Tracy, 1 Paige (N. Y.) 580; *In re* Bennett, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 373; Matter of Egan, 36 N. Y. App. Div. 47; Matter of Baird, (Supm. Ct. Spec. T.) 8 N. Y. St. Rep. 493.

*North Carolina.* — Bethea v. McLennon, 1 Ired. L. (23 N. Car.) 527.

*Pennsylvania.* — Matter of O'Brien, 1 Ashm. (Pa.) 83; *In re* Lincoln, 1 Brews. (Pa.) 394; May's Case, 10 Pa. Co. Ct. 283; Com. v. Groh, 10 Pa. Co. Ct. 557; Willis v. Willis, 12 Pa. St. 161; *In re* Rust, 177 Pa. St. 343.

*Vermont.* — Shumway v. Shumway, 2 Vt. 339.

*West Virginia.* — Lance v. McCoy, 34 W. Va. 419; Evans v. Johnson, 39 W. Va. 302, 45 Am. St. Rep. 912.

**2.** Whether there shall be an examination of the person proceeded against is considered discretionary with the inquisition, although in practice it is not often dispensed with. Matter of O'Brien, 1 Ashm. (Pa.) 82. See also *Ex p.* Southcote, Ambl. 109.

**3. Party Entitled to Full Benefit of Counsel.** — Matter of Church, (County Ct.) 64 How. Pr. (N. Y.) 393. See also *In* Matter of Dickie, (Supm. Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 422.

**4. Compensation of Counsel.** — Hallett v. Oakes, 1 Cush. (Mass.) 299; Darby v. Cabanne, 1 Mo. App. 130; Matter of Tracy, 1 Paige (N. Y.) 582; Carter v. Beckwith, 128 N. Y. 322; Matter of Hardy, 26 N. Y. App. Div. 166; Sidebotham v. Young, 4 W. N. C. (Pa.) 442; Freeman's Appeal, 22 W. N. C. (Pa.) 173. See also Tarr's Estate, 21 Pa. Co. Ct. 358. And see the title ATTORNEY AND CLIENT, vol. 3, p. 416.

is entitled to due notice of the time and place of holding the inquisition. Failure to give such notice has been considered sufficient to set aside the commission, even where no statutory provision existed requiring such notice.<sup>1</sup>

**Reasonable Time to Prepare.** — It is likewise held that such party is entitled as matter of right to an allowance of a reasonable time in which to procure witnesses and prepare his cause.<sup>2</sup>

**7. Evidence Before Inquisition** — *a*. **WHAT EVIDENCE NECESSARY.** — An existing condition of habitual drunkenness must be proven.<sup>3</sup> The evidence should always be sufficient to enable the inquisition to make an intelligent and full return to every question of fact contained in the commission.

*b*. **COMPETENCY OF EVIDENCE.** — A considerable degree of latitude is permitted in the examination of ordinary or nonexpert witnesses. It has been held, and it is now a general rule, that whether a person is drunk or sober can be better determined by the direct answer of those cognizant of the facts than by a description of his conduct.<sup>4</sup> It is also competent for a witness to testify

**1. Notice as Matter of Right** — *Alabama.* — McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; *Eslava v. Le Pretre*, 21 Ala. 504, 56 Am. Dec. 266; *Molton v. Henderson*, 62 Ala. 430.

*Arkansas.* — *Arrington v. Arrington*, 32 Ark. 676.

*Connecticut.* — *Hutchins v. Johnson*, 12 Conn. 382, 30 Am. Dec. 622.

*Georgia.* — *Morton v. Sims*, 64 Ga. 303.

*Illinois.* — *Eddy v. People*, 15 Ill. 387; *Behrens-meyer v. Kreitz*, 135 Ill. 638.

*Kansas.* — *Matter of Wellman*, 3 Kan. App. 103.

*Kentucky.* — *Mason v. Beazley*, 10 Ky. L. Rep. 154.

*Louisiana.* — *Segur v. Pellerin*, 16 La. 63; *Stafford v. Stafford*, 1 Mart. N. S. (La.) 552.

*Maine.* — *Hovey v. Harmon*, 49 Me. 271; *Holman v. Holman*, 80 Me. 142.

*Massachusetts.* — *Chase v. Hathaway*, 14 Mass. 222; *Hathaway v. Clark*, 5 Pick. (Mass.) 491.

*Michigan.* — *North v. Joslin*, 59 Mich. 647.

*Missouri.* — *Matter of Marquis*, 85 Mo. 618.

*New Jersey.* — *Matter of Whitenack*, 3 N. J. Eq. 253; *Matter of Jewell*, 26 N. J. Eq. 298.

*New York.* — *Matter of Janes*, (Supm. Ct.) 30 How. Pr. (N. Y.) 453; *Matter of Egan*, 36 N. Y. App. Div. 47.

*Pennsylvania.* — *Willis v. Willis*, 12 Pa. St. 161; *In re Rust*, 177 Pa. St. 341; *May's Case*, 10 Pa. Co. Ct. 283; *Com. v. Groh*, 10 Pa. Co. Ct. 557.

*Tennessee.* — *Ex p. Dozier*, 4 Baxt. (Tenn.) 82; *Albright v. Rader*, 13 Lea (Tenn.) 576; *Davis v. Norvell*, 87 Tenn. 36.

*Vermont.* — *Shumway v. Shumway*, 2 Vt. 339.

*West Virginia.* — *Lance v. McCoy*, 34 W. Va. 419; *Evans v. Johnson*, 39 W. Va. 302, 45 Am. St. Rep. 912.

**Exceptions to General Application of Rule.** — There are a number of reported cases forming exceptions to the general application of the rule. These exceptions are usually based upon some provision in a statute permitting the court to exercise discretion in dispensing with notice, where it is satisfied that the condition of the party proceeded against is such that service of notice would be injurious to him. *Matter of Russell*, 1 Barb. Ch. (N. Y.)

38; *Southern Tier Masonic Relief Assoc. v. Laudenbach*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 901; *Matter of Blewitt*, 131 N. Y. 547; *Medlock v. Cogburn*, 1 Rich. Eq. (S. Car.) 477; *Smith v. Burnham*, 1 Aik. (Vt.) 84.

**2. Reasonable Time to Prepare.** — *Matter of Jewell*, 26 N. J. Eq. 298.

**3. See supra**, this title, *What Constitutes Habitual Drunkenness*.

**4. When Ordinary Witness Competent.** — Where a nonexpert or ordinary witness is conversant with the supposed inebriate's drinking habits, and the possession of such knowledge is established, it is competent for a witness, having first given the facts and reasons upon which his opinion is based, to state whether or not such alleged drunkard was intoxicated or is of intemperate habits.

*Alabama.* — *Smith v. State*, 55 Ala. 1.

*California.* — *People v. Monteith*, 73 Cal. 8; *People v. Sehorn*, 116 Cal. 511.

*Georgia.* — *Choice v. State*, 31 Ga. 424; *Pierce v. State*, 53 Ga. 365.

*Illinois.* — *Dimick v. Downs*, 82 Ill. 570; *Aurra v. Hillman*, 90 Ill. 61; *Gallagher v. People*, 120 Ill. 179.

*Indiana.* — *Wright v. Crawfordsville*, 142 Ind. 642.

*Iowa.* — *State v. Huxford*, 47 Iowa 16.

*Kansas.* — *State v. Mayberry*, 33 Kan. 445.

*Maine.* — *Stacy v. Portland Pub. Co.*, 68 Me. 279.

*Massachusetts.* — *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 190, 79 Am. Dec. 724; *Com. v. Sturdivant*, 117 Mass. 134, 19 Am. Rep. 401; *Com. v. Dowling*, 114 Mass. 259; *Cox v. Central Vermont R. Co.*, 170 Mass. 139.

*Michigan.* — *Cook v. Standard L., etc., Ins. Co.*, 84 Mich. 20.

*Minnesota.* — *McKillop v. Duluth St. R. Co.*, 53 Minn. 534.

*New Hampshire.* — *State v. Pike*, 49 N. H. 407; *Hardy v. Merrill*, 56 N. H. 241, 22 Am. Rep. 441.

*New Jersey.* — *Castner v. Sliker*, 33 N. J. L. 509, affirming *Castner v. Sliker*, 33 N. J. L. 96.

*New York.* — *People v. Eastwood*, 14 N. Y. 562; *Felska v. New York Cent., etc., R. Co.*, 152 N. Y. 341.

**Witness May Testify as to Appearance.** — *Cook v. Standard L., etc., Ins. Co.*, 84 Mich. 20.



as to whether or not a person is of intemperate habits.<sup>1</sup> It is considered that what is seemingly an expression of opinion in such a case is in effect evidence of a fact and not an expression of an opinion. To this general ruling there are but very few reported exceptions.<sup>2</sup>

**Competency of Family Physician.** — The decisions are in conflict as to whether or not the testimony of the physician usually employed by the party proceeded against is admissible in evidence.<sup>3</sup>

**8. Finding or Verdict — Should Be Responsive to Writ.** — The finding should conform and be responsive to the commands and requirements of the writ. The fact whether the person proceeded against is or is not a habitual drunkard should appear; also, when necessary, whether he is wasting or squandering his property. The information and facts in relation to the circumstances of life, property, family, and general relations of the drunkard, where a finding of habitual drunkenness is had, should be returned as required by the writ.<sup>4</sup>

**Retrospective Finding.** — In a few states, where an inquisition finds a person a habitual drunkard it must also ascertain and return how long he has been a habitual drunkard. Frequently such finding overreaches months, and sometimes years. Retrospective findings are not recognized in most states.<sup>5</sup>

**1. Intemperate Habits.** — See *Smith v. State*, 55 Ala. 1 [*overruling Stanley v. State*, 26 Ala. 26]; *Tatum v. State*, 63 Ala. 152; *Choice v. State*, 31 Ga. 467; *Gallagher v. People*, 120 Ill. 182; *State v. Huxford*, 47 Iowa 17; *State v. Pratt*, 34 Vt. 323.

*People v. Eastwood*, 14 N. Y. 562, is cited more than any other case, perhaps, upon the point involved. In this case a witness was asked whether from the defendant's conduct and deportment he was (in the judgment of the witness) to any considerable extent under the influence of intoxicating liquors. Objection was taken that it was not competent for the witness to state his opinion. The question was excluded on this account, and the defendant excepted. Still the witness did testify to facts tending to show that the prisoner was probably intoxicated. The court, by Mitchell, J., held the question competent. This case has been cited with approval in the following decisions: *Hopt v. Utah*, 120 U. S. 437; *Yahn v. Ottumwa*, 60 Iowa 433; *State v. Mayberry*, 33 Kan. 445; *Hardenburgh v. Cockroft*, 5 Daly (N. Y.) 79; *De Witt v. Barly*, 17 N. Y. 340; *People v. Fernandez*, 35 N. Y. 61; *Blake v. People*, 73 N. Y. 587.

**2. Rulings Contrary to General Doctrine.** — See *Stevens v. San Francisco, etc.*, R. Co., 100 Cal. 570; *Golding v. Golding*, 74 Mo. 123; *Batchelder v. Batchelder*, 14 N. H. 380; *Horne v. Horne*, 1 Tenn. Ch. 260.

**3. Competency of Family Physician.** — In *Matter of Hoyt*, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 163, it was held that the affidavit or other testimony of the physician who had been employed by the party proceeded against in an inquisition *de inebriato inquirendo* in support of the application cannot be used. The confidential relation existing between patient and physician renders the use of such evidence against public policy. This doctrine is contradicted in the later case of *In re Benson*, (County Ct.) 16 N. Y. Supp. 111, where the testimony of "the regular physician of the supposed lunatic" was held to be competent in a proceeding *de lunatico inquirendo*. The court, by Werner, J., held that the statutory provision forbidding any physician or surgeon

to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, did not apply to a proceeding of this kind. "No physician can be better qualified to testify to the sanity or insanity of a person than he who has for some time attended such person in a professional capacity. Indeed, the cases are not rare where none but an attending physician could intelligently testify to a person's mental condition."

**4. Finding Should Be Responsive to Writ.** — Although the form and language are prescribed by statute, yet perhaps as good an illustration of the old common-law writ to which the finding must conform as can be found is that in *Bright*, *Purd. Dig. Laws Pa.* (1894), p. 1270. See *McGinnis v. Com.*, 74 Pa. St. 249.

**Where Mental and Physical Faculties Only Estate.** — In *Shuck v. Shuck*, 7 Bush (Ky.) 306, the court, by Robertson, C. J., in reviewing the testimony in the case, referred to it as sufficiently proving a wasting by the habitual drunkard "of his only estate, which consisted of his mental and physical faculties." See also *McKay v. McKay*, 18 B. Mon. (Ky.) 8.

**5. Retrospective Finding — England.** — In England a finding or verdict in lunacy cannot be made so as to have a retrospective effect, unless by special order. 25 and 26 Vict., c. 86, § 3; Lunacy Regulation Act 1862, § 3; *In re Danby*, 30 Ch. D. 323.

*New York.* — By statute in New York the inquiry must be confined to the question whether the person proceeded against is incompetent at the time of the inquiry; and testimony respecting anything said or done by him, or his demeanor or state of mind, more than two years before the hearing or trial, shall not be received as proof of lunacy, unless specially submitted by the court. Code Civ. Pro., § 2335; *Matter of Demelt*, 27 Hun (N. Y.) 482; *Matter of Cook*, (Supm. Ct. Gen. T.) 25 N. Y. St. Rep. 64. Compare *Dominick v. Dominick*, (Supm. Ct. Gen. T.) 10 N. Y. St. Rep. 33.

*Pennsylvania.* — It has been held that under the Pennsylvania statute an inquisition in

9. **Traverse of Finding of Inquisition — Procedure.** — The practice or procedure in traverse is not within the scope of this article.<sup>1</sup>

**Traverse at Common Law.** — A traverse of an inquisition of lunacy, or of habitual drunkenness, with which it is identical, is at common law, and by statute in some states, closely assimilated to cases of traverse upon "untrue inquisitions of office found."<sup>2</sup> The old common-law proceeding of inquest of office was purely *ex parte*, and an appeal lay therefrom. A traverse of a finding of habitual drunkenness is, therefore, a proceeding by which the fact of habitual drunkenness passed upon by an inquisition may be considered *de novo* by a court of record sitting with a jury.<sup>3</sup>

**Traverse as Matter of Right.** — In *England* traverse is a matter of right.<sup>4</sup> In the *United States* the rule varies in different jurisdictions.<sup>5</sup>

**Who May Traverse.** — The party proceeded against and any person aggrieved by the finding may ask leave to traverse.<sup>6</sup> But such application must be made within reasonable time.<sup>7</sup> Sometimes the court may require a party other than the person proceeded against, asking leave to traverse, to agree that the verdict in traverse shall be binding and conclusive.<sup>8</sup>

**VIII. EFFECT OF INQUISITION FINDING HABITUAL DRUNKENNESS — 1. Equivalent Usually to Finding of Lunacy.** — A finding of habitual drunkenness is, in many states, closely analogous to a finding of lunacy.<sup>9</sup> It is generally held equivalent to a finding of lunacy when such construction is necessary for the welfare of the drunkard himself, his family, or those dependent upon him.<sup>10</sup>

habitual drunkenness was not authorized to ascertain how long a person had been a habitual drunkard, the object of the commission being simply to ascertain whether he is or is not a habitual drunkard, and if he is to protect him and his family thereafter from the consequences thereof. This seems to have been directly held in *Ex p. Haviland*, 1 W. N. C. (Pa.) 345. See also *In re Sampson*, 5 Pa. Dist. 717. But such a construction is at variance with the rulings, opinions, and general reasoning in *Klohs v. Klohs*, 61 Pa. St. 245; *Hutchinson v. Sandt*, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; *Clark v. Caldwell*, 6 Watts (Pa.) 139; *Sill v. M'Knight*, 7 W. & S. (Pa.) 244; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Willis v. Willis*, 12 Pa. St. 159; *In re Gangwere*, 14 Pa. St. 417, 53 Am. Dec. 554; *Ludwick v. Com.*, 18 Pa. St. 172; *Nace v. Boyer*, 30 Pa. St. 99; *Imhoff v. Witmer*, 31 Pa. St. 243; *Noel v. Karper*, 53 Pa. St. 97; *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 413, 21 Am. Rep. 24; *Moore v. Hershey*, 90 Pa. St. 201; *Draper's Estate*, 26 W. N. C. (Pa.) 218.

1. **Traverse of Finding.** — See the title *TRAVEL* PERSONS, 10 ENCYC. OF PL. AND PR. 1202.

2. *McGinnis v. Com.*, 74 Pa. St. 248.

3. *Matter of Tracy*, 1 Paige (N. Y.) 582; *McGinnis v. Com.*, 74 Pa. St. 248.

4. **Traverse as Matter of Right.** — *Ex p. Wragg*, 5 Ves. Jr. 451; *Ex p. Ferne*, 5 Ves. Jr. 833; *Matter of Bridge*, Cr. & Ph. 338.

5. **Court May Exercise Discretion in Allowing Traverse.** — *Matter of Vanauken*, 10 N. J. Eq. 186; *Matter of Lindsley*, 46 N. J. Eq. 358; *De Hart v. Condit*, 51 N. J. Eq. 612, 40 Am. St. Rep. 545; *Matter of Tracy*, 1 Paige (N. Y.) 580; *Matter of Christie*, 5 Paige (N. Y.) 242; *Matter of Mason*, 1 Barb. (N. Y.) 436; *Matter of M'Clean*, 6 Johns. Ch. (N. Y.) 440; *Matter of Russell*, 1 Barb. Ch. (N. Y.) 38; *Matter of Clapp*, (Supm. Ct. Gen. T.) 20 How. Pr. (N.

Y.) 385. See also *Shumway v. Shumway*, 2 Vt. 339.

In *Pennsylvania* a different rule obtains. Traverse is matter of right, provided it is brought within three months after return of the inquisition. Afterwards it is allowed in the discretion of the court. *Benedict's Lunacy*, 3 Kulp (Pa.) 96; *Gumaer's Lunacy*, 1 Wilcox (Pa.) 1; *McGinnis v. Com.*, 74 Pa. St. 245.

6. **Who May Traverse.** — *Matter of Tracy*, 1 Paige (N. Y.) 582; *McGinnis v. Com.*, 74 Pa. St. 248; *Walker v. Russell*, 10 S. Car. 82.

7. *McGinnis v. Com.*, 74 Pa. St. 245; *Benedict's Lunacy*, 3 Kulp (Pa.) 96. And as involving the doctrine of laches, see *Wright v. Fisher*, 65 Mich. 283, 8 Am. St. Rep. 886.

8. *Yauger v. Skinner*, 14 N. J. Eq. 395; *Matter of Christie*, 5 Paige (N. Y.) 243; *Matter of Giles*, 11 Paige (N. Y.) 244; *Medlock v. Cogburn*, 1 Rich. Eq. (S. Car.) 477.

Such proceedings are frequently instituted by persons injured by a retrospective finding. The remedy gives them their day in court and will relieve them from any unjust or oppressive consequence of such finding. *Yauger v. Skinner*, 14 N. J. Eq. 395.

9. **Closely Analogous to Finding of Lunacy.** — *Devin v. Scott*, 34 Ind. 70; *Tome v. Stump*, (Md. 1899) 42 Atl. Rep. 902; *Rannells v. Gerner*, 80 Mo. 478; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Wadsworth v. Sharpsteen*, 8 N. Y. 390, 59 Am. Dec. 499; *Brockway v. Jewell*, 52 Ohio St. 199; *Clark v. Caldwell*, 6 Watts (Pa.) 139. See also the title *TRAVEL*.

10. **Identical with Finding of Lunacy So Far as Relates to Control of Property.** — In the early case of *Sill v. M'Knight*, 7 W. & S. (Pa.) 244, in speaking of legislation then in existence respecting habitual drunkards, which legislation has been in no way limited by more recent statutes, it was said: "It must be admitted



**Legal Lunatic.** — A habitual drunkard has been defined to be a "legal lunatic."<sup>1</sup> In states where habitual drunkards are classed with spendthrifts and not with the insane, the definition is peculiarly applicable.<sup>2</sup>

**Immunities of Habitual Drunkard as Distinguished from Disabilities of Lunatic.** — The mental incapacity of a lunatic exists in fact as well before as subsequent to the adjudication. Where, however, after adjudication, the means of indulging his appetite are removed from an inebriate, there is ordinarily a rapid improvement in what may have been his morbid or abnormal mental condition. A habitual drunkard, after abstinence for a reasonable time, although still under guardianship, is in no sense, as a general rule, a lunatic, except as he is a "legal lunatic." Unlike a lunatic, his personal liberty is not liable to be restrained.<sup>3</sup>

**2. Habitual Drunkard Rendered Non Sui Juris** — *a.* **GENERALLY.** — A finding of habitual drunkenness renders a drunkard *non sui juris* in the ordinary sense of the term.<sup>4</sup>

*b.* **REVOKES AUTHORITY OF ALL AGENTS TO ACT FOR DRUNKARD.** — As in insanity, an adjudication of habitual drunkenness revokes the right of any person to act as the agent or representative of the drunkard by virtue of authority given before the adjudication. This, of course, applies to cases where an agent is merely a representative without an interest. A committee alone, after decree, can act for the drunkard.<sup>5</sup>

*c.* **REVOKES AUTHORITY OF DRUNKARD TO ACT AS AGENT FOR ANOTHER.** — Although there seems to be no direct decision upon the point, it would

that the Act of 1819, with its amendments, and the Act of 1836 which supplanted it, have in terms put lunatics and habitual drunkards on a level so far as concerns their own estates." See also *Inhoff v. Wiemer*, 31 Pa. St. 244.

In *Rannells v. Gerner*, 80 Mo. 478, a person was found incapable of managing his own affairs because of habitual drunkenness, and a guardian was appointed for him. In passing upon the effect of a contract entered into by such incompetent person after inquisition found, the court, by Sherwood, J., held such contract absolutely void and placed the person himself within the class of "nonsane persons."

**1. Legal Lunatic.** — *Dwight on Law of Persons* 307.

**2. Massachusetts — Spendthrifts.** — See *Manston v. Felton*, 13 Pick. (Mass.) 210.

**Alabama.** — *Civ. Code Ala.* (1896), §§ 836, 837, is an act of such an anomalous character as to require consideration. It provides that when any man over twenty-one years of age, or any man under twenty-one years who has been relieved of the disabilities of nonage, is by reason of intemperance unfit to manage his estate, or is wasting or squandering it, and thereby in danger of being reduced to poverty and want, etc., his wife, brother, sister, or next of kin may file a bill in chancery to preserve the estate of such intemperate person from further waste. The bill must "specify \* \* \* the estate proposed to be secured." If the facts are found in accordance with the allegations of the bill, a trustee is appointed, but the duties of such trustee, so far as the property of his ward is concerned, are limited to the schedule of property specified in the bill. It has, therefore, been held that while the disability and contractual incapacity of such intemperate person are absolute and unqualified so far as concerns the property specified in such bill, yet any chattel or any real

estate not so mentioned, or any after-acquired property, is not within the management of the trustee, but the adjudged inebriate has full power and control thereof, precisely as though such adjudications had never been made. *Jones v. Semple*, 91 Ala. 182; *Pinkston v. Semple*, 92 Ala. 564.

**3. Habitual Drunkard Should Not Be Confined as Lunatic Without Process of Law.** — "Lunatics may be rightfully restrained of their liberty without legal process and without the intervention of a committee, and they are not always to be let loose on habeas corpus when confined by strangers. But inebriates cannot be treated as lunatics unless they are lunatics as well as inebriates; and whoever confines an inebriate must do so by due process of law." *Balcom, J., in Matter of Janes*, (Supm. Ct.) 30 How. Pr. (N. Y.) 453.

**4. Rendered Non Sui Juris.** — *Cockrill v. Cockrill*, 92 Fed. Rep. 811; *Devin v. Scott*, 34 Ind. 70; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Ruffner v. Luther*, 6 Pa. Dist. 588.

**5. Revokes Authority of Agents.** — See the title *AGENCY*, vol. 1, p. 1226.

*Motley v. Head*, 43 Vt. 633, holds that when a person loses the power to bind himself by his own acts, the general principle is true that that loss works a like loss to all those upon whom he has conferred the power to bind him. While the principle is beyond dispute, and the case was one of habitual drunkenness, yet the facts in that case were so unusual that the court held that the authority of an agent appointed by the drunkard continued and was not revoked. The case is peculiar, however, in many respects. There was no adjudication of drunkenness in the state where the agency existed and which was the home of the drunkard, but the drunkard, who had gone into another state to an "asylum for such folks," had been there placed under guardianship.



seem that an adjudication of habitual drunkenness operates to revoke and terminate all authority to act as the agent of another which the drunkard previously held.<sup>1</sup>

*d. DISQUALIFICATION OF HABITUAL DRUNKARD FOR PUBLIC OFFICE.* — The habitual drunkenness of a person holding a public office of honor, trust, or profit is perhaps in every state cause for his removal from such office. The statutes of the several states ordinarily provide for the impeachment of such officer or prescribe the manner in which he shall be proceeded against and removed.<sup>2</sup>

*e. REMOVAL FROM POSITION OF TRUST.* — Habitual drunkenness is a legal ground for dismissal from the office of executor, administrator, guardian, receiver, or other position of trust. It is usually unnecessary to await an adjudication or finding of habitual drunkenness. If it is established to the satisfaction of the court or tribunal having jurisdiction over such office that the person has become a habitual drunkard, he may be deprived of such trust.<sup>3</sup>

*f. GROUND FOR DISSOLUTION OF PARTNERSHIP.* — The habitual drunkenness of one member of a business copartnership may constitute ground for a court having equity jurisdiction, and upon proper application made, to decree the dissolution of the copartnership.<sup>4</sup>

**3. Civil Liability and Responsibility Cease** — *a. GENERAL RULE.* — The general rule is that an adjudication of habitual drunkenness deprives a person so found of all civil liability and responsibility. This follows as a necessary corollary of his becoming *non sui juris*.<sup>5</sup>

*b. EXCEPTIONS.* — There are, as already indicated, certain exceptions to this general rule.

(1) *Liability for Torts.* — As in the case of lunatics, minors, and others under disability, a habitual drunkard is liable for all torts committed by him.<sup>6</sup>

(2) *Liability for Necessaries.* — A habitual drunkard is liable for necessaries furnished in good faith to him or to those dependent upon him.<sup>7</sup>

1. See the title *AGENCY*, vol. 1, p. 1226.

2. *Disqualifies for Public Office.* — *State v. Savage*, 89 Ala. 8; *State v. Robinson*, 111 Ala. 483. See also *Pennsylvania v. Keffer*, Add. (Pa.) 290; *Com. v. Alexander*, 1 Va. Cas. 156; *Com. v. Mann*, 1 Va. Cas. 308.

3. *Removal from Position of Trust.* — This is usually regulated by statutes providing in effect that the habitual drunkenness of a person acting as executor, administrator, guardian, committee, trustee, or holding any other fiduciary position or relation, shall constitute ground for his removal from such trust. See, by way of illustration, *Code Civ. Pro. N. Y.*, §§ 2612, 2661; and see the statutes of the respective states. See also *Gurley v. Butler*, 83 Ind. 501.

*Removal of Habitual Drunkard from Office of Guardian.* — In *Kettletas v. Gardner*, 1 Paige (N. Y.) 488, the guardianship of two minors had been intrusted to a certain man and his wife. The husband became a habitual drunkard, and the chancellor directed his removal as guardian, and likewise that of his wife as being "subject to his control."

*Contrary Ruling.* — A ruling contrary to the statement of the text appears in the early case of *Sill v. McKnight*, 7 W. & S. (Pa.) 244, where Chief Justice Gibson held that an adjudication of habitual drunkenness and the appointment of a trustee for the drunkard did not alone constitute sufficient ground for the removal of the drunkard from his office as sole surviving executor of an estate.

4. *Dissolution of Partnership.* — Habitual drunkenness may constitute ground for a court of equity, upon application made, to decree a dissolution of a business copartnership. *Howell v. Harvey*, 5 Ark. 279, 39 Am. Dec. 376. See also *Light v. Light*, 25 Beav. 248; *Beall v. Smith*, L. R. 9 Ch. 85; *Jones v. Lloyd*, L. R. 18 Eq. 265.

5. *Civil Liability and Responsibility Cease.* — *Wadsworth v. Sharpsteen*, 8 N. Y. 390, 59 Am. Dec. 499, affirming *Wadsworth v. Sherman*, 14 Barb. (N. Y.) 169; *Devin v. Scott*, 34 Ind. 67.

*Connecticut — Disability Extends Only Within State.* — A person was found incapable, under the Connecticut statute, of managing his affairs, and a conservator was appointed for him. During such guardianship he removed to Massachusetts and incurred a debt for rent in that state. It was held that the creditor could recover against such incapable person by suit brought against him personally upon his return to Connecticut, and that the disability imposed by the Connecticut statute extended only within the territorial limits of that state. *Gates v. Bingham*, 49 Conn. 278.

6. See the titles *INSANITY*; *TORTS*.

7. *Liability for Necessaries* — *Alabama.* — *Ex p. Northington*, 37 Ala. 498, 79 Am. Dec. 67.

*Arkansas.* — *Henry v. Fine*, 23 Ark. 419.

*Illinois.* — *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610.

*Maine.* — *Sawyer v. Lufkin*, 56 Me. 308.

*Massachusetts.* — *Hallett v. Oakes*, 1 Cush.

(3) *Marriage After Inquisition May Be Legal.* — The marriage of a habitual drunkard after adjudication has been held valid. Such marriage cannot be attacked collaterally. When the contract of marriage is directly attacked the effect of the adjudication is merely to throw the burden of proof upon the parties desiring to establish the validity of the marriage.<sup>1</sup>

(4) *Will or Testament May Be Valid.* — A will is not a contract, therefore a will of a habitual drunkard is not necessarily invalid. It is a question of fact, on the probate of the will, whether or not the mental incompetency of the testator arising from his habitual drunkenness was so extensive as to destroy his testamentary capacity. The adjudication in itself is merely *prima facie* evidence of incompetency.<sup>2</sup>

**4. Conclusiveness of Finding of Habitual Drunkenness** — *a.* AS TO OVERREACHED PERIOD. — An inquisition finding a person to be a habitual drunkard and likewise that he has been such for a specified period prior to the inquisition is, in jurisdictions where retrospective findings may be made, presumptive evidence against the validity of any act done or performed by him within the period "overreached" by the finding. Therefore, any gift made by him during such time would not necessarily be binding upon him or upon his committee subsequently appointed; and any contract, whether by parol or under seal, or any agreement or undertaking entered into by him during such "overreached" period, is presumptively invalid and void.<sup>3</sup>

*b.* AFTER ADJUDICATION OF HABITUAL DRUNKENNESS. — The principle that when the court, by confirming the return of the inquisition or by any definitive decree, has adjudged a person to be a habitual drunkard, such

(Mass.) 299; *Kendall v. May*, 10 Allen (Mass.) 66.

*Missouri.* — *Darby v. Cabanne*, 1 Mo. App. 130.

*New Hampshire.* — *McCrillis v. Bartlett*, 8 N. H. 569.

*New Jersey.* — *Van Horn v. Hann*, 39 N. J. L. 207.

*North Carolina.* — *Surles v. Pipkin*, 69 N. Car. 521; *Tally v. Tally*, 2 Dev. & B. Eq. (22 N. Car.) 387; *Richardson v. Strong*, 13 Ired. L. (35 N. Car.) 107, 55 Am. Dec. 430.

*Ohio.* — *Brockway v. Jewell*, 52 Ohio St. 188.

*Pennsylvania.* — *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *La Rue v. Gilkyson*, 4 Pa. St. 375, 45 Am. Dec. 700.

See also the title *INSANITY*.

**What Are Necessaries.** — The term "necessaries," while primarily signifying indispensable articles or requisites, is not in legal acceptance restricted to such meaning. When applied to the case of a person *non sui juris* it has been held to embrace everything proper or suitable for such person's condition, having due regard to his situation in life and the value or extent of his property or means. *La Rue v. Gilkyson*, 4 Pa. St. 375, 45 Am. Dec. 700; *Pearl v. M'Dowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

**1. Marriage May Be Valid.** — *Imhoff v. Witmer*, 31 Pa. St. 245; *Banker v. Banker*, 63 N. Y. 409. And see the title *MARRIAGE*.

**2. Lewis v. Jones**, 50 Barb. (N. Y.) 645. And see the title *TESTAMENTARY CAPACITY*.

**3. Inquisition Is Presumptive Evidence Against Validity of Acts Within Period Overreached by Finding.** — Where a man is found to be a habitual drunkard, and the inquisition also finds that such condition of habitual drunkenness has existed for some specified period of

time prior to the commission, such retrospective finding is presumptive, although not conclusive, evidence against the validity of all acts performed by such drunkard within the overreached period.

*New Jersey.* — *Vauger v. Skinner*, 14 N. J. Eq. 395; *Covenhoven's Case*, 1 N. J. Eq. 20.

*New York.* — *Van Wyck v. Brasher*, 81 N. Y. 261 [*compare* *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 545]; *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386; *Hirsch v. Trainer*, (Supm. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 274; *Demilt v. Leonard*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 253; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Lewis v. Jones*, 50 Barb. (N. Y.) 645; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; *Matter of Patterson*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 36; *Hicks v. Marshall*, 8 Hun (N. Y.) 329; *Jackson v. Burchin*, 14 Johns. (N. Y.) 125; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 427, 22 Am. Dec. 655; *Matter of Christie*, 5 Paige (N. Y.) 242; *Matter of Giles*, 11 Paige (N. Y.) 243; *Hart v. Deamer*, 6 Wend. (N. Y.) 499.

*Pennsylvania.* — *Rogers v. Walker*, 6 Pa. St. 373, 47 Am. Dec. 470; *Willis v. Willis*, 12 Pa. St. 161; *In re Gangwere*, 14 Pa. St. 429, 53 Am. Dec. 554; *Noel v. Karper*, 53 Pa. St. 100; *Klohs v. Klohs*, 61 Pa. St. 247; *Moore v. Hershey*, 90 Pa. St. 202; *Miskey's Appeal*, 107 Pa. St. 628; *In re Sampson*, 5 Pa. Dist. 717; *Ruffner v. Luther*, 6 Pa. Dist. 589; *Koons v. Benscoter*, 2 Kulp (Pa.) 451; *Gresh v. Tamany*, 2 Kulp (Pa.) 453; *Hutchinson v. Sandt*, 4 Rawle (Pa.) 238, 26 Am. Dec. 127; *Tozer v. Saturlee*, 3 Grant Cas. (Pa.) 163; *Sill v. M'Knight*, 7 W. & S. (Pa.) 245; *Draper's Estate*, 26 W. N. C. (Pa.) 219; *Donehoo's Appeal*, (Pa. 1888) 15 Atl. Rep. 924.



adjudication renders void all gifts, deeds, or contracts subsequently made by such drunkard, has been strenuously denied and contested, but the preponderance of authority has established the principle and it seems now beyond controversy. Such adjudication is not merely *prima facie* evidence of incapacity; it is, as a general proposition, conclusive evidence against the validity of all acts performed by the drunkard which require contractual capacity. Courts seem to recognize the absolute necessity of the rule in order to protect the drunkard or lunatic.<sup>1</sup>

**Application of Principle May Sometimes Be Relaxed in Equity.** — Courts may, through equitable methods, relax the application of the rule that all acts performed by adjudged drunkards are invalid; but such a case should possess features of unusual merit.<sup>2</sup>

**5. When Legal Disability Begins** — *a. CONFLICT OF AUTHORITY.* — Important, certain, and far-reaching in its consequences as is the principle that an adjudged habitual drunkard loses his contractual capacity and many of his civil rights and privileges, there is much confusion and lack of uniformity among the authorities in deciding when such deprivation occurs — in fixing the exact stage in a proceeding in habitual drunkenness when the transformation takes place and the person affected ceases to be *sui juris*. By statute in many states the time when a habitual drunkard, in contemplation of law, becomes *non sui juris* is distinctly prescribed, but there is little harmony among the states. Either at common law, under the statutes, or by various notable adjudications, the incompetency of the habitual drunkard, so far as it is affected by any proceedings instituted to have him so found, begins or is complete at some particular one of the periods below mentioned.

*b. UPON NOTICE FILED OR SERVED, OR FILED AND SERVED, THAT APPLICATION WILL BE MADE.* — The statutes of a few states provide in effect that when a person lawfully authorized to present an application in habitual drunkenness shall file in the proper office a notice of his intention to make such application in a particular case and upon a date certain, persons dealing with the alleged inebriate are chargeable with knowledge that, in the event

**1. Adjudication Conclusive Evidence Against Validity of All Gifts, Deeds or Contracts Subsequently Made** — *Connecticut.* — *Griswold v. Butler*, 3 Conn. 231.

*Indiana.* — *Devin v. Scott*, 34 Ind. 70; *Redden v. Baker*, 86 Ind. 194.

*Kentucky.* — *Pearl v. M'Dowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

*Maine.* — *Hovey v. Hobson*, 53 Me. 453, 89 Am. Dec. 705.

*Massachusetts.* — *Leonard v. Leonard*, 14 Pick. (Mass.) 283; *Wait v. Maxwell*, 5 Pick. (Mass.) 219, 16 Am. Dec. 391.

*Missouri.* — *Rannells v. Gerner*, 80 Mo. 478; *Kiehne v. Wessell*, 53 Mo. App. 669.

*New York.* — *Matter of Patterson*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 34; *Matter of Tracy*, 1 Paige (N. Y.) 582; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Goodell v. Harrington*, 3 Thomp. & C. (N. Y.) 346; *Van Deusen v. Sweet*, 51 N. Y. 384.

*Ohio.* — *Brockway v. Jewell*, 52 Ohio St. 199. *Pennsylvania.* — *Clark v. Caldwell*, 6 Watts (Pa.) 139; *Imhoff v. Witmer*, 31 Pa. St. 243.

In *Clark v. Caldwell*, 6 Watts (Pa.) 139, it was distinctly held that a drunkard's contracts made after the finding of an inquisition are void, and that this applies even before the

final confirmation of such inquisition, where a traverse is taken.

In *Matter of Patterson*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 35, a habitual drunkard, having remained abstinent for some months after adjudication, obtained an order permitting him to make a will. The court quoted with approval the doctrine laid down in the leading case of *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655, that all gifts of the goods and chattels of a drunkard, and all bonds, or other contracts, made by him after the actual finding of the inquisition declaring his incompetency, and until he is permitted to assume the control of his property by permission of the court, are utterly void.

**Contrary Views.** — See, as stating a doctrine contrary to that of the text above, *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465; *Lucas v. Parsons*, 23 Ga. 267; *Mott v. Mott*, 49 N. J. Eq. 193; *Kern v. Kern*, 51 N. J. Eq. 583; *Reeves v. Morgan*, 48 N. J. Eq. 417; *Hill v. Day*, 34 N. J. Eq. 151; *Den v. Clark*, 10 N. J. L. 219, 18 Am. Dec. 417; *Hart v. Deamer*, 6 Wend. (N. Y.) 498; *Rippy v. Grant*, 4 Ired. Eq. (39 N. Car.) 444; *Armstrong v. Short*, 1 Hawks (8 N. Car.) 11; *Tozer v. Saturlee*, 3 Grant Cas. (Pa.) 162. See also *Hunt v. Hunt*, 13 N. J. Eq. 161.

**2. Lancaster County Nat. Bank v. Moore**, 78 Pa. St. 414, 21 Am. Rep. 24; *Moore v. Hershey*, 90 Pa. St. 201.



of his inebriation being established, the disability will date back from the time when such notice was filed, or other time legally provided for.<sup>1</sup> In some states provision is made for the service of such notice, or a copy thereof, upon certain persons who, the petitioner may perhaps fear, are liable to carry on business or have financial dealings with the supposed inebriate. In this case the notice is express as well as constructive.<sup>2</sup>

c. AT PRESENTATION OF PETITION AND ORDER FOR ISSUING OF COMMISSION. — It has been held, in the absence of any statutory provision, that the presentation to the proper tribunal of a sufficient application or petition for the issuing of the commission in habitual drunkenness or lunacy destroys the contractual competency of a person proceeded against, provided such commission eventually finds habitual drunkenness or lunacy. In such case the disability dates back and is absolute from the time when the application is presented to and filed or received in court.<sup>3</sup>

d. UPON FINDING OR AGREEMENT OF INQUEST. — It was held many years ago in an important case, and perhaps the rule is still in many places unquestioned, that where a jury of inquest makes up its return, or agrees thereto, provided the return or agreement sustains the contention of habitual drunkenness, a person proceeded against is under disability from the time of such return or agreement of the jury; and this though the return of the inquisition has not been filed and there is no official knowledge of what such inquisition has found.<sup>4</sup>

e. AT FILING OF RETURN FINDING HABITUAL DRUNKENNESS. — It has likewise been held that when the return of a commission finding habitual drunkenness is duly filed in the office of the court, the disability of the drunkard begins, such filing being open and notorious and the return itself a public record, with the existence of which every one may be acquainted.<sup>5</sup>

f. UPON DECREE OF COURT CONFIRMING FINDING OF HABITUAL DRUNKENNESS. — In some of the states, in the absence of statutory provision to the contrary, the time of the formal confirmation of the return finding habitual drunkenness is the period from which the disability of the drunkard begins. This view seems in consonance with the doctrine of the common law that after "office found" upon a proceeding *in rem*, every person, whether stranger, privy, or party, is chargeable with notice; it would seem to be the very first step when an order in the nature of a definitive decree, an order which a person aggrieved would properly pray for leave to traverse, is made by the court.<sup>6</sup>

g. UPON APPOINTMENT OF COMMITTEE FOR HABITUAL DRUNKARD. — In some jurisdictions the disability of the drunkard begins when his committee is appointed.<sup>7</sup>

h. DOCTRINE OF *LIS PENDENS*. — The familiar equitable principle of *lis*

1. See Comp. Stat. Neb. (1899), § 3230.

2. Brockway v. Jewell, 52 Ohio St. 188.

3. Griswold v. Miller, 15 Barb. (N. Y.) 520.

4. Wadsworth v. Sharpsteen, 8 N. Y. 388, affirming 14 Barb. (N. Y.) 169, 59 Am. Dec. 499. Although this case has repeatedly been cited since its adjudication in support of the proposition that after the return of an inquisition and the appointment of a committee all contracts entered into by the party proceeded against are absolutely void, or after office found and adjudication of disability, it apparently stands alone in holding, even inferentially, that as a proceeding *in rem* the inquisition is conclusive and binding upon all persons, whether strangers or not, before the finding of such inquisition has been filed and

confirmed. See Lewis v. Jones, 50 Barb. (N. Y.) 648; Southern Tier Masonic Relief Assoc. v. Laudenbach, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 605; Goodell v. Harrington, 3 Thomp. & C. (N. Y.) 346; Matter of Lapham, (Surrogate Ct.) 19 Misc. (N. Y.) 73; Carter v. Beckwith, 128 N. Y. 316; Matter of McGarvey, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 137; Redden v. Baker, 86 Ind. 194.

5. Clark v. Caldwell, 6 Watts (Pa.) 139; L'Amoureux v. Crosby, 2 Paige (N. Y.) 423, 22 Am. Dec. 655.

6. Rannells v. Gerner, 80 Mo. 474; Imhoff v. Witmer, 31 Pa. St. 243.

7. Griswold v. Butler, 3 Conn. 227; Baker v. Potter, 51 Conn. 79; Wait v. Maxwell, 5 Pick. (Mass.) 219, 16 Am. Dec. 391; Manson v. Felton, 13 Pick. (Mass.) 210.

*pendens*, although apparently entering into many of the decisions which hold invalid the contract of a habitual drunkard or lunatic made or attempted to be made after the institution of proceedings in lunacy, is, as a distinct and pertinent principle, rarely referred to by name in any of such actions. The few decisions in which it is mentioned by name are apparently conflicting.<sup>1</sup>

**IX. MEDICAL TREATMENT OF HABITUAL DRUNKARD — 1. In General.** — The modern tendency to regard alcoholic intemperance as a disease has led to much legislation respecting the medical treatment of habitual drunkards. As a general proposition it may be said that such treatment can never be forced upon the drunkard.<sup>2</sup>

**2. Commitment to Insane Asylum.** — Statutes authorizing the commitment of habitual drunkards to insane asylums for custody, care, and medical treatment were formerly not uncommon. Some have been repealed, some declared non-constitutional.<sup>3</sup> Ordinarily, a habitual drunkard cannot be confined as a lunatic unless he is a lunatic as well as a drunkard.<sup>4</sup>

**3. Treatment in "Cures," Inebriate Hospitals, and Similar Institutions.** — In *England* there is a general law by which "inebriates" may be "voluntarily committed" to "retreats." Although the entrance is voluntary, detention may be enforced.<sup>5</sup> In the *United States* statutes exist in a number of states regarding the medical treatment of habitual drunkards in inebriate asylums, "cures," "hospitals," and similar institutions. In some instances the statutes provide for medical treatment at public expense, when the patient is poor. The constitutionality of such statutes has been differently decided.<sup>6</sup> Generally, the drunkard can neither be committed to an inebriate asylum, nor detained therein, against his volition.<sup>7</sup>

1. See *Baker v. Potter*, 51 Conn. 79; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 426, 22 Am. Dec. 655; *Moore v. Hershey*, 90 Pa. St. 196.

2. *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 488; *In re House*, 23 Colo. 88. The statutes popularly known as the "Gold Cure Acts," adopted in some states, providing for medical treatment of inebriates, as a rule require the consent of the inebriate to such treatment.

"Jag Cure" Act — *Michigan*. — The so-called "Jag Cure Act" (Laws Mich. 1893, No. 207), which empowered certain courts and police magistrates to adjourn cases against any person charged as "disorderly" on account of drunkenness or intoxication, upon condition that such person enter a special recognizance binding him immediately to "take treatment for the cure of such drunkenness or intoxication," etc., is unconstitutional. *Happy Home Clubs v. Alpena County*, 90 Mich. 117, the court holding that "it is not within the province of the legislature to delegate to private corporations the power to make laws for the discharge of offenders."

3. *Matter of Janes*, (Supm. Ct.) 30 How. Pr. (N. Y.) 453; *State v. Ryan*, 70 Wis. 676.

4. *Matter of Janes*, (Supm. Ct.) 30 How. Pr. (N. Y.) 453.

5. *Medical Treatment — England*. — In *England* Acts of 1879 (42 & 43 Vict., c. 19) and 1898 (51 & 52 Vict., c. 19).

6. *Constitutionality of Statutes Providing for Treatment of Inebriates at Public Expense — Constitutional*. — *In re House*, 23 Colo. 88; *Baltimore v. Keeley Institute*, 81 Md. 106.

*Unconstitutional*. — *County v. Hennepin County*, 64 Minn. 372; *Wisconsin Keeley In-*

*stitute Co. v. Milwaukee*, 95 Wis. 153, 60 Am. St. Rep. 105. See also *Washingtonian Home v. Chicago*, 157 Ill. 415; *People v. Brooklyn*, 11 N. Y. App. Div. 115, affirmed 152 N. Y. 400, upon the point that public money should not be appropriated for the benefit of inebriates in private asylums.

7. *Inebriate May Exercise Volition as to Entering Asylum*. — *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 485, holds that the *New York* act empowering the *New York* state inebriate asylum "to receive and retain all inebriates who enter said asylum, either voluntarily or by the order of the committee of any habitual drunkard" (Laws 1857, vol. 1, p. 431, § 9), is unconstitutional, and that even where such habitual drunkard signed a contract by which he voluntarily agreed to remain in such institution for a fixed length of time, such contract could not be enforced against him. Although it does not seem that habitual drunkenness was considered in regard to its criminal or non-criminal aspect in this case, it seems to have been assumed that the inebriate to be received and retained was guilty of no criminal offense known to the county or statute law.

In *Matter of Janes*, (Supm. Ct.) 30 How. Pr. (N. Y.) 446, the *New York* statute (Laws 1865, p. 427) which authorized the commitment of inebriates under certain circumstances to the *New York* Inebriate Asylum upon proceedings *ex parte* was held unconstitutional.

**Exceptions to General Application of Proposition Stated in Text.** — By statute in several states the inebriate can exercise no volition in the matter, but upon being adjudged a habitual drunkard he may be committed to an inebriate asylum for care, custody, and treatment, and his detention therein may be enforced.



**X. COMMITTEE OF HABITUAL DRUNKARD — POWERS AND DUTIES — 1. Different Designations.** — The person appointed by the court to assume guardianship over a habitual drunkard is designated by different appellations in different jurisdictions. He is known as a "committee," "overseer," "conservator," "tutor," "guardian," "trustee," etc.<sup>1</sup> Throughout this article, such officer is uniformly termed "committee," such being his designation at common law, and the same term still being used in England as well as in the states which furnish nearly all the adjudications in habitual drunkenness.

**2. Selection or Appointment of Committee — a. RELATIVE PREFERRED.** — The power of appointment is absolutely within the sound discretion of the court. Other things being equal, the court will, however, prefer a relative to a stranger in making the appointment.<sup>2</sup>

**b. WELFARE OF INEBRIATE FIRST CONSIDERATION.** — The court, in making the appointment, regards the welfare of the inebriate, and all other considerations are subservient thereto.<sup>3</sup>

**3. Committee of Person — Care of Inebriate.** — Usually, but not necessarily, the committee of the person is also committee of estate. The most important duty, perhaps, of the committee of the person is to do all in his power to restrain the inebriate from the indulgence of his appetite and to prevent him from obtaining intoxicants, or the means of securing them. Consistently therewith, it would seem that the utmost liberty should be given the inebriate.<sup>4</sup>

For illustration, see Pub. Stat. Mass., Supp. (1889-1895), p. 152, c. 414, § 6. See also Gen. Stat. Conn. (1888), § 3688.

1. See the local statutes. In *Connecticut* such officer is termed a conservator. The powers and duties of conservators are considered in *Griswold v. Butler*, 3 Conn. 231; *Hutchins v. Johnson*, 12 Conn. 382, 30 Am. Dec. 622; *Brown v. Eggleston*, 53 Conn. 111; *Palmer v. Cheseboro*, 55 Conn. 114; *Looby v. Redmond*, 66 Conn. 447; *State v. Washburn*, 67 Conn. 195.

**Committee the Common-law Designation.** — The king was bound to provide for the safe-keeping of the property and the maintenance of the lunatic. He was compelled to do this by agents. These agents were termed committees, and were merely the receivers or bailiffs of the crown. As such, they were controllable by and accountable to the chancellor, as keeper of the king's conscience. *Van Horn v. Hann*, 39 N. J. L. 209.

**2. Relative Ordinarily Preferred for Committee.** — The governing principle has always been that if a suitable person of kin to the *non compos mentis* can be found to serve as committee, the influence of the family, which ought to be confined to its own circle, is not to be transferred to a stranger. Lord Chancellor Eldon, in *Ex p. Le Heup*, 18 Ves. Jr. 227. See also *In re Hussey*, 1 Mollóy 226; *In re Persse*, 1 Mollóy 439. See generally the title *INSANITY*.

**3. Welfare of Inebriate First Consideration.** — The selection of a committee is within the sound discretion of the court, and although the court will not without adequate cause prefer a stranger to a suitable person related to the party under disability, yet the court will make the appointment best suited to promote the true welfare of such incompetent person. *Matter of Lamoree*, 32 Barb. (N. Y.) 122; *Matter of Owens*, (C. Pl. Gen. T.) 47 How. Pr. (N. Y.) 160; *Matter of Taylor*, 9 Paige (N. Y.) 618; *Matter of Livingston*, 1 Johns. Ch. (N. Y.) 436; *Neal's Case*, 2 P. Wms. 545; *Ex p. Ludlow*, 2

P. Wms. 638; *Dormer's Case*, 2 P. Wms. 264. See the title *INSANITY*.

**4. Care of Inebriate.** — In *Stephens v. Marshall*, 23 Hun (N. Y.) 641, the committee of a habitual drunkard, upon settling his account, claimed credit for thirty dollars a month, allowed by him to such habitual drunkard as "spending money." The court refused to sanction any such allowance, saying: "Not a penny should have been allowed to the inebriate for spending money."

In the early case of *Matter of Heller*, 3 Paige (N. Y.) 201, irrespective of any statute upon the subject, the court held that where the committee of a habitual drunkard finds that any person is furnishing such drunkard with the means of intoxication, even gratuitously, the committee should apply to the court for an order restraining all persons from furnishing his ward with ardent spirits or the means of obtaining them. The court added that in the particular case before it, if, after notice of such order, any person should be guilty of a violation thereof he would be held responsible not only for a contempt of court, but for all damages which might be done by the drunkard to the property of individuals while under the influence of the liquor thus furnished to him.

**Selection of Residence for Drunkard.** — The committee of a habitual drunkard has the right, subject only to the superintending control of the court, to decide as to the proper residence of the drunkard, as he is responsible for the consequences of neglect to take proper care of such person. And it is the duty of the court to lend its aid to protect him in the proper exercise of that right, and to give him directions on the subject when necessary. *Matter of Lynch*, 5 Paige (N. Y.) 120. See also *Wood v. Wood*, 5 Paige (N. Y.) 605, 28 Am. Dec. 451; *Hill v. Horton*, 4 Dem. (N. Y.) 91; *Anderson v. Anderson*, 42 Vt. 352, 1 Am. Rep. 534; *Holyoke v. Haskins*, 5 Pick. (Mass.) 276, 16 Am. Dec. 372; *Payne v. Dunham*, 29 Ill. 129; *Lamar v. Micou*, 112 U. S. 472; *Hall*



4. **Committee of Estate** — *a.* IN GENERAL. — The committee, so far as concerns the property of the inebriate, is simply the officer or bailiff of the court; he has no title to such property, although he has possession thereof; the title and ownership remain undisturbed.<sup>1</sup> The title is in the inebriate; the possession is in the committee; but the possession of the committee is the possession of the court.<sup>2</sup>

*b.* CONTROL OF PERSONALTY. — It is the duty of the committee to administer the personal property and out of it to support the inebriate and his family; his powers are similar in many respects to those of the guardian of a minor over the personality of his ward,<sup>3</sup> and they are identical with the powers of the committee of a lunatic in like case.<sup>4</sup>

*c.* POWERS RESPECTING REAL ESTATE. — The powers and control of the committee of an inebriate over the real estate of his ward are ordinarily prescribed by statute. Commonly, such committee oversees or supervises the real estate in order to guard it against casualty, waste, or perhaps vandalism, but he can neither sell, lease, nor in any manner affect the real estate, except as the statutes provide and the court directs.<sup>5</sup>

*d.* MORTGAGE OR SALE OF REAL ESTATE. — Where the personal property of the inebriate is insufficient to support him and those dependent upon him, or to pay his debts, the court is usually empowered by statute to order the mortgage or sale of so much of the real estate as will be adequate for the purpose; all the real estate, if necessary. Such powers are entirely statutory, and the statutes of the different states must be consulted in reference thereto.<sup>6</sup>

*e.* DUTIES TO FAMILY OF INEBRIATE. — In some states the committee of an inebriate is charged not only with the custody and control of the inebriate himself, but also with the care of his minor children or dependents.<sup>7</sup>

5. **Failure to Appoint Committee — Effect of Such Omission.** — Where it is the duty of the persons prosecuting the proceeding to move for the appointment of an individual guardian, their neglect so to do may, after lapse of time, be considered tantamount to an abandonment of the proceeding upon their part. And it has been held that such abandonment may operate to relieve the inebriate of his contractual disability in certain cases where the equities of third persons were involved.<sup>8</sup>

6. **Removal of Committee.** — The committee of a habitual drunkard is liable to be removed from his office for the same causes that would warrant the court in removing a guardian of a minor or other trustee acting in behalf of a person *non sui juris*.<sup>9</sup>

*v.* Hall, 3 Atk. 721; Freeman's Case, 2 Stra. 882; *Ex p.* Cranmer, 12 Ves. Jr. 455.

1. **Committee Is Mere Bailiff Without Title to Property.** — See Walker v. Clay, 21 Ala. 507; Cameron v. Pottinger, 3 Bibb (Ky.) 11; Crane v. Anderson, 3 Dana (Ky.) 119; Matter of Patterson, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 36; Matter of Otis, 101 N. Y. 585; People v. Fox Conr's, 100 N. Y. 215; Corbett v. Beck with, 128 N. Y. 316; Matter of Strasburger, 132 N. Y. 132; Petrie v. Shoemaker, 24 Wend. (N. Y.) 85; Matter of Heller, 3 Paige (N. Y.) 199; Noe v. Gibson, 7 Paige (N. Y.) 514; Brooks v. Brooks, 3 Ired. L. (25 N. Car.) 389; Shaffer v. List, 114 Pa. St. 486; Cathcart v. Sugenheimer, 18 S. Car. 127; Isaacs v. Chinery, 74 L. T. N. S. 320. See generally the title INSANITY.

2. **Possession of Committee Is Possession of Court.** — Matter of Otis, 101 N. Y. 585; Matter of Heller, 3 Paige (N. Y.) 200; Petrie v. Shoemaker, 24 Wend. (N. Y.) 85; Pharis v. Gere, 110 N. Y. 347.

3. *Makepeace v. Bronnenberg*, 146 Ind. 248.

4. *Rannells v. Gerner*, 80 Mo. 478; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 651; *Clark v. Caldwell*, 6 Watts (Pa.) 139.

5. **Powers Respecting Real Estate — Exercisable under Direction of Court.** — *Pinkston v. Semple*, 92 Ala. 570; *Rannells v. Gerner*, 80 Mo. 478; *Matter of Otis*, 101 N. Y. 585; *Pharis v. Gere*, 110 N. Y. 347; *Shaffer v. List*, 114 Pa. St. 489.

6. **Mortgage or Sale of Real Estate Regulated by Statute.** — *Matter of Pettit*, 2 Paige (N. Y.) 597; *Matter of Heller*, 3 Paige (N. Y.) 202.

7. See the local statutes.

In *Com. v. Cox*, 1 Ashm. (Pa.) 71, the court, by King, P. J., held that the mother of a minor child of a habitual drunkard and the committee of such habitual drunkard could lawfully apprentice such child to learn some useful occupation, although the father was "in full life, and the binding made without his consent."

8. *McCormick v. Littler*, 85 Ill. 64, 28 Am. Rep. 610; *Bixler v. Gilleland*, 4 Pa. St. 159; *Leckey v. Cunningham*, 56 Pa. St. 370. See also *Black's Estate*, 132 Pa. St. 135.

9. **Removal of Committee.** — *Ex p.* Proctor, 1 Volume XV.

Resignation. — While a committee may, with the permission of court, resign his trust, it has been held that such withdrawal should never be allowed except upon sufficient cause shown. That the duties of his position have become irksome and distasteful, is not a legal ground for permitting an efficient committee to resign.<sup>1</sup>

**XI. SUITS BY, FOR, OR AGAINST HABITUAL DRUNKARDS — 1. Similar to Actions Where Lunatic Is Party in Interest.** — The general rules and practice applicable to causes where insane persons are parties in interest are applicable to suits where habitual drunkards are similarly interested or concerned;<sup>2</sup> and this applies as well to actions at law as to proceedings in equity, or to matters before courts of probate or tribunals of like character.<sup>3</sup>

**Practice and Procedure.** — The entire subject of actions by, for, and against habitual drunkards is largely statutory and lies principally within the field of practice.<sup>4</sup>

**Contracts and Torts.** — Where questions of substantive law do arise in actions or proceedings by, for, or against habitual drunkards, they ordinarily originate in contracts or torts — actions *ex contractu* or actions *ex delicto* — all of which are fully treated under appropriate titles.<sup>5</sup>

**2. Liability of Inebriate's Property for His Debts.** — At common law, although an adjudged lunatic, and, therefore, a habitual drunkard, might be sued, and the judgment obtained upon such suit, or the execution issued upon such judgment, might be a lien upon the property of such incompetent person, there was no method of enforcing payment of such lien after chancery had assumed control. A creditor might, perhaps, obtain from the chancellor, as matter of grace, a decree authorizing the committee to pay the debt, but such indulgence was never granted unless the property of the ward was more than sufficient for his support.<sup>6</sup>

Swanst. 531; *Ex p. Mildmay*, 3 Ves. Jr. 2; *Kettletas v. Gardner*, 1 Paige (N. Y.) 488; *Matter of Griffin*, (Supm. Ct. Gen. T.) 5 Abb. Pr. N. S. (N. Y.) 96; *Black's Case*, 18 Pa. St. 434; *Dean's Appeal*, 90 Pa. St. 106.

**1. Resignation of Committee.** — In *Matter of Lytle*, 3 Paige (N. Y.) 251, the court held that where a committee had voluntarily entered upon the duties of his trust, the fact that the discharge of such duties had become very unpleasant and disagreeable to him because of controversies between members of the family of his ward would not warrant his discharge as committee on his application. But in *Morgan's Case*, 3 Bland (Md.) 332, the written withdrawal of the resignation of a trustee of a lunatic seems to have been accepted as of course. See the title *INSANITY*.

**2. Similar to Actions Where Lunatic Is Party in Interest.** — *Griswold v. Butler*, 3 Conn. 231; *Hovey v. Harmon*, 49 Me. 272; *Rannells v. Gerner*, 80 Mo. 478; *Matter of McLaughlin*, 1 Clarke (N. Y.) 114; *Imhoff v. Witmer*, 31 Pa. St. 244. And generally, when regulated by statute, the proceedings are identical with those for or against lunatics. See the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1169.

**3.** *Walker v. Clay*, 21 Ala. 807; *Leonard v. The Times*, 51 Ill. App. 429; *Chicago, etc., R. Co. v. Munger*, 78 Ill. 301; *Speck v. Pullman Palace Car Co.*, 121 Ill. 50; *Cameron v. Pottinger*, 3 Bibb (Ky.) 12; *Stigers v. Brent*, 50 Md. 220, 33 Am. Rep. 317; *Hewitt's Case*, 3 Bland (Md.) 184; *Ingersoll v. Harrison*, 48 Mich. 235; *Weber v. Weidling*, 18 N. J. Eq. 443; *Robertson v. Lain*, 19 Wend. (N. Y.) 650;

*Petrie v. Shoemaker*, 24 Wend. (N. Y.) 85; *Rankin v. Warner*, 2 Lea (Tenn.) 304; *Bagster v. Portsmouth*, 7 Dowl. & R. 614, 16 E. C. L. 304. See also the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1169.

**4.** See the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1169.

**5.** See the titles *CONTRACTS*, vol. 7, p. 88; *TORTS*.

**6. Liability for Debts.** — See *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655.

Even to begin a suit against a person wanting in capacity, and who was a ward in chancery, as in the case of a habitual drunkard after adjudication, was a contempt of court. *Matter of Heller*, 3 Paige (N. Y.) 199. See also *Matter of Hopper*, 5 Paige (N. Y.) 490; *Noe v. Gibson*, 7 Paige (N. Y.) 516.

In *Matter of McLaughlin*, 1 Clarke (N. Y.) 113, the committee of a habitual drunkard came into the vice-chancellor's court, and prayed for relief from a certain judgment which had been recovered in the Supreme Court of New York, against the habitual drunkard and two other persons as joint defendants. *Whittlesey, V. C.*, denied the application of the committee, upon the ground that "it does not appear from the papers what was the subject-matter of the suit at law; whether it was upon contract or for a tort; if a contract, whether M. [the habitual drunkard] was principal, surety, or partner; how much of the debt he, as an individual, was equitably bound to pay; or whether his property received any, and what, advantage from the debt. \* \* \* It will be time enough for this court to interfere when the facts of the case are



**3. Compulsory Payment of Debts — Laws Permitting Compulsory Payment Almost General.** — In nearly every state, by statute, the creditor is now protected, and his just claims may be enforced even if such enforcement exhausts the property of the inebriate and causes him to become a public charge.<sup>1</sup>

**Nature of Proceeding.** — The principle of the former doctrine is still sufficiently dominant to prevent, as a general rule, any judgment creditor issuing execution against the property of the inebriate after such property has passed into the control of the court.<sup>2</sup> The statutes of nearly all the states provide for the sale of real estate, or preferably for the mortgage thereof, if such mortgage will accomplish the desired purpose, when the personal property is inadequate to pay debts. As a general rule, ordinary creditors have no preference among themselves. The proceeding is similar to that of the sale of the property of a decedent to pay debts.<sup>3</sup>

## XII. REMOVAL OF DISABILITY AND REHABILITATION OF HABITUAL DRUNKARD

**— 1. Superseding Commission — When Permitted.** — There is but one ground for the rehabilitation of a habitual drunkard — his actual reformation. In the event of such reformation the commission will be superseded or other action taken for his rehabilitation; otherwise the disability continues until death.<sup>4</sup>

**2. What Evidence Required to Rehabilitate — a. PROOF OF VOLUNTARY ABSTINENCE.** — Courts exercise extreme care in the matter of restoring habitual drunkards to civil rights. It is a rule that the drunkard must have abandoned not only the habit of intoxication, but also the use of alcoholic stimulants in any form.<sup>5</sup> Stress is laid upon the importance of such cessation being voluntary. It is not sufficient that the inebriate has abstained because such intoxicants were unobtainable.<sup>6</sup>

**b. PERIOD OF ABSTINENCE.** — Unless the period is fixed by statute, there is no positive rule determining how long such abstinence must be continued in order to satisfy the court that the drunkard has regained his power of self-

more fully presented, and when the plaintiffs attempt to enforce their judgment."

In *Ex p. Dowe*, 54 Ala. 258, it was held that a trustee appointed for an inebriate had no power to sell any of his ward's real estate for the payment of debts, and that no authority was conferred upon the court to cause the sale of any of the real property of the inebriate to pay debts. The primary duty of the court having the property under its charge is "the preservation of the estate, support of the husband, wife, and children, and education of the latter," which should, if possible, be discharged out of the income. Civ. Code Ala. (1896), § 2317, probably modifies or changes the doctrine stated in the above case, although there seems to be no distinct ruling upon the subject.

**1. Statutes Authorize Sale of Inebriate's Real Estate for Payment of Debts.** — *Wright's Appeal*, 8 Pa. St. 63; *Frost v. Redford*, 54 Mo. App. 356. And see the statutes of the respective states.

**2. Matter of Hopper**, 5 Paige (N. Y.) 496; *Wright's Appeal*, 8 Pa. St. 63. This is usually regulated by statute.

**3. Wright's Appeal**, 8 Pa. St. 63. And see the note *FOURTH STATE*.

**4. The statutes of the several states recognize no ground for removal of disability except complete reformation.** As illustrative of such statutes, generally, see *Code Civ. Pro.* (N. Y.), § 2443; *Homer's Stat. Ind.* (1894), § 1200; *Bright, Purd. Dig. Laws Pa.* (1894), p. 1280, § 7.

**Who May Institute Inquiry as to Continued Disability — Notice — Missouri.** — *Rev. Stat.* 1889,

§ 5549, which permits "any person" to inaugurate an inquiry as to whether one "declared to be of unsound mind, has been restored to his right mind," has been construed to entitle one under guardianship as an habitual drunkard, by his own petition, to institute such inquiry. *Cockrill v. Cockrill*, 92 Fed. Rep. 812. In this case it was also held that where such a petition is made to a probate court of the state, notice thereof to the petitioner's guardian or family is not a prerequisite to jurisdiction, and failure to give such notice is a mere irregularity which cannot be taken advantage of in a collateral proceeding; and further, that where the petitioner is released from guardianship, he may not assail the judgment of the court on the ground of lack of notice to his guardian.

**Discharge of Guardian — Presumption.** — In *Makepeace v. Bronnenberg*, 146 Ind. 243, it was held that the discharge of the guardian of an habitual drunkard would be presumed to be the result of a finding in accordance with *Burns's Annot. Stat. Ind.* (1894), § 5745, that the ward had reformed by abstaining from the use of intoxicating liquors.

**5. Use of Intoxicants Must Be Abandoned.** — *Devin v. Scott*, 34 Ind. 69; *In re Lynch*, (Supm. Ct.) 39 N. Y. Supp. 1127; *Ex p. Worral*, 1 Del. Co. Rep. (Pa.) 148; *In re Rasely*, 1 Northam Co. Rep. (Pa.) 354.

**6. Abstinence Must Be Voluntary.** — *Matter of Hoag*, 7 Paige (N. Y.) 313; *In re Lynch*, (Supm. Ct.) 39 N. Y. Supp. 1127; *Ex p. Worral*, 1 Del. Co. Rep. (Pa.) 148; *In re Rasely*, 1 Northam Co. Rep. (Pa.) 354.



control. In an early case the court said that proof of voluntary abstinence for at least one year must be shown.<sup>1</sup> This ruling exists as a statutory provision in some states.<sup>2</sup> As to the weight of evidence required, it is sufficient to say that the evidence must satisfy the court.<sup>3</sup>

**3. Decree of Rehabilitation.** — Two forms of decree are known. The one simply suspends the commission or adjudication of habitual drunkenness and puts the party on probation.<sup>4</sup> The other, and most common, effects the complete emancipation and rehabilitation of the drunkard. He is again what he ceased to be at the adjudication of drunkenness. He is *sui juris* and responsible.<sup>5</sup>

**HACK-HORSE.** See note 6.

**HACKS AND HACK LINES.** (See also the titles CARRIERS OF PASSENGERS, vol. 5, p. 481; HIGHWAYS, *post*; LICENSE; MUNICIPAL CORPORATIONS; NUISANCES; OCCUPATION, BUSINESS AND PRIVILEGE TAXES; RAILROADS; STATIONS.) — “Hack” and “hackney coach” are synonymous terms and mean a carriage kept for hire.<sup>7</sup>

**HAD.** (See also HAVE, *post*.) — See note 8.

**1. Period of Abstinence.** — Matter of Hoag, 7 Paige (N. Y.) 312.

In *In re Lynch*, (Supm. Ct.) 39 N. Y. Supp. 1127, the Supreme Court sustained the court below in its refusal to supersede an inquisition upon the petition of the habitual drunkard. It appeared from the evidence that the petitioner had continued in his habits of intoxication “down to a short period prior to the time at which he made this application.” He had been grossly intemperate in the past, having several times had delirium tremens. The Supreme Court held that to justify an order superseding the inquisition and restoring him to his property it must appear that his habits had changed so that the danger of his resuming his former vice and squandering his property was removed.

**2.** Devin v. Scott, 34 Ind. 69.

**3.** Matter of Weis, 16 N. J. Eq. 318; *In re Lynch*, (Supm. Ct.) 39 N. Y. Supp. 1127.

**4. Suspending Commission.** — See Bright, Purd. Dig. Laws Pa. (1894), p. 1280, § 78. And see In Matter of Burr, 2 Barb. Ch. (N. Y.) 208.

**5.** The decree has all the effect of a writ of supersedeas in respect to the estate or rights and privileges of the former drunkard. Bright, Purd. Dig. Laws Pa. (1894), p. 1280, § 79. See also, as illustrative of the statutes generally in force, Bates’s Annot. Stat. Ohio (1897), § 6319.

**6. Hack-Horse.** — A race was open to all licensed hackmen. It was held that a thoroughbred horse in *bona fide* use by a hackman in the ordinary course of his business came within the meaning of the word *hack-horse*. Robinson v. Provincial Exhibition Commission, 32 Nova Scotia 220.

**7. Hack or Hackney Coach Defined.** — 3 Century Dict. 2675.

“Hackney coaches standing in the streets have existed so universally in England, and for so long a period (certainly since 1700, and perhaps further back), that the term ‘hackney coach’ conveys the idea to the mind of a coach standing in the street for hire. Thus, an eminent lexicographer (Webster) defines a hackney coach to be ‘a coach let for hire, commonly at stands in the streets.’ When,

therefore, the legislature uses the term ‘hackney coach,’ it must be deemed to use it in such sense as to cover coaches for hire standing in the streets, as well as those kept in stables for hire.” Masterson v. Short, (N. Y. Super. Ct. Spec. T.) 33 How. Pr. (N. Y.) 486.

**A Hackney Coach Is Not a Wagon.** — See Quigley v. Gorham, 5 Cal. 418, 63 Am. Dec. 139; Edgcomb v. His Creditors, 19 Nev. 154.

**Hackney Carriage.** — A hackney carriage is a carriage exposed for hire to the public, whether standing in the public street or exposed for public in a private gateway. The test is whether the carriage is held out for the general accommodation of the public. *Per Lush, J.*, in Bateson v. Oddy, 43 L. J. M. C. 131, 30 L. T. 712, 22 W. R. 703.

All vehicles used for the conveyance of persons for hire within a city, whether standing in public places or in the stables of their owners, are hackney carriages within the meaning of a municipal regulation which provides that every vehicle “used for the conveyance of persons for hire from place to place within the city, except a horse car, shall be deemed a hackney carriage.” Com. v. Page, 155 Mass. 227.

Certain *English* statutes regulating and providing for the licensing of hackney carriages, define a hackney carriage as “any carriage standing or plying for hire.” See Case v. Storey, L. R. 4 Exch. 322; Skinner v. Usher, L. R. 7 Q. B. 423; Hickman v. Birch, 24 Q. B. D. 172; *Ex p.* Kippins, (1897) 1 Q. B. 3.

An ordinary omnibus, running along a fixed route, is a hackney carriage, within the meaning of these statutes. Hickman v. Birch, 24 Q. B. D. 172.

In Allen v. Tunbridge, L. R. 6 C. P. 481, it was held that a brougham, the owner of which, by agreement with a railway company, attended their station for the conveyance of passengers who chose to hire it, was a hackney carriage. See also Clarke v. Stanford, L. R. 6 Q. B. 357.

**8. Had.** — In Jenkins v. State, 97 Ala. 67, it was said: “The form given in the code for a

**HAIL INSURANCE.** (See also the title INSURANCE.) — See note 1.

**HAIR.** — See note 2.

**HALF.** — See note 3.

charge of this character and which has been adjudged sufficient is as follows: 'A B did falsely pretend to C D with intent to defraud, that he *had* ten bales of cotton packed and ready for delivery, and by means of such false pretense,' etc. In construing the indictment, drawn in accordance with the form prescribed, in the case of *Franklin v. State*, 52 Ala. 414, this court held that the word *had* meant more than to assert ownership, and held a charge correctly refused which called for an acquittal if the proof showed that defendant *had* possession of the mule, although he may not have owned the mule. We do not feel at liberty to relax the strictness required in criminal pleading further than that fixed by our statute and the forms given."

**Had in the Sense of Obtained.** — See *Newlands v. Holmes*, 4 Q. B. D. 858, 45 E. C. L. 858.

1. **Hail Insurance.** — A contract of insurance provided that in case of damage to the property insured by hail the amount thereof should be ascertained by three appraisers to be appointed by the agent of the company, and in case the appraisement should be less than a twenty-fifth part of the value of the property no claim should be made by the insured upon the company, and the insured should pay the expenses of the appraisement; and it was further agreed that on demand of the agent managing the assessment the necessary costs should be deposited by the insured, before the assessment should be made. It not appearing to the agent that any damage at all had been done to the crop by hail, security for the costs of an assessment was duly demanded, which the insured refused to give. Thereupon the insurance company requested the court to charge the jury in effect that if it found that such security was demanded the plaintiff must prove that he gave in order to recover. It was held that the instruction as requested was right and ought to have been given. *Mutual Hail Ins. Co. v. Wilde*, 8 Neb. 427.

2. See the term **BRISTLES**, vol. 4, p. 957.

In the absence of a settled designation of a cloth by merchants and importers its designation as *hair*, silk, cotton, or woollen for the purposes of customs revenue depends upon the predominance of such article in its composition, and not upon the absence of any other material. *Arthur v. Butterfield*, 125 U. S. 70.

3. **Half — Description of Lands.** — The word *half*, when used in describing lands, should be construed as meaning *half* in quantity, unless the context or surrounding facts should show a contrary intention. *Dart v. Barbour*, 32 Mich. 271; *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Heyer v. Lee*, 40 Mich. 353; *Jones v. Pashby*, 62 Mich. 614; *People's Sav. Bank v. Galvin*, 81 Mich. 11; *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491; *Owen v. Henderson*, 16 Wash. 39.

So in *Jones v. Pashby*, 48 Mich. 634, it was said: "There can be no universal rule that the word shall be so interpreted, for it is often used in conveyances when the context indicates a sense quite different. Two parts of

a farm separated by a river or a highway may be called the two *halves* without much regard to their relative quantity; and in surveys the word *half* is often used quite as loosely, but without the least confusion. In all such cases the word must be taken in the sense intended, if that is evident; and, if not, the accompanying circumstances and the subsequent acts of the parties may, perhaps, direct us to the true meaning." And see *Prentiss v. Brewer*, 17 Wis. 635; *Schmitz v. Schmitz*, 19 Wis. 207; *Brown v. Hardin*, 21 Ark. 325 (set out *infra*, this note); *Grandy v. Casey*, 93 Mo. 595.

**Undivided Half.** — In construing a conveyance of *half* of a tract of land, the court said: "It is alleged however, that the parties intended thereby the undivided *half*, and the demurrer admits that such was the intention. Such, too, we hold to be the legal effect of a conveyance by one to another of the *half* of any particular piece of property. As it could not be said that the grantee in such a case takes any particular *half*, he would take an undivided *half* of each and every part." *Baldwin v. Winslow*, 2 Minn. 216.

**Half-section.** (See also the title **PUBLIC LANDS**.) — In *Brown v. Hardin*, 21 Ark. 325, it was said: "The general and proper acceptance of the terms 'section,' *half* and 'quarter section,' as well as their construction by the general land department, denotes the land in the sectional and subdivisional lines, and not the exact quantity which a perfect admeasurement of an unobstructed surface would declare."

A conveyance of a *half* of a quarter section in *Wisconsin* would ordinarily be presumed to refer to a *half*-section whose corners were defined by the government surveys. But it may be shown by extrinsic evidence that the parties intended by such description one-*half* of the area of the quarter-section. *Prentiss v. Brewer*, 17 Wis. 635.

**Half a Month.** — When parties contract for the performance of an act during the first *half* of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day. *Grosvenor v. Magill*, 37 Ill. 239. See also the title **TIME, COMPUTATION OF**.

**Half a Year.** — In legal computation, a period of one hundred and eighty-two days, the odd hours in the *half* of the calendar being rejected. Co. Litt. 135 *b*; *Peterborough v. Catesby*, Cro. Jac. 167, Yelv. 100; 2 *Sharswood's Black. Com.* 140, Chitty's note. See also *Rev. Stat. N. Y.*, pt. 1, c. 19, p. 1, § 3. And see the title **TIME, COMPUTATION OF**.

**Half-yearly.** — A power to lease provided that rent should be served by *half*-yearly payments. It was held that this required a division of the rent, as nearly as possible, in two equal *half*-yearly payments. *Doe v. Morse*, 3 L. J. Exch. 70; *Doe v. Lock*, 4 L. J. K. B. 118.

**Half — Part.** — For an example of the word "part" used in the sense of *half* by a testator, see *Williams v. Lane*, 2 Law Repos. (4 N. Car.) 266.



**HALF BLOOD.** (See also **BLOOD**, vol. 4, p. 585; and see the title **SUCCESSION**.)—A term denoting the degree of relationship which exists between those who have one parent only in common.<sup>1</sup>

**HALL PURPOSES.**—See note 2.

**HALLUCINATION.** (See also the titles **INSANITY**; **TESTAMENTARY CAPACITY**.)—A hallucination is a morbid error in one or more senses.<sup>3</sup>

**HAM.**—See note 4.

**HAMLET.**—“Hamlet” and “vill” in old English law are used synonymously.<sup>5</sup>

**HAMMER.**—See note 6.

**HAND.**—See note 7.

1. *Bouv. Law Dict.*

**Half-sister.**—In *Wood v. Mitcham*, 92 N. Y. 379, it was said: “Bouvier’s Law Dictionary defines ‘sister’ as a ‘woman who has the same father and mother with another, or one of them only. In the first case, she is called sister, simply; in the second, *half-sister*.”

2. **Hall Purposes.**—In *Hanrahan v. O’Reilly*, 102 Mass. 201, it was held that bowling alleys erected by a tenant with the consent of the landlord for the purpose of profit in a room leased for *hall purposes* were trade fixtures which the tenant might remove. See also the title **FIXTURES**, vol. 13, p. 594.

3. *McNett v. Cooper*, 13 Fed. Rep. 590. See also *Foster v. Dickerson*, 64 Vt. 233.

4. **Ham.**—In an indictment for larceny the words “one *ham* of the value,” etc., are a sufficient description. *Reg. v. Gallears*, Temp. & M. 196. In this case it was objected by counsel for the prisoner that the prisoner could not be convicted of felony, inasmuch as it did not sufficiently appear by the indictment that the article stolen was the subject of larceny, it being urged that for anything that appeared on the face of the indictment it might have been the *ham* of an animal *feræ naturæ* which had been stolen.

5. *Rex v. Morris*, 4 T. R. 552; Anonymous, 12 Mod. 546; *Rex v. Hewson*, 12 Mod. 180; *Chorley’s Case*, Holt 153; *Rex v. Horton*, 1 T. R. 374.

6. **Hammer.**—A statute provided that a railroad company should be liable for any damage done to persons by the running of the locomotives, of cars, or other machinery of the company. It was held that a *hammer* was not machinery within this section. *Georgia Pac. R. Co. v. Brooks*, 84 Ala. 138; *Georgia R., etc., Co. v. Nelms*, 83 Ga. 74. See the titles **FELLOW SERVANTS**, vol. 12, p. 987; **MASTER AND SERVANT**.

7. **Possession or Ownership.**—In *Geyer v. Wentzel*, 68 Pa. St. 87, the court said: “The expression ‘shall come into her *hands*’ evidently intends full ownership. It cannot signify mere possession, for the prior gift of the life estate to the wife had secured that. Both German and English lexicographers concur in giving power, control, or ownership as one of the meanings of the word *hand*, especially in the plural.”

**Logs on Hand.**—A clause in a lease of a sawmill providing for its termination gave to the lessee the privilege of continuing in possession “till logs on *hand* are sawed,” etc. It was held that the words “logs on *hand*,” as used in the lease, included not only the logs

in the millyard, but also all those purchased in the usual course of business. *Crouch v. Parker*, 56 N. Y. 597.

**Stock on Hand.**—A sold to B a quantity of goods by a contract containing the following clause: “Sold to B the entire manufactured stock, in good condition, consisting of pipes, fittings, fines, etc., now on *hand* at foundry and storerooms.” Upon receiving the inventory B objected that a part of the stock in the foundry and storerooms at the time of the sale was not included. This A admitted; but he claimed that the goods had been sold to other parties prior to the sale to B, although not delivered at that time, and that they were not meant to be included in the sale to B. In an action brought by A to recover the contract price, the court, against the defendant’s objection, left it to the jury to determine what the parties meant by the use of the term “stock now on *hand*,” *i. e.*, whether it meant all of the goods which were in the foundry and storerooms at the time of the sale, or only such as the plaintiffs still owned. This was held to have been an error, on the ground that there was no ambiguity in the term, and that, therefore, it should have been construed by the court. It properly included the entire stock in the foundry and storerooms at the time of the sale. *Brady v. Cassidy*, 104 N. Y. 147.

**Money on Hand.**—A legacy of “all the money on *hand* or in bank at the time of my decease” will pass money in the hands of an agent, and such sum is not liable to reduction by reason of the agent’s claim for commissions for past services. *Copia’s Estate*, 5 Phila. (Pa.) 214, 20 Leg. Int. (Pa.) 197. See also the title **WILLS**.

**Notes of Hand.** (See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 65.)—A will by which the testator divided his property among his five children contained the following provision in regard to advancements: “And it is my will, as I have made some advances of money and other property [to my children] as will appear by notes of *hand* and my book accounts, I hold, of long or short standing, [that such advances shall] be considered as so much of their portion individually.” It was held that the description of the advances to be deducted from the portions did not include a debt due from one of the children to the testator evidenced by a bond and mortgage, and that, therefore, such debt might be collected by the executor. *Hopkins v. Holt*, 9 Wis. 228.

A testator bequeathed to his grandchildren



**HANDCARS.** — See note 1.

**HANDICRAFT.** — See note 2.

**H. AND L.** — See note 3.

**HAND LABORERS.** — See note 4.

**HANDLING.** — See note 5.

**HANDSOME.** — See note 6.

all his "notes of *hand*." It was held that this bequest did not include a judgment upon a bond. *Perry v. Maxwell*, 2 Dev. Eq. (17 N. Car.) 496.

**Under Their Hands.** (See also the title **HANDWRITING**, *post*.) — Where the declaration in an action on a promissory note alleged that the defendants in and by a certain writing or note, under their *hands*, by them well executed, promised, etc., and the proof was that after one of the defendants signed the note in his proper handwriting, the other defendant, acting freely and voluntarily, made his mark between his name written by another, and the word "mark," thus, "E. A.'s X mark," it was held that there was no essential variance. Nor would it have made any difference if it had been shown that, in making such mark, the *hand* of the writer had been guided by the *hand* of another person. *Walbridge v. Arnold*, 21 Conn. 424. See also the title **MARK**.

**Same — Attorney.** — Where the declaration in an action on a promissory note stated that the defendants, by a note "under their *hands*," promised to pay, and the note exhibited in evidence appeared to have been signed for the defendants by their attorney, it was held that this was no variance, the allegation being according to the operation of law. *Phelps v. Riley*, 3 Conn. 266.

The leaseholds of a debtor liquidating under the English Bankruptcy Act of 1869 are vested absolutely in the trustee on his appointment, subject to the right to disclaim, and the trustee is personally liable on the covenants unless he has made a valid disclaimer. By section 23 of the act this disclaimer must be "by writing under his *hand*." It was held that a letter signed by the solicitor of the trustee in his own name is not a writing under the trustee's hand sufficient for the purposes of disclaimer. *Wils n v. Wallani*, 49 L. J. Exch. 437.

**Same Writing.** In *Schuler v. Tyler*, 15 Colo. 538, it was said: "The averment of a promise by defendant, under his *hand*, is equivalent to an averment of a promise in writing, signed by defendant. The word *hand*, in legal parlance, is often used to denote handwriting or a written signature, as 'witness my *hand* and seal,' or 'witness my *hand*' if the instrument be not under seal. The word is thus used in our statutes. In certain cases a judge or justice of the peace is authorized to issue a warrant 'under his *hand*.' This undoubtedly means a writ or process in writing, signed by the judge or justice, and when thus issued it is declared to be valid without any seal."

**Die by His Own Hand.** — See the title **LIFE INSURANCE**.

**With a Strong Hand.** — In an indictment for forcible entry it has been held sufficient to state that the defendant entered with a strong *hand*, it being considered that those words implied that the entry was accomplished with the

terror and violence which constituted the offense. "With a strong *hand*" implies a more criminal degree of force than *vi et armis*. *Rex v. Wilson*, 8 T. R. 362; *Bande's Case*, Cro. Jac. 41. See also *Harvey v. Brydges*, 14 M. & W. 442; *Lawe v. King*, 1 Saund. 81. And see the title **FORCIBLE ENTRY AND DETAINER**, 9 ENCYC. OF PL. AND PR. 19.

In *Butts v. Voorhees*, 13 N. J. L. 18, it was said: "The term 'strong *hand*' is thus explained by Ryder, C. J., in *Rex v. Bathurst*, Say. 225: 'The words *manu forti* are understood to import something criminal in its nature, something more than is meant by the words *vi et armis*.' And Rolle had previously said, Style 135: 'These words distinguish this kind of entry from an ordinary trespass by entering into another's land, which is not so violent as a forcible entry is supposed to be.' The like doctrine was repeated by the court in *Rex v. Wilson*, 8 T. R. 361."

**1. Handcars.** — A statute provided that all railroad companies should be liable for injuries sustained by the running of the cars or engines of the company. It was held that cars included *handcars*. *Thomas v. Georgia R., etc., Co.*, 38 Ga. 222. See also the title **FELLOW SERVANTS**, vol. 12, p. 986; **MASTER AND SERVANT**.

**2. Handicraft.** — An English labor act defines *handicraft* to mean any manual labor exercised by way of trade or for purpose of gain in or incidental to the making any article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article. Making straw plait by a child under the age of eight years, who is being taught such plaiting, is a *handicraft* within this definition. *Beadon v. Parrott*, 40 L. J. M. C. 200, L. R. 6 Q. B. 718.

**3. H. and L.** — For **H.** and **L.** as abbreviation of "house and lot" see *State v. Newark*, 36 N. J. L. 288; *Auditor-Gen. v. Sparrow*, 116 Mich. 588.

**4. Hand Laborers.** — Laborers employed in peeling bark and squaring timber are *hand laborers*. *Weed v. Robinson*, 14 Pa. Co. Ct. 7. See also the title **MECHANICS' LIENS**.

**5. Handling — Hauling.** — In *State v. Adams*, 49 S. Car. 518, it was held that an indictment charging the hauling of liquors was not within a statute prohibiting the *handling* of liquors. See also *State v. Pickett*, 47 S. Car. 101.

**6. Handsome Present.** — A request to a tradesman to show the defendant's house and a promise that the defendant would make him a *handsome* present were held evidence of a contract to pay a reasonable compensation for the work and labor bestowed in the service. *Jewry v. Busk*, 5 Taunt. 302, 1 E. C. L. 113.

**Handsome Gratuity.** — A request by a tradesman that a *handsome* gratuity should be paid to each of his executors was held void for uncertainty in *Jubber v. Jubber*, 9 Sim. 503.

# HANDWRITING.

BY JOSEPH R. LONG.

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#### CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *ANCIENT DOCUMENTS*, vol. 2, p. 322; *EVIDENCE*, vol. 11, p. 484; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 583; *EXPERT AND OPINION EVIDENCE*, vol. 12, p. 414; *FORGERY*, vol. 13, p. 1081; *MARK*; *SIGNATURE*; *WILLS*; *WRITING*.

**I. DEFINITION.** — The term "handwriting" denotes the cast or form of writing peculiar to each hand or person; also, that which is written by hand.<sup>1</sup>

**II. PROOF OF HANDWRITING** — **1. Necessity for Proof.** — A discussion of the various cases in which proof of the handwriting of written instruments is required or held unnecessary would be impracticable and useless in this connection, but will be found under the several appropriate titles throughout this work.<sup>2</sup>

**2. Modes of Proof** — *a. GENERALLY.* — The genuineness of handwriting may be proved by the testimony of the writer himself, by the testimony of witnesses who saw the document in question written or who are familiar with the writer's handwriting, or by a comparison of the disputed writing with other papers proved or admitted to have been written by the person whose handwriting is in dispute.<sup>3</sup>

**Rules the Same in Civil and Criminal Cases.** — So far as the principles governing the admissibility of evidence in proving handwriting are concerned there is no distinction between civil and criminal cases.<sup>4</sup> The sufficiency of the evidence,

**1. Definition of Handwriting.** — *Century Dict.*; *Webster's Dict.*

Handwriting is "anything written by a person; the manner in which a person writes, including the formation of the characters, the separation of the words, and other features distinguishing the written matter, as a mechanical result, from the writing of other persons." *Bouv. L. Dict.*

The term "handwriting" includes whatever a person has written with his hand, and not merely his common and usual style

of chirography. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

**2.** See particularly the titles *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 583, and cross-references there found.

**3.** See the sections of this article immediately following.

**4.** *Rules as to Admissibility of Evidence Same in Civil and Criminal Cases.* — *De la Motte's Case*, 21 How. St. Tr. 810; *Rex v. Cator*, 4 Esp. 117; *Rex v. Hensley*, 2 Ken. K. B. 368, 1 Burr. 643;



however, in each case will obviously have to be determined according to the different rules on this subject obtaining in civil and in criminal cases.<sup>1</sup>

*b. BY WRITER HIMSELF* — *Proof by Writer's Own Testimony.* — The genuineness of handwriting may be proved by the testimony of the writer himself, and this is evidently the simplest mode of proof.<sup>2</sup>

*Writer's Testimony Not of Higher Grade than That of Other Witnesses.* — The testimony of the writer, however, with respect to the genuineness of his handwriting is not of a higher grade than that of a witness who saw the instrument written or who is familiar with the handwriting of the supposed writer; hence it is not a violation of the rule of evidence requiring the production of the best evidence obtainable to permit proof of handwriting by witnesses, without calling for the testimony of the writer, although the latter may be within the jurisdiction of the court.<sup>3</sup>

*c. BY NONEXPERT WITNESSES* — (1) *Who Saw Instrument Written.* — The handwriting of a written instrument may be proved by any person who saw the instrument written.<sup>4</sup>

(2) *Who Are Familiar with Writer's Handwriting* — (a) *Generally.* — The genuineness or falsity of a disputed writing may be proved by witnesses who are personally acquainted with the handwriting of the supposed writer.<sup>5</sup>

*Bradford v. People*, 22 Colo. 157; *Jumpertz v. People*, 21 Ill. 375; *Hammond's Case*, 2 Me. 35, 11 Am. Dec. 39; *West v. State*, 22 N. J. L. 212. And see numerous criminal cases cited throughout this article in which the principles governing proof of handwriting have been applied without reference to the character of the case.

1. *Different Rules as to Weight of Evidence.* — See generally the title EVIDENCE, vol. II, pp. 491-493.

There is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the onus of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged, to the exclusion of reasonable doubt, the prisoner must be acquitted. *Per Sir John Patteson*, in *Doe v. Wilson*, 10 Moo. P. C. 502.

2. *Proof of Handwriting by Writer Himself.* — *Chant v. Brown*, 9 Hare 790. See numerous cases cited throughout this article in which the writer's admission was regarded as sufficient proof of genuineness.

A person's signature may be proved by his acknowledgment, although after suit brought. *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318.

In *Louisiana* it has been held that when a person has denied his signature, evidence of his previous acknowledgment thereof is inadmissible. *Plicque v. Labranche*, 9 La. 559. But see *City Bank v. Foucher*, 9 La. 405.

3. *Testimony of Writer Not of Higher Grade than That of Witness.* — *McCaskle v. Amarine*,

12 Ala. 17; *Royce v. Gazan*, 76 Ga. 79; *Smith v. Prescott*, 17 Me. 277; *Lefferts v. State*, 49 N. J. L. 26; *Ainsworth v. Greenlee*, 1 Hawks (8 N. Car.) 190; *McCully v. Malcom*, 9 Humph. (Tenn.) 187; *Foulkes v. Com.*, 2 Rob. (Va.) 836. See also *Reg. v. Hurley*, 2 M. & Rob. 473.

The cases of *Cheritree v. Roggen*, 67 Barb. (N. Y.) 124, *McKee v. Myers*, Add. (Pa.) 31, and *Haun v. State*, 13 Tex. App. 383, 44 Am. Rep. 706, if not distinguishable, are clearly overborne by the weight of authority.

4. *Proof by Witness of Execution.* — *Jones v. Hough*, 77 Ala. 437; *Seibold v. Rogers*, 110 Ala. 438; *Riordan v. Guggerty*, 74 Iowa 688; *Stoddard v. Hill*, 38 S. Car. 385. See the title EXECUTION AND PROOF OF DOCUMENTS, vol. II, p. 583.

The Testimony of Such a Witness Is Not Conclusive when opposed by evidence tending to a contrary conclusion, based upon the opinion of witnesses familiar with the person's handwriting, as to its genuineness. *Sarvent v. Hesdra*, 5 Redf. (N. Y.) 47.

But the affirmative testimony of an eye-witness to a signature is not outweighed by the negative testimony of two witnesses based upon general knowledge of the party's signature and from comparison. *Bell v. Norwood*, 7 La. 95. See also *Newton v. Ricketts*, 9 H. L. Cas. 262.

The Mistake of a Witness as to the Time When He Saw the Instrument Signed has been held not materially to affect his testimony as to the genuineness of the signature, as mistakes in reference to dates are liable to occur. *Root v. Strang*, 77 Hun (N. Y.) 14.

5. *Proof by Witnesses Acquainted with Writer's Handwriting.* — *England.* — *Eagleton v. Kingston*, 8 Ves. Jr. 438.

*United States.* — *Rogers v. Ritter*, 12 Wall. (U. S.) 322.

*Alabama.* — *McCaskle v. Amarine*, 12 Ala. 17.

*Colorado.* — *Hinchman v. Keener*, 9 Colo. App. 300.

*Georgia.* — *Royce v. Gazan*, 76 Ga. 79;

**Modes of Acquiring Knowledge of Handwriting.** — The witness's personal acquaintance with the party's handwriting may have been acquired either by seeing him write or by seeing other papers known to be in his handwriting.<sup>1</sup> These modes will now be considered in detail.

(b) **From Having Seen Him Write — Proof of Handwriting by Witness Who Has Seen Party Write.** — A person's handwriting may be proved by witnesses who have become acquainted therewith from having seen him write.<sup>2</sup>

**Considerations Affecting Value of Such Testimony.** — Obviously this acquaintance will be more or less intimate according to the number of times, the amount of writing, and the circumstances under which the witness has seen the person write; but these matters affect the weight of his testimony, and not its competency.<sup>3</sup>

**Writing Once.** — Thus a witness who has seen a person write only once has been held competent to identify that person's handwriting.<sup>4</sup>

*Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467, quoting Code Ga. 1882, § 3839.

*Kansas*. — *Ort v. Fowler*, 31 Kan. 478.

*Nebraska*. — *Omaha First Nat. Bank v. Lierman*, 5 Neb. 247.

*New York*. — *Robinson Consol. Min. Co. v. Craig*, (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 478.

*North Carolina*. — *State v. Allen*, 1 Hawks (8 N. Car.) 6, 9 Am. Dec. 616.

*Rhode Island*. — *Kinney v. Flynn*, 2 R. I. 319.

*South Carolina*. — *State v. Stalmaker*, 2 Brev. (S. Car.) 1.

*Vermont*. — *Redding v. Redding*, 69 Vt. 500.

*Washington*. — *Poncin v. Furth*, 15 Wash. 201.

See the cases cited in the sections following.

On the question of the genuineness of a holographic will a witness familiar with the handwriting of the propounder, but not with that of the alleged testator, may testify as to whether the will is in the handwriting of the propounder. *Brown v. Hall*, 85 Va. 146.

**1. Modes of Acquiring Knowledge of Person's Handwriting.** — See the sections immediately following.

The leading case on the subject of the proof of handwriting by witnesses mentioning the modes of acquiring knowledge stated in the text is *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406. See also *Allen v. State*, 3 Humph. (Tenn.) 367, where it was said by Green, J., that the means of knowledge here pointed out are merely illustrative, not exclusive.

**2. Proof by Witness Who Has Seen Person Write** — *England*. — *Rex v. Hensley*, 1 Burr. 642, 19 How. St. Tr. 1341; *Garrells v. Alexander*, 4 Esp. 37; *Eagleton v. Kingston*, 8 Ves. Jr. 438.

*Alabama*. — *Karr v. State*, 106 Ala. 1.

*Colorado*. — *Salazar v. Taylor*, 18 Colo. 538.

*Connecticut*. — *Lyon v. Lyman*, 9 Conn. 55.

*Florida*. — *Thalheim v. State*, 38 Fla. 169.

*Georgia*. — *Rumph v. State*, 91 Ga. 20.

*Illinois*. — *Pate v. People*, 8 Ill. 644; *Long v. Little*, 119 Ill. 600; *Riggs v. Powell*, 142 Ill. 453.

*Indiana*. — *Haynes v. Thomas*, 7 Ind. 38; *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90.

*Kentucky*. — *Kendall v. Collier*, 97 Ky. 446.

*Louisiana*. — *Morvant's Succession*, 45 La. Ann. 207.

*Maine*. — *Hopkins v. Meguire*, 35 Me. 78.

*Massachusetts*. — *Com. v. Hall*, 164 Mass. 152.

*Missouri*. — *State v. Stair*, 87 Mo. 268, 56 Am. Rep. 449; *Lachance v. Loeblein*, 15 Mo. App. 460.

*New Hampshire*. — *Hoitt v. Moulton*, 21 N. H. 586.

*New Jersey*. — *Cook v. Smith*, 30 N. J. L. 387.

*New York*. — *Titford v. Knott*, 2 Johns. Cas. (N. Y.) 211; *Hartung v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 319; *Magee v. Osborn*, 32 N. Y. 669; *Bruyn v. Russell*, 52 Hun (N. Y.) 17; *Matter of Ollemann*, 1 Connolly (N. Y.) 441; *Root v. Strang*, 77 Hun (N. Y.) 14.

*North Carolina*. — *State v. Gay*, 94 N. Car. 514.

*Pennsylvania*. — *Travis v. Brown*, 43 Pa. St. 9, 82 Am. Dec. 540; *Wilson v. Van Leer*, 127 Pa. St. 371, 14 Am. St. Rep. 854.

*Rhode Island*. — *Kinney v. Flynn*, 2 R. I. 319.

*South Carolina*. — *Commissioners of Poor v. Hanion*, 1 Nott & M. (S. Car.) 554.

*Texas*. — *Haynie v. State*, 2 Tex. App. 168; *Williams v. Deen*, 5 Tex. Civ. App. 575.

*Virginia*. — *Sharp v. Sharp*, 2 Leigh (Va.) 249; *Chahoon v. Com.*, 20 Gratt. (Va.) 733.

*Washington*. — *Poncin v. Furth*, 15 Wash. 201.

And see cases cited in the notes immediately following.

This has been stated to be the best evidence of handwriting. *Robson v. Rocke*, 2 Add. Ecc. 80.

**3. Per Patteson, J., in Doe v. Suckermore**, 5 Ad. & El. 703, 31 E. C. L. 406.

**4. Seeing Person Write Once Qualifies** — *England*. — *Willman v. Worrall*, 8 C. & P. 380, 34 E. C. L. 438. See also *Eagleton v. Kingston*, 8 Ves. Jr. 438; *Garrells v. Alexander*, 4 Esp. 37; *Burr v. Harper*, Holt N. P. 420, 3 E. C. L. 168.

*Alabama*. — *Hopper v. Ashley*, 15 Ala. 457.

*Illinois*. — *Woodford v. McClenahan*, 9 Ill. 85; *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *Massey v. Farmers' Nat. Bank*, 104 Ill. 117.

*Maryland*. — *Smith v. Walton*, 8 Gill (Md.) 77; *Edelen v. Gough*, 8 Gill (Md.) 87.

*New York*. — *People v. ...*, 11 N. H. 71.

*New York*. — *Hammond v. Varian*, 54 N. Y. 398.



**Writing Surname.** — Again, it has been held sufficient to render a witness competent that he has seen the person write his surname only.<sup>1</sup>

**The Length of Time That Has Elapsed** since the witness saw the person write is wholly immaterial so far as his competency is concerned, and goes only to the weight of his testimony.<sup>2</sup>

(c) **From Having Seen Papers Known to Be in His Handwriting** — *aa. GENERALLY.* — A witness may testify as to a person's handwriting from knowledge thereof derived from having seen papers known to be in his handwriting.<sup>3</sup>

**Handwriting Acknowledged by Writer to Be Genuine.** — Thus the witness may have acquired his knowledge by seeing papers acknowledged by such person to be in his handwriting, or which he is estopped to deny.<sup>4</sup> It is not necessary that the writer's acknowledgment of the genuineness of the writings seen by the witness should be express; it may be implied from his conduct with reference to them.<sup>5</sup>

**Handwriting Seen in Usual Course of Business.** — A witness who has become acquainted with a person's handwriting from having seen and acted upon it in the usual course of business is competent to testify thereto.<sup>6</sup>

*Ohio.* — *Brachmann v. Hall*, 1 Disney (Ohio) 539.

*Pennsylvania.* — *McNair v. Com.*, 26 Pa. St. 388.

*South Carolina.* — *Means v. Means*, 7 Rich. L. (S. Car.) 533.

*Tennessee.* — *Demonbreun v. Walker*, 4 Baxt. (Tenn.) 199.

*Vermont.* — *In re Diggins*, 68 Vt. 198.

*Virginia.* — *Pepper v. Barnett*, 22 Gratt. (Va.) 405.

See also *Com. v. Nefus*, 135 Mass. 533. But see *U. S. v. Crow*, 1 Bond (U. S.) 51.

This is true though the words written were merely the writer's name. *Burr v. Harper*, Holt N. P. 420, 3 E. C. L. 168; *Smith v. Walton*, 8 Gill (Md.) 77; *Rideout v. Newton*, 17 N. H. 71; *Brachmann v. Hall*, 1 Disney (Ohio) 539; *In re Diggins*, 68 Vt. 198; *Pepper v. Barnett*, 22 Gratt. (Va.) 405.

1. **Surname.** — *Lewis v. Sapio*, M. & M. 39, 22 E. C. L. 242, *repudiating Powell v. Ford*, 2 Stark. 164, 3 E. C. L. 360.

2. **Length of Time Since Witness Saw Party Write Immaterial.** — *Eagleton v. Kingston*, 8 Ves. Jr. 438; *Willson v. Betts*, 4 Den. (N. Y.) 210; *Wilson v. Van Leer*, 127 Pa. St. 371, 14 Am. St. Rep. 854; *Brachmann v. Hall*, 1 Disney (Ohio) 539.

On the question of the genuineness of a deed purporting to have been executed by a man who at the time of the trial had been dead for nearly fifty years, it was held that the testimony of a witness who said that he had frequently seen the grantor write, but had seen neither the man nor his writing for more than sixty years, and that he believed the signature to be his, was competent to be submitted to the jury for whatever it was worth, upon proof that the subscribing witnesses to the deed could not be found. *Willson v. Betts*, 4 Den. (N. Y.) 210.

3. **Knowledge Acquired by Seeing Papers Written by Party.** — *Ennor v. Hodson*, 28 Ill. App. 445; *Morvant's Successor*, 45 La. Ann. 207; *Sprague v. Sprague*, 80 Hun (N. Y.) 285; and cases cited in the notes immediately following.

4. **Knowledge Acquired by Seeing Writings Acknowledged to Be Genuine** — *England.* — *Smith v. Sainsbury*, 5 C. & P. 196, 24 E. C. L. 275.

*Compare Greaves v. Hunter*, 2 C. & P. 477, 12 E. C. L. 225.

*Delaware.* — *State v. Spence*, 2 Harr. (Del.) 348.

*Maine.* — *Hammond's Case*, 2 Me. 33, 11 Am. Dec. 39; *Woodman v. Dana*, 52 Me. 9.

*Minnesota.* — *Berg v. Peterson*, 49 Minn. 420, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 269 *et seq.*

*New Hampshire.* — *State v. Hastings*, 53 N. H. 452.

*New York.* — *Donoghoe v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 120; *Johnson v. Daverne*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; *Hammond v. Varian*, 54 N. Y. 398; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

*North Carolina.* — *Gordon v. Price*, 10 Ired. L. (32 N. Car.) 385.

*Pennsylvania.* — *Cabarga v. Seeger*, 17 Pa. St. 514.

*Virginia.* — *Cody v. Conly*, 27 Gratt. (Va.) 313.

A witness who has formed an opinion of a party's handwriting from having observed it in the signature to an affidavit used in the cause, is competent to testify thereto. *Smith v. Sainsbury*, 5 C. & P. 196, 24 E. C. L. 275.

5. **Acknowledgment Need Not Be Express.** — *State v. Hastings*, 53 N. H. 452; *Allen v. State*, 3 Humph. (Tenn.) 367.

Thus the payment by one of notes purporting to be signed by him is a sufficient acknowledgment of their genuineness. *Johnson v. Daverne*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; *Gordon v. Price*, 10 Ired. L. (32 N. Car.) 385.

6. **Handwriting Seen in the Usual Course of Business.** — *Murieta v. Wolfhagen*, 2 C. & K. 744, 61 E. C. L. 744; 3,109 Cases of Champagne, 1 Ben. (U. S.) 241; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Baker v. Squier*, 1 Hun (N. Y.) 448; *Armstrong v. Fargo*, 8 Hun (N. Y.) 175; *Coffey's Case*, 4 City Hall Rec. (N. Y.) 52; *Finch v. Gridley*, 25 Wend. (N. Y.) 469; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767.

**An Officer of a Bank** who has seen a depositor's signature and paid checks signed by him is competent to prove his signature. *Murieta*



The Signature of a Public Officer may be proved by a witness who has become familiar therewith from having inspected official papers signed by the officer.<sup>1</sup>

**Handwriting of Intestate.** — Similarly the handwriting of a deceased person may be proved by his administrator who has acquired a knowledge of his handwriting from an examination of his papers after his death.<sup>2</sup>

**Genuineness of Papers Must Be Clearly Established.** — Before a witness will be permitted to testify as to a person's handwriting from knowledge derived from seeing papers purporting to have been written by him it must be clearly shown that such papers were in his handwriting.<sup>3</sup>

*Id.* **THROUGH CORRESPONDENCE.** — Again, the witness may have acquired his knowledge of the person's handwriting by having corresponded with him.<sup>4</sup>

**Where Witness Was Confidential Clerk of Person Addressed.** — It is not necessary that the letters should have been addressed to the witness himself. Thus, a clerk through whose hands correspondence between his employer and the person whose handwriting is in question has passed in the ordinary course of business is a competent witness to prove the handwriting of the latter.<sup>5</sup>

**Knowledge Acquired through Family Correspondence.** — Similarly, a member of a family who became acquainted with the family correspondence while it was

*v. Wolfhagen*, 2 C. & K. 744, 61 E. C. L. 744; *Warren v. Anderson*, 8 Scott 384; *Coffey's Case*, 4 City Hall Rec. (N. Y.) 52. But where some of the checks paid were forgeries the officer was held to be incompetent. *Brigham v. Peters*, 1 Gray (Mass.) 139. Nor is an officer of a bank a competent witness to prove the signature of a person not a depositor in his bank from having paid a check on another bank purporting to be drawn by such person, but not proved to be genuine. *Cunningham v. Hudson River Bank*, 21 Wend. (N. Y.) 557.

The Signatures to a College Diploma may be proved by a witness who has received a diploma from the same institution, and bearing the same signatures, *Finch v. Gridley*, 25 Wend. (N. Y.) 469; or by a witness who has been employed to fill up the blanks in such diplomas after they had been signed, *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

**1. Signature of Public Officer.** — *Rogers v. Ritter*, 12 Wall. (U. S.) 317; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Commonwealth Bank v. Mudgett*, 44 N. Y. 514; *Duncan v. Beard*, 2 Nott & M. (S. Car.) 400.

A clerk of a court who in the course of his business has often seen what he believed to be the official signature of a certain person as justice of the peace, and has certified the signatures as such, may be called upon to prove the handwriting of such person although he has never seen him write. *Amherst Bank v. Root*, 2 Met. (Mass.) 522. See also *infra*, this section, *Ancient Writings*.

**2. Proof of Intestate's Handwriting by His Administrator.** — *Tucker v. Kellegher*, 1 Cush. 11; *Sharp v. Sharp*, 2 Leigh (Va.) 249.

**3. Papers Seen by Witness Must Be Clearly Genuine.** — *Drew v. Prior*, 5 M. & G. 264, 44 E. C. L. 146; *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357; *Brigham v. Peters*, 1 Gray (Mass.) 139; *Cunningham v. Hudson River Bank*, 21 Wend. (N. Y.) 587; *Kinney v. Flynn*, 2 R. I. 319; *Sartor v. Bolinger*, 59 Tex. 411; *Guyette v. Bolton*, 46 Vt. 228. See also *Randolph v. Gordon*, 5 Price 312. And see *infra*, this section, *Through Correspondence*.

A witness who has merely seen writings

purporting to have been written by a certain person is not competent to testify as to the handwriting of such person. *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357.

Having seen writings by a person of the same name, but not proved to be the same person, is not sufficient to qualify a witness. *Kinney v. Flynn*, 2 R. I. 319. See also *Harrington v. Fry*, R. & M. 90, 21 E. C. L. 388.

**4. Proof by Witness Who Has Corresponded with Alleged Writer** — *England*. — *Gould v. Jones*, 1 W. Bl. 384; *Buller's N. P.* 236; *Tharpee v. Cismurne*, 2 C. & P. 21, 12 E. C. L. 8; *Murieta v. Wolfhagen*, 2 C. & K. 744, 61 E. C. L. 744. See also *Wade v. Broughton*, 3 Ves. & B. 172. *United States*. — *Reid v. Hodgson*, 1 Cranch (C. C.) 491.

*Alabama*. — *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

*Colorado*. — *Atlantic Ins. Co. v. Manning*, 3 Colo. 224.

*Georgia*. — *Pearson v. McDaniel*, 62 Ga. 100; *Rumph v. State*, 91 Ga. 20.

*Indiana*. — *Thomas v. State*, 103 Ind. 419.

*Massachusetts*. — *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Chaffee v. Taylor*, 3 Allen (Mass.) 595.

*Michigan*. — *Empire Mfg. Co. v. Stuart*, 46 Mich. 482.

*Mississippi*. — *Southern Express Co. v. Thornton*, 41 Miss. 216.

*Nebraska*. — *Violet v. Rose*, 39 Neb. 660.

*North Carolina*. — *McKonkey v. Gaylord*, 1 Jones L. (46 N. Car.) 94.

*Pennsylvania*. — *Com. v. Smith*, 6 S. & R. (Pa.) 568; *U. S. v. Simpson*, 3 P. & W. (Pa.) 437, 24 Am. Dec. 331; *Clark v. Freeman*, 25 Pa. St. 133.

*Texas*. — *Sartor v. Bolinger*, 59 Tex. 411.

*Wisconsin*. — *Parker v. Amazon Ins. Co.*, 34 Wis. 363.

**5. Proof by Clerk in Charge of Correspondence.** — *Rex v. Slaney*, 5 C. & P. 213, 24 E. C. L. 285; *Reid v. Hodgson*, 1 Cranch (C. C.) 491; *Reyburn v. Belotti*, 10 Mo. 597; *Titford v. Knott*, 2 Johns. Cas. (N. Y.) 211. See also *Eagleton v. Kingston*, 8 Ves. Jr. 438. But see *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467.

in progress can prove the handwriting of a correspondent although he himself took no part in the correspondence.<sup>1</sup>

**Genuineness of Letters Must Be Clearly Established.** — Where a witness's knowledge of a person's handwriting is derived solely from an examination of letters purporting to have been written by such person, it must clearly appear that such letters were actually in his handwriting.<sup>2</sup> Where the witness has mailed letters to a person directed to a certain place, and has received replies purporting to come from such place and to be signed by such person, this is sufficient evidence of the genuineness of the replies in the absence of evidence to the contrary.<sup>3</sup>

**cc. ANCIENT WRITINGS.** — The handwriting of a person long deceased may be proved by the testimony of a witness who has become familiar therewith from an examination of other writings known to be in his handwriting.<sup>4</sup> It has been so held in a number of cases where the writer had held an official position and the witness had acquired a knowledge of his handwriting from an inspection of official documents, in official custody, purporting to be signed by him.<sup>5</sup>

(d) **Competency and Testimony of Witnesses** — *aa. WITNESS MUST BE FAMILIAR WITH PERSON'S HANDWRITING* — (*aa*) *Generally.* — Before a witness can be permitted to testify as to a person's handwriting it must be made to appear that he has, in some manner recognized by law, acquired a knowledge of such person's handwriting sufficient to enable him to form some opinion as to its genuineness when he sees it.<sup>6</sup>

**1. Family Correspondence.** — *Tuttle v. Rainey*, 98 N. Car. 513.

**2. Letters Seen by Witness Must Be Shown to Be Genuine.** — *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467; *Nunes v. Perry*, 113 Mass. 274; *Haynie v. State*, 2 Tex. App. 168.

**Where the Letters Received Had No Relation to a Business Transaction**, but consisted merely of friendly correspondence, some acknowledgment of handwriting on the part of the writer must be shown, independent of the receipt and contents of the letters. *Flowers v. Fletcher*, 40 W. Va. 103, *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 271.

**Where Letters Received Were Not All in Same Handwriting.** — A witness whose knowledge of a person's handwriting is derived solely from the receipt of letters purporting to have been written by him, but not all in the same handwriting, is incompetent to testify as to such person's handwriting. *Flowers v. Fletcher*, 40 W. Va. 103.

**Knowledge Derived from Letters Written to Other Persons** and seen by the witness has been held not sufficient to qualify the witness to prove the writer's handwriting. *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Desbrow v. Farrow*, 3 Rich. L. (S. Car.) 382. But see cases cited *supra*, this section, as to proof by a clerk in charge of correspondence.

**3. Receipt of Letters Prima Facie Evidence of Genuineness.** — *Harrington v. Fry*, 1 C. & P. 289, 2 Bing. 179, 9 E. C. L. 370; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224. See also the title *LETTERS*.

**4. Proof of Handwriting of Ancient Documents.** — *Fitzwalter Peerage*, 10 Cl. & F. 193; *Jackson v. Brooks*, 8 Wend. (N. Y.) 426, *affirmed* 15 Wend. (N. Y.) 111; *Thomas v. Horlocker*, 1 Dall. (Pa.) 14; *Sweigart v. Richards*, 8 Pa. St. 436; and cases cited in the note immediately following.

In *Crawford, etc., Peerages*, 2 H. L. Cas.

557, a person accustomed to ancient manuscripts was held to be a competent witness where he testified that by a careful examination of certain signatures he had in his mind such a distinct knowledge of the handwriting as to be able to say, without immediate reference to them, whether any letter shown to him was or was not written by the same person.

**5. Proof of Ancient Writings Where Writer Held Official Position** — *Church Rector.* — *Taylor v. Cook*, 8 Price 650; *Doe v. Davies*, 10 Q. B. 314, 59 E. C. L. 314.

*County Judge and Clerk.* — *Willson v. Betts*, 4 Den. (N. Y.) 210.

*Justice of the Peace.* — *Sill v. Reese*, 47 Cal. 294; *Doe v. Roe*, 31 Ga. 593.

*Official Surveyor.* — *Jackson v. Murray*, Anth. N. P. (N. Y.) 105; *Jones v. Huggins*, 1 Dev. L. (12 N. Car.) 223, 17 Am. Dec. 567; *Goddard v. Gloninger*, 5 Watts (Pa.) 209; *Sweigart v. Richards*, 8 Pa. St. 436; *Turnipseed v. Hawkins*, 1 McCord L. (S. Car.) 272.

**6. Witness Must Be Acquainted with Party's Handwriting** — *Alabama.* — *Nelms v. State*, 91 Ala. 97; *Richardson v. Stringfellow*, 100 Ala. 416.

*Georgia.* — *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467.

*Illinois.* — *Pate v. People*, 8 Ill. 644; *Putnam v. Wadley*, 40 Ill. 346.

*Kansas.* — *Arthur v. Arthur*, 38 Kan. 691.

*Massachusetts.* — *Brigham v. Peters*, 1 Gray (Mass.) 139.

*New York.* — *Boyle v. Colman*, 13 Barb. (N. Y.) 42.

*Pennsylvania.* — *Slaymaker v. Wilson*, 1 P. & W. (Pa.) 216; *Porter v. Wilson*, 13 Pa. St. 641; *Fullam v. Rose*, 181 Pa. St. 138.

*South Carolina.* — *Weaver v. Whilden*, 33 S. Car. 190.

*Texas.* — *Mapes v. Leal*, 27 Tex. 345; *Sartor v. Bolinger*, 59 Tex. 411; *Haun v. State*, 13 Tex. App. 383, 44 Am. Rep. 706.



**Witness Must Claim to Have Knowledge.** — The witness must claim to be acquainted with the person's handwriting; it is insufficient for him simply to state that the disputed writing was or was not executed by the person by whom it purports to have been executed.<sup>1</sup> It is not necessary, however, that the witness should claim in express terms that he is familiar with the person's handwriting if this sufficiently appears from his testimony.<sup>2</sup> Nor need he claim positively to have such knowledge; it is sufficient if he thinks that he has.<sup>3</sup> Moreover, a witness who testifies that he has seen the person write, but that he is not sufficiently familiar with such person's handwriting to determine whether the disputed writing is genuine except by comparing it with other writings known to be genuine, is competent.<sup>4</sup>

**Statement of Fact of Acquaintance Sufficient.** — It is sufficient if the witness states that he is familiar with the person's handwriting, without further stating how his knowledge was acquired. He may then be interrogated as to the sources of his knowledge, but if this is not done its sufficiency will be presumed.<sup>5</sup>

**(24) Extent of Knowledge.** — The extent of the witness's knowledge is immaterial so far as his competency is concerned, and affects only the weight of his testimony.<sup>6</sup> Obviously, however, the extent of the witness's acquaintance with the party's handwriting is of the greatest importance in determining the value of his testimony.

**(25) Cross-examination — Testing Witness.** — Where a witness has testified that he is familiar with a person's handwriting he may be cross-examined as to the extent and sources of his knowledge;<sup>7</sup> but if this is not done, the sufficiency

*Vermont.* — *Guyette v. Bolton*, 46 Vt. 228.

**Witness Must Testify from Knowledge of Handwriting Alone.** — The witness must base his opinion upon his knowledge of the person's handwriting, and not upon extraneous circumstances. Thus a witness who testified that he believed some writing on the margin of a letter had been written by a certain person because it was on the letter, but that he would not otherwise have recognized it, was held incompetent. *Taylor v. Sutherland*, 24 Pa. St. 333. See also *Mendes Da Costa v. Pym*, Peake Add. Cas. 144.

**1. Witness Must Claim Acquaintance.** — *Wimbish v. State*, 89 Ga. 294; *Watson v. M'Allister*, 7 Mart. (La.) 368; *Carrier v. Hampton*, 11 Ired. L. (33 N. Car.) 307; *Slaymaker v. Wilson*, 1 P. & W. (Pa.) 216. But in *Goodhue v. Bartlett*, 5 McLean (U. S.) 186, it was held that it is sufficient if a witness swears positively to a person's handwriting, without stating that he is acquainted therewith, and that the question as to the source of his knowledge must come from the other side.

**2. Riggs v. Powell**, 142 Ill. 453.

**3. Witness Need Not Claim Knowledge in Positive Terms.** — Where, on the question of the genuineness of a signature, a witness did not swear positively that he had seen the person write, but believed that he had, and that he knew the person's handwriting, and that the signature was his, it was held that this was strong persuasive evidence to the jury to prove the signature. *Fash v. Blake*, 38 Ill. 318.

Where a witness, upon being asked if he knew a party's handwriting, answered that he thought he did, it was held that he was competent. *Com. v. Meehan*, 170 Mass. 362.

**4. Witness Who Requires Comparison.** — *Lyon v. Lyman*, 9 Conn. 55. See *infra*, this section, *Right of Witness to Refresh His Memory*.

**5. Source of Knowledge Not Required.** — *Barwick v. Wood*, 3 Jones L. (48 N. Car.) 306 [*distinguishing* *Carrier v. Hampton*, 11 Ired. L. (33 N. Car.) 307]; *Davis v. Higgins*, 91 N. Car. 382; *Anderson v. Logan*, 99 N. Car. 474. See also *infra*, this section, *Cross-examination — Testing Witness*.

In *McCracken v. West*, 17 Ohio 16, it was held error to permit a witness to testify as to handwriting without first laying the proper foundation by stating his means of knowledge. It does not appear from the report of this case whether the witness had or had not claimed to be familiar with the party's handwriting.

**6. Extent of Knowledge Immaterial So Far as Competency Is Concerned.** — *Lyon v. Lyman*, 9 Conn. 55; *Hartung v. People*, (Supm. Ct. Gen. T.) 4 Park. Cism. (N. Y.) 319.

A witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is for the jury. *Flowers v. Fletcher*, 40 W. Va. 103.

**Familiar with Signature Alone.** — A witness familiar with a person's signature may testify to that, although not familiar with his general handwriting. *McKonkey v. Gaylord*, 1 Jones L. (46 N. Car.) 94. And see *Rideout v. Newton*, 17 N. H. 71.

**Proving Surname Alone.** — Where, as to the genuineness of a signature, a witness testified that he believed the signature of the surname to be genuine, but could not say so as to the Christian name, and therefore could not prove the whole signature, it was held that his testimony was competent. *Smith v. Walton*, 8 Gill (Md.) 77.

**7. Witness May Be Cross-examined as to Extent and Sources of Knowledge.** — *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467; *Herrick v. Swomley*, 56 Md. 439; *Commonwealth Bank v. Mudgett*, 44 N. Y. 514; *Bardin v. Stevenson*,



of his knowledge will be presumed.<sup>1</sup>

**Testing Witness by Use of Other Writings.** — Where a witness has testified that he is familiar with a person's handwriting, it is not permissible on cross-examination to test his knowledge by showing to him other papers irrelevant to the case and asking of him his opinion as to their genuineness.<sup>2</sup> It has been held, however, that papers already in evidence may be so used for the purpose of testing the witness.<sup>3</sup>

Under Statutes allowing the introduction of irrelevant writings for purposes

75 N. Y. 164; *Whittier v. Gould*, 8 Watts (Pa.) 485. See also *Snell v. Bray*, 56 Wis. 156.

**The Nature of the Writings** which the witness saw the person whose handwriting is disputed sign may be inquired into, to test the amount of attention given by the witness to the signature. *Bardin v. Stevenson*, 75 N. Y. 164.

**Hypothetical Questions Calling for Opinions on Subjects Not Proper for Expert Evidence** — for instance, whether the witness would act on his belief of a writing's genuineness as against the writer's denial thereof — are improper. *Commonwealth Bank v. Mudgett*, 44 N. Y. 514.

**That the Form of the Party's Signature Differs** in the disputed writing from that found in the writings which the witness saw him sign and upon which his knowledge is based may be shown on cross-examination. *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302.

**A Change in the Party's Handwriting** since the disputed signature may be shown on the cross-examination of a witness who has stated that the signature is not genuine. *Armstrong v. Thruston*, 11 Md. 148.

**Variance in Different Specimens of the Handwriting of a Subscribing Witness** cannot be shown on cross-examination, as a basis for an argument that the signature of the person whose writing is disputed also varied, so that the subscribing witness might be mistaken in his identification. *Brown v. Tourtelotte*, 24 Colo. 204.

**1. Sufficiency of Witness's Knowledge Presumed Where He Is Not Cross-examined.** — *Henderson v. Montgomery Bank*, 11 Ala. 855; *Hinchman v. Keener*, 5 Colo. App. 300; *Egan v. Murray*, 80 Iowa 180; *Berryman v. Dahlgren*, 6 Rob. (La.) 189; *Smith v. Walton*, 8 Gill (Md.) 77; *Whittier v. Gould*, 8 Watts (Pa.) 485; *Pradiere v. De la Combe*, 3 Brev. (S. Car.) 481, 2 Treadw. (S. Car.) 625. See also *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

The adverse party cannot object that the witness was not cross-examined, if he has had the opportunity to cross-examine and did not avail himself of it. *Com. v. Hall*, 164 Mass. 152.

**2. Testing Witness by Use of Irrelevant Papers Not Permissible** — *England*. — *Griffits v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104; *Hughes v. Rogers*, 8 M. & W. 123.

*Connecticut*. — *Tyler v. Todd*, 36 Conn. 218.

*Illinois*. — *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

*Kansas*. — *Gaunt v. Harkness*, 53 Kan. 405, 42 Am. St. Rep. 297.

*Kentucky*. — *Andrews v. Hayden*, 88 Ky. 455.

*Massachusetts*. — *Bacon v. Williams*, 13 Gray (Mass.) 525.

*Michigan*. — *Howard v. Patrick*, 43 Mich. 121.

*Missouri*. — *Rose v. Springfield First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258.

*New York*. — *Van Wyck v. McIntosh*, 14 N. Y. 439; *Commonwealth Bank v. Mudgett*, 44 N. Y. 514, affirming 45 Barb. (N. Y.) 663; *Hillsley v. Palmer*, 32 Hun (N. Y.) 472.

*Tennessee*. — *Fogg v. Dennis*, 3 Humph. (Tenn.) 47.

*Wisconsin*. — *Pierce v. Northey*, 14 Wis. 10. See also *Nuckols v. Jones*, 8 Gratt. (Va.) 267, and see *infra*, this section, *By Expert Witnesses* — *Cross-examination* — *Testing Expert*.

**Requiring a Witness on Cross-examination to Pick Out the False and the Genuine** from a number of specially prepared signatures of the person whose writing is disputed is improper. *Gaunt v. Harkness*, 53 Kan. 405, 42 Am. St. Rep. 297; *Andrews v. Hayden*, 88 Ky. 455. See also *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

**Such Test Allowed.** — The admission of a test of a witness by other papers was held not to be a sufficient ground for reversal in *Page v. Homans*, 14 Me. 478. See also *Kirksey v. Kirksey*, 41 Ala. 626. In this case it was held that where a witness has testified as to the genuineness of a signature, it is competent on cross-examination to test his knowledge by showing to him a part of another signature purporting to be by the same person, the rest being concealed from him, and asking him in whose handwriting the part shown to him is.

In *Young v. Honner*, 2 M. & Rob. 536, it was held that a witness who had denied the genuineness of a signature in dispute might be tested on cross-examination by questioning him as to other signatures admitted by him to be genuine, though it would be otherwise if the witness had denied the genuineness of such signatures.

**3. Testing Witness by Papers Already in Evidence.** — *Hornellsville First Nat. Bank v. Hyland*, 53 Hun (N. Y.) 108.

Where a party denies his signature he may be asked on cross-examination, for the purpose of testing his knowledge, whether his signature to another document, used in the case for comparison, is genuine. *Neal v. Neal*, 58 Cal. 287.

**Testing Witness with Signature to Plea.** — A witness testifying as to a person's signature from familiarity with his handwriting may be tested on cross-examination by asking him his opinion as to the genuineness of the party's signature to the plea filed in the case. *Melvin v. Hodges*, 71 Ill. 422.

**Asking the Witness to Point Out the Difference Between the Disputed Signature and a Genuine Signature** already in evidence has been held admissible on cross-examination, where on direct examination the witness had declared the disputed writing a forgery. *State v. Hop-*

of comparison, the use of irrelevant papers on cross-examination has been permitted to impeach the witness.<sup>1</sup>

*bb. WHERE WITNESS HAS ACQUIRED HIS KNOWLEDGE AFTER CONTROVERSY AROSE*—(*aa*) *Generally*.—The mere fact that the witness acquired his knowledge of the person's handwriting after the controversy arose goes to the weight and not to the competency of his evidence.<sup>2</sup> But a witness who has acquired his knowledge *post litem motam*, and for the express purpose of being able to testify, is incompetent.<sup>3</sup>

(*bb*) *For Purpose of Testifying*.—Nonexpert witnesses who have acquired their knowledge of the handwriting of the person whose signature is disputed, for the express purpose of enabling them to testify, are usually held incompetent, such testimony being excluded by the general rule against opinions<sup>4</sup> or upon the ground that it is necessarily biased.<sup>5</sup> It has been held, however, that the mere fact that the witness induced the party to write for the purpose of obtaining a knowledge of his handwriting will not render him incompetent where the writer had no motive for disguising the handwriting.<sup>6</sup>

*cc. EFFECT OF INTEREST ON COMPETENCY OF WITNESS*.—The question whether a witness otherwise incompetent to testify in a cause by reason of interest is competent to prove the handwriting of an instrument in suit is not entirely settled. The prevailing view seems to be that an interested witness is incompetent to prove handwriting as for other purposes.<sup>7</sup>

*dd. TESTIMONY FROM OPINION AND BELIEF*.—The witness is not required to state in positive terms that a disputed writing is or is not genuine; it is sufficient if he testifies that he believes it to be so.<sup>8</sup> Moreover, where a witness claims to be familiar with a person's handwriting it is competent for him to give his opinion as to whether or not a disputed writing was by such person, although

kings, 50 Vt. 316. See also *Winnie v. Tousley*, 36 Hun (N. Y.) 190.

1. *Royal Canadian Bank v. Brown*, 27 U. C. Q. B. 41. See further *infra*, this section, *By Comparison of Handwriting*.

2. *Pate v. People*, 8 Ill. 644; *Keith v. Lothrop*, 10 Cush. (Mass.) 453.

3. See *infra*, this section, *For Purpose of Testifying*.

4. *Brookbard v. Woodley*, Peake N. P. (ed. 1795) 21, note a.

5. *Fitzwalter Peerage*, 10 Cl. & F. 193; *Township 13 S. R. 3 W. v. Misenheimer*, 78 Ill. 22; *Snyder v. McKeever*, 10 Ill. App. 188; *Galesburg First Nat. Bank v. Hovell*, 24 Ill. App. 594; *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Herrick v. Swomley*, 56 Md. 439; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

The *Maryland* cases quoted above and perhaps some others in the same list would appear to exclude expert testimony by comparison. Such testimony was at one time excluded (see 30 Am. L. Rev. 494, article by Prof. Wigmore), and the influence of the early decisions was long felt in American jurisprudence.

*Where Party Writes Before Witness Expressly to Qualify Him*.—A witness is ordinarily incompetent if his only knowledge of the handwriting of the person whose handwriting is in question is derived from seeing him write for the express purpose of showing to the witness his manner of writing in order to enable the witness to testify thereto. *Stranger v. Searle*, 1 Esp. 14; *Territory v. O'Hare*, 1 N. Dak. 30, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 277; *Reese v. Reese*, 90 Pa. St. 89, 35 Am. Rep. 634.

6. *Witness Who Induced Party to Write Held Competent*.—*Reid v. State*, 20 Ga. 681.

Such witnesses were admitted in *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318, and *Haynie v. State*, 2 Tex. App. 168. In the case last cited the witness had induced the person whose handwriting was in dispute to write a letter, for the express purpose of obtaining a specimen of his handwriting. It does not appear that the writer knew the purpose of the witness in having him write. Compare *Reg. v. Crouch*, 4 Cox C. C. 163.

7. *Effect of Interest on Competency of Witness*.—*Kirksey v. Kirksey*, 41 Ala. 626; *Rideout v. Newton*, 17 N. H. 71; *Truitt's Estate*, 10 Phila. (Pa.) 16, 30 Leg. Int. (Pa.) 84. See also *Robinson v. Robinson*, 20 S. Car. 567.

In *Ford v. Holmes*, 61 Ga. 419, an interested witness was held incompetent to deny the genuineness of letters purporting to be written by him to a decedent.

In *North Carolina* it is held that a party interested in the event of a suit is not an incompetent witness to prove the handwriting of a deceased person, although he would be incompetent to prove the actual signing, or the contents of the paper in question. *Peoples v. Maxwell*, 64 N. Car. 313; *Rush v. Steed*, 91 N. Car. 226; *Hussey v. Kirkham*, 95 N. Car. 63. See also *Ferebee v. Pritchard*, 112 N. Car. 83; *Daniels v. Foster*, 26 Wis. 686.

See generally the title *WITNESSES*.

8. *Witness May Testify as to Belief*.—*Hopper v. Ashley*, 15 Ala. 457; *Haynes v. Thomas*, 7 Ind. 38; *Bradford v. Cooper*, 1 La. Ann. 325; *Com. v. Andrews*, 143 Mass. 23; *State v. Stair*, 87 Mo. 268, 56 Am. Rep. 449; *Hoitt v. Moulton*, 21 N. H. 586; *Stevens v. Seibold*, (Supm.



he expressly disclaims the ability to give positive testimony on the subject.<sup>1</sup> But the witness must in all cases profess to be able to express an opinion or belief.<sup>2</sup>

**Testimony Must Be Direct.** — The witness must testify directly as to whether or not the disputed writing was by the person alleged to have written it. It is not competent to ask him his opinion, based upon familiarity with such person's handwriting, as to whether or not he could have written it.<sup>3</sup>

*ee.* **RIGHT OF WITNESS TO REFRESH HIS MEMORY.** — Where a witness has shown himself to be familiar with the handwriting of the person whose handwriting is in dispute, he may, either before or at the trial, refresh his memory by reference to the papers upon which his knowledge is based, or other papers known to be in the party's handwriting; and he may also compare the disputed writing with such other papers on the trial.<sup>4</sup>

*ff.* **CONSIDERATIONS AFFECTING VALUE OF WITNESS'S TESTIMONY.** — The value to be given to the opinion of a witness as to the genuineness of handwriting depends upon his opportunity and capacity of acquiring a knowledge of the person's handwriting. The jury should consider the times, places, opportunity, and circumstances under which the witness has acquired his knowledge, and also his capacity and experience. If he be an illiterate man, or one whose business seldom brings him into contact with writing, his opinion is entitled to much less weight than if he be an educated man, accustomed to correspondence and to seeing people write.<sup>5</sup> But it has been held that the mere fact that the witness is illiterate affects merely the weight of his testimony, and not its competency.<sup>6</sup>

*gg.* **FUNCTION OF COURT AND JURY.** — In accordance with the general rule of evidence, the competency of a witness testifying as to the genuineness of handwriting is a matter to be determined by the trial judge, and his ruling will not ordinarily be reviewed unless clearly erroneous.<sup>7</sup> The weight of such

Ct. Gen. T.) 5 N. Y. St. Rep. 258; *Watson v. Brewster*, 1 Pa. St. 381; *Chahoon v. Com.*, 20 Gratt. (Va.) 733.

**1. Testimony from Belief Where Witness Is Unable to Give Positive Testimony.** — *People v. Bidleman*, 104 Cal. 608; *Fash v. Blake*, 38 Ill. 363; *Hopkins v. Meguire*, 35 Me. 78; *Shitler v. Bremer*, 23 Pa. St. 413.

A witness who testifies that a disputed signature is like one he saw written by the party is competent although he has no belief as to whether the signature is genuine. *Garrells v. Alexander*, 4 Esp. 37. The authority of this case was doubted by Lord Eldon in *Eagleton v. Kingston*, 8 Ves. Jr. 438.

**2. Witness Must Be Able to Express Opinion.** — *Hopper v. Ashley*, 15 Ala. 457; *Nelms v. State*, 91 Ala. 97; *Foster v. Jenkins*, 30 Ga. 477; *Putnam v. Wadley*, 40 Ill. 346; *Wiggin v. Plumer*, 31 N. H. 251; *Burnham v. Ayer*, 36 N. H. 182; *Carter v. Connell*, 1 Whart. (Pa.) 392; *Guyette v. Bolton*, 46 Vt. 228.

The witness must express a belief as to whether the disputed writing is genuine, existing at the time when he is testifying, under the circumstances there existing. *Foster v. Jenkins*, 30 Ga. 477.

**3.** *Boyle v. Colman*, 13 Barb. (N. Y.) 42; *Burress v. Com.*, 27 Gratt. (Va.) 934.

**4. Witness May Refresh His Memory.** — *Burr v. Harper*, Holt N. P. 420, 3 E. C. L. 168; *Lyon v. Lyman*, 9 Conn. 55; *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90; *Thomas v. State*, 103 Ind. 419; *Smith v. Walton*, 8 Gill (Md.) 77;

*National Bank v. Armstrong*, 66 Md. 113, 59 Am. Rep. 156; *Worth v. McConnell*, 42 Mich. 473; *McNair v. Com.*, 26 Pa. St. 388; *Redford v. Peggy*, 6 Rand. (Va.) 316; *Pepper v. Barnett*, 22 Gratt. (Va.) 405.

Where a witness called to prove a person's signature testified that he had seen such person write only once, and then only to make his signature, and that this made so slight an impression upon him that he could not therefrom recognize such person's signature, but that from having compared the signature in dispute with the one he saw written he was of opinion that the disputed signature was genuine, it was held that he was a competent witness, and that his testimony was admissible. *Burr v. Harper*, Holt N. P. 420, 3 E. C. L. 168; *Pepper v. Barnett*, 22 Gratt. (Va.) 405.

**Introducing Documents to Substantiate Testimony.** — Witnesses who are familiar with the handwriting of a person and who swear to peculiarities therein may produce to the jury documents in their possession written by such person and upon which their acquaintance with his handwriting is founded, for the purpose of substantiating by these documents their own testimony as to such peculiarities in the person's handwriting. *Smith v. Fenner*, 1 Gall. (U. S.) 170. See also *State Bank v. Haldeman*, 1 P. & W. (Pa.) 161.

**5.** *U. S. v. Gleason*, 37 Fed. Rep. 331. See also *Strong v. Brewer*, 17 Ala. 706; *Rideout v. Newton*, 17 N. H. 71.

**6.** *Foye v. Patch*, 132 Mass. 105.

**7. Competency of Witness Question for Court.** — *Nunes v. Perry*, 113 Mass. 274; *Wilson v.*



testimony is for the jury.<sup>1</sup>

*h. SUFFICIENCY OF PROOF.* — Where a witness states that he is acquainted with the party's handwriting and that he believes the disputed writing to be his, this is sufficient proof in the absence of evidence to the contrary.<sup>2</sup>

**Number of Witnesses Not Controlling.** — Where the witnesses are divided in opinion as to the genuineness of a written instrument, the number of witnesses on a side will not always control; the weight to be given to the testimony of each witness must in all cases be considered.<sup>3</sup>

*d. BY COMPARISON OF HANDWRITING* — (1) *Definition.* — Comparison of handwriting is a mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish as the author of the instrument in question.<sup>4</sup> In a sense all evidence of handwriting, except where the witness saw the document written, is in its nature comparison, inasmuch as a witness called upon to testify as to whether a document is in the handwriting of a particular person must necessarily arrive at his conclusion by a comparison of the writing in question with other writing proved or admitted to be that of such person, or with an exemplar of such writing in his own mind, derived from previous knowledge.<sup>5</sup> By comparison of handwriting, however, in a strict or technical sense, is meant an actual production and comparison of two or more instruments or signatures as a means of ascertaining whether they were written by the same person.<sup>6</sup>

Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854.

**1. Weight of Testimony for Jury.** — Willman v. Worrall, 8 C. & P. 380, 34 E. C. L. 438; Hopper v. Ashley, 15 Ala. 457; Pate v. People, 8 Ill. 644; Utica Ins. Co. v. Badger, 3 Wend. (N. Y.) 102; Donoghoe v. People, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 120; Magee v. Osborn, 32 N. Y. 669; Watson v. Brewster, 1 Pa. St. 381; Wilson v. Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854; Kinney v. Flynn, 2 R. I. 319; Cody v. Conly, 27 Gratt. (Va.) 313.

**2. Sufficiency.** — Cook v. Smith, 30 N. J. L. 387; Hartung v. People, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 319; Commissioners of Poor v. Hanion, 1 Nott & M. (S. Car.) 554.

**Proof by Presiding Judge.** — Where the presiding judge is familiar with the signature of the person whose signature is in dispute, and upon inspection is satisfied that the disputed signature is genuine, this is sufficient *prima facie* evidence of the genuineness of such signature. Brown v. Lincoln, 47 N. H. 468.

**3. Number of Witnesses Not Controlling in Case of Conflict.** — Long v. Little, 119 Ill. 600; Merchant's Will, Tuck. (N. Y.) 151.

But where nine witnesses testified that a disputed signature was not genuine, and one, less competent than the others, testified that it was genuine, it was held that a verdict sustaining the genuineness of the signature was palpably against the weight of the evidence. Bell v. Shields, 19 N. J. L. 93.

**The Testimony of One Witness** deposing positively to the handwriting of a paper is sufficient to render it admissible in evidence, and it matters not how many other witnesses may deny it or what circumstances may be proved to cast doubt upon it. Krise v. Neason, 66 Pa. St. 253.

**4. Definition.** — Bouvier's L. Dict.

**5. All Indirect Evidence of Handwriting in Its Nature Comparison.** — Per Patteson, J., in Doe

v. Suckermore, 5 Ad. & El. 703, 31 E. C. L. 406. This language has been frequently approved by the American courts. See Keyser v. Pickrell, 4 App. Cas. (D. C.) 198; Macomber v. Scott, 10 Kan. 335; McDonogh's Succession, 18 La. Ann. 419; State v. Scott, 45 Mo. 302; Hicks v. Person, 19 Ohio 426; Travis v. Brown, 43 Pa. St. 9, 82 Am. Dec. 540.

**Comparison of Handwriting May Be Made in Two Ways:** first, by witnesses who have acquired personal knowledge of the handwriting of the person whose handwriting is in issue, by having seen him write or by having received writings from him, and who have thus formed in their minds an exemplar of his genuine handwriting, with which they compare the disputed writing, and thus form their opinion; and, second, by witnesses who have no previous knowledge of the genuine handwriting, and make their comparison by placing that which is established as genuine in juxtaposition with that which is disputed, and thus form their opinion as to whether the writings were made by the same person. These latter witnesses are admitted when it is shown that they have special skill and experience in making such comparisons. Matter of Gordon, 50 N. J. Eq. 397.

**6. Technical Comparison of Handwriting Defined.** — Burdick v. Hunt, 43 Ind. 381; Woodman v. Dana, 52 Me. 9; Smith v. Walton, 8 Gill (Md.) 77; Com. v. Smith, 6 S. & R. (Pa.) 568.

"Now this [technical comparison of handwriting] is as distinct and separate a thing from that comparison which a witness called to testify to handwriting makes between the writing in question and the exemplar in his mind, as an external, visible, and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective." Woodward, J., in Travis v. Brown, 43 Pa. St. 9, 82 Am. Dec. 540.

(2) *Historical Statement* — **Roman Law.** — Proof of handwriting by comparison was permitted under the Roman law.<sup>1</sup>

**French Law.** — So also in France under the Code of Civil Procedure.<sup>2</sup>

**English Law.** — In England such proof was allowed from an early period in the ecclesiastical courts.<sup>3</sup> In the courts of common law the decisions have not been entirely uniform, but the law as deduced from the later decisions seems to be that no comparison between the disputed writing and other writings not already properly in evidence in the cause was allowed; but that a jury might make such comparison with documents already so in evidence for other purposes when proved to be genuine, comparison by witnesses being in no case permissible,<sup>4</sup> except where the witness had previous knowledge of the person's handwriting and made such comparison in confirmation of his own testimony.<sup>5</sup>

(3) *In Absence of Statute* — (a) **Generally** — **Comparison of Handwriting Not Allowed at Common Law.** — The general rule of the common law, as has been already stated, was that proof of handwriting by comparison was not permissible.<sup>6</sup>

1. **Roman Law.** — 1 Wharton on Evidence, § 711, citing Buchner's *De Probatione de Literarum Comparationem*, l. 20, c. 4, 21.

2. **The French Law** was stated by Coleridge, J., in *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406, citing Code de Procédure Civile, pt. 1, l. 2, tit. 10, § 200; Pothier's *Traité de la Procédure Civile*, pt. 1, c. 3, sect. 2, art. 1, § 2 (Couv. Posth., tom. 3, p. 46, ed. 1809).

3. **Comparison in English Ecclesiastical Courts.** — *Beaumont v. Perkins*, 1 Phill. Ecc. 78; *Saph v. Atkinson*, 1 Add. Ecc. 162; *Lock v. Denner*, 1 Add. Ecc. 360; *Robson v. Locke*, 2 Add. Ecc. 53; *Machin v. Grindon*, 2 Add. Ecc. 91 note.

4. **English Common-law Decisions.** — The earliest reported case in which proof of handwriting by comparison was permitted seems to be *Sidney's Trial*, 9 How. St. Tr. 818. It is a much disputed question whether the report of this case is correct. Sidney was tried before Lord Jeffreys in 1683, and Jeffreys is charged with falsifying the reports in the state trials in some instances. But the attainder of Sidney was subsequently reversed by an Act of Parliament (Stat. 1 W. & M., sess. 1, c. 7) which recites that he was unjustly convicted and attainted "without sufficient legal evidence of any treasons committed by him; there being at that time produced a paper found in the closet of the said Algernon, supposed to be his handwriting, which was not proved by the testimony of any one witness to be written by him; but the jury was directed to believe it by comparing it with other writings of the said Algernon." "The act," said Lord Denman, C. J., in *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406, "is a legislative declaration, sanctioned, as we must believe, by Somers and the other great lawyers then in office, that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting." Comparison of handwriting was again permitted by Jeffreys in 1684 in *Hayes v. Case*, 10 How. St. Tr. 312. See also *Seven Bishops' Case*, 12 How. St. Tr. 183; *Osbourne v. Hosier*, 6 Mod. 167, Holt 194; *Rix v. Crosby*, 12 Mod. 72; *Reg. v. Taylor*, 6 Cox C. C. 58; *Eaton v. Jervis*, 8 C. & P. 273, 34 E. C. L. 387. For full historical information on this subject, see "Proof by

Comparison of Handwriting; Its History," by Prof. J. H. Wigmore, 30 Am. L. Rev. 481.

The early English cases were exhaustively reviewed in *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406 (1837), in which case the effect of these decisions was summed up by Patteson, J., as follows: "A direct comparison of handwriting by a witness has been, with the exception of one or two supposed cases, uniformly rejected; and it is only in very recent times that a jury has been allowed to institute such a direct comparison; and even that has been confined to a comparison between documents proved and given in evidence in the cause, being relevant to the issues raised on the record, and which being before the jury, it is hardly possible to prevent a comparison being instituted. *Griffith v. Williams*, 1 Comp. & J. 47; *Solita v. Yarrow*, 1 M. & Rob. 133; *Rex v. Morgan*, 1 M. & Rob. 134, note; *Allport v. Meek*, 4 C. & P. 267, 19 E. C. L. 378; *Bromage v. Rice*, 7 C. & P. 548, 32 E. C. L. 625. One authority to the contrary is to be found in *Allesbrook v. Roach*, 1 Esp. 351. But this court recently, in the case of *Doe v. Newton*, N. & P. 1, 5 Ad. & El. 514, 31 E. C. L. 382, has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so."

5. See *infra*, this section, *In Absence of Statute* — *By Witness in Corroboration of His Testimony*.

6. **Comparison of Handwriting Not Allowed at Common Law.** — See *supra*, this section, *Historical Statement*. See also *Rex v. Hensley*, 1 Burr. 642, 19 How. St. Tr. 1341; *Strother v. Lucas*, 6 Pet. (U. S.) 763; *Martin v. Taylor*, 1 Wash. (U. S.) 1; *U. S. v. Craig*, 4 Wash. (U. S.) 729.

**Rule Criticised.** — It has been suggested that there is an inconsistency in the rule of the common law permitting proof of handwriting by a witness familiar with the party's handwriting, and refusing to permit such proof by comparison, the method of proof being essentially the same in both cases; that is, a comparison by the witness of the disputed writing



**Reasons for Rule.** — The principal reasons assigned for this rule were that jurors were often unable to read and write, and hence could not intelligently make the comparison;<sup>1</sup> that there was danger of fraud and unfairness in the selection of the writings offered as standards; and especially that collateral issues tending to distract the jury would be raised if the genuineness of the standards themselves should be disputed.<sup>2</sup>

**Exceptions to General Rule.** — To the rule above stated there are two exceptions equally well recognized with the rule itself: First, where the paper proved or admitted to be in the handwriting of the person whose handwriting is in dispute, and offered for the purpose of comparison, is already properly in evidence in the case for some other purpose; and second, where the disputed document, though not of such antiquity as to be self-proving, is yet so old that living witnesses of its execution cannot be produced, and other ancient documents admitted to be genuine, or shown to have been treated and acted upon as such, are offered as standards of comparison. In both these cases comparison of handwriting has been allowed. To these may be added a third exception, where a witness testifying as to the genuineness of a disputed writing from familiarity with the handwriting of the alleged writer is permitted to compare such writing with other writings known to be genuine for the purpose of corroborating his own testimony.<sup>3</sup>

**American Decisions.** — The decisions of the American courts on this subject have not been entirely uniform, but the great weight of authority is in favor of the law as just stated. The advantage to be derived from the admission of this kind of evidence in certain cases, and the smallness of the danger and inconvenience to be anticipated from its admission under proper precautions, are becoming more and more generally recognized, and the present tendency of the courts seems to be towards the adoption of more liberal rules on the subject; and comparison of handwriting, either generally or in special cases, is now freely resorted to in probably every state in the Union.<sup>4</sup>

**Law in Pennsylvania and South Carolina.** — In Pennsylvania and South Carolina comparison of handwriting is not allowed as independent proof; but where other evidence as to the genuineness of the disputed writing has already been adduced, comparison with other writings proved or admitted to be genuine, whether relevant to the cause or not, is then permitted as corroborative evidence.<sup>5</sup>

in the one case with an exemplar of the party's handwriting existing in his own mind, and in the other with another specimen of his handwriting placed before him. It is contended that from the vagueness of the exemplar that may exist in the mind of the witness the direct comparison with a genuine writing is a much more satisfactory mode of proof. Sir W. D. Evans, *quoted* by Williams, J., in *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406; Dickinson, J., in *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331. See also 2 Starkie on Evidence (2d ed.) 375; 2 Phillips on Evidence 610.

It is answered, however, that the genuineness of a disputed writing is not to be determined so much by its exact similarity to another writing, which may be the work of a skilful forger, as by its general resemblance to the party's handwriting, of which a witness familiar therewith is the best judge. See the judgments of Lord Denman, C. J., and Coleridge, J., in *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406; also 2 Phillips on Evidence 610.

1. No Comparison by Illiterate Jury. — *Burr*

*Harper*, Holt N. P. 420, 3 E. C. L. 168; *Macferson v. Thoytes*, Peake N. P. (ed. 1795) 20.

2. These objections will be found fully discussed *infra*, this section, *With Irrelevant Papers*.

3. For the statement of these exceptions, see 1 Greenleaf on Evidence, §§ 578-581. These exceptions are treated separately *infra*, this section.

4. See the following subdivisions of this title.

5. **Pennsylvania Law.** — The comparison must be made by the jury, and not by experts. There seems to be no distinction made between relevant and irrelevant papers as standards of comparison. *Farmers' Bank v. Whitehill*, 10 S. & R. (Pa.) 110; *State Bank v. Haldeman*, 1 P. & W. (Pa.) 161; *Callan v. Gaylord*, 3 Watts (Pa.) 321; *Guffey v. Deeds*, 29 Pa. St. 378; *Travis v. Brown*, 43 Pa. St. 9, 82 Am. Dec. 540; *Haycock v. Greup*, 57 Pa. St. 438; *Aumick v. Mitchell*, 82 Pa. St. 211; *Berryhill v. Kirchner*, 96 Pa. St. 489; *Rockey's Estate*, 155 Pa. St. 453; *State v. McKee*, Add. (Pa.) 33. See also *Nickroy v. Skelley*, 14 S. & R. (Pa.) 372; *Udderzook v. Com.*, 76 Pa. St. 340.

For additional cases holding that no com-



(b) **With Papers Already in Case — Comparison Allowed.** — In most jurisdictions the rule is well settled that for the purpose of determining whether or not a signature or other writing alleged to have been written by a certain person is genuine it may be compared with other writings by such person proved or admitted to be genuine and already properly before the court for other purposes, either as evidence in the case <sup>1</sup> or as a part of the record.<sup>2</sup>

**Reason for Rule.** — The reason assigned for permitting such comparison with writings already in evidence is that inasmuch as such papers are already before the jury and the jurors are entitled to examine them as a part of the evidence, it is practically impossible to prevent their making the comparison between them and the disputed writing, and it is therefore better to permit them to use such papers for this purpose also, under proper instructions, than to embarrass them with impracticable distinctions as to their use.<sup>3</sup>

**Comparison of One Part of Instrument with Another.** — Where there is a question

parison can be made by experts unacquainted with the party's handwriting, see *Power v. Frick*, 2 Grant Cas. (Pa.) 306; *Clayton v. Siebert*, 3 Brews. (Pa.) 176; *Lodge v. Pipher*, 11 S. & R. (Pa.) 334; *Nickroy v. Skelley*, 14 S. & R. (Pa.) 372; *State Bank v. Haldeman*, 1 P. & W. (Pa.) 161; *Travis v. Brown*, 43 Pa. St. 9, 82 Am. Dec. 540; *Miles's Will*, 4 Pa. Dist. 179; *O'Connor v. Layton*, (Pa. 1853) 2 Am. L. Reg. 120.

But a witness acquainted with the party's hand writing may make a comparison. *State Bank v. Haldeman*, 1 P. & W. (Pa.) 161; *Power v. Frick*, 2 Grant Cas. (Pa.) 306.

**South Carolina Law.** — In this state comparison of handwriting may be made by the jury or by witnesses in the aid of doubtful proof. There is no distinction made between the use of relevant and irrelevant papers as standards of comparison. *Boman v. Plunkett*, 2 McCord L. (S. Car.) 518; *Bird v. Millar*, 1 McMull. L. (S. Car.) 123; *Desbrow v. Farrow*, 3 Rich. L. (S. Car.) 382; *Bennett v. Mathewes*, 5 S. Car. 478; *Benedict v. Flanigan*, 18 S. Car. 506, 44 Am. Rep. 583; *Graham v. Nesmith*, 24 S. Car. 285; *State v. Ezekiel*, 33 S. Car. 115.

The genuineness of the writing in dispute cannot be established by a comparison of handwriting alone. *Richardson v. Johnson*, 3 Rev. (S. Car.) 51.

Whether the direct evidence is or is not so conflicting and doubtful as to justify the admission of comparison of handwritings is a question for the trial judge, and his ruling will not be disturbed unless error is very patent. *Benedict v. Flanigan*, 18 S. Car. 506, 44 Am. Rep. 583; *Graham v. Nesmith*, 24 S. Car. 285; *State v. Ezekiel*, 33 S. Car. 115.

**1. Comparison Allowed with Papers Already in Evidence — England.** — See *supra*, this section, *Historical Statement*.

**United States.** — *U. S. v. Chamberlain*, 12 Blatchf. (U. S.) 390; *Moore v. U. S.*, 91 U. S. 270; *Williams v. Conger*, 125 U. S. 397; *Stokes v. U. S.*, 157 U. S. 187; *Green v. Terwilliger*, 56 Fed. Rep. 384.

**Alabama.** — *Crist v. State*, 21 Ala. 137; *Kirksey v. Kirksey*, 41 Ala. 626.

**Delaware.** — *Welch v. Coulborn*, 3 Houst. (Del.) 647.

**District of Columbia.** — *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198.

**Georgia.** — *Henderson v. Hackney*, 16 Ga. 521.

**Illinois.** — *Brobston v. Cahill*, 64 Ill. 356; *Rogers v. Tyley*, 144 Ill. 652; *Himrod v. Gilman*, 147 Ill. 293; *Northfield Farmers' Tp. Mut. F. Ins. Co. v. Sweet*, 46 Ill. App. 598.

**Indiana.** — *Swales v. Grubbs*, 126 Ind. 106; *Tucker v. Hyatt*, 144 Ind. 635.

**Kansas.** — *Joseph v. Eldorado First Nat. Bank*, 17 Kan. 256.

**Maryland.** — *Williams v. Drexel*, 14 Md. 566.

**Michigan.** — *Houghton First Nat. Bank v. Robert*, 41 Mich. 709; *Worth v. McConnell*, 42 Mich. 473; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578. See also *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112.

**Missouri.** — *State v. Tompkins*, 71 Mo. 613; *State v. David*, 131 Mo. 380; *Elsenrath v. Kallmeyer*, 61 Mo. App. 430.

**New Hampshire.** — *Bowman v. Sanborn*, 25 N. H. 87; *State v. Shinborn*, 46 N. H. 497.

**New York.** — *Rogers v. Shaler*, Anth. N. P. (N. Y.) 109; *Hunt v. Lawless*, (N. Y. Super. Ct.) 7 Abb. N. Cas. (N. Y.) 113; *Merchant's Will*, Tuck. (N. Y.) 151; *Dubois v. Baker*, 30 N. Y. 355; *Pontius v. People*, 82 N. Y. 339; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *Shaw v. Bryant*, 90 Hun (N. Y.) 374.

**North Carolina.** — *Yates v. Yates*, 76 N. Car. 142; *Kornegay v. Kornegay*, 117 N. Car. 242.

**Texas.** — See *Kennedy v. Upshaw*, 64 Tex. 411.

**Utah.** — *Durnell v. Sowden*, 5 Utah 216.

**Wisconsin.** — See *Smith v. Ehnert*, 47 Wis. 479.

**2. Papers on File in Case.** — All writings made by a party constituting a part of the record in the case, such as signatures to pleadings, affidavits, bonds, etc., which he is estopped to deny, may be used as standards with which to compare a disputed writing. *Dunlop v. Silver*, 1 Cranch (C. C.) 27; *Medway's Case*, 6 Ct. Cl. 421; *Blewett's Case*, 10 Ct. Cl. 235; *Wilber v. Ercholtz*, 5 Colo. 240; *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Thomas v. State*, 103 Ind. 419; *Northern Bank v. Buford*, 1 Duv. (Ky.) 335; *Vinton v. Peck*, 14 Mich. 287; *State v. De Graff*, 113 N. Car. 688.

But comparison of the disputed signature with a power of attorney filed in the case was not allowed where the genuineness of the power of attorney was not proved. *Shannon v. Fox*, 1 Cranch (C. C.) 133.

**3. Grounds for Permitting Comparison with Papers Already in Evidence.** — 1 *Greenleaf on Evidence*, § 578; *Crist v. State*, 21 Ala. 137;

whether the whole of an instrument is in the same handwriting it is competent to compare one part with another in order to determine whether the whole instrument was written by the same person.<sup>1</sup>

**Comparison of Two Disputed Instruments.** — Where two instruments purporting to have been executed by the same person are offered in evidence by the contesting parties as constituting the foundation of their respective claims, it has been held competent for an expert witness to testify to facts showing that they were executed by different persons, as bearing upon the question which, if either, was genuine or forged.<sup>2</sup>

**(c) With Irrelevant Papers.** — *ut. DECISIONS NOT HARMONIOUS.* — The decisions of the several states are not entirely uniform as to whether, on the question of the genuineness of a writing whose authenticity is in controversy, other writings by the same person not connected with the case may be introduced for the sole purpose of comparison. It will frequently be found, however, upon a careful examination, that the conflict is not substantial, and that cases may often be reconciled by a reference to the general principles of law upon which each was decided.

**36. CLASSIFICATION OF DECISIONS.** — **Introduction of Irrelevant Writings as Standards Permitted.** — In a number of cases the rule is laid down broadly that irrelevant papers proved or conceded to be genuine may be introduced in evidence for the sole purpose of comparison with the disputed writing.<sup>3</sup>

**Irrelevant Writings Excluded.** — In other cases the rule is laid down equally broadly that no comparison between the disputed writing and other writings by the alleged author not already properly in evidence for other purposes is permissible.<sup>4</sup>

*Bishop v. State*, 30 Ala. 34; *McAllister v. McAllister*, 7 B. Mon. (Ky.) 269; *Clay v. Robinson*, 7 W. Va. 348.

In Illinois, while a disputed paper may be compared with other writings by the same person proved or admitted to be genuine which are already properly before the court and jury as evidence in the case (see the last note *supra*), no such comparison may be made with the party's signature to affidavits, etc., filed in the case, although the genuineness of the latter is admitted or cannot be denied. *Kernin v. Hill*, 37 Ill. 209; *Snow v. Wiggin*, 19 Ill. App. 542; *Gitchell v. Ryan*, 24 Ill. App. 372; *Frank v. Taubman*, 31 Ill. App. 592.

**1. Comparison of One Part of Instrument with Another.** — *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257. See also *State v. Scott*, 45 Mo. 302.

Two signatures on the same paper may be compared by the jury. *Williams v. Drexel*, 14 M. L. 206.

An expert may testify as to whether, in his opinion, the body of an instrument and the signature are in the same handwriting, where this fact is controverted. *Reese v. Reese*, 90 Pa. St. 69, 35 Am. Rep. 634; *Graham v. Spang*, (Pa. 1888) 16 Atl. Rep. 91; *Haughey v. Wright*, 12 Hun (N. Y.) 179.

**2.** *Bell v. Hutchings*, (Tex. Civ. App. 1897) 41 S. W. Rep. 200.

**3. Cases Holding that Other Writings May Be Instituted for Sole Purpose of Comparison.** — *Connecticut.* — *State v. Brunson*, 1 Root (Conn.) 307; *State v. Nettleton*, 1 Root (Conn.) 308; *Lyon v. Lyman*, 9 Conn. 55; *Tyler v. Todd*, 36 Conn. 218.

*Kansas.* — *Ort v. Fowler*, 31 Kan. 478. See

*Holmberg v. Johnson*, 45 Kan. 197; *Gilmore v. Swisher*, 59 Kan. 172.

*Maine.* — *Woodman v. Dana*, 52 Me. 9; *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172.

*Massachusetts.* — *Hall v. Huse*, 10 Mass. 39; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; *Richardson v. Newcomb*, 21 Pick. (Mass.) 315; *Demeritt v. Randall*, 116 Mass. 331; *Com. v. Andrews*, 143 Mass. 23. See also *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111.

*Mississippi.* — *Wilson v. Beauchamp*, 50 Miss. 24. See also *Garvin v. State*, 52 Miss. 267.

*New Hampshire.* — *State v. Hastings*, 53 N. H. 452; *State v. Clark*, 54 N. H. 456; *Carter v. Jackson*, 58 N. H. 156. For the earlier rule in this state see *Myers v. Toscan*, 3 N. H. 47.

*Ohio.* — *Calkins v. State*, 14 Ohio St. 222;

*Koons v. State*, 36 Ohio St. 195.

*Utah.* — *Tucker v. Kellogg*, 8 Utah 11.

*Vermont.* — *Gifford v. Ford*, 5 Vt. 532; *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *State v. Hopkins*, 50 Vt. 316; *Rowell v. Fuller*, 59 Vt. 688.

*Virginia.* — *Hanriot v. Sherwood*, 82 Va. 1.

*Washington.* — *Moore v. Palmer*, 14 Wash.

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**4. Irrelevant Papers Held Inadmissible for Purpose of Comparison.** — In several of the jurisdictions named in the following list statutes abrogating the rule laid down have been enacted since the cases here cited were decided. These cases, therefore, are no longer authoritative in their respective jurisdictions. Such statutes are found in *Great Britain, Kentucky, New York, Oregon, and Illinois.* See *infra*, this section, *Under Statutes.*



**Intermediate Rule — Irrelevant Writings Admitted under Limitations.** — In several states the courts, having in mind the objections urged against this kind of evidence, have pursued an intermediate course and have adopted what seems to be the better rule, that, in general, irrelevant papers are not admissible in evidence for the sole purpose of furnishing a standard of comparison but that to this rule exceptions are made in those cases in which the objections urged could not apply; that is, where the papers offered are conceded by the opposite party to be genuine, or are such as he is estopped to deny, or where for other reasons no collateral issues can be raised by their introduction.<sup>1</sup> This rule is established by decisions in the *United States District Court*<sup>2</sup> and in the courts of the *District of Columbia*,<sup>3</sup> *Indiana*,<sup>4</sup> *Kansas*,<sup>5</sup>

*England.* — *Stranger v. Searle*, 1 Esp. 14; *Bromage v. Rice*, 7 C. & P. 548, 32 E. C. L. 625; *Doe v. Newton*, 5 Ad. & El. 514, 31 E. C. L. 382; *Doe v. Wilson*, 10 Moo. P. C. 502.

*Canada.* — *Gleeson v. Wallace*, 4 U. C. Q. B. 245.

*United States.* — *Macubbin v. Lovell*, 1 Cranch (C. C.) 184; *Turner v. Foxall*, 2 Cranch (C. C.) 324; *U. S. v. Prout*, 4 Cranch (C. C.) 301; *U. S. v. Jones*, 10 Fed. Rep. 469. See also *Elliot v. Hayman*, 2 Cranch (C. C.) 678.

*Alabama.* — *Little v. Beazley*, 2 Ala. 703, 36 Am. Dec. 431; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34; *Kirksey v. Kirksey*, 41 Ala. 626; *Bestor v. Roberts*, 58 Ala. 331; *Moon v. Crowder*, 72 Ala. 79; *Snider v. Burks*, 84 Ala. 53; *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357.

*Arkansas.* — *Miller v. Jones*, 32 Ark. 337.

*Illinois.* — *Jumpertz v. People*, 21 Ill. 375; *Putnam v. Wadley*, 40 Ill. 346; *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302; *Riggs v. Powell*, 142 Ill. 453; *Himrod v. Gilman*, 147 Ill. 293; *Snyder v. McKeever*, 10 Ill. App. 188; *Snow v. Wiggin*, 19 Ill. App. 542; *Gitchell v. Ryan*, 24 Ill. App. 372; *Frank v. Taubman*, 31 Ill. App. 592.

*Kentucky.* — *Woodward v. Spiller*, 1 Dana (Ky.) 180, 25 Am. Dec. 139; *McAllister v. McAllister*, 7 B. Mon. (Ky.) 269; *Fee v. Taylor*, 83 Ky. 259.

*Louisiana.* — *State v. Fritz*, 23 La. Ann. 55. This case appears to have been decided without reference to the Louisiana statute.

*Maryland.* — *Armstrong v. Thruston*, 11 Md. 149; *Miller v. Johnson*, 27 Md. 6.

*New Mexico.* — *Staab v. Jaramillo*, 3 N. Mex. 33.

*New York.* — *Titford v. Knott*, 2 Johns. Cas. (N. Y.) 211; *Haskins v. Stuyvesant*, Anth. (N. Y.) 97; *Wilson v. Kirkland*, 5 Hill (N. Y.) 182; *People v. Spooner*, 1 Den (N. Y.) 343; *Hutchins' Case*, 4 City Hall Rec. (N. Y.) 119; *Ellis v. People*, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 356; *Gilbert v. Simpson*, 6 Daly (N. Y.) 29; *Merchant's Will*, Tuck. (N. Y.) 151; *Glover v. New York*, 7 Hun (N. Y.) 232; *Morey v. Safe Deposit Co.*, 34 N. Y. Super. Ct. 154; *Frank v. Chemical Nat. Bank*, 37 N. Y. Super. Ct. 26; *Jackson v. Phillips*, 9 Cow. (N. Y.) 94; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Commonwealth Bank v. Mudgett*, 44 N. Y. 514; *Randolph v. Loughlin*, 48 N. Y. 456.

*Tennessee.* — *Clark v. Rhodes*, 2 Heisk.

(Tenn.) 206; *Wright v. Hessey*, 3 Baxt. (Tenn.) 42.

*Wisconsin.* — *Pierce v. Northey*, 14 Wis. 10; *Hazelton v. Union Bank*, 32 Wis. 34; *State v. Miller*, 47 Wis. 530.

**Duplicate Writing Obtained from Suspected Person After Arrest.** — Where on the trial of an information for arson it appeared that after the arrest of the defendant the police officers induced him to write at their dictation a letter containing threats of arson, it was held that the letter so written was not admissible for the purpose of comparing it with the original letter and determining thereby the authorship of the original. *State v. Miller*, 47 Wis. 530. This decision was based upon the rule that comparison with papers not already properly in evidence is incompetent.

1. See 1 Greenleaf on Evidence, § 581.

2. *United States District Court.* — *U. S. v. McMillan*, 29 Fed. Rep. 247.

3. *District of Columbia.* — Irrelevant papers are not admissible for the sole purpose of comparison. *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198. But such papers may be so used when the opposite party is estopped to deny their genuineness. *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198.

4. *Indiana.* — Irrelevant papers not admitted to be genuine are not admissible for the sole purpose of comparison. It is not competent to establish the genuineness of such papers by other evidence for the purpose of using them as standards of comparison. *Burdick v. Hunt*, 43 Ind. 381; *White Sewing Mach. Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109; *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80 Ind. 500; *Walker v. Steele*, 121 Ind. 436; *Moore v. Staser*, 6 Ind. App. 364; *Bowen v. Jones*, 13 Ind. App. 193. But such papers may be so used by expert witnesses when conceded by the opposite party to be genuine. *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472, overruling *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90; *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Forgey v. Cambridge City First Nat. Bank*, 66 Ind. 123; *Shorb v. Kinzie*, 100 Ind. 429. But see *Jones v. State*, 60 Ind. 241.

The witnesses must be experts. *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472; *Forgey v. Cambridge City First Nat. Bank*, 66 Ind. 123; *Shorb v. Kinzie*, 100 Ind. 429.

5. *Kansas.* — Irrelevant papers are admissible for the purpose of comparison by the jury or witnesses when admitted to be genuine, and generally when no collateral issues can arise



*Michigan*,<sup>1</sup> *Minnesota*,<sup>2</sup> *Missouri* (prior to the statute of 1895),<sup>3</sup> *North Carolina*,<sup>4</sup> and *Texas*,<sup>5</sup> and is recognized also in *West Virginia*.<sup>6</sup>

The General Tendency of the Recent Decisions is to a relaxation of the earlier rule prevailing in some jurisdictions under which such evidence was excluded absolutely, and to the admission of irrelevant papers for the purpose of comparison in accordance with the rule just stated. An examination of the grounds upon which this kind of evidence has been excluded will generally furnish a satisfactory principle for the decision of a particular case.

cc. GROUNDS FOR EXCLUSION OF SUCH EVIDENCE. — The principal grounds for excluding irrelevant writings as standards of comparison are first, danger of bias or unfairness in the selection of specimens, and second, the danger of raising collateral issues.<sup>7</sup> The force of the first ground of objection is small when it is remembered that the standards selected must be submitted to the court, which may exclude them when their introduction would work injustice.<sup>8</sup> The validity of the second ground of objection is conceded even in jurisdic-

from their introduction. *Macomber v. Scott*, 10 Kan. 335; *State v. Zimmerman*, 47 Kan. 242.

1. *Michigan*. — In general, irrelevant papers are not admissible for the sole purpose of comparison. *Vinton v. Peck*, 14 Mich. 287; *Matter of Foster*, 34 Mich. 21; *Houghton First Nat. Bank v. Robert*, 41 Mich. 709; *Howard v. Patrick*, 43 Mich. 121; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578; *Weidman v. Symes*, 116 Mich. 619.

Writings admitted by the party who denies the signature of an instrument in suit have been allowed to go to the jury for the purpose of comparison. *Dietz v. Grand Rapids Fourth Nat. Bank*, 69 Mich. 287.

So also a witness who has in his possession a note which he saw the party sign may compare the disputed writing therewith. *Worth v. McConnell*, 42 Mich. 473.

2. *Minnesota*. — Irrelevant papers conceded to be genuine may be used for the purpose of comparison. *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331.

3. *Missouri*. — The law in this state, prior to the enactment of the statute of 1895 upon the subject, was as stated in the text. *Dow v. Spenny*, 29 Mo. 386; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *Rose v. Springfield First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258; *State v. Thompson*, 132 Mo. 301; *Lachance v. Loeblein*, 15 Mo. App. 460; *Edmonston v. Henry*, 45 Mo. App. 346; *Singer Mfg. Co. v. Clay*, 53 Mo. App. 412; *Doud v. Reid*, 53 Mo. App. 553; *McCombs v. Foster*, 62 Mo. App. 303; *De Arman v. Taggart*, 65 Mo. App. 82.

4. *North Carolina*. — In this state an expert, in the presence of the jury, may be allowed to compare the disputed paper with such papers not connected with the case as the person whose handwriting is in controversy is estopped to deny to be genuine, or concedes to be genuine, but no others; and no comparison by the jury is permitted. *Tunstall v. Cobb*, 109 N. Car. 316; *State v. Noe*, 119 N. Car. 849. See also *Jarvis v. Vanderford*, 116 N. Car. 147.

An Original Will Taken from the Records of the Court, whose execution the party asserting the genuineness of the instrument in suit was estopped to deny, was admitted as a standard of comparison in *Croom v. Sugg*, 110 N. Car. 259. For a similar decision in the *District of*

*Columbia* see *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198.

5. *Texas*. — Papers admitted as standards must be admitted to be genuine or such as the party is estopped to deny, or as are established by the most satisfactory proof. *Mardes v. Meyers*, 8 Tex. Civ. App. 542 [citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 285]; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Kennedy v. Upshaw*, 64 Tex. 411; *Smyth v. Caswell*, 67 Tex. 567; *Wagoner v. Ruply*, 69 Tex. 700; *Jester v. Steiner*, 86 Tex. 415; *Canon v. Sweet*, (Tex. Civ. App. 1895) 29 S. W. Rep. 947.

In general irrelevant papers are not admissible. *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315; *Matlock v. Glover*, 63 Tex. 231; *Smyth v. Caswell*, 67 Tex. 567; *Haich v. State*, 6 Tex. App. 384; *Cook v. Granbury First Nat. Bank*, (Tex. Civ. App. 1896), 33 S. W. Rep. 998, *distinguishing* *Mardes v. Meyers*, 8 Tex. Civ. App. 542.

In an action by a bank to recover money paid to the defendant on a forged check, it was held that, for the purpose of showing the plaintiff's negligence in not detecting the forgery, expert witnesses might testify as to the dissimilarity of the signatures to the forged check and genuine checks drawn by the person whose name had been forged, where both genuine and forged checks had been offered in evidence and submitted to the jurors for their inspection. *Iron City Nat. Bank v. Peyton*, 15 Tex. Civ. App. 184.

6. *West Virginia*. — The general inadmissibility of irrelevant writings for comparison is established. *Clay v. Robinson*, 7 W. Va. 348, 10 W. Va. 49; *State v. Henderson*, 29 W. Va. 147; *State v. Koontz*, 31 W. Va. 127. *Obiter* expressions of the court are in favor of the exceptions mentioned in the text to the rule of exclusion. See the opinion of Haymond, J., in *Clay v. Alderson*, 10 W. Va. 49.

7. *Grounds for Exclusion of Irrelevant Instruments*. — *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406; *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198; *McDonald v. McDonald*, 142 Ind. 55; *Vinton v. Peck*, 14 Mich. 287; *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331; *Jackson v. Phillips*, 9 Cow. (N. Y.) 94; *Tunstall v. Cobb*, 109 N. Car. 316.

8. *The Evils Possible from the Selection of Particular Writings may be seen in the following*

tions where irrelevant writings are admitted.<sup>1</sup> The evil is minimized, however, where clear proof by witnesses who testify directly and positively is required to the genuineness of the standards,<sup>2</sup> and the danger disappears where the writings admitted are conceded by the opposite party or he is estopped to deny them.<sup>3</sup>

*dd.* **COMPARISON BY CONSENT OF PARTIES.**—Even in jurisdictions in which irrelevant papers are held inadmissible for the sole purpose of comparison, they may be so used by the consent of the parties.<sup>4</sup>

(d) **To Prove Ancient Writings.**—Comparison of handwriting, either by jurors or by witnesses, has been uniformly allowed in order to prove writings not old enough to be self-proving, but yet too old to admit of direct proof by living witnesses, such mode of proof being allowed from the necessity of the case on account of the impossibility of producing better evidence.<sup>5</sup>

(e) **By Witness in Corroboration of His Testimony.**—A witness testifying as to the genuineness of handwriting from familiarity with the handwriting of the alleged writer may, on the trial, compare the disputed writing with other writings known to be genuine, for the purpose of refreshing his memory and in corroboration of his testimony.<sup>6</sup>

(4) **Under Statutes—Proof by Comparison Authorized by Statute.**—Proof of handwriting by comparison, including comparison with writings otherwise irrelevant, was authorized by statute in Great Britain in 1854.<sup>7</sup> Similar statutes have since been enacted in several of the states of the American Union, and the tendency of recent legislation has generally been to establish more liberal rules as to the competency of this kind of evidence. Statutes providing for the admission of such evidence are now in force in *California*,<sup>8</sup> *Georgia*,<sup>9</sup>

misleading evidence must be, to be corrected by other evidence and by the intelligent judgment of court or jury. *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331.

The same objection applies to some extent when witnesses are called who testify from their own knowledge as to handwriting. In both cases selections are made most favorable to the party offering them; but all this is open to inquiry and observation. *Calkins v. State*, 14 Ohio St. 222.

1. See cases cited *supra*, this section, *Classification of Decisions*.

2. **Danger of Raising Collateral Issues Slight Where Proof of Standard Is Clear.**—*Calkins v. State*, 14 Ohio St. 222; *Baker v. Haines*, 6 Whart. (Pa.) 284, 36 Am. Dec. 224. See also *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

3. **No Danger Where Genuineness of Standard Is Admitted.**—*Dietz v. Grand Rapids Fourth Nat. Bank*, 69 Mich. 287; *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331; *Munkers v. Farmers' Ins. Co.*, 30 Oregon 211.

4. **Use of Irrelevant Papers by Consent.**—*Titford v. Knott*, 2 Johns. Cas. (N. Y.) 211; *Kannon v. Galloway*, 2 Baxt. (Tenn.) 230.

5. **Comparison Allowed to Prove Ancient Writings.**—*Doe v. Tarver*, R. & M. 141, 21 E. C. L. 399; *Roe v. Rawlings*, 7 East 279; *Morewood v. Wood*, 14 East 328, note; *West v. State*, 22 N. J. L. 212; *Cantey v. Platt*, 2 McCord L. (S. Car.) 260. See also Code Civ. Pro. Mont. (1895), § 3236; Hill's Annot. Laws Oregon (1892), § 766.

6. *Hopkins v. Simmons*, 1 Cranch (C. C.) 250; *U. S. v. Larned*, 4 Cranch (C. C.) 312; *State Bank v. Haldeman*, 1 P. & W. (Pa.) 161.

7. **The English Statute**, from which several of

the American acts have been exactly or substantially copied, is as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Stat. 17 & 18 Vict., c. 125, § 27; 28 & 29 Vict., c. 18, § 8. See *Wilson v. Thornbury*, L. R. 17 Eq. 517, 43 L. J. Ch. 356; *Scard v. Jackson*, 24 W. R. 159; *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24.

Although the statute does not in terms extend to a committee for privileges in the House of Lords, the rule established by the statute has been adopted by such committee. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

**Canada.**—The same statute was applicable in *Ontario*. *King v. King*, 30 U. C. Q. B. 26.

On cross-examination irrelevant writings may be used to test the knowledge of a witness who has expressed the opinion that the paper in suit is not the writing of the defendant, and such irrelevant writings, being before the jury for the purpose of arriving at the weight of the witness's testimony, may be used for arriving at a conclusion on the genuineness of the disputed paper. *Royal Canadian Bank v. Brown*, 27 U. C. Q. B. 41.

8. **California.**—Code Civ. Pro. Cal., § 1944; *Cartery's Estate*, 56 Cal. 470; *Marshall v. Hancock*, 80 Cal. 82.

9. **Georgia.**—2 Code Ga. (1895), § 5247; *Kelly v. Keese*, 102 Ga. 700; *Goza v. Brown*, 96 Ga. 421.

Papers not first submitted to the opposite party are not admissible. *Georgia Masonic*



*Iowa*,<sup>1</sup> *Kentucky*,<sup>2</sup> *Louisiana*,<sup>3</sup> *Missouri*,<sup>4</sup> *Montana*,<sup>5</sup> *Nebraska*,<sup>6</sup> *New Jersey*,<sup>7</sup> *New York*,<sup>8</sup> *Oregon*,<sup>9</sup> *Rhode Island*,<sup>10</sup> *Tennessee*,<sup>11</sup> and *Wisconsin*.<sup>12</sup> In *Texas* comparison of handwriting is authorized in criminal cases.<sup>13</sup>

**No Distinction Between Relevant and Irrelevant Writings.** — The statutes do not in terms make any distinction as to their admissibility as standards of comparison between relevant and irrelevant writings, though all provide that the genuineness of the standard must be acknowledged or satisfactorily proved. It has been repeatedly held under these statutes that irrelevant papers, when satisfactorily proved, may be used as standards.<sup>14</sup> The contrary rule seems to obtain in *Louisiana*.<sup>15</sup>

**Statutes Construed Strictly.** — It has been held that such statutes are in derogation of the common law and should be strictly construed.<sup>16</sup>

**Effect of State Statute in Federal Courts.** — The federal courts will ordinarily be

*Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Axson v. Belt*, 103 Ga. 578. See also *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467. But this requirement may be waived. *Thomas v. State*, 59 Ga. 784.

1. *Iowa*. — Code Iowa (1897), § 4620; *Hyde v. Woolfolk*, 1 Iowa 159; *Baker v. Mygatt*, 14 Iowa 131; *Morris v. Sargent*, 18 Iowa 90; *Lay v. Wissman*, 36 Iowa 305; *Whitaker v. Parker*, 42 Iowa 585; *Singer Mfg. Co. v. McFarland*, 53 Iowa 540; *State v. Calkins*, 73 Iowa 128; *Riordan v. Guggerty*, 74 Iowa 688; *Hammond v. Wolf*, 78 Iowa 227.

2. *Kentucky*. — Stat. Ky. (1894), § 1649; *Andrews v. Hayden*, 88 Ky. 455; *Froman v. Com.*, (Ky. 1897) 42 S. W. Rep. 728.

3. *Louisiana*. — Proof of handwriting may be made by experts or by comparison. Rev. Civ. Code, art. 2245; *Garland's Rev. Code Prac. La.* (1894), art. 325; *Sauve v. Dawson*, 2 Mart. (La.) 202; *Clark v. Cochran*, 3 Mart. (La.) 353; *Harris v. Patten*, 2 La. Ann. 217; *City Bank v. Foucher*, 9 La. 405; *Plicque v. Labranche*, 9 La. 559; *Temple v. Smith*, 7 La. Ann. 562; *Whitney v. Bunnell*, 8 La. Ann. 429; *McDonogh's Succession*, 18 La. Ann. 419; *State v. Barrow*, 31 La. Ann. 691.

If the two experts disagree, the court has no power to appoint a third, *Barfield v. Hewlett*, 6 Mart. N. S. (La.) 78; though by consent of the parties a third acted in *Lecarpentier v. Delery*, 4 Mart. (La.) 454.

The expert must decide from comparison alone, and not from outside information. *Lecarpentier v. Delery*, 4 Mart. (La.) 454.

There must be more than one paper with which to make the comparison. *Barfield v. Hewlett*, 6 Mart. N. S. (La.) 78.

4. *Missouri*. — The English statute is re-enacted in this state. Laws 1895, p. 284; *Burns's Prac. Code Mo.* (1896), § 1398; *State v. Goddard*, 146 Mo. 177.

5. *Montana*. — Code Civ. Pro. Mont. (1895), § 3235. For decision prior to the statute, see *Davis v. Fredericks*, 3 Mont. 262.

6. *Nebraska*. — Code Civ. Pro. Neb., § 344; *Huff v. Nims*, 11 Neb. 363; *Grand Island Banking Co. v. Shoemaker*, 31 Neb. 124; *Madison First Nat. Bank v. Carson*, 48 Neb. 763. See also *Capital Nat. Bank v. Williams*, 35 Neb. 410.

7. *New Jersey*. — 2 Gen. Stat. N. J. (1895), p. 1400; *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Yeomans v. Petty*, 40 N. J. Eq.

8. *New York*. — Act of Feb. 28, 1880, Laws 1880, c. 36, amended by Laws 1888, c. 555 (Rev. Stat. N. Y., 9th ed., p. 2469). As to the purpose and scope of the amendatory act, see *Shaw v. Bryant*, 90 Hun (N. Y.) 374. For decisions under the act of 1880, see *Peck v. Callaghan*, 95 N. Y. 73; *Bruyn v. Russell*, 52 Hun (N. Y.) 17. See generally *Winnie v. Tousley*, 36 Hun (N. Y.) 190; *Mutual L. Ins. Co. v. Suiter*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 404; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335; *Meyers v. Hunt*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 637; *Sprague v. Sprague*, 80 Hun (N. Y.) 285.

9. *Oregon*. — Hill's Annot. Laws Oregon (1892), § 765; *Holmes v. Goldsmith*, 147 U. S. 150; *Green v. Terwilliger*, 56 Fed. Rep. 384; *Munkers v. Farmers' Ins. Co.*, 30 Oregon 211; *State v. Tice*, 30 Oregon 457.

10. *Rhode Island*. — Gen. Laws R. I. (1896), c. 244, § 44. For cases prior to the statute, see *Kinney v. Flynn*, 2 R. I. 319; *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168.

11. *Tennessee*. — Annot. Code Tenn. (1896), § 5560. This act is constitutional. *Powers v. McKenzie*, 90 Tenn. 167.

The statute does not authorize the introduction of writings by persons other than the person whose handwriting is in dispute, and hence the writing of an alleged forger is not admissible for the purpose of comparing it with the writing charged to be a forgery. *Franklin v. Franklin*, 90 Tenn. 44, following *Peck v. Callaghan*, 95 N. Y. 73; *Powers v. McKenzie*, 90 Tenn. 167.

12. *Wisconsin*. — Stat. Wis. (1896), § 4189a.

13. *Texas*. — Code Crim. Pro. Tex. (1895), art. 794; *Phillips v. State*, 6 Tex. App. 364; *Jones v. State*, 7 Tex. App. 457.

14. *Irrelevant Papers Admissible under Statutes* — *England*. — *Birch v. Ridgway*, 1 F. & F. 270. *California*. — *People v. Bibby*, 91 Cal. 470. See also *People v. Mitchell*, 92 Cal. 590.

*New York*. — *Peck v. Callaghan*, 95 N. Y. 73; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 42 N. Y. St. Rep. 394.

*Oregon*. — *Holmes v. Goldsmith*, 147 U. S. 150; *Munkers v. Farmers' Ins. Co.*, 30 Oregon 211.

*Tennessee*. — *Powers v. McKenzie*, 90 Tenn. 167.

15. See *State v. Fritz*, 23 La. Ann. 55, apparently decided without reference to the statute.

16. *Franklin v. Franklin*, 90 Tenn. 44.



governed by a state statute authorizing proof of handwriting by comparison,<sup>1</sup> but such statutes have no effect upon criminal proceedings in the courts of the United States.<sup>2</sup>

(5) *The Standard of Comparison* — (a) **Generally.** — The general doctrine as to what papers may be used as standards with which to compare a disputed writing in order to determine its genuineness or falsity has already been considered in effect in former sections of this article in which the competency of comparison of handwriting in evidence has been discussed. It has been seen that in all jurisdictions papers already in evidence for other purposes, proved or admitted to be genuine, as well as undisputed papers forming part of the record of the case, are held to be proper standards of comparison; but that as to irrelevant papers the decisions are not uniform. By some courts such papers are received as standards when their genuineness is admitted or proved, while other courts reject such evidence except in certain cases, and by still others they are rejected in all cases. There remain now to be discussed certain principles governing the admission of writings as standards apart from the question of their relevancy to the issues before the court.

(b) **Proof of Genuineness — Standard Must Be Proved Genuine.** — Before a written instrument can be used as a standard of comparison its genuineness must be satisfactorily established, either by other evidence or by the admission of the adverse party.<sup>3</sup>

**Character of Evidence Required.** — While it is universally declared that the evi-

1. *Holmes v. Goldsmith*, 147 U. S. 150; *Green v. Terwilliger*, 56 Fed. Rep. 384.

2. U. S. v. Jones, 10 Fed. Rep. 469.

3. **Genuineness of Standard Must Be Established** — *United States*. — *Shannon v. Fox*, 1 Cranch (C. C.) 133; *Green v. Terwilliger*, 56 Fed. Rep. 384.

*California*. — *Spottiswood v. Weir*, 80 Cal. 448.

*Connecticut*. — *Tyler v. Todd*, 36 Conn. 218.

*Georgia*. — *McVicker v. Conkle*, 96 Ga. 584.

*Iowa*. — *Hyde v. Woolfolk*, 1 Iowa 159; *Wilson v. Irish*, 62 Iowa 260; *Winch v. Norman*, 65 Iowa 186. See *State v. Van Tassel*, 103 Iowa 6.

*Kansas*. — *Gilmore v. Swisher*, 59 Kan. 172.

*Louisiana*. — *Conrad v. State Bank*, 10 Mart. (La.) 700.

*Maine*. — *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172.

*Massachusetts*. — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Martin v. Maguire*, 7 Gray (Mass.) 177; *Com. v. Coe*, 115 Mass. 481; *Costello v. Crowell*, 133 Mass. 352, 139 Mass. 588.

*Michigan*. — *People v. Cline*, 44 Mich. 290.

*New Jersey*. — *Crissman v. Schoonover*, 3 N. J. L. 116.

*New York*. — *Clark v. Douglass*, 5 N. Y. App. Div. 547.

*North Carolina*. — *Jarvis v. Vanderford*, 116 N. Car. 147.

*Oregon*. — Under the *Oregon* statute the standards must be admitted or treated as genuine. *State v. Tice*, 30 Oregon 457.

*Pennsylvania*. — *Baker v. Haines*, 6 Whart. (Pa.) 284, 36 Am. Dec. 224; *Depue v. Place*, 7 Pa. St. 428.

*South Carolina*. — *Desbrow v. Farrow*, 3 Rich. L. (S. Car.) 382; *State v. Ezekiel*, 33 S. Car. 115.

*Texas*. — *Eborn v. Zimpelman*, 47 Tex. 503,

26 Am. Rep. 315; *Sartor v. Bolinger*, 59 Tex. 411; *Phillips v. State*, 6 Tex. App. 364; *Hatch v. State*, 6 Tex. App. 384.

*Vermont*. — *Adams v. Field*, 21 Vt. 256; *State v. Horn*, 43 Vt. 20; *Rowell v. Fuller*, 59 Vt. 688.

A mortgage, though duly acknowledged, is not a standard, unless the signature be proved. *Hyde v. Woolfolk*, 1 Iowa 159. Nor is an answer to a letter, without other proof of genuineness than its receipt, a standard. *McKeone v. Barnes*, 108 Mass. 344. Nor the writing in a diary which the party admits is his diary, unless the writing be proved. *Van Sickle v. People*, 29 Mich. 61.

**A Person's Signatures to Documents on File** in the general land office are admissible as standards with which to compare an alleged forged signature purporting to be his. *Rogers v. State*, 11 Tex. App. 608.

**The Signature of a Justice of Peace in His Docket Book** is admissible as a standard. *Marshall v. Hancock*, 80 Cal. 82.

**The Signature to an Appeal Bond** filed in the case is admissible as a standard of comparison. *Sauve v. Dawson*, 2 Mart. (La.) 202. See *supra*, this section, *With Papers Already in Case*.

**An Ancient Document**, received in evidence as such, but the handwriting of which is not otherwise proved, may be admitted as a standard of comparison. *Thompson v. Bennett*, 22 U. C. C. P. 393, by Gwynne, J.

**Indorsement on Note as Standard.** — In *Reg. v. Tower*, 20 N. Bruns. 168, in order to prove the contents of a writing signed by R., it was held admissible to introduce as a standard for R.'s signature a bill of exchange which R. had indorsed to the defendant, and which the defendant had subsequently indorsed, it being considered that the defendant's indorsement created an estoppel with respect to R.'s. *Weldon, J.*, dissented.

dence of genuineness must be of a satisfactory character,<sup>1</sup> there is some difference of opinion as to what amounts to satisfactory proof. It is held by some courts that the genuineness of the standard should be proved by the testimony of a witness or witnesses who saw it written, by the admission of the other party, or by other evidence of equal certainty.<sup>2</sup> Other courts hold that the court is to be governed by the usual rule as to the proof of facts in civil cases generally, and it is sufficient if the genuineness of the standard be established by a fair balance of the testimony.<sup>3</sup>

**Proof of Standard by Comparison.** — It has been held that the genuineness of the instrument offered as the standard of comparison cannot be proved by comparing it with some other writing.<sup>4</sup>

**Proof of Genuineness Question for Court.** — The question whether the genuineness of the standard is satisfactorily established is for the trial judge,<sup>5</sup> and his decision is not subject to review unless based upon an error of law or upon evidence which, as a matter of law, was insufficient to justify his finding.<sup>6</sup>

**c) Use of Letter-press or Photographic Copies.** — The general rule is that the instrument used as a standard of comparison must be in the original handwriting of the person whose handwriting is in issue.

**1. Genuineness of Standard Must Be Clearly Proved — England.** — *Beaumont v. Perkins*, 1 Phill. Ecc. 78.

*Iowa.* — *Hyde v. Woolfolk*, 1 Iowa 159; *Wilson v. Irish*, 62 Iowa 260; *Winch v. Norman*, 65 Iowa 186; *Sankey v. Cook*, 82 Iowa 125.

*Massachusetts.* — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *McKeone v. Barnes*, 108 Mass. 344.

*New York.* — *Clark v. Douglass*, 5 N. Y. App. Div. 547; *People v. Corey*, 148 N. Y. 476.

*Pennsylvania.* — *Baker v. Haines*, 6 Whart. (Pa.) 284, 36 Am. Dec. 224; *Depue v. Place*, 7 Pa. St. 428; *Cohen v. Teller*, 93 Pa. St. 123.

*Texas.* — *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315.

*Vermont.* — *Adams v. Field*, 21 Vt. 256; *Rowell v. Fuller*, 59 Vt. 688.

For cases in which the genuineness of the standard was held to be sufficiently established, see *Goza v. Browning*, 96 Ga. 421; *Hall v. Van Vrankin*, (Supm. Ct. Gen. T.) 64 How. Pr. (N. Y.) 407, 28 Hun (N. Y.) 403; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335; *Brant v. Denison*, (Pa. 1885) 5 Atl. Rep. 869; *Walker v. State*, 14 Tex. App. 609.

**Circumstantial Evidence of Genuineness.** — In an action against an administrator on a promissory note purporting to have been signed by his intestate, who was illiterate, by his mark, it was held that other notes so signed and paid by the decedent, found among his papers, might be used for the purpose of determining the genuineness of the signature to the note in issue, and that it was not essential that the execution of such notes should be shown by direct proof, but that it might be inferred from the circumstances. *Little v. Rogers*, 99 Ga. 95.

**Proof of Standard by Witnesses.** — The genuineness of the writing offered as a standard of comparison may be proved by the testimony of a qualified witness. *Manning v. State*, 37 Tex. Crim. 180.

But the genuineness of the proposed standard cannot be proved by the opinion of a witness derived solely from his general knowledge of the handwriting of the person whose handwriting it purports to be. *Com. v. Eastman*,

1 Cush. (Mass.) 189, 48 Am. Dec. 596, *followed* in *Sankey v. Cook*, 82 Iowa 125; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Phillips v. State*, 6 Tex. App. 364; *Hatch v. State*, 6 Tex. App. 384; *Heacock v. State*, 13 Tex. App. 97. See also *Heard v. State*, 9 Tex. App. 1; *Chester v. State*, 23 Tex. App. 577.

**An Acknowledgment by a Convict** of the genuineness of a writing, the convict being incompetent as a witness, will not render such writing admissible as a standard for such convict's handwriting. *Long v. State*, 10 Tex. App. 186.

**2. Proof by Direct or Equivalent Evidence Required.** — *Hyde v. Woolfolk*, 1 Iowa 159; *Baker v. Haines*, 6 Whart. (Pa.) 284, 36 Am. Dec. 224; *Cohen v. Teller*, 93 Pa. St. 123. See also *Power v. Frick*, 2 Grant Cas. (Pa.) 306; *Brant v. Dennison*, (Pa. 1885) 5 Atl. Rep. 869.

In *Ohio*, where the standard is not a paper already in the case, or admitted to be genuine, its genuineness must be proved by persons who testify directly and positively to its having been written by the party. *Calkins v. State*, 14 Ohio St. 222; *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600.

**3. Proof by Preponderance of Evidence Held Sufficient.** — *Rowell v. Fuller*, 59 Vt. 688.

It has been declared that genuineness should be established by proof so clear that, were it an issue in the case, a verdict would be directed for the paper's genuineness. *Clark v. Douglass*, 5 N. Y. App. Div. 547. See also *Sankey v. Cook*, 82 Iowa 125.

But the mode of proof of genuineness is to be regulated by the general rules of evidence applicable to the proof of any handwriting. *McKay v. Lasher*, 121 N. Y. 482.

**4.** *Winch v. Norman*, 65 Iowa 186.

**5. Proof of Genuineness Question for Court.** — *Egan v. Cowan*, 30 Ir. L. T. 223; *Hughes v. Dinorben*, 32 L. T. 271; *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172; *Com. v. Coe*, 115 Mass. 481; *Costelo v. Crowell*, 139 Mass. 588; *Hall v. Van Vrankin*, (Supm. Ct. Gen. T.) 64 How. Pr. (N. Y.) 407, 28 Hun (N. Y.) 403; *Rowell v. Fuller*, 59 Vt. 688.

**6.** *Costelo v. Crowell*, 139 Mass. 588. But see *Egan v. Cowan*, 30 Ir. L. T. 223.



**Letter-press Copies.** — Thus letter-press copies have been held incompetent as standards.<sup>1</sup>

**Photographic Copies — Photographs Generally Inadmissible.** — According to the weight of authority photographic reproductions of the genuine handwriting of the person whose handwriting is in controversy cannot be used as standards with which to compare the disputed writing.<sup>2</sup>

**Photographs of Documents on File in Public Archives.** — But the use for this purpose of photographic copies of signatures to instruments on file in the public archives has been permitted, the production of the originals in such case being impracticable.<sup>3</sup> In such case it must be shown, however, that the photographic copy is an exact reproduction of the original signature.<sup>4</sup>

**Where the Original Documents Are in Evidence,** it seems well settled that photographic copies and enlargements of the disputed writing and of other writings proved or admitted to be genuine may be used in evidence by the jury or by experts as aids in determining the genuineness or falsity of the writing in dispute,<sup>5</sup> provided they be made with the requisite care.<sup>6</sup>

**(d) Writings Specially Prepared — Writing by Witness on Stand.** — The general rule seems to be well settled that where the genuineness of a person's handwriting is in dispute he cannot offer in his own favor other specimens of his writing made after the controversy arose, and for the purpose of being so used, as standards with which to compare the disputed writing. He is confined to the production for this purpose of papers written by him before the controversy commenced, or of those subsequently written by him in the usual course of business and under such circumstances as to negative all idea that they were written for the purpose of being used as evidence in his own favor.<sup>7</sup>

**A Writing by a Witness on the Stand** is not admissible as a standard in favor of such witness.<sup>8</sup> But where a witness has denied what purports to be his hand-

**1. Use of Letter-press Copies Incompetent.** — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Cohen v. Teller*, 93 Pa. St. 123. See also *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

**2. Photographic Copies Not Admissible as Standards.** — *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540; *Maclean v. Schripps*, 52 Mich. 214; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Vanderslice v. Snyder*, 4 Pa. Dist. 424; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Geer v. Missouri Lumber, etc., Co.*, 134 Mo. 85, 55 Am. St. Rep. 489; *Houston v. Blythe*, 60 Tex. 506. See also *Matter of Foster*, 34 Mich. 21; *Crane v. Horton*, 5 Wash. 479.

For a general treatment of the use and admissibility in evidence of photographs, see the title PHOTOGRAPHS.

Photographic copies of genuine handwriting are not admissible as standards of comparison if the originals can be produced. *Maclean v. Scripps*, 52 Mich. 214.

In *Matter of Gordon*, 50 N. J. Eq. 397, the court compared photographic copies of disputed and genuine signatures.

**3. Photographic Copies of Public Documents Held Admissible.** — See *Re Stephens*, L. R. 9 C. P. 187, 8 Moak 481; *Luco v. U. S.*, 23 How. (U. S.) 515; *Mardes v. Meyers*, 8 Tex. Civ. App. 542.

**4. Photographic Copy Must Be Exact Reproduction of Original.** — *Geer v. Missouri Lumber, etc., Co.*, 134 Mo. 85, 56 Am. St. Rep. 489; *Houston v. Blythe*, 60 Tex. 506; *Buzard v. McNulty*, 77 Tex. 438.

**5. Photographs Admissible Where Original Is in**

**Evidence.** — *Green v. Terwilliger*, 56 Fed. Rep. 384; *Riggs v. Powell*, 142 Ill. 453; *Marcy v. Barnes*, 16 Gray (Mass.) 161, 77 Am. Dec. 405; *Frank v. Chemical Nat. Bank*, 37 N. Y. Super. Ct. 26; *Rowell v. Fuller*, 59 Vt. 688. But see *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

In an action involving the genuineness of the signature to a written instrument, it was held that photographs of the disputed signature and of two other signatures purporting to be by the same person, already in evidence, and of another signature admitted to be genuine, were competent evidence. *Rowell v. Fuller*, 59 Vt. 688.

**6. Enlargements Must Be Made with Requisite Care.** — *Crane v. Horton*, 5 Wash. 479.

**7. Writings Specially Prepared Not Admissible as Standards.** — *Hickory v. U. S.*, 151 U. S. 303; *Travers v. Snyder*, 38 Ill. App. 379; *Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356; *Springer v. Hall*, 83 Mo. 693, 53 Am. Rep. 598; *Sanderson v. Osgood*, 52 Vt. 309.

This rule has been held to prevent a party who denies the signature to an instrument in suit, from giving in evidence his sworn signature to the pleadings in the case. *Springer v. Hall*, 83 Mo. 693, 53 Am. Rep. 598; *Travers v. Snyder*, 38 Ill. App. 379.

It has been held, however, that the fact that the writing offered as a standard was written after the commencement of the action will not render it incompetent, but may be considered by the jury as affecting its weight. *Singer Mfg. Co. v. McFarland*, 53 Iowa 540.

**8. Witness Not Permitted to Write for Purpose of Making Evidence in His Own Favor.** — *U. S. v.*



writing, he may on cross-examination be called upon to write in order that such writing may be compared with the disputed writing for the purpose of contradicting him.<sup>1</sup>

(c) **Standard Must Be Produced in Court.** — It is obviously essential, in order that there may be a comparison of handwriting in the technical sense, that the standard of comparison should be produced in court.<sup>2</sup>

(d) **Who May Make Comparison** — (a) **Generally** — In Great Britain. — At common law, as has been seen, comparison of a disputed writing was allowed only with other writings already properly in the case, no comparison with irrelevant writings being permitted. This comparison could be made only by the jury.<sup>3</sup> Under the statute now in force in Great Britain authorizing comparison with any writing proved to the satisfaction of the judge to be genuine, the comparison may be made by witnesses or by the jury without the intervention of witnesses.<sup>4</sup>

In the United States. — The rules adopted in the various states of the American Union as to who may make the comparison when permissible are not entirely uniform. In some of the states the question does not seem to have been directly raised.

**Comparison by Jury or Witnesses.** — In a number of states, particularly in those where the matter is regulated by statute, the comparison may be made by the

Jones, 10 Fed. Rep. 469; Williams v. State, 61 Ala. 33; King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589, Com. v. Allen, 128 Mass. 46, 35 Am. Rep. 356; McGlasson v. State, 37 Tex. Crim. 620; State v. Koontz, 31 W. Va. 127. See also Hutchins's Case, 4 City Hall Rec. (N. Y.) 110.

But in Williams's Case, 1 Lewin C. C. 123, on the trial of an indictment for forgery, the court called upon the person whose name was alleged to have been forged, to write his name for the jury to compare the alleged forged signature therewith.

**Writing to Show Nerves Affected.** — It is error to permit one who claims that his nerves were affected by an injury, to write his signature before the jury for the purpose of comparing such signature with one written shortly after the accident. Gulzoni v. Tyler, 64 Cal. 334.

**Where Handwriting Has Changed Since Disputed Signatures.** — Where an adult witness testified that she had written the indorsements on certain notes when a child and that her handwriting had since very much changed and improved, it was held that it was not error to refuse to compel her to rewrite such indorsements at the trial for the purpose of comparison. Williams v. Riches, 77 Wis. 569.

**Party Estopped to Object to Witness Writing on Stand.** — Where a witness, at the instance of the plaintiff, had been permitted, over the defendant's objection, to write on the stand for the purpose of comparison, and the defendant afterwards on cross-examination also asked the witness to write, it was held that the defendant could not on appeal be heard to complain of the introduction of such evidence by the plaintiff. Allen v. Gardner, 47 Kan. 337.

**1. Writing Name by Witness Permissible on Cross-examination.** — O'Brien v. DeLoe, 100 Mo. 167, Holt 194; Doe v. Wilson, 10 Mo. P. C. 592; Cobbett v. Kilminster, 4 F. & F. 490; Reg. v. Taylor, 6 Cox C. C. 58; Bradford v. People, 22 Colo. 157; Chandler v. Le Barron, 45 Me. 534; Roe v. Roe, 40 N. Y. Super. Ct. 1; Bronner v. Loomis, 14 Hun (N. Y.) 341; San-

derson v. Osgood, 52 Vt. 309. See also Griffin v. State, 90 Ala. 596; Smith v. King, 62 Conn. 515.

In Houghton First Nat. Bank v. Robert, 41 Mich. 709, and Gilbert v. Simpson, 6 Daly (N. Y.) 29, the contrary was held, upon the principle that irrelevant papers, of which such writing would be one, are not admissible for the sole purpose of comparison.

**Where a Witness on Direct Examination Admits the Genuineness of a Disputed Signature,** a writing made by him on cross-examination may be used to test his veracity. People v. De Kroyst, 49 Hun (N. Y.) 71; Huff v. Nims, 11 Neb. 363.

**2. Standard Must Be Produced in Court.** — Tyler v. Todd, 36 Conn. 218; Woodman v. Dana, 52 Me. 9.

But it has been held that a witness may testify as to the similarity of a disputed signature with other signatures of the same person with which he has compared it, although the latter signatures are not produced in court. Baily v. State, (Tex. Crim. 1897) 38 S. W. Rep. 992.

**3. No Comparison by Witnesses at Common Law** — Great Britain. — See *supra*, this section, *Historical Statement*; Garrells v. Alexander, 4 Esp. 37; Rex v. Cator, 4 Esp. 117; Greaves v. Hunter, 2 C. & P. 477, 12 E. C. L. 225; Clermont v. Tullidge, 4 C. & P. 1, 19 E. C. L. 247.

**4. Consult the English statute.** See *supra*, this section, *Under Statutes*.

In Cobbett v. Kilminster, 4 F. & F. 490, the jurors were permitted to make the comparison apparently without the aid of witnesses.

In King v. King, 30 U. C. Q. B. 26, a case heard before two justices, the chief justice being absent, the court was equally divided. Wilson, J., was "content to follow" Cobbett v. Kilminster, 4 F. & F. 490; Morrison, J., refused to be bound by a *nisi prius* decision, and thought that under the statute the disputed writing and the standard could be submitted directly to the jury, when no comparison had been made by witnesses.

jury, by witnesses, or by both.<sup>1</sup>

**Comparison by Witnesses Only.** — In *North Carolina* comparison of handwriting, when permissible, may be made by witnesses only, no comparison by the jury being allowed.<sup>2</sup> In *Indiana* it is held that the jury may make the comparison, with or without the aid of experts, with papers already in the case, but that only expert witnesses may make the comparison with irrelevant papers.<sup>3</sup>

**Comparison by Jury Only.** — In *Pennsylvania* the jury alone may make the comparison.<sup>4</sup>

**Comparison by Court.** — In trials without a jury the comparison may be made by the court.<sup>5</sup> And in all cases it seems that in its discretion the court may compare the genuine and the disputed writings.<sup>6</sup>

**By Appellate Court.** — Moreover, where an appellate court tries a case *de novo* upon the evidence, the comparison may be made by such court.<sup>7</sup>

**Comparison by Referee.** — In a trial before a referee the comparison may be made by him.<sup>8</sup>

**Witness Must Be Expert.** — A witness called to prove handwriting by comparison must be an expert in handwriting.<sup>9</sup>

**Right of Jury to Make Comparison in Jury Room.** — Where comparison by the jury is permitted it seems competent for the jurors to take the genuine and disputed writings into the jury room for the purpose of making the comparison.<sup>10</sup>

**Use of Magnifying Glass by Jury.** — The jurors may make use of a magnifying glass to aid them in making the comparison.<sup>11</sup>

(b) **Previous Knowledge of Person's Handwriting Not Essential.** — In cases in which a comparison of handwriting by experts is permitted, it is not necessary that the person by whom the comparison is made should have had any previous knowledge of the handwriting of the person whose handwriting is in question.<sup>12</sup>

1. **Comparison by Jury or Witnesses.** — Such is the rule in *Connecticut*, *Kansas*, *South Carolina*, and *Texas*. See *Tyler v. Todd*, 36 Conn. 218; *Macomber v. Scott*, 10 Kan. 335; *Benedict v. Flanigan*, 18 S. Car. 506, 44 Am. Rep. 583; *Kennedy v. Upshaw*, 64 Tex. 411. And it is so provided by statute in *California*, *Iowa*, *Montana*, *Nebraska*, and *Oregon*.

Under the *New York* statute writings may not be submitted to the jury for comparison without any comparison by witnesses. *Glenn v. Roosevelt*, 62 Fed. Rep. 550; *People v. Pinckney*, 67 Hun (N. Y.) 428.

2. **No Comparison by Jury** — *North Carolina*. — *Pope v. Askew*, 1 Ired. L. (23 N. Car.) 16, 35 Am. Dec. 729; *Outlaw v. Hurdle*, 1 Jones L. (46 N. Car.) 150; *Otey v. Hoyt*, 3 Jones L. (48 N. Car.) 407; *Watson v. Davis*, 7 Jones L. (52 N. Car.) 178; *Fuller v. Fox*, 101 N. Car. 119, 9 Am. St. Rep. 27; *Tunstall v. Cobb*, 109 N. Car. 316.

3. *Indiana*. — *Chance v. Indianapolis*, etc., Gravel Road Co., 32 Ind. 472; *Huston v. Schindler*, 46 Ind. 38.

4. **Comparison by Jury.** — See *Pennsylvania* cases cited *supra*, p. 265, note 5.

5. **Comparison by Judge.** — See *Redford v. Peggy*, 6 Rand. (Va.) 317.

In a trial without a jury, the judge is not precluded by the fact that experts have testified in the case, from making a comparison between a disputed writing and other writings admitted to be genuine. *Millington v. Millington*, (Tex. Civ. App. 1894) 25 S. W. Rep. 320.

6. See *Henderson v. Hackney*, 16 Ga. 521; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; *Yeomans v. Petty*, 40 N. J. Eq. 495;

*Merchant's Will*, Tuck. (N. Y.) 151. And see the statutes of several of the states in which the submission of the writings to the court is authorized.

7. **Comparison by Appellate Court.** — *Morris v. Sargent*, 18 Iowa 90. See *Matter of Gordon*, 50 N. J. Eq. 397.

In *Burdick v. Hunt*, 43 Ind. 381, it was held that the Supreme Court could decide nothing as to the genuineness of a signature from a comparison of signatures. The decision of the court seems to have been based upon the fact that the documents were not regularly brought up before it.

8. **By Referee.** — *Hunt v. Lawless*, (N. Y. Super. Ct.) 7 Abb. N. Cas. (N. Y.) 113. See *Sutton v. Campbell*, 2 Thomp. & C. (N. Y.) 595.

9. **Witness Must Be Expert.** — *Griffin v. State*, 90 Ala. 596; *Spottiswood v. Weir*, 80 Cal. 448; *Wimbish v. State*, 89 Ga. 294; *Woodman v. Dana*, 52 Me. 9; *Omaha First Nat. Bank v. Lierman*, 5 Neb. 247; *McKay v. Lasher*, 42 Hun (N. Y.) 270.

10. **Right of Jury to Make Comparison in Jury Room.** — See *Udderzook v. Com.*, 76 Pa. St. 340; *Bird v. Millar*, 1 McMull. L. (S. Car.) 123. Compare *Matter of Foster*, 34 Mich. 21.

The jury may take the genuine and disputed writings into the jury room for comparison where this is not objected to. *Bailey v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 992.

11. *Kannon v. Galloway*, 2 Baxt. (Tenn.) 230; *Hatch v. State*, 6 Tex. App. 384.

12. **Previous Knowledge of Handwriting on Part of Person Making Comparison Not Necessary.** — *Keyser v. Picknell*, 4 App. Cas. (D. C.) 198; *Macomber v. Scott*, 10 Kan. 335; *Woodman v. Dana*, 52 Me. 9; *Moody v. Rowell*, 17 Pick.



(7) *Similarity of Handwriting as Evidence of Forgery.* — Where a disputed and a genuine signature are found upon comparison to be precisely alike in every respect, this is ordinarily regarded as strong evidence that the disputed signature is a forgery,<sup>1</sup> inasmuch as a person will almost never write twice in exactly the same manner.

c. BY EXPERT WITNESSES — (1) *Generally.* — The discussion of expert testimony here presented is confined to matters relating exclusively to experts in handwriting as distinguished from expert witnesses generally, the general subject of expert and opinion evidence being fully treated elsewhere in this work.<sup>2</sup>

(2) *Who Are Experts.* — There is no rule of law fixing the precise amount of experience or degree of skill necessary to constitute one an expert in handwriting. It is not necessary that the witness should be engaged in any particular occupation, or claim to be a professional expert. Any person who has had such experience in the examination of handwriting as to enable him to note and distinguish the characteristics of handwriting is competent to testify as an expert.<sup>3</sup> Thus, attorneys at law,<sup>4</sup> bank officers,<sup>5</sup> bookkeepers,<sup>6</sup> business men,<sup>7</sup> county officials,<sup>8</sup> teachers of writing,<sup>9</sup> and other persons<sup>10</sup> who

(Mass.) 490, 28 Am. Dec. 317; *Moye v. Hern- don*, 30 Miss. 110; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *Hicks v. Person*, 19 Ohio 426; *Calkins v. State*, 14 Ohio St. 222. But see *Page v. Homans*, 14 Me. 478; *Mer- chant's Will*, Tuck. (N. Y.) 151.

1. *Exact Similarity of Writings Evidence that One Is Forged.* — *Howland Will Case*, 4 Am. L. Rev. 625; *Day v. Cole*, 65 Mich. 129; *Hunt v. Lawless*, (N. Y. Super. Ct.) 7 Abb. N. Cas. (N. Y.) 113. See also *Taylor Will Case*, (Surrogate Ct.) 10 Abb. Pr. N. S. (N. Y.) 300.

2. See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

*Testimony of Expert and Nonexpert Witnesses Contrasted.* — No witness except an expert is competent to give an opinion as to the genuineness of handwriting simply by comparison of hands, and this is done by the production of the standard in open court. Nonexperts can give opinions only in cases where they have previous acquaintance and knowledge of the handwriting by which the genuineness of the controverted specimen is to be tested. The expert need have no previous acquaintance or knowledge of the standard to authorize him to express an opinion from comparison. The nonexpert cannot express an opinion without such previous acquaintance or knowledge. *Woodman v. Dana*, 52 Me. 9. See also *Travis v. Brown*, 43 Pa. St. 9, 82 Am. Dec. 540.

3. *Who Are Experts — Need Not Be Professional.* — *Green v. People*, 101 N. Y. 101; *Fowler*, 31 Kan. 478; *Sweetser v. Lowell*, 33 Me. 446; *Com. v. Williams*, 105 Mass. 62; *Murphy v. Hagerman*, *Wright* (Ohio) 293; *Benedict v. Flanigan*, 18 S. Car. 506, 44 Am. Rep. 583. See generally the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

A witness giving evidence under the English statute need not be a professional expert, or a person whose skill in the comparison of handwriting has been gained in the way of his professional business. *Reg. v. Allwright*, [1874] 2 Q. B. 74.

4. *Attorneys at Law.* — *Eisfield v. Dill*, 71 Iowa 442; *Abbott v. Coleman*, 22 Kan. 250; *State v. Phair*, 48 Vt. 366.

But an attorney who shows no special experience and does not claim to be able to give an opinion upon which any great reliance can be placed is not an expert. *Ellingwood v. Bragg*, 52 N. H. 488.

5. *Bank Officers.* — *Green v. Terwilliger*, 56 Fed. Rep. 384; *Hendrix v. Gillett*, 6 Colo. App. 127; *Lyon v. Lyman*, 9 Conn. 55; *Forgey v. Cambridge City First Nat. Bank*, 66 Ind. 123; *Stone v. Hubbard*, 7 Cush. (Mass.) 595; *Dubois v. Baker*, 30 N. Y. 355; *Hadcock v. O'Rourke*, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 549; *Kennedy v. Upshaw*, 66 Tex. 442; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Walker v. State*, 14 Tex. App. 609; *Bratt v. State*, 38 Tex. Crim. 121; *Riley v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 498; *Tucker v. Kellogg*, 8 Utah 11.

But the testimony of a bank cashier is not entitled to any more credit than that of another person of equal skill. *Murphy v. Hagerman*, *Wright* (Ohio) 293.

6. *Bookkeepers.* — *Bradford v. People*, 22 Colo. 157; *Vinton v. Peck*, 14 Mich. 287; *Kennedy v. Upshaw*, 66 Tex. 442; *State v. Ward*, 39 Vt. 225.

7. *Business Men of Experience in Handwriting.* — *Hyde v. Woolfolk*, 1 Iowa 159; *Edmunston v. Henry*, 45 Mo. App. 346; *Kornegay v. Kornegay*, 117 N. Car. 242; *Kennedy v. Upshaw*, 66 Tex. 442.

8. *County Officials — Officers of Court — County Auditor.* — *Eisfield v. Dill*, 71 Iowa 442.

*Clerk of Court.* — *Yates v. Yates*, 76 N. Car. 142; *Kennedy v. Upshaw*, 66 Tex. 442; *Bratt v. State*, 38 Tex. Crim. 121. But see *People v. Spooner*, 1 Den. (N. Y.) 343.

*Register of Deeds.* — *State v. De Graff*, 113 N. Car. 688; *Kornegay v. Kornegay*, 117 N. Car. 242.

9. *Teachers of Writing.* — *Eisfield v. Dill*, 71 Iowa 442; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Vinton v. Peck*, 14 Mich. 287.

10. *For Other Examples of persons held to be experts in handwriting*, see *Withee v. Rowe*, 45 Me. 571; *Marcy v. Barnes*, 16 Grav (Mass.) 161, 77 Am. Dec. 405; *Com. v. Nefus*, 135 Mass. 533; *State v. David*, 131 Mo. 380;



in their business or occupation have had large experience in the examination and study of handwriting, have been held to be experts.

(3) *Competency and Testimony of Experts* — (a) **Witness Must Be Expert.** — In order to render a witness competent to testify as an expert in handwriting, he must be shown to possess skill and experience.<sup>1</sup> The witness need not claim in express terms to be an expert; it is sufficient if he states facts showing that from his experience he is competent to express an opinion as to handwriting.<sup>2</sup> He must, however, claim to have had such experience as to qualify him to express an opinion.<sup>3</sup>

(b) **Cross-examination — Testing Expert.** — For the purpose of determining whether a witness is an expert, it is proper to ask him any question tending to show his experience and skill.<sup>4</sup>

**Testing Expert with Other Papers.** — The decisions as to whether it is or is not competent to test the skill of an expert by asking his opinion as to the identity of the handwriting in dispute with that of other papers, are few in number and generally conflicting. It has been held that the expert may be tested on cross-examination by so asking his opinion as to other writings not already in the case and not admitted to be genuine.<sup>5</sup> There are several decisions, however, that the expert may not be tested with other papers not relevant to the case.<sup>6</sup>

(c) **To What Expert May Testify — Aids to Testimony — Generally.** — It seems that an

Wheeler, etc., Mfg. Co. v. Buckhout, 60 N. J. L. 102; Chester v. State, 23 Tex. App. 577.

**A Secretary and Treasurer of a City** whose duty it was to compare handwriting was held to be an expert. State v. De Graff, 113 N. Car. 688.

**An Inspector of Franks** in the post office was held competent to testify as an expert. Rex v. Cator, 4 Esp. 117.

**1. Witnesses Must Be Shown to Be Expert.** — Goldstein v. Black, 50 Cal. 462; Tyler v. Todd, 36 Conn. 218; Mixer v. Bennett, 70 Iowa 329; Page v. Homans, 14 Me. 478; Wagner v. Jacoby, 26 Mo. 530; State v. Tompkins, 71 Mo. 613; State v. Owen, 73 Mo. 440; Ellingwood v. Bragg, 52 N. H. 488.

Witnesses who have no expert knowledge on the subject are incompetent to testify whether a written instrument can be so altered by the use of chemicals as to show no trace of such alteration. Birmingham Nat. Bank v. Bradley, 116 Ala. 142.

**Witness Must Have Had Experience.** — The mere fact that a witness has been engaged in an occupation in which he might have gained experience is not sufficient to qualify him as an expert unless it further appears that he has had such experience. Ort v. Fowler, 31 Kan. 478. See also Winch v. Norman, 65 Iowa 186.

**Testimony as to Erasure by Nonexpert Witness.** — A witness need not be an expert to testify as to an erasure in a written instrument where the question is not one of skill or science but is simply one of vision. Yates v. Waugh, 1 Jones L. (46 N. Car.) 483.

**2. Witness Need Not Claim to Be Expert.** — Glover v. Gentry, 104 Ala. 222; Hyde v. Woolfolk, 1 Iowa 159.

Where a witness testified that he was not a professional expert in handwriting, but that he had had some experience in examining handwriting, and while not claiming to have any extra skill over business men, thought he was as good a judge as business men generally, it was held that he was competent as

an expert. Hyde v. Woolfolk, 1 Iowa 159. See *supra*, this section, *Who Are Experts*.

**3. Witness Must Claim to Have Had Experience.** — Where a witness testified that he had never before been called upon to testify on the question of the similarity or dissimilarity of handwritings, and had never been employed in making such comparisons, though he had sometimes compared signatures of other persons when disagreements as to their genuineness had arisen in the course of business, it was held that he was incompetent as an expert. Goldstein v. Black, 50 Cal. 462.

**4. Witness May Be Interrogated as to His Experience.** — Tyler v. Todd, 36 Conn. 218; Roe v. Roe, 40 N. Y. Super. Ct. 1.

For the purpose of determining whether a witness is an expert it is proper to inquire of him as to his residence, his occupation, and the length of time he has been engaged in business that would qualify him to judge of handwriting, and also as to his actual experience in such matters as a witness. Tyler v. Todd, 36 Conn. 218.

**5. Testing Expert with Irrelevant Papers Not Admitted to Be Genuine.** — Thomas v. State, 103 Ind. 419; Travelers Ins. Co. v. Sheppard, 85 Ga. 751.

Expert witnesses who have testified as to the genuineness of a signature may be tested by asking them to make comparisons between signatures of another witness in the case, one genuine and the other written by an agent. Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. Rep. 536.

**6. Right to Test Expert with Irrelevant Papers Denied.** — U. S. v. Chamberlain, 12 Blatchf. (U. S.) 390; Rose v. Springfield First Nat. Bank, 91 Mo. 399, 60 Am. Rep. 258. But see West v. State, 22 N. J. L. 212, in which case the propriety of such a test seems to have been admitted, the question before the court being whether the witness might be tested by showing him only a part of the writing, the rest being concealed.

expert may testify as to any matter bearing upon the genuineness of a disputed writing regarding which an opinion can be formed from an inspection of the writing itself.

**Illustrations.** — Thus he may testify as to the characteristics of the handwriting in question;<sup>1</sup> as to whether the writing is natural or feigned;<sup>2</sup> as to alterations, additions, or erasures;<sup>3</sup> as to whether the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time;<sup>4</sup> as to whether two instruments or signatures were written with the same ink;<sup>5</sup> as to whether an instrument was written with a pen;<sup>6</sup> or as to

**1. Testimony of Experts as to Characteristics of Handwriting.** — An expert may testify as to the condition and appearance of the words and of the letters and characters in a disputed writing and may point out and explain similarities and differences. *U. S. v. Chamberlain*, 12 Blatchf. (U. S.) 390; *Riordan v. Guggerty*, 74 Iowa 688; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Frank v. Chemical Nat. Bank*, 37 N. Y. Super. Ct. 26; *Roe v. Roe*, 40 N. Y. Super. Ct. 1; *Dryer v. Brown*, 52 Hun (N. Y.) 321; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154.

**Crowded Appearance of Words.** — An expert acquainted with the handwriting of the alleged writer was allowed to testify that the writing on a note was more crowded than the maker's usual writing, as bearing on the question whether the note was written before or after the signature. *Dubois v. Baker*, 30 N. Y. 355, affirming 40 Barb. (N. Y.) 556. But in *Jewett v. Draper*, 6 Allen (Mass.) 434, it was held incompetent for an expert to testify as to his opinion, founded upon the situation and crowded appearance of certain words, that they were interpolated in a written instrument after the signature.

**2. Whether Writing Is Natural or Feigned — England.** — The opinion of a post-office inspector of franks as to whether a signature was natural or feigned has been held competent. *Goodtitle v. Braham*, 4 T. R. 497; *Rex v. Cator*, 4 Esp. 117. But see *Gurney v. Langlands*, 5 B. & Ald. 330, 7 E. C. L. 118; *Carey v. Pitt*, Peake Add. Cas. 130. Such evidence has been admitted in the ecclesiastical courts. *Saph v. Atkinson*, 1 Add. Ecc. 218.

*Indiana.* — *Cox v. Dill*, 85 Ind. 334.

*Maine.* — *Withee v. Rowe*, 45 Me. 571.

*Massachusetts.* — *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

*New York.* — *People v. Hewit*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 20; *Hunt v. Lawless*, (N. Y. Super. Ct.) 7 Abb. N. Cas. (N. Y.) 113; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *Sudlow v. Warshing*, 108 N. Y. 520, *distinguishing Kownig v. Manly*, 49 N. Y. 192, 10 Am. Rep. 346. Compare the early case of *People v. Spooner*, 1 Den. (N. Y.) 343.

*Pennsylvania.* — *Travis v. Brown*, 43 Pa. St. 9, 82 Am. Dec. 540; *Burkholder v. Plank*, 69 Pa. St. 229.

The opinion of an expert is competent as to whether a signature is in a genuine or an imitated hand, but such evidence is in general deserving of but little consideration, and is often wholly immaterial. *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

Thus an expert was allowed to give his opinion that a mark could not have been that

of a very aged man, but was simulated. *Lansing v. Russell*, 3 Barb. Ch. (N. Y.) 325.

**3. Alterations, Additions, or Erasures.** — *Reg. v. Williams*, 8 C. & P. 434, 34 E. C. L. 466; *Kruse v. Chester*, 66 Cal. 353; *Hendrix v. Gillett*, 6 Colo. App. 127; *Pate v. People*, 8 Ill. 644; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Edelin v. Sanders*, 8 Md. 118; *Vinton v. Peck*, 14 Mich. 287; *Moye v. Herndon*, 30 Miss. 110; *Dubois v. Baker*, 30 N. Y. 355; *Haddock v. O'Rourke*, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 549; *Ballentine v. White*, 77 Pa. St. 20.

On a question of the genuineness of a written instrument the opinions of experts as to alterations and additions alleged to have been made in and to such writing are competent though such experts be unacquainted with the handwriting of the writer of the instrument; but such evidence is intrinsically weak and ought to be received by the jury with great caution. *Moye v. Herndon*, 30 Miss. 110.

**4. Whether All on Single Occasion with Same Pen.** — *Fulton v. Hood*, 34 Pa. St. 365, 75 Am. Dec. 664. See also *Ellingwood v. Bragg*, 52 N. H. 488.

An expert may testify as to whether the whole of an instrument was written at the same time. *Cooper v. Bockett*, 4 Moo. P. C. 419; *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 250; *Dubois v. Baker*, 30 N. Y. 356.

**Whether Words Were Written Before Paper Folded.** — *Bacon v. Williams*, 13 Gray (Mass.) 526.

**5. Whether Writings Are in Same Ink.** — *Farmers'*, etc., *Bank v. Young*, 36 Iowa 44; *Vinton v. Peck*, 14 Mich. 287.

Whether particular words are in the same ink as the rest of a paper is a matter for the opinion of a person whose business has necessitated the handling of many letters, checks, etc. *Glover v. Gentry*, 104 Ala. 222.

**Effect of Blotter.** — On this question the expert may testify as to the effect of the use of a blotter on the appearance of the writing. *Farmers'*, etc., *Bank v. Young*, 36 Iowa 44.

**Identity of Ink as Bearing on Dates of Two Documents.** — The similarity of the ink used in the execution of two different instruments of different dates may be considered on the question whether the instruments were in fact executed at the same time. *Shelden v. Warner*, 45 Mich. 638. See also *Allaire v. Allaire*, 37 N. J. L. 312.

**Witness Need Not Be Expert in Regard to Color.** — An experienced witness may testify that two notes were not written in the same ink, and it is no objection to his competency that he was not shown to be an expert in regard to color. *Vinton v. Peck*, 14 Mich. 287.

**6. Whether a Writing Was Written with a Pen**



the age of a writing.<sup>1</sup>

**To Decipher Obscure Writings.** — When the characters in which a paper is written are obscure and difficult to decipher, the testimony of an expert in handwriting is competent to aid the court or jury in arriving at the true reading of the instrument.<sup>2</sup>

**To Compare Handwriting.** — The purpose for which experts in handwriting are most frequently called upon to testify is to decide, from a comparison of a disputed and a genuine writing, whether the two were written by the same person.<sup>3</sup>

**An Expert Must Give His Opinion as to Facts** and not as to his inferences deduced from the facts.<sup>4</sup>

**Reasons for Opinion.** — The expert may in all cases give reasons for his opinion.<sup>5</sup>

**Use of Microscope.** — An expert in the use of a microscope may examine the disputed writing under the microscope and testify as to the result of his examination.<sup>6</sup> It has been held, however, that where such expert is not also an expert in handwriting he may testify only as to what he sees upon such examination, and will not be permitted to give an opinion as to whether the writing examined has been altered.<sup>7</sup>

**Use of Photography.** — It is generally held that experts may make use of photographic enlargements of the disputed and genuine writings as aids in the

or with a certain instrument found in the defendant's possession is a matter upon which an expert may testify. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

**1. Age of Writing.** — See *Tracy Peerage*, 10 Cl. & F. 154; *Crouch v. Hooper*, 16 Beav. 182.

Where witnesses, one of whom had been a county auditor, another a teacher of penmanship, and the others attorneys at law, stated that they were familiar with old papers and writings, and thought that they were capable of giving an opinion upon the question, it was held that they might testify that an instrument purporting to be thirty years old had been recently written. *Eisfield v. Dill*, 71 Iowa 442. Such evidence, however, was held incompetent in *Cheney v. Dunlap*, 20 Neb. 265, 57 Am. Rep. 828; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180.

In *Clark v. Bruce*, 12 Hun (N. Y.) 271, the competency of such testimony seems to have been admitted, but it was held that the witness called did not appear to be an expert in the matter.

**2. Expert Testimony as to Obscurities.** — *Goblet v. Beechey*, 3 Sim. 24; *Masters v. Masters*, 1 P. Wms. 421; *Stone v. Hubbard*, 7 Cush. (Mass.) 595; *Kux v. Central Michigan Sav. Bank*, 93 Mich. 511. See also *Norman v. Morrell*, 4 Ves. Jr. 769.

What is the true reading is a question of fact for the jury. *Kux v. Central Michigan Sav. Bank*, 93 Mich. 511; *Armstrong v. Burrows*, 6 Watts (Pa.) 266. See also *Jackson v. Ransom*, 18 Johns. (N. Y.) 107. *Compare Remon v. Hayward*, 2 Ad. & El. 666, 29 E. C. L. 173.

**3. See supra**, this section, *By Comparison of Handwriting*.

**4. Expert Must Testify to Facts.** — *Kruse v. Chester*, 66 Cal. 353. See also *McGibbon v. Burpee*, 25 N. Bruns. 81.

In *People v. Severance*, 67 Hun (N. Y.) 182, it was held that an expert witness, unfamiliar

with the handwriting of the person whose handwriting was in dispute, could not, from a comparison of the disputed with genuine handwriting, testify as to the genuineness of the former, but that his evidence should be confined to a comparison of the writings, and to his opinion as to whether or not they were written by the same person. But see *Hadcock v. O'Rourke*, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 549.

**An Expert Will Not Be Permitted to Testify** as to whether a man unable to write could have made a copy of a signature. *Thayer v. Chesley*, 55 Me. 393; nor as to a person's ability to improve his handwriting. *McKeone v. Barnes*, 108 Mass. 344; nor as to the ease with which a person's signature may be forged. *Thomas v. State*, 18 Tex. App. 213.

**5. Expert May Give Reasons for His Opinion.** — *Kendall v. Collier*, 97 Ky. 446; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Keith v. Lothrop*, 10 Cush. (Mass.) 453; *Demeritt v. Randall*, 116 Mass. 331. See also *Farmers, etc., Bank v. Young*, 36 Iowa 44; *Winnie v. Tousley*, 36 Hun (N. Y.) 190.

**All the Facts upon Which the Expert Bases His Opinion** should be before the court and jury in order that they may determine, as far as possible, whether the opinion given is well founded, and that the opposing counsel may have an opportunity to cross-examine as to such facts. *Koons v. State*, 36 Ohio St. 195.

**6. Examination of Disputed Writing under Microscope.** — *Hadcock v. O'Rourke*, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 549; *Stevenson v. Gunning*, 64 Vt. 601. See also *Riggs v. Powell*, 142 Ill. 453.

An expert in handwriting and in the use of a microscope may testify as to the result of an examination by him of a written instrument under a microscope, although both the writing and the microscope are in court. *Bridgman v. Corey*, 62 Vt. 1.

**7. Stevenson v. Gunning**, 64 Vt. 601.



study and explanation of the characteristics of the handwriting in controversy.<sup>1</sup>

**Use of Blackboard.** — An expert testifying as to handwriting may make use of blackboard illustrations for the purpose of illustrating and explaining his testimony.<sup>2</sup>

**Plates and Tables.** — So also plates and tables prepared by an expert by the aid of a microscope and camera lucida, showing comparisons of genuine and disputed signatures, are admissible in evidence.<sup>3</sup>

**(d) Value of Expert Testimony — Of Slight Value.** — That the testimony of experts in handwriting may often be of great assistance to the court and jury in determining the genuineness of a disputed signature or other writing is generally recognized.<sup>4</sup> Such evidence, however, is usually regarded as of little weight, and should be received with caution.<sup>5</sup>

**Considerations Determining Value.** — Its value will obviously depend upon the knowledge and experience of the witness, his general character and reputation, and also more or less upon the facts stated by him which form the basis of his judgment, and the reasons given for his opinion.<sup>6</sup>

**Bias of Witness in Favor of Party Employing Him.** — Another circumstance to be considered in determining the value of an expert's testimony is the fact of his being in the employ of the party offering him as a witness.<sup>7</sup>

**(e) Function of Court and Jury — Competency of Witness.** — The question whether a witness is competent to testify as an expert is for the judge, and his decision is not subject to review unless clearly erroneous.<sup>8</sup>

1. See *supra*, this section, *Use of Letter-press or Photographic Copies*. Compare Taylor Will Case, (Surrogate Ct.) 10 Abb. Pr. N. S. (N. Y.) 300.

2. **Expert May Use Blackboard.** — McKay v. Lasher, 121 N. Y. 482; Dryer v. Brown, 52 Hun (N. Y.) 321.

3. **Plates and Tables.** — Green v. Terwilliger, 56 Fed. Rep. 384. For a similar case, illustrated with numerous reproductions of the writings compared, see Sharon v. Hill, (U. S. Cir. Ct.) 4 West Coast Rep. 1.

4. **Expert Testimony Admissible and Often Necessary.** — See the remarks of Hawley, J., in Green v. Terwilliger, 56 Fed. Rep. 384.

5. **Expert Testimony as to Handwriting of Slight Value — England.** — See Lord Eldon's remarks in Eagleton v. Kingston, 8 Ves. Jr. 47.

*United States.* — U. S. v. Pendergast, 32 Fed. Rep. 10.

*District of Columbia.* — Cowan v. Beall, 1 MacArthur (D. C.) 270.

*Iowa.* — Borland v. Walrath, 33 Iowa 130; Whitaker v. Parker, 42 Iowa 585; Hammond v. Wolf, 78 Iowa 227; Bruner v. Wade, 84 Iowa 698; State v. Van Tassel, 103 Iowa 6.

*Louisiana.* — Temple v. Smith, 7 La. Ann. 562.

*Michigan.* — Miller v. Herndon, 10 Mich. 115.

*New Jersey.* — Mutual Ben. L. Ins. Co. v. Brown, 30 N. J. Eq. 193, 32 N. J. Eq. 809.

*New York.* — Taylor Will Case, (Surrogate Ct.) 10 Abb. Pr. N. S. (N. Y.) 300; Sarvent v. Hesdra, 5 Redf. (N. Y.) 47.

*Ohio.* — Koons v. State, 36 Ohio St. 195.

*Pennsylvania.* — Depue v. Place, 7 Pa. St. 428.

*Vermont.* — Adams v. Field, 21 Vt. 265; Pratt v. Rawson, 40 Vt. 183.

*Wisconsin.* — Daniels v. Foster, 26 Wis. 686.

The testimony of an expert as to handwriting

is simply an expression under oath of his opinion, and the jurors are not bound by it any further than it coincides with their own opinion, or that they think it deserves to be credited on account of the experience of the witness. U. S. v. Molloy, 31 Fed. Rep. 19; Temple v. Smith, 7 La. Ann. 562.

In Luce v. Coyne, 36 U. C. Q. B. 305, an action upon a promissory note, the defendant denied the signature; an expert testified that it was his. The jury found for the plaintiff. It was held no ground for a new trial that the court did not instruct the jury that expert evidence was of little weight, especially when contradicted by direct testimony.

6. **Considerations Determining Value of Expert's Testimony.** — Green v. Terwilliger, 56 Fed. Rep. 384. See also Matter of Gordon, 50 N. J. Eq. 397.

The intelligence, skill, and experience of the witness go to the weight of his testimony, not to his competency. Benedict v. Flanigan, 18 S. Car. 506, 44 Am. Rep. 583.

**Credibility.** — The credibility of the witness does not affect his competency as an expert. It can therefore be inquired into only after his testimony as an expert has been given. Smyth v. Caswell, 67 Tex. 567.

7. **Bias of Witness in Favor of Party Employing Him.** — Sharon v. Hill, (U. S. Cir. Ct.) 4 West Coast Rep. 1, 26 Fed. Rep. 357; Green v. Terwilliger, 56 Fed. Rep. 384; Sarvent v. Hesdra, 5 Redf. (N. Y.) 47.

8. **Whether Witness Competent as Expert Question for Judge.** — Fairbank v. Hughson, 58 Cal. 314; Bradford v. People, 22 Colo. 157; Forgey v. Cambridge City First Nat. Bank, 66 Ind. 123; Quinsigamond Bank v. Hobbs, 11 Gray (Mass.) 250; Bacon v. Williams, 13 Gray (Mass.) 525; Com. v. Williams, 105 Mass. 62; Com. v. Nefus, 135 Mass. 533; Com. v. Hall, 164 Mass. 152; Com. v. Meehan, 170 Mass. 362; Ellingwood v. Bragg, 52 N. H. 488; Had-

The Weight of Expert Testimony as to handwriting is a question for the jury,<sup>1</sup> or for the court in equity cases or in trials without a jury.<sup>2</sup>

**3. Proof of Handwriting of Documents Not Produced in Court — Document to Be Proved Should Be Produced.** — It is obvious that where the handwriting of a written instrument is to be proved the instrument itself should be produced in court wherever this is practicable.<sup>3</sup>

**Proof of Handwriting of Lost Paper by Witness Who Has Seen It.** — But where for any reason the paper cannot be produced, as where it is lost or destroyed, or is in the hands of the adverse party, it is permissible to prove the handwriting by a witness who has seen the instrument and testifies as to its genuineness from familiarity with the handwriting of the alleged writer;<sup>4</sup> or, when the witness is an expert, he has been allowed to testify by a comparison of his recollection of the disputed paper with other writings known to be genuine.<sup>5</sup>

**Clear Proof Required.** — It has been held that more stringent proof is required in such cases than when the instrument is produced in court.<sup>6</sup>

**Witness Must Be Qualified.** — And it must clearly appear that the witness is qualified to express an opinion.<sup>7</sup>

**4. Proof of Mark.** — It has been held that an illiterate person's signature by his mark, being in its nature incapable of identification, cannot be proved.<sup>8</sup> But a mark presenting peculiarities which a witness claims to be able to recog-

cock *v.* O'Rourke, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 540; Koons *v.* State, 36 Ohio St. 195; Bratt *v.* State, 38 Tex. Crim. 121; State *v.* Ward, 39 Vt. 225; Wright *v.* Williams, 47 Vt. 222.

**1. Weight of Expert's Testimony for Jury.** — U. S. *v.* Malloy, 31 Fed. Rep. 19; U. S. *v.* Pendergast, 32 Fed. Rep. 108; Bradford *v.* People, 22 Colo. 157; Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123; Christman *v.* Pearson, 100 Iowa 634; Ort *v.* Fowler, 31 Kan. 478; Com. *v.* Williams, 105 Mass. 62; Koons *v.* State, 36 Ohio St. 195.

**2. Weight of Evidence for Court in Trial Without Jury.** — Green *v.* Terwilliger, 56 Fed. Rep. 384; Lay *v.* Wissman, 36 Iowa 305.

**3. Instrument to Be Proved Must Be Produced in Court.** — Muggie *v.* Adams, 76 Tex. 448.

Handwriting cannot be proved by a comparison of a detailed description by an expert of the disputed writing with a similar description of genuine writings not in evidence. Morey *v.* Safe Deposit Co., 34 N. Y. Super. Ct. 154.

As to when the production of written instruments will be excused, see the title PRODUCTION OF DOCUMENTS.

**4. Proof of Lost Instruments by Witness Familiar with Party's Handwriting.** — Alexander *v.* Vye, 16 Can. Sup. Ct. 501; Spottiswood *v.* Weir, 80 Cal. 448; State *v.* Breckenridge, 67 Iowa 204; Porter *v.* Wilson, 13 Pa. St. 641. See also Sayer *v.* Glossop, 2 Exch. 409 (witness admitted to prove the signature of party in a marriage register, the original not being obtainable).

A person who has had possession of a document and destroyed it may prove that it was written by a particular individual, although he only acquired knowledge of the handwriting of such person some weeks after the document was destroyed, and can only say that from his recollection of such document that it was written by such person. Alexander *v.* Vye, 16 Can. Sup. Ct. 501.

Where, in a case of probate, a witness unable to attend the court was examined by deposition as to the handwriting of a testamentary paper which had been shown to him by the propounder of the will, but which was not before him at the time when he gave his deposition, it was held that the testimony was admissible, its weight depending upon the certainty of the proof that the paper propounded for probate was the paper that was shown to the witness. Nuckols *v.* Jones, 8 Gratt. (Va.) 267.

**5. Proof by Experts.** — Hammond *v.* Wolf, 78 Iowa 227; Abbott *v.* Coleman, 22 Kan. 250; State *v.* Shinborn, 46 N. H. 497; Koons *v.* State, 36 Ohio St. 195; Riley *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 498.

**6. Clear Proof Required.** — Porter *v.* Wilson, 13 Pa. St. 641.

The testimony of experts in regard to the handwriting of a lost instrument is regarded as of less value than their testimony as to writings produced in court. Hammond *v.* Wolf, 78 Iowa 227.

But in Bradley *v.* Long, 2 Strobb. L. (S. Car.) 160, it was held that the fact that a note had been destroyed would dispense with strict proof of the handwriting.

**7. Spottiswood *v.* Weir,** 80 Cal. 448; Koons *v.* State, 36 Ohio St. 195; Porter *v.* Wilson, 13 Pa. St. 641.

**8. Mark Cannot Be Proved.** — Watts *v.* Kilburn, 7 Ga. 356; Travers *v.* Snyder, 38 Ill. App. 379; Allen *v.* Moss, 27 Mo. 354; Carrier *v.* Hampton, 11 Ired. L. (33 N. Car.) 307; Gilliam *v.* Perkinson, 4 Rand. (Va.) 325. See also Jones *v.* Hough, 77 Ala. 437; Jackson *v.* Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330.

Although in extraordinary instances the mark of an illiterate person may become so well known as to be susceptible of proof like handwriting, yet generally a mark cannot be identified. Carrier *v.* Hampton, 11 Ired. L. (33 N. Car.) 307.

nize may be proved by such witness.<sup>1</sup>

5. **Value of Evidence as to Handwriting.** — Evidence as to the genuineness of handwriting is generally regarded as of a weak and unsatisfactory character, not only from the exactness with which handwriting may be imitated, but also on account of the dissimilarities to be found in different specimens of the handwriting of the same person executed at different times and under different circumstances.<sup>2</sup> Notwithstanding this, however, it is well recognized that a person's handwriting, however it may be changed or affected by time or circumstances, like his face or voice, will ordinarily exhibit certain distinctive peculiarities by which it may be recognized.<sup>3</sup> Upon principle, therefore, as well as from the necessity of the case, proof of handwriting, under proper restrictions, is, as has been seen, everywhere admitted. Moreover, as has been well said, it seems that this kind of evidence, like all other probable evidence, admits of every degree of certainty, from the lowest presumption to the highest moral certainty.<sup>4</sup>

III. **PROOF OF IDENTITY BY COMPARISON OF HANDWRITING.** — Two writings, ordinarily purporting to have been written by different persons, but both shown to be genuine, may be compared with a view to determining whether or not the writer of the one and the writer of the other are in fact one and the same person. Comparison of handwriting for this purpose has been held competent, though the attention of the courts has been but seldom directed to the subject.<sup>5</sup>

#### HAPPEN. — See note 6.

1. **Proof of Mark When Peculiar.** — *George v. Surrey*, M. & M. 516, 22 E. C. L. 371; *Strong v. Brewer*, 17 Ala. 706; *Nelius v. Brickell*, 1 Hayw. (2 N. Car.) 19; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47.

In *State v. Tice*, 30 Oregon 457, a witness who claimed to be familiar with the mark of an illiterate person was permitted to give an opinion as to the genuineness of a disputed mark from comparing it with a genuine mark.

See generally the titles MARK; SIGNATURE.

2. **Evidence as to Handwriting Inconclusive.** — *Robson v. Locke*, 2 Add. Ecc. 53; *Robinson v. Arnet*, 15 La. 262; *Matter of Gordon*, 50 N. J. Eq. 397; *Jones v. State*, 7 Tex. App. 457. See also *supra*, this section, *Value of Expert Testimony*.

The opinions of witnesses that an instrument is a forgery, based upon familiarity with the handwriting of the alleged writer, are the weakest and least reliable of all evidence as against direct proof of the execution of the instrument. *Turner v. Hand*, 3 Wall. Jr. (C. C.) 88.

The sworn statement of a man of admitted truth that he did not write certain memoranda will outweigh the conflicting testimony of witnesses, some of whom recognize a resemblance to his handwriting in that of the memoranda and some of whom do not. *Bayly v. Fourchy*, 32 La. Ann. 136.

**Evidence Held Insufficient.** — Where, on the question of the genuineness of a signature, witnesses testified that it resembled another signature by the same person admitted to be genuine, but that they could not state that the two were made by the same person, it was held that this was insufficient proof to admit the paper in evidence. *Ballard v. Perry*, 28 Tex. 31.

3. *Strong v. Brewer*, 17 Ala. 706; *Jones v.*

*Hough*, 77 Ala. 437; *Matter of Gordon*, 50 N. J. Eq. 397; *Plunket v. Bowman*, 2 McCord L. (S. Car.) 138; *Gilliam v. Perkinson*, 4 Rand. (Va.) 325; *Hanriot v. Sherwood*, 82 Va. 1.

4. *Per Dargan*, C. J., in *Strong v. Brewer*, 17 Ala. 706, citing 1 Phillips on Ev. 484; and *per Williams*, J., in *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406.

5. **Comparison of Handwriting to Prove Identity.** — In the famous Tichborne trial, handwriting was admitted as strong evidence bearing on the question of identity. See *The Tichborne Trial*, (London ed.) 762-783. And see the article "Handwriting as Evidence of Identity," reprinted from the Solicitors' Journal, in 22 Cent. L. J. 316.

Where, in an action on an insurance policy, the main defense was that the insured was not dead, but had absconded in order to defraud the insurance company into paying the amount of the policy under the belief that he was dead, and there was evidence tending to identify the insured with a person calling himself by a different name who appeared in another state a short time after the disappearance of the insured, a comparison between letters written by such person and certain documents written by the insured was permitted as bearing upon the question of the identity of the two persons. *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751.

Upon an issue of fact as to whether A and B were the same person, it was held competent to compare the genuine writings of A and B for the purpose of proving their identity. *Bell v. Brewster*, 44 Ohio St. 690.

6. **Happening of a Vacancy.** (See also the titles PUBLIC OFFICERS; LEGISLATURE.) — The *Completion of a Vacancy* is the completion of a vacancy when a vacancy happens in the representation of a state or territory in the United States.



**HAPPINESS.** — As to the meaning of this word as used in the Declaration of Independence, which enumerates among the inalienable rights of mankind "the pursuit of happiness," see the titles LABOR REGULATIONS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.

**HARASS.** — See note 1.

**HARBOR.** (See also the titles MARINE INSURANCE; NAVIGABLE WATERS; NAVIGATION; and see PORT.) — I. The word "harbor" in its usual and ordinary sense means an indentation in the coast of a lake, sea, or ocean, extending

shall issue writs of election to fill such vacancy. In *In re Representation Vacancy*, 15 R. I. 623, it was held that an illegal election was the *happening* of a vacancy, within this provision.

Section 2, art. 2, of the Constitution of the United States provides that "the President shall have power to fill up all vacancies that may *happen* during the recess of the senate, by granting commissions, which shall expire at the end of their next session." The phrase "vacancies that may *happen*" used in this section, has been construed to mean vacancies that may exist, including those that may have occurred before as well as those that may have occurred during the recess. *Matter of Farrow*, 3 Fed. Rep. 112. The court quoted the opinion of Mr. William Wirt, attorney-general of the United States under President Monroe, as follows: "In reason it seems to me perfectly immaterial when the vacancy first arose, for, whether it arose during the session of the senate or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. \* \* \* This seems to me the only construction of the constitution which is compatible with its spirit, reason, and purpose, while at the same time it offers no violence to its language, and these are, I think, the governing points to which all sound construction looks."

The Constitution of *New Jersey* provides that "when a vacancy *happens* during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the commission shall expire at the end of the next session of the legislature, unless a successor shall be sooner appointed." It was held that under the clause the governor may, in the recess, make an appointment to fill the office temporarily, where the vacancy first began during the session of the legislature. *Fritts v. Kuhl*, 51 N. J. L. 191.

**Same—Creation of New Circuit or County.** — Under a constitutional provision that the governor might fill any vacancy that might *happen* in any office which he was authorized to fill, it was held that a vacancy in a county office happened when a new county was erected. *Walsh v. Com.*, 89 Pa. St. 419, 33 Am. Rep. 771.

But a provision of the Constitution of *Wisconsin* that "when a vacancy shall *happen* in the office of judge of the Supreme or Circuit Courts, such vacancy shall be filled by an appointment by the governor, which shall continue until a successor is elected and qualified" was held not applicable to a case where

a vacancy existed in the office of circuit judge by reason of the creation of a new circuit by the legislature. *State v. Messmore*, 14 Wis. 178.

**Same—Occur.** — In *Miller v. Washington*, 2 Hayw. & H. (D. C.) 244, it was said: "The only difference in the two provisions, as to filling vacancies, is that in the city charter the power is to fill vacancies which may 'occur' in the recess, and in the Constitution of the United States, to fill the vacancies which may *happen* in the recess. In both the appointments are to continue till the end of the next session. There may be a difference in the meaning of the words 'occur' and *happen*, but I shall indulge in no verbal criticism, but treat the two provisions as in substance the same." See also *Walsh v. Com.*, 89 Pa. St. 419.

**Happening.** — By a will made November 15, 1866, the testatrix devised all her estate to her husband in fee. In January, 1876, she and her husband being about to travel abroad, she made a will, beginning with the words, "In case of anything *happening* us, I would wish," etc., and devising her estate to her sister. It was held that the second will was contingent; that the contingency provided for was not the death of her husband before herself, nor the death of both by the same accident, but was the death of both while upon their travels. The court said: "The phrase 'in case of anything *happening* us' is equivalent to 'in case of the death of myself and my husband.'" *Cowley v. Knapp*, 42 N. J. L. 297, 302.

**Happens to Be.** — A statute provided that for the purpose of proceeding under it, every cause or complaint should be deemed to have arisen in any place in which the person charged or complained against *happened* to be. In construing this provision *Blackburn, J.*, in *Johnson v. Colam*, L. R. 10 Q. B. 548, said: "I am further of opinion that the words '*happens to be*' must mean in any place in which he is after the offense is complete."

**1. Injuring and Harassing.** (See also the title ATTACHMENT, vol. 3, p. 206.) — A statute required that the affidavit in attachment should state that the attachment was not sued out for the purpose of injuring or *harassing* the defendant. It was held that the affidavit stating that the attachment was not sued out for the purpose of injuring and *harassing* the defendant was not in compliance with the statute. The court said that to comply with the requirements of the statute the affidavit must show "that the attachment was not sued out for the purpose of either injuring the defendant, or of *harassing* him. The affidavit in question was that the writ was not sued for both the one and the other purpose." *Moody v. Levy*, 58 Tex. 533.

into the country in such a manner as to form an inlet or bay sufficiently narrow between the headlands to afford protection to vessels against wind and storm upon the waters.<sup>1</sup> II. In the law of torts, to harbor is to receive clandestinely, or without lawful authority, a person for the purpose of so concealing him that another, having a right to the lawful custody of such person, shall be deprived thereof; for example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or in a less technical sense, it is the reception of persons improperly.<sup>2</sup>

**HARD.** — See note 3.

1. **Harbor.** — *People v. Kirsch*, 67 Mich. 539; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 394; *New England Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1; *The Schooner Fame*, 3 Mason (U. S.) 147; *De Lovio v. Boit*, 2 Gall. (U. S.) 398.

A harbor is a station for ships; a place of refuge, shelter, rest. *The Aurania and The Republic*, 29 Fed. Rep. 103.

In *Reg. v. Hannam*, 2 Times Rep. 234, *Esher, M. R.*, said: "A harbor, in its ordinary sense, is a place to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods. The quays are a necessary part of a harbor." See also *QUAY*.

A body of water need not be landlocked or absolutely safe from every wind that blows in order to be a haven or harbor. *The Aurania and The Republic*, 29 Fed. Rep. 103; *Huntington v. Lowndes*, 40 Fed. Rep. 625, affirmed 153 U. S. 1. In the latter case it was held that *Huntington Bay*, a body of water lying between *Lloyd's Neck* and *Eaton's Neck*, on the north side of *Long Island*, in the state of *New York*, was a haven or harbor.

**Harbor and Port.** — *Harbor* and "port" are commonly used as synonymous terms, but sometimes "port" is used in a more general sense. *Martin v. Hilton*, 9 Met. (Mass.) 377.

**The Grand River**, in Michigan, at a point three miles upstream from the mouth, is not a harbor in the sense in which that word is used in the statute of Michigan, making it unlawful to catch fish in a certain way, except in certain places, *inter alia*, the harbors connected with *Lake Michigan*. *People v. Kirsch*, 67 Mich. 542.

**Land — Wills.** — In *Nichols v. Lewis*, 15 Conn. 137, it was held that harbor as used in a will referred to the land about a bay rather than to the bay itself; and the court said that this was not an uncommon meaning.

**Harbor Fees.** — The power to lay a tax on commerce in the form of a tonnage duty on vessels is vested in Congress alone; hence an ordinance of the corporation of Washington which, under the name of "harbor fees," imposes such a duty on vessels coming to its port is void. *Washington v. Barnes*, 6 D. C. 230.

See also the title *TAXATION*.

2. See also the titles *APPRENTICES*, vol. 2, p. 507; *HABEAS CORPUS*, *ante*; *HUSBAND AND WIFE*, *CO. PAROLE AND CHILD*, *ante*; *JONES v. Van Zandt*, 5 How. (U. S.) 227.

**Conceal — Harboring Slaves.** — Upon the construction of the word harbor as used in the *Fugitive Slave Act*, *Grier, J.*, in charging the jury in *Van Metre v. Mitchell*, 2 Wall. Jr. (C. C.) 311, said: "The word harbor is defined

by *Dr. Johnson* and other lexicographers, 'to entertain,' 'to permit to reside,' 'to shelter,' 'to secure,' and *Dr. Webster* adds 'to secrete.' It has various shades of meaning not exactly defined by any synonym. \* \* \* The Act of Congress, by using the terms 'harbor or conceal,' assumed, I think, that the terms are not synonymous and that there might be a harboring without concealment. \* \* \* But neither in legal use nor in common parlance is the word harbor precisely defined by the words 'entertain' or 'shelter' given by *Dr. Johnson* as two of its meanings. It implies impropriety in the conduct of the person giving the entertainment or shelter, in consequence of some imputations on the character of the person who receives it." And upon the construction of the term in this connection see also *Driskill v. Parrish*, 3 McLean (U. S.) 631, 5 McLean (U. S.) 64; *Jones v. Vanzandt*, 2 McLean (U. S.) 614, 5 How. (U. S.) 215; *Ray v. Donnell*, 4 McLean (U. S.) 504; *Cook v. State*, 26 Ga. 603; *McElhaney v. State*, 24 Ala. 71; *Eells v. People*, 5 Ill. 408.

**Same — Harboring Seamen.** — In *U. S. v. Grant*, 55 Fed. Rep. 414, it was held that a defendant might be guilty under a statute against harboring and secreting seamen, although there was no concealment of his acts. The court said: "Various shades of meaning may be found for the word to harbor, and, while it may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, it may also, under certain circumstances, be equally applicable to those acts divested of any accompanying secrecy. In the statute under consideration the inhibition is against both harboring and secreting. The intention evidently was to declare unlawful other acts than the mere concealment of deserting seamen." See also the title *SEAMEN*.

**Thieves.** — The English Crimes Act of 32 & 33 Vict. made it criminal to harbor thieves. It was held that to harbor meant to give shelter to persons, or to permit them to congregate. *Marshall v. Fox*, L. R. 6 Q. B. 370.

3. **Hard Labor.** (See also the titles *PRISONS*; *SENTENCE AND IMPRISONMENT*.) — A sentence to five months' imprisonment at hard labor was held valid, although a later act excluded the word hard. The court held that hard might be treated as surplusage. *Weaver v. Com.*, 29 Pa. St. 448.

A statute provided that any person convicted of manslaughter might, at the discretion of the jury, be imprisoned in the penitentiary or sentenced to hard labor in the county jail for not less than one year. It was held that a sentence of the jury on conviction of man-



**HARDPAN.** (See also the title WORKING CONTRACTS.)—Hardpan is defined as a hard stratum of earth.<sup>1</sup>

**HARMLESS ERROR.**—See 2 ENCYC. OF PL. AND PR. 499, title APPEALS; and the specific titles of that work, as CONTINUANCES, vol. 4, p. 822; NEW TRIAL, vol. 14, p. 707, etc.

**HARMONY.**—See note 2.

**HARVEST.**—The word "harvest" designates the time when crops of grain and grass are gathered, and does not apply to second crops, cut out of harvest season.<sup>3</sup>

**HAS.**—See HAVE, *post*.

**HATH.**—See HAVE, *post*.

**HAUL.**—See note 4.

slaughter to thirty months at *hard* labor authorized a sentence of imprisonment in the penitentiary for thirty months. The words "*hard* labor" are not necessarily to be construed to import *hard* labor for the county and not for the state. *Gunter v. State*, 83 Ala. 96, 10 Crim. L. Mag. 428.

**Hard Cider—Intoxicating Liquors.** (See also the title INTOXICATING LIQUORS; and see CIDER, vol. 6, p. 10.)—In holding *hard* cider to be within the prohibition of a statute against the sale of intoxicating liquors, in *State v. Schaefer*, 44 Kan. 94, the court said: "Therefore all the courts will take judicial notice that when the phrase '*hard* cider' is used in court by a witness, it means fermented cider or liquor, and is within the prohibition of the statute. If the witnesses for the state had testified that they drank cider, not *hard* cider, then, under the definitions of Webster and some of the other lexicographers, we would not presume that the cider was fermented and intoxicating. *Hard* cider is cider excessively fermented; and therefore, presumptively, *hard* cider is not only a fermented liquor, but intoxicating." See also *State v. McLafferty*, 47 Kan. 141.

**1. Earth or Rock.**—*Dickinson v. Poughkeepsie*, 75 N. Y. 76, 2 Hun (N. Y.) 615, in which case it was held that *hardpan* was to be classified as earth rather than as rock, where the contract provided for the excavation of earth and rock only.

**Hardpan and Indurated Earth or Gravel Synonymous.**—*Blair v. Corby*, 37 Mo. 318; *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio 397.

**Quantum Meruit.**—A party entered into a contract for the construction of a section of a canal, by the terms whereof he was to receive a given price per cubic yard for ordinary excavation, and an increased sum per cubic yard for excavation of rock, but no compensation was provided for excavation of *hardpan*. In the progress of the work a large quantity of *hardpan* was excavated, a fair remuneration for which exceeded the highest price specified in the contract for any species of work. The parties, while the section was being constructed, treated the excavation of *hardpan* as not embraced in the contract, and after the completion of the work it was conceded by the canal company, for whom the work was done, that the contractor was entitled to compensation for such work beyond the price fixed for ordinary excavation, but the parties did not agree as to the amount. It was held that the

contractor was entitled to recover for such work, upon a *quantum meruit*, whatever he could show the work to be worth. *Dubois v. Delaware, etc., Canal Co.*, 12 Wend. (N. Y.) 334, *affirmed* 15 Wend. (N. Y.) 87.

**Expert.**—What *hardpan* is, and whether any was found in excavating, are not questions relating to a matter of science, art, or skill; and it is not necessary that a witness should be shown to be qualified as an expert before he can be thus interrogated. *Currier v. Boston, etc., R. Co.*, 34 N. H. 498. See generally the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

**2. Harmony.**—The charter of the city of St. Louis was formed by a board of freeholders, under a constitutional requirement that it should be "in *harmony* with and subject to the Constitution and laws of Missouri." In construing this provision the court said: "By the word *harmony*, in this connection, is not to be understood an exact coincidence in all possible points of comparison. Its meaning is, clearly, that no regulation established by the charter, nor any made by its authority, shall do violence either to the declared laws or to the policy or manifest governmental purposes of the state, as shown in her constitution and statutory enactments." *In re Dunn*, 9 Mo. App. 259.

**3. Harvest.**—A sold a reaping and mowing machine to B, and warranted it to do good work of a certain character. But in the contract of warranty it was provided as follows: "Keeping the machine during *harvest*, whether kept in use or not, without giving notice as above, shall be deemed conclusive evidence that the machine fills the warranty." In an action by the purchaser against the vendor, based on this warranty, the court charged the jury as follows: "The word *harvest*, as used in the warranty in this case, means the usual time of harvesting small grain and grass, and should not be construed as including the cutting of a second crop of grass in the fall of the year, after the usual time for cutting small grain and grass." On appeal this portion of the charge was held to have been correct. *Wendall v. Osborne*, 63 Iowa 99.

**4. Haul and Carry.**—A statute of *Indiana* provides that "whoever shall feloniously steal, take and carry, lead, or drive away the personal goods of another" shall be guilty of larceny. An indictment in a prosecution under the act charged that the defendant "did feloniously steal, take, and *haul* away fifty



## HAVE, HAVING, ETC. — See note 1.

pounds of tobacco," etc. It was held that the use of the word *haul* instead of "carry" did not render the indictment bad. *Spittorff v. State*, 108 Ind. 171.

**Handling and Hauling.** — See **HANDLING**, *ante*.

1. **Ownership or Possession.** — It is said that the word *having* imports two things, ownership and time of ownership. *Butler's Case*, 3 Coke 30; *George v. Green*, 13 N. H. 528; *Chapman v. Turner*, 1 Call (Va.) 294. See also *Franklin v. State*, 52 Ala. 415.

**Same — Receive.** (See also **RECEIVE**.) — A statute provided that a purchaser at a judicial sale should be entitled to "receive" the rent until the redemption. In construing this provision in *Knipe v. Austin*, 13 Wash. 189, the court said: "We do not think that the legislature indulged in any fine distinctions between the word 'receive' and the word *have*, as is contended by the respondents; that if they had said 'he shall be entitled to *have*,' they would not have said any more than was said by the expression 'shall be entitled to receive'."

**Same — Fee Simple.** — Where the testator devised that one should *have* his land, it was held that the devisee took the land in fee simple. *Fairclain v. Guthrie*, 1 Call (Va.) 13.

**Same — Legal Estate.** — Where a statute provided that none should be qualified for a certain office that *have* not four hundred acres, it was held that the mere legal estate qualified. *Childers v. Childers*, 1 De G. & J. 482.

**Same — "Having and Holding" Lands, etc.** — For a construction of this phrase as used in the English Land Tax Act of 38 Geo. III., c. 5, see *Ward v. Const*, 10 B. & C. 635, 21 E. C. L. 141.

**Same — "Have or Keep" — "Have or Convey."** — The term *have* has been held to be synonymous with the terms "keep" and "convey," as used in the statute 12 Geo. III., c. 661, §§ 11 and 18, prohibiting the *having*, etc., of gunpowder. *Biggs v. Mitchell*, 2 B. & S. 523, 110 E. C. L. 523. See also the title **EXPLOSIONS AND EXPLOSIVES**, vol. 12, p. 507, note 6.

**Same — Fire Insurance.** — As to clauses in insurance policies in regard to *having* or keeping inflammable articles on the premises insured, see the title **FIRE INSURANCE**, vol. 13, p. 290 *et seq.*, and especially note 3, p. 293.

**Same — Having or Conveying.** — Of these words, as used in a statute against receiving stolen goods, *Blackburn, J.*, said: "'*Having* in his possession' may perhaps have been introduced to meet the case of the person who arrested the man when he came to offer the goods for sale or pledge. But '*having* or conveying' I think must be limited, making the one coextensive with the other, and confining it to *having ejusdem generis* with 'conveying.'" *Hadley v. Perks*, L. R. 1 Q. B. 457.

**Same — A Court Having a Seal.** — A statute of *California* authorized the clerk of a "court *having* a seal" to take oaths. An acknowledgment was taken by a clerk of a court required by statute to *have* a seal, but for which no official seal had as yet been provided. It was held that the acknowledgment was valid. The court said: "This general phrase

'*having* a seal' was only intended to denote a court of record, which is defined to be a court *having* a seal. The power of the clerk was never intended to be made to depend upon the fact of his *having* procured this article, or the care with which he preserved it." *Ingoldsby v. Juan*, 12 Cal. 564.

**Leaving — Die Without Having Children or Issue.** (See also the title **WILLS**.) — A testator bequeathed personal property to A, but provided that if A should die "without *having* child or children," the said property should go to B. A had a child that died in her lifetime. It was contended that the word *having*, in the phrase above quoted, ought to be construed as synonymous with "leaving," and that, therefore, upon the death of A, the bequest over to B took effect. But it was held by the court, in order to carry out what appeared from the evidence to have been the testator's intention, that the absolute interest vested in A upon the birth of her child. *Lord Kenyon, C. J.*, declared this to be "also the fair grammatical construction, for the meaning of the word 'leaving' is essentially different from that of *having*." *Weakley v. Rugg*, 7 T. R. 322.

The several general expressions, "*having* no issue," "leaving no issue," and "without issue," when used in relation to real estate, mean, according to the settled legal construction, an indefinite failure of issue, and must, whenever found in a will, be taken in their technical sense, unless a different intention clearly appears. *Newton v. Griffith*, 1 Har. & G. (Md.) 125; *Tongue v. Nutwell*, 13 Md. 425. See also *Lee's Case*, 1 Leon. 385; *Cole v. Goble*, 13 C. B. 445, 76 E. C. L. 445; *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

A testator devised real estate to A, without any words of limitation; but there was a devise over in the event of A's "dying without *having* any lawful issue." It was held that the devise over would take effect only on an indefinite failure of A's issue; and that, therefore, A took an estate tail. *Having*, in the phrase quoted, was construed as equivalent to the word "leaving." *Cole v. Goble*, 13 C. B. 445, 76 E. C. L. 445.

Upon a person's dying without *having* children, certain property was to pass into remainder. In construing this provision in *Wiley v. Smith*, 3 Ga. 563, the court said: "*Having* children I think is synonymous with 'leaving' children."

**Tense.** — In the following letter: "Messrs. B., S. & Co. — Gentlemen: In consideration of your *having* indorsed the under-mentioned notes, drawn by D. T. in your favor, we hereby hold ourselves accountable to you for them in the same manner as though said notes were drawn by us," signed, "S., T. & Co.," the words "your *having* indorsed" were held by a divided court to import a past consideration. *Bulkley v. Landon*, 2 Conn. 404.

**Same — Having Agreed.** — A declaration in assumpsit stated that T. had commenced an action against M. for one hundred and sixty-five pounds; and that in consideration of T.'s "agreeing to stay the said action," the defendant promised to pay to T. the one hundred and sixty-five pounds within six months next

**HAVEN.** (See also HARBOR, *ante*, and the references there given.) — A place of a large receipt and safe riding of ships, so situate and secured by the lands circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds.<sup>1</sup>

after the decease of A. The promise, as proved, was to pay as above in consideration of T.'s "*having* agreed" to stay the action. It was held that there was no variance, and that a valid consideration was proved. *Tanner v. Moore*, 9 Q. B. 1, 58 E. C. L. 1.

**Same — Having This Day Advanced.** — The following guaranty was addressed to the plaintiffs and signed by the defendants: "In consideration of your *having* this day advanced to our client, Mr. V. D., \* \* \* £750, \* \* \* we hereby jointly and severally undertake to pay the same \* \* \* in case default should be made." In an action on such guaranty it was held that the words "your *having* this day advanced" were sufficiently ambiguous to render evidence admissible to show that the advance was not a past one, but was made simultaneously with the execution of the guaranty. *Alderson, B.*, said: "The words 'your *having* this day advanced,' no advance having been made, show that they do not refer to a past event. If the words had been '*having* advanced yesterday,' the evidence would not have been admissible, as it would have been a contradiction." *Goldshede v. Swan*, 1 Exch. 154. See also *King v. Cole*, 2 Exch. 628.

**Same — Having Resigned.** — The defendant sent to the plaintiff the following letter: "In consideration of your *having* resigned the office of deacon and your connection with the Baptist church and congregation at C., I hereby agree to hold myself responsible to you for the payment of the sum of one hundred and fifty pounds due to the Rev. J. E. by the Baptist church, C., \* \* \* for which you and M., deacons of the said church, became responsible to the Rev. J. E. by an instrument bearing date," etc. It was held, on argument of a special case, in an action on this promise, that the letter showed a valid consideration. The court said: "We think that the words [*having* resigned], in their ordinary acceptance, are capable of expressing either a past or a concurrent consideration; and as upon one construction the instrument is void, the other is to be adopted, which makes it valid." *Steele v. Hoe*, 14 Q. B. 431, 68 E. C. L. 431. See also *Payne v. Wilson*, 7 B. & C. 423, 14 E. C. L. 69; *Butcher v. Stuart*, 11 M. & W. 857.

**Same — Have Given.** — In *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440, it was held that the words "*have* given and granted" would pass a present estate, either the past or present tense being sufficient. See also the title DEEDS, vol. 9, p. 138.

**Same — "Has" Held Equivalent to "May Have."** — A statute forbidding sales of goods within a certain distance of a camp meeting contained a proviso that "whosoever *has* his regular place of business within such limits is not hereby required to suspend his business." The court held that the protection of the proviso was not confined to persons "who might *have* a business within the designated limits at the time the act was passed," but was in-

tended to extend also to those "who might engage in regular business, within the designated limits, after the passage of the act." The court said: "We think the word *has* in the proviso should be read '*may have*.'" *Meyers v. Baker*, 120 Ill. 567.

**Same — Hath Absconded.** — A statute provided that a writ of attachment might issue where a creditor should make complaint on oath that his debtor "so absconds" that the ordinary process of law could not be served on him. In construing this provision in *Wallis v. Wallace*, 6 How. (Miss.) 255, the court said: "The statement in the affidavit is that the debtor '*hath* absconded,' so that the ordinary process of the law cannot be served on him. Hence it is urged that the affidavit, by using the past tense instead of the present, does not correspond to the statute. But we do not consider it necessary that the affidavit should adopt the precise language of the law; it is sufficient if the substantial requirements of the act are complied with. If the debtor '*hath* absconded,' it may be assumed that he still absconds."

**Same — Has Been.** — A statute of limitations provided that a prosecution should be legal when the indictment *has* been or may be found within five years from the commission of the offense. The court said: "The Act of 1879 is doubtless retrospective, but every word of it, save two, may have effect, and yet reach only past offenses still subject to punishment when it was enacted. These two words make the prosecution legal where 'the indictment *has* been found within five years from the time of committing the offense.' This provision is nugatory, unless it was meant to legalize indictments theretofore found more than two years after the crime." *Moore v. State*, 43 N. J. L. 224. See generally the title LIMITATION OF ACTIONS.

**Have Judgment.** — Where the record in a cause, after reciting the trial and verdict, proceeded, "therefore it is considered and adjudged by the court that the plaintiff in this action *have* judgment," etc., it was held that this was a judgment, and not merely an order for judgment; and the court did not err in refusing to set aside the docketing thereof, and subsequent proceedings thereon, on the ground that there was no judgment. The court said: "The words '*have* judgment,' in the entry here, are equivalent to '*hereby have* judgment,' or '*recover*,' as found in the same connection in ordinary entries or forms of judgment." *Potter v. Eaton*, 26 Wis. 382.

And it has been held that a recital in an order that the justices "*have* adjudged" is equivalent to a recital that they "*do* adjudge." *Rex v. St. Nicholas*, 3 Ad. & El. 79, 30 E. C. L. 36. To the same effect see *Rex v. Maulden*, 8 B. & C. 78, 15 E. C. L. 155.

**1. Haven.** — *Hale, De Jure Maris*, quoted in *U. S. v. Morel*, 13 Am. Jur. 279, 1 Brun. Col. Cas. 373, where a *haven* was held not to be included in the term "high seas" in an act de-

fining the criminal jurisdiction of the United States courts.

"The admiralty has never held that the waters of *havens*, where the tide ebbs and flows, are properly the high seas, unless those waters are without low-water mark." *U. S. v. Hamilton*, 1 Mason (U. S.) 152.

"Sir Francis Moore, who drew up the statute of charitable uses of 43 Eliz., c. 4, says in his reading thereon that 'common ponds or watering places are within the equity of' the words 'ports and *havens*' in that statute." *Paine v. Woods*, 108 Mass. 169.

**Haven and Harbor.** — In *Lowndes v. Huntington*, 153 U. S. 23, the court said: "The word *haven* has perhaps a broader signification than 'harbor.' At any rate, the use of both words in the same grant suggests that all bodies of water which might come within the reach of either term were intended to be included in the grant. In Webster the first definition given to the word *haven* is 'a bay, recess, or inlet of the sea, or the mouth of a river, which affords good anchorage and a safe station for ships.'" In giving the decision in the court below, which was affirmed, Lacombe, J., said: "In this particular case, however, I do not think it necessary to determine precisely what would be the north and south limits of this patent, if we only had the words 'by the Sound' and 'by the sea.' The use of the words 'harbor' and *haven* seems to be sufficient to carry this particular body of water. I do not know that there is any rule of law, or any principle or practice of common speech, which requires that a harbor shall be landlocked, or that a *haven* shall be absolutely safe

from every wind that blows. Grants from the sovereign, as well as acts of legislatures or documents generally, are to be interpreted by giving to the words which they contain, in the absence of anything to indicate a contrary meaning, the plain ordinary meaning which they have in the educated speech of people by whom the language is employed. This particular body of water geographically indicates that it may be used as a *haven* or harbor, and the geographical appearance of the land is to be taken largely into consideration here; for these grants were made at a time when, I infer, the north shore of Long Island was not used to any particular extent for the purposes of navigation, it not being much settled at that time. The geographical appearance, then, of this body of water, bounded on three sides by land, would indicate its appropriateness as a harbor or *haven*; and experience — as to which we have been advised through the testimony of the witnesses, leaving out of view any points of dispute between them — goes to show that it has been used as a harbor or *haven*. It is not a perfectly safe harbor, nor an absolutely secure *haven*. It is a place which, when the wind is blowing, or is threatening to blow, from a northerly point, it is desirable, perhaps, to leave; but when the wind comes from the east or south or west it is a place which, in those circumstances, will afford a reasonably secure place of harbor, and a reasonable *haven* for ships. It seems that under the language of these grants, then, the title to the land in controversy was given to the town of Huntington." *Huntington v. Lowndes*, 40 Fed. Rep. 629.



# HAWKERS AND PEDDLERS.

BY W. J. TRACY.

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**I. DEFINITIONS AND DISTINCTIONS.**—Hawkers and Peddlers are persons who practice carrying merchandise about from place to place for sale, as opposed to traders who sell at established shops. Throughout the *United States* and *Canada*, generally, the words "hawker" and "peddler" are considered equivalent in law, the term "peddler" being more used at the present day.<sup>1</sup>

**Differentiated in England.**—The terms are not synonymous in *England*, but are distinguished by Act of Parliament. A hawker is any itinerant trader who travels with any beast bearing or drawing burden, or who employs any artificial method of locomotion in order to travel. A peddler travels and trades on foot and without any beast bearing burden.<sup>2</sup>

**The Essential Difference Between a Peddler and the Ordinary Merchant** is that the latter maintains a fixed or established place of business where goods are displayed and to which purchasers may resort, while the former transports his commodities about the country, seeking customers.<sup>3</sup>

**The Distinction Between a Peddler and a Commercial Traveler or Drummer** is that the former delivers the goods sold at the time of contract of sale, while the latter solicits orders for future delivery. A peddler sells directly to the consumer; the drummer usually deals with the retail trade.<sup>4</sup> A peddler, unless permitted by statute, so far as the public is concerned, is never an agent, but acts for himself, while a drummer is generally merely an agent for the sale of his principal's merchandise.<sup>5</sup>

**Itinerant Vendors or Transient Merchants.**—Itinerants of another class are sometimes confounded with hawkers and peddlers, although there is manifestly a distinction between them. Persons in this class are commonly known, and are usually designated in the statutes, as "licensed vendors or transient merchants." Like hawkers and peddlers, they travel from place to place selling goods at retail, and usually as principals and not as agents of others; but unlike hawkers and peddlers, they do not sell from a pack or vehicle, but at a store or building established in each locality as a temporary place of business. The dealers are itinerants, but their goods are sold in the customary mercantile manner.<sup>6</sup>

1. **Hawkers and Peddlers Defined.**—Hall v. State, 39 Fla. 668; Com. v. Ober, 12 Cush. (Mass.) 495.

In *Ford v. M'Arthur*, 37 U. C. Q. B. 542, the court, by Wilson, J., in considering the question whether the license to a hawker and peddler granted under the municipal acts was confined to the licensee only, used the terms "hawking" and "peddling" throughout the opinion as equivalent. See also *Randolph v. Yellowstone Kit*, 83 Ala. 472; *Olney v. Todd*, 47 Ill. App. 449; *South Bend v. Martin*, 142 Ind. 40. And see *Emert v. Missouri*, 156 U. S. 306.

2. **Differentiated in England.**—See the *Hawkers Act*, 1888, 51 & 52 Vict., c. 33; also the *Peddlars Act*, 1871, 34 & 35 Vict., c. 96. The English cases cited in this article which were decided upon the Act of 50 Geo. III., c. 41, and older statutes, are still applicable. The *Hawkers Act* of 1888 and the *Peddlars Act* of 1871 effected a consolidation of the law relating to the subject, and the words or terms upon which such decisions were based were repeated and re-enacted by the later acts.

3. **Distinction Between Peddler and Ordinary Merchant.**—*Graffy v. Rushville*, 107 Ind. 506, 57 Am. Rep. 128; *South Bend v. Martin*, 142 Ind. 40; *Com. v. Ober*, 12 Cush. (Mass.) 495; *Com. v. Gardner*, 133 Pa. St. 289, 19 Am. St. Rep. 645; *Com. v. Harmel*, 166 Pa. St. 94.

4. **Distinction Between Peddler and Drummer.**—*Emmons v. Lewistown*, 132 Ill. 380; *Kansas v. Collins*, 34 Kan. 434; *Ex p. Taylor*, 58 Miss. 478, 38 Am. Rep. 336.

5. *Wrought Iron Range Co. v. Johnson*, 84 Ga. 757; *Mabry v. Bullock*, 7 Dana (Ky.) 237; *Temple v. Sumner*, 51 Miss. 15, 24 Am. Rep. 615; *Ex p. Taylor*, 58 Miss. 481, 38 Am. Rep. 336; *Gibson v. Kauffield*, 63 Pa. St. 169. But compare the transaction before the court in *Keller v. State*, (Ala. 1899) 26 So. Rep. 323.

6. **Itinerant Vendors or Transient Merchants.**—*State v. Harrington*, 68 Vt. 624. See also *Carrollton v. Bazzette*, 159 Ill. 284; *Peoria v. Gugenheim*, 61 Ill. App. 375; *Ottumwa v. Zekind*, 95 Iowa 622, 58 Am. St. Rep. 447; *Wolf v. Runnels*, 90 Me. 253; *Greensboro v. Williams*, (N. Car. 1899) 32 S. E. Rep. 492.

**Traveling Agents.** — There are also itinerant traders who, while they are often confounded both with commercial travelers or drummers and with peddlers, are, by their method of traffic, distinct from either class. They are agents or employees of others, and do not vend their own goods; but they sell to individuals or consumers, and not to the retail trade. Such sales are sometimes made by sample, but frequently the goods are concurrently sold and delivered. In this class, where the exercise of their calling is not declared by statute to be peddling, sewing-machine agents would seem to be included; also book canvassers, and dealers of like description.<sup>1</sup>

**Confusion in Designating Terms.** — The diversity and lack of precision in statutory language employed in the enumeration or classification of occupations render it necessary, for a proper comprehension of such terms as "itinerant vendor," "traveling vendor,"<sup>2</sup> "transient merchant," and expressions apparently similar, to ascertain the technical meaning of the expression in the locality where it is used.

**II. WHAT CONSTITUTES HAWKING AND PEDDLING — 1. Itinerant Retail Traffic — a. IN GENERAL.** — Any trader who practices carrying merchandise from place to place for sale, as opposed to one who sells at an established shop or store, is a hawker or peddler.<sup>3</sup>

**Sale May Be by Barter.** — Such sales need not be for money, but may be by barter or exchange.<sup>4</sup>

**Traveling Generally Necessary.** — Ordinarily the term "peddling" imports or carries with it the idea of itinerant vending — of going about from place to place with goods and concurrently selling and delivering them<sup>5</sup> — but this conception of the term is sometimes modified or altered by statute.<sup>6</sup>

As to what constitutes an "itinerant person" within the Kentucky Statutes, § 4216, see *Bohon v. Brown*, (Ky. 1899) 49 S. W. Rep. 450.

There are definitions of these terms that would necessarily include, within their scope, certain hawkers and peddlers. See *Pacific Junction v. Dyer*, 64 Iowa 38.

1. See the title **COMMERCIAL TRAVELERS OR DRUMMERS**, vol. 6, p. 223; *Com. v. Farnum*, 114 Mass. 267; *State v. Moorehead*, 42 S. Car. 215, 46 Am. St. Rep. 719.

2. **Traveling Vendor — Louisiana.** — As used in a Louisiana tax law (Acts 1890, No. 150, § 13), the term "traveling vendor" is synonymous with "peddler." *Pegues v. Ray*, 50 La. Ann. 574, where the court, by Blanchard, J., in passing upon that statute, said: "A traveling vendor is a peddler on an enlarged scale. The term seems to convey that idea. Nevertheless, he is a peddler, because he carries wares which he sells and delivers at the same time, going from place to place for the purpose."

3. **What Constitutes — England.** — *Druce v. Gabb*, 6 W. R. 497; *Dean v. King*, 4 B. & Ald. 517, 6 E. C. L. 584; *Manson v. Hope*, 2 B. & S. 493, 110 E. C. L. 498; *Atty.-Gen. v. Woolhouse*, 1 Y. & J. 463, 12 Price 65.

*Connecticut.* — *Merriam v. Langdon*, 10 Conn. 461.

*District of Columbia.* — *In re Wilson*, 19 D. C. 348.

*Florida.* — *Hall v. State*, 39 Fla. 674.

*Georgia.* — *Gould v. Atlanta*, 55 Ga. 686; *Davis v. Macon*, 64 Ga. 136; *Burr v. Atlanta*, 64 Ga. 228; *Wrought Iron Range Co. v. Johnson*, 84 Ga. 757.

*Illinois.* — *Chicago v. Bartee*, 100 Ill. 61.

*Indiana.* — *Graffy v. Rushville*, 107 Ind.

506, 57 Am. Rep. 128; *Martin v. Rosedale*, 130 Ind. 112; *South Bend v. Martin*, 142 Ind. 54.

*Kentucky.* — *Mabry v. Bullock*, 7 Dana (Ky.) 337; *Rash v. Farley*, 91 Ky. 345, 34 Am. St. Rep. 233.

*Maine.* — *Andrews v. White*, 32 Me. 389; *State v. Montgomery*, 92 Me. 433.

*Massachusetts.* — *Com. v. Ober*, 12 Cush. (Mass.) 496; *Com. v. Newhall*, 164 Mass. 340.

*Michigan.* — *People v. Sawyer*, 106 Mich. 430; *People v. Baker*, 115 Mich. 199.

*Minnesota.* — *Duluth v. Krupp*, 46 Minn. 438.

*Missouri.* — *State v. Emert*, 103 Mo. 241, 23 Am. St. Rep. 874; *State v. Smithson*, 106 Mo. 154; *State v. Snoddy*, 128 Mo. 528.

*New York.* — *Best v. Bauder*, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 492; *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568, *affirming* 19 Hun (N. Y.) 548.

*Pennsylvania.* — *Com. v. Dunham*, 4 Pa. Super. Ct. 74; *Fisher v. Patterson*, 13 Pa. St. 336; *Warren v. Geer*, 117 Pa. St. 212; *Com. v. Gardner*, 133 Pa. St. 291, 19 Am. St. Rep. 645; *Titusville v. Brennan*, 143 Pa. St. 647, 24 Am. St. Rep. 580; *Com. v. Harmel*, 166 Pa. St. 89.

*Tennessee.* — *State v. Wilson*, 2 Lea (Tenn.) 28.

*Vermont.* — *State v. Hodgdon*, 41 Vt. 140.

4. **Peddling May Be by Barter.** — In *Druce v. Gabb*, 6 W. R. 497, it was held that a person who goes about the country and barters needles, thread, and tapes, for bones, rags, and other similar articles, is a hawker and peddler, and requires a license under the statute.

5. **Traveling Usually Necessary.** — *Pallou v. State*, 87 Ala. 146; *State v. Hoffman*, 50 Mo. App. 586. See also *Jones v. Berry*, 33 N. H. 209; *Morrill v. State*, 38 Wis. 430, 20 Am. Rep. 12; (1842) *Op. Atty.-Gen.*, (N. Y.) 111.

6. See *Graffy v. Rushville*, 107 Ind. 506, 57 Am. Rep. 128.



**Single Act of Selling Not Peddling.** — A single act of selling, although performed in the characteristic manner of peddlers, will not in itself constitute the act of hawking and peddling. It is the practice rather than a sporadic act of peddling that the law regards.<sup>1</sup>

**Ownership of Goods — Selling for Livelihood or Profit.** — Under the *Alabama* statute it is immaterial that the articles being peddled are or are not the property of the defendant; it suffices if he goes about with the owner, assisting him in making sales, receiving therefor payment of his expenses. Under this statute, it is enough if the business is prosecuted for either "a profit or a livelihood," it not being necessary that it should be for the twofold purpose of profit and livelihood.<sup>2</sup>

**.b. SELLING ON INSTALMENT PLAN.** — When the price of goods sold by an itinerant trader is not paid at the time of the contract of sale, but the goods are then delivered and the purchase price thereof is paid in periodical instalments, such dealer is usually held to be a hawker and peddler.<sup>3</sup>

**2. Mode of Transporting Merchandise.** — Except in *England*, the real status of a hawker and peddler is not generally affected or altered by the method adopted by him to transport his stock of merchandise, although the amount of the license fee may, perhaps, be graded thereby.<sup>4</sup> A person who travels with his wares from place to place, selling at retail, is, in the absence of any statutory provision to the contrary, a hawker and peddler, although his goods may be transported by common carriers, by his own or by hired conveyance, or by himself personally.<sup>5</sup>

**3. Exceptions and Exemptions — a. MANUFACTURERS, REAL WORKERS, AND MANUFACTURING MECHANICS.** — A manufacturer, real worker, or manufacturing mechanic selling his own products is not considered a hawker and peddler, unless declared so by statute.<sup>6</sup>

**Extended in Great Britain and Canada.** — In Great Britain this exemption extends to the children, apprentices, and servants of any real worker or maker of goods, usually residing in the same house with him, selling or seeking orders for wares made by him.<sup>7</sup> In Canada this same exemption seems to exist except where changed by provincial legislation or local laws.<sup>8</sup>

**1. Single Act of Selling Does Not Constitute Peddling.** — *In re Houston*, 47 Fed. Rep. 540; *Bythwood v. State*, 20 Ala. 47; *Spencer v. Whiting*, 68 Iowa 678; *Kansas v. Collins*, 34 Kan. 434; *Com. v. Farnum*, 114 Mass. 267; *State v. Belcher*, 1 McMull. L. (S. Car.) 40; *State v. Moorehead*, 42 S. Car. 214, 46 Am. St. Rep. 719. See also *infra*, this section, *Sellers by Sample and Sellers for Future Delivery*.

**But a Single Act, Coupled with the Intent to Continue Such Acts**, will, it has been held, constitute the offense. *Keller v. State*, (Ala. 1899) 26 So. Rep. 323.

**2. Keller v. State**, (Ala. 1899) 26 So. Rep. 323.

**3. Selling on Instalment Plan.** — *South Bend v. Martin*, 142 Ind. 54; *People v. Sawyer*, 106 Mich. 430; *Com. v. Harmel*, 166 Pa. St. 89; *Com. v. Dunham*, 4 Pa. Super. Ct. 74.

**4. See *infra*, this title, *Licenses*.**

**5. Method of Transporting Goods Not Important, unless Made So by Statute.** — *Dean v. King*, 4 B. & Ald. 517, 6 E. C. L. 584; *Ballou v. State*, 87 Ala. 146; *Cole v. Randolph*, 31 La. Ann. 537; *Fisher v. Patterson*, 13 Pa. St. 336.

**6. Manufacturers, Real Workers, and Manufacturing Mechanics.** — *People v. Sawyer*, 106 Mich. 430; *Ezell v. Thrasher*, 76 Ga. 818; *Rex v. Mainwaring*, 10 B. & C. 66, 21 E. C. L. 27; *Rex v. Faraday*, 1 B. & Ad. 275, 20 E. C. L.

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**A Watchmaker and Jeweler**, whose custom it was to buy and assemble the various parts of watches and then put them in marketable condition as watches, was held not to be a manufacturer, within the *Pennsylvania* Act of April 2, 1830 (P. L. 147, § 2). *Com. v. Percival*, 11 Pa. Super. Ct. 608.

**Real Worker Defined.** — The expression "real worker" is not common in the United States. As employed in England it seems to be equivalent to the term "maker," and, when used in relation to peddling, to denote a mechanic who traffics in commodities or products made by himself, or substantially so. It seems equivalent to "manufacturing mechanic" or "small manufacturer." *Rex v. Mainwaring*, 10 B. & C. 66, 21 E. C. L. 27; *Hawkers Act*, 1888, 51 & 52 Vict., c. 33.

**7. See *Hawkers Act*, 1888, 51 & 52 Vict., c. 33.** Under 50 Geo. III., c. 41, this exemption was supplied to the "known agents" of such maker or real worker. These words are omitted from the present *Hawkers Act*. See also *Rex v. Mainwaring*, 10 B. & C. 66, 21 E. C. L. 27.

**8. It exists (except in the province of Quebec), unless changed by provincial statutes, under the Act of 50 Geo. III., c. 41, § 23.** In the province of Ontario hawking and peddling is governed by imperial statute 24 &

In United States Restricted to Individuals. — In the United States while as a general rule a person who sells his own products is not required to take out a license in the absence of a statutory provision to the contrary, yet such exemption does not ordinarily extend beyond such person himself.<sup>1</sup>

*b.* FARMERS AND GARDENERS. — A farmer or gardener, although he may vend his commodities at retail, from door to door and from town to town, is not regarded as a hawker or peddler so long as he confines his sales to the growth or productions of his own farm or garden. The sale of farm or garden produce in such case is considered merely an incident in the principal business of farming or gardening.<sup>2</sup>

*c.* VENDORS FOR CHARITABLE PURPOSES. — In *England* it would seem that where the hawking or peddling is pursued from nonmercenary and charitable motives, and the profits of the undertaking are devoted to philanthropic or religious objects, the license act does not attach.<sup>3</sup>

*d.* SELLERS BY SAMPLE AND SELLERS FOR FUTURE DELIVERY — **General Rule in United States and Canada.** — Throughout the United States and Canada, a person who goes from house to house, either for himself or for his employer, soliciting orders for the purchase of goods to be delivered in the future, or exhibiting samples of merchandise and thereby securing such orders, is not usually considered a hawker and peddler.<sup>4</sup>

25 Vict., c. 21. And see the statutes of the various provinces. See also Reg. v. Coutts, 5 Ont. 644.

1. Does Not Extend to Employees. — *Wrought Iron Range Co. v. Johnson*, 84 Ga. 755; *State v. Rhyne*, 119 N. Car. 907. And see citations *infra*, this title, *Licenses* — *License a Personal and Individual Privilege*.

2. Farmers and Gardeners. — *Homewood v. Wilmington*, 5 Houst. (Del.) 123; *Burr v. Atlanta*, 64 Ga. 228; *Davis v. Macon*, 64 Ga. 132; *Roy v. Schuff*, 51 La. Ann. 86; *People v. Sawyer*, 106 Mich. 430; *Com. v. Gardner*, 133 Pa. St. 290, 19 Am. St. Rep. 645; *Lansford v. Wertman*, 18 Pa. Co. Ct. 469; *Irwin v. Douglass*, 8 Pa. Dist. 505.

Butcher Held Not a Peddler. — *State v. Kumpel*, 2 Marv. (Del.) 464.

3. Vendors for Charitable Objects. — Twelve women, of whom the respondent was one, having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a missionary basket, from house to house, for sale. The women did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes. It was held that the respondent did not come within the definition of a peddler given in section 3 of the Pedlars Act of 1871 (34 & 35 Vict., c. 96). *Gregg v. Smith*, L. R. 8 Q. B. 302.

4. Sellers by Sample and Sellers for Future Delivery Not Peddlers — *Alabama*. — *Ballou v. State*, 87 Ala. 144.

*Colorado*. — *Kennedy v. People*, 9 Colo. App. 494.

*Illinois*. — *Olney v. Todd*, 47 Ill. App. 440; *Cerro Gordo v. Rawlings*, 135 Ill. 40.

*Iowa*. — *Spencer v. Whiting*, 68 Iowa 678; *Davenport v. Rice*, 75 Iowa 77; *Stuart v. Cunningham*, 88 Iowa 194.

*Kansas*. — *Kansas v. Collins*, 34 Kan. 434.

*Kentucky*. — *Com. v. Jones*, 7 Bush (Ky.) 502.

*Massachusetts*. — *Com. v. Ober*, 12 Cush. (Mass.) 498; *Com. v. Farnum*, 114 Mass. 267.

*Missouri*. — *State v. Hoffman*, 50 Mo. App. 586. Compare *State v. Emert*, 103 Mo. 242, 23 Am. St. Rep. 874; *Emert v. Missouri*, 156 U. S. 296.

*New Hampshire*. — *State v. Wells*, (N. H. 1899) 45 Atl. Rep. 143.

*New York*. — *Stamford v. Fisher*, 140 N. Y. 187.

*North Carolina*. — *State v. Lee*, 113 N. Car. 682, 37 Am. St. Rep. 649.

*South Carolina*. — *State v. Moorehead*, 42 S. Car. 214, 46 Am. St. Rep. 719.

*Canada*. — Reg. v. Coutts, 5 Ont. 644; Reg. v. Bassett, 12 Ont. 51; Reg. v. Henderson, 18 Ont. 145.

Taking or Soliciting Orders for Shirts Not Peddling. — *Elgin v. Picard*, 24 Ill. App. 340.

Canvassing for Sewing Machines Not Peddling Even if Sample Machine Is Delivered. — *Com. v. Farnum*, 114 Mass. 267.

Established Merchant May Solicit and Fill Orders in General Vicinity. — *Stamford v. Fisher*, 140 N. Y. 187. In this case the court referred to *Rex v. M'Knight*, 10 B. & C. 734, 21 E. C. L. 158; *Com. v. Eichenberg*, 140 Pa. St. 160; *Com. v. Ober*, 12 Cush. (Mass.) 498; and *Bal-lou v. State*, 87 Ala. 144, as cases analogous to the one before it in respect to the point that "the bargain for the goods and the delivery were on different occasions." Compare *Titusville v. Brennan*, 143 Pa. St. 647, 24 Am. St. Rep. 580.

Selling Ranges by Sample, Orders Afterwards Filled, Not Peddling. — *State v. Lee*, 113 N. Car. 682, 37 Am. St. Rep. 649.

One Who Delivers Goods Ordered by Sample Not a Peddler. — *Stuart v. Cunningham*, 88 Iowa 194; *Greensboro v. Williams*, (N. Car. 1899) 32 S. E. Rep. 492.

Sale in Law Office Not Equivalent to Sale in Public Place. — *Spencer v. Whiting*, 68 Iowa 678.

Ontario — Municipal By-law. — In Reg. v. Coutts, 5 Ont. 644, the court held that under



**Distinction Not Uniformly Recognized.** — There are some exceptions to this rule, having their origin in statutes or local ordinances regulating or restricting hawking and peddling, a calling often regarded with suspicion and disfavor.<sup>1</sup>

**Are Hawkers in England.** — In *England*, by Act of Parliament, persons selling by samples or patterns any goods to be afterwards delivered are classed as hawkers.<sup>2</sup>

**III. RESTRICTIONS UPON HAWKING AND PEDDLING** — 1. **Restrictions Usually an Exercise of Police Power.** — The business of hawking and peddling is generally the subject of police regulation, and when license fees are imposed upon its pursuit, the exaction of such fees is usually an exercise of police power.<sup>3</sup>

2. **Employment May Be Taxed for Revenue Purposes.** — The occupation may, like other employments, be subjected to a tax for revenue purposes, but the police control and regulation of the calling itself often enters into such revenue measure and constitutes, although perhaps incidentally, one of its objects and purposes.<sup>4</sup>

3. **Purpose of Restriction Important.** — Whether an enactment imposing license fees upon hawking and peddling is or is not to be considered a police regulation is not infrequently a matter of much importance in the determination and disposition of cases arising from the violation of such law.<sup>5</sup>

4. **Calling Taxed, Not Merchandise.** — Generally it is the calling or occupation, and not the property employed in such calling, that is deemed the subject of the tax or license fee,<sup>6</sup> although the distinction has in some instances been considered of little consequence.<sup>7</sup>

**Residence of Peddler Immaterial.** — Such tax or license fee may be imposed whether or not the person engaged in hawking and peddling be a resident of the state or municipality within which the license law operates, and whether

the statute in force in Ontario it was not within the power of a municipality to pass a by-law prohibiting unlicensed traders sending out agents to take orders for goods from private persons, not being retail dealers, and subsequently delivering the goods ordered.

**Sample-merchant — Virginia.** — See this term defined in *White v. Com.*, 78 Va. 484; *Henderson v. Com.*, 78 Va. 488. See also *Speer v. Com.*, 23 Gratt. (Va.) 935, 14 Am. Rep. 164; *Myerdock v. Com.*, 26 Gratt. (Va.) 988.

1. **Rule Not Uniformly Recognized — Sellers by Sample Peddlers in Several States.** — *Gould v. Atlanta*, 55 Ga. 686; *Wrought Iron Range Co. v. Johnson*, 84 Ga. 757; *Graffy v. Rushville*, 107 Ind. 506, 57 Am. Rep. 128; *Warren v. Geer*, 117 Pa. St. 212; *Titusville v. Brennan*, 143 Pa. St. 647, 24 Am. St. Rep. 580; *Spanish Fork City v. Mortensen*, 7 Utah 33.

In *Georgia* the rule seems to be inflexible. In *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, the court, by Bleckley, C. J., citing the case of *Howard v. Reid*, 51 Ga. 328, used the following language: "Every itinerant trader by sample is treated as a peddler. Code, § 1631. The itinerant trader is the person who actually travels or passes from place to place for the purpose of trading by sample or otherwise. Within the sense and meaning of the code, when one adopts that vocation and pursues it he becomes a peddler, and by that name or description is to be licensed."

2. **Hawkers Act, 1888**, 51 and 52 Vict., c. 33.

3. **Restrictive Laws Are Usually Exercises of Police Power.** — Laws regulating or licensing hawking and peddling are ordinary exercises

of police power, nor do they cease to be such because the license fees are required to be paid into the state treasury.

*Alabama.* — *Van Hook v. Selma*, 70 Ala. 363, 45 Am. Rep. 85.

*Michigan.* — *People v. Russell*, 49 Mich. 619, 43 Am. Rep. 478; *Chaddock v. Day*, 75 Mich. 531, 13 Am. St. Rep. 468.

*Missouri.* — *State v. Emert*, 103 Mo. 241, 23 Am. St. Rep. 874.

*New Jersey.* — *Muhlenbrinck v. Long Branch*, 42 N. J. L. 369; *Clark v. New Brunswick*, 43 N. J. L. 176; *Mulcahy v. Newark*, 57 N. J. L. 515.

*New York.* — *People v. Jarvis*, 19 N. Y. App. Div. 467.

*Wisconsin.* — *Morrill v. State*, 38 Wis. 429, 20 Am. Rep. 12.

4. See *infra*, this title, *Licenses — License Tax or Fee*.

5. See *infra*, this title, *Hawking and Peddling in Violation of Law — Effect upon Contract of Sale*.

6. **Calling Taxed, Not Goods.** — *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *Cooley on Taxation* (2d ed.) 579.

7. **Distinction Sometimes Immaterial.** — In *Welton v. Missouri*, 91 U. S. 278, the court, by Mr. Justice Field, said: "The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the state. \* \* \* Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves." See also *Leloup v. Mobile*, 127 U. S. 640; *Brennan v. Titusville*, 153 U. S. 303.



or not he already pays taxes upon the property or commodities used in such traffic.<sup>1</sup>

5. **Licensee Not Exempt from Ordinary Police Regulations.** — Nor will the possession of a license to hawk and peddle relieve the licensee from the operation of general laws, ordinances, or police regulations, even in instances where such enactments interfere with the convenient or profitable exercise of his calling.<sup>2</sup>

IV. **CONSTITUTIONALITY AND VALIDITY OF STATUTES** — 1. **In General.** — While the right of the several states to enact laws regulating, restraining, licensing, or even absolutely prohibiting hawking and peddling is, in general, limited only to the provisions of the respective state constitutions,<sup>3</sup> yet such laws must not be repugnant to the Federal Constitution by interfering with subjects over which Congress has exclusive legislative jurisdiction, or otherwise. Questions involving the validity of such state laws under the United States Constitution arise for the most part under the interstate commerce regulations and the patent laws.

2. **Must Not Affect Foreign or Interstate Commerce.** — State laws regulating hawking and peddling cannot apply to the peddling of foreign imports or of goods brought from other states, if such imports or such goods, by retaining their original and distinctive form and character, are still under federal protection.

**Goods Not Yet in State, or in Original Packages.** — This constitutional question most frequently arises in cases where selling by sample or soliciting the sale of goods to be delivered in the future is made peddling by state statutes or municipal enactment. Where the goods sold are not within the territory of the state at the time when the order is given and the contract of sale is made, but are shipped into such state from another state or foreign country, or from an Indian tribe which still maintains its tribal relations, or if such goods, though within the state when the sale is made, have not lost their distinctive character and are not blended into and become part of the common mass of property therein, but still preserve their original form and remain in the exact condition in which they were shipped, any state or municipal enactment interfering with such sale is an encroachment upon the exclusive right of Congress to regulate interstate commerce, and such enactment is therefore void.<sup>4</sup>

1. **Residence of Peddler Immaterial.** — *Davis v. Macon*, 64 Ga. 131; *Burr v. Atlanta*, 64 Ga. 227; *Buffalo v. Webster*, 10 Wend. (N. Y.) 102; *Edenton v. Capehart*, 71 N. Car. 159.

2. **Licensee Must Obey Police Regulations** — *Prohibiting Vehicles from Stopping in Street Beyond Certain Time.* — *Com. v. Fenton*, 139 Mass. 197.

*Prohibiting Peddling During Certain Hours.* — *Buffalo v. Schleifer*, (Buffalo Super. Ct. Gen. T.) 2 Misc. (N. Y.) 216.

3. **Cooley on Constitutional Limitations** (6th ed.) 742, states the principle in general terms: "The state has also a right to determine what employments shall be permitted, and to forbid those which are deemed prejudicial to the public good." But this doctrine is to be applied in consonance with the provisions of the national and state constitutions and subject to the inherent rights of the citizen, whether such employment be forbidden directly by the state or by some corporate body to whom the state has delegated authority.

4. **Goods Not Within State, or in Original Packages** — *United States.* — *Welton v. Missouri*, 91 U. S. 275; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 498; *Corson v. Maryland*, 120

U. S. 502; *Asher v. Texas*, 128 U. S. 131; *Brennan v. Titusville*, 153 U. S. 289; *In re Watson*, 15 Fed. Rep. 513; *In re White*, 43 Fed. Rep. 914; *In re Spain*, 47 Fed. Rep. 208; *In re Nichols*, 48 Fed. Rep. 164; *Ex p. Hough*, 69 Fed. Rep. 330; *In re Hennick*, 5 Mackey (D. C.) 502; *In re Kimmel*, 41 Fed. Rep. 777. *Alabama.* — *State v. Agee*, 83 Ala. 110; *Ex p. Murray*, 93 Ala. 79.

*California.* — *Ex p. Thomas*, 71 Cal. 204.

*Illinois.* — *Bloomington v. Bourland*, 137 Ill. 537.

*Indiana.* — *McLaughlin v. South Bend*, 126 Ind. 471; *Martin v. Rosedale*, 130 Ind. 113; *Huntington v. Mahan*, 142 Ind. 697.

*Iowa.* — *Marshalltown v. Blum*, 58 Iowa 184, 43 Am. Rep. 116; *Pacific Junction v. Dyer*, 64 Iowa 39; *McGregor v. Cone*, 104 Iowa 471.

*Kansas.* — *Fl. Scott v. Pelton*, 39 Kan. 764.

*Louisiana.* — *McClellan v. Pettigrew*, 44 La. Ann. 360; *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 852; *Pegues v. Ray*, 50 La. Ann. 574.

*Maine.* — *State v. Furbush*, 72 Me. 496.

*Missouri.* — *State v. Browning*, 62 Mo. 591.

*Nevada.* — *Ex p. Rosenblatt*, 19 Nev. 439, 3 Am. St. Rep. 901.

**When Not under Federal Protection.** — Should the goods, however, actually be within the territory of the state where such statute or ordinance is in force, prior to the securing of the order for them, or before such sale by sample, and have lost their distinctive character as original packages, even though such goods were shipped from another state or from a foreign country, the subject-matter of the transaction and the parties thereto are properly within the jurisdiction and operation of the local regulations. Such commerce is then internal and domestic, the goods having become incorporated into the general wealth or substance of the state and having lost their original character, and the peddling thereof may be the subject of local statute or ordinance.<sup>1</sup>

**3. Must Not Affect Patent Rights.** — What is commonly known as a "patent right" — the exclusive right of the patentee to make, use, or sell the invention or discovery patented — being an incorporeal right granted by the federal government, cannot be taxed in any manner by a state. State laws or municipal enactments imposing license fees upon the peddling of "patent rights" are unconstitutional and invalid.<sup>2</sup> Where negotiable paper is given in payment or part payment of a patent right, by statute in some states, the words "given for patent right" or some equivalent expression must appear conspicuously upon such note.<sup>3</sup>

**Patented Articles Not Privileged.** — The occupation of peddling articles manufactured under letters patent, as distinguished from the right to peddle or vend a patent right itself, is unquestionably subject to the police control and revenue laws of the respective states.<sup>4</sup>

**4. Requirements as to Uniformity of Operation** — *a.* **RESIDENTS OR PRODUCTS OF DIFFERENT STATES.** — No state or municipality can lawfully enact a statute or ordinance regulating hawking and peddling which discriminates between the residents or products of different states.<sup>5</sup>

*North Carolina.* — State *v.* Bracco, 103 N. Car. 349.

*Vermont.* — State *v.* Pratt, 59 Vt. 509.

*Virginia.* — Com. *v.* Myer, 92 Va. 809.

**1. When Not under Federal Protection** — *United States.* — *Ex p.* Hanson, 28 Fed. Rep. 129; *Hynes v. Briggs*, 41 Fed. Rep. 469; *In re Houston*, 47 Fed. Rep. 542; *American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Emert v. Missouri*, 156 U. S. 309; *In re Wilson*, 19 D. C. 341.

*Florida.* — Hall *v.* State, 39 Fla. 676.

*Georgia.* — Singer Mfg. Co. *v.* Wright, 97 Ga. 115.

*Indiana.* — Graffy *v.* Rushville, 107 Ind. 502, 57 Am. Rep. 128; *South Bend v. Martin*, 142 Ind. 54.

*Iowa.* — State *v.* Wheelock, 95 Iowa 583, 58 Am. St. Rep. 442.

*Kentucky.* — Rash *v.* Farley, 91 Ky. 347, 34 Am. St. Rep. 233.

*Maine.* — State *v.* Montgomery, 92 Me. 433.

*Massachusetts.* — Com. *v.* Ober, 12 Cush. (Mass.) 497; Com. *v.* Newhall, 164 Mass. 338.

*Michigan.* — People *v.* Sawyer, 106 Mich. 431.

*Missouri.* — Tracy *v.* State, 3 Mo. 3; State *v.* Shapleigh, 27 Mo. 345; State *v.* Emert, 103 Mo. 241, 23 Am. St. Rep. 874; State *v.* Smithson, 106 Mo. 154; State *v.* Snoddy, 128 Mo. 524.

*Nevada.* — *Ex p.* Robinson, 12 Nev. 268, 28 Am. Rep. 794.

*North Carolina.* — Wynne *v.* Wright, 1 Dev. & B. L. (18 N. Car.) 19; State *v.* Wessell, 109 N. Car. 735; *Wrought Iron Range Co. v. Carver*, 118 N. Car. 329.

*Pennsylvania.* — Com. *v.* Gardner, 133 Pa. St. 284, 19 Am. St. Rep. 645.

*Tennessee.* — Howe Mach. Co. *v.* Cage, 9 Baxt. (Tenn.) 519.

*Virginia.* — Speer *v.* Com., 23 Gratt. (Va.) 936, 14 Am. Rep. 164.

*West Virginia.* — State *v.* Richards, 32 W. Va. 348.

**2. Patent Rights.** — *Ex p.* Robinson, 2 Biss. (U. S.) 314; *In re Sheffield*, 64 Fed. Rep. 836; *Hollida v. Hunt*, 70 Ill. 113; *State v. Butler*, 3 Lea (Tenn.) 223. See generally the title PATENTS.

**3. Note Given for Patent Right.** — As to the validity and effect of such provisions, see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 137. And see the recent case of *Bohon v. Brown*, (Ky. 1899) 49 S. W. Rep. 450.

**4. That Article Peddled Is Patented Not Material.** — The tax or fee imposed upon peddlers is an exercise of police authority. The ordinary operation of federal laws does not take from the state any portion of its general power of police. A patentee, like any other vendor, must obey all regulations made for general observation. *Patterson v. Kentucky*, 97 U. S. 501; *Webber v. Virginia*, 103 U. S. 344; *People v. Russell*, 49 Mich. 617, 43 Am. Rep. 478; *Jordan v. Dayton*, 4 Ohio 295; *State v. Bell Telephone Co.*, 36 Ohio St. 311; *Palmer v. State*, 39 Ohio St. 238.

**5.** See *supra*, this section, *Must Not Affect Foreign or Interstate Commerce*; also the title CONSTITUTIONAL LAW, vol. 6, pp. 958, 966, 970.

*b. RESIDENTS OR PRODUCTS OF SAME STATE.* — Nor should there be any unjust discrimination between the residents or products of different sections or localities of the same state; if otherwise, the courts may declare the ordinance illegal and void.<sup>1</sup>

*c. UNIFORMITY IN LICENSE TAX — FEE IMPOSED UNDER POLICE POWER.* — A charge or fee upon hawking and peddling imposed in the exercise of what is distinctively the police power of the state is in a legal sense a license charge rather than a tax, and as such should be uniform within the same class.<sup>2</sup>

*d. FEE OR TAX IMPOSED UNDER REVENUE LAWS.* — And while such fee is a tax when laid under laws enacted wholly or primarily for revenue purposes, it is a tax upon an occupation or privilege, and, therefore, does not come within the strict application of the usual constitutional provision that taxation must be uniform.<sup>3</sup>

*e. EQUAL APPLICATION WITHIN SAME CLASS.* — But a license law affecting hawking and peddling, whether imposed for revenue or for any other purpose, should operate uniformly within the same class.<sup>4</sup>

*f. PROMOTION OF SPECIAL INTERESTS.* — Laws in restraint of hawking and peddling enacted to benefit the business or conserve the interest of resident and established merchants or other persons immediately concerned have usually been declared invalid and condemned as unfairly discriminating class legislation.<sup>5</sup> But such laws have sometimes obtained judicial sanction.<sup>6</sup>

*g. EXCEPTIONS TO APPLICATION OF RULE REQUIRING UNIFORMITY OF OPERATION* — (1) *Veteran Soldiers Sometimes Privileged.* — In some jurisdictions, former soldiers, sailors, or marines who served the general or the state government are by statute accorded especial privileges, and the license laws are modified or relaxed in their behalf.<sup>7</sup>

(2) *Persons Infirm or Disabled.* — In some places, also, persons who by reason of physical infirmity or disability are incapacitated from earning a livelihood by ordinary manual labor are by statute permitted to hawk and peddle without paying a license fee for such privilege.<sup>8</sup> Statutes making the

1. *Residents or Products of Same State.* — Gould v. Atlanta, 55 Ga. 682; Braceville v. Doherty, 30 Ill. App. 662; Morgan v. Orange, 50 N. J. L. 391; People v. Jarvis, 19 N. Y. App. Div. 466; Sayre v. Phillips, 148 Pa. St. 482, 33 Am. St. Rep. 842; Com. v. Snyder, 182 Pa. St. 633; Ex p. Overstreet, (Tex. Crim. 1898) 46 S. W. Rep. 826; Virgo v. Toronto, 22 Can. Sup. Ct. 447.

2. *License Charge Rather than Tax.* — State v. Glavin, 67 Conn. 34; People v. Jarvis, 19 N. Y. App. Div. 469; Cooley on Taxation (2d ed.) 599. See also State v. Montgomery, 92 Me. 433; North Wales v. Brownback, 10 Pa. Super. Ct. 227.

3. *For Revenue Purposes.* — Magneau v. Fremont, 30 Neb. 853, 27 Am. St. Rep. 436; Morrill v. State, 38 Wis. 428, 20 Am. Rep. 12; Dillon on Mun. Corp. (4th ed.), § 792. See also State v. Montgomery, 92 Me. 433. For a statute held unconstitutional, see State v. Klectzen, (N. Dak. 1899) 78 N. W. Rep. 985.

4. *Equal Application Within Same Class.* — McClellan v. Pettigrew, 44 La. Ann. 357; People v. Hotchkiss, (Mich. 1898) 76 N. W. Rep. 142; State v. Wagener, 69 Minn. 206; Ex p. Overstreet, (Tex. Crim. 1898) 46 S. W. Rep. 826. And see *infra*, this title, *Licenses — License Tax or Fee*.

5. *Promotion of Special Interests.* — Braceville v. Doherty, 30 Ill. App. 662; Morgan v.

Orange, 50 N. J. L. 391; People v. Jarvis, 19 N. Y. App. Div. 466; Sayre v. Phillips, 148 Pa. St. 482, 33 Am. St. Rep. 842; Com. v. Snyder, 182 Pa. St. 633; Ex p. Overstreet, (Tex. Crim. 1898) 46 S. W. Rep. 826.

6. *Protection of Established Dealers Sometimes Sanctioned.* — Graffy v. Rushville, 107 Ind. 506, 57 Am. Rep. 128; South Bend v. Martin, 142 Ind. 40; Cherokee v. Fox, 34 Kan. 16; Temple v. Sumner, 51 Miss. 15, 24 Am. Rep. 615; Morrill v. State, 38 Wis. 433, 20 Am. Rep. 12.

7. *Former Soldiers, Sailors, or Marines Privileged.* — It is quite usual, in enactments regulating hawking and peddling, to exempt from the operation of the license laws former soldiers, sailors, or marines. Each enactment must be examined for itself. In some instances, such indulgence to this particular class is manifested by imposing a smaller fee than is otherwise exacted, instead of wholly relieving such applicants from the tax. The following are given as illustrations: Stat. Cal. 1897, c. 277, § 25, p. 465; Laws Mass. 1889, c. 457, p. 311; Laws N. Y. 1898, c. 538, § 184, p. 1279; Laws N. Car. 1893, c. 311, p. 311; Bates's Annot. Stat. Ohio (1897), §§ 4398-4398b; Annot. Code Tenn. (1896), § 699.

8. *Exemption of Infirm from Payment of License Fee.* — Pub. Stat. N. H. (1891), c. 123, § 2; Laws N. Car. 1893, c. 294, § 23, p. 248.



physical disability of an applicant a requisite or indispensable condition for the granting of a license to hawk and peddle have been sustained in at least one state, the effect being to exclude all able-bodied persons from practicing such employment.<sup>1</sup>

**V. LICENSES — 1. In General.** — Whether hawking and peddling are restricted by police or by revenue laws, the result is attained through the instrumentality of licenses.<sup>2</sup> The form of license, the amount of the tax or fee, the method of securing a license or of making application therefor, and its duration, privileges, and restrictions, are wholly statutory, and, because of local influences and exigencies, greatly vary in different states, and frequently in different municipalities of the same state. A provision common to most states requires a person following the calling of a hawker and peddler to exhibit his license upon the demand of any citizen of the state or municipality in which such peddler is doing business, and imposes a penalty for a refusal to produce such license.<sup>3</sup>

**2. Duration of License.** — Usually such licenses are granted for the period of one year. Experience has demonstrated the wisdom of requiring the payment of a full year's rate, even where a licensee intends to peddle for a shorter period. And where there is no provision for the issuing of a license for a shorter period an officer will not be protected in accepting any fee less than the annual rate.<sup>4</sup>

**3. License a Personal and Individual Privilege.** — Under most license laws, a license to hawk and peddle is a special, individual privilege, and the holder of such license must conform to its requirements. Such license is not susceptible of assignment and cannot be loaned or in any manner transferred, but must be personally used by the individual named as licensee and by him alone.<sup>5</sup>

**Corporations or Firms Cannot Be Licensed.** — A corporation or a business firm cannot be licensed to hawk and peddle, unless some statutory provision permits such license to be issued.<sup>6</sup>

**4. License Tax or Fee — a. AMOUNT MUST BE REASONABLE.** — The amount to be paid for a license to hawk and peddle is necessarily prescribed by the licensing power. It is an established principle that the fee should be reasonable in amount.<sup>7</sup>

**1. Physical Disability as Requisite to Obtain License.** — *In re* Application for Peddler's License, 22 W. N. C. (Pa.) 35; *Com. v. Brinton*, 132 Pa. St. 73.

**2. Johnson v. Asbury Park**, 60 N. J. L. 431.

**3.** As illustrative of most statutes upon the subject, see *Acts Va.* 1895, c. 201, § 32, p. 224.

**4. Annual Rate Must Be Paid Unless Provision Is Made for Less Sum.** — Where the license fee is fixed for one year, the officer or board collecting it will not be protected in accepting a smaller sum for a proportionately shorter period than such year, unless the license law distinctly permits the issuing of licenses for a shorter period, and at a reduced rate. *Hart v. Beauregard*, 22 La. Ann. 238. See also *Cooley on Taxation* (2d ed.) 579.

**5. License a Personal and Individual Privilege.** — A peddler's license is usually personal with the individual. It cannot be sold, loaned, or in any manner transferred. Should a licensee dispose of his license, he may in some states render himself liable criminally (see *Act Pa.* March 28, 1799). But such transfer or disposition of such license is a nullity. Therefore, a peddler, unless permitted by statute, cannot employ a servant to drive his wagon and sell his wares without exposing such servant to a

penalty for peddling without a license. *Gibson v. Kauffield*, 63 Pa. St. 169; *Temple v. Sumner*, 51 Miss. 15, 24 Am. Rep. 615; *Mabry v. Bullock*, 7 Dana (Ky.) 337. But in *England*, under the *Hawkers Act*, 1888, 51 & 52 Vict., c. 33, a hawker may employ a servant.

**Principal Held Liable for the Penalty.** — In *Irwin v. Douglass*, 8 Pa. Dist. 505, it is held that where an ordinance against unlicensed peddling is violated the employer is responsible for the penalty, although the peddling was done through an agent.

**6. Corporation or Business Firm Cannot Be Licensed.** — *Wrought Iron Range Co. v. Johnson*, 84 Ga. 755; *State v. Rhyne*, 119 N. Car. 907. See also *Shiff v. State*, 84 Ala. 456; *Hill v. Thixton*, 94 Ky. 96; *Ex p. Butin*, 28 Tex. App. 304.

**7. License Fee Must Be Reasonable.** — *Ex p. Heylman*, 92 Cal. 492; *State v. Glavin*, 67 Conn. 34; *State Center v. Barenstein*, 66 Iowa 249; *Brooks v. Mangan*, 86 Mich. 577, 24 Am. St. Rep. 137; *People v. Hotchkiss*, (Mich. 1898) 76 N. W. Rep. 142; *People v. Baker*, 115 Mich. 199; *Duluth v. Krupp*, 46 Minn. 435. See also *Cherokee v. Fox*, 34 Kan. 16; *Ballston Spa v. Markham*, 58 Hun (N. Y.) 239; *People v. Jarvis*, 19 N. Y. App. Div. 470; *In re White*, 43 Minn. 252; *Chicago v. Barte*, 100 Ill. 61.

*b. REASONABLENESS — HOW DETERMINED.* — The controlling factor in settling the amount of such license fee when it is imposed is ordinarily the requirements of the design or purpose to be promoted or accomplished. It is therefore necessary before determining a question of reasonableness to ascertain first the design or purpose of the licensing power in imposing such license fee; second, whether or not the licensing power, especially if acting under delegated authority, possessed the right to impose a tax of any amount whatever, for the promotion or attainment of such specific design or purpose. If legal authority to impose a tax for the purpose contemplated is established in the licensing power, the question of reasonableness is resolved into an inquiry whether or not the fee exacted is commensurate with the attainment of such purpose. If greater than required, it is excessive and unreasonable.<sup>1</sup>

**Discretion Recognized.** — Courts are disposed, generally, to recognize a latitude of discretion in the licensing power, and will not hold an ordinance imposing a license fee invalid because of the magnitude of such fee, unless it is evident that the licensing power abused such discretion.

**When for Regulation Alone.** — Where the regulation of the employment, and not the production of revenue, is the purpose of the enactment, it has been held that the cost of issuing a license, together with the expenses of the police supervision of such business, forms a proper measure by which to estimate what amount of tax should be laid or license fee exacted. This rule peculiarly applies when the licensing power is acting by delegated authority.<sup>2</sup>

**5. Requisites to Obtain License.** — The enactments of most states or municipalities relating to licensing hawkers and peddlers coincide in requiring that the applicant be a male resident of full age and of good moral character, and sometimes citizenship is required;<sup>3</sup> that a statement be made, commonly in the form of a written application, showing precisely the manner in which the applicant purposes to travel and to transport his wares or merchandise, and the general character or description of the goods to be peddled; and that a certain sum be paid before the license is granted.<sup>4</sup>

**Security Required.** — Security may also be required before the license is granted, conditioned for good behavior of the licensee and his faithful observance of license laws and regulations.<sup>5</sup>

**VI. WHO MAY RESTRICT, REGULATE, OR LICENSE — 1. States.** — The several states of the Union, in the exercise of their constitutional powers or sovereignty, may restrict, regulate, or license any calling or employment. Statutory regulation of hawking and peddling exists in nearly all the states.<sup>6</sup>

**2. Municipal Corporations — Authority Never Inherent.** — This power is possessed by most municipal corporations, but is never inherent in a municipality as such because of its existence as a municipal corporation or by reason of its ordinary powers of local government.<sup>7</sup>

**Must Be Delegated.** — The legislative power of the state may delegate to municipal corporations right and authority to regulate, restrict, license, or tax certain trades, forms of business, and vocations; and an ordinance enacted in pursuance of such delegated power has all the force and legal effect within the jurisdiction of the enacting power of a state statute.<sup>8</sup>

**To Be Strictly Construed.** — Such authority is usually contained in the charter

1. *People v. Jarvis*, 19 N. Y. App. Div. 467; *State v. Glavin*, 67 Conn. 34; *Muhlenbrinck v. Long Branch*, 42 N. J. L. 368. And see the cases cited in the note immediately preceding.

2. *People v. Jarvis*, 19 N. Y. App. Div. 466; *State v. Glavin*, 67 Conn. 34.

3. **Citizenship Sometimes Required.** — Stat. Vt. (1894), § 4734; Act Pa. April 16, 1840, § 1 (*Bright. Purd. Dig. Laws Pa.*, 1894, p. 1654); Act Pa. May 5, 1841, § 7 (*Bright. Purd. Dig. Laws Pa.*, 1894, p. 1655).

4. As illustrative of the state laws upon the subject, see Rev. Stat. N. Y. (9th ed., 1896), p. 3526, § 60.

5. See *Bright. Purd. Dig. Laws Pa.* (1894), p. 1654.

6. Cooley on Const. Lim. (6th ed.) 742-744.

7. **Power Not Inherent in Municipality.** — *People v. Jarvis*, 19 N. Y. App. Div. 468; *Beach on Pub. Corp.*, § 1252.

8. **Power Must Be Delegated to Municipality.** — *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec.



of every municipality, or is supplied by subsequent legislation; but such delegated power must be strictly construed, and cannot be extended beyond the language of the instrument or statute conferring it, or the necessary implication of such language.<sup>1</sup>

**Power Cannot Be Redelegated.** — And generally such authority, when given to a municipality, must be exercised by the corporation itself, and not again delegated to any person or board, unless power so to do is explicitly given to such municipality, or unless such power is necessarily implied from the language of the charter or statute itself.<sup>2</sup>

**Ordinance Must Be Reasonable.** — Ordinances and municipal enactments regulating hawking and peddling are merely by-laws of municipal corporations; therefore they come within the familiar principle that a corporate by-law, to be valid, must be reasonable, and of such reasonable character the court is the judge.<sup>3</sup>

**Does Not Imply Power to Tax for Revenue Purposes.** — Authority delegated by the state to restrict, regulate, or license hawking and peddling does not of itself confer or imply a power to tax such calling for revenue purposes. Any duty, tax, or license fee imposed upon such calling in such case should be for the purpose of restriction or regulation.<sup>4</sup>

**Nor to Prohibit Directly or Indirectly.** — Where a municipal corporation is empowered to restrict, regulate, or license hawking and peddling, it has no implied authority to prohibit the practice of such calling.<sup>5</sup>

**Abuse of Power Should Be Palpable.** — The grievance, however, must be evident and the abuse of power flagrant to warrant judicial intervention, for ordinarily it is not the province of the judiciary curiously to scrutinize municipal rates and levies.<sup>6</sup>

**3. Courts, Boards, and Officers.** — Although when the state delegates its power, or any portion thereof, to restrict, regulate, or license hawking and peddling, it usually confers such authority upon a municipal corporation as such, yet the legislative power of the state may, unless prevented by the state constitution, clothe a court, board, or officer with authority to act in the premises.<sup>7</sup>

143; *Van Hook v. Selma*, 70 Ala. 363, 45 Am. Rep. 85. See also *Carrollton v. Bazzette*, 159 Ill. 284.

1. **Delegated Authority Strictly Construed.** — *Kennedy v. People*, 9 Colo. App. 492; *St. Paul v. Stoltz*, 33 Minn. 234; *Ex p. Taylor*, 58 Miss. 478, 38 Am. Rep. 336; *Dunham v. Rochester*, 5 Cow. (N. Y.) 465; *Cooley on Const. Lim.* (6th ed.) 231-233.

2. **Cannot Be Redelegated.** — Where a municipal corporation is charged with the regulation of hawking and peddling, such authority, being in its nature discretionary, should not be delegated to others, but must be exercised by the corporate body, or by the proper branch or department thereof. *State v. Glavin*, 67 Conn. 34; *Beach on Pub. Corp.*, § 276; *Cooley on Const. Lim.* (6th ed.) 248. But the delegation of the legislative or discretionary authority possessed by the municipal corporation should not be confounded with the right of such corporation to appoint persons to the discharge of duties purely ministerial. *In re White*, 43 Minn. 251; *Bradley v. Rochester*, 54 Hun (N. Y.) 142.

3. **Municipal Ordinance Regulating or Licensing Peddling Must Be Reasonable.** — *State v. Jersey City*, 37 N. J. L. 349; *Beach on Pub. Corp.*, § 99, 91.

4. **Does Not Imply Power to Tax for Revenue Purposes.** — *Van Hook v. Selma*, 70 Ala. 364,

45 Am. Rep. 85; *Easterly v. Irwin*, 99 Iowa 697; *Dillon on Mun. Corp.* (4th ed.), § 357; *Cooley on Taxation* (2d ed.) 597.

5. **Not to Prohibit.** — Under a late *N. Y. & C.* case already cited, the rule is stated by the court to be as follows: "It is a fundamental and well-settled principle of law that 'when a municipal corporation is given the power to license useful trades or occupations, it cannot use the license as a tax to raise revenue, nor is it authorized to entirely prohibit the exercise of the trade or occupation by any excessive license fee.'" *People v. Jarvis*, 19 N. Y. App. Div. 469, quoting 13 AM. AND ENG. ENCYC. OF LAW (1st ed.) 532. See also *Brooks v. Mangan*, 86 Mich. 577, 24 Am. St. Rep. 137; *Cooley on Taxation* (2d ed.) 598.

6. **Abuse of Municipal Discretion.** — *People v. Russell*, 49 Mich. 620, 43 Am. Rep. 478; *Duluth v. Krupp*, 46 Minn. 435. See also *Littlefield v. State*, 42 Neb. 225, 47 Am. St. Rep. 697.

7. As illustrations, see 2 Code Ga. (1895), § 4238, by which the ordinary, when sitting for county purposes, has original and exclusive jurisdiction in regulating peddling and fixing the costs of licensing such calling; Code Iowa (1897), § 1348, by which the county auditor, upon the presentation of a receipt showing the payment to the county treasurer of a license for the county.



**VII. HAWKING AND PEDDLING IN VIOLATION OF LAW — 1. Effect upon Contract of Sale.** — While it is an established principle that a contract made in violation of law is void, and no action can be maintained to enforce it,<sup>1</sup> the application of such principle to the validity of a contract made in practicing a prescribed employment has not been uniformly construed or recognized.

**Contract Sometimes Valid.** — In the case of a hawker and peddler who in violation of law pursues his calling without a license and makes sales upon credit or enters into other contracts in the course of the unlicensed business, such contracts have sometimes been held to be valid where the enactment imposing such license tax or fee partakes more of the nature of a revenue measure than of a police regulation, and where the peddling itself or the making of such contract is not expressly or by necessary implication forbidden or made void. It is generally, although not uniformly, held that a penalty implies a prohibition, although no direct words of prohibition occur in the enactment.<sup>2</sup>

**2. Prosecution of Offenders.** — The prosecution of offenders against laws regulating hawking and peddling is necessarily a matter wholly of local regu-

1. See the title *ILLEGAL CONTRACTS, post*.

**2. Contracts Sometimes Valid.** — Although the decisions upon the validity of contracts of sale made by hawkers and peddlers doing business in violation of the license laws are few and conflicting, the cases in which the general principle has been applied to contracts made in the course of analogous inhibited employments are numerous. See the title *ILLEGAL CONTRACTS, post*.

**The Following English Decisions** are often cited in the consideration of the application of the principle: *Law v. Hodgson*, 2 Campb. 147; *Johnson v. Hudson*, 11 East 180; *Brown v. Duncan*, 10 B. & C. 93, 21 E. C. L. 29; *Wetherell v. Jones*, 3 B. & Ad. 221, 23 E. C. L. 58; *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Mawhood*, 14 M. & W. 463.

**Trover to Recover Goods to Be Used in Illegal Peddling — Not Maintainable.** — In *Duffy v. Gorman*, 10 Cush. (Mass.) 45, the plaintiff brought trover to recover certain goods left in pledge with the defendant by a person who had received them from the plaintiff for the purpose of using such goods in peddling without a license. It was shown that the plaintiff was privy to the contemplated illegal peddling. It was held that as the plaintiff could claim only through his own unlawful contract, the action could not be maintained. It did not appear that peddling was expressly forbidden by statute in this case, nor the contract itself directly prohibited. This decision was cited with approval in *Pratt v. Burdon*, 168 Mass. 596, where it was held that no action could be maintained by an unlicensed life-insurance broker to recover commissions for services in effecting insurance. See also *Foster v. Thurston*, 11 Cush. (Mass.) 322. But compare *McKinney v. Andrews*, 41 Tex. 366.

**No Recovery for Goods Peddled Without License Where Sale Prohibited by Statute.** — In *Best v. Bauder*, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 489, the plaintiff, whom the court held to be a peddler, sued for the price of certain "wine roots or plants" sold to the defendant in 1863. The plaintiff was without a peddler's license, required by the United States Revenue Act of July 1, 1862, and this was interposed in defense. The plaintiff demurred on the ground that such facts were no defense to an

action for the price, but the court, by Parker, J., overruled the demurrer. It will be noted that in this case the revenue law contained a direct prohibition against selling as a peddler without a license; but from the general tenor of the decision it may be concluded that such demurrer would have been overruled had there been no direct prohibition, but only an imposition of a penalty for doing the act.

**Kentucky Statute.** — In *Bull v. Harragan*, 17 B. Mon. (Ky.) 349, it was held that under the statutes then in force (Rev. Stat. 554, § 13), a peddler selling without a license goods not manufactured in Kentucky could not recover the value of the goods. See also *Mabry v. Bullock*, 7 Dana (Ky.) 337. And in *Rash v. Farley*, 91 Ky. 344, 34 Am. St. Rep. 233, it was held that a note executed to a peddler for goods sold by him without the license required by statute is void and unenforceable. To the same effect is *Rash v. Halloway*, 82 Ky. 674.

**Contra — Penalty Attaches to Person; Does Not Affect Contract.** — In *Mandlebaum v. Gregovich*, 17 Nev. 92, 45 Am. Rep. 433, where the statute imposed a fine for selling without a license, but did not specifically prohibit the sale of goods by an unlicensed person, it was held by Hawley, J., that a traveling merchant who had sold goods without having procured the license required by such act could maintain an action for such goods.

**Where License Is for Revenue Action Will Lie on Note Given to Unlicensed Peddler.** — In *Banks v. McCosker*, 82 Md. 521, one of the defenses set up in an action to recover upon a promissory note was that the payee in such note had obtained it illegally, he being engaged in peddling goods without a license; but the court declined to recognize this defense, the provision of the code on the matter being regarded as a revenue measure, and as not affecting the contract between an unlicensed peddler and the purchaser of goods from him.

**"Peddler's Note"** — **Kentucky Statute.** — A note executed to an "itinerant person" for a patent right, or for the privilege of selling a patent right, is absolutely void unless it has indorsed across the face thereof the words, "Peddler's Note." *Bohon v. Brown*, (Ky. 1899) 49 S. W. Rep. 450. See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 137.

lation. Hawking or peddling without a license is a misdemeanor in perhaps all of the states, and is prosecuted and punished accordingly. Generally such proceeding assumes the form of a summary proceeding before a magistrate; of an indictment by the grand jury and consequent trial in the Court of Quarter Sessions of the place, or court of similar character; of an action of debt instituted, usually by a public official, for the benefit of the state or municipality; or of a proceeding in the nature of a *qui tam* action, brought by or through a complainant who under the enactment will receive a portion of the fine imposed upon the offender should such fine be exacted and collected.<sup>1</sup>

**HAY.** — Hay is grass after it has been cut and dried for fodder.<sup>2</sup>

**HAZARD — HAZARDOUS.** (See also the title FIRE INSURANCE, vol. 13, p. 284.) — See note 3.

**HE.** (See also the titles STATUTES; WILLS.) — See note 4.

1. See generally the local statutes.

2. **Hay.** — *Baumgartner v. Sturgeon River Boom Co.*, (Mich. 1899) 79 N. W. Rep. 566. But in that case it was held that where the declaration described the property destroyed as *hay* growing on the plaintiff's land, it was not error to refuse to direct a verdict for the defendant, because there was no evidence showing the loss of cut or dried *hay*, the court holding that it was manifest that the word *hay* was not used in its ordinary sense.

In *Rex v. Good*, 17 Ont. 727, it was said: "*Hay* is not an appropriate word to designate grass before it is cut. It is defined to be 'grass cut and dried for fodder; grass prepared for preservation.'"

**Arson.** (See also the title ARSON, vol. 2, p. 924.) — In *State v. Harvey*, 141 Mo. 343, it was held that stacks of *hay* were included within the term, "grass \* \* \* standing in the field," in a statute against arson. The court said: "Now, *hay* is but grass 'cut and cured for fodder,' Webster. Internat. Dict., and so the words, 'grass \* \* \* standing in the field,' may well include haystacks."

**Natural Grass.** — In *Reg. v. Good*, 17 Ont. 725, the defendant was convicted of removing *hay* from Indian lands, contrary to the *Canadian* statute. It was held that the word *hay*, as used in the statute, did not necessarily mean *hay* from natural grass only, but what is commonly known as *hay*, namely, either from natural grass or from grass sown and cultivated.

**Same — Lien.** — In holding that a laborer had a lien on *hay* cut and cured by him, the court said: "*Hay* is grass cut and dried for fodder — grass prepared for preservation. Make *hay* while the sun shines. (Webster.) Wild prairie grass is not *hay*, but when cut or mowed and raked it becomes *hay*, the drying or curing occurring between the former and the latter process. *Hay* may therefore with propriety be said to be the 'production' of the laborer who cuts and rakes it — in other words, makes it." *Emerson v. Hedrick*, 42 Ark. 205. See also the title MECHANICS' LIENS.

3. **Board of Health.** (See also the title BOARD OF HEALTH, vol. 4, p. 506.) — The appellant was enjoined at the suit of the local board of health from discharging the refuse of his tomato-canning factory into a reservoir, thence into a covered sewer, and finally into a small

natural stream, on proof that such refuse was offensive in odor and *hazardous* to the public health. The court said: "The counsel for defendant seemed to think that, taking the odors complained of at the worst, as described, they are not within the act. In his mind, the court must regard the word *hazardous* as synonymous with the highest or greatest extremity. I think he desired to lead my mind to the conclusion that the word was not used in a plain, simple, or positive sense, but in a superlative sense. Reason and all rules of interpretation reject this argument." *Butterfoss v. State*, 40 N. J. Eq. 330. See also *State v. Neidt*, (N. J. 1890) 19 Atl. Rep. 320.

**Gaming.** — A statute authorized a suit for restitution by any person who had paid money lost on any "game, *hazard*, or sport." It was held that this statute did not include betting on elections. The court said: "Considering the avowed purpose and the general scope and phraseology of the entire statute, we are not inclined to concede to the word *hazard*, in the first section, an import so comprehensive and incongruous. First, in its true philological sense, it means chance, luck, or accident, rather than mere uncertainty or contingency. \* \* \* And consequently *hazard* should be understood, *ejusdem generis*, as importing some chance or risk like that of its associate terms, 'game,' 'sport,' 'pastime.'" *Graves v. Ford*, 3 B. Mon. (Ky.) 114, 115. See also the title GAMING, vol. 14, p. 687.

But to engage in a wager on a horse race has been held to be a *hazard* within a similar statute. *Cheek v. Com.*, 100 Ky. 1. See also *Cheek v. Com.*, 79 Ky. 359.

4. **Masculine and Feminine.** — The use of the pronouns *he* and *his* in a written instrument, in referring to a person whose Christian name is designated therein by a mere initial, is not conclusive that the person referred to is a male; and in an action founded on such instrument, parol evidence is admissible to show that the person intended is a female. *Berniaud v. Beecher*, 71 Cal. 38.

**Same — Admission of Woman to Bar.** — In *Richardson's Case*, 3 Pa. Dist. 299, a rule of court in which applicants for admission to the bar were referred to by the pronoun *he* was construed in favor of the admission of women. See also the title ATTORNEY AND CLIENT, vol. 3, p. 285.



**Same — Embezzlement Act.** — And the word *his* has been held to include a woman in the phrase "take into *his* possession" in an embezzlement act. *Rex v. Smith*, R. & R. C. C. 267.

**Employee.** — Under an act making it unlawful for any person to sell spirituous liquors to be used in or about *his* house, without being duly licensed, a hired bartender may be indicted. *Com. v. Hadley*, 11 Met. (Mass.) 72. The same construction was put upon an act making it a misdemeanor for any person to keep open *his* shop on the Lord's day, under which an employee who had the management of the business, and could and did decide when the shop should be opened and when closed, was held indictable. *Com. v. Dale*, 144 Mass. 363. See generally the titles INTOXICATING LIQUORS; MASTER AND SERVANT; SUNDAY.

**Same — Concealed Weapons — His Own Premises.** (See also the title CARRYING WEAPONS, vol. 5, p. 742.) — In *State v. Terry*, 93 N. Car. 585, 53 Am. Rep. 472, it was held that a mere servant hired by the prosecutor to assist him in the cultivation of his land, being on such land, was not on *his* own premises within the statute against carrying concealed weapons.

In *Lemmons v. State*, 56 Ark. 559, it was held that the fact that the defendant lived with his father on land belonging to the father did not make the premises *his* own premises within the statute against concealed weapons. See also *Kinhead v. State*, 45 Ark. 536; *Clark v. State*, 49 Ark. 174.

**Partnership.** — A discharge of an insolvent from all debts "founded on any contract made by *him*," decreed under insolvency proceedings instituted by him in his individual capacity, and also as a member of a firm, releases him from liability for the debts of the firm. *Lothrop v. Tilden*, 8 Cush. (Mass.) 375.

**Same — His for Them.** — Where a petition for a mechanic's lien was signed by only one member of a partnership, and the petition claimed a lien upon the logs only for a sum due to *him*, but the partner in verification made oath in behalf of himself and his co-partner, it was held that this was sufficient to give a lien to the partnership. The court said that the mistake in using the word *him* for "them" did not vitiate the petition and should not be regarded. *Garland v. Hickey*, 75 Wis. 178.

In *State v. Howell*, 65 N. Car. 63, it was said: "*Him*, used in the statute instead of 'them,' is only bad grammar, which does not vitiate."

**His Commercial Paper.** — An accommodation indorser of negotiable paper, whose indorsement was in no way connected with his business, and who failed to pay the debt, could not be forced into bankruptcy for having "suspended and not resumed payment of *his* commercial paper within a period of fourteen days." *In re Clemens*, 2 Dill. (U. S.) 533. See generally the title INSOLVENCY AND BANKRUPTCY.

**His Natural Life.** — Where A demises to B for the term of *his* natural life, the demise is *prima facie* for the life of B. But where A demised to B, his executors and administrators, for the term of *his* natural life, and the lease contained a covenant for quiet en-

joyment by B, his executors, etc., during the natural life of A, the demise was for the life of A. *Doe v. Dodd*, 5 B. & Ad. 689, 27 E. C. L. 157.

**His Heirs and Assigns.** — A deed between William M'Knight and Nancy his wife, of the first part, and James Hardenbergh and Eliza his wife, of the second part, conveyed "to the said party of the second part, *his* heirs and assigns," the lands and tenements in controversy. On the construction of this deed, the court said: "The grantees are 'the party of the second part' (that is, James Hardenbergh and Eliza his wife), '*his* heirs and assigns.' The term 'party' embraces both grantees, and is used for that purpose with strict grammatical accuracy; and the word *his* is as definite in its reference to only one of them. More formally expressed this grant would read, 'to the said James Hardenbergh and Eliza his wife, and to the heirs and assigns of the said James Hardenbergh.'" *Hardenbergh v. Hardenbergh*, 10 N. J. L. 48.

**In Insurance Policies.** (See also the title FIRE INSURANCE, vol. 13, p. 136.) — "The words *his* or 'their' used in a policy, as descriptive of the property of the assured, do not render the policy void, if the insured has an insurable interest, although the interest may be a qualified or defeasible or even an equitable interest." *Fowle v. Springfield F. & M. Ins. Co.*, 122 Mass. 194. See also *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; *Martin v. State Ins. Co.*, 44 N. J. L. 490.

But where the policy contained a condition that "if the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void," and there was no written application, nor statement in the policy of the interest, which was a leasehold, but the property was described as *his*, it was held, that if the insured truly represented his interest to the company, its failure to incorporate it did not avoid the policy, but if he made no representation, his acceptance of the policy amounted to a declaration that his interest was absolute, and avoided the policy. *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

A policy with this same condition was held not to be avoided by a description of the property as *his* where the interest of the assured was an equitable one under an agreement to purchase and part payment of the purchase money. *Hough v. City F. Ins. Co.*, 29 Conn. 10.

**Mechanic's Lien.** — In *Rugg v. Hoover*, 28 Minn. 407, in holding it essential to the validity of a mechanic's lien that the name of the owner or reputed owner of the building should be stated, the court said: "There is no direct, unequivocal allegation as to the ownership of that [the building]. The only word in the affidavit that could by possibility be construed to imply ownership is the word *his* used in a clause describing or identifying the building. \* \* \* It is impossible to say that its use, in the connection in which it is used in this affidavit, is a substantial equivalent for an allegation of ownership." See also *Malter v. Falcon Min. Co.*, 18 Nev. 214. And see the title MECHANICS' LIENS.



**HEAD.**—See note 1.

**HEAD OF A FAMILY.** (For a full treatment of this term as used in exemption laws, see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 89; as used in homestead laws, see the title HOMESTEAD, *post*; and see the title FAMILY, vol. 12, p. 866.)—See note 2.

**His Land.**—In an executory contract of sale, the grantor, Rowland Madison, contracted to convey *his* land in a certain county and again to convey *his* land willed to him when *he* came to possession of it. In construing this provision in *Lewis v. Madison*, 1 Munf. (Va.) 322, the court said: "While the first expression in this contract, *his* land, would seem to import that the land contemplated was land of which Rowland Madison was then possessed, or to which he was at least entitled, the second expression only enlarges that description to land then 'willed' to him. \* \* \* The contract not only contemplates a tract then willed to Rowland Madison by the terms of it, but it also undoubtedly contemplates a specific tract, and not any tract which might thereafter be willed."

**Libel and Slander.** (See also the title LIBEL AND SLANDER, 13 ENCYC. OF PL. AND PR. 26.)—In *Harper v. Delp*, 3 Ind. 225, the court said: "The word *him* sufficiently demonstrates the person. There is an old case on this subject as follows: Action for these words: *He* (innuendo the plaintiff) is not worthy, etc. Exception was taken that the *he* might be spoken of any other, and that the innuendo would not help it. But the court held that the action well lay, for *hic* and *ille* make a demonstration what person he intended, and it is alleged that he spoke *de querente* those words. *Taylor v. How*, Cro. Eliz. 861."

**1. Head of Bureau.**—See *People v. Fire Com'rs*, 86 N. Y. 149.

**Head of Corporation.**—Under an act requiring service on the *head* of a corporation, service on the president is proper. *Sacramento v. Fowle*, 21 Wall. (U. S.) 119. See also ENCYC. OF PL. AND PR., title SERVICE OF PROCESS.

**Head of a Creek.**—The *head* of a creek is the source of the longest branch. *Davis v. Bryant*, 2 Bibb (Ky.) 110.

**Head of a River.**—By an act of the legislature, commissioners were appointed to settle the boundary line between several counties. The act authorized them to run, survey, mark, and ascertain the lines between the counties, beginning at the *head* of a certain river. The commissioners adjudged a certain stake to be at or about the head of the river. This was objected to, but the court held that it was sufficient, as the origin of a river or branch can seldom be determined with absolute accuracy. *State v. Coleman*, 13 N. J. L. J. 103.

**Head Money.**—In *Matter of Farragut*, 7 D. C. 97, it was said: "*Head* money or bounty is not prize under the law, but a gratuity which the government has promised to distribute under the direction of the secretary of the navy, in the same manner as prize money is distributed." See also the title PRIZE.

**Water Power.**—In *Shearer v. Middleton*, 88 Mich. 628, it was said: "The witness did not seem to know what is meant by the word *head*, as applied to water power in moving water wheels. I had supposed that it is a

matter of common knowledge that the signification of the term when water is applied to such use is the vertical distance between the water in a flume or place from whence it is drawn, to the tail water of the wheel by which the power is communicated to the machinery; and, unless it is shown that the water at the bottom of the dam is on the same level as the tail water of the wheel, it would afford no evidence of the *head*."

**2. In General.**—Any individual of either sex may be the head of a family. *Revalk v. Kraemer*, 8 Cal. 71.

**Exercise of Authority Necessary—Qualification of Juror.**—See *Territory v. Lopez*, 3 N. Mex. 104. See also the title JURY AND JURY TRIAL.

**Two Families in One.**—A woman having children living with her has been held to be the *head of a family* although she lived in her father's house. *Bachman v. Crawford*, 3 Humph. (Tenn.) 216.

**Residence.**—In *Wabash R. Co. v. Dougan*, 41 Ill. App. 543, *affirmed* 142 Ill. 248, it was held that to constitute one the *head of a family* it was necessary that he reside with his family. See also *Barnes v. Rogers*, 23 Ill. 350; *McMasters v. Alsop*, 85 Ill. 157.

In *Gibson v. Gross*, (Kan. App. 1898) 54 Pac. Rep. 796, it was held that a man who had placed his children with relatives, and lived at different places as a boarder, was not the *head of a family*.

But in *Sallee v. Waters*, 17 Ala. 486, it was held that a father who boarded with his child at different houses was the *head of the family*. *Whitehead v. Tapp*, 69 Mo. 415; *Brown v. Brown*, 68 Mo. 388; *Simonson v. Burr*, 121 Cal. 582.

**Husband and Wife.**—Any man who has a wife is the *head of a family*. *Security L. & T. Co. v. Kauffman*, 108 Cal. 214; *Kitchell v. Burgwin*, 21 Ill. 40.

The *head of a family* primarily is the husband and father. *Whalen v. Cadman*, 11 Iowa 227; *Parsons v. Livingston*, 11 Iowa 104.

In *Thompson v. King*, 54 Ark. 11, and *Memphis, etc., R. Co. v. Adams*, 46 Ark. 159, it was held that the terms "married" and *head of a family* were not synonymous in their use.

**Same—Support.**—In *Barry v. Western Assur. Co.*, 19 Mont. 571, a husband was held to be the *head of the family*, although the wife supported herself and her children.

But in *State v. Houck*, 32 Neb. 525, it was held that a wife living with and supporting her disabled husband was the *head of the family*. See also *Schaller v. Kurtz*, 25 Neb. 655.

**Same—Abandoned Wife.**—In *Nash v. Norman*, 5 Mo. App. 545, 6 Cent. L. J. 357, it was held that a married woman living with her children and abandoned by her husband was the *head of a family*. See also *Frazier v. Sias*, 30 Neb. 111; *Hamilton v. Hamilton*, 20 Neb. 240; *State v. Wilson*, 31 Neb. 462.

**HEADQUARTERS.**—See note 1.

**HEALTH—HEALTHY.** (See also the titles ADULTERATION, vol. 1, p. 738; BOARDS OF HEALTH, vol. 4, p. 596; CEMETERIES, vol. 5, p. 781; DRAINS AND SEWERS, vol. 10, p. 220; HOSPITALS AND ASYLUMS, *post*; INJUNCTIONS; LIFE INSURANCE; MUNICIPAL CORPORATIONS; NUISANCES; PHYSICIANS AND SURGEONS; POLICE POWER; QUARANTINE; SURFACE WATERS;

But in *Roberts v. Moudy*, 30 Neb. 683, a divorced husband who continued to furnish support to his children living with their mother was held to be the *head of the family*.

**Same—Husband Separated from Wife.**—In *Linton v. Crosby*, 56 Iowa 386, 41 Am. Rep. 107, it was held that a husband living for several years separate from his wife and not contributing to her support, they having no children, was not the *head of a family*.

**Partnership.**—In *In re Lentz*, 97 Fed. Rep. 486, it was held that a partnership could not be the *head of a family*. See also *Territory v. Lopez*, 3 N. Mex. 104.

**Brother.**—A brother supporting his minor brothers and sisters has been held to be the *head of a family*. *Marsh v. Lazenby*, 41 Ga. 153; *Conaughton v. Sands*, 32 Wis. 387; *Greenwood v. Maddox*, 27 Ark. 658; *McMurray v. Shuck*, 6 Bush (Ky.) 111.

In *Wade v. Jones*, 20 Mo. 77, it was held that where a brother had his widowed sister and her children living with him, he was the *head of a family*. See also *Marsh v. Lazenby*, 41 Ga. 153.

But in *Dendy v. Gamble*, 64 Ga. 528, it was held that an indigent sister and her children, though mainly dependent on the brother for support, did not constitute the brother the *head of a family*. The court said that to constitute the *head of a family* there must be some legal obligation on him to support its members.

**Same—Adult.**—An unmarried man who has residing with him an unmarried brother who is unable to take care of or support himself is the *head of a family*. *Webster v. McGauvran*, (N. Dak. 1899) 78 N. W. Rep. 81.

**Unmarried Man.**—In *Sallee v. Waters*, 17 Ala. 488, it was held that an unmarried man having children dependent on him was the *head of a family*.

But a bachelor having no persons depending upon him and no persons residing with him except servants and employees was held not to be the *head of a family*. *Garaty v. Du Bose*, 5 S. Car. 497.

**Unmarried Woman.**—In *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248, 11 Cent. L. J. 95, it was held that an unmarried woman living upon premises owned by her and having with her and providing for two children of a deceased sister was a *head of a family*.

**Same—Illegitimate Child.**—In *Ellis v. White*, 47 Cal. 73, an unmarried woman with an illegitimate child was held to be the *head of a family*.

**Widow.**—A widow keeping a boarding house with a female friend residing with her, and female servants, was held to be the *head of a family*. *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27.

But in *Kidd v. Lester*, 46 Ga. 231, a widow

without children was held not to be the *head of a family*.

**Grandmother.**—Within a *United States* statute apportioning lands to the heads of Indian families, it was held that a grandmother living with her grandchildren was the *head of a family*. *Ladiga v. Roland*, 2 How. (U. S.) 581. See also the title INDIANS.

**Son and Mother.**—In *Parsons v. Livingston*, 11 Iowa 104, it was held that a widower without children, having his mother living with him, who was a widow without children except such widower, was the *head of a family*.

In *Riley v. Hitzler*, 49 Ohio St. 653, it was held that a debtor residing with his widowed mother and invalid brother, who were supported by him, was the *head of a family*.

**Uncle and Niece by Marriage.**—Where a man lived with his wife and an orphan boy and a little girl, the wife's niece, and the boy and the wife died, but the man still continued to live with and support the niece, it was held that he was the *head of a family*. *Fant v. Gist*, 36 S. Car. 576.

**Father and Adult Child.**—A father who had living with him his adult son and the son's wife was held to be the *head of a family*. *Tyson v. Reynolds*, 52 Iowa 431, 10 Cent. L. J. 74. So of a father and his adult daughter. *Cox v. Stafford*, (County Ct.) 14 How. Pr. (N. Y.) 521.

A father supporting his widowed daughter and her children has been held to be the *head of a family*. *Blackwell v. Broughton*, 56 Ga. 390.

**1. Headquarters.**—A municipality, in granting aid to a railroad, stipulated that the railroad should make the city its *headquarters*. The court said that by this term was meant something more than having, in name and form only, an office of the company in that city, and that it was intended that the "operating" headquarters and general offices of the road, after construction, should be established and permanently maintained in the city. *State v. Minneapolis*, 32 Minn. 506. See generally the title MUNICIPAL AID.

But in *Jossey v. Georgia*, etc., R. Co., 102 Ga. 706, it was said: "If only the business of the company which appertains to its management as a corporation is to be transacted at the *headquarters* of the company, then the use of the word *headquarters* does not signify more than the term 'principal office,' and could not exclude the discretionary power of the board of directors to establish administrative offices for the conduct of the business of the corporation at places other than the *headquarters* of the company. So that, however we may construe the terms 'principal office' and *headquarters*, we are led inevitably to the conclusion that they do not include the purely administrative offices of the company, so as to fix their location at a designated point."

UNDERGROUND WATERS; WATER AND WATERCOURSES.)—Health means soundness of body; freedom from disease, sickness, or pain.<sup>1</sup>

**HEAR.** (See also HEARING, *post.*)—See note 2.

1. **Health and Disease.**—Hubbard *v.* Pater-son, 45 N. J. L. 312.

**Relative Term.**—In Peacock *v.* New York L. Ins. Co., 20 N. Y. 296, it was held that the word *health* as ordinarily used is a relative term. It has reference to the condition of the body, and thus it is frequently characterized as perfect, as good, as indifferent, as bad.

**Sound Health.**—In Sieverts *v.* National Benev. Assoc., 95 Iowa 716, it was said: "It would be most unreasonable to construe the term 'sound health,' as used in life insurance, to mean that the assured is absolutely free from all bodily infirmities, or tendencies to disease. If this were its true meaning, few persons of middle age could truthfully say they were in sound health." See also Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 170; Moulou *v.* American L. Ins. Co., 111 U. S. 335.

**Warranty.** (See generally the title WARRANTY.)—In Bell *v.* Jeffreys, 13 Ired. L. (35 N. Car.) 356, the court said that "the word *healthy*, in its ordinary acceptance, means free from disease or bodily ailment, or a state of the system peculiarly susceptible or liable to disease or bodily ailment." In that case it was held that mere shortness of sight was not unhealthiness; and in Harrell *v.* Norvill, 5 Jones L. (50 N. Car.) 32, it was held that a contraction of the little finger of each hand was not a breach of warranty that a slave was in sound mind and *healthy*.

In Nelson *v.* Biggers, 6 Ga. 206, it was held that a warranty that a slave was *healthy* did not extend to soundness of mind.

**Settlement.**—Under a statute giving a settlement to every *healthy* and able-bodied person in the town in which he first resided for a year, the test of *health* and ability of body is not ability to labor and support one's self and family. A person who received an injury resulting in permanent disability, but who was not incapacitated for labor during the year, was not *healthy* and able-bodied. Marlborough *v.* Sisson, 26 Conn. 57. The standard is "the ordinary condition of those who regard themselves and are regarded by others as healthy and robust persons possessing their physical powers uninjured." Starksboro *v.* Hinesburgh, 15 Vt. 200. See also the title POOR AND POOR LAWS.

**Bill of Health.**—As to a certificate from the proper authorities, given to the master of a ship upon clearing, setting forth the state of the public *health* at the port of clearing, see the titles QUARANTINE; SHIPS AND SHIPPING.

2. **Hear and Determine.**—To *hear* a cause or matter means to *hear* and determine it. Green *v.* Penzance, 6 App. Cas. 678, wherein Lord Blackburn said: "It is not to be understood that anything which by natural intendment or otherwise would cut down the meaning and intention of the legislature and make it less, I apprehend there can be no doubt that the legislature, when they direct a particular cause to be *heard* in a particular court, mean that it is to be *heard* and finally disposed of there."

And further, when they say that it is to be *heard* (meaning *heard* and finally disposed of) in a particular court, they mean, unless there is something in the context which either by natural interpretation or by necessary implication would cut it down, that in all matters which are not provided for that court is to follow its ordinary procedure."

**Merits.**—Where a statute provided that a court should *hear* and determine the matter of appeal and make such order therein with or without costs to either party as to the court should seem meet, it was held that to *hear* and determine the matter of appeal meant to decide it upon its merits. *In re Madden*, 31 U. C. Q. B. 333. See also Reg. *v.* Padwick, 8 El. & Bl. 704, 92 E. C. L. 704.

As to the word *heard* importing a trial upon the merits as contradistinguished from dilatory objections for want of parties, see Mayo *v.* Murchie, 3 Munf. (Va.) 358.

**Applicability to Original Proceedings.**—In Com. *v.* Simpson, 2 Grant Cas. (Pa.) 439, it was said: "The power 'to *hear* and determine' is an essential ingredient of original jurisdiction, and the authority 'to examine and correct errors' is the distinguishing characteristic of appellate power. To '*hear* and determine' a criminal case is 'to proceed after bill found, and to try the issues of fact and pass sentence.' 4 Black. Com. 270."

**Hear and Determine — Ex Parte Proceeding.**—A statute authorized suits to be brought against the United States to recover items in the account of a district attorney suspended or disallowed by an accounting officer, and provided that the court should not have jurisdiction to *hear* and determine claims which had been reported adversely by any court, department, or commission authorized to *hear* and determine them. It was held that the district attorney was not concluded by the rejection of items in his bill by the department of justice. The court said of the words "*hear* and determine:" "The words are used each time in the same sense; that is, they refer to judicial determination after a hearing and weighing of testimony on both sides, and not to an *ex parte* accounting." Stanton *v.* U. S., 37 Fed. Rep. 255. But see HEARING, *post.*

**Argument of Counsel.** (See also the title ARGUMENTS OF COUNSEL, 2 ENCYC. OF PL. AND PR. 698.)—The constitutional right of a prisoner to be *heard* by himself or counsel, so far as hearing in person is concerned, applies to trial only, and not to an appeal. Tooke *v.* State, 23 Tex. App. 10. A reasonable limit of the time of argument is not an infringement of the right. State *v.* Hoyt, 47 Conn. 518; State *v.* Page, 21 Mo. 257.

**Same — Oral Arguments.**—In Schmidt *v.* Boyle, 54 Neb. 387, it was held that the constitutional provision declaring that the right to be *heard* in civil cases in the court of last resort should not be denied did not prevent the appellate court from refusing to permit oral arguments. See also Niles *v.* Edwards, 95 Cal. 41.



**HEARING.** (See also the title HEARING, 10 ENCYC. OF PL. AND PR. 8; and see HEAR, *ante.*)—The stage of proceeding in a cause in equity which corresponds to the trial of a cause at law; the hearing of the arguments of counsel for the parties upon the pleadings, or pleadings and proof; <sup>1</sup> the preliminary examination of a prisoner charged with a crime, and of witnesses for the prosecution and defense; <sup>2</sup> a judicial examination of the issues between the parties. <sup>3</sup>

**Heard—Trial.**—The Constitution of *California* provided that thirty days after judgment pronounced in a cause by a department of the Supreme Court the cause might be ordered to be *heard*, and decided in banc. In construing this provision the court said: "The term *heard*, as here used, is taken from the practice in equity procedure, and corresponds to the term 'trial,' as used in cases at law. It signifies the consideration and determination of a cause by the court or by a judge, as distinguished from a trial of a cause, which is a term more properly predicated of its determination by a jury. See 3 Black, Com. 451, 453; *Akerly v. Vilas*, 24 Wis. 171; *Merritt v. Portchester*, 8 Hun (N. Y.) 45." *Niles v. Edwards*, 95 Cal. 41. See also TRIAL.

**1. Equity—United States.**—*U. S. v. Wonsom*, 1 Gall. (U. S.) 5; *Parsons v. Bedford*, 3 Pet. (U. S.) 440; *U. S. v. Goodwin*, 7 Cranch (U. S.) 108; *Doughty v. West*, etc., Mfg. Co., 8 Blatchf. (U. S.) 107; *Waggener v. Cheek*, 2 Dill. (U. S.) 563; *Minnett v. Milwaukee*, etc., R. Co., 3 Dill. (U. S.) 463, 464; *Home L. Ins. Co. v. Dunn*, 19 Wall. (U. S.) 225; *Vannevar v. Bryant*, 21 Wall. (U. S.) 41; *Wooster v. Handy*, 23 Fed. Rep. 53.

*Indiana.*—*Burson v. National Park Bank*, 40 Ind. 179.

*Massachusetts.*—*Galpin v. Critchlow*, 112 Mass. 339, 13 Am. L. Reg. N. S. 137.

*Michigan.*—*Crane v. Reeder*, 28 Mich. 534.

*New Hampshire.*—*Whittier v. Hartford F. Ins. Co.*, 55 N. H. 141, 14 Am. L. Reg. N. S. 621.

*Wisconsin.*—*Akerly v. Vilas*, 24 Wis. 165.

**Hearing on Bill and Answer.**—In *Fall v. Simmons*, 6 Ga. 268, it was said: "A *hearing*, in the chancery practice on the bill and answer, has a definite legal meaning. It is when the complainant files no replication to the answer. In that case the complainant takes the risk of recovering upon his allegations and the defendant's answer; all the statements in the answer being taken as true, whether responsive to the bill or not." See also the title HEARING, 10 ENCYC. OF PL. AND PR. 8.

**2. Preliminary Examination.**—*U. S. v. Patterson*, 150 U. S. 68, *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 324. See also 16 ENCYC. OF PL. AND PR. 818, title PRELIMINARY EXAMINATION.

**3. Hearing.**—A statute provided that if on *hearing* it appeared that the warrant was issued without proper cause the plaintiff might be required to pay costs. In construing this provision in *Glennon v. Britton*, 155 Ill. 243, the court said: "The words 'trial' and *hearing*, as here used, are familiar terms, and are generally understood as meaning a judicial examination of the issues between the parties, whether of law or of fact."

**Ex Parte Proceedings.**—Under a statute au-

thorizing the court to order costs upon a *hearing* of a cause, the attendance of a defendant in bastardy process, in default of the appearance of the prosecutors, is a *hearing*. *Reg. v. Stamper*, 1 Q. B. 119, 41 E. C. L. 464.

A cause dismissed for want of proper parties has had a *hearing*. "As soon as the case came on to be heard there was a *hearing* for the purpose of this clause." *Reg. v. Exeter*, 5 Q. B. 342, 48 E. C. L. 342.

In *Hazlitt v. Morrow*, 55 N. J. L. 547, it was held that if a defendant in attachment in a justice's court would appear he must file a bond to the plaintiff on or before the day appointed for the *hearing*. The court said: "As matters stood, the *hearing* might lawfully consist of the plaintiff's case alone." But see *Stanton v. U. S.*, 37 Fed. Rep. 255.

**Plaintiff Declining to Proceed.**—A statute gave to justices jurisdiction of assault, and power, upon *hearing*, to discharge, in which case the plaintiff was precluded from other remedies. A plaintiff appeared before the justices, and after plea declined to proceed, stating that he meant to bring an action, whereupon the justices discharged the defendant. It was held that there had been a *hearing*. *Tunnicliffe v. Tedd*, 5 C. B. 553, 57 E. C. L. 553. See also *Vaughton v. Bradshaw*, 9 C. B. N. S. 103, 99 E. C. L. 103; *Reg. v. Stamper*, 1 Q. B. 119, 41 E. C. L. 464.

A *Nisi Prius* Trial is a *hearing*. *Wilson v. Hood*, 3 H. & C. 148.

**Bail, Adjournments, Etc.**—*Hearings* on the questions of bail, adjournments, arraignments, or commitments were held to be *hearings* within a statute providing for the fees of United States marshals. *Kinney v. U. S.*, 54 Fed. Rep. 313; *U. S. v. Jones*, 134 U. S. 487. See also *U. S. v. Patterson*, 150 U. S. 68.

**Hearing of a Motion.**—The *hearing* of a motion includes an application for a rule *nisi*. *Morgan v. Alexander*, L. R. 10 C. P. 184.

**Day of Hearing.**—A rule requiring notice of demand for jury trial three days before the "day of *hearing*" means day appointed for *hearing*, and not day of actual *hearing*. *Fletcher v. Baker*, L. R. 9 Q. B. 370.

**Same—Fees of Referees.**—A written stipulation entered into by the attorneys for the respective parties declared that the compensation of a referee should be twenty dollars "for every *hearing*." It was held that the meaning of the word *hearing* could not be extended so as to include days appointed for a *hearing*, but on which in fact no *hearing* was held. *Mead v. Tuckerman*, 105 N. Y. 557. See also the title REFERENCES, 17 ENCYC. OF PL. AND PR. 1087.

**Final Hearing.**—See ENCYC. OF PL. AND PR., titles HEARING, vol. 10, p. 8; REMOVAL OF CAUSES, vol. 18, p. 150; and see this work, title FINAL JUDGMENTS AND DECREES, vol. 13, p. 23.

# HEARSAY EVIDENCE.

BY A. S. H. BRISTOW.

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## CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the title *EVIDENCE* and the cross-references there given, and the specific cross-references given in the body of this title.

**I. DEFINITION.** — Hearsay evidence has been said to denote that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person.<sup>1</sup>

**II. ADMISSIBILITY** — 1. *General Rule.* — It is a general rule that hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge.<sup>2</sup>

1. *Hearsay Evidence Defined.* — 1 Greenl. Ev., § 99; 1 Phillips Ev. 185; Hopt v. Utah, 110 U. S. 581; Shaw v. People, 5 Thomp. & C. (N. Y.) 444.

2. *General Rule as to Admissibility of Hearsay* — United States. — Queen v. Hepburn, 7 Cranch (U. S.) 290.

Alabama. — Scales v. Desha, 16 Ala. 308; Governor v. Campbell, 17 Ala. 566; Pearson v. Darrington, 32 Ala. 227; Buckley v. Cunningham, 34 Ala. 69; Smith v. Flagg, 46 Ala. 624; David v. David, 66 Ala. 139.

Arkansas. — McNeill v. Arnold, 22 Ark. 477. California. — Lawrence v. Fulton, 19 Cal. 683; Bornheimer v. Baldwin, 42 Cal. 27.

Illinois. — Morse v. Thorsell, 78 Ill. 600; Capen v. De Steiger Glass Co., 105 Ill. 185; Chicago, etc., R. Co. v. Johnson, 110 Ill. 206; Carpenter v. Joliet First Nat. Bank, 119 Ill. 352; Kent v. Mason, 79 Ill. 540; Hyde v. Howes, 2 Ill. App. 140; Melody v. People, 8 Ill. App. 485; Dencer v. Parsons, 8 Ill. App. 625.

Indiana. — Parker v. State, 8 Blackf. (Ind.)

and this rule obtains, whether the evidence be oral or written.<sup>1</sup>

The Reason is, that such evidence is too vague and unsubstantial to afford any reasonable presumption as to the recited fact. It affords too great a latitude for deception, mistake, or misapprehension, and withal, it is not given under the solemn obligation of an oath.<sup>2</sup>

**Self-serving Declarations.** — Mere self-serving declarations made by a party not as a witness and not in the presence of the other party affected thereby, are, as a general rule, hearsay evidence, and are not to be given in evidence by the party who made them, unless they form a part of the *res gestæ*,<sup>3</sup> or unless

292; *Mershon v. State*, 51 Ind. 14; *Schooler v. State*, 57 Ind. 127; *Meyer v. Bell*, 65 Ind. 83; *Reynolds v. Copeland*, 71 Ind. 422.

*Iowa*. — *State v. Henke*, 58 Iowa 457.

*Kansas*. — *Simpson v. Smith*, 27 Kan. 565; *Tarbox v. Sughrue*, 36 Kan. 225.

*Louisiana*. — *Lynch v. Postlethwaite*, 7 Mart. (La.) 69, 12 Am. Dec. 495.

*Maine*. — *Gould v. Smith*, 35 Me. 513; *Hunter v. Randall*, 69 Me. 190; *Smith v. Tarbox*, 70 Me. 127.

*Maryland*. — *Williamson v. Dillon*, 1 Har. & G. (Md.) 444.

*Massachusetts*. — *Chapin v. Taft*, 18 Pick. (Mass.) 379; *Filley v. Angell*, 102 Mass. 67; *Stockwell v. Blamey*, 129 Mass. 312; *Com. v. Ricker*, 131 Mass. 581.

*Michigan*. — *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219; *People v. Mead*, 50 Mich. 228; *McCormick Harvesting Mach. Co. v. Cochran*, 64 Mich. 636; *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 504.

*Minnesota*. — *King v. Frost*, 28 Minn. 417.

*Mississippi*. — *Wells v. Shipp*, *Walk.* (Miss.) 353; *Melius v. Houston*, 41 Miss. 59.

*Missouri*. — *Fougue v. Burgess*, 71 Mo. 389.

*New Hampshire*. — *Davis v. Sanders*, 11 N. H. 259; *Page v. Parker*, 40 N. H. 47.

*New Jersey*. — *Demoney v. Walker*, 1 N. J. L. 37.

*New York*. — *Wiggins v. People*, 4 Hun (N. Y.) 549; *People v. Cox*, 21 Hun (N. Y.) 47, *affirmed* 83 N. Y. 610; *Stickney v. Billings*, 30 Hun (N. Y.) 304; *Salmon v. Orser*, 5 Duer (N. Y.) 511; *Milbank v. Dennistoun*, 10 Bosw. (N. Y.) 382; *People v. Beach*, 87 N. Y. 508; *Holcombe v. Munson*, 103 N. Y. 682, 4 N. Y. St. Rep. 250.

*North Carolina*. — *State v. Haynes*, 71 N. Car. 79.

*Pennsylvania*. — *Robeson v. Schuylkill Nav. Co.*, 3 Grant Cas. (Pa.) 186.

*South Carolina*. — *Everingham v. Messroon*, 2 Brev. (S. Car.) 461; *Bridger v. Asheville*, etc., R. Co., 27 S. Car. 456, 13 Am. St. Rep. 653.

*Texas*. — *Campbell v. State*, 8 Tex. App. 84.

*Vermont*. — *Penniman v. Patchin*, 6 Vt. 325.

*Virginia*. — *Claiborne v. Parrish*, 2 Wash. (Va.) 146.

If hearsay evidence be admitted, though the justice direct the jury to pay no regard to it, it is error. *Demoney v. Walker*, 1 N. J. L. 37.

**Facts Which in Nature of Case Could Be Known to Witness.** — Where facts stated by a witness are such as could have been known to him, the court cannot properly assume that they were not, and exclude them as hearsay. *Heintz v. O'Donnell* 17 Tex. Civ. App. 21.

#### Facts Which Could Not Be Known to Witness.—

But where, in the nature of things, a witness could not testify to a fact from his own knowledge, a declaration by him of such fact will be inadmissible in evidence. Thus, where the court refused to permit a person to answer this question: "State to the court whether or not there would have been a purchase of that place if Williams had not told you to the contrary," it was held not to be error where the witness was not the purchaser of the place, and could not therefore be presumed to know, unless by hearsay, whether there had been any purchase or not. *Williams v. Harter*, 53 Pac. Rep. 405, 121 Cal. 47. To the same effect see *Walker v. Stilson*, (Indian Ter. 1898) 43 S. W. Rep. 959.

**1. Hearsay in Writing.** — *Xenia Bank v. Stewart*, 114 U. S. 232; *Loomis v. Stevens*, 18 Ind. App. 184; *Patterson v. Maryland Ins. Co.*, 3 Har. & J. (Md.) 71, 5 Am. Dec. 419; *Webber v. Hayes*, 117 Mich. 256; *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 319; *McIntyre v. McCabe*, 19 Mont. 333; *Willett v. People*, 27 Hun (N. Y.) 469; *Murdock v. Courtenay Mfg. Co.*, 52 S. Car. 430.

**Letters and Declarations** out of court showing reasons which led a judge of probate to pass a decree in question, are mere hearsay. *Allen's Appeal*, 69 Conn. 702.

**A Postal Card and a Letter** received by a party to a suit, from a third person, in reply to letters by such party in relation to matters in litigation, are not admissible as evidence for such party. *Capen v. De Steiger Glass Co.*, 105 Ill. 185.

**The Account of Sales** sent to a shipper by his commission merchant is not admissible in evidence to show the value of cattle shipped or of their weight, in an action against a third person. *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315; *State v. Sutton*, 64 Mo. 111.

Nor can a witness testify as to the amount for which such cattle were sold, where it appears that he obtained his information on the subject from the account of sales made by the commission merchant who sold the cattle. *Gulf, etc., R. Co. v. Baugh*, (Tex. Civ. App. 1897) 42 S. W. Rep. 245.

**2. Reason for Inadmissibility of Hearsay.** — *Queen v. Hepburn*, 7 Cranch (U. S.) 295; *Wells v. Shipp*, *Walk.* (Miss.) 353.

**3. Inadmissibility of Self-serving Declarations** — *United States*. — *Freeborn v. Smith*, 2 Wall. (U. S.) 160; *James v. Stookey*, 1 Wash. (U. S.) 330; *Saenger v. Nightingale*, 48 Fed. Rep. 708.

*Alabama*. — *Kennedy v. Meador*, 1 Stew. & P. (Ala.) 220; *Brown v. Brown*, 5 Ala. 508; *Bradford v. Haggerthy*, 11 Ala. 698; *Martin v. Williams*, 18 Ala. 190; *Wells v. Bransford*,



they form part of a connected conversation or writing offered in evidence as

28 Ala. 200; *Gordon v. Clapp*, 38 Ala. 357; *Maynard v. State*, 46 Ala. 85; *Atwell v. State*, 63 Ala. 61; *Downing v. Woodstock Iron Co.*, 93 Ala. 262; *Espalla v. Richard*, 94 Ala. 159; *Hunt v. Johnson*, 96 Ala. 130; *Alexander v. Handley*, 96 Ala. 220.

*Arkansas*. — *Hazen v. Henry*, 6 Ark. 86; *Johnson v. Brock*, 23 Ark. 282.

*California*. — *Rice v. Cunningham*, 29 Cal. 492; *Poorman v. Miller*, 44 Cal. 269; *Schultz v. McLean*, 76 Cal. 608; *Gardner v. Dennison*, 106 Cal. 190; *Shamp v. White*, 106 Cal. 220; *Rogers v. Schulenburg*, 111 Cal. 281.

*Connecticut*. — *Bucknam v. Barnum*, 15 Conn. 68; *North Stonington v. Stonington*, 31 Conn. 412; *Pinney v. Jones*, 64 Conn. 545, 42 Am. St. Rep. 209.

*Florida*. — *Sullivan v. McMillan*, 26 Fla. 543.

*Georgia*. — *Brown v. Upton*, 12 Ga. 505; *Heard v. McKee*, 26 Ga. 332; *Alston v. Grant-ham*, 26 Ga. 374; *Williams v. English*, 64 Ga. 546; *Arthur v. Gordon County*, 67 Ga. 220; *Kelly v. McGehee*, 67 Ga. 364; *Howard v. Savannah, etc., R. Co.*, 84 Ga. 711; *Surles v. State*, 89 Ga. 167; *Harrison v. Richardson*, 99 Ga. 763.

*Illinois*. — *Morse v. Thorsell*, 78 Ill. 600; *Oliphant v. Liversidge*, (Ill. 1891) 27 N. E. Rep. 921; *Treadway v. Treadway*, 5 Ill. App. 478; *Melody v. People*, 8 Ill. App. 485; *Coates v. Harmon*, 32 Ill. App. 204; *Knobloch v. Romeis*, 34 Ill. App. 577; *Tewkesbury v. Beckwith*, 46 Ill. App. 323.

*Indiana*. — *Scobey v. Armington*, 5 Ind. 514; *Meyer v. Bell*, 65 Ind. 83; *Brown v. Kenyon*, 108 Ind. 283; *White Sewing Mach. Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109; *Olvey v. Jackson*, 106 Ind. 286; *Shauver v. Phillips*, 7 Ind. App. 12; *Wilson v. Smelser*, 13 Ind. App. 31.

*Iowa*. — *Murray v. Cone*, 26 Iowa 276; *State v. Miller*, 53 Iowa 84; *Welsh v. Lemert*, 92 Iowa 116; *Corbel v. Beard*, 92 Iowa 360.

*Kansas*. — *Western Union Tel. Co. v. Getto-McClung Boot, etc., Co.*, 3 Kan. App. 56.

*Kentucky*. — *Tipper v. Com.*, 1 Met. (Ky.) 6; *Tucker v. Hood*, 2 Bush (Ky.) 85; *Talbot v. Talbot*, 2 J. J. Marsh. (Ky.) 3; *Wright v. Had-dock*, 7 Dana (Ky.) 253; *Dixon v. Labry*, (Ky. 1895) 29 S. W. Rep. 21.

*Maine*. — *Emerson v. Harmon*, 14 Me. 271; *Gilbert v. Woodbury*, 22 Me. 246; *Handly v. Call*, 30 Me. 9; *Russell v. Clark*, 38 Me. 332.

*Maryland*. — *Brooks v. Dent*, 1 Md. Ch. 523; *Nusbaum v. Thompson*, 11 Md. 557; *Hagan v. Hendry*, 18 Md. 177; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515.

*Massachusetts*. — *Hubbard v. Barker*, 1 Allen (Mass.) 99; *Nutting v. Page*, 4 Gray (Mass.) 581; *Com. v. Kent*, 6 Met. (Mass.) 221; *Emerson v. Lowell Gas Light Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621; *Thomas v. Waterman*, 7 Met. (Mass.) 227; *Carter v. Gregory*, 8 Pick. (Mass.) 165; *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 255; *Heywood v. Heywood*, 10 Allen (Mass.) 105; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Nourse v. Nourse*, 116 Mass. 101; *Whitney v. Houghton*, 125 Mass. 451; *Fiske v. Cole*, 152 Mass. 335.

*Michigan*. — *Hogsett v. Ellis*, 17 Mich. 351;

*Ward v. Ward*, 37 Mich. 253; *Eddy v. McCall*, 71 Mich. 497; *Dikeman v. Arnold*, 83 Mich. 218; *Evans v. Montgomery*, 95 Mich. 497; *Hodges v. Detroit Electric Light, etc., Co.*, 109 Mich. 547.

*Minnesota*. — *King v. Frost*, 28 Minn. 417; *Griffin v. Bristle*, 39 Minn. 456.

*Mississippi*. — *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274, and note; *Barber v. Kinard*, (Miss. 1888) 4 So. Rep. 120; *Wilkerson v. Moffett-West Drug Co.*, (Miss. 1897) 21 So. Rep. 564.

*Missouri*. — *Mulliken v. Greer*, 5 Mo. 489; *Turner v. Belden*, 9 Mo. 797; *Garesche v. Chouteau*, 37 Mo. 413; *Darrett v. Donnelly*, 38 Mo. 492; *Moore v. Sauborin*, 42 Mo. 490; *Gentry v. Field*, 143 Mo. 399; *Speer v. Burlingame*, 1 Mo. App. Rep. 322; *Blount v. Hamey*, 43 Mo. App. 644.

*New Hampshire*. — *Gordon v. Shurtliff*, 8 N. H. 260; *Buswell v. Davis*, 10 N. H. 413; *Bailey v. Woods*, 17 N. H. 365; *Wiggin v. Plumer*, 31 N. H. 251; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Judd v. Brentwood*, 46 N. H. 430.

*New Jersey*. — *Wilson v. Hillyer*, 1 N. J. Eq. 63.

*New York*. — *Smith v. Kerr*, 1 Barb. (N. Y.) 155; *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147; *Ogden v. Peters*, 15 Barb. (N. Y.) 560; *Wilson v. Pope*, 37 Barb. (N. Y.) 321; *Lynch v. McBeth*, (Supm. Ct. Gen. T.) 7 How. Pr. (N. Y.) 113; *Garnsey v. Rhodes*, 138 N. Y. 461; *Root v. Borst*, 142 N. Y. 62; *Shankland v. Bartlett*, (Supm. Ct. Gen. T.) 15 Civ. Pro. (N. Y.) 24; *Tompkins v. Sheehan*, 82 Hun (N. Y.) 345; *Mason v. Corbin*, 88 Hun (N. Y.) 540.

*North Carolina*. — *Green v. Harris*, 3 Ired. L. (25 N. Car.) 210; *State v. Jefferson*, 6 Ired. L. (28 N. Car.) 305; *White v. Green*, 5 Jones L. (50 N. Car.) 47; *Devries v. Phillips*, 63 N. Car. 207.

*Ohio*. — *Burridge v. Geauga Bank, Wright (Ohio)* 688.

*Pennsylvania*. — *Kurtz v. Haines*, (Pa. 1888) 15 Atl. Rep. 716; *Kintzel v. Kintzel*, 133 Pa. St. 71; *Stauffer v. Young*, 39 Pa. St. 455; *Graham v. Hollinger*, 46 Pa. St. 55; *Thomas v. Maddan*, 50 Pa. St. 261; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256, 94 Am. Dec. 65; *Dempsey v. Dobson*, 174 Pa. St. 122; *Tarr v. Robinson*, 158 Pa. St. 60; *Mueller's Estate*, 159 Pa. St. 590; *Thomas v. Miller*, 165 Pa. St. 216.

*Texas*. — *Garvin v. Stover*, 17 Tex. 292; *Moke v. Fellman*, 17 Tex. 368, 67 Am. Dec. 656; *Johnson v. Richardson*, 52 Tex. 481; *Taliaferro v. Goudelock*, 82 Tex. 521; *Cherry v. Butler*, (Tex. App. 1891) 17 S. W. Rep. 1090; *Rankin v. Bell*, 85 Tex. 28; *Masterson v. Jordan*, (Tex. Civ. App. 1893) 24 S. W. Rep. 549; *Bailey v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 992; *Sanders v. Bush*, (Tex. Civ. App. 1897) 39 S. W. Rep. 203; *Jones v. State*, 22 Tex. App. 324.

*Utah*. — *Flint v. Nelson*, 10 Utah 261.

*Vermont*. — *Penniman v. Patchin*, 6 Vt. 325; *Holbrook v. Murray*, 20 Vt. 525; *Worden v. Powers*, 37 Vt. 619; *Barber v. Bennett*, 62 Vt. 50; *Robinson v. Dodge*, 66 Vt. 595; *Swordferger v. Hopkins*, 67 Vt. 136.

containing admissions or confessions on his part.<sup>1</sup>

**Declarations of Persons Not Parties to Suit.** — It is a general rule also that declarations out of court of third persons not parties to the suit are not admissible in evidence for the purpose of furnishing substantive proof of matters in issue.<sup>2</sup>

*West Virginia.* — *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837.

*Wisconsin.* — *Cohn v. Heimbauch*, 86 Wis. 176. *Green v. Hadfield*, 89 Wis. 138; *Baker v. State*, 80 Wis. 416.

See also the title **DECLARATIONS (IN EVIDENCE)**, vol. 9, p. 5.

**Declarations in Support of Title.** — The rule of the text applies to declarations as to title to real or personal estate. *Blount v. Hamey*, 43 Mo. App. 644; *Crothers v. Crothers*, 40 W. Va. 169; *Dixon v. Labry*, (Ky. 1895) 29 S. W. Rep. 21; *Diel v. Stegner*, 56 Mo. App. 535.

**Self-serving Declarations by Agent.** — The rule of the text also applies to self-serving declarations made by the agent of the person offering them in evidence. *Shiner v. Abbey*, 77 Tex. 1; *C., etc., Electric Motor Co. v. Frisbie*, 66 Conn. 67; *Sira v. Wabash R. Co.*, 115 Mo. 127, 37 Am. St. Rep. 386; *Harrington v. Bronson*, 161 Pa. St. 296; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401. See also the titles **DECLARATIONS (IN EVIDENCE)**, vol. 9, p. 5; **RES GESTÆ**.

1. *Bailey v. Pardridge*, 35 Ill. App. 121, affirmed in 134 Ill. 188. See also the titles **ADMISSIONS**, vol. 1, p. 721; **CONFESSIONS**, vol. 6, p. 574.

2. **Declarations by Third Persons** — *United States.* — *Sutherland v. Round*, 16 U. S. App. 30, 57 Fed. Rep. 467; *Xenia Bank v. Stewart*, 114 U. S. 232.

*Alabama.* — *Hartshorn v. Williams*, 31 Ala. 149; *Jones v. Pelham*, 84 Ala. 208; *Young v. Arntze*, 86 Ala. 116; *Morris Min. Co. v. Knox*, 96 Ala. 320; *H. B. Claffin Co. v. Rodenberg*, 101 Ala. 213; *Mitcham v. Schuessler*, 98 Ala. 635; *Payne v. Crawford*, 102 Ala. 387; *Cook v. Thornton*, 109 Ala. 523.

*California.* — *People v. Powell*, 87 Cal. 348; *Dawson v. Schloss*, 93 Cal. 194; *People v. Dixon*, 94 Cal. 255; *Chapman v. Neary*, 115 Cal. 79.

*Colorado.* — *St. Kevin Min. Co. v. Isaacs*, 18 Colo. 400; *Lee-Clark-Andreesen Hardware Co. v. Yankee*, 9 Colo. App. 443.

*Connecticut.* — *Chapin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56; *Robinson v. Clapp*, 65 Conn. 365; *Smith v. Hall*, 69 Conn. 651; *Porter v. Ritch*, 70 Conn. 235.

*Florida.* — *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1.

*Georgia.* — *Phillips v. Trowbridge Furniture Co.*, 86 Ga. 699; *Robinson v. Stevens*, 93 Ga. 535; *Clay v. Kagelmacher*, 98 Ga. 149; *Hollis v. Sales*, 103 Ga. 75.

*Illinois.* — *Jones v. Doe*, 2 Ill. 276; *Aiken v. Hodge*, 61 Ill. 436; *Smith v. Mohler*, 24 Ill. App. 407; *Huling v. Huling*, 32 Ill. App. 519; *Grubey v. National Bank*, 35 Ill. App. 354, affirmed in 133 Ill. 79; *Henderson v. Miller*, 36 Ill. App. 232; *Fisher v. Nubian Iron Enamel Co.*, 60 Ill. App. 568.

*Indiana.* — *Lynn v. Jeter*, 7 Blackf. (Ind.) 300; *Schooler v. State*, 57 Ind. 128; *Reynolds v. Copeland*, 71 Ind. 422; *Simpkins v. Smith*, 94 Ind. 470; *Pulaski County v. Shields*, 130

Ind. 6; *Dye v. State*, 130 Ind. 87; *Moelering v. Smith*, 7 Ind. App. 451; *Treager v. Jackson Coal, etc., Co.*, 142 Ind. 164.

*Iowa.* — *District Tp. v. Morehead*, 51 Iowa 99; *State v. Henke*, 58 Iowa 457; *Harrington v. Hamburg*, 85 Iowa 272; *Leach v. Hill*, 97 Iowa 81; *Fielding v. La Grange*, 104 Iowa 530; *Welch v. Norton*, 73 Iowa 721.

*Kansas.* — *Simpson v. Smith*, 27 Kan. 565; *Ehrard v. McKee*, 44 Kan. 715; *Holman v. Raynesford*, 3 Kan. App. 676.

*Kentucky.* — *Shackelford v. Purket*, 1 A. K. Marsh. (Ky.) 425; *Penn v. Fightmaster*, (Ky. 1891) 17 S. W. Rep. 334; *Turner v. Harrison County*, (Ky. 1895) 32 S. W. Rep. 467; *Beattyville Coal Co. v. Hoskins*, (Ky. 1898) 44 S. W. Rep. 363.

*Maine.* — *Battles v. Batchelder*, 39 Me. 19; *Gains v. Hasty*, 63 Me. 361; *Hunter v. Randall*, 69 Me. 183; *Smith v. Tarbox*, 70 Me. 127.

*Massachusetts.* — *Kimball v. Currier*, 5 Gray (Mass.) 458; *Filley v. Angell*, 102 Mass. 67; *Com. v. Ricker*, 131 Mass. 581; *Wallace v. Story*, 139 Mass. 115; *McKinnon v. Norcross*, 148 Mass. 533; *Old South Soc. v. Wainwright*, 156 Mass. 115.

*Michigan.* — *People v. Mead*, 50 Mich. 228; *Egan v. Grece*, 79 Mich. 629; *Merritt v. Stebbins*, 86 Mich. 342; *Vyn v. Keppel*, 108 Mich. 244; *Van Alstine v. Kaniecki*, 109 Mich. 318.

*Minnesota.* — *Peck v. Snow*, 47 Minn. 398.

*Mississippi.* — *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146.

*Missouri.* — *St. Louis v. Arnott*, 94 Mo. 275; *Davis v. Green*, 102 Mo. 170; *Gordon v. Burris*, 141 Mo. 602; *State v. Fullerton*, 143 Mo. 682.

*Montana.* — *Wiggin v. Fine*, 17 Mont. 575; *McIntyre v. McCabe*, 19 Mont. 333.

*New Hampshire.* — *Davis v. Sanders*, 11 N. H. 259.

*New York.* — *Kent v. Walton*, 7 Wend. (N. Y.) 256; *People v. Cox*, 21 Hun (N. Y.) 47; *Stickney v. Billings*, 30 Hun (N. Y.) 304; *Goldberg v. Wolff*, (C. Pl. Gen. T.) 10 N. Y. Supp. 544; *Globe v. Rauch*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 48; *Saxton v. New York El. R. Co.*, 60 N. Y. Super. Ct. 421; *Owen v. Matthews*, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 813; *Clason v. Baldwin*, 56 Hun (N. Y.) 326; *Gross v. Moore*, 68 Hun (N. Y.) 412; *O'Neil v. Hudson Valley Ice Co.*, 74 Hun (N. Y.) 163; *Kirkpatrick v. Briggs*, 78 Hun (N. Y.) 518; *Drake v. New York City, etc., R. Co.*, 80 Hun (N. Y.) 490; *Ayer v. Colgrove*, 81 Hun (N. Y.) 322; *Myers v. Commercial Travelers' Mut. Acc. Assoc.*, 85 Hun (N. Y.) 385; *Rawls v. American L. Ins. Co.*, 36 Barb. (N. Y.) 357; *Salmon v. Orser*, 5 Duer (N. Y.) 511; *Brumfield v. Potter, etc., Mfg. Co.*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 194, reversing (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 92; *Courtney v. New York El. R. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 115; *Wilcox v. Howd*, 25 N. Y. App. Div. 354; *People v. Beach*, 87 N. Y. 508; *Doyle v. Trinity Church Corp.*, 118 N. Y. 678, 28 N. Y. St. Rep. 972; *White v. Jones*, 155 N. Y. 475, reversing 86 Hun (N. Y.) 57.



## 2. Effect of Death of Declarant. — What a man has said when not under oath

*North Carolina.* — Harper v. Dail, 92 N. Car. 394; Spencer v. Fortescue, 112 N. Car. 268; Crenshaw v. Johnson, 120 N. Car. 270.

*Ohio.* — Benster v. Powell, 11 Ohio Cir. Ct. 491, 5 Ohio Cir. Dec. 206; Voss v. Murray, 50 Ohio St. 19.

*Oklahoma.* — Richardson v. Evans, 5 Okla. 803.

*Oregon.* — Du Bois v. Perkins, 21 Oregon 189.

*Pennsylvania.* — Mitchell v. Welch, 17 Pa. St. 339, 55 Am. Dec. 557; McCormick v. Robb, 24 Pa. St. 44; Nickols v. Jones, 166 Pa. St. 599; Dosch v. Diem, 176 Pa. St. 603, 38 W. N. C. (Pa.) 533; Floyd v. Hotchkiss, 5 Pa. Super. Ct. 216; Corser v. Hale, 149 Pa. St. 274; Evans v. McKee, 152 Pa. St. 89; Burk v. Howley, 179 Pa. St. 539, 57 Am. St. Rep. 607.

*South Carolina.* — Morein v. Solomons, 7 Rich. L. (S. Car.) 97; Wardlaw v. Hammond, 9 Rich. L. (S. Car.) 454; Orr v. Orr, 34 S. Car. 275; Dobson v. Cothran, 34 S. Car. 518; Swearingen v. Hartford Ins. Co., 52 S. Car. 309.

*Tennessee.* — Britton v. State, 4 Coldw. (Tenn.) 173; Lyons v. Wattenbarger, 1 Heisk. (Tenn.) 193; Van Vleet v. Sledge, 45 Fed. Rep. 743.

*Texas.* — Kottwitz v. Bagby, 16 Tex. 656; Thurmond v. Trammell, 22 Tex. 257; O'Brien v. Hilburn, 22 Tex. 616; Atwood v. Brooks, (Tex. App. 1890) 16 S. W. Rep. 535; Rankin v. Bell, 85 Tex. 28; Campbell v. State, 8 Tex. App. 84; Davidson v. Wallingford, (Tex. Civ. App. 1895) 30 S. W. Rep. 286, 827, 88 Tex. 619; Wilkins v. Ferrell, 10 Tex. Civ. App. 231; Tillman v. Wetsel, (Tex. Civ. App. 1895) 31 S. W. Rep. 433; McCallon v. Cohen, (Tex. Civ. App. 1897) 39 S. W. Rep. 973; Dennis v. Sanger, 15 Tex. Civ. App. 411; Pittman v. Rotan Grocery Co., 15 Tex. Civ. App. 676; Mahon v. Barnett, (Tex. Civ. App. 1897) 45 S. W. Rep. 24.

*Virginia.* — French v. Chapman, 88 Va. 317.

**The Testimony of a Witness that He Was Present Just After the Accident at a Railway Crossing,** and heard the bystanders talking about the absence of the flagman and that he heard it said by some one in the crowd that "he did not attend to his business good," was inadmissible as hearsay. *Felska v. New York Cent., etc., R. Co.*, 152 N. Y. 339.

**Movements of Trains.** — In an action against a railroad company to recover damages for personal injuries, it is not competent for the plaintiff to give in evidence the statements and declarations of a stranger in relation to the departure or movements of the defendant's train, since such evidence is hearsay. *Haase v. Oregon R., etc., Co.*, 19 Oregon 354.

Where a witness, upon being asked how he knew that a switch was left open, replied, "Because they told us so," it was held that his answer was hearsay. *Chicago, etc., R. Co. v. Fietsam*, 123 Ill. 518.

**Testimony as to the Description Given by a Person Who Had Been Robbed,** of the parties who made the assault upon him with the intent to rob, is hearsay. *People v. McCrea*, 32 Cal. 98.

**Where a Witness Merely Glanced at a Letter and Heard Another Read It, and Cannot Remember Any Sentences Word for Word,** his testimony is

merely hearsay, and is not competent to prove the contents of the letter. *Coxe v. England*, 65 Pa. St. 212.

**A Witness Cannot Testify as to Whether He "Had Ever Heard" of a Contract Like the One in Issue Having Been Made by an express company.** *Adams v. Brown*, 16 Ohio St. 75.

**The Testimony of a Witness in Reply to a Question as to the Situation of a Certain Person in regard to Property,** that "he was considered in good circumstances as to property," has been held to be hearsay, and, therefore, incompetent. *Sheldon v. Root*, 16 Pick. (Mass.) 567, 28 Am. Dec. 266.

**Conversations Between Two Makers of a Note,** in the absence of the payee, are clearly not binding upon the latter. *Nelson v. Flint*, 166 U. S. 276. To the same effect see *Dexter v. Clemans*, 17 Pick. (Mass.) 175.

**Statements as to Sanity or Insanity.** — What persons who are not parties to the suit may say, or what opinions persons who are not witnesses may express, in regard to the sanity or insanity of a testator or grantor, is inadmissible as being hearsay. *Barker v. Pope*, 91 N. Car. 169. To the same effect see *Cook v. Osborn*, 2 Root (Conn.) 31.

**Evidence of Motive or Intention.** — It has been held that the declaration of a person not a party to the suit, as to his motive in doing an act, where not made at the time of the act and in such circumstances as to characterize the act, is not admissible in evidence for the purpose of proving that the act was done with the motive stated, since such evidence is mere hearsay. *North Stonington v. Stonington*, 31 Conn. 412. To the same effect is *Chicago, etc., R. Co. v. Chancellor*, 165 Ill. 438.

But the rule is otherwise where the act forms part of the *res gestæ*. *Besch v. Besch*, 27 Tex. 390. See also the title *RES GESTÆ*.

**Declarations of Military Officers.** — It has been held that the conversations of military officers are not exempted from the common-law rules of evidence, and are excluded as being mere hearsay, as are the conversations of ordinary citizens. Thus, where a witness testified that military officers had stated that it was a military necessity that certain woods should be cut down, the evidence was excluded as being hearsay. *Merritt v. Nashville*, 5 Coldw. (Tenn.) 95.

**Statements of Physician.** — A plaintiff cannot testify as to what a physician said about injuries received by the plaintiff. *Armstrong v. Ackley*, 71 Iowa 76; *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600.

Nor may a physician testify as to statements made to him in the absence of the plaintiff by the latter's attending physician concerning the character of the injury suffered by the plaintiff. *Ponca v. Crawford*, 18 Neb. 551.

**A Person Who Can Neither Read nor Write** can not testify as to the contents of a lost instrument, since his testimony must necessarily be hearsay. *Russell v. Brosseau*, 65 Cal. 605.

One who has but a very imperfect knowledge of the English language cannot testify to his impression of the conversation gathered from declarations to the interpreter. *Plymouth Coal Co. v. Kommiskey*, 116 Pa. St. 365.

**Declarations of a Witness Out of Court incon-**



may not in general be given in evidence, even when he is dead.<sup>1</sup> But to this general rule there are exceptions: first, declarations accompanying an act;<sup>2</sup> second, declarations against interest;<sup>3</sup> third, declarations made by a person in the course of business—those which it is his duty to make;<sup>4</sup> fourth, declarations concerning matters of public or general interest;<sup>5</sup> fifth, declarations concerning matters of pedigree;<sup>6</sup> sixth, dying declarations.<sup>7</sup>

**3. Effect of Sickness of Declarant.**—The fact that a witness was taken sick the day prior to the trial has been held not to be a circumstance sufficient to render his declarations admissible on the ground of necessity.<sup>8</sup>

**4. Statements of Persons Incompetent to Testify for Want of Understanding.**—The fact that a person is excluded from being a witness for want of understanding, whether it arises from immaturity or defect of intellect, will not render his unsworn declarations admissible in evidence, and, indeed, where a person is so wanting in understanding as to be an incompetent witness, it follows as a necessary consequence that his statements out of court are inadmissible in evidence.<sup>9</sup>

**5. Evidence Admitted as Not Being Hearsay**—*a. STATEMENTS OF THIRD PERSONS VIEWED AS FACTS IN CONTROVERSY.*—It has been laid down as a general rule that where the fact of the making of a statement, and not its truth or falsity, is the question in controversy, the statement may be admitted as original evidence.<sup>10</sup>

**General Opinion or Reputation.**—On this principle, declarations as to general reputation, as distinguished from hearsay evidence, are admissible.<sup>11</sup>

**Commercial Reports as to Market Prices.**—In the same way, it has been held that, since value in a business sense consists largely of the opinions of persons familiar with the market, and these opinions are largely made up of what is said and reported by others, if a person shows that his business is such that, by commercial reports or other means of like nature, he is familiar with the

sistent with his testimony are not admissible to prove the truth of the facts stated, but may be used only for purposes of impeachment. *Thiele v. Newman*, 116 Cal. 571; *Eno v. Allen*, 113 Mich. 399.

Testimony of a witness, S., who conversed over the telephone with L., as to what he, S., repeated to some third person as the answers he received from L., is inadmissible in evidence. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530.

**1. Effect of Death of Declarant.**—*Sugden v. St. Leonards*, 1 P. D. 154; *Woodward v. Goulstone*, 11 App. Cas. 469; *Crumph v. Starke*, 23 Ark. 131; *Welsh v. Barrett*, 15 Mass. 380; *Hammel v. State*, 14 Tex. App. 326.

**2.** *Sugden v. St. Leonards*, 1 P. D. 154. See also the title *RES GESTÆ*.

**3.** *Sugden v. St. Leonards*, 1 P. D. 154. See also the title *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 8.

**4.** *Sugden v. St. Leonards*, 1 P. D. 154. See also the titles *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 12; *DOCUMENTARY EVIDENCE*, vol. 9, p. 939.

**5.** *Sugden v. St. Leonards*, 1 P. D. 154. See also the title *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 9.

**6.** See the title *PEDIGREE*.

**7.** See the title *DYING DECLARATIONS*, vol. 10, p. 359.

**8. Effect of Sickness of Declarant.**—*Gaither v. Martin*, 3 Md. 146. Compare *Griffith v. Sauls*, 77 Tex. 630.

**9. Statements of Persons Incompetent to Testify for Want of Understanding.**—*Reg. v. Gut-*

*tridges*, 9 C. & P. 471, 38 E. C. L. 188; *Weldon v. State*, 32 Ind. 81; *People v. McGee*, 1 Den. (N. Y.) 24; *Smith v. State*, 41 Tex. 352.

Thus, it has been held that, on the trial of a prosecution for assault and battery with intent to commit a rape, statements made in the absence of the defendant by the female alleged to have been so injured and not allowed to testify on account of her immature age, elicited soon after the transaction by questions put to her by her parents, are not admissible in evidence to prove the crime charged. *Weldon v. State*, 32 Ind. 81.

**10. Admissibility of Statements of Third Persons Viewed as Facts in Controversy.**—*Welch v. Spies*, 103 Iowa 389; *State v. Fox*, 25 N. J. L. 602; *Murdock v. Courtenay Mfg. Co.*, 52 S. Car. 428.

**Statement of Third Persons Admitted to Fix a Date.**—It has been held that a witness may date a fact which he knows by relating it to the time when he heard another fact, and in so doing may state not only that he heard something, but what that something was, in order to let the jury see what reason he had to observe and remember. But statements so heard, though he repeats them on oath, are not evidence of the occurrence on that date of the facts which they purport to affirm. *People v. Zimmerman*, 65 Cal. 307; *Harris v. Central R., etc., Co.*, 78 Ga. 525; *Hill v. North*, 34 Vt. 604.

**11. Admissibility of General Opinion or Reputation.**—*Foulkes v. Sellway*, 3 Esp. 236; *Walker v. Moors*, 122 Mass. 501. See also the title *CHARACTER (IN EVIDENCE)*, vol. 5, p. 850.

current market prices of an article, his testimony on the subject is competent, although he may not have actual personal knowledge of any particular sales.<sup>1</sup>

**b. DECLARATIONS AS TO BODILY OR MENTAL FEELINGS.** — Where the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings have been held to be original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light and to give them their proper effect. Such declarations are regarded as verbal acts, and are as competent as any other testimony when relevant to the issue. Their truth or falsity is an inquiry for the jury.<sup>2</sup>

**c. RES GESTÆ.** — Where an act of a party is admissible in evidence, his declarations at the time explanatory of that act are also admissible as part of the *res gestæ*.<sup>3</sup> This class of evidence is generally regarded as original evidence.<sup>4</sup> But, in a late authority, it has been classed as an exception to the rule making hearsay evidence inadmissible.<sup>5</sup> A full treatment of this question will be found in a subsequent portion of this work.<sup>6</sup>

**6. Relaxation of General Rule** — **a. IN GENERAL.** — From necessity and from the impracticability in some instances of other proof, exceptions to the general rule excluding hearsay evidence have been made.<sup>7</sup>

**b. DECLARATIONS AS TO PEDIGREE.** — The proof to show pedigree forms a well-settled exception to the rule which excludes hearsay evidence. Since, in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial and were known to but few persons, it is obvious that the strict enforcement in such cases of the rule against hearsay evidence would frequently occasion a failure of justice. Accordingly, hearsay evidence of declarations of deceased members of a family as to marriages, as well as births and deaths, is admissible.<sup>8</sup>

**c. DECLARATIONS CONCERNING MATTERS OF PUBLIC OR GENERAL INTEREST.** — Another exception to the rule excluding the declarations of third persons as hearsay, exists also in the case of deceased persons or persons supposed to be dead, showing reputation as to matters of public or general interest.<sup>9</sup>

**1. Admissibility of Commercial Reports as to Market Prices.** — *Brackett v. Edgerton*, 14 Minn. 174, 100 Am. Dec. 211; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 551; *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208. See also the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 475.

But it has been held that a witness who is neither a manufacturer of nor dealer in hardware, cannot give evidence of the value of items in a hardware bill based on information derived from buyers and sellers of such articles, as such evidence is but hearsay. *Green v. Caulk*, 16 Md. 556. To the same effect see *Southern Pac. R. Co. v. Madrox*, 75 Tex. 300; *Drucker v. Metropolitan El. R. Co.*, 73 Hun (N. Y.) 102.

Also, it has been held that accounts of sales sent to a shipper by his commission merchants are not admissible in evidence to show the value of stock in the market, as it is clearly hearsay. *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315. See also the title MARKET VALUE.

**2. Declarations as to Bodily or Mental Feeling.** — *Travellers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285; *Collins v. Waters*, 54 Ill. 485; *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 25. See also *Wilkinson v. Moseley*, 30 Ala. 562.

"Such evidence, however," it has been said, "is not to be extended beyond the neces-

sity on which the rule is founded." *Roesa v. Boston Loan Co.*, 132 Mass. 439.

For a Full Discussion of This Topic see the title RES GESTÆ.

**3.** *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25.

**4.** 1 Phillips on Ev. 185; 1 Greenl. on Ev., § 108.

**5.** *Thayer's Cases on Evidence*, p. 629.

**6.** See the title RES GESTÆ.

**7. Exceptions to General Rule as to Hearsay.** — See *Westfield v. Warren*, 8 N. J. L. 251; *State v. McDonald*, 1 N. J. L. 382; *Claiborne v. Parrish*, 2 Wash. (Va.) 146.

**8. Admissibility of Declarations as to Pedigree.** — *Goodright v. Moss*, 2 Cowp. 592; *Vowles v. Young*, 13 Ves. Jr. 140; *Rex v. Erith*, 8 East 539; *Berkeley Peerage Case*, 4 Campb. 401; *Johnson v. Lawson*, 2 Bing. 86, 9 E. C. L. 329; *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147; *Haines v. Guthrie*, 13 Q. B. D. 818; *Fulkerson v. Holmes*, 117 U. S. 389; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; *Westfield v. Warren*, 8 N. J. L. 251; *Independence v. Pompton*, 9 N. J. L. 213; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Eisenlord v. Clum*, 126 N. Y. 552.

For a Full Discussion of this Question, see the title PEDIGREE.

**9.** For a discussion of this question, see the title DECLARATIONS (IN EVIDENCE), vol. 9, p. 9.



*d.* DYING DECLARATIONS. — The question of dying declarations has been fully treated in another portion of this work.<sup>1</sup>

*e.* ANCIENT DOCUMENTS. — The question of the admissibility in evidence of ancient documents has been treated elsewhere in this work.<sup>2</sup>

*f.* PUBLIC DOCUMENTS. — Documents of a public nature and of public authority are generally admissible in evidence, although their authenticity is not confirmed by the usual tests of truth, the obligation of an oath, and the power of cross-examination.<sup>3</sup>

*g.* DECLARATIONS AND ENTRIES AGAINST INTEREST. — Discussions of the admissibility of declarations and entries against interest will be found elsewhere in this work.<sup>4</sup>

*h.* DECLARATIONS OR ENTRIES MADE BY THIRD PERSONS IN THE USUAL COURSE OF BUSINESS. — The rule has been laid down that entries made by a person in the ordinary course of his business, of acts which his duty in such business requires him to do, are, in case of his death, admissible evidence of the act so done, and this, though the entries are not against the interest of the party making them.<sup>5</sup> This rule is sometimes based on the theory that such entries are part of the *res gestæ*.<sup>6</sup> But by other authorities, such entries have been held to be admissible, apart from the doctrine of *res gestæ*.<sup>7</sup>

*i.* EVIDENCE IN A FORMER PROCEEDING. — Evidence given on a former trial of the same action or in a former action involving the same issues and between the same parties or their privies, is admissible under certain circumstances, as where it is shown that the witness giving such evidence is dead, or insane, or sick and unable to attend, or, having been summoned, has been kept away by the adverse party.<sup>8</sup>

7. Hearsay to Impeach Testimony. — A witness may be impeached by proof that he has upon some material point made verbal statements out of court which contradict his testimony at the trial, though such statements are not admissible as independent evidence on the merits of the case.<sup>9</sup>

8. Hearsay in Corroboration of Testimony. — Also, it has been held that statements of a witness on some former occasion out of court may, under certain circumstances, be admitted in corroboration of his testimony.<sup>10</sup>

9. Memoranda to Refresh Memory of Witness. — The question of the admissibility of memoranda, etc., which would be inadmissible as independent evidence for the purpose of refreshing the memory of a witness, will be found discussed in another portion of this work.<sup>11</sup>

**HEARSE.** — A hearse is a carriage for conveying the dead to the grave.<sup>12</sup>

1. See the title DYING DECLARATIONS, vol. 10, p. 359.

2. See the title ANCIENT DOCUMENTS, vol. 2, p. 322.

3. Admissibility of Public Documents. — See the title DOCUMENTARY EVIDENCE, vol. 9, p. 880. Compare Thayer's Cases on Evidence, p. 314, note.

4. See the titles ADMISSIONS, vol. 1, p. 670; CONFESSIONS, vol. 6, p. 520; DECLARATIONS (IN EVIDENCE), vol. 9, p. 7; DOCUMENTARY EVIDENCE, vol. 9, pp. 904, 938.

5. Nicholls v. Webb, 8 Wheat. (U. S.) 328. See also the title DOCUMENTARY EVIDENCE, vol. 9, p. 938.

6. 1 Greenl. on Ev., § 120.

7. See the title DOCUMENTARY EVIDENCE, vol. 9, p. 938.

8. For a full discussion of this question, see the title EVIDENCE, vol. 11, p. 523. See also the title DEPOSITIONS, vol. 9, p. 295.

9. Hearsay Evidence to Impeach Testimony. —

For a discussion of this question, see the title WITNESSES.

10. Hearsay in Corroboration of Testimony. — Baker v. Maloney, (Tex. 1887) 4 S. W. Rep. 469; Clever v. Hilberry, 116 Pa. St. 431. For a discussion of this question, see the title WITNESSES.

11. Memoranda to Refresh Memory of Witness. — See the title WITNESSES.

In Robeson v. Schuylkill Nav. Co., 3 Grant Cas. (Pa.) 186, it was held that the fact that a witness had refreshed his recollection by looking at a paper in which the facts within his knowledge and hearsay are both set down together, does not make the hearsay evidence. The court in this case said: "A land-surveyor may look at his field notes when he testifies about a line he has run, but if he has put on those notes the declarations of a bystander, it has never been heard of that such declarations are thereby made good evidence."

12. Webster's Dict., followed in Spikes v.



**HEAT OF PASSION.** — *Iracundiæ calor*; a term used in defining manslaughter. For its technical meaning see the titles MURDER AND MAN-SLAUGHTER; SELF-DEFENSE.

**HEAVY.** — See note 1.

**HEDGE.** — See note 2.

**HEIFER.** — A young cow that has not had a calf.<sup>3</sup>

Burgess, 65 Wis. 430, in which case it was held that a *hearse* was a wagon, and as such exempt from execution. See also WAGON; and see generally the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 59.

1. **Heavy.** — In a charter of a railroad company prescribing a maximum rate of charge for transportation of *heavy* articles by the hundred pounds and of articles of measurement by the cubic foot, the meaning of *heavy* must be determined by proof of the custom in practice prevailing at the time of granting the charter. *Bonham v. Charlotte, etc., R. Co.*, 13 S. Car. 267, 16 S. Car. 633.

2. **Hedge.** — Where a person taking a lease of a quarter-section of land, for the term of five years, covenanted to plant and grow a good and substantial *hedge* fence by the close of the term, it was held that the true meaning of the contract was that a *hedge* as good as could reasonably be made before the expiration of the lease should be made. It did not impose the duty of making a *hedge* that would turn stock, but only that the lessee should plant

and faithfully cultivate it during the term. *Gilchrist v. Gilchrist*, 76 Ill. 281.

3. **Heifer.** — *Johnson v. Babcock*, 8 Allen (Mass.) 583; *Milligan v. Jefferson County*, 2 Mont. 543; *People v. Soto*, 49 Cal. 70; *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210.

**Calf.** — In *Milligan v. Jefferson County*, 2 Mont. 545, it was held that *heifer* did not include a calf.

**Cow.** (See also Cow, vol. 8, p. 226.) — A *heifer* has been held to fall within the word "cow." *Pomeroy v. Trimper*, 8 Allen (Mass.) 403; *Parker v. State*, 39 Ala. 365; *Garvin v. State*, 52 Miss. 209. But see *Rex v. Cook*, 1 Leach C. C. 105.

**Same — Exemption.** (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 59.) — So a *heifer* has been held to be a cow within exemption statutes. *Pomeroy v. Trimper*, 8 Allen (Mass.) 404; *Johnson v. Babcock*, 8 Allen (Mass.) 583; *Carruth v. Grassie*, 11 Gray (Mass.) 211; *Freeman v. Carpenter*, 10 Vt. 433; *Dow v. Smith*, 7 Vt. 465.

# HEIR, HEIRS, AND THE LIKE.

BY THOMAS JOHNSON MICHIE.

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## CROSS-REFERENCES.

See the titles *BENEFICIARIES (IN INSURANCE)*, vol. 3, pp. 964, 965, 971; *CATCHING BARGAIN*, vol. 5, p. 764; *CHILD — CHILDREN*, vol. 5, p. 1082; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 358; *COVENANTS*, vol. 8, pp. 164, 165; *DEATH BY WRONGFUL ACT*, vol. 8, pp. 893, 905; *DEBTS OF DECEDENTS*, vol. 8, pp. 1061, 1091, 1098; *DEEDS*, vol. 9, pp. 115, 132, 133; *DISTRESS*, vol. 9, p. 631; *EJECTMENT*, vol. 10, p. 518; *ESTOPPEL*, vol. 11, pp. 398, 415; *FAMILY*, vol. 12, p. 870; *FIXTURES*, vol. 13, p. 635; *ISSUE*; *LEGACIES AND DEVICES*; *NEXT OF KIN*; *REMAINDERS AND EXECUTORY INTERESTS*; *SHELLEY'S CASE*; *SUCCESSION*; *WILLS*. And see *BLOOD*, vol. 4, p. 586; *BODILY HEIRS*, vol. 4, p. 611; *CREDITOR*, vol. 8, p. 247. As distinguished from assign, see *ASSIGNS*, vol. 3, p. 157.

**I. DEFINITION IN GENERAL.** — At common law an heir is he who is born or begotten in lawful wedlock, and upon whom the law casts an estate in lands, tenements, or hereditaments immediately upon the death of his ancestor.<sup>1</sup>

**1. Common-law Definition.** — *Meadowcroft v. Winnebago County*, 181 Ill. 509; *Adams v. Akerlund*, 168 Ill. 639, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 357; *Fletcher v. Holmes*, 32 Ind. 510; *State v. Engle*, 21 N. J. L. 361.

The heirs of a decedent are those of his kindred upon whom the law immediately upon his decease casts the estate in real property. *Matter of Donahue*, 36 Cal. 332; *Larabee v. Larabee*, 1 Root (Conn.) 555; *Richards v. Miller*, 62 Ill. 417; *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 252; *Kelley v. Vigas*, 112 Ill. 242; *Dodge's Appeal*, 106 Pa. St. 220; *Barclay v. Cameron*, 25 Tex. 241.

For other definitions see *Ruggles v. Randall*, 70 Conn. 44; *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 252; *McKinney v. Stewart*, 5 Kan. 392; *Patterson v. Hawthorn*, 12 S. & R. (Pa.) 114; *Sparks v. Wolf*, 25 Ont. App. 334.

**Succession.** — The word "heirs" refers to a class of persons who take by succession from generation to generation. *Brooks v. Evetts*,

33 Tex. 742; *Castro v. Tennent*, 44 Cal. 262. See also *Ward v. Stow*, 2 Dev. Eq. (17 N. Car.) 509. See also *infra*, this title, *Technical Sense — Word of Limitation*.

Under the word "heir" are comprehended the heir or heirs *ad infinitum*. *Crocker v. Smith*, 10 Ill. App. 379; *Merrill v. Atkin*, 59 Ill. 19.

**Determined by Statute.** (See also the title *SUCCESSION*.) — In *Kelley v. Vigas*, 112 Ill. 245, it was said: "The word 'heir,' it is said, when uncontrolled by the context, designates the person appointed by law to succeed to the estate in question, as in case of intestacy, and so the authorities seem to hold. Who are heirs of a deceased person is determined and declared by statute." See also *Aspden's Estate*, 2 Wall. Jr. (C. C.) 368; *O'Brien v. Bugbee*, 46 Kan. 12; *Clark v. Scott*, 67 Pa. St. 446; *Ryan's Estate*, 14 W. N. C. (Pa.) 79; *Walker v. Walker*, 28 Pa. St. 40; *Dodson v. Ball*, 60 Pa. St. 500.

**Descendants Distinguished from Heirs.** — In

In the Civil Law *haeres* or "heir" has a more extended signification than in the common law. The term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law, and whether the property be real or personal in its nature. In the Scotch law "heir" also includes those who succeed to personal property.<sup>1</sup>

**Heir of the Body.** — The heirs of a man's body are such of his issue or offspring as may lawfully inherit.<sup>2</sup>

*Tichenor v. Brewer*, 98 Ky. 349, it was said: "While it may be that the same persons are often both the descendants and heirs at law of an ancestor, yet it by no means follows that the terms 'descendants' and 'heirs at law' mean always one and the same person." See also DESCENDANT, vol. 9, p. 399.

But "heirs" is sometimes used in the sense of descendants. *Maguire v. Moore*, 108 Mo. 267; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345. And so of "heirs of the body." *Tucker v. Adams*, 14 Ga. 548.

**Mother.** — In *McKinney v. Stewart*, 5 Kan. 392, it was held that a mother was the heir of her deceased son who left neither wife, child, nor father. See also the title SUCCESSION.

**Children.** (See also the title CHILD — CHILDREN, vol. 5, p. 1082.) — In *Erwin v. Ferguson*, 5 Ala. 158, it was held that an allegation that the mortgagor died leaving certain children surviving him was equivalent to the allegation that they were his heirs at law.

"To Heir" held to have been used in the sense of "to have," "to succeed to," "to receive." *Randolph v. Wright*, 81 Va. 612.

**Sole Heiress.** — Where the testator designated one G. as his sole heiress, and died leaving personal property, it was held that G. was entitled to the whole of the testator's estate, as it was his intention by the words "sole heiress" to give to her everything he had except the property specifically devised. *Siemer v. Siemer*, 2 Gill & J. (Md.) 107.

**Rule that Will Should Be Construed in Favor of Heir.** — In *Walker v. Walker*, 28 Pa. St. 46, it was held that the rule which in *England* requires preference to be given to the heir at law in cases of doubt does not obtain in *Pennsylvania*, for the reason that the term "heir" has different meanings in the two jurisdictions; in the former it is the eldest son, in the latter all the children. See also the title WILLS.

**Patents.** (See also the title PATENTS.) — In *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 222, it was said: "The words in the statute, 'the patentee, his heirs or assigns,' whether construed according to the rules of grammar or to the evident intent of Congress, mean 'the patentee or his heirs or assigns.' They comprehend the legal representatives, assignees in law, and assignees in fact, and the phraseology raises no limitation in the sense of the strict common-law rule applied to realty."

**Conveyance to Trustee.** (See also the title TRUSTS AND TRUSTEES.) — In *Brown v. Alden*, 14 B. Mon. (Ky.) 114, the word "heirs" inserted in a deed or trust conveying property to a trustee was construed to mean nothing more than a conveyance of a complete legal title.

**Heirs and Issue.** (See also ISSUE.) — "Heirs" is more comprehensive than "issue," since it embraces collateral kindred, and is not con-

fined to lineal descendants. *Kingsland v. Rapalye*, 3 Edw. (N. Y.) 1, 9. And see *infra*, this title, *Heirs in the Sense of Heirs of the Body or Issue*.

**Heirship and Representation.** — Representation and heirship, though they may produce the same result, are not the same thing, and it is not necessary that a person should be the heir of another in order to be his representative. Heirship is the result, while representation is but a process through which that result is produced. *Gaines v. Strong*, 40 Vt. 354. See also the title SUCCESSION.

**Same — Children.** — The word "heirs" always carries with it an idea of representation, but the term "children" does not. *Roome v. Counter*, 6 N. J. L. 114.

"Heir" a Clerical Mistake for "Her." — See *Huntington v. Lyman*, 138 Mass. 205.

**Creditors — New Hampshire Statute.** — In *Graves v. Graves*, 58 N. H. 24, it was held that Gen. Stat., c. 180, § 12, authorizing the probate court to extend the time of "creditors" of an estate to prove their claims, did not authorize an extension for an heir to contest a creditor's claim.

**Insurable Interest.** — A statute prohibited the issuance of a policy of insurance "upon any life in which the beneficiary named has not an insurable interest," but provided that in case of a violation of said prohibition the insurance should be payable to the heirs of the deceased. It was held that the statute embraced heirs who had not an insurable interest in the life of the deceased. *Silvers v. Michigan Mut. Ben. Assoc.*, 94 Mich. 39. See generally the title LIFE INSURANCE.

**Aliens.** — Aliens are not within the term "heirs at law." *Orr v. Hodgson*, 4 Wheat. (U. S.) 453. See also the titles ALIENS, vol. 2, p. 64; SUCCESSION.

**1. Civil Law.** — *Adams v. Akerlund*, 168 Ill. 639, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 357; *Meadowcroft v. Winnebago County*, 181 Ill. 509.

**Louisiana.** — "The term 'heir' has several significations. Sometimes it refers to one who has formally accepted a succession and taken possession thereof; sometimes to one who is called to succeed but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced." *Mumford v. Bowman*, 26 La. Ann. 417. See also *Heath v. Hewitt*, 127 N. Y. 166.

**Heirs Female in Scotch Law.** — See *Mackenzie v. Devonshire*, (1896) A. C. 400.

**2. Heir of the Body.** — *Black v. Cortmell*, 10 B. Mon. (Ky.) 193; *Waters v. Bishop*, 122 Ind. 520. See also BODY HEIRS, vol. 4, p. 611.

In *Hampton v. Holman*, 5 Ch. D. 192, it is said: "The words 'heirs of the body,' *prima facie*, mean all descendants; and it is likewise a rule of law that all descendants are heirs."



**Heir Apparent and Heir Presumptive.** — An heir apparent is one whose right of inheritance is indefeasible, provided he outlives the ancestor, as the eldest son, who must, by the common law of *England*, become the heir of his father on the death of the latter. An heir presumptive is one who, if the ancestor should die immediately, would succeed to the estate, but whose right of inheritance may be defeated by the birth of a nearer heir.<sup>1</sup>

**II. TECHNICAL SENSE — WORD OF LIMITATION.** — The term “heir” or “heir of the body” has assigned to it by judicial determinations its appropriate, peculiar, and technical import and meaning, and that import and meaning it is to receive unless there is something in the instrument clearly excepting it from this general rule, and showing that when used it was designed that this technical import should not be applied to it. In its legal import or signification it is not a word of purchase, nor a *designatio personæ*, but is *nomen collectivum*, and used as a word of limitation, and will carry the land devised or conveyed not only to the immediate heir or issue, but to all those who descend from the devisee or grantee.<sup>2</sup>

under these words, unless they are clearly qualified and restricted by other words so as to give them a more limited sense.”

In its technical sense the term “heirs of the body” includes all persons who successively answer the description of heir of the body, and hence it embraces the whole line of lineal descendants, to the most remote generation. Technically construed, the expression is one which cannot be used to describe the children or grandchildren of a living person, for *nemo est haeres viventis*. *Roberts v. Ogbourne*, 37 Ala. 178. See *infra*, this title, *Nemo Est Haeres Viventis*.

In *Sewall v. Roberts*, 115 Mass. 276, it was said: “The term ‘heir of the body’ is a well-established technical term, with which the words ‘children,’ or ‘issue,’ or ‘lawful issue’ are not synonymous.” See *infra*, this title, *Technical Sense — Word of Limitation*.

In *Yarnall’s Appeal*, 70 Pa. St. 340, it was said: “Where a testator intends the estate to go to the whole body of persons in legal succession constituting in law the entire line of descent lineal, he evidently means the same thing as if he had said ‘issue’ or ‘heirs of the body;’ or if he intends it to go to the whole line of descent, lineal and collateral, he means the same thing as if he had used the term ‘heirs,’ which as a word of art describes precisely the same line of descent.”

**Natural Heir.** — In *Smith v. Pendell*, 19 Conn. 112, the court said: “The words ‘natural heirs’ and ‘heirs of the body,’ in a will, and by way of executory devise, are considered as of the same legal import.”

**Heirs of the Body and Issue.** (See also *ISSUE*.) — In *Hawkins v. Everett*, 5 Jones Eq. (58 N. Car.) 44, it was said: “‘Heirs of the body’ has a more extended meaning than ‘children.’ It is synonymous with ‘issue,’ and includes children and the descendants of any child that may be dead.” See also *Granger v. Granger*, 147 Ind. 95; *Raborg v. Hammond*, 2 Har. & G. (Md.) 53.

But in *In re Jeaffreson*, L. R. 2 Eq. 281, it was said that “heirs of the body” is not so flexible a term as “issue.” See also *Taylor v. Taylor*, 63 Pa. St. 483; *Angle v. Brosius*, 43 Pa. St. 159; *Nes v. Ramsay*, 155 Pa. St. 632; *Bradford v. Griffin*, 40 S. Car. 471.

1. *Jones v. Fleming*, 37 Hun (N. Y.) 230. The court further said: “Neither definition describes the interest of persons whose right to inherit may be defeated by conveyance or devise. Neither heirs apparent nor heirs presumptive have a legal estate or interest, though they may, in equity, bind this possibility by way of estoppel as against themselves.” See *infra*, this title, *Nemo Est Haeres Viventis*.

2. **Technical Sense Presumed — England.** — *Mounsey v. Blamire*, 4 Russ. 384; *In re Thompson*, 9 Ch. D. 607; *Poole v. Poole*, 3 B. & P. 627; *Doe v. Chafey*, 16 M. & W. 656; *Doe v. Smith*, 7 T. R. 527; *Winter v. Perratt*, 9 Cl. & F. 669; *Holloway v. Holloway*, 5 Ves. Jr. 401; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524, 553; *Doe v. Harvey*, 4 B. & C. 610, 10 E. C. L. 419; *Doody v. Higgins*, 2 Kay & J. 729; *Burley’s Case*, cited in *Rex v. Mellington*, 1 Vent. 230; *Doe v. Perratt*, 5 B. & C. 48, 11 E. C. L. 138; *Jones v. Morgan*, 1 Bro. C. C. 206; *Whiting v. Wilkins*, 1 Bulst. 219.

*United States.* — *Osborne v. Shrieve*, 3 Mason (U. S.) 391; *Daly v. James*, 8 Wheat. (U. S.) 534; *Aspden’s Estate*, 2 Wall. Jr. (C. C.) 368.

*Arkansas.* — *Moody v. Walker*, 3 Ark. 147; *Myar v. Snow*, 49 Ark. 129.

*California.* — *Norris v. Hensley*, 27 Cal. 449.

*Connecticut.* — *Ruggles v. Randall*, 70 Conn. 44; *Beers v. Narramore*, 61 Conn. 14; *Walsh v. McCutcheon*, 71 Conn. 283; *Tingier v. Chamberlin*, 71 Conn. 469.

*Delaware.* — *Roach v. Martin*, 1 Harr. (Del.) 549, 27 Am. Dec. 748.

*Georgia.* — *Wilkinson v. Clark*, 80 Ga. 367.

*Illinois.* — *Rawson v. Rawson*, 52 Ill. 62; *Richards v. Miller*, 62 Ill. 417; *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 252; *Carpenter v. Van Olinder*, 127 Ill. 43; *Kellett v. Shepard*, 139 Ill. 433; *Meadowcroft v. Winnebago County*, 181 Ill. 510; *Ewing v. Barnes*, 156 Ill. 61.

*Kentucky.* — *Williamson v. Williamson*, 18 B. Mon. (Ky.) 329; *Johnson v. Johnson*, 2 Met. (Ky.) 331; *Mitchell v. Simpson*, 88 Ky. 126.

*Louisiana.* — *Sharp v. Kleinpeter*, 7 La. Ann. 264.

*Maryland.* — *Simpers v. Simperts*, 15 Md. 188; *Mitchell v. Mitchell*, 2 Gill (Md.) 236; *Horne v. Lyeth*, 4 Har. & J. (Md.) 435.

**Heir and Heirs.** — It is immaterial whether the term "heir" or "heirs" be

*Massachusetts.* — Sewall *v.* Roberts, 115 Mass. 277; Dove *v.* Torr, 128 Mass. 38; Putnam *v.* Gleason, 99 Mass. 454; Richardson *v.* Wheatland, 7 Met. (Mass.) 169; Clarke *v.* Cordis, 4 Allen (Mass.) 466.

*Michigan.* — Hascall *v.* Cox, 49 Mich. 440.

*Mississippi.* — Irvine *v.* Newlin, 63 Miss. 192.

*Missouri.* — Clarkson *v.* Hatton, 143 Mo. 47.

*New Hampshire.* — Crockett *v.* Robinson, 46 N. H. 454; Wilkins *v.* Ordway, 59 N. H. 378.

*New Jersey.* — Den *v.* Laquear, 4 N. J. L. 342; Den *v.* Hugg, 5 N. J. L. 491; Den *v.* Wortendyk, 7 N. J. L. 379, 380; Den *v.* Zabriskie, 15 N. J. L. 410; Den *v.* Pierson, 16 N. J. L. 185; State *v.* Engle, 21 N. J. L. 347; Hand *v.* Marcy, 28 N. J. Eq. 62.

*New York.* — Campbell *v.* Rawdon, 18 N. Y. 412; Cushman *v.* Horton, 59 N. Y. 149; Thurber *v.* Chambers, 66 N. Y. 42; Luce *v.* Dunham, 69 N. Y. 37; Tillman *v.* Davis, 95 N. Y. 17; Schoonmaker *v.* Sheely, 3 Den. (N. Y.) 490; Matter of Sanders, 4 Paige (N. Y.) 293.

*North Carolina.* — Croom *v.* Herring, 4 Hawks (11 N. Car.) 398; Nichols *v.* Gladden, 117 N. Car. 497; Rogers *v.* Brickhouse, 5 Jones Eq. (58 N. Car.) 301; Stith *v.* Barnes, 1 Law. Repos. (4 N. Car.) 484, 6 Am. Dec. 547.

*Ohio.* — Brasher *v.* Marsh, 15 Ohio St. 112.

*Pennsylvania.* — Auman *v.* Auman, 21 Pa. St. 347; Campbell *v.* Jamison, 8 Pa. St. 498; Angle *v.* Brosius, 43 Pa. St. 189; Ralston *v.* Waln, 44 Pa. St. 279; Porter's Appeal, 45 Pa. St. 201; Eby's Appeal, 50 Pa. St. 311; Clark *v.* Scott, 67 Pa. St. 446; Doeblor's Appeal, 64 Pa. St. 15; Gibson's Estate, 14 Pa. Co. Ct. 244; Moyer's Estate, 12 Pa. Co. Ct. 137; Serfass *v.* Serfass, 190 Pa. St. 484; Huss *v.* Stephens, 51 Pa. St. 282; Warn *v.* Brown, 102 Pa. St. 352; Dodge's Appeal, 106 Pa. St. 220; Smith *v.* Folwell, 1 Binn. (Pa.) 546; Hall *v.* Vandegrift, 3 Binn. (Pa.) 374; Hauptman's Estate, 12 Phila. (Pa.) 103, 35 Leg. Int. (Pa.) 194; Criswell's Appeal, 41 Pa. St. 288.

*Rhode Island.* — Alverson *v.* Randall, 13 R. I. 73; Pierce *v.* Pierce, 14 R. I. 516.

*South Carolina.* — Shaw *v.* Robinson, 42 S. Car. 342; Seabrook *v.* Seabrook, McMull. Eq. (S. Car.) 201.

*Tennessee.* — Kay *v.* Connor, 8 Humph. (Tenn.) 624, 49 Am. Dec. 690.

*Virginia.* — Wallace *v.* Minor, 86 Va. 550; Smith *v.* Chapman, 1 Hen. & M. (Va.) 289; Dickinson *v.* Hoomes, 8 Gratt. (Va.) 386.

*West Virginia.* — Milhollen *v.* Rice, 13 W. Va. 567; Reid *v.* Stuart, 13 W. Va. 338; Stuart *v.* Stuart, 18 W. Va. 689; Chipps *v.* Hall, 23 W. Va. 504; Tomlinson *v.* Nickell, 24 W. Va. 169.

**Same — Heirs of the Body.** — *Ward v. Ward*, 1 P. Wms. 132; Bartlett *v.* Green, 13 Sim. 218; Sayer *v.* Masterman, Ambler. 346; Miller *v.* Graham, 47 S. Car. 288; Bradley *v.* Mosby, 3 Call (Va.) 50; Nye *v.* Lovitt, 92 Va. 710.

**Same — Heirs — England.** — *Whiting v. Wilkins*, 1 Bulst. 219; *Rex v. Cluer*, 3 Keb. 102; *Hurley's Case*, cited in *Rex v. Mellings*, 1 Vent. 230.

*United States.* — *Daly v. James*, 8 Wheat. (U. S.) 495; *Osborne v. Shrieve*, 3 Mason (U. S.) 391.

*Connecticut.* — *Landon v. Moore*, 45 Conn. 422.

*Delaware.* — *Roach v. Martin*, 1 Harr. (Del.) 549.

*Georgia.* — *Kemp v. Daniel*, 8 Ga. 387; *Choice v. Marshall*, 1 Ga. 97; *Wilkerson v. Clark*, 80 Ga. 367.

*Illinois.* — *Vangieson v. Henderson*, 150 Ill. 119.

*Indiana.* — *Lane v. Utz*, 130 Ind. 235.

*Massachusetts.* — *Knowlton v. Leavitt*, 121 Mass. 307.

*Missouri.* — *Chew v. Keller*, 100 Mo. 362.

*New York.* — *Brown v. Lyon*, 6 N. Y. 419; *Thurber v. Chambers*, 66 N. Y. 42; *Rogers v. Rogers*, 3 Wend. (N. Y.) 521.

*North Carolina.* — *Neal v. Nelson*, 117 N. Car. 393.

*Ohio.* — *Linton v. Laycock*, 33 Ohio St. 136.

*Pennsylvania.* — *George v. Morgan*, 16 Pa. St. 106; *Criswell's Appeal*, 41 Pa. St. 290; *Curtis v. Longstreth*, 44 Pa. St. 302; *Smith v. Folwell*, 1 Binn. (Pa.) 546; *Hall v. Vandegrift*, 3 Binn. (Pa.) 374.

*Rhode Island.* — *Eaton v. Tillinghast*, 4 R. I. 276.

**Same — Quantity of Estate.** — When the term "heirs" or "heirs of the body" is used by a testator, the law presumes that he used it in their legal sense, that he intended not individuals, but quantity of estate, and descent. Whenever these terms are employed, therefore, the burden is thrown upon him who contends that they are words of purchase, to rebut this presumption and to show that they were used in the particular grant or devise to designate persons. *Guthrie's Appeal*, 37 Pa. St. 13.

**Same — Example.** — A devise to heirs is not ordinarily equivalent to a devise to children or to grandchildren or to nephews and nieces. *Johnson v. Jacob*, 11 Bush (Ky.) 646. See also *Hunter v. Watson*, 12 Cal. 376.

**Same — Not Construed as Children.** — In *Criswell's Appeal*, 41 Pa. St. 238, it was held that an addition by the testator of the words "then living" to the word "heirs" was insufficient to give to "heirs" the meaning of children.

A deed by a husband to his wife provided that after her death the property should go to their children, "and in case of the death of any of such children, then to their heir or heirs." It was held that the words "heir or heirs" were used technically and not in the sense of children. *Hochstein v. Berghauser*, 123 Cal. 681. See also *Weatherly v. Armfield*, 8 Ired. L. (30 N. Car.) 26; *Wallace v. Minor*, 86 Va. 550.

And so in the following cases the court has refused to construe "heirs" as equivalent to "children:"

*United States.* — *Boman v. Boman*, 7 U. S. App. 67; *Forest Oil Co. v. Crawford*, 77 Fed. Rep. 110.

*Connecticut.* — *Beers v. Narramore*, 61 Conn. 11.

*Georgia.* — *Sharman v. Jackson*, 30 Ga. 225.

*Indiana.* — *Taney v. Fahndley*, 126 Ind. 88; *Durbin v. Redman*, 140 Ind. 694; *Hochstedler v. Hochstedler*, 108 Ind. 506.

*Kentucky.* — *Lanham v. Wilson*, (Ky. 1893) 22 S. W. Rep. 438; *Short v. Terry*, (Ky. 1893) 22 S. W. Rep. 841; *Pritchard v. James*, 93 Ky. 306.



used, as the law has assigned to each of these the same import, and each embraces the same class.<sup>1</sup>

**Parol Evidence.** — And parol evidence is not admissible to show that the word was not used in its technical sense.<sup>2</sup>

**Who Shall Take and the Manner of Taking.** — A devise to heirs, whether to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to be that they take as heirs would take by the rules of descent.<sup>3</sup>

**Time.** — It is well settled that a gift to the heirs of one will be construed as referring to those who are such at the time of the ancestor's death.<sup>4</sup>

*Pennsylvania.* — Charles's Appeal, 2 Penny. (Pa.) 165, 13 W. N. C. (Pa.) 89.

*South Carolina.* — Ramsay v. Joyce, Mc-Mull. Eq. (S. Car.) 236, 37 Am. Dec. 550.

*Vermont.* — Smith v. Hastings, 29 Vt. 240.

*West Virginia.* — Tomlinson v. Nickell, 24 W. Va. 148.

And see the cases cited *supra*, this note.

**Same — Pretermitted Children.** — A statute provided that in case a testator did not name or provide for a child or children in his will, he should be deemed to die intestate as to such child. It was held that a will devising "to each of my heirs at law the sum of one dollar" was within this statute. The court refused to read "heirs at law" in the sense of "children." Boman v. Boman, 49 Fed. Rep. 329, reversing 47 Fed. Rep. 849. See also the title **WILLS**.

**Same — Heirs Not Extended to Grandchildren.** — Burton v. Black, 30 Ga. 641.

**Same — Heirs or Heiresses.** — In Leathers v. Gray, 101 N. Car. 162, the court said: "The phrase 'her heirs or heiresses' means no more than that the testator devised the land to his daughter and the heirs of her body, male and female, and the course of descent is not changed in any degree from what it would be if the word 'heiresses' did not appear, nor does that word suggest or imply children of the testator any more than the word 'heirs.'" Citing Donnell v. Mateer, 5 Ired. Eq. (40 N. Car.) 7; Coon v. Rice, 7 Ired. L. (29 N. Car. 217; Folk v. Whitley, 8 Ired. L. (30 N. Car.) 133; Worrell v. Vinson, 5 Jones L. (50 N. Car.) 91; Gillis v. Harris, 6 Jones Eq. (59 N. Car.) 267; 2 Minor's Inst. 351; Washburn on Real Prop. 274; note to Shelley's Case, 1 Coke 93 b.

**1. Heir in the Sense of Heirs.** — Mounsey v. Blamire, 4 Russ. 384; Spark v. Purnel, Hob. 75; Whiting v. Wilkins, 1 Bulst. 219; Roach v. Martin, 1 Harr. (Del.) 549; Den v. Cox, 9 N. J. L. 14; Hall v. Vandegrift, 3 Binn. (Pa.) 374; Stokes v. Van Wyck, 83 Va. 724; Wallace v. Minor, 86 Va. 550.

But where property is devised to A. and his heir, the courts are probably more willing to regard the word "heir" as *persona designata*. Greaves v. Simpson, 33 L. J. Ch. 641.

**Same — Nearest Heir.** — "The word 'nearest,' like 'next' or 'first,' prefixed to the term 'heirs' or 'heir,' without the use of other words of limitation on the devise to the heir, will not vary the effect of the devise." Therefore, a devise to the nearest heirs of a person is the same as a devise to his heirs generally. Ryan v. Allen, 120 Ill. 648.

**Same — Oldest Male Heir.** — In Brownell v.

Brownell, 10 R. I. 509, where realty was devised to one during her life and at her death to the oldest male heir, it was held that the devisee took an estate tail, the court refusing to construe "oldest male heir" as meaning the oldest son or daughter of the devisee. See also Dubber v. Trollope, Amb. 453; Cuffee v. Milk, 10 Met. (Mass.) 366; Canedy v. Haskins, 13 Met. (Mass.) 389.

**2. Parol Evidence Not Admissible.** — (See also the title **PAROL EVIDENCE**.) — Aspden's Estate, 2 Wall. Jr. (C. C.) 368; Richards v. Miller, 62 Ill. 417; Stith v. Barnes, 1 Law Repos. (4 N. Car.) 484, 6 Am. Dec. 547; Huss v. Stephens, 51 Pa. St. 282.

**3. Persons Who Take and Manner of Taking — England.** — Bullock v. Downes, 9 H. L. Cas. 1, 14, 22, 30.

*Illinois.* — Kelley v. Vidas, 112 Ill. 242.

*Massachusetts.* — Daggett v. Slack, 8 Met. (Mass.) 450; Houghton v. Kendall, 7 Allen (Mass.) 72, 77, 78; Holbrook v. Harrington, 16 Gray (Mass.) 102, 104; Rand v. Sanger, 115 Mass. 124, 128; Cummings v. Cummings, 146 Mass. 501, 507.

*New York.* — Clark v. Lynch, 46 Barb. (N. Y.) 81.

*Tennessee.* — Forrest v. Porch, 100 Tenn. 391.

**4. Time of Ancestor's Death — England.** — Wrightson v. Macaulay, 14 M. & W. 214; Danvers v. Clarendon, 1 Vern. 35; Holloway v. Holloway, 5 Ves. Jr. 399; Doe v. Spratt, 5 B. & Ad. 731, 27 E. C. L. 166; Vaux v. Henderson, cited in Horsemann v. Abbey, 1 Jac. & W. 388; Rawlinson v. Wass, 9 Hare 673; Boydell v. Golightly, 14 Sim. 327.

*Illinois.* — Kellett v. Shepard, 139 Ill. 433.

*Massachusetts.* — Dove v. Torr, 128 Mass. 38; Wood v. Bullard, 151 Mass. 324; Abbott v. Bradstreet, 3 Allen (Mass.) 587; Minot v. Tappan, 122 Mass. 535; Minot v. Harris, 132 Mass. 529.

*Pennsylvania.* — Woods's Appeal, 18 Pa. St. 481.

In Sparks v. Wolff, 25 Ont. App. 326, a testator devised land upon the happening of certain contingencies unto the heirs of his son. At the time the will was made the statute abolishing heirships by primogeniture had not been enacted, but before the happening of the contingency named this statute was passed. It was held that all the brothers and sisters of the son were his heirs.

"Heirs of the Body" was held to mean the persons who answer that description at the time at the death of the living tenant. Sharman v. Jackson, 30 Ga. 224.



**III. HEIRS IN THE SENSE OF HEIRS OF THE BODY OR ISSUE.** — To effectuate the intention of the maker of an instrument the term "heirs" has frequently been held to have been used not in its strictest sense, but in the sense of heirs of the body, or issue.<sup>1</sup>

**IV. WORD OF PURCHASE — CHILDREN.** — The rule that the terms "heirs" and "heirs of the body" are presumed to have been used in their technical sense will yield to the intention of the maker of the instrument. Whenever the testator or grantor annexes words of explanation to these terms, indicating that he means to use them in a qualified sense, as mere *descriptio personarum* or particular designation of certain individuals, or where such an intention can be clearly gathered from the instrument itself and the surrounding circumstances, the terms "heirs," "heirs of the body," etc., are to be treated as words of purchase and not of limitation.<sup>2</sup>

**Date of Execution.** — In *In re Swenson*, 55 Minn. 300, the words "heirs at law" in a will were construed as of its date of execution, and not as of the day on which it took effect.

**Future Date.** — And it may appear that some future date was intended. *Doe v. Frost*, 3 B. & Ald. 546, 5 E. C. L. 373; *Wrightson v. Macaulay*, 14 M. & W. 214; *Thorpe v. Thorpe*, 1 H. & C. 326.

**1. Heirs in the Sense of Issue or Heirs of the Body.** — *Porter v. Bradley*, 3 T. R. 143; *Braden v. Cannon*, 1 Grant Cas. (Pa.) 65; *Fahreny v. Holsinger*, 65 Pa. St. 392.

**Heirs in the Sense of Heirs of the Body — Connecticut.** — *Turrill v. Northrop*, 51 Conn. 33.

**District of Columbia.** — *Dengel v. Brown*, 1 App. Cas. (D. C.) 423.

**Kentucky.** — *Lee v. Lee*, 7 B. Mon. (Ky.) 607.

**Maine.** — *Fisk v. Keene*, 35 Me. 349.

**Maryland.** — *Gable v. Ellender*, 53 Md. 311; *Hardy v. Wilcox*, 58 Md. 180; *Benson v. Linthicum*, 75 Md. 141.

**Massachusetts.** — *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Albee v. Carpenter*, 12 Cush. (Mass.) 386.

**New Jersey.** — *Bruere v. Bruere*, 35 N. J. Eq. 434.

**New York.** — *Bundy v. Bundy*, 38 N. Y. 410; *Snider v. Snider*, 11 N. Y. App. Div. 171; *Tillman v. Davis*, 95 N. Y. 17.

**Pennsylvania.** — *Bassett v. Hawk*, 118 Pa. St. 108.

**West Virginia.** — *Graham v. Graham*, 4 W. Va. 320; *Tomlinson v. Nickell*, 24 W. Va. 148.

**Heirs in the Sense of Issue — United States.** — *Barber v. Pittsburgh*, etc., R. Co., 166 U. S. 83; *Abbott v. Essex Co.*, 18 How. (U. S.) 202.

**Alabama.** — *Darden v. Burns*, 6 Ala. 365.

**Georgia.** — *Forman v. Troup*, 30 Ga. 499.

**Illinois.** — *Butler v. Huestis*, 68 Ill. 603.

**Kentucky.** — *Whitaker v. Blair*, 3 J. Marsh. (Ky.) 236.

**Maine.** — *Fisk v. Keene*, 35 Me. 349.

**Maryland.** — *Pratt v. Flamer*, 5 Har. & J. (Md.) 10; *Weybright v. Powell*, 86 Md. 573; *Raborg v. Hammond*, 2 Har. & G. (Md.) 53; *Gambrill v. Forest Grove Lodge No. 4*, 66 Md. 27.

**Massachusetts.** — *Bowers v. Porter*, 4 Pick. (Mass.) 198.

**Michigan.** — *Goodell v. Hibbard*, 32 Mich. 47.

**Missouri.** — *Maguire v. Moore*, 108 Mo. 267.

**New Jersey.** — *Randolph v. Randolph*, 40 N. J. Eq. 77.

**New York.** — *Terpening v. Skinner*, 30 Barb. (N. Y.) 373.

**North Carolina.** — *Rollins v. Keel*, 115 N. Car. 68; *Davidson v. Davidson*, 1 Hawks (N. Car.) 174.

**Ohio.** — *Niles v. Gray*, 12 Ohio St. 320.

**Pennsylvania.** — *Braden v. Cannon*, 1 Grant Cas. (Pa.) 60; *Bryan v. Spires*, 3 Brews. (Pa.) 580; *Eby v. Eby*, 5 Pa. St. 461; *Seely v. Seely*, 44 Pa. St. 437; *Moody v. Snell*, 81 Pa. St. 362.

**Tennessee.** — *Harwell v. Benson*, 8 Lea (Tenn.) 348.

**Canada.** — *Zwicker v. Ernst*, 29 Nova Scotia 258.

**Examples.** — Where land is devised to a person and his heirs, with remainder to one who would be a collateral heir of the first devisee, the word "heirs" will be construed to mean heirs of the body or issue. *Bundy v. Bundy*, 38 N. Y. 410; *Taggart v. Murray*, 53 N. Y. 233; *Smith v. Scholtz*, 68 N. Y. 59.

A devise to one and his heirs and assigns, but if he should die without issue, over, shows that by heirs was meant issue. *Ide v. Ide*, 5 Mass. 500; *Gifford v. Choate*, 100 Mass. 345.

In *Wall v. Maguire*, 24 Pa. St. 249, it was said: "It is very plain that the clause 'leave no heirs' must be read 'leave no issue;' for the devisees being all related to each other, neither of them could die without leaving an heir, if he left a survivor." See also *Coles v. Ayres*, 156 Pa. St. 200; *Gambrill v. Forest Grove Lodge No. 4*, 66 Md. 25.

**2. Heirs a Word of Purchase — England.** — *Hodgesen v. Bussey*, 2 Atk. 89; *Doe v. Laming*, 2 Burr. 1111; *Legate v. Sewell*, 1 P. Wms. 87; *Archer's Case*, 1 Coke 66 b.; *Clerk v. Day*, Cro. Eliz. 313; *Luddington v. Kime*, 1 Ld. Raym. 203, 1 Salk. 224; *Reading v. Rawsterne*, 2 Ld. Raym. 829.

**Alabama.** — *Robertson v. Johnston*, 36 Ala. 200.

**Connecticut.** — *Leake v. Watson*, 60 Conn. 477.

**Georgia.** — *Tucker v. Adams*, 14 Ga. 552; *Williams v. Allen*, 17 Ga. 81.

**Illinois.** — *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589.

**Indiana.** — *Shimer v. Mann*, 99 Ind. 190; *Ridgeway v. Lanphear*, 99 Ind. 251; *Rapp v. Matthias*, 35 Ind. 332; *Cleveland v. Spilman*, 25 Ind. 95; *Doe v. Jackman*, 5 Ind. 283.

**Kentucky.** — *Prescott v. Prescott*, 10 B. Mon. (Ky.) 56; *Jarvis v. Quigley*, 10 B. Mon. (Ky.) 104.

**Children, Grandchildren, Issue.** — The rule that the technical meaning of the terms "heirs" and "heirs of the body" must yield to the evident intent of the maker of the instrument is most frequently exemplified where the word "heirs" is used in the sense of children. In a long line of decisions it has been held that the words "heir," "heirs," and "heirs of the body" may be read as "child" or "children" where it appears that such was the sense in which they were obviously used,<sup>1</sup> and so

*Maine.* — *Hamilton v. Wentworth*, 58 Me. 101.

*Maryland.* — *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

*Mississippi.* — *Gray v. Bridgeforth*, 33 Miss. 342.

*New Jersey.* — *Pillot v. Landon*, 46 N. J. Eq. 310.

*New York.* — *Tanner v. Livingston*, 12 Wend. (N. Y.) 83; *Murphy v. Harvey*, 4 Edw. (N. Y.) 131; *Burtis v. Doughty*, 3 Bradf. (N. Y.) 287; *Lytle v. Beveridge*, 58 N. Y. 592.

*North Carolina.* — *Starnes v. Hill*, 112 N. Car. 1.

*Ohio.* — *Richey v. Johnson*, 30 Ohio St. 288.

*Pennsylvania.* — *Clark v. Scott*, 67 Pa. St. 452; *Robins v. Quinliven*, 79 Pa. St. 335; *Urich's Appeal*, 86 Pa. St. 386, 27 Am. Rep. 707.

*South Carolina.* — *Dukes v. Faulk*, 37 S. Car. 255, 34 Am. St. Rep. 745; *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344, 47 Am. Dec. 537.

*Tennessee.* — *Aydlett v. Swope*, (Tenn. 1875) 17 S. W. Rep. 208.

**My Heirs.** — Where a testator devised his real estate to his wife for life, remainder over, one-half to "my heirs," and one-half to her heirs, it was held that by the words "my heirs" the testator intended those of his own blood who would inherit, and did not mean to denote succession, but to describe the devisees. *Furenes v. Severtson*, 102 Iowa 322.

**No Prior Estate.** — The word "heirs" is a word of purchase wherever a devise of an estate to "heirs" is not preceded by any prior estate of freehold devised to their ancestors. *Ward v. Stow*, 2 Dev. Eq. (17 N. Car.) 509, 27 Am. Dec. 238.

**Not Necessarily Children.** — When construed as a word of purchase the term "heirs" or "heirs of the body" does not necessarily mean children. It may mean persons who should answer the description of heirs at the time of the death of the testator, or the first taker of the property, or issue, or descendants, or it may be used technically as *nomen collectivum*, but signifying the whole line of succession. *Sharman v. Jackson*, 30 Ga. 226.

**1. Heirs in the Sense of Children.** — *England.* — *Crawford v. Trotter*, 4 Madd. 361; *Matter of Walton*, 8 De G. M. & G. 173; *Goodright v. White*, 2 W. Bl. 1010; *James v. Richardson*, 1 Vent. 334; *Doe v. Goff*, 11 East 668; *Symers v. Jobson*, 16 Sim. 267; *Milroy v. Milroy*, 14 Sim. 48; *Gummoe v. Howes*, 23 Beav. 184; *Bull v. Comberbach*, 25 Beav. 540; *Loveday v. Hopkins*, Amb. 273; *Roberts v. Edwards*, 33 Beav. 259; *Doe v. Laming*, 2 Burr. 1100; *Doe v. Ironmonger*, 3 East 533; *Zwicker v. Ernst*, 29 Nova Scotia 258.

*United States.* — *Barber v. Pittsburgh*, etc., R. Co., 166 U. S. 83; *Cutting v. Cutting*, 6 Sawy. (U. S.) 406.

*Alabama.* — *Ewing v. Standefer*, 18 Ala.

400; *Campbell v. Noble*, 110 Ala. 382; *Shepherd v. Nabors*, 6 Ala. 631; *Dunn v. Davis*, 12 Ala. 140; *Powell v. Glenn*, 21 Ala. 458; *Roberts v. Ogbourne*, 37 Ala. 174; *May v. Ritchie*, 65 Ala. 604.

*Arkansas.* — *Bevens v. Baxter*, 23 Ark. 387; *Robinson v. Bishop*, 23 Ark. 378; *Slaughter v. Slaughter*, 23 Ark. 356.

*Connecticut.* — *Anthony v. Anthony*, 55 Conn. 256.

*Georgia.* — *Goss v. Eberhart*, 29 Ga. 549; *Ford v. Cook*, 73 Ga. 215; *Tharp v. Yarbrough*, 79 Ga. 383; *Baxter v. Winn*, 87 Ga. 239; *Craig v. Ambrose*, 80 Ga. 134; *Wilkerson v. Clark*, 80 Ga. 372. See also *Claxton v. Weeks*, 21 Ga. 269.

*Illinois.* — *Buler v. Huestis*, 68 Ill. 603; *Belsay v. Engel*, 107 Ill. 182; *Bland v. Bland*, 103 Ill. 11; *Summers v. Smith*, 127 Ill. 645; *Carpenter v. Van Olinder*, 127 Ill. 42, 11 Am. St. Rep. 92; *Ebey v. Adams*, 135 Ill. 80; *Griswold v. Hicks*, 132 Ill. 494; *Strain v. Sweeney*, 163 Ill. 603; *Smith v. Kimbell*, 153 Ill. 374.

*Indiana.* — *Shimer v. Mann*, 99 Ind. 202, 50 Am. Rep. 82; *Ridgeway v. Lamphear*, 99 Ind. 251; *Hadlock v. Gray*, 104 Ind. 596; *Conger v. Lowe*, 124 Ind. 368; *Earnhart v. Earnhart*, 127 Ind. 397, 22 Am. St. Rep. 652; *Brown v. Harmon*, 73 Ind. 412; *Underwood v. Robbins*, 117 Ind. 308; *Essick v. Caple*, 131 Ind. 207; *Stevens v. Flannagan*, 131 Ind. 122; *Brumfield v. Drook*, 101 Ind. 190; *Hochstedler v. Hochstedler*, 108 Ind. 506; *Allen v. Craft*, 109 Ind. 476; *Levengood v. Hoople*, 124 Ind. 27; *Granger v. Granger*, 147 Ind. 95.

*Iowa.* — *Collins v. Phillips*, 91 Iowa 210.

*Kentucky.* — *Tucker v. Tucker*, 78 Ky. 503; *Mitchell v. Simpson*, 88 Ky. 126; *Blankenbaker v. Woodruff*, 97 Ky. 276; *Luttrell v. Wells*, (Ky. 1895) 30 S. W. Rep. 11; *Turman v. White*, 14 B. Mon. (Ky.) 450; *Feltman v. Butts*, 8 Bush (Ky.) 115; *Harper v. Wilson*, 2 A. K. Marsh. (Ky.) 466; *Hughes v. Clark*, (Ky. 1894) 26 S. W. Rep. 187; *Thomas v. White*, 3 Litt. (Ky.) 177; *Righter v. Forrester*, 1 Bush (Ky.) 279.

*Maryland.* — *Hardy v. Wilcox*, 58 Md. 180; *Albert v. Albert*, 68 Md. 352; *Lyles v. Digges*, 6 Har. & J. (Md.) 364.

*Massachusetts.* — *Bowers v. Porter*, 4 Pick. (Mass.) 198; *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243; *Haley v. Boston*, 108 Mass. 576; *Bradlee v. Andrews*, 137 Mass. 55.

*Michigan.* — See *v. Derr*, 57 Mich. 369.

*Missouri.* — *Waddell v. Waddell*, 99 Mo. 338; *Mercier v. West Kansas City Land Co.*, 72 Mo. 492; *Chew v. Keller*, 100 Mo. 362; *Maguire v. Moore*, 108 Mo. 267.

*New Hampshire.* — *Forest v. Jackson*, 56 N. H. 357; *Wiggin v. Perkins*, 64 N. H. 38.

*New Jersey.* — *Den v. Wortendyk*, 7 N. J. L. 363; *Demarest v. Den*, 22 N. J. L. 612; *Davis v. Davis*, 39 N. J. Eq. 13; *Eldridge v. Eldridge*, 41 N. J. Eq. 89.

where "heirs" is clearly used in the sense of grandchildren that meaning

*New York.* — Scott v. Guernsey, 48 N. Y. 106, 122; Lytle v. Beveridge, 58 N. Y. 592; Johnson v. Brasington, 86 Hun (N. Y.) 108; Heath v. Hewitt, 127 N. Y. 166; Terpening v. Skinner, 30 Barb. (N. Y.) 373; Vannorsdall v. Van Deventer, 51 Barb. (N. Y.) 137; Rogers v. Rogers, 3 Wend. (N. Y.) 521; Canfield v. Fallon, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345.

*North Carolina.* — Howell v. Knight, 100 N. Car. 254; Howell v. Tyler, 91 N. Car. 207; Bryant v. Deberry, 2 Hayw. (3 N. Car.) 356; Simms v. Garrot, 1 Dev. & B. Eq. (21 N. Car.) 393; Payne v. Sale, 2 Dev. & B. Eq. (22 N. Car.) 455; Hilliard v. Kearney, Busb. Eq. (45 N. Car.) 221; Harris v. Philpot, 5 Ired. Eq. (40 N. Car.) 324; Trexler v. Miller, 6 Ired. Eq. (41 N. Car.) 248; Knight v. Knight, 3 Jones Eq. (56 N. Car.) 167.

*Ohio.* — Bunnell v. Evans, 26 Ohio St. 409; King v. Beck, 15 Ohio 559; McKelvey v. McKelvey, 43 Ohio St. 213; Stewart v. Powers, 9 Ohio Cir. Ct. 143, 6 Ohio Cir. Dec. 101; Duffee v. MacNeil, 58 Ohio St. 238.

*Pennsylvania.* — Zebach v. Smith, 3 Binn. (Pa.) 69, 5 Am. Dec. 352; Eby v. Eby, 5 Pa. St. 464; Smith v. Folwell, 1 Binn. (Pa.) 546; Fahrney v. Holsinger, 65 Pa. St. 388; Berg v. Anderson, 72 Pa. St. 87; Haverstick's Appeal, 103 Pa. St. 394; Criswell v. Grumbling, 107 Pa. St. 408; Miller's Estate, 145 Pa. St. 561; Brasington v. Hanson, 149 Pa. St. 290, Evans's Estate, 155 Pa. St. 650; Leech v. Robinson, 74 Pa. St. 276; Warn v. Brown, 102 Pa. St. 352; Affolter v. May, 115 Pa. St. 59; Stambaugh's Estate, 135 Pa. St. 595; Oyster v. Knull, 137 Pa. St. 452; Muhlenberg's Appeal, 103 Pa. St. 587; Richardson's Appeal, 19 W. N. C. (Pa.) 175; Braden v. Cannon, 24 Pa. St. 168; Allen v. Henderson, 49 Pa. St. 345; Urlich's Appeal, 86 Pa. St. 386, 27 Am. Rep. 707.

*South Carolina.* — Holeman v. Fort, 3 Strobb. Eq. (S. Car.) 66, 51 Am. Dec. 665; Cruger v. Heyward, 2 Desaus. (S. Car.) 94; Hayne v. Irvine, 25 S. Car. 293; Moore v. Henderson, 4 Desaus. (S. Car.) 459; Bailey v. Patterson, 3 Rich. Eq. (S. Car.) 156; Lott v. Thompson, 36 S. Car. 38; Lemacks v. Glover, 1 Rich. Eq. (S. Car.) 141.

*Tennessee.* — Loving v. Hunter, 8 Yerg. (Tenn.) 4; Aydlett v. Swope, (Tenn. 1875) 17 S. W. Rep. 208; Arrants v. Crumley, (Tenn. Ch. 1898) 48 S. W. Rep. 343; Read v. Fite, 8 Humph. (Tenn.) 328; Franklin v. Franklin, 91 Tenn. 119; Ward v. Saunders, 3 Sneed (Tenn.) 391; Blair v. Snodgrass, 1 Sneed (Tenn.) 1; Boyd v. Robinson, 93 Tenn. 1.

*Vermont.* — Blake v. Stone, 27 Vt. 475.

*Virginia.* — Pryor v. Duncan, 6 Gratt. (Va.) 27; Self v. Tune, 6 Munf. (Va.) 470; Bradley v. Mosby, 3 Call (Va.) 50.

*West Virginia.* — Reid v. Stuart, 13 W. Va. 347.

**Heirs of the Body in the Sense of Children** — *England.* — Right v. Creber, 5 B. & C. 866, 12 E. C. L. 392; Symers v. Jobson, 16 Sim. 267; Gretton v. Haward, 6 Taunt. 94, 1 E. C. L. 320.

*United States.* — See also *SCOTT v. GUERNSEY*, 48 N. Y. 106, 122 (U. S.) 251.

*Alabama.* — Robertson v. Johnston, 36 Ala. 200; Roberts v. Ogbourne, 37 Ala. 174.

*Georgia.* — Kemp v. Daniel, 8 Ga. 387; Wilkerson v. Clark, 80 Ga. 372.

*Illinois.* — Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589.

*Indiana.* — Granger v. Granger, 147 Ind. 95.

*Kentucky.* — Jarvis v. Quigley, 10 B. Mon. (Ky.) 106.

*North Carolina.* — Allen v. Pass, 4 Dev. & B. L. (20 N. Car.) 85.

*Ohio.* — Moore v. Lewis, 2 Ohio Cir. Dec. 548, 4 Ohio Cir. Ct. 284.

*Tennessee.* — Ward v. Saunders, 2 Swan (Tenn.) 174.

*Virginia.* — Higgenbotham v. Rucker, 2 Call (Va.) 313.

**Bodily Heirs in the Sense of Children.** — Ford v. Cook, 73 Ga. 215.

**Legal Heirs in the Sense of Children.** — Swann v. Poag, 4 S. Car. 18.

**Children as a Family.** — See Morton v. Barrett, 22 Me. 257.

**Children Subsequently Born.** — In Tharp v. Yarbrough, 79 Ga. 382, "heirs" was held to mean children and not to include children subsequently born.

**Present and Future Heirs.** — Where provision is made for both present and future heirs, the word "heirs" will be taken in the sense of children. Read v. Fite, 8 Humph. (Tenn.) 328.

A conveyance was made to one as trustee for his wife and her present heirs. It was held that "heirs" was used in the sense of children. Chess-Carley Co. v. Purtell, 74 Ga. 467. See also Fountain County Coal, etc., Co. v. Beckleheimer, 102 Ind. 82; Prior v. Quackenbush, 29 Ind. 475.

**Heirs in the Sense of Daughters.** — In Pugh v. Goodtitle, 3 Bro. P. C. (Toml. ed.) 454, a testator devised property to his heirs, his son excepted; his daughters claimed that they were the persons designated under the devise, as the son, who was the proper heir, was plainly excluded, and Lord Mansfield and the rest of the Court of King's Bench were of the same opinion, but their decision was reversed by the House of Lords. See Jarman on Wills (6th ed.) 921.

**Remainderman Himself an Heir.** — Where one who is to take in the case of the death of a certain person without heirs is himself an heir of that person within the technical meaning of the word, it has been held that "heirs" will be construed as children. Franklin v. Franklin, 91 Tenn. 124; Boyd v. Robinson, 93 Tenn. 1. And see *supra*, this title, *Heirs in the Sense of Heirs of the Body or Issue*.

**Death by Wrongful Act.** — That the word "heirs" in statutes giving a right of action for wrongful death is to be taken to mean children, see the title DEATH BY WRONGFUL ACT, vol. 8, p. 905. See also Cincinnati, etc., R. Co. v. Adams, (Ky. 1890) 13 S. W. Rep. 428; Henderson v. Kentucky Cent. R. Co., 86 Ky. 389. But that it is not to be confined to minor children, see Pennsylvania Co. v. Malia, (Ky. 1899) 49 S. W. Rep. 809.

**Tenants in Common** — **Share and Share Alike.** — Where heirs at the death of the first devisee



will be given to it;<sup>1</sup> and, as has been seen, the term "heirs" is frequently read "issue."<sup>2</sup>

**Deeds.** — Although a stricter construction is applied to deeds than to wills, still the intention of the grantor must govern the construction of the deed, and the word "heir" will be construed as a word of purchase if the intent requires it.<sup>3</sup>

**V. NEMO EST HAERES VIVENTIS.** — It is clear that no person can sustain the character of heir, properly so called, in the lifetime of the ancestor, a rule embodied in the maxim *nemo est haeres viventis*;<sup>4</sup> but the courts will sometimes, in such cases, construe the word "heir" or "heirs" in the sense of heir apparent or heir presumptive<sup>5</sup> or children,<sup>6</sup> where such appears to have been the intent.

were to take the estate expressly, share and share alike, or as tenants in common, or where it was to be equally divided among them, this has been held sufficient to demonstrate that the testator meant children. *Doe v. Laming*, 2 Burr. 1100; *Doe v. Goff*, 11 East 668; *Gretton v. Haward*, 6 Taunt. 94, 1 E. C. L. 320; *Crump v. Norwood*, 7 Taunt. 362, 2 E. C. L. 362; *M'Nairs v. Hawkins*, 4 Bibb (Ky.) 390; *Prescott v. Prescott*, 10 B. Mon. (Ky.) 59; *Eldridge v. Eldridge*, 41 N. J. Eq. 91. But see *Jesson v. Wright*, 2 Bligh 1; *Ross v. Toms*, 4 Dev. L. (15 N. Car.) 376.

**Heirs of a Living Person.** — See *infra*, this title, *Nemo Est Haeres Viventis*.

**1. Grandchildren.** — *Bond's Appeal*, 31 Conn. 183; *Maguire v. Moore*, 108 Mo. 267; *Huss v. Stephens*, 51 Pa. St. 282.

**2. Issue.** — See *supra*, this title, *Heirs in the Sense of Heirs of the Body or Issue*.

**Present Heirs.** — A grantor conveyed property to his daughter and her present heirs in consideration of natural love and affection. The court said: "The words 'present heirs' are quite as expressive and clear as the words 'heirs now living,' and it is obvious that the grantor meant to grant the estate to living persons for whom he cherished 'natural love and affection.'" *Fountain County Coal, etc., Co. v. Beckleheimer*, 102 Ind. 82. See also *Chess-Carley Co. v. Purtell*, 74 Ga. 467; *Prior v. Quackenbush*, 29 Ind. 475; *Read v. Fite*, 8 Humph. (Tenn.) 328.

**3. Deeds — Heir as Word of Purchase — England.** — *Doe v. Laming*, 2 Burr. 1100.

*Illinois.* — *Seymour v. Bowles*, 172 Ill. 521.

*Indiana.* — *Fountain County Coal, etc., Co. v. Beckleheimer*, 102 Ind. 76; *Stevens v. Flannagan*, 131 Ind. 122.

*Kentucky.* — *Jarvis v. Quigley*, 10 B. Mon. (Ky.) 106; *German Nat. Bank v. Waring*, (Ky. 1896) 37 S. W. Rep. 64.

*Michigan.* — See *v. Derr*, 57 Mich. 372.

*Missouri.* — *Waddell v. Waddell*, 99 Mo. 338.

*Pennsylvania.* — *Huss v. Stephens*, 51 Pa. St. 282.

*Vermont.* — *Blake v. Stone*, 27 Vt. 475.

**4. Nemo Est Haeres Viventis.** — *Seymour v. Bowles*, 172 Ill. 521; *Mitchell v. Mitchell*, 2 Gill (Md.) 236; *Miller's Estate*, 145 Pa. St. 566.

As no one can be the heir of a living person, and as the persons who will be heirs are uncertain while the ancestor lives, a devise to them as heirs, in the proper sense of the term, cannot take effect, and is therefore void. This is obviously so if the devise be of a present

estate, which must vest, if ever, as soon as created. *Campbell v. Rawdon*, 18 N. Y. 412.

In *Clark v. Mosely*, 1 Rich. Eq. (S. Car.) 396, it was held that a devise to M.'s heirs conveyed no property unless M. died before the testator, for no man can be heir during the life of an ancestor.

A testator devised a life estate to his wife, with remainder after her death to her nearest and lawful heirs. It was held that the word "heirs" was to be taken in its technical sense, and did not mean her heirs apparent at the testator's death. *Reinders v. Koppelman*, 68 Mo. 500.

**5. Heirs in the Sense of Heirs Apparent or Presumptive — England.** — *James v. Richardson*, 1 Vent. 334; *Burchett v. Durdant*, 2 Vent. 311; *Rittson v. Stordy*, 3 Smale & G. 230; *Beaulieu v. Cardigan*, Amb. 533; *Carne v. Roch*, 4 M. & P. 862, 7 Bing. 226, 20 E. C. L. 111; *Darbison v. Beaumont*, 1 P. Wms. 229, 3 Bro. P. C. (Toml. ed.) 60; *Goodright v. White*, 2 W. Bl. 1010; *Doe v. Perratt*, 10 Bing. 198, 25 E. C. L. 92, 6 M. & G. 314, 46 E. C. L. 314, 5 B. & C. 48, 11 E. C. L. 138.

*United States.* — *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83.

*Illinois.* — *Seymour v. Bowles*, 172 Ill. 521.

*Indiana.* — *Hadlock v. Gray*, 104 Ind. 596.

*Kentucky.* — *Feltman v. Butts*, 8 Bush (Ky.) 115.

*Maine.* — *Morton v. Barrett*, 22 Me. 263.

*Massachusetts.* — *Bowers v. Porter*, 4 Pick. (Mass.) 198.

*New York.* — *Heard v. Horton*, 1 Den. (N. Y.) 165; *Vannorsdall v. Van Deventer*, 51 Barb. (N. Y.) 137; *Cushman v. Horton*, 59 N. Y. 149.

*South Carolina.* — *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 376.

*West Virginia.* — *Stuart v. Stuart*, 18 W. Va. 675.

**Promissory Note.** — Where a note was made payable on demand to the heirs of A, he being alive, it was held that it might be shown that the term "heirs" was intended to mean the presumptive heirs. *Lockwood v. Jesup*, 9 Conn. 272; *Cox v. Beltzhoover*, 11 Mo. 142.

**6. Heirs of a Living Person — Heirs Held to Mean Children — England.** — *Heath v. Hewitt*, 127 N. Y. 166; *Carne v. Roch*, 4 M. & P. 862; *Darbison v. Beaumont*, 1 P. Wms. 229, 3 Bro. P. C. (Toml. ed.) 60; *Goodright v. White*, 2 W. Bl. 1010.

*Alabama.* — *Roberts v. Ogbourne*, 37 Ala. 174.

**VI. PERSONAL PROPERTY.** — The words "inherit" and "heir" in their technical sense, relate to the right of succession to the real estate of a person dying intestate; and when used in a statute, will, or other instrument they will be taken to have been employed in their legal sense.<sup>1</sup> Thus under a gift to one's heirs, unexplained, it has been held that the technical heirs at law will take.<sup>2</sup> But a clear intention to the contrary will repel this legal presumption, and the term heir may be construed as applying to the person appointed by law to succeed to personal property,<sup>3</sup> that is to say, the next of kin,<sup>4</sup> or

*Kentucky.* — *Williamson v. Williamson*, 18 B. Mon. (Ky.) 370.

*Massachusetts.* — *Bowers v. Porter*, 4 Pick. (Mass.) 193.

*New York.* — *Heard v. Horton*, 1 Den. (N. Y.) 168; *Vannorsdall v. Van Deventer*, 51 Barb. (N. Y.) 137; *Campbell v. Rawdon*, 18 N. Y. 418.

*North Carolina.* — *Knight v. Knight*, 3 Jones Eq. (56 N. Car.) 167; *Simms v. Garrot*, 1 Dev. & B. Eq. (21 N. Car.) 393.

*South Carolina.* — *Holeman v. Fort*, 3 Strobb. Eq. (S. Car.) 66, 51 Am. Dec. 665.

*Vermont.* — *Flint v. Steadman*, 36 Vt. 210.

**Children Subsequently Born.** — A deed, the consideration for which is love and affection, from A of the one part to the heirs of B of the other part, there being three children of B in life when the deed was executed, was held to pass the title to those three children, and children of B subsequently born took no interest thereunder. *Tharp v. Yarbrough*, 79 Ga. 382.

**Grant to Living Person.** (See also the title **DEEDS**, vol. 9, p. 132.) — While as a general rule a conveyance to the heirs of a person living is void for uncertainty, as before his death it cannot be ascertained who will be his heirs, when it is apparent that in using the word "heirs" the grantor meant children, the court will so construe it and will give effect to the instrument. *Heath v. Hewitt*, 127 N. Y. 166; *Umfreville v. Keeler*, 1 Thomp. & C. (N. Y.) 486; *Heard v. Horton*, 1 Den. (N. Y.) 165; *Cushman v. Horton*, 59 N. Y. 149; *Vannorsdall v. Van Deventer*, 51 Barb. (N. Y.) 137; *Seymour v. Bowles*, 172 Ill. 524; See *v. Derr*, 57 Mich. 373; *Grimes v. Orrand*, 2 Heisk. (Tenn.) 298.

But in *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Morris v. Stephens*, 46 Pa. St. 200; *Huss v. Stephens*, 51 Pa. St. 282, and *Rivard v. Gisenhof*, 35 Hun (N. Y.) 247, the court refused to construe "heirs" as children, but held the deed void for uncertainty.

In *Grimes v. Orrand*, 2 Heisk. (Tenn.) 298, it was held that a deed conveying land *in presenti* to the heirs of a living person vested the title in his children.

**1. Not Applicable to Personalty.** — *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 222; *Hopkins v. Miller*, 92 Ala. 515; *Matter of Donahue*, 36 Cal. 329; *Glover v. Condell*, 163 Ill. 566; *Bridges v. Maxwell*, 34 Miss. 318; *Luce v. Dunham*, 69 N. Y. 36; *Swanson v. Swanson*, 2 Swan (Tenn.) 457. See also *Henry v. Henry*, 9 Ired. L. (31 N. Car.) 279.

But in *Pace v. Klink*, 51 Ga. 222, it was said: "But under our law all take under the statute of distributions; land as well as personal estate is assets; and 'heirs' and 'dis-

tributees' are synonymous words." And see *infra*, this section.

**Treaty.** — As used in a treaty providing that an alien heir might succeed to property, it was held that the word "heirs" was significant as determining the question whether the treaty extended to real as well as to personal property. *Adams v. Akerlund*, 168 Ill. 638.

**In Common Parlance — Right of Relationship.** — In common parlance the term "heir" is employed to denote the person who acquires or may receive property, either personal or real, by right of blood relationship. *Matter of James*, 80 Hun (N. Y.) 371.

**Lapse of Legacy — Word of Limitation.** — In a legacy of personal property to a legatee named and his heirs, the word "heirs," although technically appropriate to real estate, is taken to be a word of limitation and to indicate that the whole interest of the testator is given absolutely to the legatee; and if the legatee dies before the testator, the legacy lapses. *Wood v. Seaver*, 158 Mass. 411; *Kimball v. Story*, 108 Mass. 382; *Bryson v. Holbrook*, 159 Mass. 280. See also *Appleton v. Rowley*, L. R. 8 Eq. 139. And see the title **LEGACIES AND DEVISES**.

**2. Personal Property — Technical Sense Presumed.** — The word "heir," unexplained by the context, must be taken to be used in its technical sense of the person entitled to inherit realty. *Danvers v. Clarendon*, 1 Vern. 35; *Mounsey v. Blamire*, 4 Russ. 384; *Pleydell v. Pleydell*, 1 P. Wms. 748; *Smith v. Butcher*, 10 Ch. D. 113; *De Beauvoir v. De Beauvoir*, 15 L. J. Ch. N. S. 305, 3 H. L. Cas. 524; *Southgate v. Clinch*, 27 L. J. Ch. 651; *Re Roots*, 1 Dr. & Sm. 228; *Smith v. Butcher*, 10 Ch. D. 113; *Loring v. Thorndyke*, 5 Allen (Mass.) 257.

In *In re McCrea*, 180 Pa. St. 81, it was held, where a testator created a trust fund, the interest to be paid to his wife during her life, and at her death the fund to be paid to his right heirs, that the word "heirs" was used in its strict sense. See also *Hamilton v. Mills*, 29 Beav. 193; and see *infra*, this section, *Mixed Gift*.

**3. Heir Held to Refer to Personalty.** — *Knights Templars*, etc., *Mut. Aid Assoc. v. Greene*, 79 Fed. Rep. 461; *Woodward v. James*, 115 N. Y. 346; *Lawton v. Corlies*, 127 N. Y. 100; *Ivins's Appeal*, 106 Pa. St. 176; *Patterson v. Hawthorn*, 12 S. & R. (Pa.) 112; *Buckley v. Reed*, 15 Pa. St. 83; *Gibbons v. Fairlamb*, 26 Pa. St. 217; *Eby's Appeal*, 84 Pa. St. 241; *Northwestern Masonic Aid Assoc. v. Jones*, 154 Pa. St. 99; *Swanson v. Swanson*, 2 Swan (Tenn.) 457.

**4. Personal Property — Next of Kin — England.** — *Pattenden v. Hobson*, 17 Eng. L. & Eq. 16, 17 Jur. 406; *Holloway v. Holloway*, 5 Ves. Jr. 399; *Evans v. Salt*, 6 Beav. 266; *Price v. Lock-*



persons who would take under the statute of distributions.<sup>1</sup>

**Mixed Gift.**—The word "heirs" is often used in a double sense, meaning the heirs at law in relation to real estate and those persons who would be entitled under the statute of distributions in relation to personal estate. Thus where

ley, 6 Beav. 180, 2 Wms. on Executors 996; Lowndes v. Stone, 4 Ves. Jr. 649; Gittings v. M'Dermott, 2 Myl. & K. 69; Mounsey v. Blamire, 4 Russ. 384; *In re Newton*, L. R. 4 Eq. 171; *In re Steevens*, L. R. 15 Eq. 110; Vaux v. Henderson, *cited in* Horseman v. Abbey, 1 Jac. & W. 388; *In re Gamboa*, 4 Kay & J. 756; Price v. Lockley, 6 Beav. 180; Wingfield v. Wingfield, 9 Ch. D. 658; *Re Porter*, 4 Kay & J. 188; Parsons v. Parsons, L. R. 8 Eq. 260; Findlason v. Tatlock, L. R. 9 Eq. 258; *In re Thompson*, 9 Ch. D. 607; Jacobs v. Jacobs, 16 Beav. 557; *In re Philps*, L. R. 7 Eq. 151; Doody v. Higgins, 9 Hare, Appendix xxxii.

*Alabama.*—Tompkins v. Levy, 87 Ala. 263.

*Georgia.*—Hubbard v. Turner, 93 Ga. 752.

*Indiana.*—Rusing v. Rusing, 25 Ind. 63.

*Maine.*—Mace v. Cushman, 45 Me. 250.

*Massachusetts.*—Houghton v. Kendall, 7 Allen (Mass.) 72; Sweet v. Dutton, 109 Mass. 589.

*Minnesota.*—*In re Swenson*, 55 Minn. 300.

*Missouri.*—Loos v. John Hancock Mut. L. Ins. Co., 41 Mo. 538.

*New Jersey.*—Scudder v. Vanarsdale, 13 N. J. Eq. 109; Hand v. Marcy, 28 N. J. Eq. 62; Welsh v. Crater, 32 N. J. Eq. 177, *affirmed* 33 N. J. Eq. 362; Hayes v. King, 37 N. J. Eq. 1; Ward v. Dodd, 41 N. J. Eq. 414; Reen v. Wagner, 51 N. J. Eq. 4; Britton v. Supreme Council, etc., 46 N. J. Eq. 102.

*New York.*—Wright v. Methodist Episcopal Church, Hoffm. (N. Y.) 212; Richmond v. Railway Register Mfg. Co., (Supm. Ct. Gen. T.) 12 N. Y. Supp. 358; Browne v. Murdock, (Supm. Ct. Gen. T.) 12 Abb. N. Cas. (N. Y.) 360; Drake v. Pell, 3 Edw. (N. Y.) 261; Bishop v. Grand Lodge, etc., 112 N. Y. 627.

*North Carolina.*—Corbitt v. Corbitt, 1 Jones Eq. (54 N. Car.) 114; Henderson v. Henderson, 1 Jones L. (46 N. Car.) 221.

*Ohio.*—Ferguson v. Stuart, 14 Ohio 141.

*Pennsylvania.*—Hodge's Appeal, 8 W. N. C. (Pa.) 209; Walker v. Dunshee, 38 Pa. St. 438.

*South Carolina.*—Evans v. Godbold, 6 Rich. Eq. (S. Car.) 26; Heyward v. Heyward, 7 Rich. Eq. (S. Car.) 295.

*Tennessee.*—Ward v. Saunders, 3 Sneed (Tenn.) 387; Ingram v. Smith, 1 Head (Tenn.) 426; Ware v. Sharp, 1 Swan (Tenn.) 497; Gosling v. Caldwell, 1 Lea (Tenn.) 456.

*Virginia.*—Stokes v. Van Wyck, 83 Va. 731.

**Policy of Insurance.**—In Hubbard v. Turner, 93 Ga. 752, it was held that the word "heirs" in a policy of life insurance, payable to the heirs or assigns of the insurer, after his death, was to be construed as meaning next of kin, according to the statute of distributions. See also Mullins v. Thompson, 51 Tex. 7; Loos v. John Hancock Mut. L. Ins. Co., 41 Mo. 538; Hodge's Appeal, 9 Ins. L. J. (Pa.) 799; Weisert v. Muehl, 81 Ky. 336; Leavitt v. Dunn, 56 N. J. L. 309. And see the title BENEFICIARIES (IN INSURANCE), vol. 3, p. 971.

**Trust.**—A testator gave personal property

in trust for E. L., for life, and after her death for the benefit of the heirs of the body of E. L. It was held that by heirs of the body of E. L. were meant such of the statutory next of kin of E. L. as were descended from her. *In re Jeaffreson*, L. R. 2 Eq. 276.

**Next of Kin in This Connection Means Persons Who Take under the Statute of Distributions.**—Leavitt v. Dunn, 56 N. J. L. 309; Elmsley v. Young, 2 Myl. & K. 780, 787. See also Parsons v. Parsons, L. R. 8 Eq. 260; Doody v. Higgins, 2 Kay & J. 729; Low v. Smith, 2 Jur. N. S. 344; Neilson v. Monro, 27 W. R. 936; *In re Newton*, L. R. 4 Eq. 171; *Re Stannard*, 52 L. J. Ch. 355.

**1. Heirs in the Sense of Persons Taking under Statute of Distributions—England.**—*Re Roots*, 1 Dr. & Sm. 228; Vaux v. Henderson, *cited in* Horseman v. Abbey, 1 Jac. & W. 388; Gittings v. M'Dermott, 2 Myl. & K. 69; Low v. Smith, 2 Jur. N. S. 344; Doody v. Higgins, 2 Kay & J. 729; *Re Porter*, 4 Kay & J. 188; De Beauvoir v. De Beauvoir, 3 H. L. Cas. 524; Holloway v. Holloway, 5 Ves. Jr. 399; Evans v. Salt, 6 Beav. 266; Jacobs v. Jacobs, 16 Beav. 557; *In re Philps*, L. R. 7 Eq. 151; Findlason v. Tatlock, L. R. 9 Eq. 258; *In re Steevens*, L. R. 15 Eq. 110; Wingfield v. Wingfield, 9 Ch. D. 658.

*Alabama.*—Eddings v. Long, 10 Ala. 203.

*Arkansas.*—Johnson v. Knights of Honor, 53 Ark. 255.

*Connecticut.*—Mullen v. Reed, 64 Conn. 240; Ruggles v. Randall, 70 Conn. 44.

*Illinois.*—Rawson v. Rawson, 52 Ill. 62; Richards v. Miller, 62 Ill. 423.

*Maine.*—Morton v. Barrett, 22 Me. 257; Mace v. Cushman, 45 Me. 250.

*Massachusetts.*—Clarke v. Cordis, 4 Allen (Mass.) 466; Lombard v. Boyden, 5 Allen (Mass.) 249; Loring v. Thorndike, 5 Allen (Mass.) 257; Houghton v. Kendall, 7 Allen (Mass.) 72, 77; Sweet v. Dutton, 109 Mass. 589; White v. Stanfield, 146 Mass. 424.

*Michigan.*—Hascall v. Cox, 49 Mich. 441.

*Missouri.*—Keener v. Grand Lodge, etc., 38 Mo. App. 543.

*New Jersey.*—Scudder v. Vanarsdale, 13 N. J. Eq. 109; Welsh v. Crater, 32 N. J. Eq. 177, 33 N. J. Eq. 362; Hayes v. King, 37 N. J. Eq. 1; Ward v. Dodd, 41 N. J. Eq. 414; Leavitt v. Dunn, 56 N. J. L. 309; Reen v. Wagner, 51 N. J. Eq. 1.

*New York.*—Wright v. Methodist Episcopal Church, Hoffm. (N. Y.) 202; Walsh v. Walsh, 66 Hun (N. Y.) 297. See also Tillman v. Davis, 95 N. Y. 17.

*North Carolina.*—Henderson v. Henderson, 1 Jones L. (46 N. Car.) 221; Corbitt v. Corbitt, 1 Jones Eq. (54 N. Car.) 114; Kiser v. Kiser, 2 Jones Eq. (55 N. Car.) 28; McCabe v. Spruil, 1 Dev. Eq. (16 N. Car.) 189; Freeman v. Knight, 2 Ired. Eq. (37 N. Car.) 72; Croom v. Herring, 4 Hawks (11 N. Car.) 393.

*Ohio.*—Collier v. Collier, 3 Ohio St. 369.

*Pennsylvania.*—Snyder's Estate, 3 Pa. Dist. 382; Baskin's Appeal, 3 Pa. St. 307; Woods's Appeal, 18 Pa. St. 481; Eby's Appeal, 84 Pa.



there is a mixed gift of real and personal property to one's heirs it has been held that the heirs at law take the realty and the next of kin the personalty.<sup>1</sup> But where the gift is directly to the heirs of a person as a substantive gift to them of something which their ancestor was in no event to take, and it is clear that but one set of persons is meant, the heir at law will take both the personal and the real property,<sup>2</sup> or, if such appears to have been the intention of the testator, the persons entitled to the personalty under the statute of distributions may also take the real property.<sup>3</sup>

**VII. HUSBAND AND WIFE.** — A widow is not heir to her deceased husband, nor is a widower heir to his deceased wife, within the ordinary meaning of the term.<sup>4</sup> But where by statute the husband or wife takes an absolute interest

St. 241; McGill's Appeal, 61 Pa. St. 46; McKee's Appeal, 104 Pa. St. 571; Ashton's Estate, 134 Pa. St. 390; Comly's Estate, 136 Pa. St. 154; Northwestern Masonic Aid Assoc. v. Jones, 154 Pa. St. 99.

*Tennessee.* — Alexander v. Wallace, 8 Lea (Tenn.) 569.

*Texas.* — Hanna v. Hanna, 10 Tex. Civ. App. 97.

**Heirs in the Sense of Distributees.** — In other words, "heirs" is read "distributees." Clay v. Clay, 2 Duv. (Ky.) 297; Sweet v. Dutton, 109 Mass. 589; Ashton's Estate, 134 Pa. St. 390; McKee's Appeal, 104 Pa. St. 571; Eby's Appeal, 84 Pa. St. 241; Northwestern Masonic Aid Assoc. v. Jones, 154 Pa. St. 105. See also Tucker v. Adams, 14 Ga. 581.

**Heirs in the Sense of Children — Personal Property.** — So when children would take under the statute the word "heirs" is construed "children." Roberts v. Edwards, 33 Beav. 259; Crawford v. Trotter, 4 Madd. 361; Love v. Francis, 63 Mich. 192; Evans's Estate, 155 Pa. St. 650; Ashton's Estate, 134 Pa. St. 395.

**1. Mixed Property — Heirs Take Realty, Next of Kin Personalty — England.** — Kaye v. Bolton, 6 T. R. 134; Wingfield v. Wingfield, 9 Ch. D. 658; Vaux v. Henderson, cited in Horseman v. Abbey, 1 Jac. & W. 388; Doody v. Higgins, 9 Hare, appendix xxxii; Keay v. Boulton, 25 Ch. D. 212; Matter of Walton, 8 De G. M. & G. 173; Keay v. Boulton, 25 Ch. D. 212.

*Massachusetts.* — Minot v. Harris, 132 Mass. 529; Fabens v. Fabens, 141 Mass. 399.

*New Jersey.* — Ward v. Dodd, 41 N. J. Eq. 417; Scudder v. Vanarsdale, 13 N. J. Eq. 109.

*New York.* — Woodward v. James, 115 N. Y. 358.

*Tennessee.* — Alexander v. Wallace, 8 Lea (Tenn.) 569; Ward v. Saunders, 3 Sneed (Tenn.) 387; Ingram v. Smith, 1 Head (Tenn.) 412; Gosling v. Caldwell, 1 Lea (Tenn.) 454.

**2. Mixed Property — Heirs at Law Held to Take — England.** — In Goods of Dixon, 4 P. D. 81; Smith v. Butcher, 10 Ch. D. 113; De Beauvoir v. De Beauvoir, 3 H. L. Cas. 544; Forster v. Sierra, 4 Ves. Jr. 766; Swaine v. Burton, 15 Ves. Jr. 365; Mounsey v. Blamire, 4 Russ. 384; Hamilton v. Mills, 29 Beav. 193; Gwynne v. Muddock, 14 Ves. Jr. 488; Tetlow v. Ashton, 15 Jur. 213; Haslewood v. Green, 28 Beav. 1; Wright v. Atkins, Coop. t. Eld. 111.

*Massachusetts.* — Clarke v. Cordis, 4 Allen (Mass.) 465; Lombard v. Boyden, 5 Allen (Mass.) 249; Fabens v. Fabens, 141 Mass. 395; Proctor v. Clark, 154 Mass. 45.

*North Carolina.* — Hackney v. Griffin, 6 Jones Eq. (59 N. Car.) 383.

**3. Person Entitled to Personalty Taking Both Real and Personal Property.** — Pyot v. Pyot, 1 Ves. 335; Lawrence v. Crane, 158 Mass. 392; Lincoln v. Perry, 149 Mass. 368.

**4. Husband and Wife.** — Ivins's Appeal, 106 Pa. St. 176, 51 Am. Rep. 516; Dodge's Appeal, 106 Pa. St. 216, 51 Am. Rep. 519; Wilkins v. Ordway, 59 N. H. 378, 47 Am. Rep. 215; Tillman v. Davis, 95 N. Y. 17, 47 Am. Rep. 1.

**Heirs Held Not to Include Widow.** — In the following cases the term "heirs" or "heirs of the body" was held not to include the widow of a decedent.

*Arkansas.* — Johnson v. Knights of Honor, 53 Ark. 255.

*Connecticut.* — Ruggles v. Randall, 70 Conn. 44.

*Indiana.* — Brown v. Harmon, 73 Ind. 412.

*Iowa.* — Journell v. Leighton, 49 Iowa 601; Overdieck's Will, 50 Iowa 244; Blackman v. Wadsworth, 65 Iowa 80; Phillips v. Carpenter, 79 Iowa 600.

*Kentucky.* — Weisert v. Muehl, 81 Ky. 336.

*Maine.* — Lord v. Bourne, 63 Me. 368.

*Michigan.* — Bailey v. Bailey, 25 Mich. 185; Barnett v. Powers, 40 Mich. 319.

*New Hampshire.* — Richardson v. Martin, 55 N. H. 45.

*New York.* — Drake v. Pell, 3 Edw. (N. Y.) 251; Snider v. Snider, 11 N. Y. App. Div. 172; Murdock v. Ward, 67 N. Y. 387; Keteltas v. Keteltas, 72 N. Y. 312; Tillman v. Davis, 95 N. Y. 17.

*Pennsylvania.* — Dodge's Appeal, 106 Pa. St. 216, 51 Am. Rep. 519.

In Henderson v. Henderson, 1 Jones L. (46 N. Car.) 224, the court held that from the context the word "heir" plainly did not include the widow.

In a statute concerning the succession of personal estate, the word "heirs" was held not to include the widow of the decedent. Tillman v. Davis, 95 N. Y. 17, 47 Am. Rep. 1.

In Jones v. Lloyd, 33 Ohio St. 572, 8 Cent. L. J. 136, it was held that where a testator made provision for his wife in lieu of dower, and directed that in the event of her claiming dower the balance of certain personal property bequeathed for her support should be shared equally among "my heirs," the words "my heirs" would be construed as meaning the testator's next of kin according to the statute of distributions, exclusive of his wife, although in the case of intestacy his wife would have taken all such personal property.

**Action Against Legal Representatives.** — A statute provided for an action on the bond of

in the estate of a deceased consort, it has been held that they come within the technical definition of heirs and if such was the intention must be included within that term.<sup>1</sup>

legal representatives, in favor of the decedent's heirs, for a removal out of the state of property belonging to the decedent. It was held that it was not necessary or proper for the widow to join in such an action. *Bridges v. Maxwell*, 34 Miss. 309.

**Dower Interest.**—One entitled to dower, or an interest in the nature of dower, or any allowance of personal property, because of survivorship as husband or wife, is not included within the legal definition of the word "heir." *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 252. Compare *Alexander v. Northwestern Masonic Aid Assoc.*, 126 Ill. 565.

**Bill of Revivor.**—A wife is neither an heir nor a legal representative of her husband so as to entitle her to bring a bill of revivor. *Barnett v. Powers*, 40 Mich. 317.

**Repeal of Statute.**—In *Mace v. Cushman*, 45 Me. 262, it was held that a statute by which the husband of one who died intestate was entitled to the residue of her personal property after the payment of her debts was not repealed by a statute which provided that the real and personal estate of a married woman who died intestate should descend or be distributed to her heirs. But this case was *overruled* in *Cushman v. Mace*, unreported. See *Lord v. Bourne*, 63 Me. 368.

**Insurance.** (See also BENEFICIARIES (IN INSURANCE), vol. 3, p. 971.)—In *Hanson v. Minnesota Scandinavian Relief Assoc.*, 59 Minn. 123, it was held that the widow of a deceased member of an insurance association was not an heir within a by-law providing that the benefit should be paid to such person or persons as the member might have designated, and if no designation had been made, then to his legal heirs. See also *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 251; *Johnson v. Knights of Honor*, 53 Ark. 255. Compare *Alexander v. Northwestern Masonic Aid Assoc.*, 126 Ill. 558.

**Policy of Insurance Taken Out by Widower.**—In *Mearns v. Ancient Order of United Workmen*, 22 Ont. 34, it was held that where a widower who had two children took out a policy payable to his legal heirs and afterwards married and died, leaving a childless widow, the policy was payable to the children and not to the widow. But see *Young Men's Mut. L. Assoc. v. Pollard*, 3 Ohio Cir. Ct. 577, 2 Ohio Cir. Dec. 333, where the court arrived at a different conclusion. And see *Day v. Case*, 43 Hun (N. Y.) 179.

**Personal Property.**—In the following cases the widow has been held not even to take personality as heir. *Wingfield v. Wingfield*, 9 Ch. D. 658; *Fabens v. Fabens*, 141 Mass. 395; *Tillmar v. Davis*, 95 N. Y. 17; *Jones v. Lloyd*, 33 Ohio St. 572.

**Divorced Wife.**—In *Schonfield v. Turner*, 75 Tex. 324, it was held that a divorced wife was not an heir of a member of a mutual benefit society. See also *Tyler v. Odd Fellows' Mut. Relief Assoc.*, 145 Mass. 134.

**Husband Held Not to Be Heir.**—In the following cases the husband was held not to be the

heir of his deceased wife. *Matter of Walton*, 8 De G. M. & G. 174; *Mason v. Bailey*, 6 Del. Ch. 129; *Buck v. Paine*, 75 Me. 582; *Wilkins v. Ordway*, 59 N. H. 382; *Wright v. Methodist Episcopal Church*, Hoffm. (N. Y.) 202; *Roland v. Miller*, 100 Pa. St. 47.

In *Ivins's Appeal*, 106 Pa. St. 176, 51 Am. Rep. 516, it was held that the husband was not the heir or next of kin of the wife, within the ordinary meaning of a will. See also *Tyson v. Tyson*, 2 Hawks (9 N. Car.) 481. And see NEXT OF KIN.

In *Kent v. Deposit Bank*, 91 Ky. 77, it was said: "The statute uses the term 'heirs.' Technically this means those upon whom the law casts the inheritance, and while the statute may make those heirs who otherwise would not be so, because the lawmaking power regulates the descent of property, yet the husband as to the wife's property is a distributee, and, generally speaking, not an heir."

A testator devised certain land to his married daughter for life, with the remainder to her heirs. It was evident that the children of the daughter were meant by the word "heirs" as used in other parts of the will. It was held that the word "heirs" would be considered as meaning the daughter's children and not as including her husband. *Stewart v. Powers*, 9 Ohio Cir. Ct. 143, 6 Ohio Cir. Dec. 101, 2 Ohio Dec. 219.

**Surviving Husband and Wife Not Heirs under Louisiana Statute.**—*Justus's Succession*, 44 La. Ann. 721; *Gee v. Thompson*, 11 La. Ann. 657.

**1. Widow Included—England.**—*Doody v. Higgins*, 2 Kay & J. 729.

*United States.*—*Forest Oil Co. v. Crawford*, 77 Fed. Rep. 110.

*Connecticut.*—*Mullen v. Reed*, 64 Conn. 240. *Illinois.*—*Lawwill v. Lawwill*, 29 Ill. App. 647; *Rawson v. Rawson*, 52 Ill. 62; *Richards v. Miller*, 62 Ill. 417; *Alexander v. Northwestern Masonic Aid Assoc.*, 126 Ill. 558; *Covenant Mut. Ben. Assoc. v. Hoffman*, 110 Ill. 603.

*Indiana.*—*Frantz v. Harrow*, 13 Ind. 507; *Johnson v. Lybrook*, 16 Ind. 473; *Murray v. Mounts*, 19 Ind. 364; *State v. Mason*, 21 Ind. 171; *McMakin v. Michaels*, 23 Ind. 462; *Rockhill v. Nelson*, 24 Ind. 422; *Rusing v. Rusing*, 25 Ind. 63; *Fletcher v. Holmes*, 32 Ind. 510; *Wilburn v. Wilburn*, 83 Ind. 55; *Eisman v. Poindexter*, 52 Ind. 401.

*Kansas.*—*McKinney v. Stewart*, 5 Kan. 392. *Kentucky.*—*Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489.

*Michigan.*—*Hascall v. Cox*, 49 Mich. 441; *Lyons v. Yerex*, 100 Mich. 214.

*Minnesota.*—*Schultz v. Citizens' Mut. L. Ins. Co.*, 59 Minn. 308; *Hanson v. Minnesota Scandinavian Relief Assoc.*, 59 Minn. 123.

*Missouri.*—*Keener v. Grand Lodge, etc.*, 38 Mo. App. 543.

*New Jersey.*—*Welsh v. Crater*, 32 N. J. Eq. 177.

*New York.*—*Kaiser v. Kaiser*, 13 Daly (N. Y.) 522; *Walsh v. Walsh*, 66 Hun (N. Y.) 297.



**VIII. ADOPTED CHILDREN, REPRESENTATIVES, BASTARDS, ETC.** — In its less technical sense "heirs" may include adopted children,<sup>1</sup> legal representatives,<sup>2</sup> legatees and devisees,<sup>3</sup> or bastards.<sup>4</sup>

*North Carolina.* — *Henry v. Henry*, 9 Ired. L. (31 N. Car.) 279; *Croom v. Herring*, 4 Hawks (11 N. Car.) 398; *Corbitt v. Corbitt*, 1 Jones Eq. (54 N. Car.) 114; *Henderson v. Henderson*, 1 Jones L. (46 N. Car.) 224.

*Ohio.* — *Ferguson v. Stuart*, 14 Ohio 140; *Weston v. Weston*, 38 Ohio St. 473; *Jamison v. Knights Templar, etc.*, Mut. Aid Assoc., 12 Cinc. L. Bul. 272, 9 Ohio Dec. (Reprint) 388.

*Pennsylvania.* — *Ryan's Estate*, 14 W. N. C. (Pa.) 79; *Clark v. Scott*, 67 Pa. St. 446.

*South Carolina.* — *Seabrook v. Seabrook*, 10 Rich. Eq. (S. Car.) 496.

*Hawaii.* — *Carter v. Carter*, 10 Hawaii 689.

**Insurance.** (See also the preceding note.) — In *Lyons v. Yerex*, 100 Mich. 214, it was held that the widow was entitled to share in the proceeds of insurance on her husband's life which was payable to his heirs at law, when under the statute she was a distributee of his personal estate. See also *Anderson v. Groesbeck*, (Colo. 1899) 55 Pac. Rep. 1086; *Young Men's Mut. L. Assoc. v. Pollard*, 2 Ohio Cir. Dec. 333, 3 Ohio Cir. Ct. 577; *Northwestern Masonic Aid Assoc. v. Jones*, 154 Pa. St. 99.

**Death by Wrongful Act.** — In *St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, it was held that the widow and all other persons entitled to share in the personal estate of a person dying intestate were heirs at law, within an *Arkansas* statute giving a right of action to the heirs at law of any person whose death was caused by the wrongful act of another.

**Husband as Heir.** — A testator directed the sale of his real estate and its conversion into cash to be divided between his daughter Esther and the heirs of his daughters Elizabeth and Mary. It was held that the husband of Mary was entitled to her share of the fund as the heir of the wife. *Eby's Appeal*, 84 Pa. St. 245. See also *Gibbons v. Fairlamb*, 26 Pa. St. 217; *U. B. Mut. Aid Soc. v. Miller*, 107 Pa. St. 162; *Patterson v. Hawthorn*, 12 S. & R. (Pa.) 113; *McGill's Appeal*, 61 Pa. St. 46; *Richards v. Miller*, 62 Ill. 417.

**By Statute in Georgia** a husband is heir to his wife, and *vice versa*. *Pace v. Klink*, 51 Ga. 223; *Craig v. Ambrose*, 80 Ga. 134; *Gibbon v. Gibbon*, 40 Ga. 575. Compare *Brown v. Ransey*, 74 Ga. 210.

In *Massachusetts* it has been held that the words "heirs at law" included the husband or wife as statutory heir. *Fabens v. Fabens*, 141 Mass. 395; *Olney v. Lovering*, 167 Mass. 446; *Addison v. New England Commercial Travelers' Assoc.*, 144 Mass. 591; *Lawrence v. Crane*, 158 Mass. 392. See also *Sweet v. Dutton*, 109 Mass. 589.

In *Lincoln v. Perry*, 149 Mass. 374, it was said: "Under the decision in *Lavery v. Egan*, 143 Mass. 389, the husband of Judith Perry must be considered as her heir, to an amount not exceeding five thousand dollars in value."

In *Proctor v. Clark*, 154 Mass. 45, it was held that a widow was the heir of her husband to the extent of five thousand dollars, up to which an estate in fee is given to her by the

*Massachusetts* statute, but not in respect to the life estate, which is her dower interest. Consequently she can take only the sum of five thousand dollars under a will in favor of heirs.

**Hawaii.** — In *Thurston v. Allen*, 8 Hawaii 392, it was held that by the Hawaiian statutes of descent a widow was an heir. Compare *Carter v. Carter*, 10 Hawaii 689.

**1. Adopted Child.** — *Pace v. Klink*, 51 Ga. 222.

**Adopted Child Held Not to Take.** — Where a testator gave property to his lawful heirs, it was held that the term "lawful heirs" did not include his adopted child. *Morrison v. Sessions*, 70 Mich. 308. See also *Reinders v. Koppelman*, 94 Mo. 344; *Sunderland's Estate*, 60 Iowa 732. And see the title **SUCCESSION**.

**Same — Testator Not Adopting Parent.** — An adopted child was held not to take under a bequest to the heirs at law of A. The court said: "Inasmuch as the testator is not the adopting parent, the burden is upon the tenant to show that it was the intention of the testator to include an adopted child." *Wyeth v. Stone*, 144 Mass. 444. See also *Reinders v. Koppelman*, 94 Mo. 344.

**2. Executors and Administrators.** — *Rawson v. Jones*, 52 Ga. 458; *Forrest v. Price*, 52 N. J. Eq. 23; *Powell v. Boggis*, 35 Beav. 535. See also *Rice v. White*, 8 Ohio 216; *Mull v. Mull*, 81 Pa. St. 394; *Wiggin v. Perkins*, 64 N. H. 38.

**Personal Representatives Not Included.** — *Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa 354. And see *supra*, this title, *Technical Sense* — *Word of Limitation*; *Personal Property*.

**3. Heirs in the Sense of Legatees and Devisees.** — *Boydell v. Golightly*, 14 Sim. 327; *Pibus v. Mitford*, 1 Vent. 381; *Graham v. De Vampert*, 106 Ala. 279; *Eisman v. Poindexter*, 52 Ind. 401; *Meir's Will*, 9 Dana (Ky.) 434; *Greenwood v. Murray*, 28 Minn. 120; *Scudder v. Vanarsdale*, 13 N. J. Eq. 109; *Cushman v. Horton*, 59 N. Y. 149; *Collier v. Collier*, 3 Ohio St. 375; *Richard's Appeal*, 100 Pa. St. 51.

In *Wilkins v. Hukill*, 115 Mich. 594, it was held that in an agreement between legatees, whereby concessions were made in order to secure the probate of a will, the word "heirs" would be held to be a word of description merely, referring to none outside of the parties to the instrument. See also *Patterson's Appeal*, 116 Pa. St. 16.

**4. Illegitimate Children.** (See generally the title **SUCCESSION**.) — In *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, it was held that in those states whose laws permit illegitimate children recognized by the father in his lifetime to inherit from him, such children are heirs within the meaning of the *United States* statute which provides that upon the death of a party entitled to claim the benefits of the preemption law, an entry may be made in favor of his heirs. See also *Caldwell v. Miller*, 41 Kan. 12. And see the title **PUBLIC LANDS**.

A testator devised property to his niece, and after her death to her heirs by blood.



**IX. CONFLICT OF LAWS.** — Where a controversy arises as to what law determines the question who are the heirs of a given person, the ordinary rules governing conflict of laws apply. Thus, where the property in question is personal property, it is governed by the law of the owner's residence; where it is real property, by the law of the situs of the property.<sup>1</sup>

**HEIRLOOMS.** (See also the title *SUCCESSION*.) — Such goods and chattels as, contrary to the nature of chattels, go by special custom to the heir, along with the inheritance, and not to the executor.<sup>2</sup>

This was held to include an illegitimate son of the niece. *Hayden v. Barrett*, 172 Mass. 472.

**Legitimized Child.** — A testator devised land to his son Thomas, and if he died without an heir then over. Thomas had an illegitimate daughter who was legitimized by an Act of Assembly and made capable to inherit as fully as if she had been born in lawful wedlock. It was held that this daughter was an heir as the term was used in the will. *McGunnigle v. McKee*, 77 Pa. St. 85.

**Statute Held Not to Apply to Wills.** — A statute provided that an illegitimate child should be heir of his parents if they should intermarry, and heir of his mother in any case, and it was held that this statute could not apply to testate property. *Lyon v. Lyon*, 88 Me. 395.

**Brothers and Sisters.** — In *Borroughs v. Adams*, 78 Ind. 160, it was held, where a statute provided that the property of a man dying intestate, without heirs at the time of his death, should descend to and be vested in his illegitimate children, that the brothers and sisters of the intestate took his estate as heirs, to the exclusion of his illegitimate children. Counsel had contended that "heirs" in the statute meant child or children, and did not include brothers and sisters.

**1. Conflict of Laws.** (This subject will be treated at length in the title *PRIVATE INTERNATIONAL LAW*; and see also the title *WILLS*.) — *Northwestern Masonic Aid Assoc. v. Jones*, 154 Pa. St. 99; *Brown v. Ransey*, 74 Ga. 210; *Roddy v. Cox*, 29 Ga. 311; *Brown v. Belmarde*, 3 Kan. 41; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 68; *Cutting v. Cutting*, 6 Sawy. (U. S.) 396.

**Common Law.** — In *Aspden's Estate*, 2 Wall. Jr. (C. C.) 368, it was held that the term "heir at law," especially when found in connection with the term "lawful heir" as a synonym, means, in *Pennsylvania*, the person on whom the laws of that commonwealth cast the real estate of an intestate at the time of his death; and it does not mean the person on whom the common law of England, as distinguished from the laws of *Pennsylvania*, casts such estate.

**Same — Public Lands.** (See also the title *PUBLIC LANDS*.) — Where a pre-emptioner died before consummating his claim, and his administrator obtained from the United States a patent granting the land unto the heirs of the deceased pre-emptor, the word "heirs" in the patent was construed with reference to the laws of the state where the land was, although it was contended by counsel that the word "heirs" must be determined by the common law of England. *Caldwell v. Miller*, 44 Kan. 18. See also *Brown v. Belmarde*, 3 Kan. 41; *De-*

*lashmuth v. Parrent*, 40 Kan. 642; *McKinney v. Stewart*, 5 Kan. 391.

**Policy of Insurance.** — In *Knights Templars'*, etc., *Mut. Aid. Assoc. v. Greene*, 79 Fed. Rep. 461, it was held that where a policy was issued in Ohio payable to the heirs of the insured, who was domiciled in New York, where all possible beneficiaries lived, the meaning of the word "heirs" was to be determined by the law of New York.

In *Mullen v. Reed*, 64 Conn. 240, it was held that a benefit certificate made in the state where the parties resided would be construed according to the laws of that state when brought in question in the courts of another state.

**Deed of Trust.** — Where a deed of trust is executed in one state for the benefit of the heirs at law of the settler, who afterwards becomes domiciled in another state, where he dies, the laws of the latter state will govern as to who were contemplated as heirs. *Merrill v. Preston*, 135 Mass. 451, 18 Cent. L. J. 74.

2. 2 Bl. Com. 427; *Bouv. L. Dict.*

The popular and familiar sense of the word *heirlooms* is things directed to descend by way of inheritance. *Byng v. Byng*, 10 H. L. Cas. 183.

**Classes of Heirlooms.** — In *Hill v. Hill*, (1897) 1 Q. B. 494, it was said: "Its primary meaning is chattels which on the death of the ancestor pass to the heir. These are of two classes. The first is where they pass by special custom, such as the best bed and the like. The second is where the chattels, to use the old phrase, savor of the inheritance; that is, are directly connected with it. This class includes title deeds and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage, as in the case of the Pusey horn, and the ancient jewels of the crown."

**Trust Estates Created in Chattels.** — In *Hill v. Hill*, (1897) 1 Q. B. 495, it was said: "But there is a secondary sense in which the term *heirlooms* is used; that is, where chattels are settled by deed or will or otherwise, vesting them in trustees upon trusts declared whereby they are limited to go along with corporeal or incorporeal hereditaments, so far as the rules of law or equity will permit. This secondary sense is, speaking generally, the sense in which the term *heirlooms* is employed popularly, and also by lawyers as a brief description."

**Tombstone.** — A monument or tombstone has been held to be an *heirloom*. *Spooner v. Brewster*, 3 Bing. 136, 11 E. C. L. 69.

A Wild Deer has been held an *heirloom*. *Ford*

**HELD.** (See also *HOLD*, *post.*) — As a technical term, "held" embraces two ideas; that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession. We speak of lands being held in fee, or for a term of years, or by adverse possession, meaning that possession is had of these lands under claims to such possession of the nature described by these terms. So we speak of a legal title being held in respect of lands, that expression not necessarily implying the actual possession of the lands to which such title relates.<sup>1</sup> For examples of the use of the term in a less technical sense see note 2.

**HELP.** — See note 3.

*v. Tynte*, 2 Johns. & H. 150. But not a tame deer. *Morgan v. Abergavenny*, 8 C. B. 768, 65 E. C. L. 768.

**Precatory Trusts.** (See the title *PRECATORY TRUSTS*.) — The widow of a peer stated in a letter or memorandum sent to her solicitor that upon her marriage certain diamonds had been given to her by the mother of her husband, then heir presumptive to the peerage, for her life, with the request that at her death they might be left as *heirlooms*. It was held that the terms of the gift as stated did not import a precatory trust, and therefore that the absolute property in the diamonds passed under it to the donee. *Hill v. Hill*, (1897) 1 Q. B. 483.

1. *Witsell v. Charleston*, 7 S. Car. 100; *Taylor v. Robinson*, 72 Tex. 364.

**Possession.** (See also the title *PARTITION*.) — A partition statute applies to lands *held* by partitioners, joint tenants, or tenants in common. The court said that the word *held* denoted present possession, either actual or constructive. *Smith v. Gaines*, 39 N. J. Eq. 547. See also *Stevens v. Enders*, 13 N. J. L. 271.

**Owned.** — A *West Virginia* statute providing for the reassessment of lands for taxation provided for a separate assessment of the surface of lands and coal privileges, where such privileges were *held* separate from the ownership of the surface. In construing this provision the court said: "The word *held* does not contemplate the holding of a lessee who pays a royalty for the coal mined and removed to the landowner, the title remaining in the lessor, but it does contemplate a case in which another party has become the owner of the mineral or coal and holds it as such owner." *U. S. Coal, etc., Co. v. Randolph County Ct.*, 38 W. Va. 205. See also *State v. South Penn Oil Co.*, 42 W. Va. 80.

**2. Shares of Stock.** — A statute provided that no contributor of a company should be capable of presenting a petition for the winding up of such company unless his shares had been *held* by him and registered in his name for the period of at least six months. It was held that the word *held* in this section had no other meaning than that the name of the contributor had been on the register as the holder of shares for the period in question. *In re Wala Wynaad Indian Gold Min. Co.*, 21 Ch. D. 849.

**Insurance — Held by Contract.** — An applicant for insurance upon a building stated in substance that he was the owner of the property, and that no other person was interested therein, but also that it was held by contract. The policy made such statements warranties. He was in possession under a contract of sale

from the owners. It was held that there was no breach of warranty. *McCulloch v. Norwood*, 58 N. Y. 562.

**Same — Held in Trust.** — "The words 'merchandise *held* in trust' aptly describe the property of depositors. The warehouse company *held* merchandise in trust for their customers, not, it is true, as technical trustees, but as trustees in the sense that goods had been intrusted to them." *Lucas v. Liverpool, etc., Ins. Co.*, 23 W. Va. 277. See also *Hough v. People's F. Ins. Co.*, 36 Md. 400. See also the title *FIRE INSURANCE*, vol. 13, p. 116.

**Held, Perfect Participle of Verb to Hold.** — Articles of copartnership excepted from the obligation of each partner to give his time and attention to the interest of the firm "such time as may be proper for the fulfilling of the duties of any office or agency *held* individually by either partner." In construing this article the court said: "The word, whether considered grammatically or in relation to other parts of the contract, cannot legitimately be limited to an office or agency in the possession of one of the partners when the contract was formed, but includes any office or agency of which a partner might become possessed at any time during the continuance of the copartnership." *Starr v. Case*, 59 Iowa 495.

**Held and Firmly Bound.** — In *Shattuck v. People*, 5 Ill. 478, it was held that there was no difference in their legal effect between the words "is *held* and firmly bound" and the words "owes and is indebted."

**Held for Trial — Libel and Slander.** — In *McGuire v. Vaughan*, 106 Mich. 280, the trial court left the meaning of the words "*held* for trial" to the jury in an action for libel charging that the plaintiff was arrested and *held* for trial. This was held not error.

**Held Open.** — A prosecution was commenced before a justice of the peace. The respondent appeared, and by agreement of the attorneys the case was *held* open. The appellate court said: "We think by the use of these words it was intended that the cause should be *held* open for a time not exceeding the time the justice could have then adjourned it, and that at the expiration of this time, without an adjournment, or any action by the justice, the cause was no longer pending." *State v. Bruce*, 68 Vt. 183.

**3. Help.** — Where a dealer in pianos engages a truckman to remove pianos and agrees to "find *help*" for removing them, he is bound to furnish such manual labor on request as the truckman may reasonably need in addition to his own services in order to accomplish the work of removal, but he is not liable for com-



**HEMMED.** — See note 1.

**HEN.** — See note 2.

**HENCE.** — See note 3.

**HENCEFORWARD.** — Henceforward means hereafter.<sup>4</sup>

**HENCHMAN.** — See note 5.

**HER.** (See also **SHE.**) — See note 6.

**HERBAGE.** (See also the title **PROFITS Á PRENDRE.**) — Herbage is the green pasture and fruit of the earth, provided by nature for the food or bite of cattle.<sup>7</sup>

**HERD.** — A herd is defined as a number of beasts assembled together.<sup>8</sup>

**HERDER.** — See note 9.

compensation for the use of a machine or rigging invented and used by the truckman, whereby manual labor is saved. *Ladd v. Patten*, 66 Me. 97.

A warden of a prison who has power to appoint "all necessary *help*" is the proper officer to appoint a prison physician, and not commissioners who have control of the prison grounds, property, and labor, and of the purchase of supplies. *State v. Hobart*, 13 Nev. 419.

**Parol Evidence.** — A offered in writing to pay one thousand dollars to B if the latter would *help* him to effect the sale of certain lands. In an action by B to recover such amount it was admitted that he had rendered the services required of him, and both parties, in their pleadings, construed the agreement to be that B should use his best efforts to bring about the sale. It was held that parol evidence was not admissible to explain the word *help*. *Hooker v. Hyde*, 61 Wis. 204. See generally the title **PAROL EVIDENCE**.

1. **Hemmed Handkerchief.** (See also the title **REVENUE LAWS.**) — The term "*hemmed handkerchief*," as used in a tariff act, was held to be a commercial term, and not to mean a handkerchief which has been cut from the piece and in fact *hemmed*, but to mean the article commercially known as a *hemmed handkerchief*, which definition excludes the hemstitched article. *U. S. v. H. B. Claffin Co.*, 1 U. S. App. 667.

2. **Hen.** — In *People v. Ferguson*, 8 Cow. (N. Y.) 107, it was said: "*Hen.* is not, strictly speaking, a name, as *Henry* is; but the fact is that the letters *Hen.* are an abbreviation for *Henry*." See generally the title **ABBREVIATIONS**, vol. 1, p. 97.

3. **Hence.** — The terms *hence* and "therefore" are sometimes the equivalents of "so." *Clem v. State*, 33 Ind. 431.

**Hence in the Sense of Therefore.** — *Alexander v. People*, 96 Ill. 101.

4. **Henceforward—Perpetuity.** — "The word *henceforward* does not necessarily convey the idea of perpetuity; it means no more than 'hereafter,' which may import a permanent or temporary arrangement, according to the general tenor of the instrument and the nature of the subject-matter about which it is used." *Opinion of Justice*, 7 Pick. (Mass.) 128, note. See also **HEREAFTER**, *post*.

5. **Henchman.** — In *Barnes v. State*, 88 Md.

347, it was said: "A *henchman* is not, according to the ordinary meaning of the word, a policeman. The word signifies servant, page, or a hanger-on." This was a libel case.

6. **Her Mark.** — See the title **MARK**.

**Sex.** — In *Warner v. State*, 54 Ark. 663, it was said: "The use of the personal pronoun *her*, referring to Jennie Jones, in the indictment makes it sufficiently certain that the offense is charged to have been committed upon a female."

7. *Jacob's L. Dict.*; *Simpson v. Coe*, 4 N. H. 303; *Johnson v. Hodgson*, 8 East 38.

**Culling Grass.** — "Indeed, it is very clear that the word *herbage*, when used as a legal term, means now precisely what it meant in Bracton's time, and we are of opinion that a right to *herbage* does not include a right to cut grass, or dig potatoes, or pick apples, and that the plea in this case is insufficient." *Richardson, C. J.*, in *Simpson v. Coe*, 4 N. H. 303.

Common of pasturage and *herbage* does not include the right to cut and carry away brakes, fern, heather, and litter. The commoners have "a right in respect of their tenements to feed upon this waste by the mouths of their cattle, taking not merely the grass, but whatever the cattle would eat, which I take to be included under the word *herbage*." *Brett, L. J.*, in *De la Warr v. Miles*, 17 Ch. D. 589.

**Fee.** — A grant of *herbage* or feeding of land does not convey a fee. The grantees have no seizin and cannot maintain a writ of entry. They have a right to enter to take care of the land and to fit it for production of grass, etc.; and perhaps they may maintain trespass *quare clausum*, etc., for injury to the *herbage*. *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

8. **Herd.** — *Brimm v. Jones*, 13 Utah 440, which case arose upon the construction of a statute providing that a person who drives a *herd* of animals over a highway, constructed on a hillside, should be liable for all damages done by such animals in destroying the banks.

9. **Herder.** — A statute gave to a *herder* of cattle a lien for services upon the animals in his charge. It was held that "*herder* of cattle" referred to persons who were in the herding business, who took cattle and sheep into their possession and away from the possession and control of their owner, and did not apply to a mere hired hand. *Hooker v. McAllister*, 12 Wash. 46. See generally the title **MECHANICS' LIENS**.



# HERD LAWS.

By WALTER CARRINGTON.

## I. SCOPE OF TITLE, 335.

## II. LAWS FORBIDDING REMOVAL OF LIVE STOCK WITHOUT OWNER'S CONSENT, 335.

### CROSS-REFERENCES.

*As to laws relating to the branding and marking of live stock, see the title BRANDS AND MARKS, vol. 4, p. 874.*

*As to laws relating to the taking up and impounding of estrays, see the titles ANIMALS, vol. 2, p. 378; FENCES, vol. 12, p. 1035; IMPOUNDING.*

*As to laws relating to fences, see the title FENCES, vol. 12, p. 1035.*

*As to laws to prevent the introduction and communication of contagious diseases, see the title ANIMALS, vol. 2, p. 380.*

**1. SCOPE OF TITLE.** — In most of the states where the raising of live stock is an important industry, especially in the great grazing states west of the Mississippi, where large herds of cattle are permitted to roam over a great range of territory, stringent police regulations have been enacted for the purposes of regulating the marking and branding of stock and the taking up and impounding of estrays, preventing the spread of contagious diseases, and otherwise protecting live stock and the property of the owners therein. The interpretation of many of these statutes has been more appropriately treated under other titles in this work, to which cross-references will be found in the table above. This title will treat only of the construction of statutes prohibiting the driving of live stock from its accustomed range or pasture without the consent of the owner.

## II. LAWS FORBIDDING REMOVAL OF LIVE STOCK WITHOUT OWNER'S CONSENT.

— In several states there are statutes making it a criminal or penal offense to drive or remove live stock from the premises of the owner, or from its accustomed range or pasture, or from the county, without the owner's consent. The particular provisions of some of these statutes have received the interpretation of the courts.<sup>1</sup>

**1. Section 22 of the Colorado Statute** relating to the driving away of cattle (Mills's Annot. Stat. Colo. 1891, § 271) was held to be part of a special act, the effect of which was not to take a larceny of any of the animals therein named out of the provisions of the general act, but to leave it indictable under either act. *Kollenberger v. People*, 9 Colo. 233.

**Proof Sufficient to Convict under Illinois Statute.** — In Illinois proof that while the defendant was driving his herd through a part of the state, the plaintiff's cattle got into the drove; that the defendant knew they were in the drove, and aided in branding them with the initial letter of his name, and castrated a bull; that he drove them twenty-five miles from the usual range through a thickly settled country, and that on every mile of his route there was a habitation, was held sufficient to subject him to the penalty prescribed by the statute (*Starr & Curt. Annot. Stat. Ill. 1896, c. 44, par. 1*). *Arnold v. Ludlam*, 38 Ill. 190.

**Proof Essential to Recovery under Iowa Statute.** — Under the Iowa Act of March 27, 1862 (Laws 1862, c. 34), to prevent the unlawful driving away of cattle or other stock by drovers, recovery cannot be had unless it is shown that the defendant had some knowledge that the domestic animal of another had entered his drove or was being taken away. *Chamberlain v. Gage*, 20 Iowa 303.

**Natural Marks upon Cattle Afford No Indication of Ownership.** — In a prosecution for driving cattle from a range, it was held error for the court to instruct the jury that natural marks upon the cattle were sufficient to charge the taker with knowledge of their ownership. *State v. Swayze*, 11 Oregon 357.

**Statute Penalizing Driving of Live Stock Out of County.** — Under Pen. Code *Texas*, art. 778 (Pen. Code 1895, art. 929), making it a penal offense to drive live stock out of a county without the owner's consent, the offense is complete the instant the stock is driven across the

**HEREAFTER — HERETOFORE.** (See also the title **STATUTES**.) — Hereafter means in the future. Heretofore means in time past;<sup>1</sup> in the time before the present; formerly;<sup>2</sup> before this time; down to this time; hitherto.<sup>3</sup> In statutes and constitutions the words "hereafter" and "heretofore" usually relate to the time when the enactment takes effect, and not to the time of its passage.<sup>4</sup> But the terms are sometimes held to refer to the date of passage.<sup>5</sup>

county line, and under Code Crim. Pro., art. 209 (Code 1895, art. 228), may be prosecuted in either of the coterminous counties. *Rogers v. State*, 9 Tex. App. 43. But a conviction cannot be had under this statute unless it be shown that the stock was not the property of the defendant, and that it was driven out of the county without the written authority of the owner. *Covington v. State*, 6 Tex. App. 512; *Heard v. State*, 8 Tex. App. 466.

**The Word "Wilfully" in the Texas Statutes,** Pen. Code, arts. 749, 767 (Pen. Code 1895, arts. 884, 913), making it a criminal offense for one wilfully to remove or drive from its accustomed range live stock not his own, without the consent of the owner, means with evil intent or without reasonable ground to believe that the act is lawful. *Owens v. State*, 19 Tex. App. 243; *Yoakum v. State*, 21 Tex. App. 260; *Wilson v. State*, (Tex. App. 1892) 19 S. W. Rep. 255; *Mahle v. State*, (Tex. App. 1890) 13 S. W. Rep. 999; *Wells v. State*, (Tex. App. 1890) 13 S. W. Rep. 889. See also *Sterling v. State*, 15 Tex. App. 249. Compare *Shubert v. State*, 20 Tex. App. 320.

**Presumptions — Admission of Evidence.** — There is no presumption that the taking of cattle out of a range with intent to appropriate the entire dominion over them and convert them to the taker's use is a felonious taking, where it is done under a claim that the cattle are lost or abandoned and under circumstances that justify the belief that they are so, although in fact the owner has not lost the cattle nor abandoned his property in them. *State v. Swayze*, 11 Oregon 357.

In a prosecution under the *Texas Act of Nov. 12, 1866* (Pen. Code 1895, arts. 884, 886), for wilfully removing cattle from their accustomed range with intent to defraud the owner, evidence that the animals were removed from their accustomed range and that they were estrays, or that they belonged to or were controlled by a person other than the accused, is, by the express provision of the act, sufficient to make out a *prima facie* case against the accused. *Wills v. State*, 40 Tex. 69; *Smith v. State*, 41 Tex. 168; *Kemp v. State*, 38 Tex. 110. But this *prima facie* presumption of guilt may be rebutted by evidence of facts and circumstances tending to prove that there was no criminal intent. *Wills v. State*, 40 Tex. 69; *Smith v. State*, 41 Tex. 168. Therefore, in a prosecution under this statute, directions given by the defendant to his employees while collecting the cattle are admissible in evidence upon the question of intent. *Bawcom v. State*, 41 Tex. 189.

1. *Andrews v. Thayer*, 40 Conn. 156.

2. *George v. People*, 167 Ill. 447.

3. *People v. Baltimore, etc.*, R. Co., 117 N. Y. 150.

**Hereafter Borrow.** — A statute provided that a public corporation might set apart a sinking

fund to pay off moneys that they might "hereafter borrow." It was held that "hereafter borrow" related to further moneys borrowed for other purposes, and did not apply to moneys raised at a cheaper rate to pay a prior loan. *Local Board of Health v. Rochester Pavement, etc.*, Com'rs, L. R. 1 Q. B. 24.

**Hereafter Valued and Declared — Marine Insurance.** (See also the title **MARINE INSURANCE**.) — In *Inglis v. Stock*, 10 App. Cas. 269, Lord Blackburn said: "The meaning of to be 'hereafter valued and declared' is that if the insured has several adventures, all within the description in the policy, out, he may select at his pleasure which is to be protected by the policy, and on his giving notice of such a selection, to the insurers, the policy is as if it had named that adventure from the beginning."

4. **Referring to Time at Which Enactment Takes Effect.** — *Gerding v. Beall*, 63 Ga. 562; *People v. Cook County*, 176 Ill. 584; *Evansville, etc., R. Co. v. Barbee*, 59 Ind. 593; *Charles v. Lamberson*, 1 Iowa 435; *Bennett v. Bevard*, 6 Iowa 82; *Thatcher v. Haun*, 12 Iowa 303; *Fairchild v. Masonic Hall Assoc.*, 71 Mo. 527; *Matawan v. Horner*, 48 N. J. L. 445.

In *List v. Wheeling*, 7 W. Va. 522, the word *hereafter* was held to relate to the day of the adoption of the constitution by the qualified voters of the state.

A constitutional provision that "the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever," includes in its application all cases before the date of the constitution, and is not limited to those before the date of a former constitution from which this provision was transcribed. *Wynehamer v. People*, 13 N. Y. 427; *Sheppard v. Steele*, 43 N. Y. 57.

**Amended Act.** — In a statute which is amendatory of a former statute, enacting that the former one is amended "so as to read," and then incorporating the changes and additions with so much of the former statute as is retained, *hereafter* means, as to the original provisions, subsequent to their original enactment, and as to the new provisions, subsequent to the time when the amendment went into effect. *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 N. Y. 332.

5. **Hereafter Held to Relate to Date of Passage and Not to Date of Taking Effect.** — *Kendig v. Knight*, 60 Iowa 29; *Parsons v. Wayne Circuit Judge*, 37 Mich. 287.

**Settlement.** — In a statute providing that "hereafter any person of the age of twenty-one years having the other qualifications mentioned \* \* \* shall be deemed to have thereby gained a settlement," etc., *hereafter* applies as well to the qualifications as to being deemed to have gained a settlement, so that both are prospective. *Com. v. Sudbury*, 106

The word "hereafter," it has been held, will of itself render a statute prospective and save pending actions.<sup>1</sup>

**HEREBY.** — See note 2.

**HEREDITAMENTS.** (See also the titles **REAL PROPERTY**; **SUCCESSION**.) — The word "hereditaments" is a more comprehensive term than "lands" or "tenements," and includes whatsoever may be inherited, be it corporeal, real, personal, or mixed.<sup>3</sup> Hereditaments are of two kinds, corporeal and incor-

Mass. 268. See generally the title **POOR AND POOR LAWS**.

**Theretofore.** — For the sake of a sensible construction, the sense of "theretofore" is frequently given to *heretofore*, meaning time past as to a definite point of future time. *Whipple v. Saginaw Circuit Judge*, 26 Mich. 342; *State v. Troth*, 34 N. J. L. 377; *Perrine v. Farr*, 22 N. J. L. 356. See also *State v. Stites*, 13 N. J. L. 176.

**Hereafter Constructed.** — A statute applicable only to such railroads as should be "*hereafter constructed*" was held not to apply to a railroad which prior to the passage of the statute had located its lines and incurred liabilities for a right of way, and was in course of actual construction. *Atty.-Gen. v. Ware River R. Co.*, 115 Mass. 404.

**Hereafter Held Not to Denote Perpetuity.** — *Dobbins v. Cragin*, 50 N. J. Eq. 640.

**Hereinbefore.** — "*Heretofore given*" in a will was construed "*hereinbefore given*" in *Allison v. Chaney*, 63 Mo. 279. To the same effect see *Crane's Appeal*, 2 Root (Conn.) 487.

**Grant of Way.** — In 1872 the owner of two adjoining pieces of land granted one to the plaintiff and the other to the defendant. The grant to the plaintiff contained the general words "together with all buildings, ways, \* \* \* easements, and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or *heretofore* held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto." Prior to 1852 the occupiers of the two tenements had used in common a formed private road, for the purpose of going to and from their respective tenements to the high road. It was held that under the circumstances the inference that the word *heretofore* in the grant to the plaintiff was used in its ordinary grammatical meaning was rebutted, and that no right to the use of the private road passed to him. *Roe v. Siddons*, 22 Q. B. D. 224.

1. *State v. Hicks*, 48 Ark. 520. See also the titles **RETROSPECTIVE LAWS**; **STATUTES**.

2. **Will — Whole or Section.** — In the residuary clause of a will whereby the testator bequeathed all the rest and residue of his "other property" to his four children, and directed that if any of his daughters should die without leaving children "their property *hereby given*" should go over, the word *hereby* referred to the residue mentioned in the clause, and not to the dispositions of the entire will. *Renwick v. Smith*, 11 S. Car. 294.

**Whole Statute.** — A statute provided that if a grantee should fail to record a defeasance, he should not be entitled to enjoy the benefits and advantages "*hereby given* to a mortgagee." The court said: "By the word *hereby* is meant not that particular section

alone, but the whole act of which it is a part." *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91.

**A Statute proclaimed that the office of commissioner of agriculture "be hereby declared an elective office." The court said: "The word hereby imparts no additional meaning to the statute. It means, by this act, or by this statute; nothing more. The statute would receive, and necessarily receive, the same interpretation — accomplish the same result — without it as it does or can do with it." Lane v. Kolb, 92 Ala. 636.**

**Executory Contract — Hereby Sell.** — By an agreement between the parties, the plaintiff contracted to sell to the defendant the ice contained in his two icehouses, the defendant agreeing to take the ice during the month of August and to pay therefor a certain price per ton. Although the words "*hereby sell*" were used in the writing between the parties, the agreement was held to be executory. *Rien-deau v. Bullock*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 976, 66 Hun (N. Y.) 628.

**Same — Grant.** — But "*hereby granted*" has been held to import an immediate transfer of title. *Wright v. Roseberry*, 121 U. S. 496.

3. **Hereditament.** — 2 Black. Com. 17; Co. Litt. 6 a; *Challis on Real Prop.* 38; *Lloyd v. Jones*, 6 C. B. 81, 60 E. C. L. 81; *Owens v. Lewis*, 46 Ind. 508; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 412; *New York v. Mabie*, 13 N. Y. 159; *Canfield v. Ford*, 28 Barb. (N. Y.) 338; *Canal Com'rs v. People*, 5 Wend. (N. Y.) 453; *Ex p. Leland*, 1 Nott & M. (S. Car.) 463; *Barton v. Rushton*, 4 Desaus. (S. Car.) 384; *Dunlap v. Gibbs*, 4 Yerg. (Tenn.) 97.

**Double Meaning.** — The word has to some extent a double meaning. When used in relation to land it sometimes denotes the land itself as a physical object, and sometimes the estate in the land. *Challis on Real Prop.* 38. "When applied to realty it generally denotes the subject of property, apart from its nature and extent, but when applied to personality it does not then denote the subject, but signifies some inheritable right of which the subject is susceptible." *Wharton's L. Lex.*

**Fee.** — The settled sense of the word is to denote such things as may be the subject-matter of inheritance, but not the inheritance itself, and it cannot therefore, by its own intrinsic force, enlarge an estate *prima facie* a life estate into a fee. *Moor v. Denn*, 2 B. & P. 251, *reversing* *Denn v. Moor*, 1 B. & P. 558, and *affirming* *Denn v. Mellor*, 5 T. R. 558.

**Compared with Tenement.** (See also **TENEMENT**.) — "It is not so strong a word as 'tenement'; it is merely a description of the thing itself, and not of the quality of it or the interest in it." *Lord Kenyon, C. J.*, in *Doe v. Allen*, 8 T. R. 497.



poreal. Corporeal hereditaments, which lie in livery, consist of those which are substantial and permanent, visible, and tangible. They are comprehended under the general denomination "land."<sup>1</sup> Incorporeal hereditaments are heritable rights issuing out of things corporate, or concerning, or annexed to, or exercisable within the same.<sup>2</sup> These are classified by Blackstone as advow-

In *Nellis v. Munson*, 108 N. Y. 458, it was said: "Thus it is said by elementary writers that the word *hereditaments* is more extensive in its signification than 'land' or 'tenements,' and signifies anything capable of being inherited; and as applied to realty is divided into corporeal and incorporeal."

**Fixtures.** — In *Bemis v. First Nat. Bank*, 63 Ark. 625, it was said: "This means substantially (according to our view of it) the same as the expression 'and all the improvements thereon,' a phrase of common use in our western country to denote whatever has the character of a physical fixture at the time, and is generally comprehended in the words 'appurtenances,' *hereditaments*, etc., and in this case made to come under the last designation expressly in the *habendum* clause."

**Underground Railroad.** — A railroad company was authorized by a special act to construct an underground railroad. The act provided that with respect to any land which was the roadway or footway of any street the company should not be required wholly to take that land or any part of the surface thereon, but might appropriate and use the subsoil and under surface. The company, to construct a tunnel under a roadway, removed the subsoil and built an arch in brickwork. It was held that the interest of the company in the tunnel was a *hereditament*. *Metropolitan R. Co. v. Fowler*, (1892) 1 Q. B. 165, *affirmed* (1893) A. C. 416.

**Toll Bridge Held a Hereditament.** — See *Meason's Estate*, 4 Watts (Pa.) 341.

**Hereditament Held Not to Include Railroad Company's Right of Way.** — See *Great Western R. Co. v. Swindon*, etc., *Extension R. Co.*, 22 Ch. D. 685, 9 App. Cas. 792. Compare *Decamp v. Hibernia Underground R. Co.*, 47 N. J. L. 52.

**Gas Company.** — In *Rex v. Shrewsbury*, 3 B. & Ad. 216, 23 E. C. L. 58, it was held that a gas company was ratable as an occupier of the land in which its pipes were placed, within a power to rate *hereditaments*.

**Market Tolls.** — In *Colebrooke v. Tickell*, 4 Ad. & El. 916, 31 E. C. L. 230, it was held that market tolls were not ratable under a power to rate any land, house, shop, warehouse, or other building, tenement, or hereditament.

**A Privilege of Shooting on land has been held not to be a hereditament.** *Dayrell v. Hoare*, 12 Ad. & El. 356, 40 E. C. L. 67.

**Annuity.** — In *Stafford v. Buckley*, 2 Ves. 170, Lord Hardwicke said that an annuity in fee granted out of the four and one-half per cent. duties upon goods exported from the West Indies was a personal *hereditament*.

**Condition on Bond — Heirloom.** — *Hereditament* includes whatever may be inherited, and extends to a movable, such as an heirloom, and even to the condition of a bond which may descend to a man from his ancestor. *Mitchell v. Warner*, 5 Conn. 518. See also *Winchester's Case*, 3 Coke 2 b.

A condition the benefit of which may descend to a man from his ancestor is said to be a *hereditament*. *Barton v. Rushton*, 4 Desaus. (S. Car.) 384.

**Executory Devise.** — A debtor assigned his property for the benefit of his creditors in the following language: "All and singular the lands, tenements, and *hereditaments*." Upon the question whether an executory devise passed, the court said: "Nor would the word *hereditament* seem to be sufficiently specific or comprehensive to pass the interest of the assignor thus acquired under the will. For this term has relation to all such immovable things, whether corporeal or incorporeal, which a man may have, to him and his heirs, by way of inheritance; and although a word of very great extent, comprehending whatever may be inherited, or come to the heir, be it real, personal, or mixed, and although it is not holden, or lieth not in tenure." *Rash's Estate*, 2 Pars. Eq. Cas. (Pa.) 161.

**A Term of Years is not a hereditament.** *New York v. Marble*, 13 N. Y. 159.

But the term has been extended to include leaseholds. *Tomkins v. Jones*, 22 Q. B. D. 599.

**Advowson Held a Hereditament.** — *Westfaling v. Westfaling*, 3 Atk. 460; *Crompton v. Jarratt*, 30 Ch. D. 298.

**Ferry Franchise.** — See *Reg. v. Cambrian R. Co.*, L. R. 6 Q. B. 427. And see the title *FERRIES*, vol. 12, pp. 1088, 1098.

**1. Land.** (See also *LAND*, and the title *REAL PROPERTY*.) — 2 Black. Com. 17; 3 Kent's Com. 401; Wms. Real Prop. 10; *Rex v. Shrewsbury*, 3 B. & Ad. 216, 23 E. C. L. 58.

"The phrase [corporeal *hereditaments*] therefore includes only lands regarded as a physical object and legal estates of inheritance in possession." Challis on Real Prop. 41.

**Hereditament Includes Land.** — *Tomkins v. Jones*, 22 Q. B. D. 599.

**English Statute — Hereditament Confined to Corporeal Hereditament.** — *Pinchin v. London*, etc., R. Co., 5 De G. M. & G. 851, 1 Kay & J. 34. See also *Colebrooke v. Tickell*, 4 Ad. & El. 916, 31 E. C. L. 230. But see *Great Western R. Co. v. Swindon*, etc., *Extension R. Co.*, 9 App. Cas. 787, 792, 22 Ch. D. 685; *Reg. v. Cambrian R. Co.*, L. R. 6 Q. B. 422.

**2. Incorporeal Hereditaments.** — 2 Black. Com. 19; 3 Kent's Com. 402; *Marshall v. White*, Harp. L. (S. Car.) 123.

**Easement and Hereditament.** (See also the title *EASEMENTS*, vol. 10, p. 397.) — In *Metropolitan R. Co. v. Fowler*, (1892) 1 Q. B. 171, Lord Esher, M. R., said: "Is the interest a mere easement, or is it a *hereditament*? The distinction between the two has been stated in previous cases; but I think it has been as well if not better expressed by my brother Lopes than by any judge, in *Reilly v. Booth*, 44 Ch. D. 26, although others have come to the same conclusion, viz., that if the interest which the

sons, tithes, dignities, pensions, franchises, offices, commons, ways, annuities, and rents.<sup>1</sup> The first four of these are unknown to American law.<sup>2</sup> Incorporeal hereditaments lie in grant, being insusceptible to seizin.<sup>3</sup> Hereditaments are also divided into real, mixed, and personal.<sup>4</sup>

**HEREDITARY.** — See note 5.

**HEREIN.** (See also the titles **STATUTES**; **WILLS**.) — “Herein,” as used in legal phraseology, is a locative adverb, and its meaning is to be determined by the context. It may refer to the sections, the chapters, or the entire enactment in which it is used; and this rule is applicable to the construction of a document as well as of a statute.<sup>6</sup>

**HEREINAFTER.** — See note 7.

**HEREINBEFORE.** — See note 8.

**HERETOFORE.** — See **HEREAFTER** — **HERETOFORE**, *ante*, p. 336.

**HERIOT.** — Heriot is the right of a lord of a manor to the best beast upon the copyhold on the death of the copyholder.<sup>9</sup>

owner has is an interest in land it is a *hereditament*. An easement is some right which a person has over land which is not his own; but if the land is his own, if he has an interest in it, then his right is not an easement. You cannot have an easement over your own land; and if your right is an interest in land it is a *hereditament*. Affirmed in (1893) A. C. 416.

**Pews.** (See also the title **PEWS**.) — The right to use a pew has been held to be an incorporeal *hereditament*. *Marshall v. White, Harp. L. (S. Car.) 123*.

1. **Classification.** — 2 Black. Com. 21. Reversions and remainders are by some included among incorporeal *hereditaments*, but the classification is regarded as incorrect. *Rapalje & Lawrence's L. Dict.*; *Williams on Real Prop.* 241, 322. And see *Co. Litt.* 47 *a*.

**Pensions.** — As to the use of this term in American law see the title **PENSIONS**.

**Franchises.** — See **FRANCHISES**, vol. 14, p. 4, and the references there given.

**Annuities.** — See the title **ANNUITIES**, vol. 2, p. 386.

**Commons.** — See the title **PROFITS À PRENDRE**.

**Ways.** — See the titles **HIGHWAYS**, *post*; **PRIVATE WAYS**.

**Rents.** — See **RENT** and the references there given.

2. See 3 Kent's Com. 403. And it may be questioned whether heritable offices and franchises are known to our law. 3 Kent's Com. 454, 458. See the title **PUBLIC OFFICERS**.

3. *Challis on Real Prop.* 41.

4. *Challis on Real Prop.* 39, 40; *Wharton's L. Lex*.

5. **Hereditary.** — “*Hereditary real estate*” in a statute has been held to mean real estate of an inheritance. *Douglass v. Lewis*, 3 N. Mex. 345.

6. *Matter of Pearsons*, 98 Cal. 608. See also *State v. Glenn*, 7 Heisk. (Tenn.) 475.

So in *McGill v. Municipal Council*, 12 U. C. Q. B. 44, it was held that the words “*herein contained*” should be applied only to the clause of the statute in which they occurred, and not to the whole act, that being the more obvious, though not the inevitable, construction.

**Same — Amendment.** — In an act amendatory of Rev. Stat. N. Y., which provided that “every person, etc., shall be punished as *herein provided*,” “*herein provided*” has

reference to the provision for punishment contained in the act, and not to that mentioned in the Revised Statutes. *Hartung v. People*, 26 N. Y. 172, 28 N. Y. 400.

**Previous Act.** — “Not otherwise *herein* provided for,” in a customs act, means provided for in the act in which the words occur, and not by some previous act. *Movius v. Arthur*, 95 U. S. 144.

**Will.** — A reference to legacies *herein* given was held not to refer to those given in a codicil. *Early v. Benbow*, 2 Coll. Ch. Cas. 355. See also *Edmonds v. Lowe*, 3 Kay & J. 318; *Radburn v. Jervis*, 3 Beav. 450; *Fuller v. Hooper*, 2 Ves. 242; *Jauncey v. Atty.-Gen.*, 3 Giff. 308; *Byne v. Currey*, 2 Crompt. & M. 603.

7. **Hereinafter** will be construed “*hereinbefore*” when necessary to effectuate the meaning of the legislature, *Waring v. Cheraw*, etc., R. Co., 16 S. Car. 425; *Creighton v. Pringle*, 3 S. Car. 94; or the intent of a testator, *Bengough v. Edridge*, 1 Sim. 173.

**Will — Hereinafter Held Not to Apply to a Codicil.** — *Edmunds v. Lowe*, 3 Kay & J. 318. See **HEREIN**, *ante*.

8. “**Hereinbefore Contained**” in a statute has reference to matters contained in the section in which it is used, and does not extend to earlier portions of the act. *In re Cambrian R. Co.*, L. R. 3 Ch. 278.

“**Hereinbefore Mentioned**,” used in a second or subsequent count of an indictment, does not amount to an allegation that qualities so described belong to the subject to which they are averred to belong in a previous count, unless they are inseparable from it. The terms are merely descriptive. *Reg. v. Waverton*, 17 Q. B. 562, 79 E. C. L. 562.

**Word of Limitation.** — In *Taylor v. Umatilla County*, 6 Oregon 404, it was said: “The word *hereinbefore* is a word of limitation, and such words, when of unequivocal meaning and clearly expressed, will prevail to limit what goes before, to which such words refer.”

**Hereinbefore in the Sense of As It Now Exists.** — See *Wetmore v. Parker*, 52 N. Y. 464.

9. 2 Black. Com. 97.

**Heriot.** — A *heriot* is a right to take a specific chattel, a right arising either upon death or alienation in a manor. It is not of a continuous nature. *Zouche v. Dalbiac*, L. R. 10 Exch. 177.



**HERITAGE.** — See note 1.

**HERITOR.** — See note 2.

**HIDE.** — The word "hide" is defined to be the skin of an animal, either raw or dressed, but more generally applied to the undressed skins of the larger domestic animals, as oxen, horses, etc.<sup>3</sup> To hide is to conceal.<sup>4</sup>

**HIGH.** — Elevated; prominent, in a good or bad sense;<sup>5</sup> open; public; common.<sup>6</sup>

**HIGH CRIMES AND MISDEMEANORS.** — See note 7.

**HIGHEST BIDDER.** (See also the titles JUDICIAL SALES; SHERIFF'S SALES.) — See note 8.

**HIGHROADS.** — See the title HIGHWAYS, *post*, p. 343.

1. **Heritage** — Stamp Act. — A statute provided for stamps on contracts for the sale of property except lands, tenements, hereditaments, or *heritages*. In construing this provision Bruce, J., said: "The word *heritages* is a term of Scottish property law, and I think it is used here to include all such rights arising out of land as are known to and recognized by Scottish law." *Smelting Co. of Australia v. Inland Revenue Com'rs*, (1896) 2 Q. B. 186.

2. **Heritor.** — In speaking of the meaning of this word, as used in Scotch law, Halsbury, L. C., said: "Whatever may be the technical phraseology, and however it may be cut down by some archæological considerations of Scottish law, it is admitted at the bar on behalf of the appellants that at all events what we call proprietorship will bring the person who is the proprietor within the category of *heritors* under the ancient act." *Glasgow v. M'Ewan*, (1900) A. C. 95.

3. **Healy v. Brandon**, 66 Hun (N. Y.) 521, *affirmed* 142 N. Y. 681. See also *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 41.

4. **Hide and Conceal Synonymous.** — See *Cook v. State*, 26 Ga. 603; *Sandheger v. Hosey*, 26 W. Va. 224; and **CONCEAL** — **CONCEALMENT**, vol. 6, p. 420.

5. **High in the Sense of Prominent.** — *Massey v. Dunlap*, 146 Ind. 358.

**High Sheriff.** — See the title SHERIFFS, MARSHALS, AND CONSTABLES.

**High Treason.** — See the title TREASON.

**Higher Applies to One of Two Things.** — The trial court instructed the jurors that if the evidence warranted it they might find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter, and should they entertain a reasonable doubt as to the grade of crime of which the defendant might be guilty, they should give the defendant the benefit of the doubt and acquit him of the *higher* offense. The appellant contended that this was an erroneous statement, because it supposed a doubt as to the three degrees and merely told the jurors that in such event they should acquit of the *highest* of the three, while the statute referred to a doubt as to any of the degrees and declared that there could be a conviction of only the lower. The appellate court said: "This criticism is not without some plausibility, but the language of the instruction cannot be magnified into a reversible error. In its grammatical meaning the word *higher* means one of two

things, and it is not to be presumed that the jury understood it in any other sense, or were at all led astray by the instruction. Of course the use of the statutory language would have been better." *People v. Newcomer*, 118 Cal. 270.

6. In *U. S. v. Rodgers*, 150 U. S. 258, it was said: "The term *high*, in one of its significations, is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a *high way*."

7. **High Crimes and Misdemeanors.** — "When the words *high crimes and misdemeanors* are used in prosecution by impeachment, the words *high crimes* have no definite signification, but are merely used to give greater solemnity to the charge." Dissenting opinion in *State v. Lazarus*, 39 La. Ann. 186, *citing* 4 Black. Com. 5 and note. See also the title **IMPEACHMENT**, *post*.

In *State v. Knapp*, 6 Conn. 417, it was said: "*High crimes and misdemeanors*, says Russell, 'are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet owing to some technical circumstance do not fall within the definition of felony.' 1 Russell on Crimes 61."

8. **Good Faith.** — The *highest bidder* must be understood as the person who makes the highest bid in good faith. *Gray v. Veirs*, 33 Md. 22.

In *Fairfax v. Hopkins*, 2 Cranch (C. C.) 135, the court said: "The land was to be sold to the *highest bidder*; meaning, unquestionably, the *highest bona fide bidder*; and unless there be at a sale more than one such bidder, the sale cannot be made to the *highest bidder*, because where there is only one there can be no comparison. The word 'highest' was used in order that there should be no sale unless there should be a real competition."

In *Lovejoy v. Lunt*, 48 Me. 377, it was held that the term *highest bidder* in a statute authorizing collectors to sell real estate for unpaid taxes meant the one who would pay the taxes for the least quantity of the land. See also the title **TAX SALE**.

**Money Compensation.** — A statute provided that street-railroad franchises should be sold to the *highest bidder*. It was held that by *highest bidder* was meant the bidder bidding the highest in money, and that the franchise could not be sold to the *highest bidder* in square yards of gravel pavement. *Buckner v. Hart*, 52 Fed. Rep. 835, *affirmed* 54 Fed. Rep. 925.



**HIGH SCHOOL.** (See also the title SCHOOLS, UNIVERSITIES, AND COLLEGES.) — A high school may be defined as a school where the higher branches of a common-school education are taught.<sup>1</sup>

**HIGH SEAS.** (See also the titles ADMIRALTY JURISDICTION, vol. 1, pp. 649, 668; FISH AND FISHERIES, vol. 13, p. 560; NAVIGABLE WATERS.) — At common law the expression "high seas," when used in reference to the jurisdiction of the court of admiralty, included all oceans, seas, bays, channels, rivers, creeks, and waters below low-water mark, and where great ships could go, with the exception only of such parts of such oceans, etc., as were within the body of some county.<sup>2</sup>

**HIGH-WATER MARK.** (See also the title BOUNDARIES, vol. 4, pp. 818, 825.) — The term "high water," when applied to the sea or to a river where the tide flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line in the one case by winds and storms, and in the other by freshets or floods. But in respect to fresh-water rivers, the term is altogether indefinite, and the line marked uncertain. It has no fixed meaning in the sense of high-water mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of fresh-water rivers, by indentment or construction, whether between states or individuals. It may mean any stage of

1. **Primary School.** — *Whitlock v. State*, 30 Neb. 815. In this case it was held that the term did not mean a mere primary school within a statute dedicating lands to a city for a *high school*.

In *Atty.-Gen. v. Butler*, 123 Mass. 306, it was said: "The meaning of *high school* is well settled, in the laws and usages of the commonwealth, to be a school in which higher branches of learning are taught than in the common schools."

2. **High Seas.** — *The Mecca*, (1895) P. D. 107. See also *Reg. v. Anderson*, L. R. 1 C. C. 161; *Reg. v. Carr*, 10 Q. B. D. 76.

In *U. S. v. Grush*, 5 Mason (U. S.) 290, it was held by Mr. Justice Story, in the United States Circuit Court, that the term *high seas*, in its usual sense, expresses the uninclosed ocean or that portion of the sea which is without the *fauces terræ* on the seacoast, in contradistinction to that which is surrounded or inclosed between narrow headlands or promontories. It was the open uninclosed waters of the sea which constituted the *high seas*, in his judgment. See also *U. S. v. Rodgers*, 150 U. S. 254; *U. S. v. Morel*, 13 Am. Jur. 279; *U. S. v. Furlong*, 5 Wheat. (U. S.) 184; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76; *U. S. v. Robinson*, 4 Mason (U. S.) 307; *Manley v. People*, 7 N. Y. 300.

**Tidal Waters.** — In *Morgan v. Nagodish*, 40 La. Ann. 246, it was held that *high seas* means that portion of the sea which washes the open coast, and does not include the combined salt and fresh waters which, at high tide, flood the banks of an adjacent bay, bayou, or lake.

**Rivers, Harbors, Basins, Bays, etc.**, out of the limits of any particular country are generally denominated *high seas*. Anonymous, Hempst. (U. S.) 413, 1 Fed. Cas. No. 447, citing 2 Hale P. C. 12-16.

"If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense,

the *high seas*, if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a county." *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 94.

**Port.** — In a piracy act the words were held by Story, J., to mean "any waters on the seacoast which are without the boundaries of low-water mark, although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government." *U. S. v. Ross*, 1 Gall. (U. S.) 624.

In *In re Ross*, 140 U. S. 471, it was said: "Congress has provided for the punishment of murder committed upon the *high seas*, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state; and has provided that the trial of all offenses committed upon the *high seas*, out of the jurisdiction of any particular state, shall be in the district where the offender is found or into which he is first brought. The term *high seas* includes waters on the seacoast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, *high seas*."

**Great Lakes.** — In *U. S. v. Rodgers*, 150 U. S. 249, it was held that the Great Lakes were *high seas* within the meaning of the United States Revised Statutes. Compare *Ex p. Byers*, 32 Fed. Rep. 406; *Miller's Case*, Brown Adm. 156; *Johnson v. 21 Bales, etc.*, 2 Paine (U. S.) 619.

**Long Island Sound** as part of the high seas, see *Manley v. People*, 7 N. Y. 295.

**Ocean.** — In *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 487, it was said: "But I apprehend that, in crimes, the seas or the *high seas* or the ocean mean much the same."

**High Seas — Seas.** — In Anonymous, Hempst. (U. S.) 413, 1 Fed. Cas. No. 447, it was said that there is a distinction, correctly speaking, between *high seas* and seas, but the distinction is nice and not frequently attended to.

the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen.<sup>1</sup>

**HIGHWAY COMMISSIONERS.**—See the title HIGHWAY, *post*, and references there given.

**HIGHWAY CROSSING.**—See the title CROSSINGS, vol. 8, p. 335.

**HIGHWAY ROBBERY.**—See the title ROBBERY.

1. Howard *v.* Ingersoll, 13 How. (U. S.) 423.  
**Tidal Water.**—In *Gerrish v. Union Wharf*, 26 Me. 395, it was said: "The place to which tides ordinarily flow at high water becomes thereby a well-defined line or mark, which at all times can be ascertained without difficulty."

**Ordinary High-water Mark.**—*High-water mark* means ordinary *high-water mark*. *Stover v. Jack*, 60 Pa. St. 339; *Galveston v. Menard*, 23 Tex. 349; *Webber v. Richards*, 1 G. & D. 114.

In *New Jersey Zinc, etc., Co. v. Morris Canal, etc., Co.*, 44 N. J. Eq. 398, it was held that the *high-water* line is determined by the flow of the medium high tide between the spring and neap tides.

In *Plumb v. McGannon*, 32 U. C. Q. B. 14, it was said: "The evidence does not show what the limit of the highest ordinary state of the river is, or was, as that would seem to be the proper limit of *high-water mark*, and not the highest limit that the water reaches in the course of the year; for the great flow caused by the melting of the snow and ice, and by the spring rains, or by other unusual floods or causes, is to be excluded in determining the limit of *high-water mark*. The true limit would appear to be, by analogy to tidal waters, the average height of the river after the great flow of the spring has abated and the river is in its ordinary state." See also *Blundell v. Catterall*, 5 B. & Ald. 268, 7 E. C.

L. 91; *Atty.-Gen. v. Chambers*, 18 Jur. 779; *Grahame v. Brown*, 12 U. C. C. P. 418.

**Rivers.**—The term *high-water mark*, when applied to a nontidal river, means the highest limit reached by the water when the river is unaffected by freshets and contains its natural and usual flow. *Morrison v. Skowhegan First Nat. Bank*, 88 Me. 155. See also *St. Louis, etc., R. Co. v. Ramsey*, 53 Ark. 314; *Houghton v. Chicago, etc., R. Co.*, 47 Iowa 370.

**High-water mark** as a line between the public and riparian owners on navigable waters, where there is no ebb and flow of the tide, is to be determined by examining the bed and banks and ascertaining where the presence and action of the water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as the nature of the soil. It is co-ordinate with the limit of the bed of the water, and that only is to be considered the bed which the water occupies so long and continuously as to wrest it from vegetation and destroy its value for agricultural purposes. *In re Minnetonka Lake Improvement*, 56 Minn. 513; *St. Louis, etc., R. Co. v. Ramsey*, 53 Ark. 314. See also *Houghton v. Chicago, etc., R. Co.*, 47 Iowa 370.

**High-water mark** is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. *Paine Lumbar Co. v. U. S.*, 55 Fed. Rep. 864.

# HIGHWAYS.

BY H. T. TIFFANY.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *STREETS AND HIGHWAYS*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject see the following titles in this work: *ABUTTING OWNERS*, vol. 1, p. 224; *ANIMALS*, vol. 2, p. 341; *BICYCLES*, vol. 4, p. 15; *BOUNDARIES*, vol. 4, p. 756; *BRIDGES*, vol. 4, p. 918; *COUNTIES*, vol. 7, p. 898; *COUNTY COMMISSIONERS*, vol. 7, p. 975; *CROSSINGS*, vol. 8, p. 335; *DEDICATION*, vol. 9, p. 20; *DRAINS AND SEWERS*, vol. 10, p. 220; *EMINENT DOMAIN*, vol. 10, p. 1043; *LAW OF THE ROAD*; *MUNICIPAL CORPORATIONS*; *NUISANCES*; *PRESCRIPTION*; *PRIVATE WAYS*; *STREETS AND SIDEWALKS*; *TAXATION*; *TURNPIKES*.

**I. WHAT CONSTITUTES A HIGHWAY — 1. In General.** — Every thoroughfare which is used by the public, and is, in the language of the English books, "common to all the king's subjects," is a highway.<sup>1</sup> The term "highway" includes turnpikes and plank roads, they differing from ordinary highways merely in the fact that the cost of construction and maintenance is reimbursed by a toll.<sup>2</sup> Railroads are also highways,<sup>3</sup> as are navigable rivers,<sup>4</sup> canals,<sup>5</sup> ferries,<sup>6</sup> and public bridges with the approaches thereto.<sup>7</sup> A public square is likewise stated to be a highway.<sup>8</sup> These peculiar classes of highways are, however, all considered under other titles in this work,<sup>9</sup> and this article will be restricted to public ways intended and fitted for use by ordinary vehicles or foot passengers.

**Statutory Use of Term.** — The meaning of the term "highway," when used in a statute, depends upon the legislative intent, and no fixed rule in regard

1. **Definition.** — 3 Kent's Com. 432; *Mobile*, etc., R. Co. v. Davis, 130 Ill. 146.

2. **Turnpike as Highway.** — *Com. v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654; *Buncombe Turnpike Co. v. Baxter*, 10 Ired. L. (32 N. Car.) 222. And see the title *TURNPIKES*.

**Plank Roads.** — *Craig v. People*, 47 Ill. 487; *Plank-Road Co. v. Thomas*, 20 Pa. St. 91; *Ft. Edward, etc., Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 567; *Rensselaer, etc., Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56.

3. **Railroad as Highway.** — *Rex v. Severn*, etc., R. Co., 2 B. & Ald. 646; *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420; *Beekman v. Saratoga, etc., R. Co.*, 3 Paige (N. Y.) 74, 22 Am. Dec. 679; *Erie, etc., R. Co. v. Casey*, 26 Pa. St. 287. And see the title *RAILROADS*.

4. **River as Highway** — *England*. — *Bourke v. Davis*, 44 Ch. D. 110.

*United States.* — *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91.

*Alabama.* — *Olive v. State*, 86 Ala. 88.

*Indiana.* — *Porter v. Allen*, 8 Ind. 1, 65 Am. Dec. 750; *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302.

*New Hampshire.* — *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 549.

*Wisconsin.* — *Yates v. Judd*, 18 Wis. 118. And see the title *NAVIGABLE WATERS*.

5. **Canal as Highway.** — *Rex v. Kent County*, 13 East 220; *Farnum v. Blackstone Canal Corp.*, 1 Sumn. (U. S.) 46; *Barnett v. Johnson*, 15 N. J. Eq. 481; *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735. And see the title *CANALS*, vol. 5, p. 111.

6. **Ferry as Highway.** — *Rex v. Nicholson*, 12 East 334; *Peter v. Kendal*, 6 B. & C. 703, 13 E. C. L. 299; *Dundy v. Chambers*, 23 Ill. 369; *Mills v. Learn*, 2 Oregon 215. And see the title *FERRIES*, vol. 12, p. 1086.

7. **Bridge as Highway.** — *Malone v. State*, 51 Ala. 55; *Pittsburg, etc., Pass. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37, 35 W. N. C. (Pa.) 393. See the title *BRIDGES*, vol. 4, p. 918.

8. **Public Square.** — *Com. v. Bowman*, 3 Pa. St. 206; *State v. Long*, 94 N. Car. 896; *State v. Eastman*, 109 N. Car. 785; *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560. And see *Portland v. Whittle*, 3 Oregon 126. See also the title *PARKS AND PUBLIC SQUARES*.

9. See the Titles referred to in the preceding notes.

thereto can be given;<sup>1</sup> and so it may be decided not to include streets in a city when used in a particular statute.<sup>2</sup>

The Term "Road" is frequently used as synonymous with "highway,"<sup>3</sup> but it does not appear to have any fixed legal meaning.<sup>4</sup>

**2. Characteristics of Highways** — *a. USER BY INDIVIDUALS.* — As stated in the definition, a highway must be open generally to public use, this being, indeed, the distinguishing mark of a highway;<sup>5</sup> but if it is so open it is immaterial that but few individuals are in a position to make use of it,<sup>6</sup> and its character as a highway is not affected even by the fact that it furnishes access or egress to but a single property owner.<sup>7</sup>

*b. CUL DE SAC AS HIGHWAY.* — It is now settled that a *cul de sac* may be a highway, or, in other words, that it is not essential that the highway be open at both ends so as to form a thoroughfare, but it may be closed at one end by private lands or buildings.<sup>8</sup> But it has been decided in *England* that

**1. "Highway" Used in Different Senses in Statute.** — See *Glass v. State*, 30 Ala. 529; *Napier v. State*, 50 Ala. 169; *Comer v. State*, 62 Ala. 320; *Hickok v. Plattsburgh*, 41 Barb. (N. Y.) 130.

**2. Not Necessarily Inclusive of Streets.** — *Tucker v. Conrad*, 103 Ind. 355; *Cleaves v. Jordan*, 34 Me. 9.

So the term "highway" as used in a statute imposing a penalty upon a railroad company for failure to erect signboards at highway crossings was held not to apply to streets in a city. *Mobile, etc., R. Co. v. State*, 51 Miss. 137. But see *Mobile, etc., R. Co. v. Davis*, 130 Ill. 146.

**3. Term "Road."** — *Holbrook v. McBride*, 4 Gray (Mass.) 215; *Stedman v. Southbridge*, 17 Pick. (Mass.) 162; *Vantilburgh v. Shann*, 24 N. J. L. 740; *Brace v. N. Y. Cent. R. Co.*, 27 N. Y. 269; *Heiple v. East Portland*, 13 Oregon 97.

**4. See** *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409.

**5. Must Be Open to Public Use** — *England.* — *Sutcliff v. Greenwood*, 8 Price 535; *Rex v. Cumberworth*, 3 B. & Ad. 108, 23 E. C. L. 38. *Connecticut.* — *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216.

*Illinois.* — *Madison v. Gallagher*, 159 Ill. 105; *Schmisseur v. Penn*, 47 Ill. App. 278.

*Iowa.* — *Bankhead v. Brown*, 25 Iowa 540.

*Massachusetts.* — *Jones v. Andover*, 6 Pick. (Mass.) 62; *Parks v. Boston*, 8 Pick. (Mass.) 227, 19 Am. Dec. 322.

*Michigan.* — *People v. Jackson*, 7 Mich. 432, 74 Am. Dec. 729; *People v. Beaubien*, 2 Dougl. (Mich.) 256; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522.

*Missouri.* — *State v. Proctor*, 90 Mo. 334.

*New Hampshire.* — *Makepeace v. Worden*, 1 N. H. 16.

*New York.* — *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263.

So a road that can be advantageously used by the public only by trespassing on private property is not properly a public highway. *Ayres v. Richards*, 41 Mich. 680.

**Right to Use Not Continuous.** — It has been decided that a municipality may take a conveyance of a right to use a road as a public highway during the winter months only, with a further right of entering thereon during other portions of the year for the purpose of

making repairs. *Hughes v. Bingham*, 135 N. Y. 347.

**6. Immaterial that Way Accommodates Few Individuals.** — *Washington Ice Co. v. Lay*, 103 Ind. 48; *Bankhead v. Brown*, 25 Iowa 540; *Metcalf v. Bingham*, 3 N. H. 459; *Clark v. Boston, etc., R. Co.*, 24 N. H. 118; *Proctor v. Andover*, 42 N. H. 348; *Decker v. Menard County*, (Tex. Civ. App. 1894) 25 S. W. Rep. 727. Compare *Witter v. Harvey*, 1 McCord L. (S. Car.) 67, 10 Am. Dec. 650. See also *infra*, this title, *Establishment of Highways — Necessity or Desirability of Highway — Benefit to Individuals*.

**7. Use by One Person Only.** — *Johnson v. Clayton County*, 61 Iowa 89; *Pagels v. Oaks*, 64 Iowa 198; *Lazzell v. Garlow*, 44 W. Va. 466; *Lewis v. Washington*, 5 Gratt. (Va.) 265; *Varner v. Martin*, 21 W. Va. 534.

But where the object of a proposed highway was to make an outlet for a property owner who had already access to one highway, it was held that the second way must be considered as a private way and not a highway. *Richards v. Wolf*, 82 Iowa 358, 31 Am. St. Rep. 501.

**8. Cul de Sac as Highway** — *England.* — *Rugby Charity v. Merryweather*, 11 East 375, note a; *Souch v. East London R. Co.*, 42 L. J. Ch. 477, L. R. 16 Eq. 108, 21 W. R. 590; *Bateman v. Bluck*, 18 Q. B. 870, 83 E. C. L. 870, 14 Eng. L. & Eq. 69; *Young v. Cuthbertson*, 1 Macq. H. L. 455; *Reg. v. Burney*, 31 L. T. N. S. 828; *Bourke v. Davis*, 44 Ch. D. 110, 62 L. T. N. S. 34, 38 W. R. 167.

*Connecticut.* — *Peckham v. Lebanon*, 39 Conn. 235; *Goodwin v. Wethersfield*, 43 Conn. 447.

*Illinois.* — *Sheaff v. People*, 87 Ill. 189, 29 Am. Rep. 49.

*Indiana.* — *Adams v. Harrington*, 114 Ind. 66; *Moore v. Ange*, 125 Ind. 562.

*Kansas.* — *Masters v. McHolland*, 12 Kan. 17; *City Cemetery Assoc. v. Meninger*, 14 Kan. 312.

*Maine.* — *Bartlett v. Bangor*, 67 Me. 460.

*Massachusetts.* — *Danforth v. Durell*, 8 Allen (Mass.) 242.

*Michigan.* — *People v. Jackson*, 7 Mich. 432, 74 Am. Dec. 729; *Fields v. Colby*, 102 Mich. 449.

*New Jersey.* — *State v. Bishop*, 39 N. J. L. 226.

*New York.* — *People v. Kingman*, 24 N. Y.

a way cannot be a public highway if neither end connects with other highways.<sup>1</sup>

**II. CLASSES OF HIGHWAYS — 1. City Streets and Sidewalks.** — Giving to the term, for the purposes of this article, the restricted meaning above stated, it will include streets in a city<sup>2</sup> and sidewalks thereon.<sup>3</sup> These will, however, be here considered only in so far as the same principles are applicable to them as to country roads, so as to render it inadvisable or impracticable to treat them separately, and questions of a nature peculiar to them will be treated in another article.<sup>4</sup>

**2. Footways.** — The term "highway" also includes footways other than sidewalks.<sup>5</sup>

**3. State Roads.** — What is known in some sections as a state road is a highway laid out by the direct authority of the state, generally between distant places and through different counties, to supply a want felt by a large district of country, which because of the diversity of interests the local authorities are not always willing to supply.<sup>6</sup>

**4. Neighborhood Roads.** — What is known in some sections as a "neighborhood road" is a highway, since it is open to the use of all, though it is kept in repair by and is subject to the control of the persons in the neighborhood.<sup>7</sup>

**5. Section-line Roads.** — Section-line roads are highways running upon section lines under statutory provisions that such lines shall be public highways.<sup>8</sup>

559; *People v. Van Alstyne*, 3 Keyes (N. Y.) 35; *McCarthy v. Whalen*, 19 Hun (N. Y.) 503; *Saunders v. Townsend*, 26 Hun (N. Y.) 308; *Vandemark v. Porter*, 40 Hun (N. Y.) 397.

*Rhode Island.* — *Greene v. O'Connor*, 18 R. I. 56.

*Texas.* — *Decker v. Menard County*, (Tex. Civ. App. 1894) 25 S. W. Rep. 727.

*Wisconsin.* — *Schatz v. Pfeil*, 56 Wis. 429.

**1. Opening at Neither End.** — *Young v. Cuthbertson*, 1 Macq. H. L. 455; *Bailey v. Jamieson*, 1 C. P. D. 329, 34 L. T. N. S. 62. See also *State v. Price*, 21 Md. 449.

**2. City Streets — United States.** — *Cincinnati v. White*, 6 Pet. (U. S.) 431.

*Florida.* — *State v. Putnam County*, 23 Fla. 632; *Duval County v. Jacksonville*, 36 Fla. 196.

*Illinois.* — *Mobile, etc., R. Co. v. Davis*, 130 Ill. 146; *Ohio, etc., R. Co. v. People*, 39 Ill. App. 473.

*Indiana.* — *Indianapolis v. Croas*, 7 Ind. 9; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Tucker v. Conrad*, 103 Ind. 355.

*Massachusetts.* — *Davis v. Smith*, 130 Mass. 113; *Stone v. Bean*, 15 Gray (Mass.) 42; *Drake v. Lowell*, 13 Met. (Mass.) 292; *Fales v. Dearborn*, 1 Pick. (Mass.) 345.

*Michigan.* — *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450.

*New York.* — *Brace v. New York Cent. R. Co.*, 27 N. Y. 269.

*Ohio.* — *Morris v. Bowers*, *Wright* (Ohio) 749.

*Oregon.* — *Heiple v. East Portland*, 13 Oregon 97.

*Pennsylvania.* — *Penny Pot Landing*, 16 Pa. St. 79; *Road from Fitzwater St., etc.*, 4 S. & R. (Pa.) 106.

*Vermont.* — *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560.

**3. Sidewalk as Highway — United States.** — *Providence v. Clapp*, 17 How. (U. S.) 161.

*Connecticut.* — *Noyes v. Ward*, 19 Conn. 263; *Manchester v. Hartford*, 30 Conn. 118.

*Illinois.* — *Bloomington v. Bay*, 42 Ill. 503. *Indiana.* — *Debolt v. Carter*, 31 Ind. 355; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Taber v. Grafmiller*, 109 Ind. 206.

*Massachusetts.* — *Drake v. Lowell*, 13 Met. (Mass.) 292; *Boston, etc., R. Co. v. Boston*, 140 Mass. 87.

*Minnesota.* — *Furnell v. St. Paul*, 20 Minn. 117; *Young v. Waterville*, 39 Minn. 196.

*New Hampshire.* — *Hall v. Manchester*, 40 N. H. 410.

*Wisconsin.* — *James v. Portage*, 48 Wis. 677; *Cronin v. Delavan*, 50 Wis. 375.

**4. Streets and Sidewalks.** — See the title STREETS AND SIDEWALKS.

**5. Footways.** — *Allen v. Ormond*, 8 East 4; *Rex v. Burgess*, 2 Burr. 908; *Reg. v. Saintiff*, 6 Mod. 255; *Reg. v. Cluworth*, 6 Mod. 163, 1 Salk. 359; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Thrower's Case*, 1 Vent. 208; *Tyler v. Sturdy*, 108 Mass. 196; *Boston, etc., R. Co. v. Boston*, 140 Mass. 87.

**6. State Roads — Kansas.** — *State v. Shawnee County*, 28 Kan. 431; *Topeka v. Russam*, 30 Kan. 550.

*Michigan.* — *People v. Ingham County*, 20 Mich. 95; *Davis v. Ontonagon County*, 64 Mich. 404; *Pearsall v. Eaton County*, 71 Mich. 438; *Delta Lumber Co. v. Board of Auditors*, 71 Mich. 572; *Pearsall v. Eaton County*, 74 Mich. 558; *Davies v. Saginaw County*, 89 Mich. 295.

*Minnesota.* — *State v. Macdonald*, 26 Minn. 445.

*Pennsylvania.* — *Penn Tp. Road*, 66 Pa. St. 461.

*Wisconsin.* — *Jensen v. Polk County*, 47 Wis. 298.

**7. Neighborhood Roads.** — *Kissinger v. Hanselman*, 33 Ind. 80; *State v. Pettis*, 7 Rich. L. (S. Car.) 390; *State v. Harden*, 11 S. Car. 360.

**8. Section-line Roads.** — *Casey v. Kilgore*, 14 Kan. 478; *Hughes v. Milligan*, 42 Kan. 396; *Rose v. Washington County*, 42 Neb. 1; *Barry v. Deloughrey*, 47 Neb. 354; *Oyler v. Ross*, 48 Neb. 211; *Henry v. Ward*, 49 Neb. 392; *Wells v.*



6. **Pent Roads.** — The fact that gates may be legally constructed across a highway, thus making it a "pent road," does not deprive it of the character of a highway.<sup>1</sup>

7. **Town Ways.** — Though the term "town way," as referring to ways laid out by the town authorities, is occasionally used in the New England states in contradistinction to the term "highway," meaning by the latter term ways laid out by the county authorities, it is nevertheless recognized that such town ways are properly highways, they being freely open to the use of the public.<sup>2</sup>

**III. EVIDENCE AS TO HIGHWAY CHARACTER.** — While the existence of a highway at a certain place is generally to be shown by evidence of its establishment by statutory proceedings<sup>3</sup> or by prescription or dedication, evidence that a road has been used and traveled by the public generally as a highway, and is treated and kept in repair as such by the local authorities, raises a legal presumption that the road is a public highway,<sup>4</sup> though this presumption is not, it seems, conclusive.<sup>5</sup> Conversely, the failure of the authorities to make repairs when these are needed may tend to show that the road is not a highway,<sup>6</sup> as may the fact that the land has never been used by the public and has been taxed by the municipality and sold for such taxes.<sup>7</sup> So the institution of proceedings by the commissioners to lay out a highway is strong evidence that there was no pre-existing road.<sup>8</sup> But an order refusing to discontinue an alleged highway on the ground that the road is not a highway is no evidence that it is not one.<sup>9</sup>

**IV. ESTABLISHMENT OF HIGHWAYS** — 1. **General Considerations.** — A highway may become such by various methods. The principles applying to the creation of highways by lapse of time or adverse user are considered under other titles,<sup>10</sup> as is the question of the dedication of lands for highways.<sup>11</sup> A highway may also be created by direct act of the legislature,<sup>12</sup> and in certain

Pennington County, 2 S. Dak. 1, 39 Am. St. Rep. 758; *Smith v. Pennington County*, 2 S. Dak. 14; *Keen v. Fairview Tp.*, 8 S. Dak. 558; *Dowdle v. Cornue*, 9 S. Dak. 126.

1. **Presence of Gates Immaterial** — *Connecticut*. — *Blakeslee v. Tyler*, 55 Conn. 396.

*New Hampshire*. — *Proctor v. Andover*, 42 N. H. 348, 362.

*North Carolina*. — *Andrews v. Beam*, 97 N. Car. 315.

*Vermont*. — *Whitingham v. Bowen*, 22 Vt. 317; *Wolcott v. Whitcomb*, 40 Vt. 40; *French v. Holt*, 53 Vt. 364; *Bridgman v. Hardwick*, 67 Vt. 132.

*Virginia*. — *Tench v. Abshire*, 90 Va. 768.

2. **Town Ways** — *Maine*. — *Cleaves v. Jordan*, 34 Me. 9; *Waterford v. Oxford County*, 59 Me. 450.

*Massachusetts*. — *Flagg v. Flagg*, 16 Gray (Mass.) 175; *Harding v. Medway*, 10 Met. (Mass.) 469; *Jones v. Andover*, 6 Pick. (Mass.) 62, 9 Pick. (Mass.) 154; *Parks v. Boston*, 8 Pick. (Mass.) 227, 19 Am. Dec. 322; *Com. v. Boston*, 16 Pick. (Mass.) 444; *Valentine v. Boston*, 22 Pick. (Mass.) 80; *Blackstone v. Worcester County*, 108 Mass. 68.

3. **Evidence.** — See *infra*, this title, *Establishment of Highways* — *Record of Proceedings*.

4. **Presumption from Use and Recognition** — *Arkansas*. — *State v. Hester*, 21 Ark. 193; *State v. Moore*, 23 Ark. 550; *State v. Hagood*, 23 Ark. 553.

*Illinois*. — *Daniels v. People*, 21 Ill. 439.

*New Jersey*. — *State v. Snedeker*, 30 N. J. L. 80.

*Texas*. — *McWhorter v. State*, 43 Tex. 666; *Burns v. State*, 12 Tex. App. 269; *Michel v.*

*State*, 12 Tex. App. 108; *Hall v. State*, 13 Tex. App. 269.

See also *Oliver v. Loftin*, 4 Ala. 240; *State v. Ramsey*, 76 Mo. 398, and cases cited in the next note. See also *infra*, this title, *Obstructions and Encroachments* — *What Are Highways Subject to Obstruction* — *Evidence of Highway Character*.

5. **Presumption Not Conclusive** — *Arkansas*. — *McKibbin v. State*, 40 Ark. 480; *Howard v. State*, 47 Ark. 438.

*Illinois*. — *Eyman v. People*, 6 Ill. 4; *Nealy v. Brown*, 6 Ill. 10; *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344; *Illinois Cent. R. Co. v. Benton*, 69 Ill. 174; *Logan County v. People*, 116 Ill. 466, *affirming* 17 Ill. App. 49.

*Iowa*. — *Brown v. Jefferson County*, 16 Iowa 339.

*Montana*. — *State v. Auchard*, (Mont. 1898) 55 Pac. Rep. 361.

6. **Failure to Repair.** — *Lewiston v. Proctor*, 27 Ill. 144.

7. **Nonuser and Taxation.** — *Trerice v. Barreau*, 54 Wis. 99.

8. **Proceedings to Establish.** — *Shields v. Ross*, 158 Ill. 214.

9. **Refusal to Discontinue.** — *Com. v. Petitcler*, 110 Mass. 62.

10. **Prescription.** — See the titles *ADVERSE POSSESSION*, vol. 1, p. 787; *PRESCRIPTION*.

11. **Dedication.** — See the title *DEDICATION*, vol. 9, p. 20.

12. **Creation by Legislature.** — *Henry v. Ward*, 49 Neb. 392; *People v. Flagg*, 46 N. Y. 401; *People v. Queens County*, 112 N. Y. 585; *Matter of Central Park Com'rs*, 51 Barb. (N. Y.) 277; *People v. McDonald*, 4 Hun (N. Y.) 187.

cases temporary highway rights may exist over land abutting on a highway.<sup>1</sup> No methods of establishing a highway other than those enumerated are, it seems, recognized by the law.<sup>2</sup> The creation of highways by statutory proceedings for their establishment will be here considered, and likewise a few cases in which, as regards particular persons, their existence cannot be denied, on principles analogous to those of estoppel.

The Taking of Private Property for highway purposes is considered elsewhere.<sup>3</sup>

**2. Official Proceedings in General.** — The question what officers or court shall decide upon the question of the establishment is determined wholly by the state statute, and a consideration thereof is not called for here.

**When Questions Considered.** — It has been decided that the questions involved may be considered by a body vested with jurisdiction thereof at a special or extra session<sup>4</sup> or at an adjourned meeting,<sup>5</sup> and that the hearing of the application may be adjourned to a subsequent day,<sup>6</sup> provided this involves no violation of the statute,<sup>7</sup> and provided due notice of the time and place of the adjourned meeting is given.<sup>8</sup>

**3. Necessity or Desirability of Highway** — *a.* **IN GENERAL.** — To authorize the establishment of a highway it must be shown to be of public convenience or utility.<sup>9</sup> It need not be shown to be an absolute necessity; that it is required by public convenience is sufficient.<sup>10</sup> In view of the varying circumstances of each particular case, no general rule can be stated for determining the propriety of establishing the highway, but the existence of other means of communication, whether or not it is a public highway, is to be considered.<sup>11</sup> And it is said that the condition of population, the location of markets, the character of the soil, and the physical features of the locality are all to be considered.<sup>12</sup> That the use of the highway will be for purposes of pleasure

**1. Highway Rights on Abutting Land.** — See *infra*, *User for Passage and Transit — Right of Traveler to Pass on Abutting Land*.

**2. Highways Established Only in Recognized Ways.** — See *U. S. v. Schwarz*, 4 Cranch (C. C.) 160; *U. S. v. Emery*, 4 Cranch (C. C.) 270; *Grube v. Nichols*, 36 Ill. 92; *Louisville, etc., R. Co. v. Survant*, 96 Ky. 197; *Rowell v. Montville*, 4 Me. 270; *Kennedy v. Williams*, 87 N. Car. 6; *State v. Marble*, 4 Ired. L. (26 N. Car.) 318; *Gaines v. Merryman*, 95 Va. 660.

**3. Taking of Private Property.** — See the title **EMINENT DOMAIN**, vol. 10, p. 1043.

**4. Special or Extra Session.** — *White v. Fleming*, 114 Ind. 560; *Fleener v. Claman*, 126 Ind. 166; *Loesnitz v. Seelinger*, 127 Ind. 422.

**5. Adjournment.** — *Burkleo v. Washington County*, 38 Minn. 441; *Yankton County v. Klemisch*, (S. Dak. 1898) 76 N. W. Rep. 312.

**6. Iowa.** — *Woolsey v. Hamilton County*, 32 Iowa 130.

*Kansas.* — *Masters v. McHolland*, 12 Kan. 17.

*Maine.* — *Weymouth v. York County*, 86 Me. 391; *Brown v. Mosher*, 83 Me. 111.

*New Hampshire.* — *Hampstead's Petition*, 19 N. H. 343.

*New Jersey.* — *State v. Vanbuskirk*, 21 N. J. L. 86.

*South Dakota.* — *Issenhuth v. Baum*, (S. Dak. 1898) 76 N. W. Rep. 928.

**7. Wilson v. Atkin**, 80 Mich. 247; *State v. Castle*, 44 Wis. 670.

**8.** See *infra*, this section, *Notice*.

**9. Public Convenience** — *Iowa.* — *Richards v. Wolf*, 82 Iowa 358, 31 Am. St. Rep. 501.

*Kansas.* — *Lockerman v. Chase County*, 27

Kan. 659; *Butts v. Geary County*, 7 Kan. App. 302.

*Massachusetts.* — *Com. v. Sawin*, 2 Pick. (Mass.) 547.

*New Hampshire.* — *Dudley v. Cilley*, 5 N. H. 558; *Dudley v. Butler*, 10 N. H. 281; *Goodwin v. Milton*, 25 N. H. 458; *Underwood v. Bailey*, 59 N. H. 480.

*New York.* — *Matter of Lawton*, (County Ct.) 22 Misc. (N. Y.) 426.

*Virginia.* — *Linkenhoker v. Graybill*, 80 Va. 835.

**10.** *Green v. Elliott*, 86 Ind. 53; *Fritch v. Patterson*, 149 Ind. 455; *Com. v. Cambridge*, 7 Mass. 158.

**11. Other Means of Communication.** — *Opp v. Timmons*, 149 Ind. 236; *Hayward v. Bath*, 38 N. H. 179; *In re Alteration of Four-Corner Road*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 458, 59 Hun (N. Y.) 618; *King v. Blackwell*, 96 N. Car. 322. Compare *Bradford v. Cole*, 8 Fla. 263.

**12. Other Considerations.** — *Opp v. Timmons*, 149 Ind. 236.

**Special Cases Stated.** — It was held that where the desired terminus, a body of water, was reached by the construction of part of the proposed highway, an extension thereof of over eight hundred feet running along the bank would not be authorized. *In re East Hampton*, (Supm. Ct. App. Div.) 47 N. Y. Supp. 269.

But where a gap of about two hundred feet existed between two highways, it was held proper to establish a new highway to close such gap. *People v. Moore*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 881, *affirmed* 129 N. Y. 639.

merely will not prevent its establishment.<sup>1</sup> But it cannot be laid out merely for purposes of ornament.<sup>2</sup> The fact that the proposed highway is upon a road which might otherwise become a highway by prescriptive use is immaterial.<sup>3</sup>

*b. BENEFIT TO INDIVIDUALS.* — While a highway cannot be established merely for the benefit of an individual,<sup>4</sup> its establishment will not be refused merely because the primary benefit therefrom will inure to one individual whose property will be reached thereby.<sup>5</sup>

*c. EXPENSES INVOLVED.* — The damages which will be incurred and all other elements of expense may be considered.<sup>6</sup> And in this connection the financial ability of the municipality to bear the expense may be considered.<sup>7</sup>

*d. INDEMNITY TO MUNICIPALITY.* — While the highway should not be established, if not of public necessity, merely because the petitioner or another person agrees to indemnify the municipality against damages and costs,<sup>8</sup> the fact of such agreement does not show an absence of public necessity.<sup>9</sup> In

*1. Use for Pleasure Purposes.* — *Higginson v. Nahant*, 11 Allen (Mass.) 530, where it was held to be proper to lay out a town way merely for the purpose of providing access to places on private lands for the purpose of affording to the public an opportunity of enjoying the natural scenery. See also *Bryan v. Branford*, 50 Conn. 246.

*2. Ornamental Purposes.* — *Woodstock v. Gallup*, 28 Vt. 587, where it was held that a highway could not be laid out merely for the purpose of ornament and improvement of the court-house grounds, though these matters might be considered in determining its convenience and necessity.

*3. Possible Existence by Prescription.* — *Opp v. Timmons*, 149 Ind. 236.

*4. Benefit of Individuals.* — *Lockerman v. Chase County*, 27 Kan. 659; *Underwood v. Bailey*, 59 N. H. 480; *London Britain Road*, 13 Lanc. Bar (Pa.) 207; *Snow v. Sandgate*, 66 Vt. 451.

The Right to a Private Road to furnish a property owner with access or egress as provided by a statute seems in one case to have been considered ground for refusing to establish a public highway for the purpose of furnishing access or egress to two or three individuals only. *Matter of Lawton*, (County Ct.) 22 Misc. (N. Y.) 426.

*5. Individual Benefit Not Ground for Refusing Highway* — *California*. — *Sherman v. Buick*, 32 Cal. 255.

*Iowa.* — *Bankhead v. Brown*, 25 Iowa 540; *Phillips v. Watson*, 63 Iowa 28; *Pagels v. Oaks*, 64 Iowa 198.

*Kansas.* — *Masters v. McElhenny*, 17 Kan. 17.

*Massachusetts.* — *Denham v. Bristol County*, 108 Mass. 202.

*New York.* — *Matter of Whitestown*, (County Ct.) 24 Misc. (N. Y.) 150.

*Ohio.* — *Ferris v. Bramble*, 5 Ohio St. 113.

*Texas.* — *Decker v. Menard County*, (Tex. Civ. App. 1898) 25 S. W. Rep. 727; *Galveston, etc., R. Co. v. Baudat*, 18 Tex. Civ. App. 595.

*Vermont.* — *Paine v. Leicester*, 22 Vt. 44; *Robinson v. Winch*, 66 Vt. 110; *Brock v. Barnett*, 57 Vt. 172.

*Virginia.* — *Lewis v. Washington*, 5 Gratt. (Va.) 265.

See also *supra*, this title, *What Constitutes a Highway*.

In *Johnson v. Clayton County*, 61 Iowa 89, it was held that a public highway might properly be established, although the only landowner to whose property it furnished access objected thereto, it being considered that the public had a right of access to such an individual for such purposes as procuring his services as a juror or witness.

*6. Expenses of Highway* — *Connecticut.* — *Perkins v. Andover*, 31 Conn. 603; *Hoadley v. Waterbury*, 34 Conn. 38; *Howe v. Ridgefield*, 50 Conn. 594.

*Indiana.* — *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *Rominger v. Simmons*, 88 Ind. 453.

*Iowa.* — *Nelson v. Goodykoontz*, 47 Iowa 32.

*Kansas.* — *Lockerman v. Chase County*, 27 Kan. 659; *Butts v. Geary County*, 7 Kan. App. 302.

*Massachusetts.* — *Com. v. Cambridge*, 7 Mass. 158.

*New Hampshire.* — *Dudley v. Cilley*, 5 N. H. 560; *Stinson v. Dunbarton*, 46 N. H. 385.

*New York.* — *In re Alteration of Four Corner-Road*, 59 Hun (N. Y.) 618, 13 N. Y. Supp. 458.

*Pennsylvania.* — *In re Road in Bern*, (Pa. 1889) 17 Atl. Rep. 205. Compare *Road in Kingston*, 134 Pa. St. 409.

*Repair of Connecting Highway.* — So it was decided that it was proper to consider the additional expenditure which would be rendered necessary in order to put a connecting highway in condition appropriate to the new travel resulting from the establishment of the new road. *Howe v. Ridgefield*, 50 Conn. 592.

*7. Financial Ability of Municipality.* — *Bristol v. Branford*, 42 Conn. 323; *Hartford v. Day*, 64 Conn. 250; *Perry Tp. v. John*, 79 Pa. St. 412; *Road in Huntington*, 8 Kulp (Pa.) 152; *Green Tp. Road*, 3 Pa. Dist. 256.

*8. Indemnity to Municipality.* — *Dudley v. Cilley*, 5 N. H. 558; *Knowles's Petition*, 22 N. H. 361; *Com. v. Sawin*, 2 Pick. (Mass.) 547; *Jones v. Andover*, 9 Pick. (Mass.) 153.

*9. Butts v. Geary County*, 7 Kan. App. 302; *Parks v. Boston*, 8 Pick. (Mass.) 218, 10 Am. Dec. 322; *Copeland v. Packard*, 16 Pick. (Mass.) 217; *Harrington v. Harrington*, 1 Met. (Mass.) 404; *Gurnsey v. Edwards*, 26 N. H. 241. *Philadelphia v. Ambler*, 11 Phila. 111. *Road in Bern*, (Pa. 1889) 17 Atl. Rep. 205; *Watson v. South Kingstown*, 5 R. I. 562.



*New Jersey*, however, it was held that the proceedings were invalid where the opposition to the highway was withdrawn because the applicants offered to pay the costs.<sup>1</sup>

*c. TERMINUS OF HIGHWAY.* — The establishment of a highway will not be refused because only one end thereof connects with another public highway,<sup>2</sup> and so it may terminate at a church,<sup>3</sup> at a burying ground,<sup>4</sup> or at a public stream.<sup>5</sup> It may also terminate at the state line, though there is no highway connecting with it in the adjoining state,<sup>6</sup> or at a county line,<sup>7</sup> or at a town line, so that the persons in the adjoining town only will utilize it.<sup>8</sup>

*f. INTERFERENCE WITH TURNPIKE.* — The fact that the construction of the highway will interfere with the receipts of an existing turnpike is not ground for refusing to establish it, provided it is otherwise necessary,<sup>9</sup> but it cannot be established merely for the purpose of avoiding the payment of tolls.<sup>10</sup>

*g. LEGISLATIVE QUESTION.* — The question of the necessity or desirability of a highway is a legislative rather than a judicial one, and in the absence of a statutory provision to the contrary the matter rests within the discretion of the official or officials to whom the power to establish is delegated, rather than with the courts.<sup>11</sup>

*h. WHO MAY OBJECT.* — The owner of land through which it is proposed to locate the highway is entitled to object thereto,<sup>12</sup> but a mere taxpayer has been held not to be entitled to object.<sup>13</sup>

1. *Hampton v. Poland*, 50 N. J. L. 367.

2. *Cul de Sac—Connecticut.* — *Goodwin v. Wethersfield*, 43 Conn. 447.

*Illinois.* — *Sheaff v. People*, 87 Ill. 189, 29 Am. Rep. 49.

*Indiana.* — *Kyle v. Miller*, 108 Ind. 90; *Adams v. Harrington*, 114 Ind. 66.

*Kansas.* — *Masters v. McHolland*, 12 Kan. 17.

*Michigan.* — *Fields v. Colby*, 102 Mich. 449.

*New Jersey.* — *State v. Bishop*, 39 N. J. L. 226.

*New York.* — *People v. Van Alstyne*, 3 Keyes (N. Y.) 35.

*Wisconsin.* — *Schatz v. Pfeil*, 56 Wis. 429.

See also *supra*, this title, *What Constitutes a Highway—Characteristics of Highways—Cul de Sac as Highway.*

In *Pennsylvania*, apparently, this rule is subject to limitations. See *Road in Upper Darby*, 2 Pa. Co. Ct. 366; *Plainfield Tp. Road*, 6 Pa. Co. Ct. 412; *Road in Lehman*, 7 Kulp (Pa.) 404; *Road in Manchester*, 8 York Leg. Rec. (Pa.) 169.

3. *Terminus at Church.* — *Church Road*, 5 W. & S. (Pa.) 200; *West Pikeland Road*, 63 Pa. St. 471.

4. *At Burial Ground.* — *Kissinger v. Hanselman*, 33 Ind. 80.

5. *At Stream.* — *Moore v. Auge*, 125 Ind. 562; *Watson v. South Kingstown*, 5 R. I. 562.

6. *At State Line.* — *Crosby v. Hanover*, 36 N. H. 404; *Rice v. Rindge*, 53 N. H. 530.

7. *At County Line.* — *Peckham v. Lebanon*, 39 Conn. 234; *Millett v. Franklin County*, 81 Me. 257; *Road in Conyngham*, 1 Wilcox (Pa.) 245.

8. *At Town Line.* — *Gilman v. Westfield*, 47 Vt. 20.

9. *Injury to Existing Turnpike.* — *Hall v. Ragsdale*, 4 Stew. & P. (Ala.) 252; *Curtis v. Morehouse*, 12 La. Ann. 649. See also the title *TURNPIKES*.

10. *Third Turnpike Road v. Champney*, 2 N. H. 199; *Cheshire Turnpike v. Stevens*, 10 N.

H. 133; *Newburgh, etc., Turnpike Road v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274; *White's Creek Turnpike Co. v. Davidson County*, 3 Tenn. Ch. 396; *Franklin, etc., Turnpike Co. v. Maury County Ct.*, 8 Humph. (Tenn.) 342.

11. *Discretion of Officers—Alabama.* — *Commissioners' Ct. v. Bowie*, 34 Ala. 461.

*California.* — *Sherman v. Buick*, 32 Cal. 241.

*Connecticut.* — *Harwinton v. Catlin*, 19 Conn. 520; *Ives v. East Haven*, 48 Conn. 272.

*Indiana.* — *Ralston v. Beall*, (Ind. 1892) 30 N. E. Rep. 1095.

*Maine.* — *Baldwin v. Bangor*, 36 Me. 518.

*Massachusetts.* — *Com. v. Roxbury*, 8 Mass. 457.

*Missouri.* — *Bell v. County Ct.*, 61 Mo. App. 173.

*Nebraska.* — *Howard v. Clay County*, 54 Neb. 443.

*New Hampshire.* — *Groton's Petition*, 43 N. H. 91; *Thompson v. Conway*, 53 N. H. 622; *Wardwell v. Tamworth*, 62 N. H. 696.

*New Jersey.* — *State v. Bishop*, 39 N. J. L. 226; *Hoffman v. Rodman*, 39 N. J. L. 252.

*New York.* — *People v. Highway Com'rs*, 37 N. Y. 360; *Matter of Whitestown*, (County Ct.) 24 Misc. (N. Y.) 150.

*Oregon.* — *Vedder v. Marion County*, 28 Oregon 77.

*Pennsylvania.* — *Ohio, etc., Tp. Road*, 166 Pa. St. 132; *Blakely Road*, 8 Pa. Co. Ct. 592; *Com. v. Thompson*, 126 Pa. St. 614.

*Vermont.* — *Gallup v. Woodstock*, 29 Vt. 347.

12. *Who May Object.* — *Roberts v. Williams*, 15 Ark. 43; *Damrell v. San Joaquin County*, 40 Cal. 154; *Farmer v. Stewart*, 2 N. H. 97; *Trudeau v. Sheldon*, 62 Vt. 198; *Reynolds v. Barre*, 63 Vt. 541.

13. *Burnham v. Goffstown*, 50 N. H. 560. See also *infra*, this section, *Appeal and Certiorari*.

**4. Where Highway May Be Located — a. ON PUBLIC PROPERTY APPROPRIATED TO PUBLIC USE.** — Without special legislative authority a highway cannot be laid out through property appropriated by the legislature for public use, if such use would be interrupted by the presence of the highway,<sup>1</sup> and this rule applies to a public park.<sup>2</sup>

**b. OVER NAVIGABLE WATERS.** — And generally authority to lay out highways does not include a power to lay one out over navigable waters.<sup>3</sup> And without special legislative authority a highway cannot be laid out between high-water and low-water marks;<sup>4</sup> but the rule is different in case of land reclaimed and so raised above high-water mark,<sup>5</sup> and the highway may be laid across a navigable canal.<sup>6</sup>

**c. ON RAILROAD PROPERTY.** — While a highway may be located across the track of a railroad,<sup>7</sup> it cannot, without special authority, be located longitudinally on a railroad right of way,<sup>8</sup> nor, by the weight of authority, can the depot or terminal grounds be utilized for this purpose.<sup>9</sup>

**d. ON EXISTING HIGHWAY.** — The highway may, it seems, be established so as to run in part upon a road already existing.<sup>10</sup> In *Pennsylvania* it is stated that while, as a general rule, one road cannot be located on another regularly laid out and opened, it may be laid on another so far as may be necessary to reach a particular terminus.<sup>11</sup>

**Location on Turnpike.** — Though a highway may be laid out longitudinally upon an existing turnpike,<sup>12</sup> special legislative authority is necessary for this purpose.<sup>13</sup>

**1. Property Appropriated to Public Use.** — *Atlanta v. Central R. Co.*, 53 Ga. 120. See also the title EMINENT DOMAIN, vol. 10, p. 1043.

**The Failure to Obtain Consent** from the state prior to the laying out of the highway over its land does not invalidate the proceedings, it being sufficient if consent is thereafter obtained. *Clarke v. South Kingstown*, 18 R. I. 283.

**2. Highway Through Park.** — *Wellington et al.*, Petitioners, 16 Pick. (Mass.) 88.

**3. Navigable Waters.** — *State v. Anthoine*, 40 Me. 435; *Cape Elizabeth v. Cumberland County*, 64 Me. 456; *Wells v. York County*, 79 Me. 522; *Com. v. Coombs*, 2 Mass. 489; *Charlestown v. Middlesex County*, 3 Met. (Mass.) 202.

**What Are Navigable Waters.** — It has been decided that tidewaters in a creek or cove which will float merely the smallest class of boats are not navigable waters within the rule. *Wethersfield v. Humphrey*, 20 Conn. 218; *Groton v. Hurlburt*, 22 Conn. 178. *Compare Com. v. Charlestown*, 1 Pick. (Mass.) 180, 11 Am. Dec. 161. And see the title NAVIGABLE WATERS.

**4. Land Below High-water Mark.** — *Marblehead v. Essex County*, 5 Gray (Mass.) 451; *Kean v. Stetson*, 5 Pick. (Mass.) 492.

**5. Henshaw v. Hunting**, 1 Gray (Mass.) 203; *Clement v. Burns*, 43 N. H. 609.

**6. Highway Across Canal.** — *Morris Canal, etc., Co. v. State*, 24 N. J. L. 62.

**7. Railroad Property.** — See the title CROSSINGS, vol. 8, p. 377.

**8. Bridgeport v. New York, etc.**, R. Co., 36 Conn. 255, 4 Am. Rep. 63; *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. L. 28. *Compare Sackett v. Greenwich*, 38 Conn. 528.

**9. Milwaukee, etc.**, R. Co. v. *Fairbault*, 23 Minn. 167; *St. Paul Union Depot Co. v. St.*

*Paul*, 30 Minn. 359; *Prospect Park, etc., R. Co. v. Williamson*, 91 N. Y. 552. *Contra Chicago, etc.*, R. Co. v. *Lake*, 71 Ill. 333; *Philadelphia, etc.*, R. Co. v. *Philadelphia*, 9 Phila. (Pa.) 563, 29 Leg. Int. (Pa.) 404.

**10. Establishment on Existing Road — Maine.** — *Sanger v. Kennebec County*, 25 Me. 291; *Wells v. York County*, 79 Me. 522.

*Massachusetts.* — *Folsom v. Middlesex County*, (Mass. 1899) 53 N. E. Rep. 155.

*New Hampshire.* — *Raymond v. Griffin*, 23 N. H. 340; *State v. Canterbury*, 28 N. H. 195, 40 N. H. 311; *Hopkinton v. Winship*, 35 N. H. 210; *Stinson v. Dunbarton*, 46 N. H. 225.

*New York.* — *People v. Highway Com'rs*, 37 N. Y. 360.

*Vermont.* — *Kelley v. Danby*, 46 Vt. 504.

**11. Pennsylvania Decisions.** — *West Chester Road Case*, 2 Rawle (Pa.) 421; *Hess's Mill Road*, 21 Pa. St. 217; *Southampton Road*, 21 Pa. St. 356; *Reserved Tp. Road*, 80 Pa. St. 165; *In re Road in Springdale Tp.*, 91 Pa. St. 260; *Road in Upper Darby*, 2 Del. Co. Rep. (Pa.) 472; *Road in Hilltown*, 2 Del. Co. Rep. (Pa.) 480; *Road in Linsdale*, 1 Montg. Co. Rep. (Pa.) 31; *Road in Whitmarsh*, 7 Montg. Co. Rep. (Pa.) 161; *Road from Willson's Farm, etc.*, 1 Pearson (Pa.) 170; *Road in Blakely*, 2 Lack. Jur. (Pa.) 313; *Matter of Ross Tp. Road*, 5 Pa. Super. Ct. 85; *In re Road in Taylor, etc., Tps.*, 3 Lack. Leg. N. (Pa.) 194; *Road in Hazle*, 6 Kulp (Pa.) 463.

**12. Location on Turnpike.** — *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Third Div. of Kensington Dist.*, 2 Rawle (Pa.) 445.

**13. West Boston Bridge v. Middlesex County**, 10 Pick. (Mass.) 270; *Folsom v. Middlesex County*, (Mass. 1899) 53 N. E. Rep. 155; *Matter of Public Highway*, 22 N. J. L. 62. *Butterfield v. Northampton*, 100 Mass. 100; *Franconia*, 5 Montg. Co. Rep. (Pa.) 43.

*c. ACROSS PRIVATE PROPERTY — (1) In General.* — In the absence of any statutory prohibition, a highway may generally be laid out across property of a private character, whether improved or unimproved, and accordingly it may be laid across school property.<sup>1</sup> But in *Pennsylvania* it was stated that it should not be laid through a man's dwelling house unless this is absolutely necessary.<sup>2</sup> And occasionally the fact that a landowner will be injured by the establishment of a particular route is mentioned as ground for avoiding that route.<sup>3</sup>

(2) *Buildings and Fixtures.* — A statute prohibiting the laying out of a highway through a building or fixture was held to include a cow stable and wagon shed;<sup>4</sup> but a ditch conducting water to a mill is not a building, fixture, or erection within such a statute,<sup>5</sup> nor is a building erected after application for the highway within the purview thereof.<sup>6</sup>

In *New Jersey* it is provided by statute that no dwelling house shall be pulled down or removed for the purpose, thus in effect prohibiting a laying out through such property,<sup>7</sup> and this statute has been held to apply to a billiard saloon attached to and used with a hotel.<sup>8</sup> It has also been held to apply although the owner of the house was an applicant for the highway,<sup>9</sup> but not when the order for the laying out was made before the erection of the house.<sup>10</sup>

(3) *Yards and Inclosures.* — The statute also occasionally prohibits the laying out of a highway through a yard or inclosure without the owner's consent,<sup>11</sup> or without a special proceeding to determine the necessity of so doing.<sup>12</sup>

(4) *Orchards and Gardens.* — A statute prohibiting the laying out of a highway through an orchard without the owner's consent applies to a collection of fifteen or twenty fruit trees set out for farm or other purposes,<sup>13</sup> but not to a few broken and decayed trees not protected or cared for,<sup>14</sup> nor to two or three wild fruit trees.<sup>15</sup> And the highway cannot pass through even the borders of the orchard if the effect thereof is to deprive the owner of the beneficial enjoyment of his fruit trees in whole or in part.<sup>16</sup> But the prohibition

1. *School Property.* — *Rominger v. Simmons*, 88 Ind. 453; *Belfast Academy v. Salmond*, 11 Me. 109.

2. *Dwelling-house.* — *Extension of Second St.*, 23 Pa. St. 346; *Pottsgrove Tp. Road*, 5 Pa. Co. Ct. 361.

3. *Injury to Landowner.* — *Cross v. Police Jury*, 7 Rob. (La.) 121; *People v. Ireland*, 75 Hun (N. Y.) 600.

4. *Buildings and Fixtures.* — *Smart v. Hart*, 75 Wis. 471.

5. *People v. Kingman*, 24 N. Y. 559.

Platforms erected along a railroad track, for freight or passengers, are held not to be so essential to the enjoyment of the company's franchise as not to be removable while laying out a highway. *New York, etc., R. Co. v. Drummond*, 46 N. J. L. 644.

6. *Carris v. Highway Com'rs*, 2 Hill (N. Y.) 443.

7. *New Jersey Statute — Dwelling Houses.* — *State v. Stites*, 13 N. J. L. 172; *State v. Hale*, 25 N. J. L. 324; *Mowbray v. Allen*, 58 N. J. L. 315.

8. *State v. Troth*, 36 N. J. L. 422, *reversing* 34 N. J. L. 377.

9. *Fredericks v. Hoffmeister*, 62 N. J. L. 565.

10. *State v. Waldron*, 17 N. J. L. 369; *Verga v. Miller*, 45 N. J. Eq. 93.

11. *Yards and Inclosures.* — *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *Ex p. Clapper*, 3 Hill (N. Y.) 458; *Clark v. Phelps*, 4 Cow. (N. Y.) 190; *Albany Northern R. Co. v. Brown-*

*ell*, 24 N. Y. 345; *Lansing v. Caswell*, 4 Paige (N. Y.) 519; *People v. Comes*, 1 Hun (N. Y.) 530.

*Ground the Limits of Which Are Not Defined* by a fence or otherwise was held not to be within a statute prohibiting the laying out of a road through a millyard, though it adjoined a sawmill and was used for piling logs, but it was said that the commissioners must leave a sufficient area for the use of the millowner. *People v. Kingman*, 24 N. Y. 559.

*Departure from Route Petitioned for.* — In *Indiana* an act providing that a road should not run through any person's inclosure of one year's standing, without the owner's consent, unless a good way could not otherwise be had, was held to be applicable only when its application did not involve an essential departure from the route petitioned for. *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *Cummins v. Shields*, 34 Ind. 154.

12. *Proceedings to Determine Necessity.* — *Matter of James*, 43 Hun (N. Y.) 67; *People v. Queens County*, 58 Hun (N. Y.) 371.

13. *Highway Through Orchard.* — *Nischen v. Hawes*, 15 Ky. L. Rep. 40, (Ky. 1893) 21 S. W. Rep. 1049.

14. *Wilson v. Creekmore*, 16 Ky. L. Rep. 261, (Ky. 1894) 27 S. W. Rep. 809.

15. *Ballou v. Elder*, 95 Iowa 693; *People v. Schellenger*, (Supm Ct. Gen. T.) 32 N. Y. St. Rep. 353.

16. *Seymour v. State*, 19 Wis. 240. Compare Volume XV.



of a highway through a garden does not apply to land which happens to be inclosed with a garden.<sup>1</sup> Such a statutory prohibition has been held to apply only to roads established under the general provisions of the highway law, and not to section-line roads.<sup>2</sup> The question as to the character of the land, as being within such statute, is, it seems, generally a question of fact.<sup>3</sup>

**5. Width of Highway.** — A statutory provision as to the width must be complied with,<sup>4</sup> but it has been held that a limitation as to the width need not be observed when land of greater width was donated for the road and the increased width did not involve a greater expense;<sup>5</sup> and the fact that the statutory width is exceeded is stated not to render the proceedings open to collateral attack.<sup>6</sup>

**6. Application for Highway — a. NECESSITY.** — The statutes very generally provide that the order for the road shall be made upon application by freeholders or taxpayers, and in such a case the statutory application, generally termed the petition, is necessary to confer jurisdiction upon the court or other authority vested with the power of laying out roads.<sup>7</sup> Accordingly, a petition for an alteration of a highway is, it seems, insufficient to support proceedings for the establishment of a new highway,<sup>8</sup> and so a petition for an improvement is insufficient for the purpose.<sup>9</sup> If there is no statutory requirement as to the application, the officials may establish the highway entirely of their own motion.<sup>10</sup>

**b. QUALIFICATIONS OF APPLICANTS.** — The statutory provisions as to the persons who must apply for the road are mandatory.<sup>11</sup> The record of the proceedings should show that the petitioners for the road have the statutory qualifications, and its failure to do so is fatal to the sufficiency of the proceed-

*Snyder v. Plass*, 28 N. Y. 465; *Snyder v. Trumpbour*, 38 N. Y. 355.

**1. Land Inclosed with Garden.** — *People v. Highway Com'rs*, 57 N. Y. 549; *People v. Horton*, 8 Hun (N. Y.) 357.

**2. Section-Line Roads.** — *Howard v. Brown*, 37 Neb. 902.

**3. Question of Fact.** — *People v. Moore*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 881, affirmed 129 N. Y. 639.

**4. Statutory Requirement as to Width.** — *State v. Wagner*, 45 Iowa 482; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Bridgman v. Hardwick*, 67 Vt. 132.

**Construction of Statute.** — A provision that a highway shall not be less than a width named has been held not to prevent the establishment of a highway of greater width. *Brown v. Greenfield Tp. Board*, 109 Mich. 557. To the same effect see *Humboldt County v. Dinsmore*, 75 Cal. 604.

**5. Donation of Land.** — *Hays v. Lewis*, 28 Ohio St. 326.

**6. Knowles v. Muscatine**, 20 Iowa 248.

**7. Application — Alabama.** — *Commissioners' Ct. v. Bowie*, 34 Ala. 461.

*Florida.* — *Bradford v. Cole*, 8 Fla. 263.

*Iowa.* — *Curtis v. Pocahontas County*, 72 Iowa 151.

*Kansas.* — *Shaffer v. Weech*, 34 Kan. 595; *Hentzler v. Bradbury*, 5 Kan. App. 1; *Mills v. Neosho County*, 50 Kan. 635.

*Missouri.* — *Warren v. Gibson*, 40 Mo. App. 469.

*Nebraska.* — *Robinson v. Mathwick*, 5 Neb. 252.

*New Hampshire.* — *Prichard v. Atkinson*, 3 N. H. 335; *Haywood v. Charlestown*, 34 N. H. 23; *Clemes v. Burns*, 43 N. H. 609; *State v. Morse*, 50 N. H. 9.

*Ohio.* — *Corry v. Gaynor*, 22 Ohio St. 584; *Hays v. Jones*, 27 Ohio St. 218; *McGonnigle v. Arthur*, 27 Ohio St. 251.

*Oregon.* — *Johns v. Marion County*, 4 Oregon 46.

**8. Petition for Alteration Insufficient.** — *Lowe v. Brannan*, 105 Ind. 247; *Livermore, Petitioner*, 11 Me. 275; *Com. v. Cambridge*, 7 Mass. 158.

But in *Bliss v. Deerfield*, 13 Pick. (Mass.) 102, Shaw, C. J., apparently regarded a petition for an alteration as sufficient to support the establishment of a highway, if the word "alteration" was used in the petition not technically, but substantially with the meaning of establishing a new highway. And see to the same effect *Com. v. Berkshire County*, 8 Pick. (Mass.) 343, and *Raymond v. Cumberland County*, 63 Me. 112.

**9. Petition for Improvement Insufficient.** — *Lowe v. Brannan*, 105 Ind. 247; *Com. v. Cambridge*, 7 Mass. 158.

**10. Application Not Required by Statute — Maine.** — *Howard v. Hutchinson*, 10 Me. 335.

*Nebraska.* — *Rose v. Washington County*, 42 Neb. 1.

*New York.* — *People v. Richmond County*, 20 N. Y. 252; *Marble v. Whitney*, 28 N. Y. 297; *People v. Jones*, 63 N. Y. 310; *Gould v. Glass*, 19 Barb. (N. Y.) 179; *McCarthy v. Whalen*, 19 Hun (N. Y.) 503.

*Texas.* — *Decker v. Menard County*, (Tex. Civ. App. 1894) 25 S. W. Rep. 727; *Kopecky v. Daniels*, 9 Tex. Civ. App. 305.

**11. Qualifications of Applicants.** — *People v. Blackwelder*, 21 Ill. App. 254; *Warne v. Baker*, 35 Ill. 382; *Little v. Thompson*, 24 Ind. 112; *Washington County v. McCallister*, 18 Kan. 129; *Williams v. Holmes*, 2 Wis. 129; *Damp v. Dane*, 29 Wis. 419.

ings upon direct attack.<sup>1</sup> When attacked collaterally, however, the fact that the petitioners have the necessary qualifications may, it seems, be shown by testimony outside the record.<sup>2</sup>

**Roads in Different Jurisdictions.** — When a statute provides for the establishment of a road through two or more counties upon the application of a certain number of residents in such counties, the petition is, it has been held, sufficient, though all the signers reside in one of such counties.<sup>3</sup>

**c. SUFFICIENCY OF APPLICATION** — (1) *In General.* — The requirements of the statute as to the contents of the application are generally such as by implication to render a petition in writing necessary. Whether, in the absence of express or implied provisions in the statute, a mere oral application would be sufficient, the cases do not clearly show.<sup>4</sup> A failure of the peti-

**The Death** of a petitioner before the making of the final order does not affect the authority of the officials to count his name as that of a petitioner. *Makemson v. Kauffman*, 35 Ohio St. 444.

**Tenants in Common as Petitioners.** — Where a statute required a petition to be signed by the majority of resident landowners who would be benefited by the improvement, it was decided that resident tenants in common of undivided lands not holding as heirs were to be counted as if owners in severalty, but that the names of those who signed a former petition for a similar improvement, afterwards abandoned, could not be counted in favor of the improvement. *Makemson v. Kauffman*, 35 Ohio St. 444.

**1. Qualifications of Petitioners Must Be Shown by Record.** — *Wabaunsee County v. Muhlenbacker*, 18 Kan. 129; *Blize v. Castlio*, 8 Mo. App. 290; *Chicago, etc., R. Co. v. Young*, 96 Mo. 39; *Jefferson County v. Cowan*, 54 Mo. 234; *Daugherty v. Brown*, 91 Mo. 26; *Godchaux v. Carpenter*, 19 Nev. 475.

**In Indiana**, however, the objection that the petition is not signed by the proper persons is waived by failure to present it promptly in the lower court. *Sowle v. Cosner*, 56 Ind. 276; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominer v. Simmons*, 88 Ind. 453; *Forsythe v. Kreuter*, 100 Ind. 27; *Osborn v. Sutton*, 108 Ind. 443; *Robinson v. Rippey*, 111 Ind. 112; *Bronnenburg v. O'Bryant*, 139 Ind. 17; *Miller v. Burks*, 146 Ind. 219; *Forsyth v. Wilcox*, 143 Ind. 144.

**Sufficiency of Showing.** — Where a petition showed upon its face that it was signed by more than twelve householders, as provided by statute, and the prayer of the petition was granted, and the opening of the road was ordered, it was held that there was a sufficient showing as to the qualifications of the petitioners, although the county board did not make an express finding upon the question. *Schade v. Theel*, 45 Kan. 628. See to the same effect *Anderson v. Hamilton County*, 12 Ohio St. 635; *State v. Nelson*, 57 Wis. 147.

**A Finding of Record** that the signers were duly qualified has been decided to be unnecessary, when this fact is shown on the face of the petition. *Schade v. Theel*, 45 Kan. 628; *Howard v. Dakota County*, 25 Neb. 229; *Yankton County v. Klemisch*, (S. Dak. 1898) 76 N. W. Rep. 312; *State v. Nelson*, 57 Wis. 147.

**Evidence.** — Nor need the journal of the proceedings of the board contain a statement that evidence to this effect was offered, the peti-

tion showing the qualifications of the petitioners upon its face, and the board finding that the law had been complied with. *Howell v. Redlon*, 44 Kan. 558.

**2. Collateral Attack.** — *Willis v. Sproule*, 13 Kan. 257; *Oliphant v. Atchison County*, 18 Kan. 386; *Banse v. Clark*, 69 Minn. 53; *Austin v. Allen*, 6 Wis. 134.

But in *Thatcher v. Crisman*, 6 Colo. App. 49, it was decided that where the order establishing a highway did not state that it was issued upon a petition duly signed, and the petition as shown in the record of the proceedings was not signed as required by statute, the order was invalid and subject to collateral attack.

If no testimony is offered it has been decided that the party attacking the record has made out a *prima facie* case that the proceedings are void and is entitled to judgment accordingly. *Oliphant v. Atchison County*, 18 Kan. 386. But see *Humboldt County v. Dinsmore*, 75 Cal. 604.

**3. Roads in Different Jurisdictions.** — *State v. Macdonald*, 26 Minn. 445. See also, as to applicants for road in different jurisdictions, *People v. Keck*, 90 Hun (N. Y.) 497; *Gilman v. Westfield*, 47 Vt. 21.

**Road on Township Line.** — Where the statute authorized the highway commissioners to lay out roads in a town on petition by twelve resident landowners, and a subsequent section declared that roads might be established on township or county lines "in the same manner as other public roads," except that a copy of the petition should be presented to the commissioners of each town, "said petition to be as in other cases," it was held that, to obtain a road along a county line adjoining three towns, the proper procedure was to have three copies of the petition, each one of which should be signed by twelve landowners resident in one of the towns and presented to the commissioners of that town. *Wright v. Highway Com'rs*, 145 Ill. 48.

**4. Oral Application.** — In *Hawkins v. Justices*, 12 Lea (Tenn.) 351, it was decided that where a statute did not absolutely require that the application should be made by a petition, though it fairly implied this by reference to "the petition," if the court entertained an informal oral application, and made an order specifying where the road should begin and end, and its general direction, that would be sufficient to give jurisdiction to the court, especially when no objection was made to the form of the application. See also *Com. v.*



tioners to sign the petition is, it appears, not absolutely fatal.<sup>1</sup>

(2) *Showing as to Jurisdiction.* — The petition need not, it seems, expressly state that the road will be in the county in which the proceedings occur, provided the location is clearly defined.<sup>2</sup>

(3) *Description of Proposed Highway.* — The petition must contain a description of the proposed road in order to confer jurisdiction to establish it.<sup>3</sup> And generally speaking the description will be sufficient if the road may be readily and certainly located therefrom.<sup>4</sup> To attain this certainty it is necessary to state the termini, and the statute frequently provides that these shall be stated.<sup>5</sup> But in one state it has been held that the petition may name

Coombs, 2 Mass. 490, where it is stated that the application "regularly" ought to be in writing.

1. *Failure to Sign Application.* — In *Smith v. Goldsborough*, 80 Md. 49, it was held that where the persons named as petitioners in the petition fail to sign it, but they adopt it as their petition in the proceedings to open the road, and no objection is made by the persons opposing the road until after appeal to the Circuit Court from the finding of the county commissioners, their failure to sign does not affect the jurisdiction of the commissioners and of such court. See as to failure of one of the petitioners to sign, *Hays v. Parrish*, 52 Ind. 132.

*Addressee of Petition.* — Where the statute provided that a petition for a highway should run to the board of supervisors, it was held that a petition was not insufficient though it was addressed, not to the board, but to the county auditor, who was a clerk of the board and had certain powers and duties in relation to the establishment of roads. *State v. Barlow*, 61 Iowa 572.

2. *Allegation as to Jurisdiction.* — *Sutherland v. Holmes*, 78 Mo. 399. But see *Damrell v. San Joaquin County*, 40 Cal. 154.

3. *Description.* — *Highway Com'rs v. Mallory*, 21 Ill. App. 184; *Farmer v. Pauley*, 50 Ind. 583; *Shute v. Decker*, 51 Ind. 241; *De Long v. Schimmel*, 58 Ind. 64; *Hayford v. Aroostook County*, 78 Me. 153.

*Illustrations of Insufficient Description.* — A description of the proposed highway as beginning at a certain point, and "thence southerly to the C. river to low-water mark," was insufficient. *Clement v. Burns*, 43 N. H. 609.

And likewise, a description reading, "thence bearing southerly, to avoid Flat Creek, and keeping on the most favorable ground, running easterly and northerly," in and through the land of A, to a given point, was too indefinite. *Scraper v. Pipes*, 59 Ind. 158.

4. *Sufficient if Identification Possible* — *Illinois*, — *Henline v. People*, 81 Ill. 269.

*Indiana*, — *Smith v. Weldon*, 73 Ind. 454; *Conaway v. Ascherman*, 94 Ind. 187; *Clift v. Brown*, 95 Ind. 53; *Adams v. Harrington*, 114 Ind. 66.

*Kansas*, — *Casey v. Kilgore*, 14 Kan. 478. *Maine*, — *Bryant v. Penobscot County*, 79 Me. 128.

*New Hampshire*, — *Knowles's Petition*, 22 N. H. 361; *Wentworth v. Milton*, 46 N. H. 44.

*New Jersey*, — *State v. Northrop*, 18 N. J. L. 271; *State v. Waldron*, 17 N. J. L. 369; *State v. White*, 35 N. J. L. 203.

*Oregon*, — *Ames v. Union County*, 17 Oregon 600.

*Pennsylvania*, — *Road in Abington*, 2 Montg. Co. Rep. (Pa.) 92.

*South Dakota*, — *Yankton County v. Klemisch*, (S. Dak. 1898) 76 N. W. Rep. 312.

*Wisconsin*, — *State v. O'Connor*, 78 Wis. 282.

A Rule of Court may, in the absence of a statutory provision to the contrary, provide that the petition shall give the termini, without fixing any intermediate boundaries. *Wiggin v. Exeter*, 13 N. H. 304; *Stevens v. Goffstown*, 21 N. H. 454; *Eames v. Northumberland*, 44 N. H. 67; *Baker v. Ashland*, 50 N. H. 27.

5. *Description of Termini* — *Illinois*, — *Highway Com'rs v. Mallory*, 21 Ill. App. 184.

*Indiana*, — *De Long v. Schimmel*, 58 Ind. 64; *McDonald v. Wilson*, 59 Ind. 54; *Wells v. Rhodes*, 114 Ind. 467; *Adams v. Harrington*, 114 Ind. 66.

*Maine*, — *Sumner v. Oxford County*, 37 Me. 119; *Howland v. Penobscot County*, 49 Me. 146.

*Massachusetts*, — *Com. v. Coombs*, 2 Mass. 490.

*New Jersey*, — *State v. Green*, 18 N. J. L. 179.

*Oregon*, — *Johns v. Marion County*, 4 Oregon 46.

*Pennsylvania*, — *Ottercreek Tp. Public Road*, 104 Pa. St. 261; *Montgomery Tp. Road*, 15 Pa. Co. Ct. 384.

*Particular Descriptions.* — It was held that a description of a terminus as "at or near" a certain house was sufficiently definite, the house in such case being considered the terminus. *Proctor v. Andover*, 42 N. H. 348.

But a statement that a starting point was "south of and adjacent to the right of way of the Michigan Central railroad" was too indefinite. *McDonald v. Wilson*, 59 Ind. 54.

*Terminus on Other Highway.* — The terminus of the proposed road may be described as on an existing highway at a named point thereon. *State v. Emmons*, 24 N. J. L. 45; *Biddle v. Dancer*, 20 N. J. L. 634; *People v. Nash*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 29; *State v. Rapp*, 39 Minn. 65; *In re Road in Verona*, (Pa. 1888) 12 Atl. Rep. 456.

So it was held that a petition for a highway "from a point on the east line of the city of Pittsburg, at the intersection of Waverly Lane and Peebles avenue, in said city, to a point on the Edgewood public road at or near the Home for Aged Women," was sufficiently certain, the first terminus being mathematically certain and the last approximately so. *In re Road in Sterrett Tp.*, 114 Pa. St. 627.



alternative points for the termini.<sup>1</sup>

The Width of the proposed road need not be stated unless it is expressly required by statute.<sup>2</sup>

(4) *Showing as to Qualifications of Applicants.* — It has been decided in several cases that the application or petition need not itself contain any averment as to whether the applicants possess the qualifications required by statute, such decision being generally based upon the omission of the statute, in naming the essentials of the application, to include such recital.<sup>3</sup> But other courts have decided that the application must show that the signers have the necessary qualifications.<sup>4</sup>

(5) *Names of Landowners.* — Where the statute provides that the petition shall state the names of the owners of the land over which the proposed highway will run, a failure to comply therewith renders the petition defective.<sup>5</sup>

(6) *Statement of Relief Sought.* — The petition should state the character of the relief which is sought;<sup>6</sup> but where the statute provided that the peti-

And a description of the terminus as a point near a certain person's dwelling house on a certain road was sufficient. *Westport v. Bristol County*, 9 Allen (Mass.) 203.

But the terminus on the existing highway must be approximately fixed. *Woodruff v. Douglass County*, 17 Oregon 314; *Pembroke v. Plymouth County*, 12 Cush. (Mass.) 351; *State v. Green*, 18 N. J. L. 179.

And in *Sime v. Spencer*, 30 Oregon 340, it was held that where the statute required the petition to specify the place of beginning it was not sufficient to describe the road as "commencing in the centre of the county road leading from P. to A. valley, at a point about one hundred and fifty yards in a southwesterly course from the dwelling of S."

**Terminus on Road to Be Built.** — The terminus may be described as on a road "now building" or which is asked for by the same petition. *Acton v. York County*, 77 Me. 128; *West Goshen Roads*, 7 Pa. Co. Ct. 250.

**Name of Township.** — The application need not state in what township the beginning and ending of the road are located, provided these points are precisely described. *Oxford Tp. v. Brands*, 45 N. J. L. 332; *State v. Cake*, 24 N. J. L. 516.

**1. Alternative Termini.** — *Sumner v. Oxford County*, 37 Me. 112; *Packard v. Androscoggin County*, 80 Me. 43.

**2. Width of Proposed Road — California.** — *Hill v. Ventura County*, 95 Cal. 239.

*Indiana.* — *Watson v. Crowsore*, 93 Ind. 220.

*Iowa.* — *State v. Wagner*, 45 Iowa 482.

*Missouri.* — *Matter of Gardner*, 41 Mo. App. 589.

*New Hampshire.* — *Raymond v. Griffin*, 23 N. H. 345; *Kennett's Petition*, 24 N. H. 139; *Proctor v. Andover*, 42 N. H. 348.

**3. Need Not Recite Qualifications of Applicants.** — *Humboldt County v. Dinsmore*, 75 Cal. 604; *Willis v. Sproule*, 13 Kan. 257; *Oliphant v. Atchison County*, 18 Kan. 386; *Fisher v. Davis*, 27 Mo. App. 321; *Snoddy v. Pettis County*, 45 Mo. 361; *Bewley v. Graves*, 17 Oregon, 274.

**4. Contrary Decisions.** — *Nischen v. Hawes*, 15 Ky. L. Rep. 40, (Ky. 1893) 21 S. W. Rep. 1049; *Wilson v. Township Board*, 87 Mich. 240; *Road in Sussex, etc., Counties*, 13 N. J. L. 157. Compare *Matter of Highway*, 3 N. J. L. 242.

See also *Tehama County v. Bryan*, 68 Cal. 57; *Conaway v. Ascherman*, 94 Ind. 187.

**5. Names of Landowners.** — *Hays v. Campbell*, 17 Ind. 430; *Vawter v. Gilliland*, 55 Ind. 278; *Conaway v. Ascherman*, 94 Ind. 187; *Thayer v. Burger*, 100 Ind. 262; *Godchaux v. Carpenter*, 19 Nev. 415; *People v. Whitney's Point*, 32 Hun (N. Y.) 508.

It is not a sufficient designation of the owners to name them as the heirs of a certain person. *Hughes v. Sellers*, 34 Ind. 337.

**A Collateral Attack** on the proceedings is not justified by the failure of the petition to contain such a statement. *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *McIntyre v. Marine*, 93 Ind. 193.

**As to the Mode of Attacking Proceedings** on this ground under the *Indiana* statutes, see *Vawter v. Gilliland*, 55 Ind. 278; *Meyers v. Brown*, 55 Ind. 596; *Schmied v. Keeney*, 72 Ind. 309; *Porter v. Stout*, 73 Ind. 3; *Dillman v. Crooks*, 91 Ind. 158; *McIntyre v. Marine*, 93 Ind. 193.

**Schoolhouse Site.** — But it was held that the failure to describe a schoolhouse site of one acre did not deprive the officials of jurisdiction, such site being included in the description of a forty-acre tract, the description of the road in the petition readily disclosing what lands were affected, and the school-district officials assenting to its location in accordance with the petition. *Woodworth v. Spirit Mound Tp.*, 10 S. Dak. 504.

**Railroad Track.** — In the absence of any statutory requirement the petition need not state that the road will cross a railroad track, though the railroad company is entitled to a statutory notice of the pendency of the petition. *Weymouth v. York County*, 86 Me. 391.

**6. Statement of Relief Sought.** — A petition asking that a described highway "be —," without stating the relief desired, was held to be insufficient. *Lehmann v. Rinehart*, 90 Iowa 346.

And likewise a petition that the highway "be opened for travel" was held to be insufficient to authorize the establishment of a road. *Curtis v. Pocahontas County*, 72 Iowa 151.

**Petition for Alteration.** — The sufficiency of a petition for the alteration of a road to sustain the establishment of one is considered *supra*, this section, *Application for Highway — Necessity*.

tion should be for the "establishment" of the road, a petition asking for the appointment of a commissioner "to examine into the expediency of establishing" the road,<sup>1</sup> or "to open" a road, was held to be sufficient.<sup>2</sup>

(7) *Duplicity*. — It is not proper in one petition to ask for the establishment of more than one highway,<sup>3</sup> and it seems that the fact that the highways run into each other does not render such a procedure proper.<sup>4</sup> But it has been decided that such unauthorized joinder of applications for different roads is not jurisdictional, and is not ground for collateral attack upon the legality of the roads laid out thereunder.<sup>5</sup>

*Vacation and Establishment in One Proceeding*. — It has been decided that it is proper to join, in the same petition, a request for the vacation of the highway and for the establishment of another highway, when this latter is to be a substitute for that vacated,<sup>6</sup> though this has been held not to be permissible under the *Michigan* statute.<sup>7</sup>

(8) *Amendment*. — (a) *In General*. — Considerable freedom in amending the petition is allowed.<sup>8</sup>

(b) *Addition or Withdrawal of Names*. — A petition may be amended by the addition of petitioners' names thereto,<sup>9</sup> or by the withdrawal of names therefrom.<sup>10</sup>

d. *VARIANCE*. — The description as given in the application is, as a general rule, to be followed in the subsequent proceedings,<sup>11</sup> but it is sufficient if

1. *Prayer for Establishment*. — *State v. Pitman*, 38 Iowa 252; *State v. Barlow*, 61 Iowa 572.

2. *McCollister v. Shuey*, 24 Iowa 362; *Stevens v. Cerro Gordo County*, 41 Iowa 341.

3. *Duplicity*. — *Stoddard v. Johnson*, 75 Ind. 20; *Evans v. West*, 138 Ind. 621. See also *Salsbury Tp. Roads*, 147 Pa. St. 471, *reversing* 9 Pa. Co. Ct. 521.

4. *Connecting Roads*. — In *Baker v. Ashland*, 50 N. H. 27, Sargent, J., in deciding this point, said that if the fact that one road runs into another can make them both the same highway so as to allow of their establishment in one proceeding, then all the highways in any town established constitute but one highway, and the same would be true of all the highways in a county, and of all or of nearly all in the state. But see *Stoddard v. Johnson*, 75 Ind. 20, where the court decided that the prohibition of more than one improvement in a single petition did not forbid the inclusion therein of any number of roads, provided they were connected.

5. *Defect Is Not Jurisdictional*. — *Banse v. Clark*, 69 Minn. 53; *Hardy v. Keene*, 54 N. H. 449.

The Statute may, of course, provide for the establishment of several disconnected roads. See *Monroe County v. Harrell*, 147 Ind. 500.

6. *Vacation and Establishment of Road in One Petition*. — *Anderson v. Wood*, 80 Ill. 15; *Brown v. Roberts*, 23 Ill. App. 461; *Harris v. Mahaska County*, 88 Iowa 219; *State v. Bergen*, 21 N. J. L. 342.

7. *Michigan Decisions*. — *Shue v. Highway Com'r*, 41 Mich. 638; *Cox v. Highway Com'r*, 83 Mich. 193.

8. *Amendment*. — *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; *Burns v. Simmons*, 101 Ind. 557; *Porter v. Stout*, 73 Ind. 3; *Hedrick v. Hedrick*, 55 Ind. 78; *New Marlborough v. Berkshire County*, 9 Met. (Mass.) 432; *Winchester v. Middlesex County*, 114 Mass. 482; *Darimouth v. Bristol County*, 153 Mass. 12; *Young v. Laconia*, 59 N. H. 534; *Howe v.*

*Jamaica*, 19 Vt. 607. See *Hempfield Tp. Road*, 2 Leg. Chron. (Pa.) 163.

As to Route. — Slight changes in the statement of the route have been allowed. *Windham v. Litchfield*, 22 Conn. 231; *Burns v. Simmons*, 101 Ind. 557; *Young v. Laconia*, 59 N. H. 534.

But it was held that where the change was such as to deprive a petitioner of all benefits from the road, he was released from liability to subscribe to the cost thereof. *Jewett v. Hodgdon*, 3 Me. 103.

9. *Addition of Names*. — *Bronnenburg v. O'Bryant*, 139 Ind. 17.

10. *Withdrawal of Names*. — *Black v. Campbell*, 112 Ind. 122; *Ralston v. Beall*, (Ind. 1892) 30 N. E. Rep. 1095; *Webster v. Bridgewater*, 63 N. H. 296; *Hays v. Jones*, 27 Ohio St. 218. But see *Grinnell v. Adams*, 34 Ohio St. 44.

11. *Correspondence to Description in Application*. — *California*. — *Damrell v. San Joaquin County*, 40 Cal. 154; *Brannan v. Mecklenburg*, 49 Cal. 672.

*Iowa*. — *State v. Molly*, 18 Iowa 525.

*Maine*. — *Orrington v. Penobscot County*, 51 Me. 570; *Bryant v. Penobscot County*, 79 Me. 128.

*Massachusetts*. — *Pembroke v. Plymouth County*, 12 Cush. (Mass.) 351.

*Michigan*. — *People v. Township Board*, 12 Mich. 434.

*Minnesota*. — *Halverson v. Bell*, 39 Minn. 240.

*New Hampshire*. — *Cole v. Canaan*, 29 N. H. 88; *State v. Rye*, 35 N. H. 368; *Eames v. Northumberland*, 44 N. H. 67.

*New Jersey*. — *State v. Pierson*, 37 N. J. L. 363; *State v. Burnet*, 14 N. J. L. 385; *Powell v. Hitchner*, 32 N. J. L. 211; *State v. French*, 24 N. J. L. 736.

*New York*. — *People v. Hildreth*, (Supm. Ct. Gen. T.) 24 N. Y. St. Rep. 458; *People v. Whitney's Point*, 102 N. Y. 81; *Matter of Feeney*, (County Ct.) 20 Misc. (N. Y.) 272; *Hallock v. Woolsey*, 23 Wend. (N. Y.) 328.

the correspondence is substantial,<sup>1</sup> and it is stated that the identity of the termini will be presumed unless the contrary appears or is shown by the evidence.<sup>2</sup> Greater strictness is generally required in locating the termini as named in the petition than in following the course between the termini named therein.<sup>3</sup>

The Width of the highway being generally fixed by statute or being within the discretion of the court or officers laying out the highway, a variance in that regard is not as a rule material.<sup>4</sup>

The Establishment of a Part of the Highway applied for has been held in a number of cases to be valid;<sup>5</sup> but a contrary view has been taken in some states in view of the particular provisions of the statute.<sup>6</sup>

*Ohio.* — Robinson v. Logan, 31 Ohio St. 466.

*Pennsylvania.* — Boyer's Road, 37 Pa. St. 257; Road in Jackson, 3 Lack. Jur. (Pa.) 44; Road in Lower Chanceford, 8 York Leg. Rec. (Pa.) 165.

*Texas.* — Cummings v. Kendall County, 7 Tex. Civ. App. 164.

In Maryland it is expressly provided by statute that the commissioners may adopt a somewhat different location from that named in the petition. Smith v. Goldsborough, 80 Md. 49.

**1. Substantial Correspondence Sufficient** — *Connecticut.* — Clark v. Middlebury, 47 Conn. 334; Greene v. East Haddam, 51 Conn. 547.

*Indiana.* — Lowe v. Brannan, 105 Ind. 249; McDonald v. Payne, 114 Ind. 359.

*Iowa.* — State v. Lane, 26 Iowa 223.

*Maine.* — Wayne v. Kennebec County, 37 Me. 558.

*Montana.* — Crowley v. Gallatin County, 14 Mont. 292.

*New Hampshire.* — Wiggin v. Exeter, 13 N. H. 309; Bachelor v. New Hampton, 60 N. H. 207.

*New Jersey.* — State v. Smith, 21 N. J. L. 91; State v. Vanbuskirk, 21 N. J. L. 86; State v. Hulick, 33 N. J. L. 307; Oxford Tp. v. Brands, 45 N. J. L. 332.

*New York.* — People v. Carman, 69 Hun (N. Y.) 118; Hallock v. Woolsey, 23 Wend. (N. Y.) 328.

*Pennsylvania.* — Road in Kingston, 5 Kulp (Pa.) 235.

*Wisconsin.* — Neis v. Franzen, 18 Wis. 537.

**2. Presumption of Identity.** — Cushing v. Gay, 23 Me. 9; Orono v. Penobscot County, 30 Me. 302; Smith v. Conway, 17 N. H. 586. See also State v. Stites, 13 N. J. L. 172.

**3. Illustrations of Substantial Correspondence.** — So it was held that the laying out was not invalid because it extended the line twenty rods farther than the terminus designated in the petition, this being done at the request of the owner of the land over which the extension was made, he releasing all claim to damages. State v. O'Connor, 78 Wis. 282.

And where the petition described one terminus as "northerly" of a certain monument, and the report said "northeasterly" of the same monument, there was no variance. State v. Rye, 35 N. H. 368.

**Improper Variance.** — It has been held that a variance of twenty-five links between the point of commencement as prayed for and as established was fatal. Shinkle v. Magill, 58 Ill. 422.

**Junction with Other Highway.** — Where a highway as laid out struck another highway more than one hundred rods north of the terminus

designated in the petition, there was held to be a departure rendering the laying out invalid. Flanders v. Colebrook, 51 N. H. 300. See to the same effect Cole v. Canaan, 29 N. H. 88; Hodgdon v. New Hampton, 56 N. H. 332.

But it was held that the fact that one of the termini was two hundred feet and the other one thousand feet from the points named in the petition did not render the action of the commissioners illegal where the object sought, that of connecting two other roads, was accomplished. People v. Hildreth, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 308.

**Correspondence in Course Between Termini.** — See Greene v. East Haddam, 51 Conn. 547.

And the fact that the petition describes a definite and particular line does not preclude a reasonable discretion in making variations from the course named. State v. Thompson, 46 Minn. 302. But see Adams v. Rulon, 50 N. J. L. 526.

**In New Hampshire and Pennsylvania** the route between the termini is a matter for the viewers, and a description thereof in the petition is not binding on them. Wiggin v. Exeter, 13 N. H. 304; Baker v. Ashland, 50 N. H. 27; *In re* State St., 8 Pa. St. 485; McConnell's Mill Road, 32 Pa. St. 285; Ottercreek Tp. Public Road, 104 Pa. St. 261; Sadsbury Tp. Roads, 147 Pa. St. 471; West Goshen Roads, 7 Pa. Co. Ct. 250. But the departure from the description in the petition must not be so great that the court can say that it was not in the contemplation of the parties. Flanders v. Colebrook, 51 N. H. 300.

**4. Variance in Width.** — *In re* Essex Ave., 121 Mo. 98; Raymond v. Griffin, 23 N. H. 340; Proctor v. Andover, 42 N. H. 348; Ford v. Danbury, 44 N. H. 388; *In re* State St., 8 Pa. St. 485. See also Com. v. Boston, etc., R. Corp., 12 Cush. (Mass.) 254; Greene v. East Haddam, 51 Conn. 547.

**5. Establishment of Part of Highway Prayed For.** — Windham v. Litchfield, 22 Conn. 226; Monroe v. Danbury, 24 Conn. 199; Pierce v. Southbury, 29 Conn. 490; Clark v. Middlebury, 47 Conn. 331; Bryant v. Penobscot County, 79 Me. 128; Princeton v. Worcester County, 17 Pick. (Mass.) 154; Com. v. West Boston Bridge, 13 Pick. (Mass.) 195; Thorpe v. Worcester County, 9 Gray (Mass.) 57; Kelley v. Danby, 46 Vt. 504.

**6. Establishment of Part Not Allowable.** — Linblom v. Ramsey, 75 Ill. 246; Ford v. Danbury, 44 N. H. 388; Highway Com'rs v. Judges, 25 Wend. (N. Y.) 453; Twenty-eighth St., 33 Leg. Int. (Pa.) 64, 2 W. N. C. (Pa.) 368.



**7. Notice — a. NECESSITY — (1) In General.** — It is quite frequently stated that the proceedings in a particular case are void for failure to give the statutory notice.<sup>1</sup> This statement is, however, generally made in cases involving the right of a landowner who has not received such notice to attack the proceedings on the ground that his land is thereby improperly taken for public use, and the absence of such notice does not, it seems, in every case render the proceedings absolutely void for all purposes.<sup>2</sup> And accordingly it has been decided that only the landowners who have failed to receive notice are entitled to attack the proceedings on that ground.<sup>3</sup> In some cases, however, the failure to give the statutory notice seems to be regarded as fundamentally affecting the jurisdiction.<sup>4</sup>

So it was held, in view of statutory provisions to the effect that the officials should determine the propriety of the "proposed" location, or of "such" highway as was described in the petition, that the laying out of only a part of the highway prayed for was illegal. *Brannan v. Mecklenburg*, 49 Cal. 672; *People v. Township Board*, 12 Mich. 434.

And in *Robinson v. Logan*, 31 Ohio St. 466, it was held that where the petition was, as required by statute, made by the majority of the landowners whose lands would be assessed to pay for the highway, the improvement was an entirety, and to allow a small fraction thereof only to be made, and an assessment levied to pay for it, would deprive the landowner of the protection intended by the statute.

**1. Statutory Notice Must Be Given — Alabama.** — *Barnett v. State*, 15 Ala. 829.

*California.* — *Silva v. Garcia*, 65 Cal. 591.

*Illinois.* — *Johnson v. Stephenson*, 39 Ill. App. 88; *Highway Com'rs v. Hoblit*, 19 Ill. App. 259; *Highway Com'rs v. People*, 2 Ill. App. 24; *Hammon v. Highway Com'rs*, 38 Ill. App. 237; *Johnson v. Stephenson*, 39 Ill. App. 88.

*Indiana.* — *Little v. Thompson*, 24 Ind. 146; *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405.

*Iowa.* — *State v. Weimer*, 64 Iowa 243; *McBurney v. Graves*, 66 Iowa 314; *Chicago, etc., R. Co. v. Ellithorpe*, 78 Iowa 415.

*Kentucky.* — *Case v. Myers*, 6 Dana (Ky.) 330; *Walker v. Corn*, 3 A. K. Marsh. (Ky.) 167; *Fletcher v. Fugate*, 3 J. J. Marsh. (Ky.) 631; *Morris v. Salle*, (Ky. 1892) 19 S. W. Rep. 527.

*Maine.* — *Ware v. Penobscot County*, 38 Me. 492.

*Michigan.* — *Dixon v. Highway Com'r*, 75 Mich. 225; *Welch v. Hodge*, 94 Mich. 493; *Wilson v. Township Board*, 87 Mich. 240; *Blodgett v. Whaley*, 47 Mich. 469; *Names v. Highway Com'rs*, 30 Mich. 490; *Dupont v. Highway Com'rs*, 28 Mich. 362; *Van Auken v. Highway Com'rs*, 27 Mich. 414.

*Missouri.* — *Daugherty v. Brown*, 91 Mo. 26. *New York.* — *People v. Kniskern*, 54 N. Y. 52; *People v. Allegany County*, (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 544; *People v. Smith*, 7 Hun (N. Y.) 17.

*Ohio.* — *Fravert v. Finfrock*, 43 Ohio St. 335.

*Oregon.* — *Minard v. Douglas County*, 9 Oregon 206.

*Pennsylvania.* — *Road in Lancaster City*, 68 Pa. St. 396.

*Rhode Island.* — *Ross v. North Providence*, 10 R. I. 461.

*Texas.* — *McIntire v. Lucker*, 77 Tex. 259; *Vogt v. Bexar County*, 5 Tex. Civ. App. 272.

*Vermont.* — *La Farrier v. Hardy*, 66 Vt. 200;

*Kidder v. Jennison*, 21 Vt. 108; *Walbridge v. Cabot*, 67 Vt. 114.

*West Virginia.* — *Adams v. Clarksburg*, 23 W. Va. 203.

*Wisconsin.* — *Williams v. Mitchell*, 49 Wis. 284; *State v. Langer*, 29 Wis. 68; *Roehrborn v. Schmidt*, 16 Wis. 519.

**2. Want of Notice Not Absolutely Fatal.** — *Com. v. Weiher*, 3 Met. (Mass.) 445; *State v. Richmond*, 26 N. H. 232. See also *Beebe v. Scheidt*, 13 Ohio St. 406; *Rutland v. Worcester County*, 20 Pick. (Mass.) 71; *Lyle v. Chicago, etc., R. Co.*, 55 Minn. 223; *People v. Allen*, 37 N. Y. App. Div. 248; *McIntire v. Lucker*, 77 Tex. 259.

In *Kansas* it was decided that a statute making it the duty of one of the petitioners to give notice in writing to the landowners of the time and place of the meeting of the viewers referred not so much to the laying out of the road as to the compensation of the landowner, and that, consequently, failure to give such notice did not render the proceedings void. *Leavenworth County v. Epsen*, 12 Kan. 531. Subsequently the legislature added to the statute a provision that copies of the notice with affidavits of its service should be filed in the county clerk's office "before said road shall be established;" and it was held that, in view of the interpretation given to the statute before the amendment, the additional words were added for the purpose of making the notice jurisdictional. *State v. Farry*, 23 Kan. 731; *Troy v. Doniphan County*, 32 Kan. 507; *Crawford v. Elk County*, 32 Kan. 555; *Chase County v. Carter*, 30 Kan. 581.

**3. Want of Notice Not Available to Persons Receiving Notice.** — *Nichols v. Salem*, 14 Gray (Mass.) 490; *Com. v. Weiher*, 3 Met. (Mass.) 445; *State v. Richmond*, 26 N. H. 232; *Grand Trunk R. Co. v. Berlin*, (N. H. 1894) 36 Atl. Rep. 554; *Pennsburg v. Alley*, 12 Pa. Co. Ct. 213.

**4. Notice Jurisdictional — Alabama.** — *Molett v. Keenan*, 22 Ala. 484; *Commissioners' Ct. v. Bowie*, 34 Ala. 461.

*Illinois.* — *Corley v. Kennedy*, 28 Ill. 143; *Highway Com'rs v. Harper*, 38 Ill. 103; *Frizell v. Rogers*, 82 Ill. 109; *Highway Com'rs v. Hoblit*, 19 Ill. App. 259; *Johnson v. Stephenson*, 39 Ill. App. 88; *Schuchman v. Highway Com'rs*, 52 Ill. App. 497.

*Iowa.* — *State v. Berry*, 12 Iowa 58; *McColister v. Shuey*, 24 Iowa 362; *State v. Anderson*, 39 Iowa 274.

See also *infra*, this subsection, *Actual Notice*.

**Want of Notice Available to All Parties.** — So in *Anderson v. Pemberton*, 89 Mo. 61, it was

(2) *Waiver of Notice*. — In confirmation of the view above stated, as to the purpose of the notice and the effect of a failure to give it as giving cause of complaint only to those not receiving notice, is the fact that the cases generally agree that a landowner, by appearing in the proceedings, or otherwise taking part therein, waives his right to notice, and so precludes himself from thereafter attacking the proceedings for want thereof.<sup>1</sup>

(3) *Notice of Adjournment*. — When the parties interested are properly notified of the time and place of a proposed meeting of the commissioners or other tribunal, no new notice of the time and place of an adjourned meeting is necessary,<sup>2</sup> but the time and place of the adjourned meeting must be named at the time of adjournment.<sup>3</sup>

*b. SUFFICIENCY OF NOTICE* — (1) *Time of Giving Notice*. — The provision of the statute in regard to the time of giving notice must be complied with,<sup>4</sup> and a provision that a certain number of days' notice shall be given of the proposed action has been construed to require that the day on which the notice is given and the day of such proposed action shall be excluded in computing the time.<sup>5</sup>

decided that if the proceeding was void as to one landowner for failure to give the statutory notice to him it was void as to all of the landowners. *Citing* *Brush v. Detroit*, 32 Mich. 43, which latter case, however, involved the right of one to object to an assessment for a highway on the ground that one whose land was taken therefor was not notified.

In *Wisconsin* it was held that the failure to give the statutory notice to the occupant of land invalidated the proceedings, although he received notice in some other way and was present at the meeting of the supervisors which decided upon the application. *State v. Langer*, 29 Wis. 68; *Seifert v. Brooks*, 34 Wis. 443. See also *Ruhland v. Hazel Green*, 55 Wis. 664. And it was decided that even one who signed the petition for the highway could avail himself of the objection that there was a want of the statutory notice, *State v. Logue*, 73 Wis. 598; though the notice need not be served upon owners or occupants of the lands to be affected who themselves sign the petition, *State v. Nelson*, 57 Wis. 147.

1. *Waiver of Notice* — *Illinois*. — *Anderson v. Wood*, 80 Ill. 16; *Board of Supervisors v. Magoon*, 109 Ill. 142.

*Indiana*. — *Daggy v. Coats*, 19 Ind. 259; *Orton v. Tilden*, 110 Ind. 131.

*Kansas*. — *Akin v. Riley County*, 36 Kan. 170; *Woodson County v. Heed*, 33 Kan. 34; *State v. Hedeon*, 47 Kan. 402; *Stephens v. Leavenworth County*, 36 Kan. 664; *Hanson v. Cloud County*, (Kan. App. 1898) 55 Pac. Rep. 468.

*Maine*. — *Condon v. County Com'rs*, 89 Me. 409.

*Massachusetts*. — *Com. v. Westborough*, 3 Mass. 406; *New Marlborough v. Berkshire County*, 9 Met. (Mass.) 423; *Rutland v. Worcester County*, 20 Pick. (Mass.) 71; *Hancock v. Boston*, 1 Met. (Mass.) 122; *New Salem et al., Petitioners*, 6 Pick. (Mass.) 470, *cited in* *Brown v. Essex County*, 12 Met. (Mass.) 210; *Com. v. Westborough*, 3 Mass. 406.

*Michigan*. — *Sherman v. Peterson*, 91 Mich. 480.

*Minnesota*. — *Anderson v. Decoria*, (Minn. 1898) 77 N. W. Rep. 229; *Kieckenapp v. Wheeling*, 64 Minn. 547.

*New Hampshire*. — *State v. Richmond*, 26 N. H. 232; *Gay v. Smith*, 38 N. H. 171; *Roberts v. Stark*, 47 N. H. 223.

*New York*. — *People v. Burton*, 65 N. Y. 223.

*Pennsylvania*. — *Road in North Hopewell*, 6 York Leg. Rec. (Pa.) 10, 5 Del. Co. Rep. (Pa.) 85; *Road in Lower Chanceford*, 8 York Leg. Rec. (Pa.) 8, 165; *Rodgers v. Freemansburg*, 1 Lehigh Val. L. Rep. (Pa.) 161, 2 Pa. Co. Ct. 518; *Walnut St.*, 7 Kulp (Pa.) 562.

*Rhode Island*. — *Tingley v. Providence*, 9 R. I. 388.

*South Dakota*. — *Issenhuth v. Baum*, (S. Dak. 1898) 76 N. W. Rep. 928; *Woodworth v. Spirit Mound Tp.*, 10 S. Dak. 504.

*Texas*. — *Onken v. Riley*, 65 Tex. 468.

*Vermont*. — *Robinson v. Winch*, 66 Vt. 110; *Brock v. Barnet*, 57 Vt. 172.

*Virginia*. — *Tench v. Abshire*, 90 Va. 768.

2. *Notice of Adjourned Meeting*. — *Board of Supervisors v. Magoon*, 109 Ill. 142; *Weymouth v. York County*, 86 Me. 391; *Westport v. Bristol County*, 9 Allen (Mass.) 203; *New Salem et al., Petitioners*, 6 Pick. (Mass.) 470; *Com. v. Berkshire County*, 8 Pick. (Mass.) 343; *In re Road in Peach Bottom Tp.*, 3 Penny. (Pa.) 541.

3. *McPherson v. Holdridge*, 24 Ill. 38; *Pegler v. Highway Com'rs*, 34 Mich. 359; *Dixon v. Highway Com'r*, 75 Mich. 225.

*Posting of Notice at Different Place*. — Where the statute provided that a meeting of commissioners might be adjourned by public announcement and by the posting of a notice at the time and place named for the first meeting, it was held that posting such notice at a more public place, a mile and a half from the place of the original meeting, did not render invalid the action taken at the adjourned meeting. *Wright v. Highway Com'rs*, 145 Ill. 48.

4. *Time of Giving Notice*. — *Detroit Sharpshooters' Assoc. v. Highway Com'rs*, 34 Mich. 36; *Corley v. Kennedy*, 28 Ill. 143.

5. *Computation of Time*. — *Public Roads*, 5 Harr. (Del.) 174; *People v. Highway Com'r*, 38 Mich. 247; *Dixon v. Highway Com'r*, 75 Mich. 225; *Cox v. Highway Com'r*, 83 Mich. 193; *Coquard v. Boehmer*, 81 Mich. 445.

(2) *Formal Requisites — Signature and Seal.* — It has been held that in the absence of a statutory requirement the notice need not be signed,<sup>1</sup> and a seal need not be affixed by the official issuing the notice unless required by statute.<sup>2</sup>

(3) *Statement of Time.* — Since the object of the notice is to inform the persons interested of proceedings to be taken in connection with the laying out of the road, it is defective if it fails to state the time of such proceedings.<sup>3</sup> So where the statute required the notice to state that objections to the highway must be filed by a day named therein, a notice which failed to name such day was held to give no jurisdiction to the county commissioners.<sup>4</sup>

(4) *Statement of Place.* — The notice must likewise be sufficiently definite as to the place at which the proposed action will be taken to enable persons interested to be present thereat,<sup>5</sup> and a notice stating that a meeting will take place at a certain village or town, without naming any particular building or locality therein, has been held to be insufficient.<sup>6</sup> And the proceeding will be invalid if it is conducted at a place substantially different from that named in the notice.<sup>7</sup>

(5) *Statement of Proposed Action.* — The statement of the action proposed to be taken by the petitioners is, it seems, sufficient if it clearly shows the nature of such action; and accordingly when the statute directed that the notice should state the time of the application for the "appointment of a commissioner," it was sufficient to state that application would be made for the "establishment of the road" or "for a new road."<sup>8</sup> Statutory pro-

**Reasonable Time.** — Where the owners of the land were trustees of an academy, and a majority lived in the town, it was held that seven days' notice given to them by the selectmen was sufficient. *Belfast Academy v. Salmon*, 11 Me. 109.

**1. Signature Unnecessary.** — *Wright v. Wells*, 29 Ind. 354; *Daugherty v. Brown*, 91 Mo. 26; *Warren v. Gibson*, 40 Mo. App. 470.

**Contrary Decision.** — But in *Minard v. Douglas County*, 9 Oregon 206, it was held that where the statute provided for the posting of a notice that application for the road would be made, the notice must be signed by the petitioners, the court saying that the fact that the notice was issued by persons authorized by law to issue it must be shown upon the face of the notice by proper authentication, as in the case of more formal process, since no person can be summoned before a legal tribunal but in pursuance of law and by persons authorized by law to summon him. See also *Road Notices*, 5 Harr. (Del.) 324; *Road in Springfield*, 6 Del. Co. Rep. (Pa.) 94.

**Notice by Commissioners or Supervisors.** — It was held that a notice of a commissioners' meeting signed "by order of the commissioners, A B, chairman," was sufficient. *Com. v. Berkshire County*, 8 Pick. (Mass.) 343. See also *Parish v. Gilmanton*, 11 N. H. 293; *Peavey v. Wolfborough*, 37 N. H. 286. And that the signatures of supervisors, if made by the town clerk under their direction, were sufficient, see *Williams v. Mitchell*, 49 Wis. 284.

**Variance in Names.** — That the names signed to the petition and to the notice that application will be made for the highway are slightly different will not render the proceedings void, at least as against collateral attack. *Bewley v. Graves*, 17 Oregon 274. Compare *King v. Benton* (Ct. in Dec.).

**2. Seal Unnecessary.** — *State v. Chicago*, etc., R. Co., 80 Iowa 586.

**3. Statement of Time of Proceedings.** — *State v. Waterman*, 79 Iowa 360; *Pegler v. Highway Com'rs*, 34 Mich. 359; *State v. Otoe County*, 6 Neb. 129; *Matter of Johnson*, 49 N. J. L. 381.

**4. Beatty v. Beethe**, 23 Neb. 210.

**Sufficiency of Statement of Time.** — In *State v. Nelson*, 57 Wis. 147, it was held that a notice made June 13, 1881, and appointing "Tuesday, the 28th day of June, at one o'clock P. M.," as a time for the meeting of the supervisors, sufficiently stated the time, though it did not name the year. But where a notice was without date and merely stated that a petition would be presented at the next regular term of court, there was no sufficient notice. *Bitting v. Douglas County*, 24 Oregon 406.

**Hour of Day.** — In *Matter of Highway*, 3 N. J. L. 242, it was stated that a notice of a proposed application need not state the precise hour of the day at which it would be made. See also *West Fallowfield Road*, 7 Pa. Co. Ct. 647.

**5. Statement of Place.** — *Hammon v. Highway Com'rs*, 38 Ill. App. 237.

**6. Highway Com'rs v. Hoblit**, 19 Ill. App. 259; *Matter of Johnson*, 49 N. J. L. 381; *Wharton v. Sorden*, 59 N. J. L. 356. See also *Mt. Joy Tp. Road*, 13 Lanc. L. Rev. (Pa.) 383.

**7. Proceedings at Place Different from That Named.** — *Matter of Johnson*, 49 N. J. L. 381.

But where the notice was of a meeting at the west end of the proposed road, it was held to be sufficient if the commissioners met there and walked over the proposed route, and then heard reasons for or against the road. *Smith v. Highway Com'rs*, 150 Ill. 385.

**8. Statement of Proposed Action.** — *Woolsey v. Hamilton County*, 32 Iowa 130.

**9. Stevens v. Cerro Gordo County**, 41 Iowa

**Name of Court.** — A notice that "at the next term of the County Court for the County of \_\_\_\_\_"



visions, however, as to the notice to be given by officials of their purpose to decide upon the application or to lay out the road, have been strictly construed.<sup>1</sup>

(6) *Description of Route.* — Though a minute description of the proposed route is, it is said, unnecessary and improper,<sup>2</sup> the beginning and end thereof should be stated.<sup>3</sup> And if the statute provides that the notice shall specify the intermediate points through which the road is to pass, an omission thereof invalidates the proceedings.<sup>4</sup> A mistake in regard to the proposed location will, it has been held, invalidate the proceedings if not readily discoverable, though it might be discovered by careful examination of the petition and notice.<sup>5</sup> A reference to the petition, which clearly describes the route, is sufficient if the person objecting to the notice has not been misled.<sup>6</sup>

(7) *Description of Land and Landowners.* — Where the statute requires the names of the owners of the land involved to be stated in the notice, the failure to do so renders the proceedings invalid, at least as against a landowner whose name is omitted.<sup>7</sup> A requirement, however, that the land through which the highway will pass should be stated in the notice is, it seems, sufficiently complied with if the tracts may be readily identified.<sup>8</sup>

(8) *Personal Notice.* — (a) *In General.* — Personal notice upon parties affected by the laying out of the road is not necessary unless expressly required by statute.<sup>9</sup> And a statutory requirement of "reasonable notice" of a proposed view has been held not to render personal notice necessary if the usual mode

a petition would be presented to "said court" to establish a road "within said county," and then describing the route as beginning at a certain point "in H. county," sufficiently showed as against collateral attack that the petition would be presented to the County Court of H. county. *Sweek v. Jorgensen*, 33 Oregon 270.

1. *Official Action — Statement as to Object of Meeting.* — It was held in *Wisconsin* that a statute requiring that the town supervisors give notice of the time and place at which they will meet to decide upon an application for a road was not satisfied by a notice stating when and where they would meet "to make an examination and survey of said proposed road," *Austin v. Allen*, 6 Wis. 134; or by one stating the time and place of a meeting to "take into consideration" the application for the road, *Babb v. Carver*, 7 Wis. 124; *State v. Castle*, 44 Wis. 670.

*Notice of Intention to Lay Out.* — It was held that where the statute provided that the road should not be laid out unless, seven days previous to the laying out, a written notice of the intention of the selectmen to lay it out was served on the owners of land over which they proposed to lay it out, this requirement was not satisfied by a notice that on a certain day the selectmen would view the proposed route and hear the parties, and if they adjudged that the prayer of the petition ought to be granted, they would then proceed and lay out the road over said route. *Fitchburg R. Co. v. Fitchburg*, 121 Mass. 132.

2. *Description of Route.* — *Matter of Public Road in Middlesex, etc., Counties*, 4 N. J. L. 34.

3. *State v. Green*, 18 N. J. L. 179.

4. *Intermediate Points.* — *Smithers v. Fitch*, 82 Cal. 153.

5. *Error Not Readily Discoverable.* — *Butterfield v. Pollock*, 45 Iowa 257.

6. *Reference to Petition.* — *Behrens v. Highway Com'rs*, 169 Ill. 558.

7. *Names of Landowners.* — *State v. Iowa Cent. R. Co.*, 91 Iowa 275. Compare *McKinney v. Baker*, 100 Iowa 362.

But such omission is not ground for collateral attack if the description of the route was such that one reading it must know the location. *McIntyre v. Marine*, 93 Ind. 193.

8. *Description of Land.* — A requirement that a notice of a meeting to decide upon the petition shall specify the several tracts through which the highway may pass was satisfied by a notice defining the proposed route and referring to the lines of government subdivisions so that there was no difficulty in ascertaining what tracts would be affected, though there was no express enumeration of government subdivisions. *State v. Nelson*, 57 Wis. 147; *Jackson v. Rankin*, 67 Wis. 285. See also *State v. O'Connor*, 78 Wis. 282.

9. *Personal Notice Unnecessary.* — *Adams v. Harrington*, 114 Ind. 66; *Starry v. Treat*, 102 Iowa 449; *Wilson v. Hathaway*, 42 Iowa 173; *State v. Chicago, etc., R. Co.*, 80 Iowa 586; *McKinney v. Baker*, 100 Iowa 362; *State v. Beeman*, 35 Me. 242; *Taylor v. Hampden County*, 18 Pick. (Mass.) 309; *Healey v. Newton*, 119 Mass. 480; *Pawnee County v. Storm*, 34 Neb. 735; *In re Road in Sterrett Tp.*, 114 Pa. St. 627; *In re Road in Upper St. Clair Tp.*, 20 W. N. C. (Pa.) 369; *Clayton's Case*, 1 Walk. (Pa.) 527; *Wagner v. Salzburg Tp.*, 132 Pa. St. 636.

*Effect on Claim for Damages.* — In *Pawnee County v. Storm*, 34 Neb. 735, it was said that while notice in a newspaper as provided by the statute is sufficient to give to the county board jurisdiction of the proceedings, it does not deprive a landowner who had no actual notice of the proceedings of the right to recover damages for his property taken, within a reasonable time after obtaining actual notice.

of giving official notice is by publication.<sup>1</sup>

**Requirement by Rule of Court.** — In case personal notice is required by rule of court, but not by statute, its absence, though ground for direct attack on a report by viewers, has been held not to be ground for impeaching a decree collaterally.<sup>2</sup>

(b) **To Owners of Land.** — A statute sometimes provides expressly for notice to the owners of land through which the road is to be laid out,<sup>3</sup> or to the agents of such owners.<sup>4</sup> In case of change of ownership of land pending the proceedings, it is not necessary that the subsequent owner be notified.<sup>5</sup> Each of two tenants in common has been held to be entitled to the notice,<sup>6</sup> and notice to a husband will not bind his wife.<sup>7</sup> A mortgagee not in possession is not an owner within the meaning of such a statute, the mortgagor being the owner entitled to the notice.<sup>8</sup> A requirement that the notice be served "personally" was held to be satisfied by the reading of it to those entitled.<sup>9</sup>

(c) **To Occupants of Land.** — It is sometimes required that the notice be served upon all the "occupants" of land through which the proposed highway is to be laid.<sup>10</sup>

(d) **To Town.** — It is sometimes required by statute or rule of court that notice be given to the town of the proposed laying out of a road therein,<sup>11</sup> and

1. "Reasonable Notice." — *Freetown v. Bristol County*, 9 Pick. (Mass.) 46.

2. **Requirement by Rule of Court.** — Road in Lower Swatara Tp., 6 Pa. Dist. 686; *Mathewson v. Clinton Tp.*, 8 Pa. Co. Ct. 204.

3. **Notice to Landowners.** — Road from App's Tavern, 17 S. & R. (Pa.) 388; Road in Lancaster City, 68 Pa. St. 396; *Ryder v. Horsting*, 130 Ind. 104.

In Iowa the statute provides that notice shall be given to owners of land "as shown by the transfer books," and accordingly notice is not required in the case of one whose ownership is not so shown. *Wilson v. Hathaway*, 42 Iowa 173; *State v. Chicago, etc., R. Co.*, 68 Iowa 135; *State v. Chicago, etc., R. Co.*, 80 Iowa 586. And it is held that, under this statute, if the transfer books show ownership in a decedent, notice need not be given to his heirs, though his death and the names of his heirs are shown by the county records. *Starry v. Treat*, 102 Iowa 449.

4. **Notice to Agent.** — Where the statute provides that notice may be served on an agent of the owner, the notice is not binding upon the latter unless it purported to be served upon the agent as such, and the notice must be directed to the owner. *Evans v. Santana Live Stock, etc., Co.*, 81 Tex. 622. And the fact of agency must be shown. *Chase County v. Cartter*, 30 Kan. 581.

5. **Change of Ownership.** — *Pickford v. Lynn*, 98 Mass. 491; *Monson v. County Com'rs*, 84 Me. 99.

6. **Tenants in Common.** — *Whitcher v. Benton*, 48 N. H. 157.

7. **Notice to Husband.** — *Whitcher v. Benton*, 48 N. H. 157.

8. **Notice to Mortgagee Unnecessary.** — *Parish v. Gilmanton*, 11 N. H. 294; *Gurnsey v. Edwards*, 26 N. H. 224; *Whiting v. New Haven*, 45 Conn. 395; *Goodrich v. Atchison County*, 47 Kan. 355; *Warren v. Gibson*, 40 Mo. App. 469; *Cool v. Crommett*, 13 Me. 250.

A Purchaser at Foreclosure Sale of land affected by the highway is bound by any notice which was binding on the mortgagee. *Morris v.*

*Beard*, 138 Ind. 560; *Monson v. County Com'rs*, 84 Me. 99; *Pickford v. Lynn*, 98 Mass. 491.

9. **Personal Service.** — *Green v. State*, 56 Wis. 583. See also, as to what constitutes personal service, *Vogt v. Bexar County*, 16 Tex. Civ. App. 567.

10. **Notice to Occupants of Land.** — *Porter v. Stout*, 73 Ind. 3; *Austin v. Allen*, 6 Wis. 134; *State v. Langer*, 29 Wis. 68.

A Station Agent at a depot on the ground through which the highway is to run is an occupant within such statute. *State v. O'Connor*, 78 Wis. 282.

**Notice to Overseer.** — Where the law required the notice to be given to the owner or "holder," it was held that the notice might be left with an overseer residing on the farm. *Kimmey's Petition*, 5 Harr. (Del.) 18.

The Iowa Statute requires that notice shall be served on each owner or occupier, as shown by the transfer books, who resides in a county, and it is held thereunder that if the owner be a nonresident notice must be served upon the occupier. *Alcott v. Acheson*, 49 Iowa 569.

**Railroad Company as Occupant.** — And under such statute it is held that a railroad company organized under the laws of the state is in possession of land over which it operates its line of road and is consequently entitled to notice. *Chicago, etc., R. Co. v. Ellithorpe*, 78 Iowa 415; *State v. Iowa Cent. R. Co.*, 91 Iowa 275. But a railroad company not organized under the laws of the state is not a resident within such statute and is not entitled to notice. *State v. Chicago, etc., R. Co.*, 68 Iowa 135.

11. **Notice to Town.** — *North Reading v. Middlesex County*, 7 Gray (Mass.) 109; *Com. v. Chase*, 2 Mass. 170; *Com. v. Peters*, 3 Mass. 229; *Com. v. Coombs*, 2 Mass. 489; *Com. v. Cambridge*, 4 Mass. 627; *Com. v. Egremont*, 6 Mass. 491; *Knox v. Epsom*, 56 N. H. 14; *Kennett's Petition*, 42 N. H. 139; *Burnham v. Goffstown*, 50 N. H. 560; *Horne v. Rochester*, 62 N. H. 347; Road in Ryan, 3 Kulp (Pa.) 158; Road in Upper Fairfield Tp., 11 Pa. Co. Ct. 396.

in such case a notice to the selectmen and town clerk as such has been held to be sufficient.<sup>1</sup> And where petitioners for a highway were required to cause a certified copy of the petition to be given to the town officers it was held that such service might be made by the petitioner himself.<sup>2</sup>

(9) *Posting of Notice.* — A requirement as to the posting of notice must be substantially complied with.<sup>3</sup> Posting copies of the notice is stated to be sufficient under a statute requiring notice to be given by advertisement posted at certain places.<sup>4</sup> And the posting of copies of the petition has been held to be a sufficient compliance with a requirement of notice of the presentation of the petition.<sup>5</sup>

(10) *Actual Notice.* — It has been held that where actual notice is given to parties interested, the want of the statutory notice will not affect the validity of the proceedings, but on this question the decisions are not entirely harmonious.<sup>6</sup>

c. PROOF OF NOTICE — (1) *In General.* — Where the statute requires notice before the making of the order, proof of such notice is a prerequisite to such order.<sup>7</sup> If the statute is silent as to the manner of proving notice, any satisfactory proof thereof is sufficient,<sup>8</sup> and the giving of notice may be shown by parol.<sup>9</sup> But it has been held that the mere certificate of the person posting the notice is not sufficient, the statute not providing therefor, and this not being a recognized legal form of proof.<sup>10</sup>

1. *Whittredge v. Concord*, 36 N. H. 530.

In *Pennsylvania* notice must be given to a county when it is liable for the damages resulting from the laying out of the road. *Ryon Tp. Road*, 4 Pa. Dist. 736; *Road in Friendsville*, 16 Pa. Co. Ct. 172. See Act April 15, 1891.

2. *Service by Petitioner.* — *McClure v. Groton*, 50 N. H. 49; *Sanborn v. Meredith*, 58 N. H. 150. See also *State v. Atkinson*, 27 N. J. L. 420.

3. *Posting of Notice.* — *Highway Com'rs v. People*, 2 Ill. App. 24; *Schuchman v. Highway Com'rs*, 52 Ill. App. 497; *Cassidy v. Smith*, 13 Minn. 129; *People v. Stedman*, 57 Hun (N. Y.) 280; *West Manheim Road*, 1 Pa. Dist. 800. Compare *Wright v. Highway Com'rs*, 145 Ill. 48.

*Place of Posting* — "*Public*" *Place.* — In *Territory v. Lannon*, 9 Mont. 1, it was held that a notice posted at a railroad station about seven hundred feet from the intersection of the proposed road with another highway, at which latter point there was no suitable place for posting the notice, was posted at a "public" place "in the vicinity of" the proposed road within the meaning of the statute.

Where the statute made it the duty of the clerk to post a copy of the order laying out a road, on the door of the building where the township meeting was usually held, or, if there was no such building, then in one of the most public places in the township, it was held sufficient to post the copy on an inner door of a tavern which was one of the two places where the meeting was held alternately, this being one of the most public places in the township. *People v. Township Board*, 2 Mich. 187.

4. *Posting Copies.* — *Vedder v. Marion County*, 22 Oregon 264.

5. *Of Copies of Petition.* — *Sutherland v. Holmes*, 78 Mo. 399. But under a later statute in the same state requiring the posting of a copy of the petition and a notice stating when the petition would be presented, it was

held that the mere posting of the petition was not sufficient notice. *Peed v. Barker*, 61 Mo. App. 556.

If the Posting Is Defective so that it is not observed by persons passing, the report may be properly set aside. *Road in Manchester*, 8 York Leg. Rec. (Pa.) 169.

6. *Actual Notice Sufficient.* — *Sumner v. Oxford County*, 37 Me. 112; *Copeland v. Packard*, 16 Pick. (Mass.) 217. See also *Humboldt County v. Dinsmore*, 75 Cal. 604.

*Actual Notice Not Substitute for Statutory Notice.* — *Bitting v. Douglas County*, 24 Oregon 406; *Grapevine Road*, 18 Pa. Co. Ct. 639. See also *supra*, this section, *Notice — Necessity — In General.*

7. *Proof of Notice — Necessity — Delaware.* — *In re Isaacs*, (Del. 1897) 39 Atl. Rep. 588.

*Illinois.* — *Johnson v. Stephenson*, 39 Ill. App. 88.

*Indiana.* — *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399.

*Michigan.* — *Van Auker v. Highway Com'rs*, 27 Mich. 414.

*New Jersey.* — *State v. Shreeve*, 15 N. J. L. 57; *Matter of Highway*, 16 N. J. L. 91.

8. *Mode of Proof.* — *Parish v. Gilmanton*, 11 N. H. 293.

9. *Parol Evidence.* — *In re Isaacs*, (Del. 1897) 39 Atl. Rep. 588; *State v. Bergen*, 24 N. J. L. 548; *In re Road in Washington Tp.*, (Pa. 1885) 1 Atl. Rep. 657; *Issenhuth v. Baum*, (S. Dak. 1898) 76 N. W. Rep. 928.

*Statutory Presumption of Notice.* — A statutory provision that an order laying out a highway shall be *prima facie* evidence of the regularity of prior proceedings raises the presumption that notice was properly given. *Rochborn v. Schmidt*, 16 Wis. 519; *Williams v. Mitchell*, 49 Wis. 284; *State v. Nelson*, 57 Wis. 147; *State v. Logue*, 73 Wis. 598; *State v. Harland*, 74 Wis. 11.

10. *Certificate.* — *Frizell v. Rogers*, 82 Ill. 109; *Detroit Sharpshooters' Assoc. v. Highway Com'rs*, 34 Mich. 36.



(2) *Affidavit*. — An affidavit by the person concerned in the service of the notice is a proper form of proof,<sup>1</sup> but an affidavit need not be filed unless expressly required.<sup>2</sup> And even when the statute required affidavits as to the posting of notice to be filed with the county clerk, it was held that the fact that such affidavits were thereafter found to be absent from the file did not affect the validity of the proceedings, but that the posting might be proven by the person who performed it.<sup>3</sup>

(3) *Return of Officers*. — The notice may also be shown by the return of commissioners or other persons vested with jurisdiction to conduct the proceedings,<sup>4</sup> but the return need not show the giving of notice unless this is especially required by statute.<sup>5</sup>

(4) *Recital in Order*. — In the absence of a statutory requirement of other proof, a recital of notice in the order granting or denying the petition is sufficient proof thereof.<sup>6</sup>

(5) *Recital of Facts*. — The proof of notice should generally state the particular facts involved in the service or giving of notice in order that the court or other tribunal may determine its sufficiency.<sup>7</sup>

d. RECORD MUST SHOW NOTICE. — The record of the proceedings should show that the notice has been given according to law.<sup>8</sup> In some cases it has

1. *Affidavit of Service*. — Wright *v.* Wells, 29 Ind. 354; State *v.* Otoe County, 6 Neb. 129; State *v.* Waldron, 17 N. J. L. 369; Sanborn *v.* Meredith, 58 N. H. 150.

In Wells *v.* Hicks, 27 Ill. 343, it was stated that the proof of posting notices by the *ex parte* affidavits of the persons posting them is a better form of proof than verbal evidence of such parties, since otherwise the death or removal of the latter would endanger the location of the road.

In Gaines *v.* Linn County, 21 Oregon 425, it was held that when the statute required a petition for a road to be accompanied by satisfactory proof of notice to all persons concerned, the proof might be by the affidavit of one of the petitioners who knew that such notice had been given.

2. *Not Expressly Required*. — Pagels *v.* Oaks, 64 Iowa 198, where it was decided that such affidavit was not absolutely required by a statute providing that the auditor should establish the road when satisfied that notice had been served.

3. *Affidavits Absent from Files*. — Carron *v.* Clark, 14 Mont. 301.

4. *Return of Officers* — Maine. — Southard *v.* Ricker, 43 Me. 575.

Massachusetts. — New Salem, *et al.*, Petitioners, 6 Pick. (Mass.) 470.

Michigan. — People *v.* Highway Com'rs, 14 Mich. 528; Pegler *v.* Highway Com'rs, 34 Mich. 359; Moetter *v.* Highway Com'r, 39 Mich. 726; Gray *v.* Highway Com'r, 40 Mich. 165; Shue *v.* Highway Com'r, 41 Mich. 638; Nielsen *v.* Wakefield, 43 Mich. 434; Wilson *v.* Township Board, 87 Mich. 240.

Pennsylvania. — *In re* Road in Springdale Tp., 91 Pa. St. 260; Wagner *v.* Salzburg Tp., 132 Pa. St. 636; *In re* Road in Verona, (Pa. 1888) 12 Atl. Rep. 456.

5. *Road from Cully's Fishery*, 13 S. & R. (Pa.) 25; Road in Middle Creek Tp., 9 Pa. St. 69; *In re* Road in South Abington Tp., 109 Pa. St. 118.

6. *Recital in Order*. — Huntington *v.* Birch, 12 Conn. 142; Shinkle *v.* Magill, 58 Ill. 422;

Frizell *v.* Rogers, 82 Ill. 109; Board of Supervisors *v.* Magoon, 109 Ill. 142; Bruggerman *v.* True, 25 Minn. 123; State *v.* Lewis, 22 N. J. L. 564.

*Necessity of Recital*. — And in State *v.* Shreeve, 15 N. J. L. 57, it was stated that when the authority of the court depends on the due proof of the posting of notices the order must show that such proof was given.

7. *Recital of Facts Necessary* — Maine. — Southard *v.* Ricker, 43 Me. 575.

Michigan. — People *v.* Highway Com'rs, 14 Mich. 528; Dupont *v.* Highway Com'rs, 28 Mich. 362; Truax *v.* Sterling, 74 Mich. 160; Schroeder *v.* Onekama, 95 Mich. 25.

Montana. — State *v.* Auchard, (Mont. 1898), 55 Pac. Rep. 361.

Nebraska. — State *v.* Otoe County, 6 Neb. 129.

New Jersey. — Road in Sussex, etc., Counties, 13 N. J. L. 157.

Oregon. — Minard *v.* Douglas County, 9 Oregon 206; King *v.* Benton County, 10 Oregon 512; Sweek *v.* Jorgensen, 33 Oregon 270.

Pennsylvania. — Road in Palmer, 11 W. N. C. (Pa.) 429.

Contra. — New Salem *et al.*, Petitioners, 6 Pick. (Mass.) 470; *In re* Road in Springdale Tp., 91 Pa. St. 260; *In re* Road in South Abington Tp., 109 Pa. St. 118; Locust St., 153 Pa. St. 276.

See also *infra*, this section and subsection, *Record Must Show Notice*.

8. *Notice Must Appear from Record* — Alabama. — Road, etc., Com'rs *v.* Thompson, 15 Ala. 134; Barnett *v.* State, 15 Ala. 829.

Illinois. — Highway Com'rs *v.* Harper, 38 Ill. 103.

Iowa. — State *v.* Berry, 12 Iowa 58; State *v.* Anderson, 39 Iowa 274; Alcott *v.* Acheson, 49 Iowa 569; McBurney *v.* Graves, 66 Iowa 317.

Kansas. — Venard *v.* Cross, 8 Kan. 248.

Maine. — Southard *v.* Ricker, 43 Me. 575.

Michigan. — Names *v.* Highway Com'rs, 30 Mich. 490; Moetter *v.* Highway Com'r, 39 Mich. 726; Cox *v.* Highway Com'r, 83 Mich. 113.

been held that a mere recital or finding in the record that notice was given is sufficient; <sup>1</sup> and it has been held in one state that a recital that all the requirements of the law have been complied with raises a presumption that the necessary notice was given, <sup>2</sup> while in other jurisdictions it has been determined that the particular facts involved in the giving of notice must be set forth in the record. <sup>3</sup> The requirements, however, are less strict on a collateral attack than on a direct attack. <sup>4</sup>

**8. Commissioners or Viewers — a. IN GENERAL.** — In case of the establishment of a highway by a court, and frequently in other cases, the statute provides for reference of the question of laying out the highway to a selected body of men who are, in different jurisdictions, called commissioners, viewers, jurors, or surveyors. In other cases the question is decided by permanent officials, generally termed commissioners or supervisors. This subsection will be devoted chiefly to the officers of the first class, though incidentally officers of the second class will be referred to.

**b. NECESSITY.** — If the statute provides for the appointment of viewers or like officers, a failure to make such an appointment will generally render the proceedings invalid. <sup>5</sup>

**c. ORDER FOR VIEW — (1) Description of Road.** — The order for view or appointing viewers should, it is said, give a general description of the proposed road by its termini, with a statement of its general direction. <sup>6</sup>

*Missouri.* — Chicago, etc., R. Co. v. Young, 96 Mo. 39; Matter of Gardner, 41 Mo. App. 589.

*Nebraska.* — State v. Otoe County, 6 Neb. 129.

*Ohio.* — Ferris v. Bramble, 5 Ohio St. 109; Frevert v. Finrock, 31 Ohio St. 621, 43 Ohio St. 335.

*Oregon.* — Grady v. Dundon, 30 Oregon 333.

*Pennsylvania.* — Central R. Co.'s Appeal, 102 Pa. St. 39. Compare *In re Road in South Abington Tp.*, 109 Pa. St. 118.

So it has been decided that where the record fails to show service of the notice upon a landowner as required by statute, he cannot be prosecuted for the obstruction of the road, the proceedings being void as to him. *State v. Weimer*, 64 Iowa 243.

**1. Recital of Giving of Notice Sufficient.** — *Hobbs v. Tipton County*, 116 Ind. 376; *McCollister v. Shuey*, 24 Iowa 362; *Woolsey v. Hamilton County*, 32 Iowa 130; *State v. Pitman*, 38 Iowa 252; *Crawford v. Elk County*, 32 Kan. 555; *Limerick, Petitioner*, 18 Me. 183.

**2. Recital of Compliance with Law.** — *Larson v. Fitzgerald*, 87 Iowa 402; *State v. Minneapolis, etc., R. Co.*, 88 Iowa 689.

But if the Record Attempts to State the Facts involved in the giving of notice, it will be presumed that it states all the facts, and if these are insufficient to show legal notice it will be considered that the court acted without jurisdiction. *State v. Waterman*, 79 Iowa 360.

**3. Particular Facts Must Be Stated in Record.** — *Van Auken v. Highway Com'rs*, 27 Mich. 414; *Detroit Sharpshooters' Assoc. v. Highway Com'rs*, 34 Mich. 36; *Nielsen v. Wakefield*, 43 Mich. 434; *Schroeder v. Onkama*, 95 Mich. 25; *People v. Smith*, 7 Hun (N. Y.) 17; *State v. Officer*, 4 Oregon 180; *Cameron v. Wasco County*, 27 Oregon 318. And see *Lattimer v. Tillamook County*, 22 Oregon 291. See also *supra*, this section, *Proof of Notice — Recital of Facts*.

In *Dupont v. Highway Com'rs*, 28 Mich. 362, it was said: "In cases of this nature, where public officers are proceeding summarily to deprive owners of their lands, jurisdictional facts must be distinctly shown, and are not to be made out by a general averment which amounts to no more than a statement that the law has been complied with. The record must show the facts, so that we may see whether the law was complied with or not."

**4. Collateral and Direct Attack.** — In *Missouri* it seems that while a recital that due legal notice had been given is not sufficient in a direct proceeding, such as an appeal, Chicago, etc., R. Co. v. Young, 96 Mo. 39; Matter of Gardner, 41 Mo. App. 589; on a collateral attack such a recital is conclusive of a compliance with the statute, *Daugherty v. Brown*, 91 Mo. 26; *Lingo v. Burford*, 112 Mo. 149. In the last case it was said that the County Court was the tribunal authorized to determine the sufficiency of the proof, and was not required by law to spread on its record the evidence by which it ascertained that notice had been given, this being merely a fact *in pais* to be established by evidence, and its judicial ascertainment of the question must be considered conclusive. See also *Heagy v. Black*, 90 Ind. 534.

**5. Necessity of Viewers.** — *State v. Horn*, 34 Kan. 556; *Hughes v. Milligan*, 42 Kan. 396; *Warren v. Brown*, 31 Neb. 8; *In re Road in Plumcreek Tp.*, 110 Pa. St. 544; *Missouri, etc., R. Co. v. Austin*, (Tex. Civ. App. 1897) 40 S. W. Rep. 35.

But in Tennessee the appointment of a jury of view is regarded as merely a proceeding to bring the facts before the court, which may proceed in disregard of the report or without receiving any. *Justices v. Graham*, 6 Baxt. (Tenn.) 77; *Hawkins v. Justices*, 12 Lea (Tenn.) 351.

**6. Order for View — Description of Road.** — *Hubbard v. Wickliffe*, 2 A. K. Marsh. (Ky.) 503, 1 Litt. (Ky.) 80; *Wood v. Campbell*, 14 B. Mon. (Ky.) 339.

In New Jersey and Pennsylvania, however, the route between the termini is regarded as a matter exclusively for the viewers, and it is consequently error for the court to designate any intermediate point,<sup>1</sup> though in the former state it is held that a road proceeding will not be set aside for such an error on the part of the court.<sup>2</sup>

The Width of the road need not be stated if this is a matter within the discretion of the viewers.<sup>3</sup>

(2) *Purpose of Road.* — Where the statute provided that the roads should be opened only for certain purposes it was held that the order appointing viewers must state one or more of the statutory grounds for allowing the application.<sup>4</sup>

*d. SELECTION AND APPOINTMENT.* — The selection of viewers or similar officers must be in accordance with the statutory provisions,<sup>5</sup> and in *New Jersey* a requirement that in appointing surveyors regard shall be had to the permanent surveyors of highways in the townships wherein the road is to be laid is mandatory.<sup>6</sup> But mere irregularities in the mode of choosing jurors to pass upon the advisability of the road have in *New York* been decided not to affect the validity of the proceedings.<sup>7</sup>

*Effect of Vacancy.* — The question of the effect of a vacancy in the board upon the power of the other members to act is necessarily dependent upon the statutory provisions as to the constitution of the tribunal. It has been held in *New Hampshire* that on the death of one of three commissioners the survivors could not conduct proceedings, there being a provision empowering the court to fill the vacancy.<sup>8</sup> But where viewers are appointed by a court which retains supervision over them, it seems that the court may fill vacancies occurring before action by the viewers.<sup>9</sup>

*c. WHO MAY ACT* — (1) *Petitioners.* — It has been held that petitioners for the road are disqualified to act as commissioners or viewers in the matter of laying out the road.<sup>10</sup> And petitioners have been decided not to be within

1. *New Jersey and Pennsylvania Rule.* — Matter of Public Road in Middlesex, etc., Counties, 4 N. J. L. 34; Sadsbury Tp. Roads, 147 Pa. St. 471, 29 W. N. C. (Pa.) 481; McConnell's Mill Road, 32 Pa. St. 285; Catharine Tp. Road, 76 Pa. St. 189.

2. *Hampton v. Poland*, 50 N. J. L. 367.

3. *Width of Road.* — Beigh's Road, 23 Pa. St. 302; Boston, etc., R. Corp. v. Lincoln, 13 R. I. 705.

4. *Statement of Purpose of Road.* — *Abney v. Barnett*, 1 Bibb (Ky.) 557; *Fletcher v. Fugate*, 3 J. J. Marsh. (Ky.) 631; *Nischen v. Hawes*, 15 Ky. L. Rep. 40, (Ky. 1893) 21 S. W. Rep. 1049, in which cases it was held that since the statute provides for opening roads only for convenience of travelers to the county court house, warehouse, ferry, etc., the order must state for which one of these purposes the road was allowed.

As to Necessity of Naming the Time and Place of action to be taken under the order, see *infra*, this subsection, *Time and Place of Action*.

5. *Selection of Viewers.* — *Jonestown Road*, 1 P. & W. (Pa.) 243, where it was held that if the statute required the court to appoint six viewers, a practice of appointing twelve viewers, from whom the parties were allowed to strike six, was erroneous.

6. *New Jersey Practice.* — *Conover v. Bird*, 56 N. J. L. 228; *State v. Bergen*, 21 N. J. L. 342; *Parrell v. State*, 30 N. J. L. 530.

7. *Irregularities in Choosing Jurors.* — The statute required the clerk to deposit in a box

certain names and to draw therefrom twelve names, these to constitute the jury, and it was held that any error in the preparation of the box by improperly including or excluding names, if not depriving persons interested of any substantial right, did not justify a reversal of the proceedings. *People v. Potter*, 36 Hun (N. Y.) 181; *Buckley v. Drake*, 41 Hun (N. Y.) 384; *People v. Dolge*, 45 Hun (N. Y.) 310, affirmed 110 N. Y. 680.

8. *Survivors Cannot Conduct Proceedings.* — *Palmer v. Conway*, 22 N. H. 144, where it was held that a statute providing that "all words purporting to give a joint authority to three or more public officers shall be construed as giving such authority to a majority of them" applied to a majority of the full board only, and was not applicable to a case of vacancy.

In *Mitchell v. Holderness*, 34 N. H. 209, and *Wentworth v. Farmington*, 49 N. H. 119, it was held that the remaining members of the board could not act although there was nothing left to do except to make the report. Compare *People v. Syracuse*, 63 N. Y. 291, where it was held that upon the death of a commissioner appointed by a special act, the survivors could exercise the powers if no provision existed for filling the vacancy.

9. *Vacancy Filled by Court.* — *Road in Little Britain*, 27 Pa. St. 69.

10. *Disqualification of Petitioners.* — *Public Road*, 5 Harr. (Del.) 242; *Road in Radnor*, 5 Binn. (Pa.) 612; *May Town, etc., Road*, 4 Yeates (Pa.) 479; *Road in Green Tp.*, 129 Pa.



statutory requirements of "disinterested" <sup>1</sup> or "indifferent" men.<sup>2</sup> But it has been decided in *New York*, under a statute requiring jurors "who are not interested in the lands" through which the road is to be laid out to certify to its necessity, that an applicant for a highway may act as such juror.<sup>3</sup> And a judgment of a commissioners' court laying out a road has been held not to be void because petitioners were appointed on the jury of view, the statute not prohibiting their appointment and the disqualification of jurors not usually invalidating the judgment based on their verdict.<sup>4</sup> Nor does the appointment of petitioners as viewers affect the validity of the proceedings when the viewers act merely in an advisory capacity to the county commissioners, who may disregard their action.<sup>5</sup>

(2) *Relationship or Affinity*. — That one of the viewers was a brother-in-law of one of the petitioners for the road is sufficient to render the report illegal.<sup>6</sup> And the uncle of the petitioner has likewise been held to be disqualified under a statute requiring the appointment of "disinterested" persons.<sup>7</sup> Likewise the brother-in-law<sup>8</sup> and the father-in-law of a landowner<sup>9</sup> have been held to be disqualified. But relationship to one who, while active in urging the proceedings, is not directly interested as petitioner or adjoining owner,<sup>10</sup> or to the trustees of a church which owns land which will be taken for the highway,<sup>11</sup> has been held not to disqualify. The fact that two of the viewers are related is also immaterial,<sup>12</sup> and an official charged with the duty of drawing the jurors is not disqualified by the fact that his brother signed the petition.<sup>13</sup>

(3) *Taxpayers*. — The fact that one is a taxpayer of the town which will contribute to the construction and maintenance of the proposed highway has been held not to disqualify him to act;<sup>14</sup> but the contrary has been

St. 527; Ohio, etc., Tp. Road, 166 Pa. St. 132; Delmar Tp. Road, 13 Pa. Co. Ct. 505. But see *White v. Coleman*, 6 Gratt. (Va.) 138.

**As Against Collateral Attack**. — The fact that one of the acting commissioners was one of the petitioners, and interested in establishing the road, will not render the proceedings void. *Carroll County v. Justice*, 133 Ind. 89, 36 Am. St. Rep. 528.

1. *Epler v. Niman*, 5 Ind. 459; *Thompson v. Multnomah County*, 2 Oregon 34; *Williams v. Mitchell*, 49 Wis. 284.

2. *Anthony v. South Kingstown*, 13 R. I. 229.

3. **New York Rule**. — *People v. Dains*, 38 Hun (N. Y.) 43; *Buckley v. Drake*, 41 Hun (N. Y.) 384. Compare *People v. Potter*, 36 Hun (N. Y.) 181.

4. **Judgment Not Void**. — *Vogt v. Bexar County*, 16 Tex. Civ. App. 567.

5. **Viewers in Advisory Capacity**. — *Crowley v. Gallatin County*, 14 Mont. 292.

6. **Relationship or Affinity**. — *Phillips v. Tucker*, 3 Met. (Ky.) 69; *Road in Hellam*, 6 York Leg. Rec. (Pa.) 149. And see *Hilltown Road*, 18 Pa. St. 233.

7. *Clifford v. York County*, 59 Me. 262. But see *Sadsbury Road*, 9 Pa. Co. Ct. 521.

But in *Massachusetts* and *Vermont*, it seems, relationship to a petitioner does not disqualify one from acting. *Wilbraham v. Hampden County*, 11 Pick. (Mass.) 322; *Chase v. Rutland*, 47 Vt. 393.

8. **Brother-in-law of Landowner**. — *Taylor v. Worcester County*, 105 Mass. 225. But see *Matter of Ogden St.*, 63 Hun (N. Y.) 188.

9. **Father-in-law of Landowner**. — *Bradley v. Frankfort*, 99 Ind. 417.

10. **Relationship to One Not Directly Interested**. — *Road in Lower Windsor*, 29 Pa. St. 18.

11. *People v. Cline*, 23 Barb. (N. Y.) 197.

12. **Relationship of Viewers**. — *Crowley v. Gallatin County*, 14 Mont. 292.

13. **Official Drawing Names**. — *People v. Dains*, 38 Hun (N. Y.) 43.

**Statutory Number Competent**. — Where the statute required twelve freeholders to certify to the necessity and propriety of the road, but twenty actually united in the certificate, the fact that five of these twenty were "of kin to the owners of the land" within the *New York* statute was held not to vitiate the certificate. *Highway Com'rs v. Judges*, 7 Wend. (N. Y.) 264.

14. **Taxpayers**. — *Thompson v. Love*, 42 Ohio St. 61; *Gray v. Middletown*, 56 Vt. 53.

In *Massachusetts* it was decided that the fact that a county commissioner was a taxable inhabitant of a town through which a contemplated road was to pass did not prevent him from acting as such commissioner in proceedings to lay out the road. *Wilbraham v. Hampden County*, 11 Pick. (Mass.) 322; *Danvers v. Essex County*, 2 Met. (Mass.) 186. The law has, however, since then been changed by statute. *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513.

**Statutory Provision**. — It was decided in *New Jersey* that a statutory provision that the officers to be appointed to determine the question of laying out a road should be residents of the township through which the road was to run was not impliedly repealed or in any way amended by a subsequent act which made the township liable for compensation to landowners, though this would involve an interest on the part of such officers as taxpayers in the laying out of the road. *Parsell v. State*, 30 N. J. L. 530, *disapproving State v. Atkinson*, 27 N. J. L. 420.

decided in *New Hampshire*.<sup>1</sup>

(4) *Freeholders*. — One having a remainder interest after a life estate in land is a freeholder within a statute requiring viewers or jurors to be freeholders,<sup>2</sup> as is one whose estate is liable to be divested by the execution of a power of sale.<sup>3</sup>

(5) *Owners of Land Affected*. — The statute sometimes provides that landowners along the proposed highway shall not act.<sup>4</sup> And it has been decided that such a landowner is not a "disinterested" person within the requirement of a statute.<sup>5</sup> Elsewhere it has been held that, apart from statute, such a landowner is not disqualified to act.<sup>6</sup>

(6) *Officers in Previous Proceedings*. — It has been decided that one is not disqualified to act as a viewer or surveyor because he has acted in that capacity in former proceedings involving the same road, which for some reason have failed.<sup>7</sup> And a member of the County Court has been held qualified to confirm a viewers' report made by him and others before he became a member of the court.<sup>8</sup>

(7) *Waiver of Objections*. — The objection that one is disqualified to act as viewer or commissioner must be made promptly or it will be considered as waived.<sup>9</sup> Accordingly it has been held that the objection must be made before the view or location actually takes place;<sup>10</sup> and in other cases it has been decided that the objection cannot be made after the filing of the report or the return.<sup>11</sup>

(8) *Showing in Record*. — It has been held that the record of the proceed-

1. *Taxpayer Disqualified*. — In *New Boston's* Petition, 49 N. H. 328, it was held that a commissioner who was a stockholder in a corporation paying taxes in the town could not act.

*Disqualification as to Part of Proceedings*. — In *Mitchell v. Holderness*, 29 N. H. 523, it was decided that, under a statute providing that a town adjoining that through which the highway should pass might be made to bear a part of the expense of the road, a commissioner residing in such town could act in determining the question whether the road should be laid out, but that, as soon as the question arose whether the adjoining town should contribute, he became disqualified to act further.

2. *Freeholders*. — *Garrett v. Hedges*, (Ky. 1891) 17 S. W. Rep. 871.

3. *People v. Scott*, 8 Hun (N. Y.) 566.

*Incumbrances on real estate* do not affect the qualification of the owner of the land as a freeholder. *Harbaugh Ave.*, 10 Pa. Co. Ct. 440.

4. *Landowners Disqualified*. — *Daggy v. Green*, 12 Ind. 303.

5. *State v. Delesdernier*, 11 Me. 473. See also *Wilson v. Township Board*, 87 Mich. 240.

6. *Landowners Not Disqualified*. — *Webster v. Washington County*, 26 Minn. 220; *Matter of Southern Boulevard*, (Supm. Ct. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 447; *Foot v. Stiles*, 57 N. Y. 399.

*Engineer Assisting Viewers*. — In *Thompson v. Goldthwait*, 132 Ind. 20, it was held that the disqualification of interest did not extend to an engineer whom the statute required to be appointed merely to aid the viewers in the location of the work and in making estimates.

*Majority of Board Disinterested*. — In *Kieckheaff v. Wheeling*, 64 Minn. 547, in determining that the proceeding was not absolutely void on account of the interest of one member as a landowner, the fact that the majority of

the board was disinterested seems to have been considered as important, as well as the fact that on appeal there was a trial *de novo* of the whole proceedings.

7. *Officers in Previous Proceedings*. — *Fulton v. Cummings*, 132 Ind. 453; *State v. Bergen*, 24 N. J. L. 548. And see *Road in Chartiers Tp.*, 34 Pa. St. 413. Compare *Locke v. Highway Com'r*, 107 Mich. 631.

8. *Viewer Becoming Member of Court*. — *Galbraith v. Littlech*, 73 Ill. 209.

9. *Waiver by Failure to Make Objection*. — *Road in Kingston*, 5 Kulp (Pa.) 235; *Road in Hazle*, 6 Kulp (Pa.) 463; *Williams v. Mitchell*, 49 Wis. 284; *State v. Nelson*, 57 Wis. 147.

In *Danvers v. Essex County*, 2 Met. (Mass.) 185, however, it was determined that where the meeting of the commissioners to view the route was adjourned without any proceedings having taken place, an objection to the competency of the commissioner was made in time if made at the opening of the hearing on the second day of the adjourned meeting.

10. *Kentucky*. — *Garrett v. Hedges*, (Ky. 1891) 17 S. W. Rep. 871.

*Massachusetts*. — *Hallock v. Franklin County*, 2 Met. (Mass.) 558; *Ipswich v. Essex County*, 10 Pick. (Mass.) 519.

*New Hampshire*. — *Towns v. Stoddard*, 30 N. H. 23.

*Pennsylvania*. — *Road in Limerick Tp.*, 16 Pa. Co. Ct. 567.

*West Virginia*. — *Doddridge County v. Stout*, 9 W. Va. 703.

11. *Objection After Report or Return*. — *State v. Bergen*, 24 N. J. L. 548; *Road in Whitemarsh*, 7 Montg. Co. Rep. (Pa.) 161; *Road in Lower Saucon*, 1 Northam. Co. Rep. (Pa.) 41; *Road in Upper Leacock*, 8 Lanc. L. Rev. (Pa.) 76; *Millcreek Road*, 9 Pa. Co. Ct. 592; *Road in Allen Tp.*, 18 Pa. St. 463; *Hilltown Road*, 18 Pa. St. 233.



ings must show that the viewers were found to possess the statutory qualifications.<sup>1</sup> But a different view apparently is involved in the decision of another court that, unless the contrary appears, the viewers will be presumed to have the statutory qualifications.<sup>2</sup>

*f. NUMBER OF OFFICIALS WHO MUST ACT.* — The general rule that if several persons are authorized to exercise powers of a public nature all must convene and deliberate, but the majority may decide, applies, in the absence of statute, to the case of persons intrusted with the laying out of a road.<sup>3</sup> Generally, however, the matter is regulated by statutory provisions, as when it is provided that words importing joint authority to three or more persons shall be construed as giving authority to the majority of such persons, and such a statute will apply to road commissioners or viewers.<sup>4</sup>

*Under a New Jersey Statute* providing that the highway shall be laid out by six surveyors appointed by the court, all of whom must have notice and a majority of whom may act, it was decided that all must have an opportunity to act, and if one is excluded by the other five the proceedings will be void,<sup>5</sup> and that the record of the proceedings must show that notice was duly served on all.<sup>6</sup>

*And a New York Statute* providing that two highway commissioners of a town may make an order, provided the order shows that all the commissioners met and deliberated or were notified to attend the meeting, was held to be mandatory, so as to render an order made by two out of three commissioners absolutely void, if it did not show that the third commissioner participated in their deliberations or was notified to do so.<sup>7</sup>

**1. Showing as to Qualifications.** — *Northern Pac. Terminal Co. v. Portland*, 14 Oregon 24, where it was determined that the facts showing the qualifications must be recited in detail.

*In Crowley v. Gallatin County*, 14 Mont. 292, however, it was held that the recital in a resolution of county commissioners opening a road, that in accordance with their order appointing persons possessing the statutory qualifications as viewers the road was ordered to be opened, was a sufficient showing in the record that the viewers possessed these qualifications.

**2. Presumption of Qualifications.** — *Road from App's Tavern*, 17 S. & R. (Pa.) 388.

**3. Majority May Decide After Deliberation by All** — *Illinois*. — *Louk v. Woods*, 15 Ill. 256; *Galbraith v. Littleich*, 73 Ill. 209.

*Massachusetts*. — *Com. v. Ipswich*, 2 Pick. (Mass.) 70.

*New Hampshire*. — *Wentworth v. Farmington*, 49 N. H. 119.

*New York*. — *Babcock v. Lamb*, 1 Cow. (N. Y.) 238.

*Ohio*. — *Matter of Wells County Road*, 7 Ohio St. 16.

*Pennsylvania*. — *Road and Bridge Viewers*, 8 Pa. Co. Ct. 557; *Paradise Road*, 29 Pa. St. 20; *State Road in Lehigh, etc., Counties*, 60 Pa. St. 330; *Turnpike Road Case*, 5 Binn. (Pa.) 481; *In re Plains Tp.*, 7 Kulp (Pa.) 234.

See also *Smith v. New Haven*, 59 Conn. 203.

**Majority of Selectmen.** — It has been decided that when a board of selectmen are authorized to lay out a road, they may lawfully perform this duty by a major part of the whole number, such a body being generally authorized and intended to act by majorities. *Jones v. Andover*, 9 Pick. (Mass.) 146; *Dartmouth v. Bristol County*, 153 Mass. 12. See also *Crommett v. Pearson*, 18 Me. 344.

And the same effect was produced by statu-

tory provision that a majority of the selectmen should be competent to act in all cases. *Hall v. Manchester*, 39 N. H. 295.

**4. Statutory Provision** — *Indiana*. — *Hays v. Parrish*, 52 Ind. 132; *Scraper v. Piper*, 59 Ind. 158; *Bronnenburg v. O'Bryant*, 139 Ind. 17.

*Maine*. — *Acton v. York County*, 77 Me. 128.

*New Jersey*. — *Eatontown Tp. v. Wolley*, 49 N. J. L. 386.

*Oregon*. — *Beekman v. Jackson County*, 18 Oregon 283.

*Wisconsin*. — *State v. James*, 4 Wis. 408.

**Presumption of Validity.** — And where an order laying out the road has been made upon a report signed by two of the three viewers, it will be presumed, in the absence of anything to show the contrary, that the third viewer was present and joined in the deliberations. *Louk v. Woods*, 15 Ill. 256; *Galbraith v. Littleich*, 73 Ill. 209.

**5. New Jersey Statute.** — *State v. Shreve*, 4 N. J. L. 337. See also *Matter of Highway*, 16 N. J. L. 391.

**6. State v. Burnet**, 14 N. J. L. 385; *State v. Van Geison*, 15 N. J. L. 339; *Griscom v. Gilmore*, 15 N. J. L. 475; *Ex p. Shough*, 16 N. J. L. 264.

**7. New York Statute.** — *Fitch v. Highway Com'rs*, 22 Wend. (N. Y.) 132; *People v. Hynds*, 30 N. Y. 470, *affirming* 27 Barb. (N. Y.) 94; *People v. Williams*, 36 N. Y. 441; *Simmons v. Sines*, 4 Abb. App. Dec. (N. Y.) 246; *Christy v. Newton*, 60 Barb. (N. Y.) 332; *Chapman v. Swan*, 65 Barb. (N. Y.) 210; *Stewart v. Wallis*, 30 Barb. (N. Y.) 344.

**The Survey**, however, was held to be a mere ministerial act not requiring the presence of all the commissioners, it being sufficient if all the commissioners met and viewed the proposed route and made an order laying out the highway. *Marble v. Whithey*, 28 N. Y. 297.

**If a Disqualified Person Acts on a jury of**



Under a Pennsylvania Statute requiring the action to be by five of the six viewers, and the report to be signed by four of such five, it is sufficient if the record shows or satisfactory proof is otherwise given that the view was by five of the viewers,<sup>1</sup> and the fact that one who does not act is disqualified does not affect the proceedings.<sup>2</sup> But if one disqualified joins with the other five in the view, the proceeding is invalid.<sup>3</sup>

*g. OATH TO BE TAKEN* — (1) *In General*. — Where the statute prescribes an oath to be taken by viewers, jurors, or commissioners before acting, a failure to take such oath will render the proceedings invalid, at least on direct attack;<sup>4</sup> but a statutory requirement that the report be under oath does not render it necessary that the commissioners be sworn before entering upon their duties.<sup>5</sup> Where the form of the oath is prescribed by statute, it must be substantially followed,<sup>6</sup> though a slight variance will be immaterial.<sup>7</sup> The oath taken by viewers need not be subscribed by them, unless this is expressly required by statute.<sup>8</sup>

(2) *Waiver of Defects*. — It has been held that the failure to take the statutory oath, or defects therein, may be waived by proceeding with the hearing

view, the proceedings are invalid though the others constitute a number equal to that required by the statute to join in such action. *Tiffany v. Gifford*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 43. See to the same effect *Cambria St.*, 75 Pa. St. 357.

1. *Pennsylvania Statute*. — *New Hanover Road*, 18 Pa. St. 220; *Road in Little Britain*, 27 Pa. St. 69; *Road from Cully's Fishery*, 13 S. & R. (Pa.) 25; *Road to Ewing's Mill*, 32 Pa. St. 282; *Paradise Road*, 29 Pa. St. 20.

2. *Disqualification of Viewer*. — *Paschall St.*, 81 Pa. St. 118.

3. *Cambria St.*, 75 Pa. St. 357.

4. *Necessity of Oath* — *Alabama*. — *Keenan v. Commissioners' Ct.*, 26 Ala. 568.

*Georgia*. — *Frith v. Justices*, 30 Ga. 723.

*Kentucky*. — *Grimes v. Doyle, Sneed* (Ky.) 58; *Daveiss v. County Ct.*, 1 Bibb (Ky.) 514.

*Massachusetts*. — *Com. v. Coombs*, 2 Mass. 489.

*Minnesota*. — *State v. McLeod County*, 27 Minn. 90.

*New Jersey*. — *Fisher v. Allen*, 8 N. J. L. 301; *State v. Barnes*, 13 N. J. L. 268; *Hoagland v. Culvert*, 20 N. J. L. 387; *State v. Davis*, 13 N. J. L. 10; *Matter of Public Road in Middlesex, etc., Counties*, 4 N. J. L. 455; *State v. Lawrence*, 5 N. J. L. 981; *Matter of Highway*, 16 N. J. L. 391.

*Pennsylvania*. — *Bryson's Road*, 2 P. & W. (Pa.) 207; *Matter of Road from Morrison's Lane, etc.*, 3 S. & R. (Pa.) 210; *Broad St. Road Case*, 7 S. & R. (Pa.) 444; *Cambria St.*, 75 Pa. St. 357; *Pleasant St.*, 5 Luz. Leg. Reg. (Pa.) 221; *Road in Butler*, 6 Kulp (Pa.) 443.

*Tennessee*. — *Douglass v. Rawlins*, 4 Hayw. (Tenn.) 111.

*Texas*. — *Davidson v. State*, 16 Tex. App. 336.

*Virginia*. — *Fisher v. Smith*, 5 Leigh (Va.) 611.

But in *Woolsey v. Hamilton County*, 32 Iowa 130, it was decided that the fact that the oath was administered by an official who had no power to administer oaths did not affect the validity of the proceedings on certiorari.

*Constitutional Requirement as to Public Officers*. — It was decided that persons who were

especially appointed by agreement as county commissioners to act upon a single petition for a highway were to be deemed "public officers" within a constitutional requirement that all public officers take a certain prescribed oath. *Wentworth v. Farmington*, 51 N. H. 128.

5. *Report under Oath*. — *Sutherland v. Holmes*, 78 Mo. 399; *Warren v. Gibson*, 40 Mo. App. 469.

6. *Substantial Compliance with Statute Necessary*. — It was decided that where the statute required the viewers to swear to perform the duties of the office "impartially and according to the best of their judgment," an oath "faithfully to discharge their duties" was insufficient, *Cambria St.*, 75 Pa. St. 357; *Nicetown Lane*, 32 Leg. Int. (Pa.) 28; as was an oath to perform their duties with "fidelity," *Jefferson Tp. Road*, 2 Lack. Leg. N. (Pa.) 328. To the same effect, as to the necessity of incorporating in the oath the word "impartially" if so provided by the statute, see *State v. McLeod County*, 27 Minn. 90.

*Limitation of Statutory Duties*. — Where the officer was chosen as such for all the townships in the county, and by statute his duties were not limited to a particular township, the oath was held to be ineffective if the statutory form was so changed as to limit the oath to his duties in that particular town. *State v. Davis*, 13 N. J. L. 10; *State v. Ayres*, 15 N. J. L. 479; *State v. Hart*, 17 N. J. L. 185.

7. *Slight Variance Immaterial*. — Where the statute provided that the oath should be in the form, "I do solemnly and sincerely promise and affirm," it was held that an oath in the form, "I do solemnly and sincerely declare and affirm," was sufficient. *Bassett v. Den*, 17 N. J. L. 432. And see *State v. Shreve*, 4 N. J. L. 337.

Where the Warrant to the locating committee particularly described their whole duty it was held that an oath "faithfully and impartially to perform the service to which" they were appointed, or "faithfully and impartially to discharge the trust reposed in" them, was sufficient. *Com. v. Westborough*, 3 Mass. 406.

8. *Subscribing Oath*. — *Hays v. Parrish*, 52 Ind. 132.

with knowledge of the defects and failing to make the objection.<sup>1</sup>

(3) *Showing in Record.* — The taking of the statutory oath should be shown by the record.<sup>2</sup> By some courts it has been decided that the showing is sufficient if it is stated that the viewers or commissioners were sworn,<sup>3</sup> or sworn according to law,<sup>4</sup> while in other jurisdictions it has been held that a recital that the viewers or commissioners were duly sworn before acting, without stating the particular form of the oath, was insufficient.<sup>5</sup>

4. *TIME AND PLACE OF ACTION.* — The failure of the order for view to comply with the statutory requirement that it shall name the time and place of the action to be taken thereunder has been stated to be a radical error avoiding the whole proceeding,<sup>6</sup> and the meeting or other action of the viewers or commissioners must be at the time and place named in the order.<sup>7</sup> If the order is made returnable on a certain day, any proceedings by the viewers after that day, without notice to persons interested, are invalid.<sup>8</sup>

5. *MODE OF PROCEDURE.* — Common-law rules in regard to the character of evidence admissible have been decided not to apply in the case of proceedings before commissioners or viewers,<sup>9</sup> but in *New Hampshire* the rule seems to be otherwise.<sup>10</sup> They cannot make a special finding of the facts and submit the questions of law arising thereon to the court.<sup>11</sup> The viewers must actually go upon the land and lay and mark it out,<sup>12</sup> but a statutory requirement as to

1. *Waiver of Defects.* — *Raymond v. Cumberland County*, 63 Me. 110; *Gilford's Petition*, 25 N. H. 124; *Wentworth v. Farmington*, 51 N. H. 128. And see *Woolsey v. Hamilton County*, 32 Iowa 130.

*Objection on Appeal.* — It was held that where from a County Court judgment based on the report of the viewers an appeal was taken to the Circuit Court, where there was a trial *de novo*, and the facts were there fully investigated by the introduction of witnesses, the failure to swear the viewers was not ground for objection on appeal to the Supreme Court. *Patton v. Clark*, 9 Yerg. (Tenn.) 268, *distinguishing* *Douglass v. Rawlins*, 4 Hayw. (Tenn.) 111.

*Collateral Attack.* — It has also been held that if such defects are not made ground for direct attack they cannot be set up in a collateral attack on the proceedings. *Henline v. People*, 81 Ill. 269; *Hankins v. Calloway*, 88 Ill. 155.

2. *Showing in Record.* — *Daveiss v. County Ct.*, 1 Bibb (Ky.) 514; *Elliot v. Lewis*, 1 A. K. Marsh. (Ky.) 453; *Polland v. Ferguson*, 1 Litt. (Ky.) 196; *Breckinridge v. Ward*, 1 T. B. Mon. (Ky.) 57; *State v. Hutchinson*, 10 N. J. L. 242; *State v. Green*, 15 N. J. L. 88; *Matter of Road from Morrison's Lane, etc.*, 3 S. & R. (Pa.) 210, and cases cited in next two notes. *Contra*, *Sneed v. Falls County*, 91 Tex. 168; *Galveston, etc.*, R. Co. v. Baudat, 18 Tex. Civ. App. 595.

3. *Recital of Swearing Sufficient.* — *Bronnenburg v. O'Bryant*, 139 Ind. 17; *Wood v. Campbell*, 14 B. Mon. (Ky.) 339; *In re Road in East Donegal Tp.*, 90 Pa. St. 190.

4. *Paschall St.*, 81 Pa. St. 118; *Wayne Tp. Road*, 33 Leg. Int. (Pa.) 322.

*Record Showing Departure from Prescribed Form.* — But where the statute required the viewers to be sworn to perform their duties "impartially and according to the best of their judgment" a statement in the record that they had been "sworn or affirmed to the faithful discharge of their duties" showed that the

oath was insufficient. *Cambria St.*, 75 Pa. St. 357.

5. *Statement of Form of Oath Necessary.* — *Kee-nan v. Commissioners' Ct.*, 26 Ala. 568, apparently *overruling* *Long v. Commissioners' Ct.*, 18 Ala. 482, 52 Am. Dec. 230; *Crossett v. Owens*, 110 Ill. 378.

6. *Failure to Fix Time and Place in Order.* — *Matter of Johnson*, 49 N. J. L. 381; *Wharton v. Sorden*, 59 N. J. L. 356. But see *Larson v. Fitzgerald*, 87 Iowa 402.

7. *Order Must Be Complied With.* — *Roberts v. Williams*, 13 Ark. 355; *Smith v. Highway Com'rs*, 150 Ill. 385; *Hobbs v. Tipton County*, 103 Ind. 575; *State v. Conover*, 7 N. J. L. 203; *Wharton v. Sorden*, 59 N. J. L. 356; *State v. Scott*, 9 N. J. L. 17.

8. *Action After Return Day.* — *Metzler, etc.*, Road, 62 Pa. St. 151; *Road in Manchester Tp.*, 15 Pa. Co. Ct. 623; *Road in Stroud Tp.*, 6 Pa. Dist. 634; *Road in Fairview*, 7 Kulp (Pa.) 232. And see *Windham, Petitioner*, 32 Me. 452; *Anderson v. Pemberton*, 89 Mo. 61.

*The Statute* may, of course, provide for proceedings on a day other than that specified in the order. *Vogle v. Bridges*, (Ky. 1893) 22 S. W. Rep. 82.

*Power to Change Time.* — It was decided in *Indiana* that where a statute required the board of county commissioners to fix the time for the meeting of the viewers, the board could, after fixing the time, thereafter change it. *Black v. Thomson*, 107 Ind. 162.

9. *Admissibility of Evidence.* — *Wethersfield v. Humphrey*, 20 Conn. 226; *Bristol v. Branford*, 42 Conn. 222. See also *Matter of Pugh*, (County Ct.) 22 Misc. (N. Y.) 43; *Commissioners' Ct. v. Bowie*, 34 Ala. 461.

10. *Kennett's Petition*, 24 N. H. 139; *Watts v. Derry*, 22 N. H. 498; *Goodwin v. Milton*, 25 N. H. 458; *Landaff's Petition*, 34 N. H. 163.

11. *Special Findings.* — *Germantown, etc.*, Turnpike Road Co.'s Case, 4 Rawle (Pa.) 191; *Point-No-Point Road Case*, 2 S. & R. (Pa.) 277.

12. *Route to Be Actually Laid Out.* — *Abbott v. Johnson County*, 5 Kan. App. 162; *Hughes v.*

placing stakes or other monuments to mark the way is directory merely, and a failure to do so will not affect the proceedings if the route is otherwise indicated.<sup>1</sup>

*j. IMPROPER CONDUCT* — (1) *Entertainment by Parties Interested*. — In the absence of any intentional impropriety or resulting prejudice, the fact that the viewers or commissioners are entertained by persons interested in the proposed highway will not invalidate their proceedings,<sup>2</sup> but such entertainment, if forbidden by rule of court, will have that effect,<sup>3</sup> and in *Pennsylvania* it is stated that a different rule would apply in the case of highways in cities.<sup>4</sup> In *New Hampshire* it was held that the fact that the petitioners furnished spirituous liquors to the commissioners was sufficient ground for setting aside the report, without inquiry as to the effect of such liquors.<sup>5</sup> That the meeting is at the house of one of the applicants does not necessarily render their proceedings void.<sup>6</sup>

(2) *Ex Parte Communications*. — Communications with the officials by one of the parties interested, in the absence of the others, has been held sufficient ground for setting aside their proceedings,<sup>7</sup> though a different view is taken when the communication was merely to urge a speedy decision.<sup>8</sup>

That the Report Was Drawn by the Attorney for the Petitioners will not render it invalid.<sup>9</sup>

(3) *Illegal Fees*. — The payment of illegal fees to surveyors by interested parties was held ground for setting aside their return.<sup>10</sup>

(4) *Time of Objection*. — An objection on the ground of improper conduct must be promptly taken.<sup>11</sup>

*k. ADJOURNMENT*. — The special tribunal may adjourn from time to time until the business is completed,<sup>12</sup> provided it does not extend the adjournment so as to be unable to report at the time fixed.<sup>13</sup>

*l. CHANGE OF DECISION*. — It has been decided that after the tribunal has decided upon the application, and the members have separated, the decision cannot be altered,<sup>14</sup> but a contrary view has also been taken.<sup>15</sup>

*m. REVIEWERS*. — In *Indiana* and *Pennsylvania* provision is made for the

Sellers, 34 Ind. 337; *Ward v. State*, 12 Lea (Tenn.) 469.

1. *Placing Monuments*. — *Gadbraith v. Littleh*, 73 Ill. 209; *McCollister v. Shuey*, 24 Iowa 362; *Howland v. Penobscot County*, 49 Me. 143.

2. *Entertainment* — *Connecticut*. — *Beardsley v. Washington*, 39 Conn. 265; *Greene v. East Haddam*, 51 Conn. 547.

*Massachusetts*. — *Blake v. Norfolk County*, 114 Mass. 583.

*New Jersey*. — *State v. Bergen*, 21 N. J. L. 342; *State v. Justice*, 24 N. J. L. 413; *State v. Reckless*, 38 N. J. L. 393.

*Pennsylvania*. — *In re Road in Drumore Tp.*, (Pa. 1886) 7 Atl. Rep. 193; *Jefferson Tp. Road*, 2 Lack. Leg. N. (Pa.) 287; *Road in East Earl*, 10 Lanc. L. Rev. (Pa.) 340; *Forks Tp. Road*, 1 Northam. Co. Rep. (Pa.) 223; *East Franklin Tp. Road*, 8 Pa. Co. Ct. 590; *Matter of Road in Plymouth Tp.*, 5 Rawle (Pa.) 150. See also *Londonderry Tp. Road*, 6 Pa. Co. Ct. 391; *North Branch Road*, 8 Pa. Co. Ct. 284; *Blakely Road*, 8 Pa. Co. Ct. 592.

3. *Forbidden by Rule of Court*. — *In re Road in Drumore Tp.*, (Pa. 1886) 7 Atl. Rep. 193; *Road in Lykens Tp.*, 19 Pa. Co. Ct. 145; *Sadsbury Road*, 9 Pa. Co. Ct. 521.

4. *Highways in Cities*. — *In re Road in Drumore Tp.*, (Pa. 1886) 7 Atl. Rep. 193; *Magnolia St.*, 8 Phila. (Pa.) 468.

5. *Furnishing of Spirituous Liquors*. — *Petition of Newport Highway*, 48 N. H. 433.

6. *Meeting at Applicant's House*. — *Dunkley v. Washington*, 39 Conn. 265; *Oxford Tp. v. Brands*, 45 N. J. L. 332.

7. *Ex Parte Communications*. — *Harris v. Woodstock*, 27 Conn. 567; *Peavey v. Wolfborough*, 37 N. H. 286.

8. *Blake v. Norfolk County*, 114 Mass. 583.

9. *Road in Lower Macungie Tp.*, 26 Pa. St. 221.

10. *Payment of Illegal Fees*. — *State v. White*, 35 N. J. L. 203; *State v. Reckless*, 38 N. J. L. 393.

11. *Time of Taking Objection*. — *Williams v. Stonington*, 49 Conn. 229; *Limming v. Barnett*, 134 Ind. 332; *Re Moreland Tp. Road*, 13 Montg. Co. Rep. (Pa.) 71.

12. *Adjournment*. — *Goodwin v. Wethersfield*, 43 Conn. 437; *Allison v. Highway Com'rs*, 54 Ill. 170; *Wood v. Highway Com'rs*, 62 Ill. 391; *Weymouth v. York County*, 86 Me. 391; *Westport v. Bristol County*, 9 Allen (Mass.) 203.

Under a statute authorizing "any number of the six surveyors" to adjourn, it was held that all might adjourn. *State v. Vanbuskirk*, 21 N. J. L. 86.

13. *Butman v. Fowler*, 17 Ohio 101; *Ruhland v. Hazel Green*, 55 Wis. 664.

14. *Change of Decision*. — *Matter of Highway*, 16 N. J. L. 391.

15. *Butman v. Fowler*, 17 Ohio 101.



appointment of a second body of viewers, or "reviewers" as they are called.<sup>1</sup> In the latter state, a statute requires such reviewers to be appointed on a petition filed at or before the next term after the report of the viewers,<sup>2</sup> and in case of a conflict between the report of the viewers and that of the reviewers, either may be adopted by the court.<sup>3</sup>

**Re-review.** — In *Pennsylvania* a third view, or "re-review," is allowed,<sup>4</sup> the report of which the court may or may not adopt in preference to one of the previous reports.<sup>5</sup>

**9. Report or Return** — *a.* IN GENERAL. — The report or return by the viewers, commissioners, or other officers need generally contain only the statements required by the statute, it being presumed that the viewers have properly performed their duty in respect to the matters not referred to.<sup>6</sup> In *New Jersey*, however, it is held that the return must show upon its face a compliance with all the material directions of the statute.<sup>7</sup> In *West Virginia* it is held that the report need not be in any particular form, but that it is sufficient if all the details required by statute are recited in an order of the court made on such report and contained in the court records.<sup>8</sup>

*b.* TIME OF MAKING. — The report or return must be made within the time fixed by the statute<sup>9</sup> unless there is a valid order extending the time.<sup>10</sup> Where a statute provided for a report to the next term of court, it was held that it could not be made at the term at which the viewers were appointed.<sup>11</sup> The failure to report, however, at the appointed time will not terminate the proceedings.<sup>12</sup>

*c.* DESCRIPTION OF HIGHWAY. — The statute generally provides that the report or return shall describe the location of the highway as fixed by the viewers or commissioners, and compliance with such a requirement is absolutely necessary,<sup>13</sup> though small errors and omissions not affecting the cer-

**1. Reviewers.** — *Suits v. Murdock*, 63 Ind. 73; *Doctor v. Hartman*, 74 Ind. 221; *Bowman v. Jobs*, 123 Ind. 44; *Charlotte St.*, 23 Pa. St. 286; *Heidelberg Tp. Road*, 47 Pa. St. 536; *Road in Baldwin Tp.*, 36 Pa. St. 9; *Leet Tp. Road*, 159 Pa. St. 72.

**2. Matter of Public Road in Indiana County**, 51 Pa. St. 296; *Franconia Tp. Road*, 78 Pa. St. 316; *Road in Upper Yoder Tp.*, 129 Pa. St. 640; *In re Road in Cheltenham County*, (Pa. 1888) 13 Atl. Rep. 93; *Church Road*, 5 W. & S. (Pa.) 200.

**3. Conflicting Reports.** — *In re Road in Ralpho Tp.*, (Pa. 1888) 15 Atl. Rep. 725; *Hatfield Tp. Road*, 1 Pa. Dist. 820; *Buckwalter's Road Case*, 3 S. & R. (Pa.) 236; *Bachman's Road*, 1 Watts (Pa.) 400; *Paradise Road*, 29 Pa. St. 20.

**4. Re-review.** — *Road in Upper Yoder Tp.*, 129 Pa. St. 640; *Pomfret St. Road Case*, 2 Rawle (Pa.) 124; *Hellertown Road*, 5 W. & S. (Pa.) 202.

**5. Road in Kingston Tp.**, 134 Pa. St. 409; *In re Road in Ralpho Tp.*, (Pa. 1888) 15 Atl. Rep. 725.

**6. Report or Return.** — *Campbell v. Fogg*, 132 Ind. 1; *Spurgeon v. Bartlett*, 56 Mo. App. 349; *In re Road in South Abington Tp.*, 109 Pa. St. 118; *In re Road in Drumore Tp.*, (Pa. 1886) 7 Atl. Rep. 193.

**7. New Jersey Requirements.** — *State v. Lippincott*, 25 N. J. L. 434; *State v. Yauger*, 29 N. J. L. 384; *State v. Van Geison*, 15 N. J. L. 339; *Griscom v. Gilmore*, 16 N. J. L. 105; *Ex p. Shough*, 16 N. J. L. 264; *Bassett v. Clement*, 17 N. J. L. 166; *State v. Scott*, 9 N. J. L. 17.

**8. West Virginia Requirements.** — *Herron v. Carson*, 26 W. Va. 62.

**9. Time of Return** — *Maine.* — *Cushing v. Gay*, 23 Me. 9; *Parsonsfeld v. Lord*, 23 Me. 511; *Belfast, Appellants*, 53 Me. 431; *Chapman v. York County*, 79 Me. 267.

*Missouri.* — *Rose v. Garrett*, 91 Mo. 65.

*New Jersey.* — *Matter of Highway*, 3 N. J. L. 244; *Martin v. Stillwell*, 50 N. J. L. 530.

*Pennsylvania.* — *Heidelberg Tp. Road*, 47 Pa. St. 536; *Metzler, etc.*, *Road*, 62 Pa. St. 151; *In re Road in Salem Tp.*, 103 Pa. St. 250; *Higgins v. Sharon*, 5 Pa. Super. Ct. 92, 41 W. N. C. (Pa.) 9.

**10. Extension of Time.** — *Matter of Ross Tp. Road*, 5 Pa. Super. Ct. 85; *Sharpless's Petition*, 5 Del. Co. Rep. (Pa.) 196; *In re Knox St.*, 21 Pa. Co. Ct. 583; *Frankstown Tp. Road*, 26 Pa. St. 472; *Chartiers Tp. Road*, 48 Pa. St. 314; *Baldwin, etc.*, *Road*, 3 Grant Cas. (Pa.) 62; *Road in Byberry*, 6 Phila. (Pa.) 384, 24 Leg. Int. (Pa.) 349.

**11. Premature Report.** — *Road in Baldwin Tp.*, 36 Pa. St. 9.

**12. Effect of Failure to Report.** — *Henline v. People*, 81 Ill. 269.

**13. Description of Highway.** — *Shute v. Decker*, 51 Ind. 241; *Campbell v. Fogg*, 132 Ind. 1; *State v. Lippincott*, 25 N. J. L. 434; *Griscom v. Gilmore*, 16 N. J. L. 105; *Ex p. Shough*, 16 N. J. L. 264.

**As to Sufficiency of Particular Descriptions** see *Mossman v. Forrest*, 27 Ind. 233; *McDonald v. Payne*, 114 Ind. 359; *Garrett v. Hedges*, 13 Ky. L. Rep. 647; *Rochester v. Sledge*, 82 Ky. 344, 6 Ky. L. Rep. 235; *Dartmouth v. Bristol County*, 153 Mass. 12; *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *Hallock v. Woolsey*, 23 Wend. (N. Y.) 328.

tainty of the location may be regarded as immaterial.<sup>1</sup> The termini must be fixed with reasonable certainty,<sup>2</sup> and the courses and distances should be given,<sup>3</sup> though courses will be controlled by monuments.<sup>4</sup> A description of the centre line of the road, accompanied by a statement showing its width, is sufficient.<sup>5</sup>

**Width of Highway.** — Where the statute fixes a width, it need not be stated in the report or return<sup>6</sup> unless there is an express requirement to that effect.<sup>7</sup>

**A Variance** from the description in the petition will render the return invalid, but this will be the case only if the variance is substantial.<sup>8</sup>

**Plat or Draft.** — The statute sometimes requires a plat or draft of the road to accompany the return.<sup>9</sup>

*d. REFERENCE TO IMPROVEMENTS.* — In *New Jersey* and *Pennsylvania* the statutes provide that the plat shall make reference to the improvements through which the highway passes. In the former state the word "improvements" was held to refer to inclosed fields, and not to barns and houses,<sup>10</sup> but in the latter state a broader construction is given to the term.<sup>11</sup> It has been held sufficient if there be a reference to the improvements in either the draft or the report, though the statute provides for its incorporation in the draft.<sup>12</sup> The omission to refer to improvements is fatal on certiorari or appeal,<sup>13</sup> though the lower court could refer the report back for the insertion of such reference.<sup>14</sup>

*e. STATEMENT AS TO NECESSITY OF HIGHWAY.* — It has been held that where the statute, in prescribing the essentials of the report, does not expressly require a statement of the necessity or utility of the road, such a statement is unnecessary.<sup>15</sup> A specific requirement of such a statement must,

**A Reference to a Plat** accompanying the report may be sufficient to cure omissions in the description. *Clarke v. South Kingstown*, 18 R. I. 283.

**1. Immaterial Errors.** — *Carr v. Berkley*, 145 Mass. 539; *State v. Schanck*, 9 N. J. L. 107; *Oxford Tp. v. Brands*, 45 N. J. L. 332; *Clarke v. South Kingstown*, 18 R. I. 283.

**2. Termini** — *Kentucky*. — *Craig v. North*, 3 Met. (Ky.) 187.

*New Jersey.* — *State v. Woodruff*, 36 N. J. L. 204; *Ex p. Shough*, 16 N. J. L. 264.

*Pennsylvania.* — *Bean's Road*, 35 Pa. St. 280; *Road in Lower Merion*, 58 Pa. St. 66; *Springfield Road*, 73 Pa. St. 127; *O'Hara Tp. Road*, 152 Pa. St. 319; *Road in Cheltenham*, 3 Montg. Co. Rep. (Pa.) 37; *Road in Windsor*, 10 York Leg. Rec. (Pa.) 185; *Road in Union Tp.*, 17 Pa. Co. Ct. 39.

A description of a terminus as being on a certain road near a certain house or building has been held to be sufficient. *Blakeslee v. Tyler*, 55 Conn. 387; *Vogle v. Bridges*, (Ky. 1893) 22 S. W. Rep. 82. But see *De Long v. Schimmel*, 58 Ind. 64; *State v. Woodruff*, 36 N. J. L. 204; *Ex p. Shough*, 16 N. J. L. 264; *O'Hara Tp. Road*, 152 Pa. St. 319; *Road in Union Tp.*, 17 Pa. Co. Ct. 39.

**3. Courses and Distances.** — *Wood v. Campbell*, 14 B. Mon. (Ky.) 339; *Phillips v. Tucker*, 3 Met. (Ky.) 70; *Craig v. North*, 3 Met. (Ky.) 187; *Tingle v. Tingle*, 12 Bush (Ky.) 161; *State v. Clark*, 1 N. J. L. 261; *Race St.*, 8 Pa. Co. Ct. 95.

**4. Woodman v. Somerset County**, 25 Me. 300; *Knowles's Petition*, 22 N. H. 361.

**5. Description of Centre Line.** — *Tingle v. Tingle*, 12 Bush (Ky.) 161; *People v. Highway Com'rs*, 13 Wend. (N. Y.) 310. Compare *Hopkins v. Crombie*, 4 N. H. 520.

**6. Width of Highway.** — *Campbell v. Fogg*, 132 Ind. 1. Compare *Pennsgrove, etc.*, *Road*, 4 Yeates (Pa.) 372; *Tench v. Abshire*, 90 Va. 768.

**7. Matter of Feeny**, (County Ct.) 20 Misc. (N. Y.) 272. And see *Hayes v. Shackford*, 3 N. H. 10; *Willis v. Sproule*, 13 Kan. 257.

**8. Variance from Petition.** — *McDonald v. Payne*, 114 Ind. 359; *Powell v. Hitchner*, 32 N. J. L. 211; *State v. Burnet*, 14 N. J. L. 385; *North Lebanon Tp. Road*, 3 Pa. Co. Ct. 401; *Road in Cassville*, 4 Pa. Super. Ct. 511.

**9. Plat or Draft.** — As to essentials of the plat or draft, see *Tower v. Pistick*, 55 Ill. 115; *State v. Hulick*, 37 N. J. L. 70; *State v. Miller*, 23 N. J. L. 383; *State v. English*, 22 N. J. L. 291, 713; *Road from App's Tavern*, 17 S. & R. (Pa.) 388; *In re Road in South Abington Tp.*, 109 Pa. St. 118; *Matter of Ross Tp. Road*, 5 Pa. Super. Ct. 85.

**10. Reference to Improvements.** — *State v. Hoping*, 18 N. J. L. 423; *State v. Smith*, 21 N. J. L. 91; *State v. Hulick*, 37 N. J. L. 70.

**11. Leet Tp. Road**, 159 Pa. St. 72, where it is stated that boundary lines are not "improvements" within the statute, but that the term includes fences upon such lines, and buildings and clearings upon the lands inclosed by them.

**12. Schuylkill Falls' Road**, 2 Binn. (Pa.) 250; *Road from Cully's Fishery*, 13 S. & R. (Pa.) 25.

**13. Effect of Omission.** — *State v. Lippincott*, 25 N. J. L. 434; *In re Road in Belle Vernon*, 15 W. N. C. (Pa.) 232; *Leet Tp. Road*, 159 Pa. St. 72; *O'Hara Tp. Road*, 152 Pa. St. 319. Compare *In re Road in Sterrett Tp.*, 114 Pa. St. 127.

**14. In re Road in Springdale Tp.**, 91 Pa. St. 210.

**15. Necessity of Highway.** — *Humboldt County v. Dinsmore*, 75 Cal. 604; *Heagy v. Black*, 90



however, be complied with by a substantial finding to that effect,<sup>1</sup> and in *Michigan* a requirement that the commissioner ascertain the necessity is held to render a statement of such necessity in his report a jurisdictional requisite.<sup>2</sup>

*f. SIGNING OF REPORT.* — The signing of the report by two of the three commissioners, the third being present and consenting, has been held to be sufficient,<sup>3</sup> and it will be presumed, in the absence of anything to show the contrary, that a third viewer who failed to sign the report was nevertheless present and acting with his colleagues.<sup>4</sup>

*g. MODIFICATION AND AMENDMENT.* — As a general rule, in the absence of a statutory provision to the contrary, the report must be approved or disapproved as a whole, the tribunal to which it is made having no power to make changes therein.<sup>5</sup> If the report is defective, it may be recommitted,<sup>6</sup> and there is generally a right of amendment subject to the supervision of the tribunal to which the report is made.<sup>7</sup>

*h. OBJECTIONS.* — The mode of presenting objections to the report or return is purely a question of local custom or statute, and accordingly may take the form of exceptions,<sup>8</sup> a remonstrance,<sup>9</sup> or a caveat.<sup>10</sup> A failure to present them promptly when authorized or called upon to do so will generally

Ind. 534; *Campbell v. Fogg*, 132 Ind. 1; *Limerick*, Petitioner, 18 Me. 183.

**1. Substantial Finding.** — *In re Road in Upper St. Clair Tp.*, (Pa. 1887) 7 Atl. Rep. 772, 11 Atl. Rep. 625.

A statement by the viewers that "after due consideration and diligent inquiry as to necessity of said road" they "are of opinion that the prayer of the petitioners should be granted," and have therefore located and do recommend for public use a certain road, was held to be a substantial finding of the necessity of the road. *In re Road in Sterrett Tp.*, 114 Pa. St. 627.

So in *Pierce v. Southbury*, 29 Conn. 490, it was held that a report stating that the committee found that a certain part of the road prayed for was not required by common convenience and necessity and that that portion should not be laid out, but that they found another portion that "ought to be laid," and they therefore laid it out, sufficiently stated that that portion was required by common convenience and necessity.

**2. Michigan Rule.** — *Truax v. Sterling*, 74 Mich. 160; *Cox v. Highway Com'r*, 83 Mich. 193; *Cowing v. Ripley*, 76 Mich. 650.

**The Kentucky Statute** requiring a statement of the "conveniences or inconveniences" of the proposed road, to the public as well as to individuals, must be complied with. *Daveiss v. County Ct.*, 1 Bibb (Ky.) 514; *Foreman v. Allen*, 2 Bibb (Ky.) 581; *Wood v. Campbell*, 14 B. Mon. (Ky.) 339.

**3. Signing of Report.** — *Vassalborough*, Petitioner, 19 Me. 339. And see *Crommett v. Pearson*, 18 Me. 344.

**4. Galbraith v. Littlech**, 73 Ill. 209.

As to the signature of the report under the *Pennsylvania* statute, see *New Hanover Road*, 18 Pa. St. 220; *Road in Ross Tp.*, 36 Pa. St. 87; *Road from Cully's Fishery*, 13 S. & R. (Pa.) 25; *Road in Middle Creek Tp.*, 9 Pa. St. 69; *Springbrook Road*, 64 Pa. St. 451; *Greenleaf Case*, 4 Whart. (Pa.) 514.

**5. Partial Approval Not Permitted.** — *Dunstan v. Jamestown*, 7 N. Dak. 1; *Catharine Tp. Road*, 76 Pa. St. 189; *In re Public Road in*

*Benzinger Tp.*, 115 Pa. St. 436; *Ohio*, etc., *Tp. Road*, 166 Pa. St. 132; *Cummings v. Kendall County*, 7 Tex. Civ. App. 164. But see *Winston v. Waggoner*, 5 J. J. Marsh. (Ky.) 41; *Bennett v. Greenup County*, 13 Ky. L. Rep. 349; *Peirce v. Somersworth*, 10 N. H. 369; *Patten's Petition*, 16 N. H. 278.

**6. Recommitment** — *Connecticut*. — *Ives v. East Haven*, 48 Conn. 272.

*Indiana*. — *Fulton v. Cummings*, 132 Ind. 453.

*New Hampshire*. — *Peavey v. Wolfborough*, 37 N. H. 287; *Berry v. Hebron*, 38 N. H. 196; *Stinson v. Dunbarton*, 46 N. H. 385; *Underwood v. Bailey*, 58 N. H. 59.

*Pennsylvania*. — *Hilltown Road*, 18 Pa. St. 233; *Beigh's Road*, 23 Pa. St. 302; *Road in Hempfield Tp.*, 122 Pa. St. 439.

*Vermont*. — *Walbridge v. Cabot*, 67 Vt. 114.

**7. Amendment.** — *Vogle v. Bridges*, 15 Ky. L. Rep. 6, (Ky. 1893) 22 S. W. Rep. 82; *Andover v. Essex County*, 5 Gray (Mass.) 393; *Long v. Talley*, 91 Mo. 305; *Hayes v. Shackford*, 3 N. H. 10; *Washington v. Fisher*, 43 N. J. L. 377; *Craig v. Brands*, 46 N. J. L. 521; *Mt. Olive Tp. v. Hunt*, 51 N. J. L. 274.

**8. Exceptions.** — *Road in Stroud Tp.*, 6 Pa. Dist. 634; *Cherrytree Tp. Road*, 10 Pa. Co. Ct. 389; *Road in Collins Tp.*, 36 Pa. St. 85; *O'Hara Tp. Road*, 152 Pa. St. 319.

**9. Remonstrance** — *Indiana*. — *Wilson v. Whitsell*, 24 Ind. 306; *Cummins v. Shields*, 34 Ind. 154; *Butterworth v. Bartlett*, 50 Ind. 537; *Bowers v. Snyder*, 66 Ind. 340; *Peed v. Brenneman*, 72 Ind. 288; *Schmied v. Keeney*, 72 Ind. 309; *Brown v. Stewart*, 86 Ind. 377; *Denny v. Bush*, 95 Ind. 315; *Wells v. Rhodes*, 114 Ind. 467; *Lake Erie*, etc., *R. Co. v. Spidel*, 19 Ind. App. 8.

*Oregon*. — *Vedder v. Marion County*, 28 Oregon 77.

A statement in a remonstrance that the highway would not be of sufficient public utility was held to be insufficient as a denial of such utility, it being a negative pregnant. *Wells v. Rhodes*, 114 Ind. 467.

**10. Caveat.** — *Brands v. Craig*, 49 N. J. L. 185; *State v. Reckless* 38 N. J. L. 393.



involve a waiver of the right to make them.<sup>1</sup>

**10. Order for Establishment** — *a. IN GENERAL.* — An order establishing the highway is generally required by the statute.<sup>2</sup> Technical terminology is not required therein,<sup>3</sup> and it has been decided that an order for the record of the highway is sufficient as an order of establishment.<sup>4</sup> The order need not state that the proposed highway connects with another highway.<sup>5</sup> The statute sometimes provides that the survey of the highway shall be incorporated in the order, but this does not, it seems, require the incorporation of more than a sufficient description of the highway.<sup>6</sup>

*b. DESCRIPTION OF HIGHWAY.* — The order establishing the highway must describe the route thereof with sufficient certainty to enable it to be located,<sup>7</sup> and if the description is insufficient as to a part of the proposed highway it will, it seems, be insufficient as to all.<sup>8</sup> The description may, however, be aided by reference to the application if the latter contains a sufficient description.<sup>9</sup> It is generally sufficient if the proceedings taken as a whole sufficiently indicate the route and termini of the road to enable it to be located without excessive difficulty,<sup>10</sup> and it seems that a reference to a

**1. Waiver of Objections.** — *Thayer v. Burger*, 100 Ind. 262; *Gill v. Scituate*, 100 Mass. 200; *Sullivan v. Lafayette County*, 58 Miss. 790.

**2. Order for Establishment** — *Illinois.* — *Dempsey v. Donnelly*, 58 Ill. 40; *Pool v. Breese*, 114 Ill. 514.

*Iowa.* — *Carey v. Weitgenant*, 52 Iowa 660.

*Michigan.* — *Kruger v. Le Blanc*, 70 Mich. 76.

*Missouri.* — *State v. Cunningham*, 61 Mo. App. 188; *Peed v. Barker*, 1 Mo. App. Rep. 446.

*Montana.* — *Pagel v. Fergus County*, 17 Mont. 586.

*Nebraska.* — *Oyler v. Ross*, 48 Neb. 211.

*New York.* — *Pratt v. People*, 13 Hun (N. Y.) 664.

*Pennsylvania.* — *Road in Bucks County*, 3 Whart. (Pa.) 105.

*Wisconsin.* — *State v. James*, 4 Wis. 408.

**Order Unnecessary.** — It has been held that where the statute did not declare what should constitute the establishment of a road, but provided that no road established should be opened until recorded, the road was established upon the making of the record, though there was no order so declaring, the record showing an adoption of the report of the viewers. *Sumner v. Peebles*, 5 Wash. 471. See also *State v. Dover*, 10 N. H. 394.

So in *Pennsylvania* a formal order to open, which the clerk issues as a matter of course upon the final confirmation of a report, is not necessary to complete the proceedings. *Road Case*, 3 W. & S. (Pa.) 559; *Neeld's Road Case*, 1 Pa. St. 353; *Road to Ewing's Mill*, 32 Pa. St. 282; *Hibberd v. Delaware County*, 1 Pa. Super. Ct. 204.

**3. Sufficiency of Order.** — *Windham v. Cumberland County*, 26 Me. 406.

**4. Order for Record.** — *Larson v. Fitzgerald*, 87 Iowa 402. But see *contra*, *Oyler v. Ross*, 48 Neb. 211.

**5. Connection with Other Highway.** — *Moore v. Roberts*, 64 Wis. 538.

**6. Incorporation of Survey.** — *Tower v. Pitstick*, 55 Ill. 115; *Rousey v. Wood*, 47 Mo. App. 465; *Matter of De Camp*, 19 N. Y. App. Div. 564. Compare *Pratt v. People*, 13 Hun (N. Y.) 664.

**7. Description of Road** — *California.* — *People v. Whitaker*, 101 Cal. 597.

*Massachusetts.* — *Yeamans v. Hampden County*, 16 Gray (Mass.) 36.

*Michigan.* — *Blodgett v. Whaley*, 47 Mich. 469.

*Minnesota.* — *Sonnek v. Minnesota Lake*, 50 Minn. 558.

*Montana.* — *Pagel v. Fergus County*, 17 Mont. 586.

*New York.* — *People v. Diver*, 19 Hun (N. Y.) 263; *Matter of De Camp*, 19 N. Y. App. Div. 564.

*Wisconsin.* — *Moll v. Benckler*, 30 Wis. 584.

**Applications of Rule.** — So it was held that an order laying out a highway from a certain point "running nearly in a northwesterly direction, near where the travel is now seeking to get the best route," to another point named, was void for uncertainty. *Blodgett v. Whaley*, 47 Mich. 469.

And a description of the highway as running on specified lines "as near as practicable" was likewise held insufficient. *Sonnek v. Minnesota Lake*, 50 Minn. 558.

**An Order Fifty Years Old** will not, however, be rejected in a collateral proceeding for indefiniteness in description. *Dominick v. Hill*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 329.

**8. Partial Insufficiency.** — *Barnes v. Fox*, 61 Iowa 18; *Sonnek v. Minnesota Lake*, 50 Minn. 558.

**9. Reference to Application.** — *Ruston v. Grimwood*, 30 Ind. 364; *Satterly v. Winne*, 101 N. Y. 218; *Isham v. Smith*, 21 Wis. 32.

**Location in Part.** — But it was held that such reference was not sufficient when the order was to the effect "that the way prayed for should be located in part." *Danvers v. Essex County*, 2 Met. (Mass.) 185.

**10. Description to Be Gathered from Proceedings as a Whole.** — *California.* — *People v. Whitaker*, 101 Cal. 597.

*Illinois.* — *Todemier v. Aspinwall*, 43 Ill. 401.

*Indiana.* — *State v. Harrison*, 114 Ind. 66; *McDonald v. Payne*, 114 Ind. 359; *Wells v. Rhodes*, 114 Ind. 467.

*Iowa.* — *State v. Schilb*, 47 Iowa 611.

particular plan as showing the route is sufficient.<sup>1</sup>

It is sufficient to state the centre line of the road with accuracy, with a specification of the width on each side thereof,<sup>2</sup> and if it is not stated whether the line named is the centre line or a side line, it will be presumed to be the former,<sup>3</sup> unless such presumption is plainly excluded, as when the line named is a river bank or the boundary of a railroad right of way.<sup>4</sup>

**Statement of Width of Highway.** — It has been held that where the statute does not absolutely fix the width of the highway it must be stated in the order or previous proceedings, and the omission to state it renders the order void.<sup>5</sup> In *Illinois*, however, it is held that an order not specifying the width will be good as against collateral attack,<sup>6</sup> and in *Rhode Island* an order of a town council declaring a highway necessary and appointing a committee to lay it out need not specify the width.<sup>7</sup> It has been held that a reference to the petition which stated the width was a sufficient designation thereof,<sup>8</sup> though such reference was, in another case, held insufficient when it did not appear that the petition stated the width and there was no statutory requirement that it should do so.<sup>9</sup> In *Pennsylvania* the omission of the court to fix the width of the highway on approving the report of the viewers, as provided by the statute, is fatal to the proceedings,<sup>10</sup> and the width cannot be fixed by a general order applicable in all cases not otherwise provided for,<sup>11</sup> nor can it be fixed subsequently, *nunc pro tunc*.<sup>12</sup> Where the statute names a width it is unnecessary to state any width in the order.<sup>13</sup>

**c. STATEMENT OF NECESSITY OF HIGHWAY.** — In the absence of a statutory requirement it is not necessary that the order recite any determination as to the necessity of the highway.<sup>14</sup>

**d. CONDITIONAL ORDER.** — An order making the opening of the highway conditional upon the payment of damages or expenses by the petitioners or

*Maine.* — *Selectmen v. Oxford County*, 86 Me. 185.

*Massachusetts.* — *Henshaw v. Hunting*, 1 Gray (Mass.) 203; *Gilkey v. Watertown*, 141 Mass. 317.

*Minnesota.* — *State v. Rapp*, 39 Minn. 65; *Banse v. Clark*, 69 Minn. 53.

*Nebraska.* — *Warren v. Brown*, 31 Neb. 8.

*North Dakota.* — *Dunstan v. Jamestown*, 7 N. Dak. 1.

*Texas.* — *Floyd v. State*, 25 Tex. 277; *Galveston, etc., R. Co. v. Baudat*, 18 Tex. Civ. App. 595.

*Vermont.* — *Robinson v. Winch*, 66 Vt. 110.

*Wisconsin.* — *State v. Babcock*, 42 Wis. 138.

1. **Reference to Plan.** — *Stone v. Cambridge*, 6 Cush. (Mass.) 270; *Gilkey v. Watertown*, 141 Mass. 317; *Hall v. Manchester*, 39 N. H. 296.

2. **Description of Centre Line.** — *People v. Highway Com'rs*, 13 Wend. (N. Y.) 310; *People v. Haverstraw*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 7, 65 Hun (N. Y.) 620.

3. *Tingle v. Tingle*, 12 Bush (Ky.) 161; *Terrell v. Tarrant County*, 8 Tex. Civ. App. 563.

4. *Hays v. State*, 8 Ind. 425; *McDonald v. Payne*, 114 Ind. 359.

5. **Statement of Width of Highway.** — *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *File v. Highway Com'rs*, 34 Ill. App. 538; *White v. Conover*, 5 Blackf. (Ind.) 462; *Carlton v. State*, 8 Blackf. (Ind.) 208; *Barnard v. Haworth*, 9 Ind. 103; *Erwin v. Fulk*, 94 Ind. 235; *State v. Leicester*, 33 Vt. 653. And see *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405.

6. *Alvord v. Ashley*, 17 Ill. 563; *Morgan v. Green*, 17 Ill. 395; *Pearce v. Gilmer*, 54 Ill. 25; *Highway Com'rs v. Harrison*, 108 Ill. 398.

7. *Boston, etc., R. Corp. v. Lincoln*, 13 R. I. 705; *Clarke v. South Kingstown*, 18 R. I. 283.

8. **Reference to Petition.** — *Rose v. Kansas City*, 128 Mo. 135.

9. *Hudson v. Voreis*, 134 Ind. 642.

10. **Pennsylvania Cases.** — *Road Case*, 3 W. & S. (Pa.) 559; *Road Case*, 4 W. & S. (Pa.) 39; *Matter of Road in Pitt Tp.*, 1 Pa. St. 356; *Road to Ewing's Mill*, 32 Pa. St. 282.

11. *Matter of Road in Norriton Tp.*, 4 Pa. St. 337; *In re Shaefferstown Road*, 5 Pa. St. 515; *Road in Hempfield Tp.*, 122 Pa. St. 439.

12. *In re Road in Lackawanna Tp.*, 112 Pa. St. 212; *Lower Allen Tp. Road*, 18 Pa. Co. Ct. 298, 5 Pa. Dist. 764.

13. **Width Fixed by Statute.** — *Crowley v. Galatin County*, 14 Mont. 292; *Sumner v. Peebles*, 5 Wash. 471.

14. **Statement as to Necessity of Highway.** — *Barry v. Deloughrey*, 47 Neb. 354; *McNair v. State*, 26 Neb. 257. *Compare New v. Ewing*, 1 A. K. Marsh. (Ky.) 55.

In *Maine* and *Massachusetts* the statutes expressly require an adjudication that the road is of common convenience and necessity. See *Harkness v. Waldo County*, 26 Me. 353; *Cushing v. Gay*, 23 Me. 9; *Danvers v. Essex County*, 2 Met. (Mass.) 185.

**Substantial Finding.** — A judgment that "the public convenience requires that the highway should be laid out" has been held to be equivalent to a finding that the highway is necessary. *Hunter v. Newport*, 5 R. I. 325.

other persons benefited by the road has been held valid,<sup>1</sup> and the statute sometimes expressly provides for such an order.<sup>2</sup> But in *Pennsylvania* it has been decided, in view of the wording of the statutes, that a condition thus leaving the effect of the order in abeyance is invalid.<sup>3</sup> Other conditions have been held to render the order void, as when there was an attempt to impose thereby an illegal burden on the municipality,<sup>4</sup> or where the statute expressly forbade the annexation of a condition,<sup>5</sup> or where it was provided that a highway should be used only during a certain part of the year.<sup>6</sup> And in *Maine* it has been decided that a vote by the town to accept upon conditions a way laid out by the selectmen is invalid.<sup>7</sup>

*c. TIME OF RENDITION.* — If the statute provides that the decision upon the application shall be rendered within a certain time, there is no jurisdiction to render it after such time;<sup>8</sup> but a requirement that the officials "act" within a certain time does not require them to render a decision in that time, but merely to begin their investigation.<sup>9</sup> The order of establishment may, in the absence of any statutory prohibition, be entered at a special term.<sup>10</sup> In *Pennsylvania*, under the statute, the order cannot be made until the term after that at which the width is fixed by the court.<sup>11</sup>

*f. FILING.* — A requirement that the order be filed within a certain time must be strictly complied with;<sup>12</sup> but where the statute does not specify the time of filing it has been decided to be sufficient if the filing be within a reasonable time.<sup>13</sup>

*g. RESCISSION.* — It has been decided that a board of county commissioners cannot set aside its recorded order establishing a highway,<sup>14</sup> but there are likewise adjudications to the contrary.<sup>15</sup>

**11. Appeal and Certiorari.** — The statute generally gives the right of appeal from the decision of the tribunal upon the application to establish a highway,<sup>16</sup>

**1. Conditional Order.** — *Jones v. Andover*, 9 Pick. (Mass.) 146; *Harrington v. Harrington*, 1 Met. (Mass.) 404; *Hancock v. Worcester*, 62 Vt. 106.

**2. Statutory Provision.** — See *Horton v. Norwalk*, 45 Conn. 239; *Brown v. Ellis*, 26 Iowa 85; *State v. Glass*, 42 Iowa 56; *Harris v. Mahaska County*, 88 Iowa 219; *Rawlings v. Biggs*, 85 Ky. 251; *Roe v. Union County*, 19 Oregon 315; *Hancock v. Worcester*, 62 Vt. 106. Compare *Rich v. Gow*, 19 Ill. App. 81.

**3. Pennsylvania Decisions.** — *Road in Lathrop Tp.* 84 Pa. St. 126; *In re Road in O'Hara Tp.*, 87 Pa. St. 356. Compare *Roads in Londonderry Tp.*, 129 Pa. St. 244.

**4. Illegal Conditions.** — *Braintree v. Norfolk County*, 8 Cush. (Mass.) 546, where the municipality was required to tend the draw in a bridge on a highway. So in *Acton v. York County*, 77 Me. 128, a condition that cattle passes should be built was held to render the order void.

**5. Brown v. Brown**, 50 N. H. 538, 51 N. H. 367, where, however, it was held that the illegal condition did not render the establishment of the highway invalid as against collateral attack.

**6. Holcomb v. Moore**, 4 Allen (Mass.) 529, where the way was to be used only during the time of sleighing.

**7. Maine Decisions.** — *Christ's Church v. Woodward*, 26 Me. 172; *State v. Calais*, 48 Me. 456.

**8. Time of Order.** — *State v. Castle*, 44 Wis. 679; *Ruhland v. Hazel Green*, 55 Wis. 664.

**9. Wells v. Hicks**, 27 Ill. 343. And see 15 C. of L.—25

*Highway Com'rs v. Harper*, 38 Ill. 103; *Wood v. Highway Com'rs*, 62 Ill. 391; *Anderson v. Wood*, 80 Ill. 15.

**10. Term of Court.** — *Terrell v. Tarrant County*, 8 Tex. Civ. App. 563.

**11. Road in Middle Creek Tp.**, 9 Pa. St. 69; *Road in Lathrop Tp.*, 84 Pa. St. 126.

**12. Filing of Order.** — *Pool v. Breese*, 114 Ill. 594, *affirming* 16 Ill. App. 551; *Wright v. Highway Com'rs*, 145 Ill. 48; *Prescott v. Beyer*, 34 Minn. 493; *Dolphin v. Pedley*, 27 Wis. 469.

**13. Town v. Blackberry**, 29 Ill. 137; *Allison v. Highway Com'rs*, 54 Ill. 170; *Highway Com'rs v. Barry*, 66 Ill. 496; *Highway Com'rs v. People*, 61 Ill. App. 634.

**14. Rescission of Order.** — *Badger v. Merry*, 139 Ind. 631.

**15. New Marlborough v. Berkshire County**, 9 Met. (Mass.) 423; *Thorpe v. Worcester County*, 9 Gray (Mass.) 57; *Makemson v. Kauffman*, 35 Ohio St. 444.

In *Higgins v. Curtis*, 39 Kan. 283, it was held that after a board of county commissioners had rejected the report, it could reconsider its action in so doing, and continue further action to a future day of that session.

**16. Right of Appeal** — *Arkansas*. — *Baughner v. Rudd*, 53 Ark. 417.

*Illinois*. — *Whittaker v. Gutheridge*, 52 Ill. App. 460; *Pool v. Breese*, 114 Ill. 594; *Ravatte v. Race*, 152 Ill. 672.

*Indiana*. — *Yelton v. Addison*, 101 Ind. 58; *Potter v. McCormack*, 127 Ind. 439; *Wilson v. McClain*, 131 Ind. 335; *Glassburn v. Deer*, 143 Ind. 174.

*Kentucky*. — *Grider v. Porter*, 7 Ky. L. Rep.



but the right of appeal exists only when there is a statutory provision to that effect,<sup>1</sup> and it has been decided under particular statutes that there is no right of appeal from an order refusing to open a highway, although such right exists in case of the allowance of the application.<sup>2</sup> An owner of land affected by the proposed road is generally the only one entitled to appeal,<sup>3</sup> but by the terms of the statute other persons may be so entitled.<sup>4</sup> The appeal is generally allowed to a tribunal not of regular appellate jurisdiction, and on appeal the trial is generally *de novo*,<sup>5</sup> though it is not always so.<sup>6</sup>

Notice of the appeal must be given as required by the statute,<sup>7</sup> though this

47; *Crittenden County Ct. v. Shanks*, 88 Ky. 475; *Harding v. Putnam* (Ky. 1893) 21 S. W. Rep. 100.

*Louisiana*. — *Cross v. Police Jury*, 7 Rob. (La.) 121.

*Maine*. — *Gray v. Cumberland County*, 83 Me. 429; *Eden v. Hancock County*, 84 Me. 52; *Shaw v. County Com'rs*, 91 Me. 102.

*Michigan*. — *Tefft v. Township Board*, 38 Mich. 558; *Brown v. Township Board*, 92 Mich. 294.

*Minnesota*. — *State v. Rapp*, 39 Minn. 65; *State v. Flaherty*, 46 Minn. 128; *State v. St. John*, 47 Minn. 315.

*Missouri*. — *Nickerson v. Lynch*, 135 Mo. 471; *Bennett v. Woody*, 137 Mo. 377.

*New Hampshire*. — *Boston, etc., R. Co. v. Cilley*, 44 N. H. 578; *Peirce v. Portsmouth*, 58 N. H. 311.

*New York*. — *Matter of Barrett*, 7 N. Y. App. Div. 482.

*North Carolina*. — *McDowell v. Western North Carolina Insane Asylum*, 101 N. Car. 656; *Lambe v. Love*, 109 N. Car. 305; *Russell v. Leatherwood*, 114 N. Car. 683.

*Ohio*. — *Geddes v. Rice*, 24 Ohio St. 60.

*Oregon*. — *Towns v. Klamath County*, 33 Oregon 225.

*Rhode Island*. — *Bosworth v. Providence*, 17 R. I. 58.

*South Dakota*. — *Wayne v. Caldwell*, 1 S. Dak. 483, 36 Am. St. Rep. 750; *Dell Rapids v. Irving*, 9 S. Dak. 222.

*Tennessee*. — *Merritt v. Pryor*, 86 Tenn. 155.

*Texas*. — *Taylor v. Travis County*, 77 Tex. 333; *Bell v. Palo Pinto County*, (Tex. Civ. App. 1895) 29 S. W. Rep. 929; *Galveston, etc., R. Co. v. Baudat*, 18 Tex. Civ. App. 595.

*Virginia*. — *Norfolk, etc., R. Co. v. Rasnake*, 90 Va. 170.

*Washington*. — *Pearson v. Island County*, 3 Wash. 497.

**1. Statutory Authority Necessary** — *Kansas*. — *Kent v. Labette County*, 42 Kan. 534.

*Illinois*. — *Lockman v. Morgan County*, 32 Ill. App. 414.

*Maine*. — *Freeman v. County Com'rs*, 74 Me. 326.

*Maryland*. — *Greenland v. Harford County*, 68 Md. 59.

*New York*. — *People v. Lawson*, 17 Johns. (N. Y.) 277; *People v. Nelson*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 346.

**Question of Jurisdiction.** — A statutory provision that a decision by a court confirming or vacating a decision of commissioners appointed by such court in a highway proceeding should be final, was held not to prevent an appeal when the question involved was one of

jurisdiction. *Matter of De Camp*, 151 N. Y. 557, reversing 77 Hun (N. Y.) 478.

**2. Order Refusing to Establish Highway.** — *McKee v. Gould*, 108 Ind. 107; *Tomlinson v. Peters*, 120 Ind. 237; *Jones v. Duffy*, 119 Ind. 440; *Wilson v. Township Board*, 87 Mich. 240; *Aldridge v. Spears*, 40 Mo. App. 527.

**3. Who May Appeal** — *Alabama*. — *Moore v. Hancock*, 11 Ala. 245; *Parnell v. Commissioners' Ct.*, 34 Ala. 278.

*Delaware*. — *Long Point Road*, 5 Harr. (Del.) 152.

*Iowa*. — *McNichols v. Wilson*, 42 Iowa 385.

*Louisiana*. — *Vacoune v. Police Jury*, 1 Mart. N. S. (La.) 596.

*New Hampshire*. — *Union School Dist. v. Keene*, 63 N. H. 623.

*New York*. — *People v. Schell*, 5 Lans. (N. Y.) 352.

*Oregon*. — *Gaines v. Linn County*, 21 Oregon 430.

**4. In Illinois** "any person or persons interested" may appeal. *Whitmer v. Highway Com'rs*, 96 Ill. 289; *Oswego v. Kellogg*, 99 Ill. 590; *Brown v. Roberts*, 23 Ill. App. 461. And see *Gray v. Jones*, 178 Ill. 169.

In *Indiana* one not a party to the proceedings can appeal on filing an affidavit showing his interest in the matter. *Fleming v. Hight*, 95 Ind. 78; *Wilson v. Wheeler*, 125 Ind. 173.

**5. Trial De Novo** — *Illinois*. — *Williamson v. Cass County*, 84 Ill. 361; *Pool v. Breese*, 114 Ill. 594.

*Indiana*. — *Turley v. Oldham*, 68 Ind. 114; *Grimwood v. Macke*, 79 Ind. 100; *Clift v. Brown*, 95 Ind. 53; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Fleming v. Hight*, 95 Ind. 78; *Reynolds v. Shults*, 106 Ind. 291; *Hughes v. Beggs*, 114 Ind. 427; *Goodwine v. Evans*, 134 Ind. 262.

*Missouri*. — *Forsyth v. Heege*, 61 Mo. App. 277; *Long v. Talley*, 91 Mo. 305.

*North Carolina*. — *McDowell v. Western North Carolina Insane Asylum*, 101 N. Car. 656.

**6. Smith v. McMeekin**, 79 Ky. 24; *Rawlings v. Biggs*, 85 Ky. 251, 8 Ky. L. Rep. 919; *Crittenden County Ct. v. Shanks*, 88 Ky. 475; *Morris v. Salle*, (Ky. 1892) 19 S. W. Rep. 527.

**7. Notice of Appeal** — *Illinois*. — *Highway Com'rs v. Newell*, 53 Ill. 320.

*Iowa*. — *McNichols v. Wilson*, 42 Iowa 385; *Scott v. Lasell*, 71 Iowa 180; *Finke v. Zeigelmiller*, 77 Iowa 251; *Ellis v. Carpenter*, 89 Iowa 521.

*Michigan*. — *Tefft v. Township Board* 38 Mich. 558; *Brazee v. Raymond*, 59 Mich. 548.

*Minnesota*. — *Haven v. Orton*, 37 Minn. 445; *Andrews v. Marion*, 23 Minn. 372.

may be waived.<sup>1</sup>

Certiorari will also lie to review the proceedings, subject to the principles generally applicable to that writ.<sup>2</sup>

**12. Record of Proceedings.** — If the statute requires the proceedings or a part thereof to be recorded, such record is essential to the establishment of the highway.<sup>3</sup> It has been held, however, that the filing of a report by selectmen laying out a highway was a sufficient record,<sup>4</sup> though in another case it was held that a requirement of the record of the establishment involved the making of a copy of the whole proceedings in a book prepared for the purpose.<sup>5</sup> Where a report of the laying out of a highway was lost after being filed, but before recording, it was held that a copy thereof might be recorded.<sup>6</sup> And the record may be amended to accord with the facts.<sup>7</sup>

The Existence of the Highway can be proved only by the production of the record required by the statute,<sup>8</sup> and to be admissible the record must be authenticated as required by the statute.<sup>9</sup> The record of a plat of the highway as required by a statute in case of establishment is not, it is said, evidence of the existence of the highway, but merely of its locality.<sup>10</sup>

**13. Collateral Attack.** — An order establishing a highway cannot be collaterally attacked provided the tribunal making the order had jurisdiction of the subject-matter and of the parties.<sup>11</sup> Accordingly irregularities in the proceed-

*New York.* — *Rector v. Clark*, 78 N. Y. 21, reversing 12 Hun (N. Y.) 189.

*Wisconsin.* — *State v. Nelson*, 57 Wis. 147.

**1. Waiver of Notice.** — *Anderson v. Wood*, 80 Ill. 15; *Board of Supervisors v. Magoon*, 109 Ill. 142; *Libbey v. McIntosh*, 60 Iowa 329; *Akin v. Riley County*, 36 Kan. 170; *Peirce v. Portsmouth*, 58 N. H. 311.

**2. Certiorari — Alabama.** — Roads, etc., *Com'rs v. Thompson*, 15 Ala. 134; *Barnett v. State*, 15 Ala. 829; *Commissioners' Ct. v. Thompson*, 18 Ala. 694; *Ex p. Keenan*, 21 Ala. 558; *Molett v. Keenan*, 22 Ala. 484.

*Illinois.* — *Trainer v. Lawrence*, 36 Ill. App. 90; *Schuchman v. Highway Com'rs*, 52 Ill. App. 497; *Ravatte v. Race*, 152 Ill. 672; *Behrens v. Highway Com'rs*, 169 Ill. 558. *Compare Wright v. Highway Com'rs*, 150 Ill. 138.

*Iowa.* — *McCrory v. Griswold*, 7 Iowa 248; *Tiedt v. Carstensen*, 61 Iowa 334.

*Maine.* — *Phillips v. Franklin County*, 83 Me. 541.

*Maryland.* — *Gaither v. Watkins*, 66 Md. 576.

*Massachusetts.* — *Dwight v. Springfield*, 4 Gray (Mass.) 107; *Parks v. Boston*, 8 Pick. (Mass.) 218, 19 Am. Dec. 322.

*Minnesota.* — *State v. Fitch*, 30 Minn. 532.

*New Hampshire.* — *Grand Trunk R. Co. v. Berlin*, (N. H. 1894) 36 Atl. Rep. 554.

*New York.* — *People v. Hildreth*, 126 N. Y. 360; *People v. Heddon*, 32 Hun (N. Y.) 299; *People v. Dolge*, 45 Hun (N. Y.) 310; *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377, 8 Wend. (N. Y.) 47. But see *People v. County Cl.*, 152 N. Y. 214.

*Oregon.* — *Thompson v. Multnomah County*, 2 Oregon 34.

*Pennsylvania.* — *In re Germantown Ave.*, 99 Pa. St. 479; *In re Road in Palmer Tp.*, 109 Pa. St. 274; *Saucon Tp. v. Broadhead*, (Pa. 1887) 9 Atl. Rep. 63; *Road in Roaring Brook Tp.*, 140 Pa. St. 632.

See also the title CERTIORARI, 4 ENCYC. OF PL. AND PR. 1.

**3. Record of Proceedings — United States.** — *U. S. v. Schwarz*, 4 Cranch (C. C.) 160; *U. S.*

*v. Emery*, 4 Cranch (C. C.) 270; *Burns v. Multnomah R. Co.*, 8 Sawy. (U. S.) 543.

*Illinois.* — *People v. Ruby*, 59 Ill. App. 653.

*Maine.* — *Todd v. Rome*, 2 Me. 55.

*Massachusetts.* — *Com. v. Merrick*, 2 Mass. 529.

*Michigan.* — *Kruger v. Le Blanc*, 70 Mich. 76.

*Minnesota.* — *Teick v. Carver County*, 11 Minn. 292; *Prescott v. Beyer*, 34 Minn. 493. *Compare Banse v. Clark*, 69 Minn. 53.

*Oregon.* — *Naylor v. Beeks*, 1 Oregon 216.

*Compare Fenwick Hall Co. v. Old Saybrook*, 69 Conn. 32. And see also *ante*, *Order for Establishment — Filing*.

**Special Matters to Appear in Record.** — See *supra*, this section, *Notice — Record Must Show Notice; Commissioners or Viewers — Who May Act — Showing in Record; Oath to Be Taken — Showing in Record; also infra*, this title, *Alteration of Highways — Proceedings — Notice; Vacation or Discontinuance of Highways — Proceedings — Notice*.

**4.** *Hardy v. Houston*, 2 N. H. 309.

**5.** *State v. Carman*, Tappan (Ohio) 194.

**6. Loss of Paper.** — *Frame v. Boyd*, 35 N. J. L. 457.

**7. Amendment.** — *Du Page County v. Martin*, 39 Ill. App. 298; *Du Page County v. Highway Com'rs*, 142 Ill. 607.

**8. Proof of Existence of Highway.** — *U. S. v. King*, 1 Cranch (C. C.) 444; *People v. Madison County*, 125 Ill. 334, *affirming* 23 Ill. App. 386; *Com. v. Logan*, 5 Litt. (Ky.) 286; *Dudley v. Butler*, 10 N. H. 281; *State v. Carman*, Tappan (Ohio) 194; *Brander v. Justices*, 5 Call (Va.) 548, 2 Am. Dec. 606. *Compare Haywood v. Charlestown*, 43 N. H. 61; *Maysville, etc., R. Co. v. Greenup County*, 12 Ky. L. Rep. 46.

**9.** *Gillett v. Taylor*, 48 Ill. App. 403.

**10.** *Naylor v. Beeks*, 1 Oregon 216.

**11. Collateral Attack — California.** — *Humboldt County v. Dinsmore*, 75 Cal. 604; *Siskiyou County v. Gamlich*, 110 Cal. 94.

*Connecticut.* — *Fenwick Hall Co. v. Old Saybrook*, 69 Conn. 32.

*Illinois.* — *Rich v. Gow*, 19 Ill. App. 81;

ings for establishment cannot be made ground of defense to an indictment or penal action for the obstruction of a highway,<sup>1</sup> nor to a prosecution for refusing to work thereon;<sup>2</sup> neither can such irregularities support an action for trespass by the landowner against the officers opening the road<sup>3</sup> nor an injunction to restrain the opening.<sup>4</sup> In case, however, of absence of jurisdiction the order is absolutely void and may be made the subject of collateral attack.<sup>5</sup>

**Affirmative Showing of Jurisdiction.** — The general rule is that the facts showing jurisdiction to make the order establishing the highway must appear on the face of the record of the proceedings,<sup>6</sup> but it seems that where the statute

Hankins *v.* Calloway, 88 Ill. 155; Gordon *v.* Highway Com'rs, 169 Ill. 510.

*Indiana.* — Suits *v.* Murdock, 63 Ind. 75; Rassier *v.* Grimmer, 130 Ind. 219; Strieb *v.* Cox, 111 Ind. 299; Burton *v.* State, 111 Ind. 600; Bowen *v.* Hester, 143 Ind. 511; Monroe County *v.* Harrell, 147 Ind. 500; Evans *v.* West, 138 Ind. 621.

*Iowa.* — Hupert *v.* Anderson, 35 Iowa 578; State *v.* Kinney, 39 Iowa 226.

*Kansas.* — Willis *v.* Sproule, 13 Kan. 257; Hentzler *v.* Bradbury, 5 Kan. App. 1.

*Maine.* — Topsham *v.* Lisbon, 65 Me. 449; Cyr *v.* Dufour, 68 Me. 492; Higgins *v.* Hamor, 88 Me. 25.

*Missouri.* — Crenshaw *v.* Snyder, 117 Mo. 167; New Madrid County *v.* Phillips, 125 Mo. 61; Mitchell *v.* Kansas City, etc., R. Co., 138 Mo. 326.

*New Hampshire.* — Robbins *v.* Bridgewater, 6 N. H. 524; State *v.* Richmond, 26 N. H. 232; State *v.* Canterbury, 28 N. H. 195; Haywood *v.* Charlestown, 34 N. H. 23; State *v.* Rye, 35 N. H. 368; Dana *v.* Craddock, 66 N. H. 593; State *v.* Weare, 38 N. H. 314; Bryant *v.* Tamworth, (N. H. 1896) 39 Atl. Rep. 431.

*New Jersey.* — Tainter *v.* Morristown, 19 N. J. Eq. 46; Humphreys *v.* Woodstown, 48 N. J. L. 588; State *v.* Blauvelt, 34 N. J. L. 261.

*New York.* — Matter of Woolsey, 95 N. Y. 135; Mayer *v.* New York, 101 N. Y. 284, affirming 28 Hun (N. Y.) 587; People *v.* Mills, 109 N. Y. 69.

*North Carolina.* — State *v.* Davis, 68 N. Car. 297.

*Ohio.* — McClelland *v.* Miller, 28 Ohio St. 488.

*Oregon.* — State *v.* Myers, 20 Oregon 442; Bewley *v.* Graves, 17 Oregon 274; Cameron *v.* Wasco County, 27 Oregon 318; Grady *v.* Dundon, 30 Oregon 333.

*Pennsylvania.* — Wagner *v.* Salzburg Tp., 132 Pa. St. 636, 25 W. N. C. (Pa.) 476.

*South Carolina.* — State *v.* Kendall, 54 S. Car. 192.

*South Dakota.* — Yankton County *v.* Klemisch, (S. Dak. 1898) 76 N. W. Rep. 312.

*Texas.* — Vogt *v.* Bexar County, 16 Tex. Civ. App. 567.

**1. Defense to Indictment.** — Miller *v.* Porter, 71 Ind. 521; State *v.* Smith, 100 N. Car. 550; Crouch *v.* State, 39 Tex. Crim. 145. See also *infra*, this title, *Obstructions and Encroachments* — *What Are Highways Subject to Obstruction* — *Mode of Creation*.

**2. Refusal to Work.** — State *v.* Joyce, 121 N. Car. 610; State *v.* Witherspoon, 75 N. Car. 222.

**3. Trespass Against Officers.** — Hankins *v.* Calloway, 88 Ill. 155; Willis *v.* Sproule, 13

Kan. 257; Ogden *v.* Stokes, 25 Kan. 517; Cyr *v.* Dufour, 62 Me. 20.

**4. Injunction Will Not Lie** — *Georgia.* — Nichols *v.* Sutton, 22 Ga. 369.

*Illinois.* — Bailey *v.* McCain, 92 Ill. 277; Dickerson *v.* Highway Com'rs, 18 Ill. App. 88; Whittaker *v.* Gutheridge, 52 Ill. App. 460.

*Indiana.* — Adams *v.* Harrington, 114 Ind. 66; McDonald *v.* Payne, 114 Ind. 359; Rassier *v.* Grimmer, 130 Ind. 219; Ryder *v.* Horsting, 130 Ind. 104; Gold *v.* Pittsburg, etc., R. Co., (Ind. 1899) 53 N. E. Rep. 285; Chicago, etc., R. Co. *v.* Sutton, 130 Ind. 405; Switzerland County *v.* Reeves, 148 Ind. 467.

*Missouri.* — Baubie *v.* Ossman, 142 Mo. 499.

*Nebraska.* — Hopkins *v.* Keller, 16 Neb. 569.

*Ohio.* — Vondron *v.* Cranberry Tp., 6 Ohio N. P. 534, 8 Ohio Dec. 227.

*Texas.* — Sneed *v.* Falls County, (Tex. Civ. App. 1897) 42 S. W. Rep. 121.

**5. Void Order** — *Illinois.* — Whittaker *v.* Gutheridge, 52 Ill. App. 460.

*Indiana.* — Hudson *v.* Voreis, 154 Ind. 642.

*Kansas.* — Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129.

*Massachusetts.* — Holcomb *v.* Moore, 4 Allen (Mass.) 529.

*Tennessee.* — Ingram *v.* Warren, Jackson, Tenn. 1876.

*Texas.* — Evans *v.* Santana Live Stock, etc., Co., 81 Tex. 622.

**Special Defects Ground for Collateral Attack.** — See *supra*, this section, *Width of Highway*; *Application for Highway* — *Qualifications of Applicants*; *Sufficiency of Application* — *Duplicity*; *Notice* — *Sufficiency of Notice* — *Description of Land and Landowners*; *Personal Notice* — *In General*; *Record Must Show Notice*; *Commissioners or Viewers* — *Selection and Appointment* — *Oath to Be Taken* — *Waiver of Defects*.

**6. Jurisdiction Must Affirmatively Appear** — *Alabama.* — Commissioners' Ct. *v.* Thompson, 18 Ala. 694.

*Illinois.* — Highway Com'rs *v.* People, 2 Ill. App. 24.

*Indiana.* — Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329.

*Kansas.* — Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129; Hentzler *v.* Bradbury, 5 Kan. App. 1.

*Michigan.* — People *v.* Highway Com'rs, 16 Mich. 63; Van Auken *v.* Highway Com'rs, 27 Mich. 414.

*Missouri.* — Jones *v.* Zink, 65 Mo. App. 409; Whitely *v.* Platte County, 73 Mo. 30; Zimmerman *v.* Snowden, 88 Mo. 218; Daugherty *v.* Brown, 91 Mo. 30; Lingo *v.* Burford, 112 Mo. 155; Zeibold *v.* Foster, 118 Mo. 349.



names particular matters to be placed on the record it is not necessary to set out other jurisdictional facts therein.<sup>1</sup>

**Presumption of Regularity.** — Where the jurisdiction appears it will be presumed in aid of the order that every fact necessary to its validity existed and that all necessary preliminary steps were taken.<sup>2</sup>

**14. Successive Petitions.** — Apart from statute, the refusal or dismissal of an application for the establishment of a highway will not bar a subsequent proceeding to establish one over the same route,<sup>3</sup> especially if the evidence as to the necessity of the road is different in the two proceedings.<sup>4</sup> And it was held that an order establishing a highway might be made, though subsequent to the filing of the petition under which it was made another similar but less extensive petition was filed and a highway was ordered thereunder, which, however, was not constructed within the statutory time.<sup>5</sup> It is sometimes provided, however, by statute or rule of court, to prevent unwarrantable repetition of the same proceedings, that a second application shall not be made within a specified time after the refusal of the first.<sup>6</sup> An order establishing a highway is conclusive, and a subsequent order of establishment on a new petition, and differing from the other merely in providing for smaller compensation to the landowner, is void.<sup>7</sup>

**15. Curative Acts.** — Quite frequently statutes have been passed curing defects and irregularities in previous proceedings establishing highways.<sup>8</sup> Such statutes do not, however, validate proceedings which were originally void for want of jurisdiction.<sup>9</sup>

*New York.* — *Miller v. Brown*, 56 N. Y. 386.  
*Oregon.* — *State v. Officer*, 4 Oregon 180.

**1. Special Statutory Requirements** — *Illinois.*  
— *Lowe v. Aroma*, 21 Ill. App. 598.  
*Iowa.* — *State v. Prine*, 25 Iowa 231.

*Kansas.* — *Willis v. Sproule*, 13 Kan. 257;  
*Crawford v. Elk County*, 32 Kan. 555.

*North Carolina.* — *McClelland v. Miller*, 28 Ohio St. 488.

*Ohio.* — *Anderson v. Hamilton County*, 12 Ohio St. 635.

*Texas.* — *Sneed v. Falls County*, 91 Tex. 168, (Tex. Civ. App. 1897) 42 S. W. Rep. 121.

**2. Presumption of Regularity** — *Illinois.* — *Nealy v. Brown*, 6 Ill. 10; *Ferris v. Ward*, 9 Ill. 499; *Dumoss v. Francis*, 15 Ill. 543; *Highway Com'rs v. People*, 69 Ill. App. 326; *Galbraith v. Littiech*, 73 Ill. 209; *Shields v. Ross*, 158 Ill. 214.

*Indiana.* — *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405; *Ryder v. Horsting*, 130 Ind. 104.

*Iowa.* — *Crisman v. Deck*, 84 Iowa 344.

*Kansas.* — *Willis v. Sproule*, 13 Kan. 257; *Hentzler v. Bradbury*, 5 Kan. App. 1.

*Nebraska.* — *Howard v. Dakota County*, 25 Neb. 229.

*New York.* — *People v. Heddon*, 32 Hun (N. Y.) 299.

*Ohio.* — *McClelland v. Miller*, 28 Ohio St. 488.

*Vermont.* — *French v. Barre*, 58 Vt. 567.

**Statutory Provision.** — It is sometimes provided by statute that the order of establishment shall be *prima facie* evidence of the regularity of the proceedings. *Hankins v. Calloway*, 88 Ill. 155; *Trotter v. Barrett*, 164 Ill. 262; *Williams v. Giblin*, 86 Wis. 147. But such a provision does not dispense with an affirmative showing of jurisdiction. *Highway Com'rs v. People*, 2 Ill. App. 24; *Northern Pac. Terminal Co. v. Portland*, 14 Oregon 24; *Williams v. Giblin*, 86 Wis. 147.

**3. Successive Petitions.** — *Pagels v. Oaks*, 64 Iowa 198; *Cole v. Cumberland County*, 78 Me. 532; *Bruyn v. Graham*, 1 Wend. (N. Y.) 370; *Kamer v. Clatsop County*, 6 Oregon 238.

**4. Warlick v. Lowman**, 111 N. Car. 532.

The *Illinois* statute (Starr & Curt. Annot. Stat. Ill. 1896, c. 121, par. 48) providing that when proceedings to open a road are revoked because the damages assessed are excessive, no other petition for the same road shall be entertained within two years, does not bar a second petition when the first was dismissed without any award of damages. *Smith v. Highway Com'rs*, 150 Ill. 385; *Randecker v. Highway Com'rs*, 61 Ill. App. 426.

**5. Folsom v. Middlesex County**, (Mass. 1899) 53 N. E. Rep. 155.

**6. Statutory Provision.** — *Waterford v. Oxford County*, 59 Me. 450; *Whitcher v. Landaff*, 48 N. H. 153; *Matter of Highway*, 3 N. J. L. 242, 590; *State v. Potts*, 4 N. J. L. 396; *Towamencin Road*, 10 Pa. St. 195; *Franconia Tp. Road*, 78 Pa. St. 316; *Road in West Manchester Tp.*, 10 Pa. Co. Ct. 429.

**7. Order of Establishment Conclusive.** — *Hupert v. Anderson*, 35 Iowa 579.

**8. Curative Acts** — *Colorado.* — *Thatcher v. Crisman*, 6 Colo. App. 49.

*Illinois.* — *Canoe Creek v. McEniry*, 23 Ill. App. 227.

*Iowa.* — *Bennett v. Fisher*, 26 Iowa 497.

*Kentucky.* — *Louisville, etc., R. Co. v. Com.*, (Ky. 1898) 46 S. W. Rep. 207.

*Minnesota.* — *State v. Baugherman*, 11 Minn. 493.

*Wisconsin.* — *Hunter v. Chicago, etc., R. Co.*, 99 Wis. 613.

**9. Jurisdictional Defects.** — *State v. Auchard*, (Mont. 1898) 55 Pac. Rep. 361; *Grady v. Dundon*, 30 Oregon 333; *Williams v. Giblin*, 86 Wis. 147.

**16. Opening of Highway — a. IN GENERAL.** — An adjudication locating or establishing a highway does not generally render the highway actually existent for purposes of use until it has been opened,<sup>1</sup> though it is, it seems, legally existent upon the making of the adjudication, without any opening;<sup>2</sup> and no opening is necessary if the highway is established on a pre-existing road which is already in condition for use.<sup>3</sup> The opening generally consists in the removal of obstructions so as to render the highway passable for travelers,<sup>4</sup> but it is not essential that all obstructions be removed,<sup>5</sup> nor need an overseer or hands be assigned to it.<sup>6</sup>

**b. TIME FOR OPENING.** — The statute generally prescribes a time within which the highway must be opened, failure to comply with which constitutes an abandonment of the highway;<sup>7</sup> or it may be left to the officials establishing the road to fix the time for the opening.<sup>8</sup> If the time is not fixed in one of these ways, the opening must, it seems, be within a reasonable time.<sup>9</sup> Under the *Pennsylvania* statute the road cannot be opened until the term after that at which the report of viewers is approved and the order fixing the width of the road is made.<sup>10</sup>

**c. DESCRIPTION IN PROCEEDINGS TO BE FOLLOWED.** — The description of the highway in the proceedings for establishment is conclusive upon the officers charged with the opening of the highway, and they have no right to deviate from the route so designated;<sup>11</sup> and it has been held that an officer

**1. Necessity of Opening — Illinois.** — *Ottawa v. Yentzer*, 160 Ill. 509.

*Iowa.* — *State v. Stoke*, 80 Iowa 68.

*Maine.* — *Woodman v. Somerset County*, 25 Me. 300.

*Massachusetts.* — *Loker v. Damon*, 17 Pick. (Mass.) 284.

*Minnesota.* — *State v. Leslie*, 30 Minn. 533.

*Texas.* — *Dodson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 78.

*Wisconsin.* — *Kellar v. Earl*, 98 Wis. 488.

**Effect of Failure to Open.** — So it was held that a landowner could forcibly oppose a person riding through his land over which a highway had been established but not opened. *State v. Stoke*, 80 Iowa 68.

And it was held that before the highway was actually constructed, one breaking down fences in order to pass over it was liable in trespass to the owner of the fence. *Loker v. Damon*, 17 Pick. (Mass.) 284.

But a different decision was rendered when the person breaking down the fence was merely going over the road to test it at the request of the contractor for its construction. *Wight v. Phillips*, 36 Me. 551.

**Duty to Open.** — An officer failing to obey an order to open a highway may be criminally liable as maintaining a nuisance or for contempt. *Graffins v. Com.*, 3 P. & W. (Pa.) 502; *Road in Roaring Brook Tp.*, 140 Pa. St. 632, 28 W. N. C. (Pa.) 141; *Hamiltonban Tp.*, 11 Pa. Co. Ct. 368.

**2. Highway Legally Existent Before Opening.** — *Ballard v. Butler*, 30 Me. 94; *Millett v. Franklin County*, 80 Me. 427; *In re Railroad Com'rs*, 91 Me. 135; *Hallock v. Franklin County*, 2 Met. (Mass.) 558; *Senter v. Pugh*, 9 Gratt. (Va.) 260.

**3. Opening Unnecessary.** — *Heald v. Moore*, 79 Me. 271; *In re Railroad Com'rs*, 91 Me. 135; *Grove v. Graham*, 41 Ohio St. 303; *Heddeleston v. Hendricks*, 52 Ohio St. 460.

**4. What Constitutes Opening.** — *Wragg v.* 469.

*Penn Tp.*, 94 Ill. 11, 34 Am. Rep. 199; *State v. Cornville*, 43 Me. 427; *State v. Leslie*, 30 Minn. 533. See also *infra*, this title, *Abandonment and Nonuser — Statutory Abandonment — Of Unopened Highway*.

**5.** *Wiley v. Brimfield*, 59 Ill. 306; *Turner v. Wright*, 13 Ill. App. 191.

**6.** *Gilson v. State*, 5 Lea (Tenn.) 161.

**7. Time for Opening.** — See *infra*, this title, *Abandonment and Nonuser — Statutory Abandonment — Of Unopened Highway*.

**8. Fixing by Officials.** — See *State v. Rye*, 35 N. H. 368; *Matter of Public Road in Middlesex, etc.*, Counties, 4 N. J. L. 329.

**9. Reasonable Time.** — *Blaisdell v. Portland*, 39 Me. 113. In *Davies v. Huebner*, 45 Iowa 574, it was held that under the circumstances the failure to open or use the highway for ten years did not defeat the public right. But in *Lemasters v. State*, 10 Ind. 391, it was held that where the highway was in fact opened and used on a route different from that named in the order, it could not be opened in accordance with such order twenty-seven years after the making thereof.

**10. Pennsylvania Rule.** — *Matter of Road in Pitt Tp.*, 1 Pa. St. 356; *Gibson's Mill Road*, 37 Pa. St. 255.

**11. Following Designated Route — Delaware.** — *Huey v. Hendrixen*, 1 Harr. (Del.) 145.

*Illinois.* — *Owens v. Crossett*, 105 Ill. 354; *Deer v. Highway Com'rs*, 109 Ill. 379; *Deere v. Cole*, 118 Ill. 165; *Farrelly v. Kane*, 172 Ill. 415.

*Indiana.* — *Phipps v. State*, 7 Blackf. (Ind.) 513.

*Kansas.* — *Shaffer v. Weech*, 34 Kan. 595.

*Missouri.* — *Butler v. Barr*, 18 Mo. 357.

*Pennsylvania.* — *Calder v. Chapman*, 8 Pa. St. 522; *Clark v. Com.*, 33 Pa. St. 112; *Morrow v. Com.*, 48 Pa. St. 305.

*Tennessee.* — *Ward v. State*, 12 Lea (Tenn.) 469.

undertaking to change the route while opening the highway is liable to indictment.<sup>1</sup>

*d. WIDTH TO BE OPENED.* — The municipality is not bound to make the highway safe and convenient for travelers throughout its whole width, it being sufficient to open a reasonable width.<sup>2</sup>

*e. REMOVAL OF BUILDINGS AND FENCES.* — The statute sometimes provides for notice to the owner to remove buildings<sup>3</sup> or fences,<sup>4</sup> and without such previous notice the authorities have no right to make the removal,<sup>5</sup> though the absence of such notice will not, it seems, render the establishment of the road entirely void.<sup>6</sup>

*f. INJUNCTION.* — Threatened illegal action on the part of the highway officers in opening a highway may, in a proper case, be restrained by injunction.<sup>7</sup> So injunction will issue when there is no legally established highway,<sup>8</sup> or when the opening has been deferred beyond the statutory period,<sup>9</sup> or where adequate compensation to the landowner has not been paid.<sup>10</sup> It may also lie to prevent deviations from the proper line of the highway,<sup>11</sup> or to prevent the removal of fences without first giving the statutory notice.<sup>12</sup>

**17. Establishment by Estoppel.** — If the owner of land through which the alleged highway runs sees the public or individuals making improvements on the assumption that there is such a highway, and makes no objection thereto, he is estopped thereafter to deny its existence.<sup>13</sup>

**V. ASCERTAINMENT, RESURVEY, AND RECORD OF EXISTING HIGHWAYS — 1. Of Highways Created by User.** — In some states the statute provides for the ascertainment and entry of record by officials of highways which have become such by user for the statutory period.<sup>14</sup> Such action by the highway officials cannot, it is said, change the width or location of the highway, it being merely the perpetuation of evidence of existing rights.<sup>15</sup> And the statute has been held in *Illinois* to apply only to highways already recognized by the proper authorities.<sup>16</sup> In *Indiana* notice to owners of land through which the highway runs is, it seems, a necessary preliminary.<sup>17</sup>

**1. Criminal Liability.** — *Com. v. Johnson*, 134 Pa. St. 635.

**2. Width to Be Opened.** — *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Weare v. Fitchburg*, 110 Mass. 334; *Metcalf v. Boston*, 158 Mass. 284. See also *infra*, this title, *Defective and Unsafe Highways — Defects Outside of Traveled Path.*

**3. Removal of Buildings.** — *Com. v. Noxon*, 121 Mass. 42; *Colburn v. Kittridge*, 131 Mass. 470.

**4. Removal of Fences.** — *Hall v. People*, 57 Ill. 307; *Conley v. Grove*, 124 Ind. 208; *Mosier v. Vincent*, 34 Iowa 478; *State v. Leslie*, 30 Minn. 533; *Brock v. Hishen*, 40 Wis. 674.

**5. Effect of Failure to Give Notice.** — *Taylor v. Marcy*, 25 Ill. 518; *Ruston v. Grimwood*, 30 Ind. 364; *Suits v. Murdock*, 63 Ind. 73; *Kelley v. Horton*, 2 Cow. (N. Y.) 424; *Case v. Thompson*, 6 Wend. (N. Y.) 634; *Kellar v. Erie*, 95 Wis. 488.

**6. Kidder v. Jennison**, 21 Vt. 108; *Robinson v. Winch*, 66 Vt. 110.

**7. Injunction.** — *Kyle v. Kosciusko County*, 94 Ind. 115; *Bills v. Belknap*, 36 Iowa 583; *Grant v. Crow*, 47 Iowa 632; *Quinton v. Burton*, 61 Iowa 471; *Bolton v. McShane*, 67 Iowa 207.

**8. McIntyre v. Storey**, 80 Ill. 127; *Frizell v. Rogers*, 82 Ill. 109; *Morgan v. Miller*, 59 Iowa 481. And see *supra*, this section, *Collateral Attack.*

**9. Opening Unduly Deferred.** — *Green v. Green*, 34 Ill. 320.

**10. Compensation to Landowner.** — *Miller v.*

*Mobile*, 47 Ala. 163, 11 Am. Rep. 768; *Highway Com'rs v. Durham*, 43 Ill. 86; *Dinwiddie v. Roberts*, 1 Greene (Iowa) 363; *Carbon Coal, etc., Co. v. Drake*, 26 Kan. 345; *Cameron v. Washington County*, 47 Miss. 264.

**11. To Prevent Deviations.** — *Wetherell v. Newington*, 54 Conn. 74; *Highway Com'rs v. Harrison*, 108 Ill. 398; *Kern v. Isgrigg*, 132 Ind. 4. But see *Highway Com'rs v. Green*, 156 Ill. 504.

**12. Removal of Fences.** — *Conley v. Grove*, 124 Ind. 208.

**13. Estoppel.** — *Campbell v. O'Brien*, 75 Ind. 222; *Ross v. Thompson*, 78 Ind. 90; *Sunderland v. Martin*, 113 Ind. 411; *Reed v. Harlan*, 3 West. L. Month. 632, 2 Ohio Dec. (Reprint) 553. And see the title *DEDICATION*, vol. 9, p. 34 *et seq.*

**14. Record of Highways Created by User.** — *Freshour v. Hihn*, 99 Cal. 443; *Vandever v. Garshwiler*, 63 Ind. 185; *Gibbons v. Copper*, 67 Ind. 81; *Higham v. Warner*, 60 Ind. 549; *Strong v. Makeever*, 102 Ind. 578; *Washington Ice Co. v. Lay*, 103 Ind. 48; *McKeen v. Porter*, 134 Ind. 483; *Simmons v. Providence*, 12 R. I. 8.

**15. Talmage v. Huntting**, 29 N. Y. 447; *Ivory v. Deerpark*, 116 N. Y. 476; *Cole v. Van Keuren*, 4 Hun (N. Y.) 262, 64 N. Y. 646.

**16. People v. Highway Com'rs**, 52 Ill. 498.

**17. Notice to Landowners.** — *Vandever v. Garshwiler*, 63 Ind. 185; *Ye'ton v. Addison*, 101 Ind. 58. See also *Washington Ice Co. v. Lay*, 103 Ind. 48.



2. Of Highways Established by Statutory Proceedings. — The statutes also occasionally provide for the resurvey and record of highways which were properly laid out, but which have become uncertain by reason of the loss of the records of establishment or through other contingencies.<sup>1</sup> Such proceeding is based upon the existence of previous valid proceedings to establish the highway, and will have no effect in the absence thereof.<sup>2</sup> The resurvey need not correspond with the original survey,<sup>3</sup> but it is not, it seems, conclusive as against an abutting owner claiming that it includes his property.<sup>4</sup>

3. Evidence of Location. — In determining the location of a highway it is proper to consider plats and surveys made by authority of law.<sup>5</sup> And likewise, in case of uncertainty, continuous public use and travel may be considered,<sup>6</sup> and the testimony of any one acquainted with the facts may be received.<sup>7</sup> In *Massachusetts* the statute provides that in the absence of other evidence a building or a fence which has existed in one place for more than twenty years upon the side of the highway shall conclusively fix the boundary of the highway;<sup>8</sup> but in the absence of such a provision a fence is merely evidence of the proper line.<sup>9</sup> A highway is, it has been held, presumed to run in a straight line in the absence of evidence to the contrary.<sup>10</sup>

VI. ALTERATION OF HIGHWAYS — 1. In General. — An alteration of a highway, as the expression is used, generally refers to a change in the course thereof,<sup>11</sup> and therefore necessarily involves to some extent the establishment of a new highway and the vacation of the part of the old highway for which

1. Resurvey of Established Highway — *Indiana*. — *Gibbons v. Copper*, 67 Ind. 81; *Washington Ice Co. v. Lay*, 103 Ind. 48.

*Iowa*. — *Balke v. Bailey*, 20 Iowa 124; *Israel v. Jewett*, 29 Iowa 475; *Jewett v. Israel*, 35 Iowa 261; *Blair v. Boesch*, 59 Iowa 554; *Ackerson v. Van Vleck*, 72 Iowa 57.

*New York*. — *Snyder v. Plass*, 28 N. Y. 465; *Wheatfield v. Shasley*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 100.

*Ohio*. — *Beckwith v. Beckwith*, 22 Ohio St. 180; *Ludlow v. Dies*, 7 Ohio Cir. Dec. 49.

*Vermont*. — *Hogaboon v. Highgate*, 55 Vt. 412; *Trudeau v. Sheldon*, 62 Vt. 198.

See also *infra*, this title, *Alteration of Highways — Relocation and Straightening of Road*.

2. Based on Previous Valid Proceedings. — *Carey v. Weitgenant*, 52 Iowa 660; *Barnes v. Fox*, 61 Iowa 18; *Kelsey v. Burgess*, (Supm. Ct. Gen. T.) 35 N. Y. St. Rep. 363; *Trudeau v. Sheldon*, 62 Vt. 198.

3. Correspondence with Original Survey. — *Culver v. Fair Haven*, 67 Vt. 163.

4. Effect as Against Landowner. — *Beckwith v. Beckwith*, 22 Ohio St. 180.

5. Evidence of Location. — *Hiner v. People*, 34 Ill. 297; *Merrill v. Kalamazoo*, 35 Mich. 211; *Naylor v. Beeks*, 1 Oregon 216. Compare *Dale v. Metzmaker*, 63 Ill. 38.

6. *Taeger v. Riepe*, 90 Iowa 484; *Vicksburg v. Marshall*, 59 Miss. 563; *Marlboro Tp. v. Van Derveer*, 47 N. J. L. 259.

7. *Witherspoon v. Meridian*, 69 Miss. 288; *Morrow v. Com.*, 48 Pa. St. 305.

8. *Abutting Buildings and Fences*. — *Horne v. Haverhill*, 110 Mass. 527; *Winslow v. Nayson*, 113 Mass. 411; *Pettingill v. Porter*, 3 Allen (Mass.) 349; *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473; *Wood v. Quincy*, 11 Cush. (Mass.) 487; *Holbrook v. McBride*, 4 Gray (Mass.) 215; *Morton v. Moore*, 15 Gray (Mass.) 573; *Plumer v. Brown*, 8 Met. (Mass.) 578.

9. *Wetherell v. Newington*, 54 Conn. 67. See also *Rozell v. Andrews*, 103 N. Y. 150.

10. Presumption of Straightness of Route. — *Seeley v. Bridgeport*, 53 Conn. 1; *Butler v. Barr*, 18 Mo. 357. But see *Seisler v. Smith*, 150 Ind. 88, in which case it is stated that a highway is not to be presumed to run throughout its whole course upon a section line merely because some portion thereof is upon such line.

11. Alteration Refers to Change of Course. — *Harrison v. Milwaukee County*, 51 Wis. 645. See also *In re Alston*, (Del. 1898) 40 Atl. Rep. 938, construing a statute giving power to "change" public roads as authorizing merely a change of course.

A Mere Change of Grade in an existing way, or change in the material with which a way is constructed, was stated not to be an alteration of the way within the meaning of the statute, but an alteration in the technical sense must involve the substitution of one way for another. *Bigelow v. Worcester*, 169 Mass. 390, citing *Bliss v. Deerfield*, 13 Pick. (Mass.) 102; *Goodwin v. Marblehead*, 1 Allen (Mass.) 37, and *Com. v. Cambridge*, 7 Mass. 158. See also *Dana v. Boston*, 170 Mass. 593. To the same effect see *Harrison v. Milwaukee County*, 51 Wis. 645. But in *Waddell v. New York*, 8 Barb. (N. Y.) 95, it was held that a power to "alter and amend" a street included power to change its grade.

Change of Width. — In *Heiple v. Clackamas County*, 20 Oregon 147, it was held that a power to alter a road included a power to reduce the width. And see to the same effect *Lincoln v. Warren*, 150 Mass. 309. But in *New Jersey* a contrary decision was rendered, in view of the preamble of the statute providing for alteration, wherein was recited the frequent desirability of changes in public roads "by vacating short pieces of such roads and relaying them in other places." *Parkhurst v. Van Derveer*, 48 N. J. L. 80. And see *In re Alston*, (Del. 1898) 40 Atl. Rep. 938.

the substitution is made.<sup>1</sup> Consequently, the fact that the petition, in praying for an alteration, asks also for a discontinuance of the part of the highway made unnecessary thereby does not change the character of the proceeding as one for an alteration;<sup>2</sup> and under a notice of the alteration of a road, a part of the old road rendered unnecessary thereby may be discontinued.<sup>3</sup> An alteration is, however, a separate form of improvement, which is to be distinguished both from the vacation or discontinuance of an existing highway<sup>4</sup> and from the establishment of a new highway, the important question involved in the latter distinction being the extent of the departure from the old road.<sup>5</sup>

**Reason for Alteration.** — It has been held that the possible danger from trains operated on a railroad track or the frightening of horses thereby is a proper consideration in determining the expediency of the proposed alteration.<sup>6</sup>

**The Width of the highway as changed will, it is stated, be presumed to be the same as that of the original highway,<sup>7</sup> and this is a necessary consequence of a statutory provision that the new road shall equal the old road in all respects.<sup>8</sup>**

**2. Conditional Alteration.** — It has been held that the order for the alteration may be conditioned upon the making of the alteration by the petitioner<sup>9</sup> or upon the payment by him of damages to property owners injured by the alteration.<sup>10</sup>

**3. Proceedings — a. STATUTE TO BE FOLLOWED.** — A road cannot be altered except by proceedings in conformity with the statute,<sup>11</sup> and this applies

**1. Alteration Includes Establishment and Vacation.** — *Brown v. Roberts*, 23 Ill. App. 461; *Bowers v. Snyder*, 88 Ind. 302; *People v. Jones*, 63 N. Y. 306; *Millcreek Tp. v. Reed*, 29 Pa. St. 195; *Conrad v. Lewis County*, 10 W. Va. 784. See also *infra*, this title, *Vacation or Discontinuance of Highways — Vacation Implied from Alteration*.

So where the statute provided that no road should be opened through an orchard, it was held that an existing road could not be altered so as to cross an orchard. *Wilson v. Creekmore*, (Ky. 1894) 27 S. W. Rep. 809.

**2. Hobart v. Plymouth County**, 100 Mass. 159.

**3. Ponder v. Shannon**, 54 Ga. 187.

**4. Alteration Distinguished from Vacation.** — *Thompson v. Crabb*, 6 J. J. Marsh. (Ky.) 222.

So it was decided that a statute authorizing a town meeting to discontinue a way by vote did not authorize it to change one of the boundary lines of the way and discontinue the part lying outside of such line, this action being in effect an alteration, which was intrusted by statute only to tribunals proceeding judicially. *Lincoln v. Warren*, 150 Mass. 309.

**5. Distinguished from Establishment of New Road.** — *Brown v. Roberts*, 23 Ill. App. 461; *Raymond v. Cumberland County*, 63 Me. 112; *Green v. Loudenslager*, 54 N. J. L. 478; *People v. Jones*, 63 N. Y. 306; *Roads in Londonderry Tp.*, 129 Pa. St. 244. And see *State v. Canterbury*, 40 N. H. 307.

**Illustrations.** — So where an application was filed to vacate a road, and at the same time another application was made to establish a narrower road at the same place, it was held that this was in effect an application to alter a road and should be presented to the court by a single application for an alteration. *Green v. Loudenslager*, 54 N. J. L. 478.

But in *Vedder v. Marion County*, 28 Oregon 77, where application was made for the estab-

lishment of a new road twenty-eight chains in length and for the vacation of another forty-one chains in length, they diverging from their point of intersection at an angle of more than forty-five degrees, and intersecting another road at points thirty chains apart, it was held that, in view of the lengths of the two roads and their marked divergence, one could not be considered as intended to supersede or render unnecessary the other, and that therefore the petition must be considered as not for an alteration, but as the commencement of two proceedings, the one for the location and the other for the vacation of a road.

**6. Proximity to Railroad.** — *Bennett v. Greenup County*, (Ky. 1891) 17 S. W. Rep. 167; *Helm v. Short*, 7 Bush (Ky.) 628.

**7. Width of Highway.** — *Wakeman v. Wilbur*, 147 N. Y. 657.

**8. Sumner v. Peebles**, 5 Wash. 471.

**9. Conditional Alteration.** — *Harris v. Mahaska County*, 88 Iowa 219; *M'Ilvoy v. Speed*, 4 Bibb (Ky.) 85. But see *Cotting v. Culpepper*, 79 Ga. 792.

**10. Thurman v. Emerson, 4 Bibb (Ky.) 279.**

**Noncompliance with Condition.** — Where the order opening a highway provided that it should be open free of expense to the county in accordance with an agreement made with one of the petitioners, it was held that after the alteration had been made, and the road as altered had been used for two years, the Commissioners' Court had no power to annul its order for alteration merely because the petitioner had not complied with his agreement. *Robson v. Byler*, 14 Tex. Civ. App. 374.

**11. Statutory Requirements Must Be Followed.** — *Farrelly v. Kane*, 172 Ill. 415; *Pratt v. Lewis*, 39 Mich. 7; *Heddeston v. Hendricks*, 52 Ohio St. 460; *Hancock v. Wyoming*, 148 Pa. St. 635; *Morrow v. Com.*, 48 Pa. St. 305.

The Statute may expressly provide that a road shall not be altered except by order



although there was a mistake in the survey or location of the highway.<sup>1</sup>

*b. APPLICATION.* — An application or petition for an alteration must be signed by the persons named in the statute,<sup>2</sup> and must state with reasonable certainty the part of the highway sought to be changed and the character of such change.<sup>3</sup> It has also been decided that the petition must allege the necessity or utility of the alteration, this being a condition precedent to the jurisdiction of the court.<sup>4</sup> But a contrary decision has likewise been made.<sup>5</sup>

*c. NOTICE.* — A failure to comply with a statutory requirement of notice renders the proceedings invalid.<sup>6</sup> In *New Jersey* it has been decided that the notice must name the township in which the road lies, as in that state the township controls in the appointment of surveyors,<sup>7</sup> but it need be posted only in the township in which the part of the road sought to be altered lies.<sup>8</sup> Only a general statement of the action proposed to be taken is necessary,<sup>9</sup> but if the taking of land is involved, the notice must be sufficient to inform the owner that his land will be taken.<sup>10</sup> The giving of notice may, unless there is a statutory requirement to the contrary, be proven by parol evidence;<sup>11</sup> and it has been held that the notice need not be made a part of the record.<sup>12</sup>

made in a regular proceeding for that purpose. *James v. Hendree*, 34 Ala. 488; *Stanley v. Sharp*, 1 Heisk. (Tenn.) 417.

Abutting owners cannot change the highway, although the new road is shorter and better than the old one. *Gross v. McNutt*, (Idaho 1894) 38 Pac. Rep. 935.

**1. Mistake in Location.** — *Babcock v. Welsh*, 71 Cal. 400; *Patterson v. Munyan*, 93 Cal. 128; *Com. v. Dicken*, 145 Pa. St. 453; *Holden v. Cole*, 1 Pa. St. 303; *McMurtrie v. Stewart*, 21 Pa. St. 322; *Furniss v. Furniss*, 29 Pa. St. 15.

**2. Petition for Alteration.** — *Taylor v. Lucas*, 8 Blackf. (Ind.) 289; *Patton v. Creswell*, 120 Ind. 147; *Neis v. Franzen*, 18 Wis. 537. And see *Wilson v. Berkstresser*, 45 Mo. 283; *Bailey v. McCain*, 92 Ill. 277.

**Petition for New Road Insufficient.** — So where the petition was to establish a new road, the court had no authority to change the boundaries of an old road, and its order was invalid although the statute gave it power to make such changes and provided for proceedings for alterations similar to those in the case of the establishment of a new road. *State v. Farrelly*, 35 Mo. App. 282.

**3. Description of Alteration.** — *Harris v. Mahaska County*, 88 Iowa 219; *Wilson v. Berkstresser*, 45 Mo. 283; *Zeibold v. Foster*, 118 Mo. 349; *Chartiers Tp. Road*, 48 Pa. St. 314.

In *Neis v. Franzen*, 18 Wis. 537, it was decided that a petition which requested an alteration between two specified points, "to avoid that swampy land, and lay the said highway either northward or southward, \* \* \* at the discretion of the supervisors, on dry and good land," sufficiently described the desired alteration, the supervisors being vested with a reasonable discretion.

**Under a Massachusetts Statute** giving authority to the county commissioners to "locate anew" a road, "either for the purpose of establishing the boundary lines of such road or making alterations in the course and width thereof," a petition to relocate "R. street," which was an ancient public highway known by that name, and stating that such highway "is uncertain in several places and generally needs revision," sufficiently described the termini of the road. *Hyde Park v. Norfolk*

*County*, 117 Mass. 416. And see *Taft v. Com.*, 158 Mass. 526.

**4. Averment of Necessity or Utility.** — *Leath v. Summers*, 3 Ired. L. (25 N. Car.) 108, 22 Am. Dec. 711.

**5. Bowers v. Snyder**, 88 Ind. 302.

**6. Notice.** — *Peabody v. Sweet*, 3 Ind. 514; *Mitchell v. Bond*, 11 Bush (Ky.) 615; *Jeffries v. Swampscott*, 105 Mass. 535; *Chasmer v. Convery*, 53 N. J. L. 588; *Williams v. Mitchell*, 49 Wis. 284.

**Who May Complain of Omission.** — The failure, however, to post a copy of the order providing for an alteration of a highway, which was entirely on one person's land, was held not to render the order absolutely void as to other persons. *Engleman v. Longhorst*, 120 N. Y. 332, *affirming* (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 322.

**Sufficiency of Notice.** — In *Conrad v. Lewis County*, 10 W. Va. 784, it was held that since a petition to alter a road is in effect one to establish a new road and to discontinue the old one, the notice must be such as is required by statute in proceedings to establish a road and also in proceedings to discontinue.

**7. Name of Township.** — *State v. Allen*, 11 N. J. L. 103; *Parkhurst v. Van Derveer*, 48 N. J. L. 80; *Chasmer v. Convery*, 53 N. J. L. 588.

**8. Place of Posting.** — *State v. Bassett*, 33 N. J. L. 26.

**9. Statement of Proposed Action.** — *Hyde Park v. Norfolk County*, 117 Mass. 416.

**10. To Owners of Land.** — *Potter v. Ames*, 43 Cal. 75.

In *Quackenbush v. District of Columbia*, 20 D. C. 300, it was decided that under a statute providing for notice calling upon persons having objections to the alteration to present them at the next meeting of the commissioners, the notice was insufficient if it merely stated that it was proposed to alter a road to twice its former width, and that a plat of the alteration was on file, since this did not show an abutting owner whether or not the proposed alteration would affect his land.

**11. Evidence of Notice.** — *Larson v. Fitzgerald*, 87 Iowa 402; *Zeibold v. Foster*, 118 Mo. 349.

**12. Showing in Record.** — *Garrett v. Hedges*, (Ky. 1891) 17 S. W. Rep. 871. And see *Wil-*



**d. VIEWERS OR COMMISSIONERS.** — The statute commonly provides for a reference of the question of the proposed alteration to viewers or commissioners, and the conclusiveness of their report or return is a matter to be determined by the language of such provision.<sup>1</sup> The order appointing viewers must, it has been held, describe the proposed alteration with reasonable certainty,<sup>2</sup> as must the report or return, either by actual description or by reference to other parts of the proceedings.<sup>3</sup>

**e. ORDER.** — An order for the alteration of a highway must contain a description sufficient to identify the alteration,<sup>4</sup> but this may be by reference to other papers filed in the proceedings.<sup>5</sup> The fact that the order does not show on its face any connection between the pre-existing road and the road as altered, as that the latter will render part of the former unnecessary, does not affect the validity of the alteration, if such connection appears from the surveys and descriptions of the new and old roads.<sup>6</sup>

**f. APPEAL AND CERTIORARI.** — A right to a review of the proceedings by appeal or certiorari is generally allowed by statute. It has been held, however, that one is not entitled to a review merely because he owns property in the vicinity of the alteration, since his injury is not different in kind from that of other landowners.<sup>7</sup> But it has been held that the county attorney, as representative of the public, may appeal in the name of the commonwealth from a judgment establishing an alteration.<sup>8</sup>

**4. Relocation and Straightening of Road.** — The statute may also provide in terms for the relocation of a road<sup>9</sup> or for the straightening thereof,<sup>10</sup> these involving practically the same character of improvement as an alteration.

**5. Rights of Landowners.** — One is not entitled to claim damages for injuries caused by the alteration of a highway if these are merely of the same character as are suffered by others in the vicinity; and consequently one whose land does not abut on the part of the highway which is altered is not entitled to make such claim.<sup>11</sup> But persons whose lands are taken for the purpose of

*liams v. Mitchell*, 49 Wis. 284, where the statute made the order *prima facie* evidence of the regularity of the proceedings, and it was held that the failure to give notice must affirmatively appear from the record.

A Recital in the Order that notice had been published as required by law was held to furnish no presumption that persons residing on their abutting lands were notified in writing as required by the code. *Fulton County v. Amoroso*, 89 Ga. 614.

**1. Viewers or Commissioners.** — See *Cotting v. Culpepper*, 79 Ga. 792; *Bennett v. Greenup County*, (Ky. 1891) 17 S. W. Rep. 167; *Hampstead's Petition*, 19 N. H. 343; *Robson v. Byler*, 14 Tex. Civ. App. 374.

**2. Order Appointing Viewers.** — *Hawkins v. Robinson*, 5 J. J. Marsh. (Ky.) 9; *Poston v. Terry*, 5 J. J. Marsh. (Ky.) 220.

**3. Report or Return.** — *Garrett v. Hedges*, (Ky. 1891) 17 S. W. Rep. 871; *Wilson v. Beverly*, 103 Mass. 136; *Hopkinton's Petition*, 27 N. H. 133; *Carris v. Highway Com'rs*, 2 Hill (N. Y.) 443. And see *Deering v. Cumberland County*, 87 Me. 151.

**4. Order — Description of Alteration.** — *Strong v. Makeever*, 102 Ind. 578; *Rud v. Pope County*, 66 Minn. 358.

**5. Wooldridge v. Rentschler**, 62 Mo. App. 591; *Robson v. Byler*, 14 Tex. Civ. App. 374.

It is stated that the validity of the order is not affected by the fact that it fails properly to describe the alteration, the alteration having been actually made, and the road as changed

having been used and worked for over twenty years. *Bailey v. McCain*, 92 Ill. 277.

**6. Levee Dist. No. 9 v. Farmer**, 101 Cal. 178.

**7. Right to Review.** — *Davis v. Hampshire County*, 153 Mass. 218; *Conklin v. Fillmore County*, 13 Minn. 454; *State v. Barton*, 36 Minn. 145. And see *Brown v. Roberts*, 23 Ill. App. 461, *affirmed* 123 Ill. 631. See also *Emery v. Pembroke*, 55 N. H. 229.

**8. Com. v. Kimberlin**, 8 Bush (Ky.) 445.

**9. Relocation of Road.** — Under a *Massachusetts* statute authorizing commissioners to locate anew a road for the purpose of establishing its boundary lines or of making alterations in its course or width, it was held that the commissioners may widen an old road and depart entirely from its boundary lines for short distances. *Hobart v. Plymouth County*, 100 Mass. 159; *Stockwell v. Fitchburg*, 110 Mass. 305. And that under a petition to relocate, the commissioners might widen a road and change its grade, and include within its boundaries new strips of land and exclude from its boundaries other strips of land. *Hyde Park v. Norfolk County*, 117 Mass. 416; *Richards v. Bristol County*, 120 Mass. 401; *Cambridge v. Middlesex County*, 167 Mass. 137.

**10. Straightening of Roads.** — Under a power to straighten a highway, it has been decided that the existing highway may be entirely departed from in places. *Gipson v. Heath*, 98 Ind. 100; *State v. Canterbury*, 40 N. H. 307.

**11. Damages from Alteration.** — *Bailey v. Cul-*

the alteration are entitled to compensation as in other cases of taking property for public use.<sup>1</sup>

**VII. VACATION OR DISCONTINUANCE OF HIGHWAYS — 1. Reasons for Vacation.** — The question whether a highway should be vacated or discontinued is determined primarily by considerations of its necessity or utility.<sup>2</sup> Thus it may be vacated because of its comparative uselessness through the construction of other roads,<sup>3</sup> or through the construction of a railroad, even though this was contemplated at the time of the establishment of the highway.<sup>4</sup> Vacation will not be refused merely because it may possibly cause inconvenience to an individual,<sup>5</sup> but the fact that the road is useful to several families is a consideration adverse to its vacation.<sup>6</sup>

A Diminution in the Ability of a Town to build a highway may be a sufficient change of circumstances after its establishment to authorize its discontinuance before it is actually opened, the financial ability of the town being one of the considerations determining the propriety of establishing the highway in the first place.<sup>7</sup> And so the diminished ability of the town to maintain the road may warrant a discontinuance.<sup>8</sup> But the fact that the road hands in the township are insufficient to maintain all the roads therein is not ground for discontinuing any particular road.<sup>9</sup>

**2. What Roads May Be Vacated.** — As a foundation for a proceeding to vacate there must be a highway actually existing.<sup>10</sup>

ver, 84 Mo. 531; *Jackson v. Jackson*, 16 Ohio St. 163.

**1. Compensation for Land Taken.** — *Potter v. Ames*, 43 Cal. 75; *Fulton County v. Amorous*, 89 Ga. 614; *Israel v. Jewett*, 29 Iowa 475; *Zeibold v. Foster*, 118 Mo. 349; *Bounds v. Kirven*, 63 Tex. 159; *Llano County v. Scott*, 2 Tex. Civ. App. 408. See also the title EMINENT DOMAIN, vol. 10, p. 1043.

The Massachusetts Statutes require that notice of the intended widening of a way, and an opportunity to remove any wood or trees which would interfere with such widening, be given to the abutting owner, and if he fails to remove such wood or trees he will be held to have relinquished them; and it is likewise provided that if he fail to remove buildings or materials after due notice they may be removed by the commissioners, and that the expense of such removal shall be allowed in reduction of his damages. *White v. Foxborough*, 151 Mass. 28; *Murray v. Norfolk County*, 149 Mass. 328.

**2. Reasons for Vacation.** — *Cook v. Quick*, 127 Ind. 477; *Robertson v. McDowell*, (Ky. 1893) 24 S. W. Rep. 7; *People v. Griswold*, 67 N. Y. 59; *Palo Alto Road*, 160 Pa. St. 104; *Road in Lehman*, 7 Kulp (Pa.) 404.

The fact that before the highway was actually constructed, but after its establishment, a considerable portion of the wood and timber near it at the time of its establishment was cut and carried away, might be properly considered as showing such a diminution of necessity as to be a cause for discontinuance. *Candia v. Chandler*, 58 N. H. 127.

An Agreement by a Town for a valuable consideration to discontinue a highway at some future time is invalid, since the question of discontinuance is to be determined by considerations of the utility of the highway. *Cromwell v. Connecticut Brown Stone Quarry Co.*, 50 Conn. 470.

**"Useless" Road.** — Where a statute provides for the discontinuance of a "useless" road,

the fact that it is merely not necessary, or that a new road elsewhere would be better, is not ground for discontinuance. *Matter of Coe*, (County Ct.) 19 Misc. (N. Y.) 549.

That the Public Necessity or Interest Was Considered in vacating a highway must, it has been decided, appear from the record. *Pear-sall v. Eaton County*, 71 Mich. 438; *Furman v. Furman*, 86 Mich. 391.

**3. Construction of Other Roads.** — *Com. v. Roxbury*, 8 Mass. 457; *Greenman v. Shiawassee County*, 38 Mich. 642; *Hampstead's Petition*, 19 N. H. 349; *Webster's Petition*, 60 N. H. 576. Compare *Perkins v. Andover*, 31 Conn. 602.

But the mere pendency and reference of a petition for another highway which might be a substitute for the first is not ground for vacating the latter. *Marlborough's Petition*, 45 N. H. 556.

**4. Construction of Railroad.** — *Hopkinton's Petition*, 27 N. H. 133; *Bethlehem's Petition*, 20 N. H. 210.

**5. Inconvenience to Individuals.** — *Cole v. Shannon*, 1 J. J. Marsh. (Ky.) 218; *Kimball v. Homan*, 74 Mich. 699. And see *Hyde v. Teal*, 46 La. Ann. 645; *De Forest v. Wheeler*, 5 Ohio St. 286.

**6. Ashcraft v. Lee**, 81 N. Car. 135.

**7. Diminution in Ability of Town.** — *Tuftsborough v. Fox*, 58 N. H. 416.

**8. Dudley v. Cilley**, 5 N. H. 561; *Winship v. Enfield*, 42 N. H. 206; *Goffstown's Petition*, 43 N. H. 200; *Marlborough's Petition*, 45 N. H. 556.

**9. Insufficient Road Hands.** — *Ashcraft v. Lee*, 81 N. Car. 135.

**10. Existing Highway Necessary.** — *Jersey City v. State*, 30 N. J. L. 521; *Matter of Beck St.*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 571; *Road in Brown*, 42 Leg. Int. (Pa.) 406; *Vernon Tp. Road*, 70 Pa. St. 23.

Errors in the Proceedings to Establish the Road do not, however, affect the right of the court subsequently to vacate it. *Evers v. Vreeland*,



A Road Recently Established will generally not be vacated unless new facts have arisen since its establishment rendering it unnecessary or undesirable.<sup>1</sup> But the fact that the road, though its opening was ordered, has never been actually opened does not affect the right to proceed to vacate it,<sup>2</sup> and it has been held that the power to discontinue is not affected by the pendency of an appeal from the order of establishment<sup>3</sup> or of a mandamus proceeding to compel the opening of a road which has been ordered.<sup>4</sup>

**3. Vacation of Part of Highway.** — A statute authorizing the vacation of a highway will, it seems, authorize the vacation of a part thereof;<sup>5</sup> and the statute sometimes expressly authorizes this to be done.<sup>6</sup>

**4. Conditional Vacation.** — Conditions or reservations annexed to the vote or adjudication vacating a highway have been held in some cases to be valid, though in other cases a contrary decision has been given, the question depending apparently on the character of the condition or reservation.<sup>7</sup> The annexa-

50 N. J. L. 386; *State v. Adams*, (N. J. 1891) 21 Atl. Rep. 937.

A Pennsylvania Statute provides that after a road has been laid out and confirmed, it may be vacated upon a petition of a majority of the original petitioners for the road. Road in Augusta Tp., 17 Pa. St. 71; Madison, etc., School House Road, 37 Pa. St. 417. But the statute provides that the right of vacation in such way shall not exist if the road has been opened, and this applies if it has been partially opened. Road in Greenwich Tp., 11 Pa. St. 186. A road was, however, held not to be opened in part merely because it had been worked on by the public authorities, if it was not actually opened for safe and convenient public travel. Road in Heath Tp., 21 Pa. Co. Ct. 254.

**1. Road Recently Established.** — *People v. Griswold*, 67 N. Y. 59, where the court said that the statute manifestly looks to stability in the determination of the question of laying out roads, and does not permit vacillation and wilful and capricious change; that the provision for the discontinuance of a road when it becomes useless or unnecessary implies a road which has lost its usefulness by change of circumstances and of local means and habits of trade and intercourse, and that the question of usefulness, having been passed upon by a jury at the time of laying it out, is not at once to be submitted to another jury. To the same effect see *Cassville Road*, 21 Pa. Co. Ct. 212.

And in *Connecticut* the refusal to vacate a road newly laid out was based upon the ground that the question of its necessity was *res judicata*. *Webb v. Rocky Hill*, 21 Conn. 468.

The Statute may likewise limit the time after the establishment of the road within which a proceeding to vacate may be brought. *Adams v. Ulmer*, 91 Me. 47; *Brock v. Hishen*, 40 Wis. 674. And see *Smock v. Vanderveer*, 41 N. J. L. 303.

**2. Road Not Actually Opened.** — *Tuftsborough v. Fox*, 58 N. H. 416; *Millett v. Franklin County*, 80 Me. 427; *Hagemeyer v. Keene*, 8 Mo. App. 574; *Senter v. Pugh*, 9 Gratt. (Va.) 260.

In *Hallock v. Franklin County*, 2 Met. (Mass.) 558, Shaw, C. J., said: "The way becomes a highway from the adjudication, and the right of the public becomes complete; although before the liabilities of the town, for

damages which may be sustained by travelers, attach to it, some time must necessarily be allowed to fit it for actual travel, and some actual or constructive notice must be given that it is so fitted and opened for travel. The subsequent discontinuance of the highway, whether very soon after it has been established by the adjudication or after a long lapse of time, is a new, substantive, distinct official act. It does not rescind nor annul the former proceeding, but it assumes its continued existence as the basis of the discontinuance."

In *New Jersey* the rule stated in the text is based on a statutory provision making a road a public highway from the time appointed for opening it, and not from the time at which it is actually opened. *State v. Judges*, 9 N. J. L. 246; *State v. Adams*, (N. J. 1891) 21 Atl. Rep. 937.

**3. Appeal from Establishment Pending.** — *Clarke v. Manchester*, 56 N. H. 502.

**4. Pending Mandamus Proceeding.** — *State v. Judges*, 9 N. J. L. 246.

**5. Vacation of Part.** — *State v. Bassett*, 33 N. J. L. 26.

In *Swanson St.*, 163 Pa. St. 323, Greene, J., after referring to the fact that the general road law, as distinguished from the statute then under consideration, specifically gives power to vacate the whole or any part of a road, said: "But it does not follow from this that a power to vacate part of a road cannot be deduced from legislation which gives power to vacate the whole of it. In all ordinary circumstances the power to do a greater act includes the power to do the lesser act, which is a part of the greater. In the interpretation of the doctrine of powers this is well understood. It is not easy to see why it is not true of the power to vacate roads. If a court is empowered to vacate the whole of a road, why may it not vacate a part of it?"

**6. Hughes v. Beggs**, 114 Ind. 427; *Chasmer v. Blew*, 55 N. J. L. 67; *Union Tp. Road*, 10 Pa. Co. Ct. 433.

**7. Vacation on Condition Is Valid.** — *McKenzie v. Gilmore*, (Cal. 1893) 33 Pac. Rep. 262; *Sears v. Fuller*, 137 Mass. 326; *Cooper v. Detroit*, 42 Mich. 584; *Buchholz v. New York*, etc., R. Co., 148 N. Y. 640.

**Reservation of Private Way.** — It has been held that a proviso that the road shall be kept open as a private way is valid. *Hatch v. Monroe County*, 56 Miss. 26. And that,



tion of an invalid condition or reservation has been adjudged not to render the vacation void, but in such case the vacation is absolute.<sup>1</sup>

**5. Who May Vacate.** — The legislature may vacate a highway by direct enactment,<sup>2</sup> but the power is generally delegated. Accordingly, the statute may provide for vacation by county officials, such as commissioners and supervisors,<sup>3</sup> or by the selectmen or trustees of a town,<sup>4</sup> and in New England there is usually a provision for the vacation of certain classes of highways by a vote of a town meeting.<sup>5</sup> In other cases it is provided that the discontinuance shall be by or under the supervision of a court.<sup>6</sup>

where an order was made adopting a report of viewers recommending that the highway be made a private road and that the landowners give a deed to the county for a private road, there was no abandonment of the road until such deeds were made. *McKenzie v. Gilmore*, (Cal. 1893) 33 Pac. Rep. 262. But see *Coakley v. Boston*, etc., R. Co., 159 Mass. 32.

**Vacation Conditional on Completion of Other Road.** — It is proper to provide that the road shall not be actually vacated until after another road, which is intended to take its place, is actually opened. *Coakley v. Boston*, etc., R. Co., 159 Mass. 32; *Bridgeport*, etc., Turnpike Road, 171 Pa. St. 312; *Roads in Londonderry Tp.*, 129 Pa. St. 244.

**Vacation for Special Purposes.** — Where the vacation was expressed to be for a particular purpose, it was held that even if this rendered the vacation conditional, the land would not again become a highway on the suspension of the conditional occupation. *Cooper v. Detroit*, 42 Mich. 584.

**Conditions Held Invalid.** — In *Hayes v. Tyler*, 85 Iowa 126, it was held that where the petition was for the vacation of a road, the board of supervisors had no authority to order its vacation on condition that a landowner dedicate a right of way on the land over which the road ran, to be subsequently used as a highway, the court saying that the petition was for the vacation of the road and not for its exchange for a mere right of way, and that the law did not authorize a transaction of that kind.

**Reservation of Right to Reopen.** — And in *Cheshire Turnpike v. Stevens*, 10 N. H. 133, it was held that a town having authority to discontinue a road could not, in discontinuing it, reserve a right to reopen it at any time without paying damages to the landowners.

**A Condition that Gates Be Erected** upon the closing of the road is likewise invalid. *People v. Judges*, 24 Wend. (N. Y.) 249.

**1. Invalidity of Condition Renders Vacation Absolute.** — In *Cheshire Turnpike v. Stevens*, 10 N. H. 133, *supra*, it was held that the discontinuance of the highway was absolute.

So in *Coakley v. Boston*, etc., R. Co., 159 Mass. 32, it was decided that a discontinuance by vote of a town was not rendered ineffective by the possible validity of a proviso reserving to those owning abutting land the right to use the road as a private way.

But see *Hayes v. Tyler*, 85 Iowa 126, stated in the preceding note, and *People v. Judges*, 24 Wend. (N. Y.) 249.

**2. Vacation by Legislature.** — *Haynes v. Thomas*, 7 Ind. 38; *State v. Hampton*, 2 N. H. 22; *Haywood v. Charlestown*, 34 N. H. 23; *Bauer v. Andrews*, 7 Phila. (Pa.) 359.

### 3. Vacation by County Officials — California.

— *Keena v. Placer County*, 89 Cal. 11.

*Illinois.* — *Shields v. Ross*, 158 Ill. 214.

*Indiana.* — *Cook v. Quick*, 127 Ind. 477.

*Iowa.* — *Hayes v. Tyler*, 85 Iowa 126; *Grove v. Allen*, 92 Iowa 519; *Moffitt v. Brainard*, 92 Iowa 122.

*Kansas.* — *Mills v. Neosho County*, 50 Kan. 635.

*Louisiana.* — *Hyde v. Teal*, 46 La. Ann. 645; *Raxedale v. Seip*, 32 La. Ann. 435.

*Massachusetts.* — *Com. v. Boston*, etc., R. Co., 150 Mass. 174.

*Michigan.* — *Pearsall v. Eaton County*, 71 Mich. 438; *Corry v. Place*, 99 Mich. 524; *People v. Highway Com'rs*, 15 Mich. 347.

*Minnesota.* — *Keyes v. Minneapolis*, etc., R. Co., 36 Minn. 290.

*Mississippi.* — *Hatch v. Monroe County*, 56 Miss. 26.

*Montana.* — *State v. Deer Lodge County*, 19 Mont. 582.

*New York.* — *Marble v. Whitney*, 28 N. Y. 297; *Buchholz v. New York*, etc., R. Co., 148 N. Y. 640; *People v. Williams*, 36 N. Y. 441.

*Ohio.* — *Matter of Wells County Road*, 7 Ohio St. 16.

*Washington.* — *Hull v. Stephenson*, 19 Wash. 572.

**4. By Town Officials.** — *Scutt v. Southbury*, 55 Conn. 405; *Welton v. Thomaston*, 61 Conn. 398; *Ashcraft v. Lee*, 81 N. Car. 135; *Buchanan v. Baker*, 54 Ohio St. 324; *McQuigg v. Cullins*, 56 Ohio St. 649; *Atty.-Gen. v. Sherry*, 20 R. I. (pt. i.) 44; *State v. Reesa*, 59 Wis. 106.

**5. By Vote of Town Meeting.** — *Bigelow v. Hillman*, 37 Me. 52; *State v. Brewer*, 45 Me. 606; *Latham v. Wilton*, 23 Me. 125; *Sears v. Fuller*, 137 Mass. 326; *Coakley v. Boston*, etc., R. Co., 159 Mass. 32; *Thompson v. Major*, 58 N. H. 242; *Drew v. Cotton*, (N. H. 1894) 42 Atl. Rep. 239.

**6. Vacation by Court** — *Indiana.* — *Hughes v. Beggs*, 114 Ind. 427.

*Kentucky.* — *Robertson v. McDowell*, (Ky. 1893) 24 S. W. Rep. 7; *Bradbury v. Walton*, 94 Ky. 163, 14 Ky. L. Rep. 823.

*Missouri.* — *State v. Wells*, 70 Mo. 635; *In re Big Hollow Road*, 111 Mo. 326.

*New Hampshire.* — *Campton's Petition*, 41 N. H. 197; *Boscawen's Petition*, 33 N. H. 421; *Candia v. Chandler*, 58 N. H. 127.

*New Jersey.* — *State v. Bassett*, 33 N. J. L. 26; *State v. Adams*, (N. J. 1891) 21 Atl. Rep. 937.

*Oregon.* — *Beekman v. Jackson County*, 18 Oregon 283; *Latimer v. Tillamook County*, 22 Oregon 291.

*Pennsylvania.* — *Swanson St.*, 163 Pa. St. 323; *Vacation of Union St.*, 140 Pa. St. 525;

**Road in More than One Jurisdiction.** — The right of authorities of one municipal division, such as a county or town, to vacate a road which is partly in another jurisdiction is purely a matter of statutory control, and generally, it seems, such power is not given.<sup>1</sup>

**6. Proceedings** — *a.* **STATUTORY METHOD TO BE FOLLOWED.** — A highway can be vacated or discontinued only in the manner provided by the statute;<sup>2</sup> and consequently, when the statute provides for a proceeding by petition and notice, a mere *ex parte* order or resolution is ineffective,<sup>3</sup> and after a highway has been regularly established a subsequent order in the same proceeding discontinuing it is unauthorized and void.<sup>4</sup>

*b.* **PETITION.** — The requirements of the petition for the vacation of the road are generally the same as those of one for the establishment of a road, and while the statutory form need not be exactly followed,<sup>5</sup> the petitioners must have the qualifications named in the statute,<sup>6</sup> and the petition must contain a sufficient description of the road or part of the road sought to be vacated.<sup>7</sup> It is sufficient to state that it is a public road or highway which is sought to be vacated, without stating by what authority it was opened,<sup>8</sup> but it is not sufficient, according to the *Pennsylvania* cases, to state that the highway has become inconvenient, useless, and burdensome, so as to justify its vacation; the petition must distinctly state the facts showing the truth of such allegation.<sup>9</sup>

*c.* **NOTICE.** — The statute generally requires notice of the proposed action, and a failure to give such notice is, it seems, a jurisdictional defect rendering the proceedings void.<sup>10</sup> But it has been held that where notice is not required

Palo Alto Road, 160 Pa. St. 104; Hess's Mill Road, 21 Pa. St. 217; Southampton Road, 21 Pa. St. 356.

*West Virginia.* — *Conrad v. Lewis County*, 10 W. Va. 784; *Yates v. West Grafton*, 33 W. Va. 507.

**1. Road in More than One Jurisdiction.** — *State v. Oxford*, 65 Me. 210; *Bigelow v. Brooks*, (Mich. 1899) 77 N. W. Rep. 810; *Palo Alto Road*, 160 Pa. St. 104.

In *Drew v. Cotton*, (N. H. 1894) 42 Atl. Rep. 239, it was held that the fact that a statute provided that a highway extending beyond the limits of a town "may" be discontinued upon petition to the Supreme Court did not prevent the discontinuance by a vote of the town, as in other cases, of a highway which was part of a continuous thoroughfare extending to other towns.

**Part of Road Within Jurisdiction.** — Where a road extended along the outer limit of a city, one-half of its width being within the city and one-half outside, it was held that the fact that the county commissioners who undertook to vacate the whole road did not have power to do so as regards that part within the city did not affect the validity of their action as regards that part outside the city. *Shields v. Ross*, 158 Ill. 214.

**2. Statutory Method to Be Adopted.** — *People v. Marin County*, 103 Cal. 223; *Rice v. Chicago*, etc., R. Co., 30 Ill. App. 481; *Shue v. Highway Com'r*, 41 Mich. 638; *Miller v. Corinna*, 42 Minn. 391; *Currier v. Davis*, (N. H. 1896) 41 Atl. Rep. 239; *Excelsior Brick Co. v. Haverstraw*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 99; *Hughes v. Bingham*, 135 N. Y. 347; *Silverthorn v. Parsons*, 8 Ohio Cir. Dec. 349; *Du Bois Cemetery Co. v. Griffin*, 165 Pa. St. 81.

**3. Ex Parte Order Insufficient.** — *Bruce v. Saline County*, 26 Mo. 262; *State v. Wells*, 70

Mo. 635; *State v. Rhodes*, 35 Mo. App. 360; *McNair v. State*, 26 Neb. 257; *Excelsior Brick Co. v. Haverstraw*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 681; *Conrad v. Lewis County*, 10 W. Va. 784.

**4. Discontinuance in Proceedings to Establish.** — *Reiff v. Conner*, 10 Ark. 241; *Miller v. Schenck*, 78 Iowa 372; *Mills v. Neosho County*, 50 Kan. 635; *Jones v. Oxford County*, 45 Me. 419; *People v. Pike*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 70.

**5. Sufficiency of Petition.** — *Devoe v. Smeltzer*, 86 Iowa 385. See also *In re Road in McCandless Tp.*, 110 Pa. St. 605.

**A Petition to Establish a Road** will not support an order vacating the whole or part of an old road. *Franklin*, etc., Road, 7 Pa. Co. Ct. 273; *Blakely Road*, 8 Pa. Co. Ct. 498. And see the preceding subdivision of this section, *Statutory Method to Be Followed*.

**6. Qualifications of Petitioners.** — *Shields v. Ross*, 158 Ill. 214; *Pearsall v. Eaton County*, 71 Mich. 438; *Smith v. Frenzer*, 12 Ohio Cir. Ct. 250, 5 Ohio Cir. Dec. 658; *State v. Nelson*, 57 Wis. 147.

**7. Description of Road.** — *Stephenson v. Farmer*, 49 Ind. 234; *Cook v. Quick*, 127 Ind. 477; *Milford's Petition*, 37 N. H. 57; *State v. Lippincott*, 25 N. J. L. 434; *Vedder v. Marion County*, 22 Oregon 264; *Ottercreek Tp. Public Road*, 104 Pa. St. 261; *Jefferson Tp. Road*, 2 Lack. Leg. N. (Pa.) 287.

**8. Character as Highway.** — *Swanson St.*, 163 Pa. St. 323.

**9. Alleging Uselessness of Road.** — *Road in Ross Tp.*, 36 Pa. St. 87; *Ottercreek Tp. Public Road*, 104 Pa. St. 261; *Abington Road*, 3 Pa. Dist. 226; *Hamiltonban Tp. Road*, 19 Pa. Co. Ct. 648; *In re Road in Shaler Tp.*, 5 Pa. Super. Ct. 1005.

**10. Giving of Notice Jurisdictional.** — *Moffitt v.*



by statute, it need not be given, no rights of property being divested by the proceeding.<sup>1</sup> The notice must designate the highway or portion thereof sought to be vacated,<sup>2</sup> and the giving of notice should appear on the record of the proceedings.<sup>3</sup> In some states the statute provides for a general notice, to be posted for a certain length of time,<sup>4</sup> while in other states personal notice to landowners is required.<sup>5</sup>

**Waiver of Notice.** — Notice of the latter character may, it seems, be waived by the individuals entitled to it,<sup>6</sup> while that by posting, being for the benefit of the public at large, cannot be waived.<sup>7</sup>

**d. REMONSTRANCE.** — The statute sometimes expressly provides for a remonstrance against the vacation of a road either by persons whose land abuts thereon or by other persons interested.<sup>8</sup>

**e. COMMISSIONERS OR VIEWERS.** — When the vacation is to be made by a court, the statute generally provides for a reference of the question of its advisability to viewers or commissioners.<sup>9</sup> The fact that a viewer has been one of the petitioners to establish the road does not disqualify him,<sup>10</sup> but residence in a town petitioning for the discontinuance has been held to disqualify a commissioner.<sup>11</sup>

**f. REPORT OR RETURN.** — The decision of the viewers or commissioners

Brainard, 92 Iowa 122; *Troy v. Doniphan County*, 32 Kan. 507; *Crawford v. Elk County*, 32 Kan. 555; *Mitchell v. Bond*, 11 Bush (Ky.) 614; *People v. Highway Com'rs*, 14 Mich. 528; *Ross v. Highway Com'rs*, 32 Mich. 301; *Goss v. Highway Com'r*, 63 Mich. 608; *Curry v. Place*, 99 Mich. 524; *State v. Otoe County*, 6 Neb. 133; *Lazzell v. Garlow*, 44 W. Va. 466.

In *Conrad v. Lewis County*, 10 W. Va. 784, Green, President, referred to the distinct provisions of the statute by which, in the case of a proceeding to establish, notice to the landowners only was required, as they were the only persons who would be injured thereby, while in the case of a proceeding to vacate a road there was merely a requirement that notice thereof be posted, since the public is the party interested in the discontinuance of an existing road; and then went on to say that a discontinuance without any notice to the public was to be regarded "as 'a mere police order which might be set aside upon motion at a subsequent term.' And as any citizen, had the proper public notice been given, could have appeared in answer to such public notice, and resisted the discontinuance of the road, it follows that, no such notice having been given, any citizen of the county had a right to appear at a subsequent term and move the court to set aside so much of its order as discontinued a portion of a public road."

**1. Notice Not Required by Statute.** — *Nicholson v. Stockett*, Walk. (Miss.) 67; *Abington Road*, 3 Pa. Dist. 226; *Haynes v. Lassell*, 29 Vt. 157.

**2. Description of Highway.** — *State v. Green*, 18 N. J. L. 179.

**3. Showing in Record.** — *Mitchell v. Bond*, 11 Bush (Ky.) 615; *People v. Highway Com'rs*, 14 Mich. 528; *People v. Highway Com'rs*, 16 Mich. 63; *Yates v. West Grafton*, 33 W. Va. 507.

**4. Posting of Notice.** — *Troy v. Doniphan County*, 32 Kan. 507; *Mitchell v. Bond*, 11 Bush (Ky.) 614; *Latimer v. Tillamook County*, 22 Oregon 291; *Conrad v. Lewis County*, 10 W. Va. 784.

**5. Notice to Landowners.** — Where the statute provided for notice to the owners of the land through which the highway ran, it was held that notice should be given to one whose premises would be left without any outlet or approach on one side, *Goss v. Highway Com'r*, 63 Mich. 608; and to one whose land did not front upon any highway, and whose only outlet was a private way belonging to him which extended to the highway sought to be vacated, *Phillips v. Highway Com'r*, 35 Mich. 15.

But in *Rhode Island* it was held that where the statute provided for notice only to persons who were owners of or interested in the land over which the highway was laid out, abutting owners on one side of the highway were not entitled to notice if the highway was laid out entirely on the land of one who owned the land abutting on the other side. *Atty.-Gen. v. Sherry*, 20 R. I. (pt. i.) 44.

**6. Waiver of Notice.** — *Candia v. Chandler*, 58 N. H. 127.

**7. Mitchell v. Bond**, 11 Bush (Ky.) 614. But see *Yates v. West Grafton*, 33 W. Va. 507.

**8. Remonstrance** — *Connecticut*. — *Scutt v. Southbury*, 55 Conn. 407.

*Indiana*. — *Butterworth v. Bartlett*, 50 Ind. 537; *Early v. Hamilton*, 75 Ind. 376; *House v. Greensburg*, 93 Ind. 533; *Brandenburg v. Hittel*, 16 Ind. App. 224.

*Missouri*. — *In re Big Hollow Road*, 111 Mo. 326, affirming 40 Mo. App. 363.

*New York*. — *Matter of Coe*, (County Ct.) 19 Misc. (N. Y.) 549.

*Washington*. — *Hull v. Stephenson*, 19 Wash. 572.

**9. Commissioners or Viewers.** — *Thomas v. Hawkins*, 20 Ga. 126; *Millet v. Franklin County*, 81 Me. 257; *Marlborough's Petition*, 46 N. H. 494; *Matter of Coe*, (County Ct.) 19 Misc. (N. Y.) 549; *Road in Ross Tp.*, 36 Pa. St. 87; *Union Tp. Road*, 10 Pa. Co. Ct. 433.

**10. Qualifications.** — *In re Road in McCandless Tp.*, 110 Pa. St. 605. And see *State v. Vanderveer*, 25 N. J. L. 233, 669; *Moore v. Sandown*, 19 N. H. 93.

**11. Nashua's Petition**, 12 N. H. 425.



is embodied in a report or return made to the court,<sup>1</sup> and this should show with reasonable certainty the road or part of a road vacated.<sup>2</sup>

*g. ORDER FOR VACATION.* — An order or adjudication vacating a highway is, like other orders, conclusive until set aside or reversed;<sup>3</sup> and it has been held that such an order cannot be set aside at a subsequent term.<sup>4</sup> Nor can its validity be inquired into by a bill in equity to require the owner of the land over which the way ran to furnish the plaintiff with a safe and suitable way across his land.<sup>5</sup>

*h. APPEAL AND CERTIORARI.* — The statute generally provides for a right of appeal from an order vacating or refusing to vacate a highway,<sup>6</sup> and on appeal to a court other than one of general appellate jurisdiction the proceeding is frequently *de novo*.<sup>7</sup> Certiorari will also lie in a proper case to review the proceedings.<sup>8</sup>

*Who May Ask Review.* — The question who may appeal or bring certiorari is determined primarily by the statute, and generally the right has been denied to such persons as are not in a position to sustain a special injury or disadvantage from the vacation not common to the community.<sup>9</sup> Accordingly it has been decided that a statute giving a right of appeal to "any person who shall feel himself aggrieved" was not to be taken literally, and that while a person through, to, or along whose land the part of the road vacated ran might appeal, one whose land abutted on another highway could not complain.<sup>10</sup> A like decision was made under a statute giving a right of appeal to any person or persons "interested" in the decision.<sup>11</sup> But where the statute allowed a remonstrance against the vacation by any twelve freeholders who were residents of the township, it was held that any one of the remonstrants was "aggrieved" within the meaning of a statute, so as to give him a right to appeal from the order vacating the road.<sup>12</sup> And in *New York* a resi-

1. *Report or Return.* — *Scutt v. Southbury*, 55 Conn. 405; *Devoe v. Smeltzer*, 86 Iowa 385; *Furman v. Furman*, 86 Mich. 391; *Mont-Vernon's Petition*, 37 N. H. 516; *Goffstown's Petition*, 43 N. H. 199.

2. *Description of Road.* — *Mont-Vernon's Petition*, 37 N. H. 515; *State v. Bassett*, 33 N. J. L. 26; *State v. Lippincott*, 25 N. J. L. 434; *Rutherford's Road Case*, 10 S. & R. (Pa.) 120; *Road in Jackson Tp.*, 9 Pa. St. 85; *In re Road in Whiteley Tp.*, (Pa. 1888) 15 Atl. Rep. 895.

3. *Conclusiveness of Adjudication.* — *Bradbury v. Walton*, 94 Ky. 163; *Lyle v. Lesia*, 64 Mich. 16.

4. *Setting Aside of Order.* — *Reiff v. Conner*, 10 Ark. 241; *Barr v. Stevens*, 1 Bibb (Ky.) 293. But see *Mitchell v. Commissioners' Ct.*, 116 Ala. 650.

5. *Attack in Equity.* — *Ellis v. Blue Mountain Forest Assoc.*, (N. H. 1893) 41 Atl. Rep. 856.

6. *Right of Appeal.* — *Connecticut.* — *Scutt v. Southbury*, 55 Conn. 405.

*Illinois.* — *Highway Com'rs v. Quinn*, 136 Ill. 604.

*Indiana.* — *Cook v. Quick*, 127 Ind. 477.

*Kentucky.* — *Cole v. Shannon*, 1 J. J. Marsh. (Ky.) 220.

*Maine.* — *Cambridge v. Piscataquis County*, 86 Me. 141; *Coombs v. Franklin County*, 68 Me. 484.

*Minnesota.* — *State v. Holman*, 40 Minn. 369; *Schuster v. Lemond*, 27 Minn. 253; *State v. Barton*, 36 Minn. 145; *State v. Holman*, 40 Minn. 369.

*Missouri.* — *In re Big Hollow Road*, 113 Mo. 326, affirming 40 Mo. App. 363.

*New York.* — *People v. Nichols*, 51 N. Y.

470; *Matter of Coe*, (County Ct.) 19 Misc. (N. Y.) 549.

*North Carolina.* — *Ashcraft v. Lee*, 81 N. Car. 135.

*Ohio.* — *Buchanan v. Baker*, 54 Ohio St. 324.

*Pennsylvania.* — *Swanson St.*, 163 Pa. St. 323, 35 W. N. C. (Pa.) 306.

*Virginia.* — *Senter v. Pugh*, 9 Gratt. (Va.) 260.

*Washington.* — *Hull v. Stephenson*, 19 Wash. 572.

7. *Proceeding de Novo.* — *Hughes v. Beggs*, 114 Ind. 427; *Brandenburg v. Hittel*, (Ind. 1894) 37 N. E. Rep. 329, 16 Ind. App. 224; *In re Big Hollow Road*, 111 Mo. 326; *Buchanan v. Baker*, 54 Ohio St. 324.

8. *Certiorari.* — *Harris v. Mahaska County*, 88 Iowa 219; *Hammond v. Worcester County*, 154 Mass. 509; *Holden v. Berkshire County*, 7 Met. (Mass.) 561; *Greenman v. Shiawassee County*, 38 Mich. 642; *State v. Adams*, (N. J. 1891) 21 Atl. Rep. 938.

9. *Who May Ask Review.* — *Cole v. Shannon*, 1 J. J. Marsh. (Ky.) 218; *Davis v. Hampshire County*, 153 Mass. 218; *Hammond v. Worcester County*, 154 Mass. 509; *Kimball v. Homan*, 74 Mich. 699. But see *Hull v. Stephenson*, 19 Wash. 572.

10. *Schuster v. Lemond*, 27 Minn. 253, cited in *State v. Barton*, 36 Minn. 145; *State v. Holman*, 40 Minn. 369.

11. *Person "Interested."* — *Highway Com'rs v. Quinn*, 136 Ill. 604, overruling *Whitmer v. Highway Com'rs*, 96 Ill. 292.

12. *Remonstrants.* — *Matter of Big Hollow Road*, 40 Mo. App. 363, affirmed 111 Mo. 326. And see *Hull v. Stephenson*, 19 Wash. 572.

dent taxpayer of the town, having a right to appeal from the order laying out a highway, may also appeal from an order of discontinuance.<sup>1</sup>

**7. Effect of Vacation.** — After the vacation of a highway it is as if it had never existed, and it can be renewed only in the same way in which highways may be established in other cases.<sup>2</sup>

**The Discontinuance Is Complete,** it seems, upon the making of the adjudication without an actual shutting up of the road or an exclusion of travel therefrom,<sup>3</sup> but where a new highway is to be laid out to take the place of an old highway, the latter, it has been decided, cannot be fenced up by the owners of the land until the new highway is made fit for travel.<sup>4</sup>

**8. Collateral Attack.** — It has been held that the order for alteration is not subject to collateral attack because it fails to recite the facts necessary to give jurisdiction to the court<sup>5</sup> or because the description is too indefinite.<sup>6</sup>

**9. Injunction.** — It has been held that an injunction will not lie to restrain the vacation of a highway at the suit of one whose access to his property is not interfered with and whose injury will be the same as that of other property owners in the vicinity.<sup>7</sup>

**10. Successive Petitions.** — It has been held that after a refusal to vacate a road, another petition for the vacation of the same road will not be considered unless a different state of facts as to the necessity or desirability of the road is shown.<sup>8</sup>

**11. Rights of Abutting Owners.** — It is generally held that in the absence of statutory provision one whose land abuts on a highway is not entitled to damages on account of the discontinuance of the highway, his rights therein not being considered property within the protective clauses of the constitution.<sup>9</sup>

1. *Matter of Coe*, (County Ct.) 19 Misc. (N. Y.) 549.

2. **Re-establishment of Vacated Highway.** — *Reiff v. Conner*, 10 Ark. 241; *Com. v. Western*, 1 Pick. (Mass.) 136; *Cooper v. Detroit*, 42 Mich. 584; *Chestnut St.*, 15 Pa. Co. Ct. 115; *Yates v. West Grafton*, 33 W. Va. 507.

3. **Discontinuance Complete from Adjudication.** — *Hallock v. Franklin County*, 2 Met. (Mass.) 558; *Tinker v. Russell*, 14 Pick. (Mass.) 279; *Com. v. Western*, 1 Pick. (Mass.) 136; *Coakley v. Boston*, etc., R. Co., 159 Mass. 32.

4. **Preparation of New Highway.** — *Witter v. Damitz*, 81 Wis. 385.

**The Statute** sometimes provides that when a road is discontinued and another substituted for it, the former shall not be closed until the new road is actually made. *Roads in Londonderry Tp.*, 129 Pa. St. 244, 24 W. N. C. (Pa.) 327; *Phelps v. Pacific R. Co.*, 51 Mo. 477. And in such case an order shutting up the old road before the new one is open is void. *Bridgeport*, etc., *Turnpike Road*, 171 Pa. St. 312, 37 W. N. C. (Pa.) 199.

5. **Collateral Attack.** — *Stanley v. Sharp*, 1 Heisk. (Tenn.) 417; *Robson v. Byler*, 14 Tex. Civ. App. 374.

6. *Bailey v. McCain*, 96 Ill. 277.

7. **Injunction.** — *Hesing v. Scott*, 107 Ill. 600; *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379, 40 Am. Rep. 598; *Heller v. Atchison*, etc., R. Co., 28 Kan. 625.

8. **Successive Petitions.** — *Bath's Petition*, 22 N. H. 576; *Boscawen's Petition*, 33 N. H. 421. But see to the contrary *People v. Nichols*, 51 N. Y. 470.

**Statutory Provision.** — In *New Jersey* a statute provides that if the surveyors shall return that they think the laying out, vacation, or altera-

tion of the road to be unnecessary, no new application touching the said road shall be made within one year; and it was decided that this precluded a second proceeding during the pendency of a previous one. *Parker v. Adams*, 55 N. J. L. 334, reversing (N. J. 1891) 21 Atl. Rep. 938.

9. **Abutting Owners Not Entitled to Damages on Discontinuance** — *California*. — *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490.

*Illinois*. — *Fesser v. Achenbach*, 29 Ill. App. 373. *Compare East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795.

*Iowa*. — *Ellsworth v. Chickasaw County*, 40 Iowa 571; *Brady v. Shinkle*, 40 Iowa 576; *Barr v. Oskaloosa*, 45 Iowa 275; *Grove v. Allen*, 92 Iowa 519; *McKinney v. Baker*, 100 Iowa 362.

*Kansas*. — *Coffey County v. Venard*, 10 Kan. 95.

*Kentucky*. — *Elizabethtown*, etc., R. Co. v. *Jackson*, 9 Ky. L. Rep. 242.

*Montana*. — *State v. Deer Lodge County*, 19 Mont. 582.

*New Jersey*. — *Kean v. Elizabeth*, 54 N. J. L. 462.

*New York*. — *Holloway v. Delano*, (Supm. Ct.) 40 N. Y. St. Rep. 702.

*Pennsylvania*. — *McGee's Appeal*, 114 Pa. St. 470.

In *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649, Black, J., said: "Surrendering the right of way over a public road to the owners of the soil is not taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance of the road are not entitled to compensation. A private road is private property, and an Act of Assembly to close it up without paying for



But occasionally a different view has been taken, and the abutting owner has been held to be entitled to compensation.<sup>1</sup> A distinction in this regard has been stated to exist between country roads and city streets,<sup>2</sup> and it has been decided in a number of cases that the owner of a city lot cannot be deprived, without payment of compensation, of access to thoroughfares connecting his property with other parts of the city.<sup>3</sup>

A Statute, in some states, however, provides for compensation to persons or certain classes of persons injured by the discontinuance or vacation of a highway;<sup>4</sup> but such provision has been generally construed to apply only to persons owning land abutting on the highway, or who are specially injured, beyond other persons in the neighborhood, by the discontinuance.<sup>5</sup>

it would be depriving the owner of his property. But a public road belongs to nobody but the state; and when the government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place."

**1. Contrary Decisions.**—In *Pearsall v. Eaton County*, 74 Mich. 558, Sherwood, C. J., said: "The benefits to be received by a person whose land is taken by the public for a road are a part of the consideration for the release of the land, or its condemnation for a road, and when once vested in him, or he becomes entitled thereto, they are as much his property as the land itself, and neither the state nor any of its subordinate agencies can deprive him of them, except in the manner pointed out by the constitution, and that has not been done in this case. Notice, finding of public necessity for taking, and compensation ascertained by jury, and made, are wanting, and without these the proceedings are void." To the same effect see *McQuigg v. Cullins*, 56 Ohio St. 649. See also *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795.

**2. Distinction Between Country Roads and City Streets.**—In *Bradbury v. Walton*, 94 Ky. 167, it was said: "The streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot-owner, the grantor, or the party making the dedication, saying to the owners of lots, this right of ingress and egress you shall have. But not so with an ordinary public road. The state creates the easement for the entire public; its use is that of the public, one citizen having as much right to this use as the other, and when its abandonment or nonuse is deemed necessary for the public good, the County Court may discontinue it altogether, and in that tribunal the question must be made."

**3. Deprivation of Ingress and Egress**—*Indiana*.—*Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9.

*Kansas*.—*Heller v. Atchison*, etc., R. Co., 28 Kan. 625.

*Kentucky*.—*Bannon v. Rohmeiser*, 90 Ky. 48, 29 Am. St. Rep. 355; *Transylvania University v. Lexington*, 3 B. Mon. (Ky.) 25, 38 Am. Dec. 173.

*Massachusetts*.—*Smith v. Boston*, 7 Cush. (Mass.) 254.

*Minnesota*.—*Brakken v. Minneapolis*, etc., R. Co., 29 Minn. 41.

*Missouri*.—*Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Glasgow v. St. Louis*, 107

Mo. 202; *Heinrich v. St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490.

*Tennessee*.—*Anderson v. Turbeville*, 6 Coldw. (Tenn.) 150.

*West Virginia*.—*Lazzell v. Garlow*, 44 W. Va. 466.

In *New York* it is stated that though one public way to property is closed, if there is another left the property owner sustains no actionable damage. *Coster v. Albany*, 43 N. Y. 399; *Fearing v. Irwin*, 55 N. Y. 490; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411.

**4. Statutory Provision for Compensation.**—*Butterworth v. Bartlett*, 50 Ind. 537; *Cook v. Quick*, 127 Ind. 477; *Conkling v. Zerega*, 72 Hun (N. Y.) 134; *Matter of Barclay*, 91 N. Y. 430.

**5.** *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795.

Under a *Massachusetts* statute providing for payment of any damages sustained by persons in their property by the laying out, altering, or discontinuing of any highway, it was held that, in general, the discontinuance of the highway gives no right to recover damages to the owner of land not abutting on the way discontinued and still accessible by other ways. *Smith v. Boston*, 7 Cush. (Mass.) 254; *Castle v. Berkshire County*, 11 Gray (Mass.) 26; *Davis v. Hampshire County*, 153 Mass. 218; *Hammond v. Worcester County*, 154 Mass. 509; *Stanwood v. Malden*, 157 Mass. 17.

In *Nichols v. Richmond*, 162 Mass. 170, *Morton, J.*, said: "The line has to be drawn somewhere, on practical grounds, between those who may and those who may not recover for damages caused by the discontinuance, in whole or in part, of a street or way; and it has been drawn so as to limit the right of recovery to damages which are special and peculiar, and different in kind from those suffered by the public at large. In the present case, although, owing to the proximity of her premises to the discontinued portion of the way, and to the use which she made of them, the inconvenience and damage to the petitioner were greater than to others having occasion to use the way, the difference was one of degree and not of kind. She was obliged to travel farther than before in passing to and fro between the different portions of her farm. But every one who passed over the way was subjected to a similar inconvenience."

A Right of Way cannot be taken from a person's property to the highway which is vacated apparently gives the same right to compensation as if the property abutted on the highway. *Webster v. Lowell*, 142 Mass. 324. And see remarks of



**12. Vacation Implied from Alteration.** — It is generally agreed that upon the alteration of a highway by the construction of a part of it in a different place, where it will serve the same purposes, thus rendering a part of the old road useless or unnecessary, such old road is to that extent discontinued, without express words to that effect.<sup>1</sup> Nor does the fact that one of the termini of the road as altered is different from the terminus in the same direction of the old road affect the application of the principle.<sup>2</sup>

**VIII. ABANDONMENT AND NONUSER — 1. In General.** — The question whether title to highways can be acquired as against municipal or *quasi*-municipal corporations by adverse possession, a point upon which the decisions of the different states are in direct conflict, is considered in another part of this work.<sup>3</sup> Courts, however, occasionally refer to the abandonment of a highway, as shown by nonuser thereof by the public, or other evidence, apparently without special reference to the principle of adverse possession.<sup>4</sup> In other states

Shaw, C. J., in *Smith v. Boston*, 7 Cush. (Mass.) 254.

In *New Hampshire*, under a practically similar statute, it was stated that the damages should be assessed not only to abutters but to others who have suffered a special damage from the discontinuance of the highway not common to the general public. *Concord's Petition*, 50 N. H. 530; *Candia v. Chandler*, 58 N. H. 127.

The *Persons "Through" Whose Land* the road runs, to whom, by an *Indiana* statute, a right to damages upon its vacation is given, were held to include persons whose land merely abutted upon the highway. *Brandenburg v. Hittel*, (Ind. 1894) 37 N. E. Rep. 329.

**1. Vacation Implied from Alteration — California.** — *Brook v. Horton*, 68 Cal. 554.

*Georgia.* — *Ponder v. Shannon*, 54 Ga. 188.

*Illinois.* — *Champlin v. Morgan*, 20 Ill. 183; *Grube v. Nichols*, 36 Ill. 99; *Brockhausen v. Boehland*, 36 Ill. App. 224, *affirmed* 137 Ill. 547.

*Kentucky.* — *M'Ilvoy v. Speed*, 4 Bibb (Ky.) 86.

*Massachusetts.* — *Com. v. Westborough*, 3 Mass. 406; *Com. v. Cambridge*, 7 Mass. 158; *Com. v. Boston, etc.*, R. Co., 150 Mass. 174; *Hobart v. Plymouth County*, 100 Mass. 159; *Goodwin v. Marblehead*, 1 Allen (Mass.) 37; *Bennett v. Clemence*, 6 Allen (Mass.) 10; *Bowley v. Walker*, 8 Allen (Mass.) 21; *Johnson v. Wyman*, 9 Gray (Mass.) 186; *Bliss v. Deerfield*, 13 Pick. (Mass.) 102.

*New Jersey.* — *State v. Bergen*, 21 N. J. L. 342.

*Oregon.* — *Heiple v. Clackamas County*, 20 Oregon 149.

*Pennsylvania.* — *Millcreek Tp. v. Reed*, 29 Pa. St. 195.

*Vermont.* — *Closson v. Hamblet*, 27 Vt. 728.

*West Virginia.* — *Yates v. West Grafton*, 33 W. Va. 507.

*Wisconsin.* — *Hark v. Gladwell*, 49 Wis. 172.

**What Constitutes Alteration Within Rule.** — So in *State v. Reesa*, 59 Wis. 106, where the highway diverged from the section line, on which it mostly ran, to pass around a slough, and the town board, on petition to discontinue the divergent portion and to lay it on a straight line, made an order for the "laying out of a highway" on the line between these points or diversions from the section line, but no order was made discontinuing the old highway

around the slough, it was held that the order involved an alteration of the highway so as to come within the rule that in such a case the old highway should be considered as discontinued.

**Intention.** — In *Com. v. Boston, etc.*, R. Co., 150 Mass. 174, a county road entering another at right angles was defected by the board of commissioners at a point some twenty-eight rods from the point of intersection, and was made to enter the other road about the same distance north of the old intersection; and it was held by the court that the portion of the road between the point of inflection and its first terminus was thereby intended to be vacated. In determining the matter the court said: "There is nothing in the language of the petition or of the adjudication to suggest that anything else was contemplated than a substitution of a new piece of road for an old one on the same general line of travel."

**Way to Public Landing.** — But it was held that the alteration of a way by the substitution of a new one therefor did not discontinue the old way if the latter was necessary to furnish access to a public landing, as this would in effect discontinue a landing, which the county commissioners had no authority to do. *Bennett v. Clemence*, 6 Allen (Mass.) 10.

**2. Change of Terminus.** — *Com. v. Boston, etc.*, R. Co., 150 Mass. 174; *Vedder v. Marion County*, 28 Oregon 77.

**3. Adverse Possession of Highway.** — See the title ADVERSE POSSESSION, vol. I, p. 787.

**4. Abandonment of Highway — Connecticut.** — *Beardsley v. French*, 7 Conn. 125, 18 Am. Dec. 86; *Benham v. Potter*, 52 Conn. 248; *Hartford v. New York, etc.*, R. Co., 59 Conn. 259.

*Indiana.* — *Jeffersonville, etc.*, R. Co. v. O'Connor, 37 Ind. 95; *Louisville, etc.*, R. Co. v. White, 94 Ind. 257; *Louisville, etc.*, R. Co. v. Shanklin, 94 Ind. 297, 98 Ind. 573; *Louisville, etc.*, R. Co. v. Pixley, 94 Ind. 603.

*Iowa.* — *Lathrop v. Central Iowa R. Co.*, 69 Iowa 105; *Lawson v. Fitzgerald*, 87 Iowa 402.

*Massachusetts.* — *Holt v. Sargent*, 15 Gray (Mass.) 97; *Warner v. Holyoke*, 112 Mass. 362; *Cutter v. Cambridge*, 6 Allen (Mass.) 20.

*Michigan.* — *Lyle v. Lesia*, 64 Mich. 16; *Coleman v. Flint, etc.*, R. Co., 64 Mich. 160; *Devaux v. Detroit, Harr. (Mich.)*, 98.

*Minnesota.* — *Miller v. Corinna*, 42 Minn. 391.

it is denied that the public right to use the highway can be lost by nonuser.<sup>1</sup>

**2. Character of Nonuser.** — A mere partial or transient nonuser of the highway is not sufficient to show an abandonment,<sup>2</sup> and it has been held that until a highway dedicated to the public is needed for actual use, no mere nonuser, however long continued, will effect an abandonment.<sup>3</sup>

**3. Duration of Nonuser.** — In none of the cases does an abandonment appear to have been considered as established when the period of nonuser was less than the period necessary to establish adverse possession, except when a new highway has been opened and established in place of the one abandoned;<sup>4</sup> and while the court has occasionally refused to name any fixed period of time as necessary to constitute an abandonment by nonuser,<sup>5</sup> in some cases the statutory period of prescription has been stated to be necessary.<sup>6</sup>

**4. Acceptance of Other Highway.** — In *Illinois* an abandonment is said to exist only when another highway is accepted in place of the pre-existing one under such circumstances as to give to the public a valid title to the former;<sup>7</sup> a mere adoption of another line of travel by the public, without legal right thereto, being insufficient.<sup>8</sup> Provided, however, this condition is complied with, the fact that the new highway may be less useful to the public is said to be immaterial.<sup>9</sup>

**5. Abandonment of Part of Width.** — The mere fact that a part of the width of the highway has not been used as such, or has been obstructed for a considerable length of time, does not effect a narrowing of the highway as by abandonment of the part so disused.<sup>10</sup>

*Missouri.* — *Bruce v. Saline County*, 26 Mo. 262.

*New York.* — *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Crain v. Fox*, 16 Barb. (N. Y.) 184; *Amsbey v. Hinds*, 46 Barb. (N. Y.) 622, 48 N. Y. 57; *Woodruff v. Paddock*, 130 N. Y. 615.

*North Carolina.* — *Willey v. Norfolk Southern R. Co.*, 96 N. Car. 40.

*Ohio.* — *Fox v. Hart*, 11 Ohio 414.

*South Carolina.* — *Street Com'rs v. Taylor*, 2 Bay (S. Car.) 282, 1 Am. Dec. 647.

*Tennessee.* — *Shelby v. State*, 10 Humph. (Tenn.) 165.

*Vermont.* — *Knight v. Heaton*, 22 Vt. 480.

See also the title EASEMENTS, vol. 10, p. 434 et seq.

In *Beardsley v. French*, 7 Conn. 125, 18 Am. Dec. 86, Hosmer, C. J., said: "The nonuser of an easement of this kind, for many years, is *prima facie* evidence of a release of the right to the person over whose land the highway once ran; and although the precise limit of time in respect of the public, in such cases, has not been established, there can be no doubt that the desertion of a public road for nearly a century is strong presumptive evidence that the right of way has been extinguished."

**Illustrations.** — So in *Holt v. Sargent*, 15 Gray (Mass.) 97, it was held that a discontinuance of a highway might be shown by evidence that it had been shut up, the land inclosed by permanent fences or walls, and continuously occupied or improved, for over forty years, for purposes inconsistent with its use as a highway.

And in *Woodruff v. Paddock*, 56 Hun (N. Y.) 288, a nonuser of a public alley for over forty years, together with affirmative evidence of intention to abandon, was held to justify a finding that such alley was no longer a highway.

The Burden of Proof of the abandonment of a highway is on the landowner claiming the land free from the burden of the highway. *Dingwall v. Weld County*, 19 Colo. 415.

**1. Abandonment Not Shown by Nonuser.** — *Davies v. Huebner*, 45 Iowa 574; *Sheen v. Stothart*, 29 La. Ann. 631; *Com. v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599; *Com. v. McNaughter*, 131 Pa. St. 55.

**2. Character of Nonuser.** — *Lewiston v. Proctor*, 27 Ill. 414; *Davis v. Nicholson*, 81 Ind. 183; *Grandville v. Jenison*, 84 Mich. 54; *State v. Morse*, 50 N. H. 9; *State v. Alstead*, 18 N. H. 60; *Crump v. Mims*, 64 N. Car. 767.

**3. Necessity of Highway.** — *Henshaw v. Hunting*, 1 Gray (Mass.) 210; *Morton v. Moore*, 15 Gray (Mass.) 573; *Parker v. St. Paul*, 47 Minn. 317; *Briel v. Natchez*, 48 Miss. 423; *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 357.

**4. Duration of Nonuser.** — *Peoria v. Johnston*, 56 Ill. 45; *Brockhausen v. Boehland*, 36 Ill. App. 224, affirmed 137 Ill. 547; *Lyle v. Lesia*, 64 Mich. 16.

**5. Beardsley v. French, 7 Conn. 125, 18 Am. Dec. 86; *Hartford v. New York, etc., R. Co.*, 59 Conn. 259; *Jeffersonville, etc., R. Co. v. O'Connor*, 37 Ind. 95.**

**6. Statutory Period.** — *State v. Culver*, 65 Mo. 607, 27 Am. Rep. 295; *Crump v. Mims*, 64 N. Car. 767; *Lake Shore, etc., R. Co. v. Cleveland*, 1 Ohio N. P. 1, 1 Ohio Dec. 1; *Nail, etc., Co. v. Furnace Co.*, 46 Ohio St. 544. And see *Lyle v. Lesia*, 64 Mich. 16.

**7. Acceptance of Other Highway.** — *Brockhausen v. Boehland*, 36 Ill. App. 224, affirmed 137 Ill. 547; *Galbraith v. Littiech*, 73 Ill. 209; *Peoria v. Johnston*, 56 Ill. 45.

**8. *Chicago v. Morgan*, 26 Ill. 181.**

**9. *Grube v. Nichols*, 36 Ill. 92.**

**10. Abandonment of Part of Width.** — *Indiana.* — *Wolfe v. Sullivan*, 133 Ind. 331; *Brown v. Hiatt*, 16 Ind. App. 340.



**6. Statutory Abandonment — a. OF UNOPENED HIGHWAY.**— It is sometimes provided by the statute that the failure to open a highway within a certain length of time after it is established as a highway shall effect an abandonment thereof.<sup>1</sup> Where the statute contained such a provision as to a highway "laid out," it was held that it did not apply to a highway dedicated by a recorded plat.<sup>2</sup>

**What Constitutes Opening.**— Under statutes of this character it has been decided that the highway, to be considered as opened, need not be in such a state of repair as to exclude a possibility of indictment for nonrepair,<sup>3</sup> but it is not opened if nothing has been done to the larger part of it and the remainder was already open and used as a road.<sup>4</sup> In *New York* it was decided that the criterion as to whether a road was "opened and worked" was whether it was made passable as a highway for public travel.<sup>5</sup> In *Kansas* it was decided that the fact that the travel deviated in various places a number of rods from the line of the road as established did not cause a discontinuance of the road in such parts as being unopened.<sup>6</sup> And in *Illinois* the fact that

*Kansas.*— *Hentzler v. Bradbury*, 5 Kan. App. 1.

*Maine.*— *Pillsbury v. Brown*, 82 Me. 450.

*New Jersey.*— *Humphreys v. Woodstown*, 48 N. J. L. 595.

*Ohio.*— *Fox v. Hart*, 11 Ohio 414; *McClelland v. Miller*, 28 Ohio St. 488.

*Wisconsin.*— *Moore v. Roberts*, 64 Wis. 538.

And see *Com. v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599.

In *Webb v. Butler County*, 52 Kan. 375, *Johnston, J.*, said: "It is frequently the case that the full width of country roads is not improved or used, for the reason that the necessities of the public for the time being do not require it; but such limited use will not lessen the right of the public to use the entire width of the highway when the increased travel and the exigencies of the public make it necessary. It has been held that where an easement is obtained by adverse use alone, the extent of the easement must be measured by the actual use, but this rule has no application to a road of a certain width authorized and established in pursuance of statute."

**1. Failure to Open Highway — California.**— *Myers v. Daubenbiss*, 84 Cal. 1.

*Illinois.*— *Trotter v. Barrett*, 164 Ill. 262.

*Indiana.*— *Decker v. Washburn*, 8 Ind. App. 673.

*Kansas.*— *Webb v. Butler County*, 52 Kan. 375.

*Maine.*— *King v. Lewiston*, 70 Me. 406; *Coombs v. Franklin County*, 71 Me. 239.

*New Jersey.*— *Humphreys v. Woodstown*, 48 N. J. L. 588.

*New York.*— *Horey v. Haverstraw*, 124 N. Y. 273, reversing 47 Hun (N. Y.) 356; *Christy v. Newton*, 60 Barb. (N. Y.) 332; *Ludlow v. Oswego*, 25 Hun (N. Y.) 260; *People v. New York Cent., etc., R. Co.*, 69 Hun (N. Y.) 166; *Marble v. Whitney*, 28 N. Y. 297; *Cohoes v. Delaware, etc., Canal Co.*, 54 Hun (N. Y.) 559; *Falvey v. Bridges*, (Supm. Ct. Gen. T.) 40 N. Y. St. Rep. 732.

*Ohio.*— *Peck v. Clark*, 19 Ohio 367; *McClelland v. Miller*, 28 Ohio St. 488.

*Wisconsin.*— *Dolphin v. Pedley*, 27 Wis. 469.

The Burden of Proof is on the party alleging a cessation of the highway by failure to open

and work it. *Cohoes v. Delaware, etc., Canal Co.*, 134 N. Y. 407; *McVee v. Watertown*, 92 Hun (N. Y.) 306.

The Massachusetts Statute (Pub. Stat. Mass. 1882, c. 49, § 88) provides that the laying out of a way shall be void against the owner of the land over which it is located unless possession is taken of the land for the purpose of the highway within two years; and it has been decided that no person except such owner of land can complain of noncompliance with the provision. *Pickford v. Lynn*, 98 Mass. 491. But upon such failure to take possession, another proceeding may be begun for the laying out of the way. *Folsom v. Middlesex County*, (Mass. 1899) 53 N. E. Rep. 155.

As to what constitutes a taking possession of land within the statute, see *Wilcox v. New Bedford*, 140 Mass. 570; *Gilkey v. Watertown*, 141 Mass. 317.

**2. Character of Highway.**— *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449.

As to the classes of highways covered by the *New York* statute, see *Amsbry v. Hinds*, 48 N. Y. 57; *Ludlow v. Oswego*, 25 Hun (N. Y.) 260.

**3. What Constitutes Opening.**— *State v. Cornville*, 43 Me. 427.

**4. State v. Cornville**, 43 Me. 427. Compare *Baker v. Runnels*, 12 Me. 235.

**5.** "The requirement to open and work a highway implies that it must be made passable as a highway for public travel. It need not be a first-class road; it need not be finished; but it must be sufficient to enable the public to pass over it." *Beckwith v. Whalen*, 70 N. Y. 430, quoted and approved in *Horey v. Haverstraw*, 124 N. Y. 273.

But in *Baker v. Runnels*, 12 Me. 235, it was decided that a road was open though a part of it was impassable except for foot passengers.

**6. Deviation from Established Route.**— *Stickel v. Stoddard*, 28 Kan. 715; *Wilson v. Janes*, 29 Kan. 233. In the latter case the court said "A road may be opened without either notice or work. Travel alone upon such a road would be a sufficient opening of the same. And certainly, whenever a road is in fact used as a public highway by the public, it cannot be considered as an 'unopened' road within the meaning of the statute."



the commissioners allowed the owner of land through which the road was laid out to put up bars to protect his crops was held not to affect the validity of the opening for the purpose of the statute.<sup>1</sup> Though no work is done in preparing the highway after it is established, a discontinuance does not, it seems, ensue if it is established on an existing road which is sufficient for the public use.<sup>2</sup>

If Parts Only of the Highway are opened and traveled, such parts will not, it has been held, be discontinued by force of the statute merely because other parts are not opened;<sup>3</sup> and a statute providing that all public roads laid out, and not open and used for twenty years, shall be deemed vacated, was held to apply only where no part of the road had been opened and used.<sup>4</sup> But in *Illinois* it is held that the statutory abandonment cannot be avoided by opening portions only of the road within the statutory time.<sup>5</sup>

The Failure to Open the Full Width of the highway does not effect a partial discontinuance or restrict the width of the highway to that opened.<sup>6</sup>

The Statutory Period does not begin to run until the end of the proceedings involved in the establishment of the road,<sup>7</sup> and in case of a highway created by dedication the time runs from the acceptance thereof.<sup>8</sup>

*b. OF HIGHWAY ALREADY OPENED.* — The statute sometimes expressly provides that a failure to use a highway for a certain length of time, generally a period of five or six years, shall terminate its existence.<sup>9</sup> A failure to use a highway, within the statute, was held to have occurred though such failure was caused by the building of fences or making of excavations therein by an abutting owner, so as to render its use impossible.<sup>10</sup> But under another statute, declaring a highway vacated if "unused for public travel" for five years, it was held that "unused" signified an abandonment by the public, and that the statute did not apply when the road could not be used owing to the wrongful removal of bridges therefrom by a railroad company, the restoration of which the public was seeking to compel.<sup>11</sup>

*Nonuser of Part of Highway.* — Such a statute has been held to apply though the nonuser was of merely a portion of the highway, so as to effect a discontinuance of such portion.<sup>12</sup> But the mere fact that the line of travel is deflected for the statutory period from a small portion of the road by reason of some local difficulty or obstruction will not constitute the statutory nonuser of the part from which travel is so deflected;<sup>13</sup> nor will the impossibility of

1. Putting up Bars. — *Wiley v. Brimfield*, 59 Ill. 306.

2. Establishment on Pre-existing Road. — *Heald v. Moore*, 79 Me. 271; *Grove v. Graham*, 41 Ohio St. 303; *Hedleston v. Hendricks*, 52 Ohio St. 460.

3. Opening of Part of Highway. — *State v. Madison*, 59 Me. 538; *McCarthy v. Whalen*, 19 Hun (N. Y.) 503.

4. *Humphreys v. Woodstown*, 48 N. J. L. 588.

5. *Green v. Green*, 34 Ill. 320; *Wragg v. Penn Tp.*, 94 Ill. 11, 34 Am. Rep. 199.

6. Opening of Part of Width. — *Webb v. Butler County*, 52 Kan. 375; *Heald v. Moore*, 79 Me. 271; *Walker v. Caywood*, 31 N. Y. 51.

7. Computation of Statutory Periods. — *Highway Com'rs v. People*, 38 Ill. 347; *Coombs v. Franklin County*, 71 Me. 239.

8. *Christie v. Hawley*, 67 N. Y. 133.

A Petition to Discontinue the highway before it is opened does not interrupt or change the time for opening the highway. *State v. Wellman*, 83 Me. 282.

9. Statutory Abandonment of Opened Highway. — *McRose v. Bottyer*, 81 Cal. 122; *Myers v. Daubenbiss*, 84 Cal. 1; *Cooper v. Detroit*, 42

Mich. 584; *Riley v. Brodie*, (Supm. Ct. Eq. T.) 22 Misc. (N. Y.) 374; *Amsbey v. Hinds*, 46 Barb. (N. Y.) 622; *Herrick v. Geneva*, 92 Wis. 114.

Retroactive Effect of Statute. — The fact that the *New York* statute provided that all highways "that have ceased to be traveled or used" as such for six years shall cease to be highways was held not to give such a statute a retroactive effect. *Amsbry v. Hinds*, 48 N. Y. 57.

10. Nonuser. — *Horey v. Haverstraw*, 124 N. Y. 273, reversing 47 Hun (N. Y.) 356.

11. *Chosen Freeholders v. Pennsylvania R. Co.*, 45 N. J. L. 82.

12. Nonuser of Part of Highway. — *Horey v. Haverstraw*, 124 N. Y. 273; *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146; *Mangam v. Sing Sing*, 11 N. Y. App. Div. 215.

13. *O'Dea v. State*, 16 Neb. 241.

So in *Maire v. Kruse*, 85 Wis. 302, where the statute provided that a highway should be considered as discontinued if entirely abandoned as a route of travel, it was held that where two highways met at right angles, but, owing to a hill, travel had diverged near the corner, cutting off the corner and a small portion of

using the highway to its full width, owing to obstructions along the sides thereof, effect such a nonuser.<sup>1</sup>

**IX. ESTOPPEL TO CLAIM HIGHWAY.** — The principle of estoppel has also been applied in favor of the owners of the fee, when the public authorities, by failure to indicate clearly the existence or boundaries of the highway, have induced such owners to expend money in improvements upon land within the limits of the highway.<sup>2</sup> And the same principle has been applied in favor of innocent purchasers of land in reliance upon the apparent abandonment or nonexistence of a highway thereon.<sup>3</sup>

**X. IMPROVEMENTS AND REPAIRS — 1. In General.** — While under particular statutes the duty to improve or repair a highway may be absolute,<sup>4</sup> the plan and manner of making repairs and improvements, and the extent thereof, are generally matters within the discretion of the highway officers, except in so far as the negligent failure to make them is ground for action by a person injured thereby.<sup>5</sup>

When a Highway Is Established on the Division Line of two municipalities there is frequently a statutory provision, owing to the inconvenience of each municipality making repairs on its side of the road, that the municipal officers may divide the road crosswise and assign to each municipality the part to be kept in repair by it.<sup>6</sup>

each highway, and the corner was consequently not used for the statutory period, the portions so unused did not cease to be parts of the highways.

**1. Nonuser of Part of Width.** — *Mangam v. Sing Sing*, 26 N. Y. App. Div. 464; *State v. Wertzel*, 62 Wis. 184.

**2. Estoppel to Claim Highway** — *United States*. — *Simplot v. Chicago, etc.*, R. Co., 16 Fed. Rep. 350.

*Illinois*. — *Piatt County v. Goodell*, 97 Ill. 84; *Lee v. Mound Station*, 118 Ill. 304; *Chicago, etc., R. Co. v. Joliet*, 79 Ill. 25.

*Indiana*. — *Brooks v. Riding*, 46 Ind. 15; *Sims v. Frankfort*, 79 Ind. 446; *Hamilton v. State*, 106 Ind. 361.

*Iowa*. — *Davies v. Huebner*, 45 Iowa 574; *Orr v. O'Brien*, 77 Iowa 253; *Crismon v. Deck*, 84 Iowa 344. See also *Waterloo v. Union Mill Co.*, 72 Iowa 437.

*Maryland*. — *Baldwin v. Trimble*, 85 Md. 396.

*Michigan*. — *Gregory v. Knight*, 50 Mich. 61.

*Ohio*. — *Evens v. Cincinnati*, 2 Handy (Ohio) 236.

Compare *Sims v. Chattanooga*, 2 Lea (Tenn.) 694; *State v. Leaver*, 62 Wis. 387.

In *Crocker v. Collins*, 37 S. Car. 327, 34 Am. St. Rep. 752, *McIver, C. J.*, illustrating the principle of the text, said: "When a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of a town, and expended his money in erecting buildings thereon, without interference on the part of the public, these or perhaps other circumstances connected with adverse possession for the statutory period may afford good ground for estoppel."

**Illustration of Principle.** — So in *Chicago, etc., R. Co. v. People*, 91 Ill. 251, where the municipal authorities acquiesced for nineteen years in the use of a highway by a railroad company for an arch, which was part of the railroad bed, and then agreed in writing that the company should have the right so to use the highway until it was necessary to

rebuild the arch, it was held that the municipality was estopped from compelling the company to remove the arch until its rebuilding was necessary.

**Temporary Structures.** — But the erection of mere temporary structures of little value, under a mistake as to the location of the highway, will give no rights to the landowner. *Cheek v. Aurora*, 92 Ind. 107.

**3. Innocent Purchasers.** — *Bradley v. Appanoose County*, 106 Iowa 105; *Smith v. Gorell*, 81 Iowa 218; *Bosworth v. Mt. Sterling*, 12 Ky. L. Rep. 157, (Ky. 1890) 13 S. W. Rep. 920; *Lyle v. Lesia*, 64 Mich. 16.

So in *Riley v. Brodie*, (Supm. Ct. Eq. T.) 22 Misc. (N. Y.) 374, where there was no record of the laying out of a highway, and the highway, though once used as such, was discontinued by the authorities and thereafter became a *cul de sac* on the land and was covered with grass, uninclosed, and partially obstructed by posts, in which condition it had remained for twenty years, it was held that one purchasing without knowledge of such highway was entitled to claim the land free from any easement in favor of the public.

**4. Improvements and Repairs** — *Illinois*. — *Klein v. People*, 31 Ill. App. 302.

*Indiana*. — *State v. Kamman*, 151 Ind. 407.

*Kentucky*. — *Hammar v. Covington*, 3 Met. (Ky.) 494.

*New Jersey*. — *State v. Orange*, 31 N. J. L. 131.

*Pennsylvania*. — *Uniontown v. Com.*, 34 Pa. St. 293.

*Wisconsin*. — *Deichsel v. Maine*, 81 Wis. 553.

As to mandamus to compel improvements or repairs, see the title **MANDAMUS**.

**5. Discretion of Officers.** — *Atwood v. Par-tree*, 56 Conn. 80; *Munson v. Mallory*, 36 Conn. 173, 4 Am. Rep. 52; *Patoka Tp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417; *Palmer v. Carroll*, 24 N. H. 314. See this matter more fully treated under the title **STREETS AND SIDEWALKS**.

**6. Highway on Line Between Municipalities.** — *Highway Com'rs v. Highway Com'rs*, 74 Ill.



**2. Petition for Improvement.** — It is sometimes provided by statute that a petition signed by a certain proportion of the neighboring landowners shall be filed as a preliminary to improving a highway.<sup>1</sup>

**3. Contract for Repairs.** — The municipality is sometimes authorized by statute to make contracts with individuals by which the latter agree to keep roads in repair for a specified time,<sup>2</sup> and the municipality may, apart from statute, receive from an individual an obligation to relieve it permanently from the expense of keeping a part of the highway in repair.<sup>3</sup>

**4. Injuries to Private Property.** — A municipality is liable for injuries caused to private property by the improper or negligent improvement or repair of a highway, as in the case of other public improvements.<sup>4</sup>

A Ditch necessary for the proper improvement of a highway may be built therein though it cause some inconvenience to an abutting owner;<sup>5</sup> but a ditch cannot be constructed on adjoining land for the purpose of draining the highway except as expressly authorized by a statute providing for compensation.<sup>6</sup>

**Entry on Private Land.** — The highway officer may enter upon private land in order to remove an obstruction in a watercourse there which has caused an overflow of the highway, this being a right possessed by any adjoining owner of private property.<sup>7</sup>

**There Is in Some States** a special statutory provision for the assessment of damages to landowners caused by the repairing of highways.<sup>8</sup>

**Change of Grade.** — As a general rule an authorized change of the grade of a highway is not an injury for which an abutting owner can claim damages.

App. 185; *State v. Thomaston*, 74 Me. 198; *Sharp v. Evergreen Tp.*, 67 Mich. 443; *Montgomery v. Scott*, 34 Wis. 338. See as to bridges between two municipalities the title BRIDGES, vol. 4, p. 930.

**1. Petition for Improvement.** — *Wyandotte County v. Barker*, 45 Kan. 699; *La Monte v. Chosen Freeholders*, (N. J. 1896) 35 Atl. Rep. 1; *Campbell v. Park*, 32 Ohio St. 544; *Thompson v. Love*, 42 Ohio St. 61. See also the titles SPECIAL ASSESSMENTS; STREETS AND SIDEWALKS.

**2. Contract for Repairs — Connecticut.** — *Jones v. Marlborough*, 70 Conn. 583.

**Kentucky.** — *Campbell County v. Youtsey*, (Ky. 1889) 12 S. W. Rep. 305.

**Massachusetts.** — *Clark v. Russell*, 116 Mass. 457.

**Mississippi.** — *State v. Vice*, 71 Miss. 912. **Missouri.** — *McKissick v. Mt. Pleasant Tp.*, 48 Mo. App. 416.

**3. Brookfield v. Reed**, 152 Mass. 568; *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267.

**4. Injuries to Private Property — Alabama.** — *Montgomery v. Townsend*, 84 Ala. 478.

**Connecticut.** — *Hooker v. New Haven, etc.*, Co., 14 Conn. 146, 36 Am. Dec. 477; *Mootry v. Danbury*, 45 Conn. 556, 29 Am. Rep. 703.

**Illinois.** — *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1. *Compare Carter v. Chicago*, 57 Ill. 283; *English v. Danville*, 170 Ill. 131.

**Indiana.** — *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Valparaiso v. Adams*, 123 Ind. 250.

**Iowa.** — *Heater v. Heister*, 658, 26 Am. Rep. 182. *Compare Bills v. Belknap*, 36 Iowa 583; *Quinton v. Burton*, 61 Iowa 471.

**Kentucky.** — *Louisville v. Louisville Rolling*

*Mill Co.*, 3 Bush (Ky.) 416, 96 Am. Dec. 243.

**Massachusetts.** — *Perry v. Worcester*, 6 Gray (Mass.) 544, 66 Am. Dec. 431; *Sprague v. Worcester*, 13 Gray (Mass.) 193.

**Missouri.** — *Foster v. St. Louis*, 71 Mo. 157; *Werth v. Springfield*, 78 Mo. 107.

**New Hampshire.** — *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Carpenter v. Nashua*, 58 N. H. 37.

**New Jersey.** — *State v. Jersey City*, 34 N. J. L. 277.

**Ohio.** — *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421.

**Rhode Island.** — *O'Rourke v. Bain*, (R. I. 1887) 12 Atl. Rep. 407.

**Virginia.** — *Powell v. Wytheville*, 95 Va. 73; *Smith v. Alexandria*, 33 Gratt. (Va.) 208, 36 Am. Rep. 788.

**Wisconsin.** — *Goodall v. Milwaukee*, 5 Wis. 32.

**5. Ditch in Highway.** — *Wilson v. Duncan*, 74 Iowa 491; *Randall v. Christensen*, 76 Iowa 169. See also the title DRAINS AND SEWERS, vol. 10, p. 220.

**6. Ditch on Private Property.** — *Chaplin v. Highway Com'rs*, 129 Ill. 651; *Cable v. Hultz*, 118 Ind. 13; *Plummer v. Sturtevant*, 32 Me. 325. See also *Dierks v. Highway Com'rs*, 142 Ill. 197.

**7. Removal of Obstruction in Watercourse.** — *Johnson v. Dunn*, 134 Mass. 522.

**8. Statutory Provisions for Compensation.** — See *Board of Auditors v. People*, 38 Ill. App. 239; *Chaplin v. Highway Com'rs*, 129 Ill. 651; *Dierks v. Highway Com'rs*, 142 Ill. 197; *Deniston v. Clark*, 125 Mass. 216; *Dana v. Boston*, 170 Mass. 593; *Bartlett v. Bristol*, 66 N. H. 420.



unless injury was caused by negligence in making the change, or unless the statute expressly provides for compensation.<sup>1</sup>

**Surface Waters.** — The question of right of the highway officers as against abutting owners to make improvements which result in a change in the flow of surface water is considered in another place.<sup>2</sup>

**5. Use of Materials.** — The municipality or its officers are liable in case materials for repairs are taken from adjoining land without any statutory authority for so doing.<sup>3</sup> The statute sometimes provides for the taking of material from private property for the purpose of highway repairs, on condition that compensation is made therefor,<sup>4</sup> and the municipality has certain rights to the use of materials within the highway as against the owner of the fee therein.<sup>5</sup>

**6. Criminal Liability for Failure to Repair.** — It is well settled that a municipal corporation is liable to a criminal prosecution for failure to perform its duties in regard to the repair of highways.<sup>6</sup> It is no defense that the highway is but little used,<sup>7</sup> or that the part out of repair will be of no immediate use because of the absence of a bridge which the municipality is not obliged to maintain.<sup>8</sup> The indictment may be supported by proof that the highway is inconvenient, without proof that it is absolutely unsafe.<sup>9</sup>

Individuals also, who are bound by law to repair a highway, are liable to indictment in case of failure to do so.<sup>10</sup>

**XI. HIGHWAY OFFICERS — 1. Powers Limited.** — Highway officers have in general only such powers as are conferred by statute,<sup>11</sup> and they have no power to surrender the use of the highway for private purposes<sup>12</sup> or to authorize a nuisance on the highway.<sup>13</sup>

**1. Change of Grade.** — See the title EMINENT DOMAIN, vol. 10, p. 1124.

**2. Surface Waters.** — See the titles MUNICIPAL CORPORATIONS; SURFACE WATERS.

**3. Use of Materials.** — *Barrett v. Nelson*, 29 Kan. 594; *Hawks v. Charlemont*, 107 Mass. 414; *Ward v. Folly*, 5 N. J. L. 554; *Duryea v. Smith*, 62 Hun (N. Y.) 619, 16 N. Y. Supp. 688; *Jackson v. Rankin*, 67 Wis. 285.

**4. Statutory Compensation.** — *Barrett v. Nelson*, 29 Kan. 594; *Burrows v. Cosler*, 33 Ohio St. 567; *Kendall v. Post*, 8 Oregon 141; *Jackson v. Rankin*, 67 Wis. 285. See also *Jeffersonville, etc., R. Co. v. Daugherty*, 40 Ind. 33.

In *Massachusetts* it is provided by statute that a municipality may lay out a "gravel and clay" pit on private land to furnish material for the repair of highways. See *Hatch v. Hawkes*, 126 Mass. 177.

**5. Materials in Highway.** — See *infra*, this title, *Ownership of Fee*.

**6. Criminal Liability of Town — England.** — *Rex v. Stoughton*, 2 Saund. 158; *Rex v. Nottingham*, 2 Lev. 112; *Rex v. Kent County*, 13 East 220; *Rex v. Stratford-upon-Avon*, 14 East 349. See also *Reg. v. Poole*, 19 Q. B. D. 602. *Kentucky.* — *Com. v. Hopkinsville*, 7 B. Mon. (Ky.) 38.

*Maine.* — *State v. Kittery*, 5 Me. 254; *State v. Fryeburg*, 15 Me. 405; *State v. Strong*, 25 Me. 297; *State v. Milo*, 32 Me. 55; *State v. Gorham*, 37 Me. 451; *Bragg v. Bangor*, 51 Me. 532; *State v. Madison*, 59 Me. 538, 63 Me. 546; *State v. Oxford*, 65 Me. 210; *State v. Thomas-ton*, 74 Me. 198.

*Massachusetts.* — *Com. v. Newburyport*, 103 Mass. 129; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Com. v. Taunton*, 16 Gray (Mass.) 228; *Com. v. Petersham*, 4 Pick. (Mass.)

119; *Com. v. North Brookfield*, 8 Pick. (Mass.) 463.

*New Hampshire.* — *State v. Raymond*, 27 N. H. 388; *State v. Canterbury*, 28 N. H. 195.

*New Jersey.* — *Lodi Tp. v. State*, 53 N. J. L. 259.

*North Carolina.* — *State v. Yarrell*, 12 Ired. L. (34 N. Car.) 130.

*Pennsylvania.* — *Com. v. Lansford*, 14 Pa. Co. Ct. 376.

*Tennessee.* — *Chattanooga v. State*, 5 Sneed (Tenn.) 578; *State v. Murfreesboro'*, 11 Humph. (Tenn.) 217.

*Vermont.* — *State v. Fletcher*, 13 Vt. 124. *Wisconsin.* — *Byron v. State*, 35 Wis. 313.

**7. Utility Immaterial.** — *Hill v. State*, 4 Sneed (Tenn.) 443.

**8. Com. v. Deerfield**, 6 Allen (Mass.) 449.

**9. Highway Need Not Be Unsafe.** — *Com. v. Taunton*, 16 Gray (Mass.) 228.

**10. Individual Liability.** — *Reg. v. Barker*, 25 Q. B. D. 213; *Phillips v. Com.*, 44 Pa. St. 197, a case of one who had contracted to repair the highway.

Highway Officers are also criminally liable for failure to repair. See *infra*, this title, *Highway Officers*.

**11. Powers of Officers.** — *Ohio, etc., R. Co. v. People*, 123 Ill. 648; *Highway Com'rs v. Wrought Iron Bridge Co.*, 3 Ill. App. 570; *Austin v. Carter*, 1 Mass. 231; *Reed v. Scituate*, 5 Allen (Mass.) 120; *Moore v. Brooklyn City R. Co.*, 108 N. Y. 98.

**12. Surrender of Highway.** — *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157; *Johnson v. Rea*, 12 Ill. App. 331; *Rice v. Chicago, etc., R. Co.*, 30 Ill. App. 481.

**13. Nuisance.** — *People v. Fowler*, (Supm. Ct. Gen. T.) 43 N. Y. St. Rep. 415.

**Contract Obligations** can be imposed by them on the municipality only so far as they are expressly authorized to incur such obligations, or as such power is necessarily incident to the grant of other powers.<sup>1</sup> Where the statute limits the indebtedness that may be contracted to the funds in the treasury or to the amount of the revenue of the current year, the officers have no power to anticipate the revenue of future years.<sup>2</sup> And if the statute provides that a contract for work shall be made in a particular manner, as by letting it to the highest bidder, a failure to comply therewith renders the contract void.<sup>3</sup>

**2. Are Not Agents of Municipality.** — A highway officer has been decided not to be the agent or servant of the municipality so as to render it liable for his acts or those of his employees, unless these result in defects or want of repairs in the highway, for which the municipality would be liable if caused by individuals.<sup>4</sup>

**3. Advancements by Officer.** — An officer may, it seems, recover from the municipality sums advanced by him for the purpose of putting the highway in repair,<sup>5</sup> provided such repairs are strictly within his powers and duties.<sup>6</sup>

**4. Mode of Action.** — The commissioners of highways of a town have been decided to be a *quasi* corporation,<sup>7</sup> and not a court, though some of their duties are of a judicial character,<sup>8</sup> and they must act as a body and not separately.<sup>9</sup>

**5. Road Districts.** — The statute occasionally provides for the division of the municipality into road districts, generally at the discretion of the officers of the municipality, and the assignment of a particular officer to each district.

**1. Power to Contract Limited** — *Maine.* — *Morrell v. Dixfield*, 30 Me. 157; *Field v. Towle*, 34 Me. 405; *Ingalls v. Auburn*, 51 Me. 352; *Getchell v. Wells*, 55 Me. 433.

*Massachusetts.* — *Loker v. Brookline*, 13 Pick. (Mass.) 343; *Blanchard v. Ayer*, 148 Mass. 174.

*Michigan.* — *Highway Com'rs v. Van Dusan*, 40 Mich. 429; *Hosier v. Higgins Tp. Board*, 45 Mich. 340.

*New Hampshire.* — *Wells v. Goffstown*, 16 N. H. 53.

*New York.* — *People v. Ulster County*, 93 N. Y. 397; *People v. Burrell*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 217; *People v. Warren County*, 82 Hun (N. Y.) 295.

*Rhode Island.* — *Sweet v. Conley*, 20 R. I. 381.

**Contract for Legal Services.** — It has been held that commissioners of highways may employ counsel for the purpose of conducting a prosecution for obstructing a highway and to render other legal services relating to the manner of the highways. *Duntz v. Duntz*, 44 Barb. (N. Y.) 459.

**2. Amount of Indebtedness.** — *Highway Com'rs v. Newell*, 80 Ill. 587; *Brauns v. Peoria*, 82 Ill. 11; *Sullivan v. Highway Com'rs*, 114 Ill. 262; *State v. Snodgrass*, 98 Ind. 546.

**3. Mode of Letting Contract.** — *Brauns v. Peoria*, 82 Ill. 11; *Mackenzie v. Baraga Tp.*, 39 Mich. 554; *Beard v. De Goit*, 58 Mich. 245; *State v. Vice*, 71 Miss. 912.

**4. Municipality Not Liable for Acts of Officers** — *Indiana.* — *Union Civil Tp. v. Berryman*, 3 Ind. App. 344.

*Kansas.* — *Quincy Tp. v. Sheehan*, 48 Kan. 629.

*Kentucky.* — *Hutchinson v. Pulaski County*, (Ky. 1889) 11 S. W. Rep. 607.

*Maine.* — *Small v. Danville*, 51 Me. 359.

*Massachusetts.* — *Walcott v. Swampscott*, 1 Allen (Mass.) 101; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Barney v. Lowell*, 98 Mass. 570; *McManus v. Weston*, 164 Mass. 263; *Findley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Cushing v. Bedford*, 125 Mass. 526; *McKenna v. Kimball*, 145 Mass. 555; *Clark v. Easton*, 146 Mass. 43; *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691.

*New Hampshire.* — *Ball v. Winchester*, 32 N. H. 435; *Hardy v. Keene*, 52 N. H. 370; *Cofran v. Sanbornton*, 56 N. H. 12; *Wakefield v. Newport*, 62 N. H. 624; *Downes v. Hopkinton*, 67 N. H. 456.

*New York.* — *People v. Town Auditors*, 74 N. Y. 310.

*Vermont.* — *Bates v. Rutland*, 62 Vt. 178, 22 Am. St. Rep. 95.

But see *Watkins v. Walker County*, 18 Tex. 585, 70 Am. Dec. 298.

So it has been decided that the municipality is not liable for trespasses committed by highway surveyors while constructing or repairing highways, *Hutchison v. Pulaski County*, (Ky. 1889) 11 S. W. Rep. 607; *Small v. Danville*, 51 Me. 359; nor for the negligence of persons employed by the selectmen in repairing a highway, *Wakefield v. Newport*, 62 N. H. 624.

**5. Advances by Officer.** — *Clark Civil Tp. v. Brookshire*, 114 Ind. 437.

**6.** *Jones v. Lancaster*, 4 Pick. (Mass.) 149.

**7. Action as Corporate Body.** — *Highway Com'rs v. Baumgarten*, 41 Ill. 254; *Highway Com'rs v. Highway Com'rs*, 60 Ill. 58; *McManus v. McDonough*, 107 Ill. 95.

**8.** *Guptail v. Teft*, 16 Ill. 305.

**9.** *Russell v. Minter*, 83 Ill. 150; *McManus v. McDonough*, 107 Ill. 95; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Deichsel v. Maine*, 81 Wis. 553. And see *Furman v. Taylor*, 62 Hun (N. Y.) 619, 16 N. Y. Supp. 793.



as may be most conducive to the proper care of the highways.<sup>1</sup>

**6. Liabilities of Officers — a. FAILURE TO REPAIR HIGHWAY.** — In a number of cases highway officers have been held liable for injuries to persons using the highway, caused by their negligent failure properly to perform their duties in regard to its repair, on the ground that these duties are of a ministerial character.<sup>2</sup> But in other cases such officers have been held not to be so liable,<sup>3</sup> this decision being in some instances based on the fact that the particular officer in question was not at liberty to refuse the appointment.<sup>4</sup>

**Sufficiency of Funds.** — In order to render an officer liable for failure to repair, he must have sufficient funds for the purpose or the means of procuring them,<sup>5</sup> and he is not liable because, in the exercise of discretion, he has applied all the funds to certain repairs and left others unattended to.<sup>6</sup> This requirement of the sufficiency of funds as a condition of liability does not, however, apply where the injuries are caused by an act of misfeasance on the part of the officer, and not of nonfeasance.<sup>7</sup>

**b. INJURIES TO PRIVATE PROPERTY.** — An officer is not liable for an error in the exercise of his discretion as to the mode of repairing or removing obstructions from the highway, though this results in injury to private property.<sup>8</sup> He has, however, been held to be liable if his acts are dictated by a

**1. Road Districts — California.** — *Tehama County v. Bryan*, 68 Cal. 57; *Wristen v. Donlan*, 79 Cal. 472.

**Colorado.** — *People v. Carver*, 5 Colo. App. 156.

**Indiana.** — *Lyon v. Kee*, 120 Ind. 150.

**Iowa.** — *Dunham v. Fox*, 100 Iowa 131.

**Massachusetts.** — *McCormick v. Boston*, 120 Mass. 499.

**New Hampshire.** — *Thompson v. Fellows*, 21 N. H. 431; *Palmer v. Carroll*, 24 N. H. 314; *Kimball v. Russell*, 56 N. H. 488.

**New Jersey.** — *Morgan v. Monmouth Plank Road Co.*, 26 N. J. L. 99.

**Washington.** — *Robertson v. King County*, 20 Wash. 259.

**2. Liability for Failure to Repair Highway — California.** — *Huffman v. San Joaquin County*, 21 Cal. 426.

**Indiana.** — *House v. Montgomery County*, 60 Ind. 580, 28 Am. Rep. 657; *Perry v. Barnett*, 65 Ind. 522.

**Maryland.** — *Anne Arundel County v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Calvert County v. Gibson*, 36 Md. 229.

**Michigan.** — *Highway Com'rs v. Martin*, 4 Mich. 557, 69 Am. Dec. 333.

**Mississippi.** — *Sutton v. Board of Police*, 41 Miss. 236.

**New York.** — *Mackey v. Locke*, (Supreme Ct. Gen. T.) 28 N. Y. St. Rep. 281; *Hover v. Barkhoof*, 44 N. Y. 113; *Bennett v. Whitney*, 94 N. Y. 302; *Smith v. Wright*, 24 Barb. (N. Y.) 170; *Babcock v. Gifford*, 29 Hun (N. Y.) 186; *Farman v. Ellington*, 46 Hun (N. Y.) 41; *Embler v. Wallkill*, 57 Hun (N. Y.) 384.

**North Carolina.** — *Hathaway v. Hinton*, 1 Jones L. (46 N. Car.) 243.

**Wisconsin.** — *Robinson v. Rohr*, 73 Wis. 436, 9 Am. St. Rep. 810.

**3. Officers Not Liable.** — *Young v. Davis*, 2 H. & C. 197; *Worden v. Witt*, (Idaho 1895) 39 Pac. Rep. 1114; *McConnell v. Dewey*, 5 Neb. 385; *Young v. Road Com'rs*, 2 Nott & M. (S. Car.) 537.

**4. Nagle v. Wakey**, 161 Ill. 387, affirming 59 Ill. App. 198; *Lynn v. Adams*, 2 Ind. 143;

*Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468; *McKenzie v. Chovin*, 1 McMull. L. (S. Car.) 222.

So where a statute provided that in certain contingencies the selectmen should have charge of repairs, it was held that they were not liable for damages caused by want of repairs, they being obliged to serve without pay, and having no available funds, but only the credit of the town, and their duties being varied, uncertain, and discretionary. *Daniels v. Hathaway*, 65 Vt. 247.

**5. Sufficiency of Funds.** — *Salt Creek v. Highway Com'rs*, 25 Ill. App. 187; *Patterson v. Colebrook*, 29 N. H. 94; *Hines v. Lockport*, 50 N. Y. 238; *Flynn v. Hurd*, 118 N. Y. 19; *Hutson v. New York*, 5 Sandf. (N. Y.) 289; *Day v. Crossman*, 1 Hun (N. Y.) 570; *Lament v. Haight*, (Supm. Ct. Gen. T.) 44 How. Pr. (N. Y.) 1; *Warren v. Clement*, 24 Hun (N. Y.) 472.

**6. Monk v. New Utrecht**, 104 N. Y. 552.

**7. Acts of Misfeasance.** — *Bennett v. Whitney*, 94 N. Y. 302; *Rector v. Pierce*, 3 Thomp. & C. (N. Y.) 416.

**8. Not Liable for Exercise of Discretion — Indiana.** — *McOsker v. Burrell*, 55 Ind. 425; *Spitznogle v. Ward*, 64 Ind. 30.

**Maine.** — *Wilson v. Simmons*, 89 Me. 242.

**Massachusetts.** — *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Benjamin v. Wheeler*, 8 Gray (Mass.) 409, 15 Gray (Mass.) 486; *Bay State Brick Co. v. Foster*, 115 Mass. 431; *Benjamin v. Wheeler*, 15 Gray (Mass.) 486; *Heald v. Lang*, 98 Mass. 581; *Morrison v. Howe*, 120 Mass. 572; *Denniston v. Clark*, 125 Mass. 216; *Hatch v. Hawkes*, 126 Mass. 177; *Johnson v. Dunn*, 134 Mass. 522.

**Michigan.** — *Highway Com'rs v. Ely*, 54 Mich. 173. See also *Sage v. Laurain*, 19 Mich. 137.

**Missouri.** — *Cook v. Hecht*, 64 Mo. App. 273, 2 Mo. App. Rep. 995; *Patten v. Weightman*, 51 Mo. 432.

**New Hampshire.** — *Rowe v. Addison*, 34 N. H. 306; *Waldron v. Berry*, 51 N. H. 136.

**New York.** — *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hines v. Lockport*, 50 N. Y. 238; *Wil-*



wilful or malicious purpose to cause such injury,<sup>1</sup> though in *Massachusetts*, on the other hand, it is held that his motive in doing the acts is immaterial.<sup>2</sup> It is also stated in one or two cases that his discretion stops where absolute rights of property begin.<sup>3</sup> He is not liable, however, it seems, for minute infringements upon the lands of adjacent owners, provided he uses ordinary care, the rule *de minimis* applying in this case.<sup>4</sup> An officer is liable for injuries to private property caused by unauthorized acts performed by him in the course of opening or repairing a highway,<sup>5</sup> and is so liable if, in attempting to

son *v.* New York, 1 Den. (N. Y.) 595, 43 Am. Dec. 719.

*Ohio*. — Grove *v.* Mikesell, 13 Ohio St. 158.

*Pennsylvania*. — Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556.

*Rhode Island*. — Sullivan *v.* Webster, 16 R. I. 33.

*Wisconsin*. — Smith *v.* Gould, 59 Wis. 631, 61 Wis. 31.

**Application of Rules — Removal of Obstruction.** — It has been held in *Massachusetts* that the determination whether an article or object in a highway constitutes an obstruction being a matter for the decision of the highway surveyors, they cannot be made liable for injuries caused by their removal thereof. Benjamin *v.* Wheeler, 15 Gray (Mass.) 486; Heald *v.* Lang, 98 Mass. 581; Bay State Brick Co. *v.* Foster, 115 Mass. 431.

**Injury to Water Rights.** — And it has been decided in *Pennsylvania* that the highway officer cannot be made liable for injuries to a millowner by the fact that the obstruction of the causeway at the crossing of a stream diminished the flow of water necessary to run his mill. Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556. *Contra*, McCord *v.* High, 24 Iowa 350.

**The Existence of a Statute** providing for compensation to a landowner injured by repairs on the highway may be a ground for exempting the officer from liability for such injuries. Keene *v.* Chapman, 25 Me. 126; Denniston *v.* Clark, 125 Mass. 216. But see Adams *v.* Richardson, 43 N. H. 212.

**1. Wilful and Malicious Acts.** — Wilding *v.* Hough, 37 Iowa 446; Third Turnpike Road *v.* Champney, 2 N. H. 199; Cheshire Turnpike *v.* Stevens, 10 N. H. 133; Palmer *v.* Carroll, 24 N. H. 314; Waldron *v.* Berry, 51 N. H. 136; Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556.

So it was held that a road supervisor might be guilty of trespass in removing an obstruction, as, for instance, a dwelling house, if this was done not to open the highway, but with the malicious purpose of injuring the owner. Wilding *v.* Hough, 37 Iowa 446.

**2.** Benjamin *v.* Wheeler, 15 Gray (Mass.) 486; Morrison *v.* Howe, 120 Mass. 565; Upham *v.* Marsh, 128 Mass. 546.

**3.** Dillon, C. J., in McCord *v.* High, 24 Iowa 350. See to the same effect Cubit *v.* O'Dett, 51 Mich. 347.

**4. Minute Trespasses.** — Brown *v.* Bridges, 31 Iowa 138, where the trespasses consisted in throwing cuttings from a hedge upon the land and encroaching an inch or so in cutting the line of the highway.

See generally, as to the rule *de minimis*, the title *DE MINIMIS NON CURAT LEX*, vol. 8, p. 828.

**5. Liability for Unauthorized Acts — Connecticut.** — Ely *v.* Parsons, 55 Conn. 83.

*Illinois*. — Allen *v.* Michel, 38 Ill. App. 313; Board of Auditors *v.* People, 38 Ill. App. 239; Tearney *v.* Smith, 86 Ill. 391; Barnard *v.* Highway Com'rs, 172 Ill. 391.

*Indiana*. — Cauble *v.* Hultz, 118 Ind. 13.

*Iowa*. — Mosier *v.* Vincent, 34 Iowa 478.

*Kansas*. — Barrett *v.* Nelson, 29 Kan. 594.

*Maine*. — Plummer *v.* Sturtevant, 32 Me. 325; Muzzey *v.* Davis, 54 Me. 361.

*Massachusetts*. — Elder *v.* Bemis, 2 Met. (Mass.) 599.

*Michigan*. — Buskirk *v.* Strickland, 47 Mich. 389; Cubit *v.* O'Dett, 51 Mich. 347.

*Missouri*. — Moore *v.* Hawk, 57 Mo. App. 412.

*New Hampshire*. — Adams *v.* Richardson, 43 N. H. 212; Waldron *v.* Berry, 51 N. H. 136.

*New York*. — Clark *v.* Phelps, 4 Cow. (N. Y.) 190; Moran *v.* McClearns, 63 Barb. (N. Y.) 185, 44 How. Pr. (N. Y.) 30.

*Ohio*. — Beckwith *v.* Beckwith, 22 Ohio St. 180.

*Rhode Island*. — Tucker *v.* Eldred, 6 R. I. 404.

*Wisconsin*. — Jackson *v.* Rankin, 67 Wis. 285.

**Applications of Rule — Flooding Lands.** — So an officer has been held liable for injuries caused by cutting drains, or changing the grade, or altering a watercourse, or doing other acts the result of which is to flood the lands of adjoining property owners. Tearney *v.* Smith, 86 Ill. 391; Barnard *v.* Highway Com'rs, 172 Ill. 391; Allen *v.* Michel, 38 Ill. App. 313; Harris *v.* Carson, 40 Ill. App. 147; Rowe *v.* Addison, 34 N. H. 306; Moran *v.* McClearns, 63 Barb. (N. Y.) 185, 44 How. Pr. (N. Y.) 30.

But in *Indiana* it has been held that he is not liable for such results when caused merely by an erroneous exercise of judgment. McCosker *v.* Burrell, 55 Ind. 425; Spitznogle *v.* Ward, 64 Ind. 30. Compare Johnson *v.* Dunn, 134 Mass. 522.

**Injuries to Vegetation.** — So he is liable for unauthorized injuries to trees or hedges. Ely *v.* Parsons, 55 Conn. 83; Moore *v.* Hawk, 57 Mo. App. 495.

**Wrongful Use of Materials.** — He is liable for an unauthorized appropriation of materials in the highway belonging to the owner of the fee, for the purpose of making repairs on the highway. Tucker *v.* Eldred, 6 R. I. 404; Muzzey *v.* Davis, 54 Me. 361.

**Uncovered Drain.** — And he is liable for injuries caused to an adjoining owner by the making of an uncovered drain or ditch in the highway, the statute expressly providing that any trench or ditch made by him must be covered. Waldron *v.* Berry, 51 N. H. 136.

locate a highway, he trespasses upon land outside the proper location<sup>1</sup> or if he undertakes to make repairs or remove obstructions where no highway legally exists.<sup>2</sup>

*c. ACTS UNDER JUDICIAL AUTHORITY.* — A highway officer is, like other officers, free from liability to individuals for acts performed under a regular order of a judicial or quasi-judicial character, such as an order opening a road;<sup>3</sup> but to be exempt from liability his acts under the order must be lawful,<sup>4</sup> and if the order was rendered without jurisdiction it will afford no protection to him.<sup>5</sup>

*d. ACTS OF SUBORDINATES.* — While the officer is not liable for the acts of a subordinate who occupies an office known to the law,<sup>6</sup> he is liable for the acts of one voluntarily employed by him,<sup>7</sup> especially if he knows of the acts of such employee and acquiesces therein.<sup>8</sup>

*e. ACTS OF PREDECESSORS.* — An officer is not liable for injuries caused by the negligence of his predecessor in office.<sup>9</sup>

*f. PENAL LIABILITY.* — A highway officer failing to work or repair a highway under his charge has been quite frequently held to be liable criminally,<sup>10</sup>

**1. Acts Not Within Highway Location.** — *Beyer v. Tanner*, 29 Ill. 135; *Shoup v. Shields*, 116 Ill. 488; *Heagy v. Black*, 90 Ind. 534; *Webster v. White*, 8 S. Dak. 479; *Babb v. Carver*, 7 Wis. 124. Compare *Huey v. Richardson*, 2 Harr. (Del.) 206.

**2. Highway Nonexistent.** — *Campbell v. Kennedy*, 34 Iowa 494; *Buskirk v. Strickland*, 47 Mich. 389; *Kelsey v. Burgess*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 169; *Marvin v. Pardee*, 64 Barb. (N. Y.) 353.

**3. Acts under Judicial Authority** — *Arkansas*. — *Cockrum v. Williamson*, 53 Ark. 131.

*Indiana*. — *Rutherford v. Davis*, 95 Ind. 245; *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405.

*Maine*. — *Hovey v. Mayo*, 43 Me. 332; *Cyr v. Dufour*, 68 Me. 492.

*Missouri*. — *Walker v. Likens*, 24 Mo. 298; *Wyatt v. Thomas*, 29 Mo. 23; *Harper v. Morse*, 46 Mo. App. 470; *Patten v. Weightman*, 51 Mo. 432; *Woodridge v. Rentschler*, 62 Mo. App. 591; *Crenshaw v. Snyder*, 117 Mo. 167; *Peery v. Gill*, 36 Mo. App. 685; *State v. Buhler*, 90 Mo. 560; *Crenshaw v. Snyder*, 117 Mo. 167.

*Virginia*. — *Yeager v. Carpenter*, 8 Leigh (Va.) 454, 31 Am. Dec. 665.

**4. Rutherford v. Davis**, 95 Ind. 245.

**5. Void Order.** — *Cockrum v. Williamson*, 53 Ark. 131; *Guptail v. Teft*, 16 Ill. 365; *Larned v. Briscoe*, 62 Mich. 393; *Stockett v. Nicholson*, Walk. (Miss.) 75; *Peery v. Gill*, 36 Mo. App. 685; *Rousey v. Wood*, 57 Mo. App. 650. See also *supra*, this title, *Establishment of Highways* — *Collateral Attack*.

**Mandamus** was refused, however, when it was sought thereby to compel a surveyor of highways to restore at his own expense the grade of a street which, acting under unauthorized orders of the town council, he had raised above the established grade so as to injure an abutting property owner. *Sweet v. Conley*, 20 R. I. 381.

**6. Liability for Acts of Subordinates.** — *Anne Arundel County v. Duvall*, 54 Md. 350, 39 Am. Rep. 393.

**Presumption of Authority.** — In *Harris v. Carson*, 40 Ill. App. 147, however, it is decided that work done by an overseer, an inferior officer, with the knowledge of the commission-

ers of highways, is presumed to be done with their approval until the contrary is shown.

**7. Employers.** — *Ely v. Parsons*, 55 Conn. 83; *Robinson v. Rohr*, 73 Wis. 436, 9 Am. St. Rep. 810.

**8. Elder v. Bemis**, 2 Met. (Mass.) 599.

**9. Liability for Acts of Predecessor.** — *McOsker v. Burrell*, 55 Ind. 425; *Gould v. Booth*, 66 N. Y. 62; *Lament v. Haight*, (Supm. Ct. Gen. T.) 44 How. Pr. (N. Y.) 1.

**10. Criminal Liability** — *Alabama*. — *McCullough v. State*, 63 Ala. 75; *Alexander v. State*, 16 Ala. 661.

*Arkansas*. — *State v. Stroope*, 20 Ark. 202; *State v. Hester*, 21 Ark. 193; *State v. Moore*, 23 Ark. 550; *Dormar v. State*, 31 Ark. 49.

*Illinois*. — *Zorger v. People*, 25 Ill. 193.

*Indiana*. — *State v. Hogg*, 5 Ind. 515; *State v. McMurrin*, 1 Ind. 44; *Tate v. State*, 5 Blackf. (Ind.) 73; *State v. Harsh*, 6 Blackf. (Ind.) 346; *State v. Brown*, 8 Blackf. (Ind.) 69.

*Massachusetts*. — *White v. Phillipston*, 10 Met. (Mass.) 108.

*Mississippi*. — *Sutton v. Board of Police*, 41 Miss. 236; *State v. Public Road Com'rs*, Walk. (Miss.) 368.

*New Hampshire*. — *Walpole v. State*, 16 N. H. 157.

*New Jersey*. — *State v. Bernards Tp.*, 39 N. J. L. 60; *State v. Hageman*, 13 N. J. L. 314.

*North Carolina*. — *Hathaway v. Hinton*, 1 Jones L. (46 N. Car.) 243; *State v. Long*, 76 N. Car. 254; *State v. Halifax*, 4 Dev. L. (15 N. Car.) 345; *State v. Miller*, 100 N. Car. 543. Compare *State v. Britt*, 118 N. Car. 1255.

*Ohio*. — *Grove v. Mikesell*, 13 Ohio St. 158.

*Pennsylvania*. — *Phillips v. Com.*, 44 Pa. St. 197; *Com. v. Reiter*, 78 Pa. St. 161; *Graffins v. Com.*, 3 P. & W. (Pa.) 502; *Edge v. Com.*, 7 Pa. St. 275; *Com. v. Johnson*, 134 Pa. St. 635.

*South Carolina*. — *State v. Chappell*, 2 Hill L. (S. Car.) 391. See also *State v. Broyles*, 1 Bailey L. (S. Car.) 134.

*Tennessee*. — *Hill v. State*, 4 Sneed (Tenn.) 443, distinguishing *State v. Barksdale*, 5 Humph. (Tenn.) 154.

*Texas*. — *Howell v. State*, 29 Tex. App. 592.

*Virginia*. — *Com v. Howard*, 1 Gratt. (Va.) 555; *Com. v. Piper*, 9 Leigh (Va.) 657.

or subject to a statutory penalty.<sup>1</sup> While in some cases it is assumed apparently that there is such a criminal liability apart from statute on the ground that leaving a road in an improper condition constitutes a nuisance,<sup>2</sup> it is generally imposed by express statute,<sup>3</sup> and the liability of the officer is generally restricted to cases in which his neglect to repair is wilful.<sup>4</sup>

**XII. OWNERSHIP OF FEE—1. Mere Easement Generally in Public.**—The highway at common law is an easement merely, and the fee thereof remains in the landowner with all the rights of property incident thereto, subject only to the right of travel vested in the public.<sup>5</sup> But this rule is subject to change

**1. Statutory Penalty.**—*Hizer v. Rockford*, 86 Ill. 325; *State v. Bernards Tp.*, 39 N. J. L. 60.

**2. Common-law Liability.**—*State v. Public Roads Com'rs*, Walk. (Miss.) 368; *Graffins v. Com.*, 3 P. & W. (Pa.) 502; *State v. Chappell*, 2 Hill L. (S. Car.) 391; *Hill v. State*, 4 Sneed (Tenn.) 443.

**3. Statutory Liability.**—See the statutes of the various states.

**4. Wilful Neglect.**—*Salt Creek v. Highway Com'rs*, 25 Ill. App. 187; *Eyman v. People*, 6 Ill. 4; *State v. Levens*, 22 Mo. 469; *State v. Miller*, 100 N. Car. 543; *Moore v. State*, 27 Tex. App. 439; *Howell v. State*, 29 Tex. App. 592; *Parker v. State*, 29 Tex. App. 372.

**5. Easement Only Vested in Public.**—*England*, —*Lade v. Shepherd*, 2 Stra. 1004; *Harrison v. Rutland*, 62 L. J. Q. B. 117, (1893) 1 Q. B. 142; *Goodtitle v. Alker*, 1 Burr. 133; *Dovaston v. Payne*, 2 H. Bl. 527, 2 Smith Lead. Cas. 142; *Grose v. West*, 7 Taunt. 39, 2 E. C. L. 39; *Doe v. Pearsey*, 7 B. & C. 304, 14 E. C. L. 50; *Meynell v. Surtees*, 31 Eng. L. & Eq. 485; *Davison v. Gill*, 1 East 64.

*United States.*—*U. S. v. Harris*, 1 Sumn. (U. S.) 21; *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Harris v. Elliott*, 10 Pet. (U. S.) 25.

*Arkansas.*—*Taylor v. Armstrong*, 24 Ark. 102; *Reichert v. St. Louis*, etc., R. Co., 51 Ark. 491.

*California.*—*People v. Marin County*, 103 Cal. 223.

*Connecticut.*—*Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Chatham v. Brainerd*, 11 Conn. 60; *Woodruff v. Neal*, 28 Conn. 165; *Buel v. Clark*, 1 Root (Conn.) 49; *Brown v. Freeman*, 1 Root (Conn.) 118; *Read v. Leeds*, 19 Conn. 182.

*Illinois.*—*Illinois*, etc., *Canal v. Haven*, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 50; *Manly v. Gibson*, 13 Ill. 308; *Louisville*, etc., R. Co. v. *Lanter*, 47 Ill. App. 339; *Indianapolis*, etc., R. Co. v. *Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Old Town v. Dooley*, 81 Ill. 255; *Palatine v. Kreuger*, 121 Ill. 72; *Snell v. Chicago*, 133 Ill. 415; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513.

*Indiana.*—*Vaughn v. Stuzaker*, 16 Ind. 338. *Iowa.*—*Dubuque v. Maloney*, 9 Iowa 450; *Overman v. May*, 35 Iowa 89; *Deaton v. Polk County*, 9 Iowa 594.

*Kansas.*—*Caulkins v. Mathews*, 5 Kan. 199; *Shawnee County v. Beckwith*, 10 Kan. 603; *Roberts v. Brown County*, 21 Kan. 247.

*Louisiana.*—*Mendez*, *Dugan*, 1 La. Ann. 171; *Bradley v. Pharr*, 45 La. Ann. 426.

*Maine.*—*Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *Small v. Pennell*, 31 Me. 26; *Westbrook v. North*, 2 Me. 17; *Barr v. Stevens*, 90 Me. 100.

*Maryland.*—*Douglass v. Boonsborough Turnpike Road Co.*, 22 Md. 219, 85 Am. Dec. 647.

*Massachusetts.*—*Com. v. Peters*, 2 Mass. 125; *Fairfield v. Williams*, 4 Mass. 427; *Tip-pets v. Walker*, 4 Mass. 595; *Perley v. Chandler*, 6 Mass. 454; *Adams v. Emerson*, 6 Pick. (Mass.) 57; *Robbins v. Borman*, 1 Pick. (Mass.) 122; *Boston v. Richardson*, 13 Allen (Mass.) 146; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121.

*Minnesota.*—*Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861; *Ellsworth v. Lord*, 40 Minn. 337.

*Missouri.*—*Williams v. Natural Bridge Plank Road Co.*, 21 Mo. 580; *Pemberton v. Dooley*, 43 Mo. App. 176; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Snoddy v. Bolen*, 122 Mo. 479; *Grant v. Moon*, 128 Mo. 43.

*New Hampshire.*—*Makepeace v. Worden*, 1 N. H. 16; *Copp v. Neal*, 7 N. H. 275.

*New York.*—*Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Gidney v. Earl*, 12 Wend. (N. Y.) 98; *Presbyterian Soc. v. Auburn*, etc., R. Co., 3 Hill (N. Y.) 567; *Higgins v. Reynolds*, 31 N. Y. 151; *Munn v. Worrall*, 53 N. Y. 44, 13 Am. Rep. 470; *Northern Turnpike Road Co. v. Smith*, 15 Barb. (N. Y.) 355; *People v. Law*, 34 Barb. (N. Y.) 494; *Hochalter v. Manhattan R. Co.*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 341; *Washington Cemetery v. Prospect Park*, etc., R. Co., 7 Hun (N. Y.) 655, 68 N. Y. 591; *Matter of Buffalo*, 131 N. Y. 293, 27 Am. St. Rep. 592.

*North Carolina.*—*State v. Davis*, 80 N. Car. 351, 30 Am. Rep. 86; *State v. Hewell*, 90 N. Car. 705.

*Ohio.*—*Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Bingham v. Doane*, 9 Ohio 167; *Cincinnati*, etc., R. Co. v. *Cummins*, 14 Ohio St. 523; *Hatch v. Cincinnati*, etc., R. Co., 18 Ohio St. 123; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *McClelland v. Miller*, 28 Ohio St. 502.

*Pennsylvania.*—*Ball v. Ball*, 1 Phila. (Pa.) 36, 7 Leg. Int. (Pa.) 26; *Chambers v. Furry*, 1 Yeates (Pa.) 167; *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138.

*South Carolina.*—*Charleston Rice Milling Co. v. Bennett*, 18 S. Car. 254.

*Vermont.*—*Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

*Virginia.*—*Western Union Tel. Co. v. Williams*, 86 Va. 700; *Hodges v. Seaboard*, etc., R. Co., 88 Va. 653; *Page v. Belvin*, 88 Va. 985;



by statute or municipal charter, and it has quite frequently been provided that a statutory dedication will vest the fee in the public;<sup>1</sup> and this is likewise the case when, at the time of the establishment of the highway, the particular locality was subject to the civil law, by which the fee is vested in the sovereign.<sup>2</sup>

The **Abutting Owner** is generally the owner of the fee, on the principle that one whose land is bounded by a highway is presumed to have title to the middle of the highway; but this is not necessarily so.<sup>3</sup>

**2. Rights as Between Public and Owner of Fee** — *a. RIGHTS OF USER IN GENERAL.* — The owner of the fee may make any use of his land within the limits of the highway which will not interfere with the use of the highway for travel.<sup>4</sup> The public, on the other hand, are guilty of a trespass as against such owner if, without legal authority, they deposit articles or material on the highway<sup>5</sup> or dig or plough up the land therein.<sup>6</sup> So a person present on the highway for purposes other than travel has been held to be a trespasser upon the fee;<sup>7</sup> and an owner of abutting land is guilty of trespass if he erects a bay window which extends into the highway,<sup>8</sup> though he may erect gates so as to swing over the highway.<sup>9</sup>

**Municipal Structure.** — Even a municipality cannot, as against the owner of the fee, erect or maintain on the highway a structure which has no connection with its use as such,<sup>10</sup> but the owner of the fee cannot object to the erection of a statue or other appropriate work of art thereon by the public authorities.<sup>11</sup>

*b. TREES IN HIGHWAY* — (1) *In General.* — The ownership of the trees in the highway remains in the proprietor of the fee,<sup>12</sup> and consequently he may remove them at pleasure.<sup>13</sup> And he may plant trees in the highway

*Bolling v. Petersburg*, 3 Rand. (Va.) 563; *Warwick v. Mayo*, 15 Gratt. (Va.) 528.

*Wisconsin.* — *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407; *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Wis. 32; *Milwaukee v. Milwaukee, etc.*, R. Co., 7 Wis. 85; *Black v. Chicago, etc.*, R. Co., 18 Wis. 208, 21 Wis. 602; *Hegar v. Chicago, etc.*, R. Co., 26 Wis. 624; *Pettibone v. Hamilton*, 40 Wis. 402; *Valley Pulp, etc., Co. v. West*, 58 Wis. 599.

**1. Special Provisions Vesting Fee in Municipality** — *Iowa.* — *Des Moines v. Hall*, 24 Iowa 234.

*Kansas.* — *Challiss v. Atchison Union Depot, etc.*, Co., 45 Kan. 398.

*Missouri.* — *Hannibal v. Draper*, 15 Mo. 634; *Thomas v. Hunt*, 134 Mo. 392; *Reid v. Board of Education*, 73 Mo. 304.

*Nebraska.* — *Lindsay v. Omaha*, 30 Neb. 512, 27 Am. St. Rep. 415.

See also the title **DEDICATION**, vol. 9, p. 74; and as to the streets of New York city, see *Kane v. New York El. R. Co.*, 125 N. Y. 164.

**2. Civil Law.** — *Dunham v. Williams*, 37 N. Y. 254; *Mott v. Clayton*, 9 N. Y. App. Div. 181; *Mitchell v. Bass*, 33 Tex. 259.

**3. Abutter Owns to Middle of Highway.** — See the presentation of this rule with authorities under the title **BOUNDARIES**, vol. 4, p. 809.

**4. User by Owner of Fee** — *England.* — *Harrison v. Rutland*, (1893) 1 Q. B. 142.

*Illinois.* — *Sadorus v. Black*, 65 Ill. App. 72; *Indianapolis, etc.*, R. Co. v. *Hartley*, 67 Ill. 439, 16 Am. Rep. 624.

*Maine.* — *Farnsworth v. Rockland*, 83 Me. 508.

*Michigan.* — *Clark v. Lake St. Clair, etc.*, Ice Co., 24 Mich. 508.

*Missouri.* — *Gordon v. Peltzer*, 56 Mo. App. 599.

*New Hampshire.* — *Chamberlain v. Enfield*, 43 N. H. 356.

*Pennsylvania.* — *Piollet v. Simmers*, 106 Pa. St. 95, 51 Am. Rep. 496.

**5. Trespasses by Public.** — *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138. Compare *Mayhew v. Morton*, 17 Pick. (Mass.) 357, 28 Am. Dec. 300; *Parsons v. Clark*, 76 Me. 476.

**6. Burr v. Stevens**, 90 Me. 500; *Robbins v. Borman*, 1 Pick. (Mass.) 122.

**7. Harrison v. Rutland**, (1893) 1 Q. B. 142; *Huffman v. State*, 21 Ind. App. 449; *Adams v. Rivers*, 11 Barb. (N. Y.) 390; *State v. Buckner*, Phil. L. (61 N. Car.) 558.

**8. By Abutting Owner.** — *Codman v. Evans*, 5 Allen (Mass.) 308, 81 Am. Dec. 748.

**9. O'Linda v. Lothrop**, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

**10. Municipal Structure.** — *Winchester v. Capron*, 63 N. H. 605, 56 Am. Rep. 554.

**11. Erection of Statue.** — *Tompkins v. Hodgson*, 2 Hun (N. Y.) 146.

**12. Rights as to Trees** — *England.* — *Goodtitle v. Alker*, 1 Burr. 143.

*United States.* — *Barclay v. Howell*, 6 Pet. (U. S.) 498.

*Iowa.* — *Overman v. May*, 35 Iowa 89.

*New Hampshire.* — *Baker v. Shephard*, 24 N. H. 208.

*New Jersey.* — *Weller v. McCormick*, 52 N. J. L. 470.

*Ohio.* — *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578.

*Pennsylvania.* — *Sanderson v. Haverstick*, 8 Pa. St. 294.

**13. Lancaster v. Richardson**, 4 Lans. (N. Y.) 136.

outside the traveled path.<sup>1</sup> The highway officers cannot remove or cut such trees except when it is necessary for the safe and free use of the highway,<sup>2</sup> and it is said that even if their removal is necessary the owner should have an opportunity to transplant them.<sup>3</sup> The officer is civilly liable if he converts the trees to his own use,<sup>4</sup> as is any private individual guilty of cutting or destroying the trees.<sup>5</sup>

(2) *Use for Repairs.* — It has been held that the municipal authorities cannot use trees within the highway for the purpose of repairs thereon,<sup>6</sup> but a contrary decision has also been made to the effect that a reasonable use may be made for that purpose.<sup>7</sup>

c. *HERBAGE IN HIGHWAY.* — The right to the herbage, including grass, is likewise exclusively in the owner of the fee,<sup>8</sup> and accordingly, though he may pasture his cattle on his land within the highway subject to any regulations as to allowing cattle to go at large,<sup>9</sup> the public at large have no right to such pasturage.<sup>10</sup>

*Statute or Ordinance Allowing Pasturage.* — And it has been held that the legislature cannot authorize municipalities to permit the domestic animals of one person to depasture the land of another, over which an ordinary highway has been located, thus in effect depriving the landowner of the herbage without compensation.<sup>11</sup>

1. *Right to Plant.* — *People's Ice Co. v. The Steamer Excelsior*, 44 Mich. 229, 38 Am. Rep. 246; *Graves v. Shattuck*, 35 N. H. 258, 69 Am. Dec. 536. See also *infra*, this title, *Obstructions and Encroachments*.

As to the New York Statute see *Edsall v. Howell*, 86 Hun (N. Y.) 424; *Wheatfield v. Shasley*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 100.

2. *Removal or Cutting by Officers.* — *Atlanta v. Holliday*, 96 Ga. 546; *Bills v. Belknap*, 36 Iowa 583; *Everett v. Council Bluffs*, 46 Iowa 66; *Quinton v. Burton*, 61 Iowa 471; *Crismon v. Deck*, 84 Iowa 344; *Werner v. Flies*, 91 Iowa 146; *Wellman v. Dickey*, 78 Me. 29; *Makepeace v. Worden*, 1 N. H. 16; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Evans v. Street Com'rs*, 84 Hun (N. Y.) 206; *Tate v. Greensboro*, 114 N. Car. 392. See also *infra*, this title, *Obstructions and Encroachments* — *Particular Methods of Obstruction*.

In *Atlanta v. Holliday*, 96 Ga. 546, it was held a proper exercise of discretion by the lower court to grant an injunction restraining a municipality from removing shade trees on a sidewalk, the fee of which was in an abutting owner, when there were many telephone, telegraph, and trolley poles on a street, which would just as much obstruct travel, and which it was not intended to remove.

3. *Clark v. Dasso*, 34 Mich. 86. But see *Chase v. Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 898; *Ely v. Parsons*, 55 Conn. 83.

4. *Officer Civilly Liable.* — *Clark v. Dasso*, 34 Mich. 86; *Makepeace v. Worden*, 1 N. H. 16; *Niagara Falls Suspension Bridge Co. v. Bachman*, 4 Lans. (N. Y.) 523; *Tucker v. Eldred*, 6 R. I. 404.

5. *Injuries by Individuals.* — *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597; *Gamble v. Pettijohn*, 116 Mo. 375; *McCruden v. Rochester R. Co.*, (Supm. Ct.) 5 Misc. (N. Y.) 59; *Andrews v. Youmans*, 78 Wis. 58; *Sanderson v. Haverstick*, 8 Pa. St. 294; *O'Connor v. Nova Scotia Telephone Co.*, 22 Can. Sup. Ct. 276.

As to Criminal Prosecution for injuries to trees in the highway as being injuries to private property, see *Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578.

6. *Use for Repairs.* — *Baker v. Shephard*, 24 N. H. 208; *Tucker v. Eldred*, 6 R. I. 404.

7. *Felch v. Gilman*, 22 Vt. 38. And see *Cook v. Hecht*, 64 Mo. App. 273.

8. *Herbage in Highway—England.* — *Goodtitle v. Alker*, 1 Burr. 145.

*Connecticut.* — *Woodruff v. Neal*, 28 Conn. 165.

*Kansas.* — *Shawnee County v. Beckwith*, 10 Kan. 603.

*Massachusetts.* — *Adams v. Emerson*, 6 Pick. (Mass.) 57.

*Michigan.* — *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532.

*Missouri.* — *Gamble v. Pettijohn*, 116 Mo. 375.

*Vermont.* — *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

9. *Parker v. Jones*, 1 Allen (Mass.) 270.

10. *Public Have No Right to Grass on Highway—Connecticut.* — *Woodruff v. Neal*, 28 Conn. 165.

*Kansas.* — *Caulkins v. Mathews*, 5 Kan. 191.

*Maine.* — *Cool v. Crommet*, 13 Me. 250.

*Massachusetts.* — *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121.

*Michigan.* — *Campau v. Konan*, 39 Mich. 362.

*New Hampshire.* — *Avery v. Maxwell*, 4 N. H. 36.

*Wisconsin.* — *Harrison v. Brown*, 5 Wis. 27.

So in *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363, where a woman was authorized by the highway surveyor to cut grass growing in the highway in front of the plaintiff's house so as to make the highway passable for her children going to school, it was held that she had a right to cut the grass, but that she became a trespasser by feeding the grass to her horse.

11. *Statute or Ordinance Allowing Pasturage.* — *Woodruff v. Neal*, 28 Conn. 165. And see *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20



*d. SPRINGS IN HIGHWAY.* — The use of a spring in the highway belongs exclusively to the owner of the fee, and the public has no right thereto.<sup>1</sup>

*e. SOIL AND MINERAL DEPOSITS* — (1) *Rights of Owner of Fee.* — The soil and any mineral deposits within the limits of the highway belong to the owner of the fee,<sup>2</sup> and he is entitled to remove them so long as he does not interfere with the public use of the highway.<sup>3</sup>

(2) *Removal by Municipality in Making Repairs.* — As to the right of the municipality to use or appropriate soil or superincumbent materials while making repairs on or improving the highway, the cases are in considerable confusion. The municipality may, it is said, make a reasonable use thereof.<sup>4</sup> According to some of the cases, soil may be taken from one part of the highway and used upon another part,<sup>5</sup> or even upon a different highway which is within the jurisdiction of the same municipal authorities, both highways being regarded as parts of one plan of public improvement;<sup>6</sup> while in other cases it is stated that there is no right to remove soil from one part of the highway in order to improve the highway at another place, unless such removal is necessary for the proper construction or repair of the part from which it is removed,<sup>7</sup> or, according to the *Indiana* cases, unless the improvement of the highway to which it is removed is a part of the same general plan of improvement as that of the highway from which it is taken.<sup>8</sup>

(3) *Disposition of Soil or Material Necessarily Removed.* — It has been decided that soil or material necessarily removed from the highway in the course of making repairs may be disposed of by the municipal authorities without reference to any claim by the owner of the fee;<sup>9</sup> but in some cases a

Am. Dec. 678; *Gidney v. Earl*, 12 Wend. (N. Y.) 98; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *White v. Scott*, 4 Barb. (N. Y.) 56.

For a Contrary View see *Welch v. Bowen*, 103 Ind. 252; *Griffin v. Martin*, 7 Barb. (N. Y.) 297; *Hardenburgh v. Lockwood*, 25 Barb. (N. Y.) 9.

1. *Springs.* — *Old Town v. Dooley*, 81 Ill. 255; *Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483, in which latter case it was decided that the municipality could not divert the water from a spring to a public watering trough.

2. *Soil and Mineral Deposits.* — *Krueger v. Palatine*, 20 Ill. App. 420; *Hawesville v. Hawes*, 6 Bush (Ky.) 232; *Fisher v. Rochester*, 6 Lans. (N. Y.) 225; *Gidney v. Earl*, 12 Wend. (N. Y.) 98; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 452, 8 Am. Dec. 263; *Higgins v. Reynolds*, 31 N. Y. 151; *Tucker v. Eldred*, 6 R. I. 404.

*Removal of Stone.* — So it has been decided that the municipality cannot, as a consideration for the grading of a street by the contractor, agree that he shall receive and appropriate to his own use all the stone in the street, the removal of such stone not being necessary for the purpose of the improvement. *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861; *Viliski v. Minneapolis*, 40 Minn. 304. And see *Overman v. May*, 35 Iowa 89.

3. *West Covington v. Freknig*, 8 Bush (Ky.) 121; *Gamble v. Pettijohn*, 116 Mo. 375; *Williams v. Kenney*, 14 Barb. (N. Y.) 631.

4. *Use in Repairs.* — *Bundy v. Catto*, 61 Ill. App. 209; *Overman v. May*, 35 Iowa 89; *Cook v. Hecht*, 64 Mo. App. 273; *Felch v. Gilman*, 22 Vt. 38; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84.

5. *Bissell v. Collins*, 28 Mich. 277, 15 Am.

Rep. 217, *distinguishing* *Cuming v. Prang*, 24 Mich. 523.

6. *Use for Repairs on Other Highway — Connecticut.* — *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360.

*Illinois.* — *Palatine v. Kreuger*, 121 Ill. 72.

*Maine.* — *Hovey v. Mayo*, 43 Me. 322.

*Massachusetts.* — *Adams v. Emerson*, 6 Pick. (Mass.) 58; *Denniston v. Clark*, 125 Mass. 216.

*Michigan.* — *Griswold v. Bay City*, 35 Mich. 452.

*Wisconsin.* — *Huston v. Ft. Atkinson*, 56 Wis. 350.

*Rights of Public Paramount.* — It has been decided that the right of the public to the soil for the purpose of repairs or improvements is paramount to the claim of the owner of the fee, and accordingly he has been restrained by injunction from taking possession of earth which has been removed in repairing the highway. *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360. And so it has been held that he may be restrained by ordinance from removing surplus soil needed elsewhere for the streets. *Palatine v. Kreuger*, 121 Ill. 72.

7. *Decisions Limiting Rights of Removal for Repair — Georgia.* — *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298; *Macon v. Hill*, 58 Ga. 595.

*Indiana.* — *Anderson v. Bement*, 13 Ind. App. 248. Compare *Aurora v. Fox*, 78 Ind. 1. *Minnesota.* — *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861.

*New York.* — *Ladd v. French*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 56; *Cotanch v. Grover*, 57 Hun (N. Y.) 272; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498, *explaining* *Niagara Falls Suspension Bridge Co. v. Bachman*, 4 Lans. (N. Y.) 523.

8. *Haas v. Evansville*, 20 Ind. App. 482; *Aurora v. Fox*, 78 Ind. 1.

9. *Soil or Material Necessarily Removed.* — Up-



different view has been taken.<sup>1</sup>

*f. EXCAVATIONS BY OWNER OF FEE.* — The owner of the fee may sink a drain or watercourse below the surface of the highway, or make any other excavation therein, provided he takes proper precaution to cover it so as not to interfere with the safety and convenience of travelers,<sup>2</sup> and he is bound thereafter to keep the covering in repair.<sup>3</sup>

**3. Remedies of Owner of Fee** — *a. EJECTMENT.* — The right of the owner of the fee to bring ejectment therefor, in case of its unlawful occupation or obstruction by others, is not affected by the existence of the easement of the highway.<sup>4</sup>

*b. TRESPASS.* — The owner of the fee may also bring trespass against a person or corporation making a wrongful use of the highway.<sup>5</sup>

*c. INJUNCTION.* — And injunction may likewise be maintained by the owner of the fee in a proper case to restrain the wrongful use of the highway.<sup>6</sup>

*ham v. Marsh*, 128 Mass. 546, where it was held that the highway officer might, in the exercise of his discretion, deposit soil removed upon his own land near by. And so it was held that the municipality might contract for work to be done and to be paid for with the stone removed in doing the work. *Viliski v. Minneapolis*, 40 Minn. 304.

**1.** In *Haas v. Evansville*, 20 Ind. App. 482, it was stated that the owner of the fee is entitled to the surplus soil excavated in the course of a street improvement, but he must take possession thereof within a reasonable time or the municipality may make use of it in other improvements. See also *Fisher v. Rochester*, 6 Lans. (N. Y.) 225; *Grover v. Cor-net*, 135 Mo. 21.

**2. Excavations.** — *Perley v. Chandler*, 6 Mass. 454; *Highway Com'rs v. Martin*, 88 Mich. 115; *Pemberton v. Dooley*, 43 Mo. App. 176; *Gordon v. Peltzer*, 56 Mo. App. 599; *Groton v. Haines*, 36 N. H. 388; *Clay v. Hart*, (County Ct.) 25 Misc. (N. Y.) 110; *Dexter v. Riverside, etc.*, Mills, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 933; *McCarthy v. Syracuse*, 46 N. Y. 194; *Woodring v. Forks Tp.*, 28 Pa. St. 355, 70 Am. Dec. 134; *Papworth v. Milwaukee*, 64 Wis. 359.

**3. Duty to Keep in Repair.** — *Woburn v. Henshaw*, 101 Mass. 193; *Lowell v. Merrimack River Locks, etc.*, 104 Mass. 21; *Dybert v. Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Woodring v. Forks Tp.*, 28 Pa. St. 361; *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135; *Hays v. Gallagher*, 72 Pa. St. 136; *West Bend v. Mann*, 59 Wis. 72.

**4. Ejectment by Owner of Fee** — *England.* — *Goodtitle v. Alker*, 1 Burr. 133.

*Alabama.* — *Perry v. New Orleans, etc.*, R. Co., 55 Ala. 413, 28 Am. Rep. 740.

*Arkansas.* — *Taylor v. Armstrong*, 24 Ark. 102.

*California.* — *Coburn v. Ames*, 52 Cal. 387.

*Illinois.* — *Postal Tel.-Cable Co. v. Eaton*, 170 Ill. 513.

*Indiana.* — *Terre Haute, etc.*, R. Co. v. *Rodel*, 89 Ind. 128, 46 Am. Rep. 164.

*Kentucky.* — *Louisville, etc.*, R. Co. v. *Hess*, 92 Ky. 407.

*Maine.* — *Thompson v. Androscoggin Bridge*, 5 Me. 62, 2 Selw. 728, 1 Saund. Pl. & Ev. 447; *Ayer v. Phillips*, 69 Me. 50.

*Maryland.* — *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513.

*Massachusetts.* — *Alden v. Murdock*, 13 Mass. 256; *Com. v. Peters*, 2 Mass. 125; *Perley v. Chandler*, 6 Mass. 454; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Merrimack River Locks, etc. v. Nashua, etc.*, R. Co., 104 Mass. 1, 6 Am. Rep. 181.

*Michigan.* — *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613.

*Missouri.* — *Thomas v. Hunt*, 134 Mo. 392.

*New Jersey.* — *Wright v. Carter*, 27 N. J. L. 76.

*New York.* — *Uline v. New York Cent., etc.*, R. Co., 101 N. Y. 98, 54 Am. Rep. 661; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Carpenter v. Oswego, etc.*, R. Co., 24 N. Y. 655; *Dunham v. Williams*, 36 Barb. (N. Y.) 136.

*Pennsylvania.* — *Cooper v. Smith*, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658.

*Virginia.* — *Bolling v. Petersburg*, 3 Rand. (Va.) 563; *Warwick v. Mayo*, 15 Grait. (Va.) 528.

**5. Trespass** — *Connecticut.* — *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Read v. Leeds*, 19 Conn. 183.

*Illinois.* — *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453.

*Maine.* — *Burr v. Stevens*, 90 Me. 500.

*Maryland.* — *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513.

*Massachusetts.* — *Robbins v. Borman*, 1 Pick. (Mass.) 122.

*Missouri.* — *Thomas v. Hunt*, 134 Mo. 392.

*Pennsylvania.* — *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138.

*Vermont.* — *Pomeroy v. Mills*, 3 Vt. 279; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

*Wisconsin.* — *Andrews v. Youmans*, 78 Wis. 58.

**6. Injunction** — *New York.* — *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Murdock v. Prospect Park, etc.*, R. Co., 73 N. Y. 579; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132; *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523; *Syracuse Solar Salt Co. v. Rome, etc.*, R. Co., 67 Hun (N. Y.) 153; *Matter of Buffalo*, 131 N. Y. 203, 27 Am. St. Rep. 592; *Coalsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, affirming 24 N. Y. App. Div. 273.

*Vermont.* — *Elliott v. Jenkins*, 69 Vt. 134.

4. **Reversion on Vacation or Abandonment of Highway.** — Upon the vacation, discontinuance, or abandonment of a highway, the absolute title to the land covered by the highway reverts to the owner of the fee;<sup>1</sup> and since the abutting owner is generally the owner of the fee, the reversion is generally to him,<sup>2</sup> and the statute sometimes expressly provides that on the vacation of a highway the title shall vest in the abutting owner.<sup>3</sup>

**XIII. DEFECTIVE AND UNSAFE HIGHWAYS — 1. Municipal Corporations Liable** — *a. MUNICIPAL CORPORATIONS PROPER.* — In determining the question of the liability of a city, county, town, or other corporation of a municipal character, for injuries caused by defects in a highway, a distinction is made in the majority of the states between municipal corporations proper, such as cities and incorporated villages, and what are sometimes called *quasi* municipalities, such as counties and towns. In these states it is held that municipal corporations proper are, without any express statutory provision to that effect, liable for all injuries caused by defective highways, on the theory that being invested with the exclusive control over the highways within their limits, and having ample power to raise money for their construction and repair, it is their duty to keep the highways in a reasonably safe condition, for failure to perform which they are subject to a corresponding liability.<sup>4</sup>

**1. Reversion to Owner of Fee** — *United States.* — *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Wirt v. McEnery*, 21 Fed. Rep. 233.

*Connecticut.* — *Kirtland v. Meriden*, 39 Conn. 107; *Benham v. Potter*, 52 Conn. 248.

*Illinois.* — *Hunter v. Middleton*, 13 Ill. 50; *St. John v. Quitzow*, 72 Ill. 334; *Meyer v. Teutopolis*, 131 Ill. 552; *Gebhardt v. Reeves*, 75 Ill. 301; *Helm v. Webster*, 85 Ill. 116; *Hyde Park v. Borden*, 94 Ill. 26; *Thomsen v. McCormick*, 136 Ill. 135.

*Indiana.* — *Decker v. Evansville*, etc., R. Co., 133 Ind. 493.

*Kentucky.* — *West Covington v. Freking*, 8 Bush (Ky.) 121; *Louisville*, etc., R. Co. v. *Herman*, 14 Ky. L. Rep. 526.

*Massachusetts.* — *Emmonds v. Smith*, 5 Dane's Abr. 567; *Perley v. Chandler*, 6 Mass. 454; *Alden v. Murdock*, 13 Mass. 256; *Parker v. Framingham*, 8 Met. (Mass.) 260.

*Minnesota.* — *Lamm v. Chicago*, etc., R. Co., 45 Minn. 71.

*Mississippi.* — *Nicholson v. Stockett*, Walk. (Miss.) 67.

*New York.* — *Hooker v. Utica*, etc., Turnpike Road Co., 12 Wend. (N. Y.) 371; *Matter of John*, etc., Sts., 19 Wend. (N. Y.) 659; *Dunham v. Williams*, 36 Barb. (N. Y.) 136; *Heard v. Brooklyn*, 60 N. Y. 242; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Mangan v. Sing Sing*, 11 N. Y. App. Div. 212.

*Pennsylvania.* — *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649.

*Texas.* — *Mitchell v. Bass*, 26 Tex. 372.

*Washington.* — *Burmeister v. Howard*, 1 Wash. Ter. 207.

*Wisconsin.* — *Goodall v. Milwaukee*, 5 Wis. 32; *Milwaukee v. Milwaukee*, etc., R. Co., 7 Wis. 85; *Ford v. Chicago*, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791; *Weisbrod v. Chicago*, etc., R. Co., 18 Wis. 35, 86 Am. Dec. 743; *Hegar v. Chicago*, etc., R. Co., 26 Wis. 624.

**2. Abutting Owner** — *California.* — *Bigelow v. Ballerino*, (Cal. 1895) 41 Pac. Rep. 14.

*Indiana.* — *Decker v. Evansville*, etc., R. Co., 133 Ind. 493.

*Minnesota.* — *Lamm v. Chicago*, etc., R. Co., 45 Minn. 71.

*Ohio.* — *Stevens v. Shannon*, 6 Ohio Cir. Ct. 142, 3 Ohio Cir. Dec. 386.

*Pennsylvania.* — *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Ball v. Ball*, 1 Phila. (Pa.) 36, 7 Leg. Int. (Pa.) 26.

**3. Statutory Provision** — *Iowa.* — *Pettingill v. Devin*, 35 Iowa 344; *Day v. Schroeder*, 46 Iowa 546.

*Kansas.* — *Belleville v. Hallowell*, 41 Kan. 192; *Showalter v. Southern Kansas R. Co.*, 49 Kan. 421; *Southern Kansas R. Co. v. Showalter*, 57 Kan. 681.

*Michigan.* — *Scudder v. Detroit*, 117 Mich. 77.

*Missouri.* — *Thomas v. Hunt*, 134 Mo. 392.

*Nebraska.* — *Omaha*, etc., R. Co. v. *Rogers*, 16 Neb. 117; *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361.

*Pennsylvania.* — *In re Vacation of Public Road*, 19 Pa. Co. Ct. 70, 5 Pa. Dist. 771.

**4. Municipalities Proper Liable in Absence of Statute** — *United States.* — *Barnes v. District of Columbia*, 91 U. S. 540; *Cleveland v. King*, 132 U. S. 295; *District of Columbia v. Woodbury*, 136 U. S. 450; *Weightman v. Washington Corp.*, 1 Black (U. S.) 39; *Nebraska City v. Campbell*, 2 Black (U. S.) 590; *Robbins v. Chicago*, 4 Wall. (U. S.) 658; *Delger v. St. Paul*, 14 Fed. Rep. 567; *Hannibal v. Campbell*, 57 U. S. App. 484, 86 Fed. Rep. 297; *Ethridge v. Philadelphia*, 26 Fed. Rep. 43.

*Alabama.* — *Smoot v. Wetumpka*, 24 Ala. 112; *Dargan v. Mobile*, 31 Ala. 469; 70 Am. Dec. 505; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Campbell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656; *Albritton v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Selma v. Perkins*, 68 Ala. 145; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

*Colorado.* — *Daniels v. Denver*, 2 Colo. 669; *Denver v. Dunsmore*, 7 Colo. 328; *Boulder v. Niles*, 9 Colo. 416.

*Dakota.* — *Larson v. Grand Forks*, 3 Dak. 307.

*Delaware.* — *Magarity v. Wilmington*, 5

*b. QUASI-MUNICIPAL CORPORATIONS.* — In these same states, on the other hand, *quasi*-municipal corporations are held not to be liable for defects in the highways unless they are expressly made so by statute, the theory on which they are distinguished from municipal corporations proper being generally stated to be that they are mere agencies of the state, though in some of the

Houst. (Del.) 530; *Anderson v. Wilmington*, 8 Houst. (Del.) 516.

*Florida.* — *Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358; *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5.

*Georgia.* — *Rome v. Dodd*, 58 Ga. 239; *Western, etc., R. Co. v. Atlanta*, 74 Ga. 774; *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486; *Mill-edgeville v. Cooley*, 55 Ga. 17; *Wilson v. Atlanta*, 60 Ga. 473; *Brunswick v. Braxton*, 70 Ga. 193; *Greensboro v. McGibbony*, 93 Ga. 672.

*Illinois.* — *Browning v. Springfield*, 17 Ill. 143, 63 Am. Dec. 345; *Bloomington v. Bay*, 42 Ill. 503; *Springfield v. Le Claire*, 49 Ill. 476; *Rockford v. Hildebrand*, 61 Ill. 155; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860.

*Indiana.* — *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Centerville v. Woods*, 57 Ind. 192; *Kistner v. Indianapolis*, 100 Ind. 210; *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. Rep. 827; *Goshen v. Myers*, 119 Ind. 196; *Worthington v. Morgan*, 17 Ind. App. 603; *Williamsport v. Lisk*, 21 Ind. App. 414.

*Iowa.* — *Case v. Waverly*, 36 Iowa 545; *Hendershott v. Ottumwa*, 46 Iowa 658, 26 Am. Rep. 182; *Barnes v. Newton*, 46 Iowa 567; *Clark v. Epworth*, 56 Iowa 462; *Beazan v. Mason City*, 58 Iowa 233.

*Kansas.* — *Topeka v. Tuttle*, 5 Kan. 311; *Atchison v. King*, 9 Kan. 550; *Wyandotte v. White*, 13 Kan. 191; *Smith v. Leavenworth*, 15 Kan. 81; *Jansen v. Atchison*, 16 Kan. 358; *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165; *Kansas City v. Birmingham*, 45 Kan. 212.

*Kentucky.* — *Patch v. Covington*, 17 B. Mon. (Ky.) 722, 66 Am. Dec. 186; *Greenwood v. Louisville*, 13 Bush (Ky.) 226, 26 Am. Rep. 263.

*Louisiana.* — *O'Neill v. New Orleans*, 30 La. Ann. 220, 31 Am. Rep. 221; *Cline v. Crescent City R. Co.*, 41 La. Ann. 1031.

*Maryland.* — *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326; *Baltimore v. Pendleton*, 15 Md. 12; *Harford County v. Wise*, 71 Md. 43.

*Minnesota.* — *Shurtle v. Minneapolis*, 17 Minn. 308; *Cleveland v. St. Paul*, 18 Minn. 279; *Furnell v. St. Paul*, 20 Minn. 117; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564; *Kellogg v. Janesville*, 34 Minn. 132; *Welter v. St. Paul*, 40 Minn. 460, 12 Am. St. Rep. 752; *Young v. Waterville*, 39 Minn. 196; *Nichols v. St. Paul*, 44 Minn. 494.

*Mississippi.* — *Bell v. West Point*, 51 Miss. 262; *Vicksburg v. Hennessy*, 54 Miss. 392; *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. Rep. 596.

*Missouri.* — *Blake v. St. Louis*, 40 Mo. 569; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Smith v. St. Joseph*, 45 Mo. 449; *Craig v. Sedalia*, 63 Mo. 417; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Halpin v. Kansas City*, 76 Mo. 335; *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *Haniford v. Kansas City*, 103 Mo. 172; *Vogelgesang v. St.*

*Louis*, 139 Mo. 127; *Baldwin v. Springfield*, 141 Mo. 205.

*Montana.* — *Sullivan v. Helena*, 10 Mont. 134; *McCune v. Missoula*, 10 Mont. 146.

*Nebraska.* — *Omaha v. Olmstead*, 5 Neb. 446; *Lincoln v. Walker*, 18 Neb. 244; *Ponca v. Crawford*, 23 Neb. 662; *Wahoo v. Reeder*, 27 Neb. 770.

*Nevada.* — *McDonough v. Virginia City*, 6 Nev. 90.

*New York.* — *Conrad v. Ithaca*, 16 N. Y. 158; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Nelson v. Canisteo*, 100 N. Y. 89; *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; *Bishop v. Goshen*, 120 N. Y. 337; *Harrington v. Buffalo*, 121 N. Y. 147; *McNally v. Cohoes*, 127 N. Y. 350; *Hyatt v. Rondout*, 44 Barb. (N. Y.) 385.

*North Carolina.* — *Meares v. Wilmington*, 9 Ired. L. (31 N. Car.) 73, 49 Am. Dec. 412; *Bunch v. Edenton*, 90 N. Car. 431.

*North Dakota.* — *Ludlow v. Fargo*, 3 N. Dak. 485; *Vail v. Amenla*, 4 N. Dak. 239.

*Ohio.* — *Dayton v. Pease*, 4 Ohio St. 80; *Toledo v. Cone*, 41 Ohio St. 149; *Shelby v. Clagett*, 46 Ohio St. 549.

*Oregon.* — *Sheridan v. Salem*, 14 Oregon 328; *Farquar v. Roseburg*, 18 Oregon 271, 7 Am. St. Rep. 732.

*Pennsylvania.* — *Erie City v. Schwingle*, 22 Pa. St. 388, 60 Am. Dec. 87; *Rapho Tp. v. Moore*, 68 Pa. St. 404, 8 Am. Rep. 202; *Fritsch v. Allegheny*, 91 Pa. St. 226; *Rigony v. Schuylkill County*, 103 Pa. St. 382; *Brookville v. Arthurs*, 130 Pa. St. 501.

*Tennessee.* — *Memphis v. Lasser*, 9 Humph. (Tenn.) 757; *Nashville v. Brown*, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289; *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755; *Knoxville v. Bell*, 12 Lea (Tenn.) 157.

*Texas.* — *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Klein v. Dallas*, 71 Tex. 280; *Austin v. Ritz*, 72 Tex. 391.

*Utah.* — *Levy v. Salt Lake City*, 3 Utah 63.

*Virginia.* — *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; *Noble v. Richmond*, 31 Gratt. (Va.) 271, 31 Am. Rep. 726; *Orme v. Richmond*, 79 Va. 86; *Clark v. Richmond*, 83 Va. 355; *McCoull v. Manchester*, 85 Va. 579; *Moore v. Richmond*, 85 Va. 538.

*Washington.* — *Morgan v. Morley*, 1 Wash. 464; *Hutchinson v. Olympia*, 2 Wash. Ter. 314; *Saylor v. Montesano*, 11 Wash. 328; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847.

*West Virginia.* — *Wilson v. Wheeling*, 19 W. Va. 324, 42 Am. Rep. 780; *Curry v. Mannington*, 23 W. Va. 14; *Moore v. Huntington*, 31 W. Va. 842; *Biggs v. Huntington*, 32 W. Va. 55.

And see generally the title MUNICIPAL CORPORATIONS.



states they are held to be exempt merely because the obligation to keep the highways in repair is not imposed upon them by statute.<sup>1</sup> In *Maryland* and *Pennsylvania*, however, quasi-municipal corporations are held to be liable for defects in highways which they are under an obligation to repair, though not expressly made liable by statute.<sup>2</sup>

c. NEW ENGLAND RULE. — In the *New England States*, and in *Arkansas*, *California*, *Michigan*, *New Jersey*, *South Carolina*, and *Wisconsin*, the distinction between the liability of municipal corporations proper and quasi municipalities is not recognized, and it is held that no municipality, whether a city, town, county, or district, is civilly liable for injuries caused by a failure to repair defects in the highways, unless the liability is imposed by statute.<sup>3</sup> But even in some of these states a municipality has been held to be liable, apart from statute, if the defect is of its own direct creation and there is not merely a failure to repair a defect created by another or by natural causes, since in such case it stands in the position of any other wrongdoer.<sup>4</sup>

d. STATUTES IMPOSING LIABILITY. — In most of the states above referred to, in which no liability on the part of the municipality is recognized as exist-

#### 1. Quasi Municipalities Liable Only by Statute.

— *Hedges v. Madison County*, 6 Ill. 306; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652 [overruling *South Ottawa v. Foster*, 20 Ill. 296]; *Russell v. Steuben*, 57 Ill. 35; *Yeager v. Tippecanoe Tp.*, 81 Ind. 46; *Shrum v. Washington County*, 13 Ind. App. 585; *Eikenberry v. Bazaar Tp.*, 22 Kan. 556; *Wheatly v. Mercer*, 9 Bush (Ky.) 704; *King v. Police Jury*, 12 La. Ann. 858; *Altnow v. Sibley*, 30 Minn. 186, 44 Am. Rep. 191; *People v. Town Auditors*, 74 N. Y. 310; *Morey v. Newfane*, 8 Barb. (N. Y.) 645; *Barber v. New Scotland*, 88 Hun (N. Y.) 522; *Kinsey v. Jones County*, 8 Jones L. (53 N. Car.) 186; *Vail v. Amenias*, 4 N. Dak. 239. For a detailed treatment of the liability of counties for defective highways, see the title COUNTRIES, vol. 7, p. 950.

2. Quasi Municipalities Liable Apart from Statute. — *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Prince George's County v. Burgess*, 61 Md. 29, 48 Am. Rep. 88; *Dean v. New Milford Tp.*, 5 W. & S. (Pa.) 545; *Rapho Tp. v. Moore*, 68 Pa. St. 404, 8 Am. Rep. 202; *Shadler v. Blair County*, 136 Pa. St. 488; *Burrell Tp. v. Uncapher*, 117 Pa. St. 353, 2 Am. St. Rep. 664. See further the title COUNTRIES, vol. 7, p. 951.

3. Municipalities Not Liable in Absence of Statute. — *Arkansas*. — *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32; *Ft. Smith v. York*, 52 Ark. 84.

*California*. — *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 271; *Chope v. Eureka*, 78 Cal. 588, 12 Am. St. Rep. 213; *Arnold v. San José*, 81 Cal. 618.

*Connecticut*. — *Chidsey v. Canton*, 17 Conn. 475; *Stonington v. States*, 31 Conn. 213; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677; *Lounsbury v. Bridgeport*, 66 Conn. 360; *Bartram v. Sharon*, 71 Conn. 686.

*Maine*. — *Sanford v. Augusta*, 32 Me. 536; *Mitchell v. Rockland*, 52 Me. 118; *Morgan v. Hollowell*, 57 Me. 375; *Frazer v. Lewiston*, 76 Me. 531.

*Massachusetts*. — *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Sawyer v. Northfield*, 7 Cush. (Mass.) 490; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Hand v. Brookline*, 126

Mass. 324; *Nash v. South Hadley*, 145 Mass. 105.

*Michigan*. — *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212; *Detroit v. Putnam*, 45 Mich. 263; *McKellar v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687; *Williams v. Grand Rapids*, 59 Mich. 51; *Roberts v. Detroit*, 102 Mich. 64. See also *Detroit v. Osborne*, 135 U. S. 492.

*New Hampshire*. — *Farnum v. Concord*, 2 N. H. 392; *Wakefield v. Newport*, 62 N. H. 624; *Wooster v. Plymouth*, 62 N. H. 193; *Clark v. Manchester*, 62 N. H. 577; *Sargent v. Gilford*, 66 N. H. 543.

*New Jersey*. — *Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Livermore v. Chosen Freeholders*, 29 N. J. L. 245; *Pray v. Jersey City*, 32 N. J. L. 394; *Carter v. Rahway*, 57 N. J. L. 196.

*Rhode Island*. — *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235. See also *Providence v. Clapp*, 17 How. (U. S.) 167.

*South Carolina*. — *Coleman v. Chester*, 14 S. Car. 291; *Black v. Columbia*, 19 S. Car. 412, 45 Am. Rep. 785; *Young v. Charleston*, 20 S. Car. 116, 47 Am. Rep. 827.

*Vermont*. — *Hyde v. Jamaica*, 27 Vt. 443; *State v. Burlington*, 36 Vt. 521; *Parker v. Rutland*, 56 Vt. 224; *Wilkins v. Rutland*, 61 Vt. 336.

*Wisconsin*. — *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60; *Spearbracker v. Larrabee*, 64 Wis. 573; *Goeltz v. Ashland*, 75 Wis. 642; *Wiltse v. Tilden*, 77 Wis. 152; *Daniels v. Racine*, 98 Wis. 649. But see *Webster v. Beaver Dam*, 84 Fed. Rep. 280.

4. Direct Act of Municipality. — *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Hand v. Brookline*, 126 Mass. 324; *Wilkins v. Rutland*, 61 Vt. 336; *Hughes v. Fond du Lac*, 73 Wis. 380. *Contra*, *Young v. Charleston*, 20 S. Car. 116, 47 Am. Rep. 827.

This same distinction between misfeasance and nonfeasance is taken in the English cases. See *infra*, this section, *Rule of Liability in England and Canada*.

Illustration of Distinction. — So it was held that a town is liable to a traveler on a highway

ing apart from statute, there exist statutes imposing and defining such liability, and as the decisions of the particular cases generally turn to some extent upon the language of the statutes, it seems desirable to state briefly the substance of these enactments. In *Connecticut* the municipality is liable to one injured "by means of a defective road or bridge;"<sup>1</sup> in *Maine*, to one who suffers bodily injury or damage in his property "through any defect or want of repair or sufficient railing" in a highway, provided the municipal officers had twenty-four hours' notice;<sup>2</sup> in *Massachusetts*, for injuries suffered "through a defect or want of repair or of sufficient railing" which might have been remedied "by reasonable care and diligence;"<sup>3</sup> and in *Michigan*, to one injured by reason of neglect to keep the highways or streets "in reasonable repair," and in condition "reasonably safe and convenient for public travel."<sup>4</sup> In *New Hampshire* a town is made liable for injuries caused by "any obstruction, defect, insufficiency, or want of repair which renders" the highway "unsuitable for the travel thereon;"<sup>5</sup> in *New Jersey* townships are liable to one injured "by means of the insufficiency or want of repairs of any public road;"<sup>6</sup> and in *New York* a town is liable for all damages sustained "by reason of any defect in its highways or bridges existing because of the neglect of any commissioner of highways of such town."<sup>7</sup> In *Rhode Island* towns

for injuries resulting from improper construction of its waterworks which undermined the highway, irrespective of its duty to keep the highway in repair. *Hand v. Brookline*, 126 Mass. 324.

1. *Connecticut*. — Gen. Stat. (1888), § 2673. See *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; *Hall v. Norwalk*, 65 Conn. 310.

2. *Maine*. — Rev. Stat. (1883), c. 18, § 80, as amended by Laws 1895, c. 164, p. 196. The statute also requires that highways shall be kept "safe and convenient." *Church v. Cherryfield*, 33 Me. 460; *Peck v. Ellsworth*, 36 Me. 393; *Tripp v. Lyman*, 37 Me. 250; *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *Rogers v. Newport*, 62 Me. 101; *Morgan v. Lewiston*, 91 Me. 566.

3. *Massachusetts*. — See Pub. Stat. (1882), c. 52, § 18; Laws 1888, c. 114; Laws 1891, c. 170.

Previous to 1877, towns were absolutely liable for injuries caused by a defect which had existed for twenty-four hours, or if the town had notice of the defect; while under the present statute the liability is conditioned upon the existence of notice and the failure to exercise reasonable care and diligence. See *Horton v. Ipswich*, 12 Cush. (Mass.) 488; *George v. Haverhill*, 110 Mass. 506; *Bodwell v. North Andover*, 110 Mass. 511, note; *Rooney v. Randolph*, 128 Mass. 580; *Hayes v. Cambridge*, 136 Mass. 402; *Post v. Boston*, 141 Mass. 189; *Horrigan v. Clarksburg*, 150 Mass. 218; *Blessington v. Boston*, 153 Mass. 409; *Bowes v. Boston*, 155 Mass. 344; *Murphy v. Worcester*, 159 Mass. 546. See also *infra*, this section, *Notice of Defect*.

4. *Michigan*. — How. Annot. Stat. Supp. (1883-1890), §§ 1442-1446*h*.

The statute extends to defects in construction as well as to defects through omission to repair. *Carver v. Detroit*, etc., *Plank Road Co.*, 61 Mich. 584; *Sebert v. Alpena*, 78 Mich. 165. But it is not a neglect to keep the highway in repair within the statute, to let things stand in it that form no part of it. *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep.

687. See also, as to the construction of the statute, *Sharp v. Evergreen Tp.*, 67 Mich. 443; *Southwell v. Detroit*, 74 Mich. 438; *Quinlan v. Manistique*, 85 Mich. 22; *Tatman v. Benton Harbor*, 115 Mich. 695.

The requirement is merely that the highway shall be reasonably safe and fit for travel. *Medina Tp. v. Perkins*, 48 Mich. 71; *Dotton v. Albion*, 50 Mich. 129; *Harris v. Clinton Tp.*, 64 Mich. 447, 8 Am. St. Rep. 842; *Woodbury v. Owosso*, 64 Mich. 245; *Shippy v. Au Sable*, 65 Mich. 501.

5. *New Hampshire*. — Pub. Stat. (1891), c. 76, § 1. See *Wheeler v. Troy*, 20 N. H. 78; *Hall v. Manchester*, 40 N. H. 410; *Howe v. Plainfield*, 41 N. H. 135; *Winship v. Enfield*, 42 N. H. 197; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Hardy v. Keene*, 52 N. H. 370; *Sweeney v. Newport*, 65 N. H. 86.

6. *New Jersey*. — Gen. Stat. (1895), p. 2844, par. 192, 194.

Townships in a number of counties are expressly excepted from the statutory liability, and it is held that the statute does not impose any liability for defects in a city street or sidewalk. *Carter v. Rahway*, 55 N. J. L. 177; *Dupuy v. Union Tp.*, 46 N. J. L. 269.

7. *New York*. — Laws 1890, c. 568, § 16, p. 1181.

Before the enactment, in 1881, of a statute practically similar to that referred to in the text, the commissioners of highways were liable to persons injured through their neglect to repair. *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Hover v. Barkhoof*, 44 N. Y. 113; *People v. Town Auditors*, 74 N. Y. 310. And since that enactment the town is subject to a liability commensurate with that of a commissioner. *Ivory v. Deerpark*, 116 N. Y. 476; *Bryant v. Randolph*, 133 N. Y. 70; *Clapper v. Waterford*, 131 N. Y. 382; *Lane v. Hancock*, 142 N. Y. 510; *Barber v. New Scotland*, 88 Hun (N. Y.) 522; *Waller v. Hebron*, 5 N. Y. App. Div. 577; *Young v. Macomb*, 11 N. Y. App. Div. 480; *Riley v. Eastchester*, 18 N. Y. App. Div. 94.

A highway may be defective owing to the



are made liable for neglect to keep highways "in good repair;"<sup>1</sup> in *South Carolina* a right of action is given to one injured "through a defect or in the negligent repair of a highway, causeway, or bridge;"<sup>2</sup> in *West Virginia* a right of action is given to one injured by reason of a public road, street, sidewalk, or alley "being out of repair;"<sup>3</sup> and in *Wisconsin* a remedy is given for any damage happening "by reason of the insufficiency or want of repairs of any bridge, sluiceway, or road."<sup>4</sup> In *Vermont* the municipality is not liable for defects in a highway except when the damages arise from the "insufficiency of any bridge, culvert, or sluice."<sup>5</sup>

**No Extension by Construction.** — Such a statutory liability as is above referred to will not be extended by construction.<sup>6</sup>

**2. Highways for Which Municipality Is Liable** — *a.* **ADOPTION OR ASSUMPTION OF CONTROL BY MUNICIPALITY.** — In order to render a municipality liable as for defects in a highway, it is not absolutely necessary that the alleged highway should have been regularly established by statutory proceedings, or should be supported by dedication or prescription, it being held that a municipality which assumes control of land as a highway or as a part of a highway, and by so doing induces persons to make use of such land for purposes of travel, cannot throw upon the person injured the burden of proving the regularity of the proceedings by which the land became a highway, or of the authority by which the highway was established.<sup>7</sup> The usual evidence of such assumption of control or adoption of land as a highway consists in repairing or doing work on the road.<sup>8</sup>

presence thereon of an obstruction, as well as when there is a physical disturbance or injury to the roadbed. *Whitney v. Ticonderoga*, 127 N. Y. 40.

**1. Rhode Island.** — Gen. Laws (1896), c. 72, §§ 11, 12. The duty of the municipality is determined by the provision in section 1 of the same chapter, that it shall keep the highway in repair and mended so that the same may be "safe and convenient for travelers," and this requires not absolute but reasonable safety only. *McCloskey v. Moies*, 19 R. I. 297. See also *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35; *Yeaw v. Williams*, 15 R. I. 20.

**2. South Carolina.** — Civ. Stat. (1893), § 1169. And see the title COUNTIES, vol. 7, p. 952, note.

**3. West Virginia.** — Code (1891), c. 43, § 53. See *Phillips v. Ritchie County*, 31 W. Va. 477; *Moore v. Huntington*, 31 W. Va. 842; *Chapman v. Milton*, 31 W. Va. 384; *Biggs v. Huntington*, 32 W. Va. 55.

**4. Wisconsin.** — Stat. (1898), § 1339. See *Schroth v. Prescott*, 63 Wis. 652; *Adams v. Oshkosh*, 71 Wis. 49; *Bogie v. Waupun*, 75 Wis. 1; *Goeltz v. Ashland*, 75 Wis. 642; *Smalley v. Appleton*, 75 Wis. 18.

**5. Vermont.** — Laws 1880, No. 62; amended Laws 1882, No. 13.

Prior to 1880, towns were liable for damages that arose from the insufficiency or want of repair of their highways. *Ford v. Braintree*, 64 Vt. 144. See also *Willard v. Sherburne*, 59 Vt. 361; *Wilkins v. Rutland*, 61 Vt. 336.

**6. No Extension by Construction** — *Connecticut*. — *Bartram v. Sharon*, 71 Conn. 686.

*Maine*. — *Moulton v. Sanford*, 51 Me. 127; *Brown v. Skowhegan*, 82 Me. 273.

*Michigan*. — *Detroit v. Putnam*, 45 Mich. 263.

*Rhode Island*. — *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235.

*Wisconsin*. — *Smalley v. Appleton*, 75 Wis. 18.

**7. Assumption of Control by Municipality** — *United States*. — *New York v. Sheffield*, 4 Wall. (U. S.) 189.

*Illinois*. — *Champaign v. Patterson*, 50 Ill. 62; *Roodhouse v. Christian*, 55 Ill. App. 107.

*Indiana*. — *Aurora v. Colshire*, 55 Ind. 484; *Goshen v. Myers*, 119 Ind. 196.

*Maryland*. — *Kennedy v. Cumberland*, 65 Md. 514, 57 Am. Rep. 346.

*Michigan*. — *Will v. Mendon*, 108 Mich. 251.

*Minnesota*. — *Phelps v. Mankato*, 23 Minn. 276.

*Missouri*. — *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634.

*New Hampshire*. — *Stark v. Lancaster*, 57 N. H. 88.

*New York*. — *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; *McVee v. Watertown*, 92 Hun (N. Y.) 306; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Wakeman v. Wilbur*, 147 N. Y. 657.

*Washington*. — *Taake v. Seattle*, 18 Wash. 178.

*West Virginia*. — *Wilson v. Wheeling*, 19 W. Va. 325, 42 Am. Rep. 780; *Phillips v. Huntington*, 35 W. Va. 406.

*Wisconsin*. — *Houfe v. Fulton*, 34 Wis. 608, 17 Am. Rep. 463. Compare *Green v. Bridge Creek*, 38 Wis. 449, 20 Am. Rep. 18.

"How the street became such — whether by formal official action of the city in accepting its dedication or by acceptance by user on the part of the public — is immaterial so far as concerns the duty of the municipal corporation to keep it in such condition as to be safe for the public to travel along." *Phelps v. Mankato*, 23 Minn. 279, approved in *Schafer v. New York*, 12 N. Y. App. Div. 384; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418.

**8. Work and Repairs** — *Kentucky*. — *Henderson v. White*, (Ky. 1899) 49 S. W. Rep. 764, 20 Ky. L. Rep. 1525.

*Michigan*. — *Will v. Mendon*, 108 Mich. 251.



In New Hampshire, however, it is held that the defendant municipality may show that the highway was not established in the statutory method, in view of a statutory provision that highways shall be established only by statutory proceedings or by user for twenty years.<sup>1</sup> Mere irregularities, however, in the proceedings do not constitute a defense.<sup>2</sup>

**Highways Constructed by Others.** — On the principle above stated a municipality has been held to be liable for injuries received on a highway within its control, although the highway, or the defective part thereof, had been constructed by another;<sup>3</sup> and accordingly a municipality is liable for injuries caused by defects in a sidewalk originally constructed by the abutting owner and afterwards used by the public with the knowledge of the municipality,<sup>4</sup> and in such a case, it being the duty of the municipality to control the sidewalks within its limits, the assumption of such control will be presumed.<sup>5</sup>

**User by the Public** is conceded to be evidence that the road is a public highway;<sup>6</sup> but it is said that such user alone, without a positive act on the part

*Minnesota.* — *Lindholm v. St. Paul*, 19 Minn. 245; *Treise v. St. Paul*, 36 Minn. 527.

*Nebraska.* — *Plattsmouth v. Mitchell*, 20 Neb. 228; *Imperial v. Wright*, 34 Neb. 732.

*New York.* — *Greenberg v. Kingston*, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 511.

*Texas.* — *Waxahachie v. Connor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 693.

*Vermont.* — *Whitney v. Essex*, 42 Vt. 520; *Folsom v. Underhill*, 36 Vt. 580; *Coates v. Canaan*, 51 Vt. 131.

*Wisconsin.* — *Codner v. Bradford*, 3 Chand. (Wis.) 291, 3 Pin. (Wis.) 259.

**Statutes in Maine and Massachusetts** provide that the municipality sued for an injury occasioned by a defect in a highway shall not deny the location thereof if, within six years before the injury, it has made repairs thereon. *Gilpatrick v. Biddeford*, 51 Me. 182, 54 Me. 93; *Hayden v. Attleborough*, 7 Gray (Mass.) 338; *Taylor v. Woburn*, 130 Mass. 494.

In Michigan the statute restricts liability on the part of the municipality to highways which have been in use for ten years. *McKeller v. Monitor Tp.*, 78 Mich. 485.

**1. New Hampshire Decisions.** — *Haywood v. Charlestown*, 34 N. H. 23; *Smith v. Northumberland*, 36 N. H. 38; *Hall v. Manchester*, 39 N. H. 295; *Tilton v. Pittsfield*, 58 N. H. 327; *Wentworth v. Rochester*, 63 N. H. 244. See also *Stevens v. Nashua*, 46 N. H. 192.

**2. Irregularities in Proceedings.** — *Raymond v. Griffin*, 23 N. H. 340; *Proctor v. Andover*, 42 N. H. 348; *Hardy v. Keene*, 54 N. H. 451; *Horne v. Rochester*, 62 N. H. 347; *Randall v. Conway*, 63 N. H. 513; *Norris v. Haverhill*, 65 N. H. 89.

**3. Adoption of Highway Laid Out or Improved by Others** — *California.* — *Barton v. McDonald*, 81 Cal. 265; *Schulte v. North Pac. Transp. Co.*, 50 Cal. 593.

*Illinois.* — *Flora v. Nancy*, 136 Ill. 45.

*Indiana.* — *Aurora v. Colshire*, 55 Ind. 484; *Aurora v. Bitner*, 100 Ind. 396.

*Kansas.* — *Rosedale v. Golding*, 55 Kan. 167; *Wallace v. Evans*, 43 Kan. 513.

*Maine.* — *Bradbury v. Benton*, 69 Me. 194.

*Massachusetts.* — *Aston v. Newton*, 134 Mass. 597, 45 Am. Rep. 347; *Kellogg v. Northampton*, 8 Gray (Mass.) 504; *Weare v. Fitchburg*, 110 Mass. 334.

*Minnesota.* — *Graham v. Albert Lea*, 48 Minn. 201.

*Nebraska.* — *Kinney v. Tekamah*, 30 Neb. 605; *Chadron v. Glover*, 43 Neb. 732.

*New Hampshire.* — *Willey v. Portsmouth*, 35 N. H. 303.

*New York.* — *Hiller v. Sharon Springs*, 28 Hun (N. Y.) 346; *Clapper v. Waterford*, 62 Hun (N. Y.) 170; *McCormick v. Amsterdam*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 272; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Jewhurst v. Syracuse*, 108 N. Y. 303.

*Pennsylvania.* — *Dalton v. Upper Tyrone Tp.*, 137 Pa. St. 18.

*Vermont.* — *Dickinson v. Rockingham*, 45 Vt. 99; *Potter v. Castleton*, 53 Vt. 435.

*Wisconsin.* — *Houfe v. Fulton*, 34 Wis. 608, 17 Am. Rep. 463; *Cartright v. Belmont*, 58 Wis. 370.

So it was held that a town was liable for injuries received through defects in a private road which was temporarily adopted by the town authorities as a substitute for a highway which was not in condition for use. *Dickinson v. Rockingham*, 45 Vt. 99.

**4. Sidewalks** — *Illinois.* — *Champaign v. McInnis*, 26 Ill. App. 338; *Bloomington v. Bay*, 42 Ill. 503; *Marseilles v. Howland*, 124 Ill. 547; *Mansfield v. Moore*, 124 Ill. 133; *Hogan v. Chicago*, 168 Ill. 559.

*Kansas.* — *Topeka v. Sherwood*, 39 Kan. 690.

*Massachusetts.* — *Weare v. Fitchburg*, 110 Mass. 334.

*Minnesota.* — *Graham v. Albert Lea*, 48 Minn. 206.

*Missouri.* — *Oliver v. Kansas City*, 69 Mo. 79.

*Nebraska.* — *Foxworthy v. Hastings*, 25 Neb. 183.

*New Hampshire.* — *Lambert v. Pembroke*, 66 N. H. 280.

*New York.* — *Law v. Kingsley*, 82 Hun (N. Y.) 76; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122.

*Vermont.* — *Potter v. Castleton*, 53 Vt. 435.

*Virginia.* — *Orme v. Richmond*, 79 Va. 86.

*Wisconsin.* — *Hill v. Fond du Lac*, 56 Wis. 242.

**5. Assumption of Control Presumed.** — *Shannon v. Tama City*, 74 Iowa 22; *Fuller v. Jackson*, 82 Mich. 480.

**6. User by Public.** — *Guthrie v. New Haven*, 31 Conn. 308; *Taylor v. Woburn*, 130 Mass. 494; *Kennedy v. Le Van*, 23 Minn. 513; *Maus v. Springfield*, 101 Mo. 617, 20 Am. St. Rep. 634; *Musick v. Latrobe*, 184 Pa. St. 375.

of the municipality showing an assumption of control, is not sufficient to render the municipality liable for defects.<sup>1</sup> In *New York*, however, it is stated that a city is liable if it suffers the public to treat the land as an ordinary street.<sup>2</sup>

Upon the Incorporation or Extension of a Municipality proper, such as a city, so as to include highways which have previously been under the jurisdiction or supervision of the highway officers of a county or town, the duty to maintain and repair such highways is generally transferred to the municipality, and the county or town is relieved therefrom.<sup>3</sup> This may, however, not be so in view of particular statutory provisions.<sup>4</sup> The municipality may be liable for defects even which existed at the time of its incorporation, if it failed to exercise proper diligence in removing them,<sup>5</sup> but it is not jointly liable with a town because the highway officers, who were guilty of negligence in failing to repair a defect, were elected in part by the vote of a portion of territory which was afterwards incorporated into the city.<sup>6</sup>

*b. NEWLY ESTABLISHED HIGHWAY.* — A municipality is liable for defects in a new highway as soon as the latter is actually opened for public travel,<sup>7</sup> and the fact that the time fixed for the completion of the work of construction has not elapsed is immaterial.<sup>8</sup> The fact, however, that the municipality has accepted the dedication of a highway does not impose a liability to keep the dedicated land in repair until the municipality, in some appropriate manner, has sanctioned its use by the public.<sup>9</sup>

*c. DISCONTINUED HIGHWAY.* — After the discontinuance of a highway, the municipality is in general not liable for defects therein,<sup>10</sup> but it is liable if such discontinued highway is in a dangerous condition, but apparently open to travel, and it fails to establish barriers or warnings to prevent the use thereof.<sup>11</sup>

**3. Municipal Duties and Liabilities in General** — *a. ORDINARY AND REASONABLE CARE.* — The general obligation on the part of the municipal corporation is to use ordinary and reasonable care to keep the highways in a safe and proper condition,<sup>12</sup> though its liability may be independent of the exercise of

**1. Insufficient to Show Municipal Liability.** — *Folsom v. Underhill*, 36 Vt. 589; *Tower v. Rutland*, 56 Vt. 28.

**2. Contrary Decision.** — *Schafer v. New York*, 154 N. Y. 466, affirming 12 N. Y. App. Div. 384. And see *Austin v. Ritz*, 72 Tex. 403.

**3. Incorporation or Extension of Municipality** — *Alabama.* — *McCain v. State*, 62 Ala. 138. *Arkansas.* — *Fitzgerald v. Saxton*, 58 Ark. 494.

*Illinois.* — *Snell v. Chicago*, 133 Ill. 413. *Indiana.* — *Frankfort v. Coleman*, 19 Ind. App. 368.

*Iowa.* — *McCullom v. Black Hawk County*, 21 Iowa 409.

*Kansas.* — *Rosedale v. Golding*, 55 Kan. 167.

*New York.* — *Nelson v. Canisteo*, 100 N. Y. 89; *Richards v. New York*, 48 N. Y. Super. Ct. 315.

*Ohio.* — *Steubenville v. King*, 23 Ohio St. 610.

*South Carolina.* — *Pope v. Road Com'rs*, 12 Rich. L. (S. Car.) 407.

*Texas.* — *State v. Jones*, 18 Tex. 874.

**4.** *Mead v. Derby*, 40 Conn. 205; *McNeal Pipe, etc., Co. v. Lippincott*, 57 N. J. L. 540.

**5.** *Nelson v. Canisteo*, 100 N. Y. 89; *Scranton v. Catterson*, 94 Pa. St. 202.

**6.** *Embler v. Wallkill*, 132 N. Y. 222.

**7. Liability Attaches When Highway Opened for Travel** — *Illinois.* — *Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Chicago v. Martin* 49

Ill. 241, 95 Am. Dec. 590; *Aurora v. Pulfer*, 56 Ill. 270.

*Maine.* — *Lowell v. Moscow*, 12 Me. 300; *Bradbury v. Benton*, 69 Me. 194.

*Massachusetts.* — *Bliss v. Deerfield*, 13 Pick. (Mass.) 102; *Drury v. Worcester*, 21 Pick. (Mass.) 44.

*Nebraska.* — *Omaha v. Richards*, 49 Neb. 244.

*New York.* — *Seymour v. Salamanca*, 137 N. Y. 364; *McNish v. Peekskill*, 22 N. Y. App. Div. 631, 48 N. Y. Supp. 210. And see *Schafer v. New York*, 154 N. Y. 466.

**8.** *Blaisdell v. Portland*, 39 Me. 113; *Loker v. Damon*, 17 Pick. (Mass.) 284.

**9.** *Taubman v. Lexington*, 25 Mo. App. 226; *Bassett v. St. Joseph*, 53 Mo. 303, 14 Am. Rep. 446; *Downend v. Kansas City*, 71 Mo. App. 529; *Brennan v. St. Louis*, 92 Mo. 482; *Hunter v. Weston*, 111 Mo. 176; *Meiners v. St. Louis*, 130 Mo. 274; *Baldwin v. Springfield*, 141 Mo. 212; *Imperial v. Wright*, 34 Neb. 732.

**10. Discontinued Highway.** — *Tinker v. Russell*, 14 Pick. (Mass.) 279; *Horey v. Haverstraw*, 124 N. Y. 273.

**11.** *Munson v. Derby*, 37 Conn. 298, 9 Am. Rep. 332; *Bills v. Kaukauna*, 94 Wis. 310.

**12. Ordinary Care Required** — *Delaware.* — *Harrigan v. Wilmington*, 8 Houst. (Del.) 140.

*Illinois.* — *Streator v. Liebenorfer*, 71 Ill. App. 625; *Roodhouse v. Christian*, 158 Ill. 137; *Rock Island v. Drost*, 71 Ill. App. 613.

such care under a particular statute.<sup>1</sup> It follows that the municipality is not an insurer or guarantor of the safety of the highways, and consequently may not be liable for injuries even though the person injured was in the exercise of due care.<sup>2</sup> Nor is it liable for injuries resulting from extraordinary accidents which would not be guarded against in the exercise of reasonable care and skill, even though the accident would not have happened had the highway been differently constructed or had some slight imperfection not existed therein.<sup>3</sup>

**Opportunity to Remove Defect.** — So the question whether the municipality is liable for not having removed or repaired a defect after having received notice thereof is dependent upon whether it had a reasonable opportunity and time so to do between the receipt of notice thereof and the happening of the accident.<sup>4</sup>

**b. ORDINARY TRAVEL ONLY TO BE CONSIDERED.** — The obligation is to keep a road in a safe condition for ordinary travel only, and hence the municipality is not bound to maintain it so as to insure the safety of reckless drivers<sup>5</sup> or of bicycle riders as distinct from other users of the road.<sup>6</sup>

**c. SPECIAL CONDITIONS OF MUNICIPAL ACTION.** — It has been held that where a statute requires that a highway shall be kept in a reasonably safe

*Indiana.* — *Michigan City v. Boeckling*, 122 Ind. 39.

*Kansas.* — *Jansen v. Atchison*, 16 Kan. 358; *Eudora v. Miller*, 30 Kan. 494.

*Michigan.* — *Medina Tp. v. Perkins*, 48 Mich. 67; *Moore v. Kenockee*, 75 Mich. 332.

*Mississippi.* — *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521.

*Missouri.* — *Squires v. Chillicothe*, 89 Mo. 226.

*New York.* — *Hunt v. New York*, 109 N. Y. 134; *Lane v. Hancock*, 142 N. Y. 510.

*Pennsylvania.* — *Miller v. Bradford*, 186 Pa. St. 164.

*Virginia.* — *Moore v. Richmond*, 85 Va. 538.

**1. Requirement of Particular Statute.** — See *George v. Haverhill*, 110 Mass. 511; *Prindle v. Fletcher*, 39 Vt. 256; *Ward v. Jefferson*, 24 Wis. 342; *Burns v. Elba*, 32 Wis. 605.

**2. No Guaranty of Safety.** — *United States.* — *Barnes v. District of Columbia*, 91 U. S. 540.

*Connecticut.* — *Wilson v. Granby*, 47 Conn. 73, 36 Am. Rep. 51.

*Indiana.* — *Indianapolis v. Cook*, 99 Ind. 10.

*New York.* — *Hunt v. New York*, 109 N. Y. 134; *Williams v. Brooklyn*, 33 N. Y. App. Div. 539.

*Pennsylvania.* — *Burns v. Bradford*, 137 Pa. St. 367.

*Tennessee.* — *Poole v. Jackson*, 93 Tenn. 62.

*Texas.* — *Shelley v. Austin*, 74 Tex. 608.

**3. Remote Dangers.** — *McFarland v. Emporia Tp.*, 59 Kan. 568; *Morse v. Belfast*, 77 Me. 44; *Lane v. Hancock*, 142 N. Y. 510; *Beltz v. Yonkers*, 148 N. Y. 67; *Waller v. Hebron*, 5 N. Y. App. Div. 577; *Bishop v. Schuylkill Tp.*, (Pa. 1887) 8 Atl. Rep. 449.

So it was held that a town is not liable for injuries caused by a hole in a highway, three or four inches deep and several feet in length and basin-like in its shape, since it could not have been anticipated that the presence of such a hole would result in injuries. *Grant v. Enfield*, 11 N. Y. App. Div. 358.

**4. Repairs Within Reasonable Time After Notice.** — *Connecticut.* — *Davis v. Guilford*, 55 Conn. 357; *Cummings v. Hartford*, 70 Conn. 115.

*Illinois.* — *Chicago v. Hoy*, 75 Ill. 530; *Decatur v. Besten*, 169 Ill. 340, *affirming* 69 Ill. App. 410.

*Indiana.* — *Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79.

*Michigan.* — *Burleson v. Reading*, 110 Mich. 512; *McKormick v. West Bay City*, 110 Mich. 265; *Handy v. Meridian Tp.*, 114 Mich. 454.

*Missouri.* — *Barr v. Kansas City*, 105 Mo. 550; *Richardson v. Marceline*, 73 Mo. App. 360.

*New Hampshire.* — *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

*New York.* — *Farman v. Ellington*, 46 Hun (N. Y.) 41; *Smith v. Rochester*, 79 Hun (N. Y.) 174.

*Tennessee.* — *Knoxville v. Bell*, 12 Lea (Tenn.) 157.

*Vermont.* — *Ozier v. Hinesburgh*, 44 Vt. 220; *Spear v. Lowell*, 47 Vt. 692.

*Wisconsin.* — *McCabe v. Hammond*, 34 Wis. 590; *Bloor v. Delafield*, 69 Wis. 273.

**Illustrations of Reasonable Time.** — So it was held that when the overseer of the highway district received notice on Saturday night or on Sunday morning he might be bound to make repairs on Sunday, or at least to adopt measures to prevent accidents, unless the defect was so open and visible that it might be easily avoided. *Alexander v. Oshkosh*, 33 Wis. 277; *Bloor v. Delafield*, 69 Wis. 273.

And when notice of a hole was received at nine o'clock A. M., it was held that a warning signal should have been erected by one o'clock P. M., the time of the accident. *Bradford v. Anniston*, 92 Ala. 349, 25 Am. St. Rep. 60.

**5. Ordinary Travel Only to Be Considered.** — *Walker v. Vicksburg*, 71 Miss. 899.

**6. Sutphen v. North Hempstead**, 80 Hun (N. Y.) 409. See generally the title *BICYCLES*, vol. 4, p. 15.

So a town was liable for an injury to an elephant driven over the highway with due care, only if, in the opinion of the jury, it was proper to make such use of the highway under the circumstances. *Gregory v. Adams*, 14 Gray (Mass.) 242. And see the title *BRIDGES*, vol. 4, p. 935.



condition, the fact that the township is obliged to act through officers will not excuse negligence that would not be tolerated in an individual;<sup>1</sup> but elsewhere it is stated that courts and juries should consider the unavoidable delay often attending the action of municipal authorities, and financial and other embarrassments.<sup>2</sup> Nor can a municipality excuse its failure to repair by showing that its officers or servants were negligent<sup>3</sup> or by showing that particular officers or employees were directed to repair the defect in question.<sup>4</sup>

*d.* AMOUNT OF USE OF HIGHWAY. — The duty of the municipality as regards a highway is, it seems, affected by the amount of use of such highway,<sup>5</sup> but this does not affect its duty to keep every highway within its limits in a reasonably safe condition.<sup>6</sup> And a town is not, as a matter of law, free from liability on account of a loose plank in a sidewalk, merely because it contains a population of only five or six hundred people.<sup>7</sup>

*e.* TOTAL EXTENT OF HIGHWAYS. — It is stated that the fact that the total extent of the highways in the municipality is very considerable does not affect its obligation to keep them free from defects.<sup>8</sup> This statement was made, however, in reference to cities, and a different view seems to have been taken in the case of *quasi* municipalities, such as towns.<sup>9</sup>

*f.* DEFECTIVE PLAN OF CONSTRUCTION. — The principle that a municipality is not liable for the adoption of a defective plan of construction, this being the exercise of a discretionary power, has been applied in *New York* and in some early cases in *Michigan*, to the case of highways defectively planned,<sup>10</sup> but such a defense to an action for injuries is ignored by the cases generally, and when occasionally referred to has been held to apply only in case reason-

1. Special Conditions of Municipal Action. — *Handy v. Meridian Tp.*, 114 Mich. 454.

2. *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508.

3. Negligence of Municipal Officers. — *Anna v. Boren*, 77 Ill. App. 408.

4. Direction to Third Persons. — *Atherton v. Bancroft*, 114 Mich. 241; *Parish v. Eden*, 62 Wis. 272.

5. Amount of Use of Highway. — *Davis v. Guilford*, 55 Conn. 351; *Fitz v. Boston*, 4 Cush. (Mass.) 365; *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. Rep. 596; *Stark v. Lancaster*, 57 N. H. 88; *Lehmann v. Brooklyn*, 30 N. Y. App. Div. 305.

In *Glasier v. Hebron*, 131 N. Y. 447, Peckham, J., said: "While it is said that a municipal corporation owes a duty of active vigilance to see that its streets and highways are maintained in a fairly safe condition, yet such expression, 'active vigilance,' is a relative term. What would be more than active vigilance under some circumstances would be less than that amount under others. A thronged thoroughfare in a populous city would require much more attention in regard to its condition as to safety on the part of the officers of the corporation than would any ordinary highway running through a sparsely settled district of a town, and not along what might be regarded as a dangerous piece of country."

6. *Davis v. Guilford*, 55 Conn. 351; *Flora v. Naney*, 136 Ill. 45; *Decatur v. Besten*, 169 Ill. 340.

7. Population of Municipality. — *Graham v. Oxford*, 105 Iowa 705.

8. Extent of Highways Requiring Supervision. — *Lindsay v. Des Moines*, 68 Iowa 368; *Lincoln v. Smith*, 28 Neb. 762.

9. *Medina Tp. v. Perkins*, 48 Mich. 67; *Lane*

*v. Hancock*, 142 N. Y. 510. And see *O'Connor v. Otonabee Tp.*, 35 U. C. Q. B. 73. See also *infra*, this section, *Lack of Means for Repair*.

10. Defective Plan of Construction—Municipality Not Liable. — *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Lansing v. Toolan*, 37 Mich. 152; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Monk v. New Utrecht*, 104 N. Y. 552; *Watson v. Kingston*, 114 N. Y. 88; *Roach v. Ogdensburg*, 80 Hun (N. Y.) 467.

On this theory it was held that a municipality was not liable for an accident caused by a defect in the plan of constructing a sidewalk, which consisted in making the slope thereof too great. *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655. Compare *Ford v. Des Moines*, 106 Iowa 94.

Failure to Erect a Barrier between the highway and a dangerous excavation or declivity has been held not to be a defect in the plan so as to exempt the municipality from liability. *Maxim v. Champion*, 50 Hun (N. Y.) 88, affirmed 119 N. Y. 626; *Wood v. Gilboa*, 76 Hun (N. Y.) 175. And see *Lane v. Hancock*, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 470.

Effect of Statute. — In *Malloy v. Walker Tp.*, 77 Mich. 448, it was decided that where the statute required municipalities to keep highways in good repair, and safe and convenient for public travel, a municipality could not construct a dangerous and unsafe road and shield itself behind its legislative power to adopt a particular plan and method of building the road, although it had been decided, before the passage of the statute, that such choice of a plan was a defense in such an action. See *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Lansing v. Toolan*, 37 Mich. 152.

able care and skill were used in the choice of a plan.<sup>1</sup>

*g. ACTION OF ELEMENTS.* — While the municipality is liable for defects resulting from natural as well as artificial causes,<sup>2</sup> it has been held to be under no obligation to take precautions against an extraordinary flood or storm;<sup>3</sup> nor is it liable for the swampy and miry condition of the road resulting entirely from the weather and the nature of the soil.<sup>4</sup> But where it adopts a method of street construction which, under the natural and ordinary action of the elements, will render travel dangerous, the municipality is as subject to liability for such dangerous condition as if it had created such condition in the first instance, without the intervention of the weather.<sup>5</sup>

*h. COST OF WORK.* — It has been held that in determining whether the municipality has exercised reasonable diligence in making repairs it is proper to consider the total extent of the highways within the jurisdiction and the amount of money probably available for expenditure upon the roads, together with the probable expense of the particular work under consideration.<sup>6</sup> In *New Hampshire*, however, the financial ability of the town and the expense of the particular repair are considered in no way to affect the duty of the town.<sup>7</sup>

*i. LACK OF MEANS FOR REPAIR.* — That the municipality or its officers are without means to make repairs will, it has been held, exempt it from liability for failure to make them, but this view does not everywhere prevail.<sup>8</sup> There must be not only a lack of funds for the work, but also a lack of ability to procure them<sup>9</sup> or to have the work done in any way; and it has accord-

**1. Plan Manifestly Unsafe.** — *Gould v. Topeka*, 32 Kan. 485; *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596; *Conlon v. St. Paul*, 70 Minn. 216; *Circleville v. Sohn*, 59 Ohio St. 285; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558. See also *Birmingham v. Lewis*, 92 Ala. 352.

**2. Defects from Natural Causes.** — *Tripp v. Lyman*, 37 Me. 250; *Monies v. Lynn*, 121 Mass. 442; *Palmer v. Portsmouth*, 43 N. H. 265. See also *infra*, this section, *Snow and*

**3. Extraordinary Flood or Storm.** — *Hopkins v. Rush River*, 70 Wis. 10; *Oak Harbor v. Gallagher*, 52 Ohio St. 183, in which case the municipality was held not to be liable for injuries caused by the blowing down of a bill board in an extraordinary storm.

**4. Miry Condition of Road.** — *Brendlinger v. New Hanover Tp.*, 148 Pa. St. 93.

**5. Effect of Action of Elements.** — *Lehmann v. Brooklyn*, 30 N. Y. App. Div. 305. And see *Post v. Boston*, 141 Mass. 189.

**6. Cost of Work.** — *Rooney v. Randolph*, 128 Mass. 580; *Hayes v. Cambridge*, 136 Mass. 402; *Sanders v. Palmer*, 154 Mass. 475; *Weeks v. Needham*, 156 Mass. 289; *Perry Tp. v. John*, 79 Pa. St. 412.

**7. Winship v. Enfield, 42 N. H. 197, where Sargent, J., said that the ability of the town to maintain the highway in suitable repair was presumably considered in laying it out, and also called attention to the fact that if the town was impoverished the cost of repair could be placed on the county.**

**8. Lack of Means for Repair Is Defense** — *Illinois*. — *Carney v. Marsilles*, 136 Ill. 401, 29 Am. St. Rep. 328.

*Mississippi*. — *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. Rep. 596.

*New York*. — *Hines v. Lockport*, 50 N. Y. 236; *Weed v. Ballston Spa*, 76 N. Y. 336; *Monk v. New Utrecht*, 104 N. Y. 552; *Young*

*v. Macomb*, 11 N. Y. App. Div. 480; *Lane v. Hancock*, 67 Hun (N. Y.) 623; *Eveleigh v. Hounsfield*, 34 Hun (N. Y.) 140.

**Contra.** — *Baltimore, etc., Turnpike Road v. State*, 63 Md. 573; *Burns v. Elba*, 32 Wis. 605. And see *Winship v. Enfield*, 42 N. H. 197; *Erie City v. Schwingle*, 22 Pa. St. 384, 60 Am. Dec. 87.

The Existence of Indebtedness sufficient to consume all the available funds does not excuse a failure to make a small repair of a pressing character. *Rhines v. Royalton*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 944, 61 Hun (N. Y.) 621.

That at the Time of the Injury there was a lack of funds to make the repair is no excuse if the defect had existed for a long time to the knowledge of the commissioner, and he had possessed sufficient funds within that time. *Whitlock v. Brighton*, 2 N. Y. App. Div. 21.

**9. Inability to Procure Funds.** — *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Ivory v. Deerpark*, 116 N. Y. 476; *Whitlock v. Brighton*, 2 N. Y. App. Div. 21; *Quinn v. Sempronius*, 33 N. Y. App. Div. 70; *Wendell v. Troy*, 39 Barb. (N. Y.) 329; *Peach v. Utica*, 10 Hun (N. Y.) 477. See also *Columbus v. Ogletree*, 102 Ga. 293.

**Applications of Principle.** — So under the *New York* statute making towns liable only in case the highway commissioners are liable, it was held that where the commissioner had no funds in his hands, and the town supervisor held funds applicable to such purpose, but had not paid them over to the commissioner though the latter had demanded them, the town was liable if the commissioner failed to perform his full duty in requesting the supervisor to pay to him such funds, or in taking measures to compel payment. *Clapper v. Waterford*, 131 N. Y. 382.

So it was no excuse for failure to repair that there were no funds in the treasury, if a tax



ingly been held that such lack is no defense if it arose merely from failure to levy proper taxes,<sup>1</sup> or if the abutting property owners may be assessed for the expense,<sup>2</sup> or when the municipality has power to call on individuals to make the repairs.<sup>3</sup> And so a town cannot defend on this ground if it has power to have the expense imposed on the county.<sup>4</sup>

**Discretion of Commissioners.** — The commissioners have discretion to apply the funds in making repairs according to what they consider the comparative urgency of such repairs, and the town is not liable for an error of judgment in this respect;<sup>5</sup> but their discretion must be reasonably exercised, and they cannot, by determining to spend the money otherwise, excuse the failure to make a necessary repair at a trifling expense.<sup>6</sup>

**Duty to Erect Barriers.** — If the danger can be obviated by the erection of temporary barriers or the placing of signals, the municipality will be liable though without funds to make any repairs.<sup>7</sup>

**Evidence and Burden of Proof.** — Evidence of repairs after the accident is not permissible for the purpose of showing that there was a sufficiency of funds to make the repair at the time of the accident.<sup>8</sup> The burden of proof to show want of means for repair is upon the municipality,<sup>9</sup> and must be pleaded by it as a matter of defense.<sup>10</sup>

*j.* **SAME MEASURE OF CIVIL AND CRIMINAL LIABILITY.** — It has been stated in reference to liability under some of the *New England* statutes that it exists only when the facts are such as would render the municipality liable to indictment for failure to keep the highway in repair,<sup>11</sup> but it is not error for the court to refuse so to instruct the jury if the principle of liability is otherwise correctly stated.<sup>12</sup>

**4. Rule of Liability in England and Canada.** — In England and Canada the municipal authority having control of the highway is not liable, unless made so by special statute, for injuries caused by its nonfeasance, as failure to repair the highway, though it is liable for direct acts of misfeasance on the part of its officers or employees which create a nuisance in the highway.<sup>13</sup>

levy had already been made against which warrants might be issued in anticipation of its collection. *Mt. Vernon v. Brooks*, 39 Ill. App. 426.

**1. Failure to Levy Taxes.** — *Lombar v. East Tawas*, 86 Mich. 14; *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. Rep. 596; *Erie City v. Schwingle*, 22 Pa. St. 384, 60 Am. Dec. 87. Compare *Scott Tp. v. Montgomery*, 95 Pa. St. 444.

Where the statute required towns to keep their highways safe, it was held that they were not freed from liability by the expenditure of a reasonable sum in proportion to their taxable property in keeping the highway in repair. *Stone v. Langworthy*, 20 R. I. 602.

**2. Power to Assess Cost on Abutting Owners.** — *Birmingham v. Lewis*, 92 Ala. 352; *New Albany v. McCulloch*, 127 Ind. 500; *Shelby v. Clagett*, 46 Ohio St. 549. See the title SPECIAL OR LOCAL ASSESSMENTS.

**3. Power to Procure Labor.** — *Weed v. Ballston Spa*, 76 N. Y. 329.

**4. Imposition of Cost on County.** — *Winship v. Enfield*, 42 N. H. 197; *Glaub v. Goshen Tp.*, 7 Kulp (Pa.) 292.

**5. Discretion of Commissioners.** — *Monk v. New Utrecht*, 104 N. Y. 552.

**6. Ivory v. Deerpark**, 116 N. Y. 476.

**7. Duty to Erect Barriers.** — *Birmingham v. Lewis*, 92 Ala. 352; *Carney v. Marseilles*, 136 Ill. 401, 29 Am. St. Rep. 328.

**8. Clapper v. Waterford**, 131 N. Y. 382,

reversing 62 Hun (N. Y.) 170, and apparently overruling *Bouton v. Thomas*, 46 Hun (N. Y.) 6, and *Stone v. Poland*, 58 Hun (N. Y.) 21.

**9. Burden of Proof.** — *Hover v. Barkhoof*, 44 N. Y. 113; *Clapper v. Waterford*, 131 N. Y. 382; *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; *Lane v. Hancock*, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 470; *Whitlock v. Brighton*, 2 N. Y. App. Div. 21; *Quinn v. Sempronius*, 33 N. Y. App. Div. 70; *Bidwell v. Murray*, 40 Hun (N. Y.) 190; *Getty v. Hamlin*, 46 Hun (N. Y.) 1; *Bullock v. Durham*, 64 Hun (N. Y.) 380.

**10. Defense to Be Pleaded.** — *Shartle v. Minneapolis*, 17 Minn. 308; *Netzer v. Crookston*, 59 Minn. 244.

**11. Liability to Indictment.** — *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677; *Merrill v. Hampden*, 26 Me. 234; *Davis v. Bangor*, 42 Me. 522, 66 Am. Dec. 298; *Howard v. North Bridgewater*, 16 Pick. (Mass.) 189.

**12. Instructions.** — *Bunker v. Gouldsboro*, 81 Me. 188; *Goldthwait v. East Bridgewater*, 5 Gray (Mass.) 61.

**13. English Decisions.** — *Young v. Davis*, 2 H. & C. 197; *Gibson v. Preston*, L. R. 5 Q. B. 218; *Foreman v. Canterbury*, L. R. 6 Q. B. 214; *Cowley v. Newmarket Local Board*, (1892) A. C. 345; *Pictou v. Geldert*, (1893) A. C. 524; *Thompson v. Brighton*, (1894) 1 Q. B. 332; *Sidney v. Bourke*, (1895) A. C. 433, explaining *Bathurst v. Macpherson*, 4 App. Cas. 256, and overruling *Hartnall v. Ryde Com'rs*, 4 B. & S.



5. Defects Created by Individuals — *a*. MUNICIPAL LIABILITY. — Whether the municipal liability is or is not based upon an express statute, it is universally held that the obligation of the municipality to keep the streets in repair and free from defects is of such a primary character that it is not relieved from liability by the fact that the obstruction or defect was the creation of an independent wrongdoer,<sup>1</sup> provided it has notice thereof in time to remove the

361, 116 E. C. L. 361; *Saunders v. Holborn Dist. Board of Works*, (1895) 1 Q. B. 64.

**Canada Decisions.** — *Saint John v. Campbell*, 26 Can. Sup. Ct. 1; *Montreal v. Mulcair*, 28 Can. Sup. Ct. 458; *McInnis v. Charlottetown*, 33 Can. L. J. 297; *Linell v. Victoria*, 3 British Columbia 400; *Smith v. Vancouver*, 5 British Columbia 491; *Patterson v. Victoria*, 5 British Columbia 628; *Thomas v. Annapolis*, 28 Nova Scotia 551.

**Statutory Provision.** — In *Ontario* the corporation is made civilly liable for injuries caused by failure to keep a road or street in repair. See *Municipal Act*, § 531; *Colbeck v. Brantford Tp.*, 21 U. C. Q. B. 276; *O'Connor v. Otonabee Tp.*, 35 U. C. Q. B. 73; *Hutton v. Windsor*, 34 U. C. Q. B. 487; *Ewing v. Toronto*, 29 Ont. 197.

1. **Municipality Liable Though Defect Created by Another** — *United States*. — *Cleveland v. King*, 132 U. S. 295; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Serrot v. Omaha*, 1 Dill. (U. S.) 312.

*Alabama*. — *Birmingham v. McCary*, 84 Ala. 470.

*Connecticut*. — *Manchester v. Hartford*, 30 Conn. 118; *Jones v. New Haven*, 34 Conn. 1; *Boucher v. New Haven*, 40 Conn. 457.

*Florida*. — *Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358.

*Georgia*. — *Savannah v. Donnelly*, 71 Ga. 258.

*Indiana*. — *Higert v. Greencastle*, 43 Ind. 574; *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Centerville v. Woods*, 57 Ind. 192; *Elkhart v. Ritter*, 66 Ind. 136; *Huntington v. Breen*, 77 Ind. 29; *Aurora v. Bitner*, 100 Ind. 396; *Glantz v. South Bend*, 106 Ind. 305.

*Iowa*. — *Rowell v. Williams*, 29 Iowa 210; *Powers v. Council Bluffs*, 50 Iowa 197.

*Kansas*. — *Atchison v. King*, 9 Kan. 550; *Kansas City v. Bradbury*, 45 Kan. 381, 23 Am. St. Rep. 731; *Abilene v. Cowperthwait*, 52 Kan. 324.

*Kentucky*. — *Newport v. Miller*, 93 Ky. 22.

*Louisiana*. — *Howe v. New Orleans*, 12 La. Ann. 481.

*Maine*. — *Springer v. Bowdoinham*, 7 Me. 442; *Frost v. Portland*, 11 Me. 271; *Barstow v. Augusta*, 17 Me. 190; *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721; *French v. Brunswick*, 21 Me. 29, 38 Am. Dec. 250; *State v. Gorham*, 37 Me. 451; *Phillips v. Veazie*, 40 Me. 96; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Wellcome v. Leeds*, 51 Me. 313.

*Maryland*. — *Baltimore v. Pendleton*, 15 Md. 12; *Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395.

*Massachusetts*. — *Davis v. Leominster*, 1 Allen (Mass.) 182; *Day v. Milford*, 5 Allen (Mass.) 98; *Snow v. Adams*, 1 Cush. (Mass.) 443; *Bacon v. Boston*, 3 Cush. (Mass.) 174; *Lowell v. Spaulding*, 4 Cush. (Mass.) 217, 50 Am. Dec. 775; *Fitz v. Boston*, 4 Cush. (Mass.) 365; *Coggs-*

*well v. Lexington*, 4 Cush. (Mass.) 307; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; *Merrill v. Wilbraham*, 11 Gray (Mass.) 154; *Drake v. Lowell*, 13 Met. (Mass.) 292; *Bigelow v. Weston*, 3 Pick. (Mass.) 267; *Currier v. Lowell*, 16 Pick. (Mass.) 170; *Lowell v. Boston*, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; *Pollard v. Woburn*, 104 Mass. 84; *Prentiss v. Boston*, 112 Mass. 43; *Hawks v. Northampton*, 116 Mass. 420; *Burt v. Boston*, 122 Mass. 223; *Purple v. Greenfield*, 138 Mass. 1.

*Michigan*. — *Dotson v. Albion*, 50 Mich. 129.

*Missouri*. — *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Fink v. St. Louis*, 71 Mo. 52; *Welsh v. St. Louis*, 73 Mo. 71; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Brennan v. St. Louis*, 92 Mo. 482.

*New Hampshire*. — *Elliot v. Concord*, 27 N. H. 204; *Johnson v. Haverhill*, 35 N. H. 74; *Wiley v. Portsmouth*, 35 N. H. 303; *Hall v. Manchester*, 40 N. H. 410; *Clark v. Barrington*, 41 N. H. 44; *Howe v. Plainfield*, 41 N. H. 135; *Palmer v. Portsmouth*, 43 N. H. 265; *Chamberlain v. Enfield*, 43 N. H. 356; *State v. Dover*, 46 N. H. 452; *Hardy v. Keene*, 52 N. H. 370; *Sides v. Portsmouth*, 59 N. H. 24.

*New York*. — *Wilson v. Watertown*, 3 Hun (N. Y.) 508; *Wilson v. Watertown*, 5 Thomp. & C. (N. Y.) 579, 3 Hun (N. Y.) 508; *Johnson v. Poughkeepsie*, 29 N. Y. App. Div. 16; *Griffin v. New York*, 9 N. Y. 456, 61 Am. Dec. 700; *Hickok v. Plattsburgh*, 16 N. Y. 161, note; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 441; *Wendell v. Troy*, 39 Barb. (N. Y.) 329; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Nelson v. Canisteo*, 100 N. Y. 89; *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442.

*North Carolina*. — *Dillon v. Raleigh*, 124 N. Car. 184.

*Ohio*. — *Toledo Consol. St. R. Co. v. Sweeney*, 8 Ohio Cir. Ct. 298, 4 Ohio Cir. Dec. 11; *Circleville v. Neuding*, 41 Ohio St. 465.

*Oregon*. — *Farquar v. Roseburg*, 18 Oregon 271, 17 Am. St. Rep. 732; *McAllister v. Albany*, 18 Oregon 426.

*Pennsylvania*. — *Birmingham v. Dorer*, 3 Brews. (Pa.) 69; *West Chester v. Apple*, 35 Pa. St. 284, 78 Am. Dec. 336; *Norristown v. Moyer*, 67 Pa. St. 355; *Newlin Tp. v. Davis*, 77 Pa. St. 317; *Scranton v. Catterson*, 94 Pa. St. 202; *Susquehanna Depot v. Simmons*, 112 Pa. St. 384, 56 Am. Rep. 317; *Dalton v. Upper Tyrone Tp.*, 137 Pa. St. 18; *Gates v. Pennsylvania R. Co.*, 150 Pa. St. 50; *Boyle v. Hazleton*, 171 Pa. St. 167.

*Rhode Island*. — *Chapman v. Cook*, 10 R. I. 304, 14 Am. Rep. 686.

*Vermont*. — *Kelsey v. Glover*, 15 Vt. 708; *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155; *Barber v. Essex*, 27 Vt. 62.

cause of the danger.<sup>1</sup> And it has been held that when the municipal liability is based upon a statute, the municipality and the person originally creating the defect are not joint tortfeasors, so that a judgment against the latter will, before satisfaction thereof, bar an action against the municipality.<sup>2</sup> But obstructions which are not otherwise such as to render the municipality liable will not have that effect merely because they are placed by individuals in the highway in violation of a municipal ordinance.<sup>3</sup> In *Wisconsin* it is held that a statutory or charter provision that the action by the person injured shall be first brought against the person who is primarily liable for the injury, as having caused it, is valid.<sup>4</sup>

**Liability for Negligence of Railroad Company.** — On the principle referred to above, the liability of the municipality for a defective condition of the highway, whereby a person is injured, is not affected by the fact that the defect results primarily from the failure of a railroad company authorized to construct its road over the highway, to perform its duty, generally expressly imposed by statute or charter, of placing and maintaining in repair any part of a highway occupied by it.<sup>5</sup> In *Massachusetts* the liability of the municipality for such defects within the location of a steam-railroad company is, it seems, affected by the special statutes of that state,<sup>6</sup> but there as elsewhere the municipality is liable in case of the failure of a street-railroad company properly to repair the street.<sup>7</sup>

*Washington.* — *Sproul v. Seattle*, 17 Wash. 256.

*Wisconsin.* — *Hammond v. Mukwa*, 40 Wis. 35; *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759.

*Canada.* — *Maxwell v. Clarke Tp.*, 4 Ont. App. 460; *Atkinson v. Chatham*, 29 Ont. 518; *Beech v. Montreal*, 13 Quebec Super. Ct. 187; *Castor v. Uxbridge Tp.*, 39 U. C. Q. B. 113.

In *Frost v. Portland*, 11 Me. 274, *Weston, J.*, said: "The law looks not to the cause of the defect, or to the remedies which a town may have over, or to any cumulative remedy which the person injured may have against others. It has, for adequate reasons of public policy, imposed upon towns both the duty and the liability."

1. See *infra*, this section, *Notice of Defect*.

2. **Municipality and Individual Not Joint Tortfeasors.** — *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17.

3. **Violation of Ordinance.** — *Davis v. Manchester*, 62 N. H. 422.

4. **Wisconsin Rule.** — *Hincks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 735; *Amos v. Fond du Lac*, 46 Wis. 695; *Raymond v. Sheboygan*, 70 Wis. 318; *Hiner v. Fond du Lac*, 71 Wis. 74.

The action must have been brought against such person with reasonable diligence. *McFarlane v. Milwaukee*, 51 Wis. 691.

Before proceeding against the city the person injured must have obtained a judgment and had an execution against the person primarily liable returned unsatisfied. *Henker v. Fond du Lac*, 71 Wis. 616.

5. **Negligence of Railroad Company** — *Florida.* — *State v. Putnam County*, 23 Fla. 632.

*Maine.* — *Phillips v. Veazie*, 40 Me. 96; *Wellcome v. Leeds*, 51 Me. 313.

*Maryland.* — *Eyler v. Allegany County*, 49 Md. 257, 33 Am. Rep. 249.

*Minnesota.* — *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567.

*New Hampshire.* — *Elliot v. Concord*, 27 N. H. 204; *State v. Dover*, 46 N. H. 452; *Sides v. Portsmouth*, 59 N. H. 24.

*New York.* — *Bryant v. Randolph*, 133 N. Y. 70.

*Ohio.* — *Steubenville v. McGill*, 41 Ohio St. 235; *Zanesville v. Fannan*, 53 Ohio St. 605, 53 Am. St. Rep. 664.

*Pennsylvania.* — *Aston Tp. v. McClure*, 102 Pa. St. 322.

*Rhode Island.* — *Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420.

*Texas.* — *Galveston, etc., R. Co. v. White*, (Tex. Civ. App. 1895) 32 S. W. Rep. 186.

*Vermont.* — *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155.

6. In *Massachusetts* it is stated that the liability of a town to keep its highways safe and convenient cannot be limited by implication, except to the extent to which the special obligation imposed by statute upon the railroad corporation, or the construction or operation of the railroad, deprives the town of the power to discharge the general statutory duty to which it is subjected. *Jones v. Waltham*, 4 Cush. (Mass.) 299, 50 Am. Dec. 783; *Davis v. Leominster*, 1 Allen (Mass.) 182; *Pollard v. Woburn*, 104 Mass. 84; *Johnson v. Salem Turnpike, etc., Bridge Corp.*, 109 Mass. 522; *Hawks v. Northampton*, 116 Mass. 420; *Noyes v. Gardner*, 147 Mass. 509. See also *Sawyer v. Northfield*, 7 Cush. (Mass.) 490; *Currier v. Lowell*, 16 Pick. (Mass.) 170; *White v. Quincy*, 97 Mass. 430; *Flanders v. Norwood*, 141 Mass. 17.

7. **Street Railroads** — *Illinois.* — *Peoria v. Gerber*, 168 Ill. 318, affirming 68 Ill. App. 255.

*Massachusetts.* — *Fowler v. Gardner*, 169 Mass. 505; *Lowell v. Merrimack River Locks, etc.*, 104 Mass. 18; *Johnson v. Salem Turnpike, etc., Bridge Corp.*, 109 Mass. 522; *Pren-tiss v. Boston*, 112 Mass. 43; *Hawks v. Northampton*, 116 Mass. 420; *Bailey v. Boston*, 116 Mass. 423, note.

*New York.* — *Byrne v. Syracuse*, 79 Hun (N. Y.) 555.

*Rhode Island.* — *Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420.

*Texas.* — *Ft. Worth St. R. Co. v. Allen*,

*b. INDIVIDUAL LIABILITY — (1) In General.* — An individual is liable for injuries caused by an unlawful or unauthorized obstruction or excavation in the highway, created by him,<sup>1</sup> and the right of the person injured to sue such wrongdoer is not affected by the fact that he also has a right of recovery against the municipality for its failure to remove the defect or obviate the danger therefrom.<sup>2</sup> Nor will a judgment in favor of the municipality, in an action by the person injured, bar a subsequent action by the same person against the individual who caused the defect, although the latter was notified of the action against the municipality in time to have become a party thereto.<sup>3</sup>

*(2) Based on Creation of Nuisance.* — The liability of an individual who without authority of law creates a dangerous condition in the highway, to a person injured thereby, is generally based on the theory that the defect or obstruction constitutes a nuisance,<sup>4</sup> and accordingly it has been decided that the liability of such person is not affected by the question whether he was actually negligent.<sup>5</sup> This principle has been applied in a number of cases

(Tex. Civ. App. 1897) 39 S. W. Rep. 125, 1 Am. Neg. Rep. 529.

**1. Individual Obstructing or Excavating Highway Liable to Person Injured** — *United States.* — *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

*Arkansas.* — *Southern Express Co. v. Texarkana Water Co.*, 54 Ark. 131; *Pine Bluff Water, etc., Co. v. Derrisseaux*, 56 Ark. 132.

*California.* — *McKune v. Santa Clara Valley Mill, etc., Co.*, 110 Cal. 480; *Pastene v. Adams*, 49 Cal. 87.

*Georgia.* — *Folsom v. Lewis*, 85 Ga. 146.

*Illinois.* — *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683.

*Indiana.* — *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446, 9 Am. St. Rep. 865.

*Iowa.* — *Calder v. Smalley*, 66 Iowa 219, 55 Am. Rep. 270.

*Louisiana.* — *Williams v. Louisiana Electric Light, etc., Co.*, 43 La. Ann. 295.

*New Jersey.* — *Durant v. Palmer*, 29 N. J. L. 544.

*New York.* — *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629; *Harlow v. Humiston*, 6 Cow. (N. Y.) 191; *Lansing v. Smith*, 8 Cow. (N. Y.) 152; *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352; *McDermott v. Conley*, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 403; *Macaulay v. Schneider*, 9 N. Y. App. Div. 279; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Haden v. Clarke*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 478; *Davenport v. Ruckman*, 37 N. Y. 568; *Tinker v. New York, etc., R. Co.*, 157 N. Y. 312.

*Wisconsin.* — *Hundhausen v. Bond*, 36 Wis. 29.

**2. Though Municipality Also Liable** — *Iowa.* — *Calder v. Smalley*, 66 Iowa 219, 55 Am. Rep. 270.

*Maine.* — *Tobin v. Portland, etc., R. Co.*, 59 Me. 183, 8 Am. Rep. 415.

*Maryland.* — *Rowe v. Baltimore, etc., R. Co.*, 82 Md. 493.

*Massachusetts.* — *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33.

*Minnesota.* — *Landru v. Lund*, 38 Minn. 538.

*New Hampshire.* — *Elliot v. Concord*, 27 N. H. 205.

*New York.* — *Davenport v. Ruckman*, 37 N. Y. 568.

*Pennsylvania.* — *Philadelphia v. Weller*, 4 Brews. (Pa.) 24; *Brookville v. Arthurs*, 130 Pa. St. 501; *Gates v. Pennsylvania R. Co.*, 150 Pa. St. 50, 154 Pa. St. 566.

*Vermont.* — *Willard v. Newbury*, 22 Vt. 458.

**3. Judgment in Action Against Municipality.** — *Severin v. Eddy*, 52 Ill. 189.

**As to What Obstructions Are Wrongful** see *infra*, this title, *Obstructions and Encroachments*.

**4. Interference with Highway is Nuisance** — *England.* — *Hadley v. Taylor*, L. R. 1 C. P. 53.

*Connecticut.* — *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Clinton v. Howard*, 42 Conn. 294.

*Illinois.* — *Gridley v. Bloomington*, 68 Ill. 47.

*Indiana.* — *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446, 9 Am. St. Rep. 865.

*Massachusetts.* — *Vosburgh v. Moak*, 1 Cush. (Mass.) 453, 48 Am. Dec. 613; *Stoughton v. Porter*, 13 Allen (Mass.) 191; *Scanlon v. Wedger*, 156 Mass. 462.

*New Jersey.* — *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578.

And see cases in the next note.

**5. Negligence Immaterial When Use of Highway Wrongful** — *California.* — *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55.

*Illinois.* — *Pfau v. Reynolds*, 53 Ill. 212.

*Louisiana.* — *McCloughry v. Finney*, 37 La. Ann. 27.

*Maine.* — *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720.

*Maryland.* — *Owings v. Jones*, 9 Md. 108.

*New York.* — *Houghtaling v. Shelley*, 51 Hun (N. Y.) 598; *Whalen v. Gloucester*, 4 Hun (N. Y.) 24; *Congreve v. Smith*, 18 N. Y. 79; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Irvine v. Fowler*, 5 Robt. (N. Y.) 482; *Anderson v. Dickie*, (N. Y. Super. Ct. Gen. T.) 26 How. Pr. (N. Y.) 105; *Robinson v. New York, etc., R. Co.*, 27 Barb. (N. Y.) 512; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Wendell v. Troy*, 39 Barb. (N. Y.) 329; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Clifford v. Dam*, 81 N. Y. 52; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 117.

But see *Collins v. Leafey*, 124 Pa. St. 203.

In *Congreve v. Smith*, 18 N. Y. 79, Strong, J., said: "The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; \* \* \* and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question



where an abutting owner has made an excavation without authority from the municipality and has been held to be absolutely liable for resulting injuries,<sup>1</sup> though in some states it is held that such rule of liability does not apply to excavations properly and safely made by abutting owners, on the ground that they are not unlawful even in the absence of permission to make them.<sup>2</sup> So one who makes an excavation in the highway and places a bridge thereover for the purpose of passage is bound to see that the bridge is sufficient and is kept in repair.<sup>3</sup>

c. EFFECT OF LICENSE — (1) *On Municipal Liability* — (a) *In General*. — If the highway is obstructed by one acting under a license or statutory authority, the municipality is bound, in the exercise of its duty to keep the way in repair, to take precaution to render it safe,<sup>4</sup> and it is accordingly liable if the highway is, after the completion of work thereon by the licensee, left in a dangerous condition,<sup>5</sup> except so far as the dangers necessarily follow the improvement.<sup>6</sup> Generally speaking, it seems, the act of its licensee is not its act, so as to render it liable for his negligence,<sup>7</sup> though a contrary statement has sometimes been made.<sup>8</sup>

(b) *Improper License*. — A municipality is, however, liable, it seems, if without authority it grants permission to obstruct a highway, and any person is injured by such obstruction,<sup>9</sup> and the municipality is also liable if it permits

of negligence can arise, the act being wrongful."

1. *Excavations by Abutting Owners*. — Barry v. Terkildsen, 72 Cal. 254, 1 Am. St. Rep. 55; Pfau v. Reynolds, 53 Ill. 212; Clifford v. Dam, 81 N. Y. 52; Jennings v. Van Schaick, 108 N. Y. 530, 2 Am. St. Rep. 459.

2. *Michigan*. — Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422.

*Minnesota*. — Wabasha v. Southworth, 54 Minn. 79.

*Missouri*. — Kirkpatrick v. Knapp, 28 Mo. App. 427.

*Ohio*. — Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

*Pennsylvania*. — Harrison v. Collins, 86 Pa. St. 153, 27 Am. Rep. 699.

3. Perley v. Chandler, 6 Mass. 454; Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Woodring v. Forks Tp., 28 Pa. St. 355, 70 Am. Dec. 134; Houston, etc., R. Co. v. Dunn, 17 Tex. Civ. App. 687. And see Schubert v. Cowles, 31 N. Y. App. Div. 418.

4. *Precautions to Be Taken by Municipality* — *Georgia*. — Augusta v. Cone, 91 Ga. 714.

*Indiana*. — Kenyon v. Indianapolis, 1 Wils. (Ind.) 129.

*Kansas*. — Abilene v. Cowperthwait, 52 Kan. 324.

*Maine*. — Phillips v. Veazie, 40 Me. 96.

*Massachusetts*. — Davis v. Leominster, 1 Allen (Mass.) 182; Currier v. Lowell, 16 Pick. (Mass.) 170.

*Minnesota*. — Estelle v. Lake Crystal, 27 Minn. 243; Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 567.

*Missouri*. — McCarroll v. Kansas City, 64 Mo. App. 283, 2 Mo. App. Rep. 993.

*Montana*. — Sullivan v. Helena, 10 Mont. 134.

*Nebraska*. — Davis v. Omaha, 47 Neb. 836.

*New York*. — Masterton v. Mt. Vernon, 58 N. Y. 391; Magee v. Troy, 48 Hun (N. Y.) 383.

*Vermont*. — Willard v. Newbury, 22 Vt. 458; Batty v. Duxbury, 24 Vt. 155.

*Virginia*. — McCoull v. Manchester, 85 Va. 579.

*Washington*. — Sproul v. Seattle, 17 Wash. 256.

5. *Municipality Liable if Highway Left in Dangerous Condition*. — Michigan City v. Boeckling, 122 Ind. 39; Baltimore v. Pendleton, 15 Md. 12; Aiken v. Philadelphia, 9 Pa. Super. Ct. 502.

6. *Not Liable for Dangers Necessarily Resulting*. — Lawrence v. New Bedford, 160 Mass. 227; Fowler v. Gardner, 169 Mass. 505; Jones v. Waltham, 4 Cush. (Mass.) 299, 50 Am. Dec. 783; Willey v. Portsmouth, 35 N. H. 304.

7. *Municipality Not Liable for Licensee's Negligence*. — Denver v. Sherret, 60 U. S. App. 104, 88 Fed. Rep. 226; Warsaw v. Dunlap, 112 Ind. 576; Masterton v. Mt. Vernon, 58 N. Y. 391, *distinguishing* Wendell v. Troy, 4 Keyes (N. Y.) 261; Dorlon v. Brooklyn, 46 Barb. (N. Y.) 604; McDermott v. Kingston, 19 Hun (N. Y.) 198; Magee v. Troy, 48 Hun (N. Y.) 383; Susquehanna Depot v. Simmons, 112 Pa. St. 385, 56 Am. Rep. 317; Terry v. Richmond, 94 Va. 537. *Compare* Hume v. New York, 74 N. Y. 264.

8. *Contrary Decisions*. — Savannah v. Donnelly, 71 Ga. 258; Augusta v. Cone, 91 Ga. 714; Stephens v. Macon, 83 Mo. 345; Haniford v. Kansas City, 103 Mo. 172. And see cases in the next note.

*That the Municipality Directs a property owner to improve a sidewalk in a manner not intrinsically dangerous, does not render him the agent of the municipality so as to charge the latter with his negligence.* Dooley v. Sullivan, 112 Ind. 451, 2 Am. St. Rep. 209. See also Davis v. Omaha, 47 Neb. 836. But see Boucher v. New Haven, 40 Conn. 460.

9. *Obstruction Maintained under Invalid Municipal License*. — Stanley v. Davenport, 54 Iowa 463, 37 Am. Rep. 216; Cohen v. New York, 113 N. Y. 532, 10 Am. St. Rep. 506, in which latter case the municipality granted to an individual the right to keep his wagon in the street, and Peckham, J., said that when

a use of the street which is intrinsically dangerous.<sup>1</sup>

(c) **Duty to Supervise Work.** — It has, moreover, been decided in a number of cases that a municipality which grants a permit to make an excavation in a highway is bound to exercise a supervision over the doing of the work and to see that travelers are not endangered thereby; and it has accordingly been held liable for injuries caused by failure properly to guard such excavation, although it had no actual notice of the dangerous condition thereof.<sup>2</sup> And a municipality has been held liable for the defective filling of an excavation made by its permission or of which it had notice,<sup>3</sup> though a contrary view has also been taken.<sup>4</sup>

(2) **On Individual Liability.** — A license to make a particular use of the highway, otherwise unlawful, while it exempts the licensee from the liability which would otherwise exist for injuries irrespective of the question of his negligence,<sup>5</sup> does not exempt him from the duty of taking proper precaution to prevent injuries therefrom to persons using the highway,<sup>6</sup> and accordingly he is under the obligation of placing proper barriers or lights around any excavation or obstruction made by him during the progress of the work,<sup>7</sup> and

a municipality, without any pretense of authority and in direct violation of a statute, grants to an individual the right to obstruct a highway while in the transaction of his private business, and takes compensation therefor, it is to be regarded as itself maintaining the nuisance, and is liable for any resulting damages.

**A Contrary View,** however, is apparently taken in *Maine*. *Green v. Portland*, 32 Me. 431.

**1. Use Intrinsically Dangerous.** — *Warsaw v. Dunlap*, 112 Ind. 576; *Little v. Madison*, 42 Wis. 643; 24 Am. Rep. 435.

So in *Speir v. Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, affirming (*Brooklyn City Ct. Gen. T.*) 19 N. Y. Supp. 665, which affirms 18 N. Y. Supp. 170, a city was held liable for injuries caused by fireworks discharged by private persons, under a permit from the municipal authorities, at the intersection of closely built-up streets, the place named in the permit. See also the title EXPLOSIONS AND EXPLOSIVES, vol. 12, p. 518, and note 2.

**2. Municipality Bound to Exercise Supervision** — *United States*. — *District of Columbia v. Woodbury*, 136 U. S. 464.

*Colorado*. — *Denver v. Aaron*, 6 Colo. App. 232.

*Connecticut*. — *Boucher v. New Haven*, 40 Conn. 460, explained and distinguished in *Cummings v. Hartford*, 70 Conn. 115.

*Georgia*. — *Savannah v. Donnelly*, 71 Ga. 258; *Augusta v. Cone*, 91 Ga. 714.

*Kansas*. — *Abilene v. Cowperthwait*, 52 Kan. 324.

*Minnesota*. — *Cleveland v. St. Paul*, 18 Minn. 279.

*Missouri*. — *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Stephens v. Macon*, 83 Mo. 345; *Haniford v. Kansas City*, 103 Mo. 172; *Taubman v. Lexington*, 25 Mo. App. 218; *Golden v. Clinton*, 54 Mo. App. 100.

*Contra* — *New York*. — *Dorlon v. Brooklyn*, 46 Barb. (N. Y.) 664; *McDonnell v. Kingston*, 4 Hun (N. Y.) 198.

**3. Filling of Excavation.** — *Seamons v. Fitts*, 20 R. I. 443.

**4. Masterton v. Mt. Vernon**, 58 N. Y. 391.

**5. Effect of License.** — *Calder v. Smalley*, 66

*Iowa* 219, 55 Am. Rep. 270; *Cowan v. Muskegon R. Co.*, 84 Mich. 583; *Clifford v. Dam*, 81 N. Y. 52; *Casper v. Dry Dock, etc.*, R. Co., 23 N. Y. App. Div. 451; *Port Jervis v. Port Jervis First Nat. Bank*, 96 N. Y. 550; *Kelly v. Doody*, 116 N. Y. 575; *Tinker v. New York, etc.*, R. Co., 157 N. Y. 312.

**6. Licensee Must Not Endanger Travelers.** — *Chicago v. Robbins*, 2 Black (U. S.) 423; *Manchester v. Quimby*, 60 N. H. 10; *Flynn v. New York El. R. Co.*, 49 N. Y. Super. Ct. 60; *Clifford v. Dam*, 81 N. Y. 52; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 503; *Port Jervis v. Port Jervis First Nat. Bank*, 96 N. Y. 550; *Clarke v. Crimmins*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 978; *Brousseau v. Bourdon*, 13 Quebec Super. Ct. 46.

So where a water company was permitted to place hydrants in the streets and open them to flush its mains, it was held that it had no right to flush either at such time or in such manner as unnecessarily to impede travel or imperil the safety of those using the street, and that it was liable for injuries caused by so doing. *Topeka Water Co. v. Whiting*, 58 Kan. 639.

**Approval of the Work** as done by the licensee by the municipal authorities does not release the licensee from liability. *Alton, etc., Horse R., etc., Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509; *Houston City St. R. Co. v. Delesdernier*, 84 Tex. 82.

**A Temporary Bridge**, however, over an excavation made in the course of doing work need not be such as to render the passage as safe as before the making of the excavation. *Nolan v. King*, 97 N. Y. 565, 49 Am. Rep. 561.

**7. Excavation Must Be Guarded and Lighted** — *United States*. — *Chicago v. Robbins*, 2 Black (U. S.) 418, 4 Wall. (U. S.) 657.

*Illinois*. — *Pfau v. Reynolds*, 53 Ill. 212.

*Maine*. — *Veazie v. Penobscot R. Co.*, 49 Me. 119.

*Massachusetts*. — *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33.

*New York*. — *Sexton v. Zett*, 44 N. Y. 430; *Port Jervis v. Port Jervis First Nat. Bank*, 96 N. Y. 550; *Charlock v. Freel*, 125 N. Y. 357; *Steivermann v. White*, 48 N. Y. Super. Ct. 523; *Seneca Falls v. Zalinski*, 8 Hun (N. Y.) 571.

*Ohio*. — *Potter v. Bunnell*, 20 Ohio St. 150.



he is bound to restore the highway, after the completion of his work, to a condition of reasonable safety.<sup>1</sup>

**Strict Compliance Necessary.** — In order that the license may exempt the licensee from absolute liability for injuries, it is necessary that he strictly comply therewith.<sup>2</sup>

**Implied License.** — The giving of a license may, it is held, be implied from the acquiescence by the municipal authorities for a considerable time in the construction and maintenance of obstructions or excavations.<sup>3</sup>

**6. Liabilities of Abutting Owners — a. IN GENERAL.** — An abutting owner or occupant is, apart from statute, under no obligation to keep the highway in repair and safe for travel,<sup>4</sup> though he is, like other persons, liable for injuries resulting from defects in the highway created by him.<sup>5</sup> Accordingly, if he makes a permanent excavation, such as a coal hole, he is bound to exercise reasonable care to see that the cover is secure.<sup>6</sup>

**1. Must Restore Highway to Condition of Safety.** — *Reeves v. Larkin*, 19 Mo. 192; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Clifford v. Dam*, 81 N. Y. 56; *Wasmer v. Delaware, etc., R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *McCamus v. Citizens' Gas Light Co.*, 40 Barb. (N. Y.) 380; *Peard v. Karst*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 159; *Wiley v. Smith*, 25 N. Y. App. Div. 351.

**Applications of Rule.** — So where one, after making an excavation, refills it, he must anticipate and provide for the natural effect of rains upon earth so excavated and replaced, and see that during and after a rain it is in proper and safe condition, or that guards or watchmen are kept by it, or other suitable precautions taken. *Johnson v. Friel*, 50 N. Y. 679; *Southern Express Co. v. Texarkana Water Co.*, 54 Ark. 131; *Dillon v. Washington Gas-Light Co.*, 1 MacArthur (D. C.) 626.

And so if the stones in the street are relaid so as to give such an appearance of security as would induce one using reasonable caution to tread upon them as being safe, the person making the excavation will be liable in case they are not safe. *Drew v. New River Co.*, 6 C. & P. 754, 25 E. C. L. 634.

**2. Strict Compliance with License.** — *Com. v. Erie, etc.*, R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

So a water company is liable for injuries from a hydrant placed near the middle of the walk, though it has authority to place the hydrant in the walk, unless it has authority to place it at that particular place. *Bean v. Maine Water Co.*, 92 Me. 469.

**3. License May Be Implied.** — *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Nelson v. Godfrey*, 12 Ill. 23; *Gridley v. Bloomington*, 68 Ill. 47; *Babbage v. Powers*, 130 N. Y. 281; *Seneca Falls v. Zalinski*, 8 Hun (N. Y.) 571.

**4. Abutting Owner Not Bound to Repair.** — See the title ABUTTING OWNERS, vol. 1, p. 243. See also *Fletcher v. Scotten*, 74 Mich. 212; *Morris v. Woodburn*, 57 Ohio St. 330.

**Effect of Inclosing Land.** — The rule of the common law that if the abutting owner incloses his property so as to prevent a traveler from passing thereover if the highway should be unsafe, he thereby becomes bound to keep the road in repair (*Duncomb's Case*, Cro. Car. 366; *Rex v. Flecknow*, 1 Burr. 461; *Steel v.*

*Prickett*, 2 Stark. 468, 3 E. C. L. 491; *Reg. v. Ramsden*, El. Bl. & El. 949, 96 E. C. L. 949), is stated not to prevail in *New Jersey*. *Weller v. McCormick*, 47 N. J. L. 397, 54 Am. Rep. 175.

**5. Abutter Liable for Defects Created by Him — United States.** — *Chicago v. Robbins*, 2 Black (U. S.) 418, 4 Wall. (U. S.) 657.

*Illinois.* — *Stephani v. Brown*, 40 Ill. 428; *Pfau v. Reynolds*, 53 Ill. 212.

*Iowa.* — *Rowell v. Williams*, 29 Iowa 210; *Ottumwa v. Parks*, 43 Iowa 119; *Calder v. Smalley*, 66 Iowa 219, 55 Am. Rep. 270.

*Louisiana.* — *Shidet v. Jules Dreyfuss Co.*, 50 La. Ann. 280.

*Maryland.* — *Gunther v. Dranbauer*, 86 Md. 1.

*Massachusetts.* — *Lowell v. Spaulding*, 4 Cush. (Mass.) 277, 50 Am. Dec. 775; *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429.

*Missouri.* — *Mancuso v. Kansas City*, 74 Mo. App. 138; *Stevens v. Walpole*, 76 Mo. App. 213.

*New Jersey.* — *Durant v. Palmer*, 29 N. J. L. 544.

*New York.* — *Anderson v. Dickie*, 1 Robt. (N. Y.) 238; *Whalen v. Gloucester*, 4 Hun (N. Y.) 24; *Matthews v. De Groff*, 13 N. Y. App. Div. 356; *Houghtaling v. Shelley*, 51 Hun (N. Y.) 598; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Canandaigua v. Foster*, 156 N. Y. 354.

*Ohio.* — *Nagle v. Brown*, 37 Ohio St. 7; *Morris v. Woodburn*, 57 Ohio St. 330.

*Pennsylvania.* — *Palmer v. Silverthorn*, 32 Pa. St. 65.

*Rhode Island.* — *Pawtucket v. Bray*, 20 R. I. 17, 2 Am. Neg. Rep. 71.

*Vermont.* — *Brownell v. Troy, etc.*, R. Co., 55 Vt. 218.

See for further authorities the title ABUTTING OWNERS, vol. 1, p. 244.

**6. Care Required to Cover Permanent Excavation — Iowa.** — *Calder v. Smalley*, 66 Iowa 219, 55 Am. Rep. 270.

*Massachusetts.* — *Stevenson v. Joy*, 152 Mass. 45.

*Missouri.* — *Kirkpatrick v. Knapp*, 28 Mo. App. 427; *Mancuso v. Kansas City*, 74 Mo. App. 138.

*New York.* — *Anderson v. Dickie*, 1 Robt. (N. Y.) 238; *Whalen v. Gloucester*, 4 Hun (N. Y.) 24; *Irvin v. Fowler*, 5 Robt. (N. Y.) 482; *Matthews v. De Groff*, 13 N. Y. App. Div.



*b. IMPOSITION OF DUTY OF REPAIR.* — The duty of keeping sidewalks in repair may, it has generally been held, be imposed by statute or ordinance on the abutting owner,<sup>1</sup> but such a provision will not make him liable for injuries received by travelers from want of repairs,<sup>2</sup> or affect the liability of the municipality therefor.<sup>3</sup> And a municipality has no power, unless specially authorized so to do, to transfer its liability for injuries caused by a defect in the highway to an abutting owner;<sup>4</sup> and it has even been held that a statutory provision to that effect is invalid.<sup>5</sup> But a *Michigan* statute making the owner of abutting property liable over to the city, in case of recovery against the latter by one injured through the abutter's failure to repair a sidewalk when required to do so, has been held to be valid.<sup>6</sup>

*c. DANGEROUS CONDITION OF PROPERTY.* — An abutting owner is liable for injuries to a traveler on the highway caused by objects or places on his property which are calculated to render travel on the highway unsafe.<sup>7</sup> This

356; *Black v. Maitland*, 11 N. Y. App. Div. 188; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459.

*Pennsylvania.* — *Dickson v. Hollister*, 123 Pa. St. 421, 10 Am. St. Rep. 533.

1. *Imposition of Repair on Abutter* — *Massachusetts.* — *Goddard, Petitioner*, 16 Pick. (Mass.) 504, 28 Am. Dec. 259.

*New Jersey.* — *Paxson v. Sweet*, 13 N. J. L. 196.

*New York.* — *Russell v. Canastota*, 98 N. Y. 496.

*Ohio.* — *Bonsall v. Lebanon*, 19 Ohio 418.

*Pennsylvania.* — *Smith v. Kingston*, 120 Pa. St. 357; *Wilkinsburg v. Home for Aged Women*, 131 Pa. St. 109.

*Tennessee.* — *Franklin v. Maberry*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315; *Washington v. Nashville*, 1 Swan (Tenn.) 177; *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

*Contra.* — *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640.

In *Woodward v. Boscobel*, 84 Wis. 226, it was decided that the municipality had no such power unless given to it by its charter.

2. *Does Not Inure to Benefit of Person Injured* — *Connecticut.* — *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189.

*Illinois.* — *Rockford v. Hildebrand*, 61 Ill. 152.

*Iowa.* — *Keokuk v. Independent Dist.*, 53 Iowa 352, 36 Am. Rep. 226.

*Louisiana.* — *Betz v. Limingi*, 46 La. Ann. 1113, 49 Am. St. Rep. 344.

*Maryland.* — *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.

*Massachusetts.* — *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 252, 74 Am. Dec. 682.

*Michigan.* — *Taylor v. Lake Shore, etc., R. Co.*, 45 Mich. 74, 40 Am. Rep. 457.

*Missouri.* — *St. Louis v. Connecticut Mut. L. Ins. Co.*, 107 Mo. 92, 28 Am. St. Rep. 402.

*New York.* — *Rochester v. Campbell*, 123 N. Y. 405; *Law v. Kingsley*, 82 Hun (N. Y.) 76; *Moore v. Gadsden*, 93 N. Y. 12; *Rohling v. Eich*, 23 N. Y. App. Div. 179.

*Ohio.* — *Wilhelm v. Defiance*, 58 Ohio St. 56.

*Rhode Island.* — *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502.

*Wisconsin.* — *Sommer v. Marshfield*, 60 W. 59; *Toutloff v. Green Bay*, 91 Wis. 470 [questioning *Hiner v. Fond du Lac*, 71 Wis. 74, and *Woodward v. Boscobel*, 84 Wis. 226]; *Cooper*

*v. Waterloo*, 88 Wis. 433; *Fife v. Oshkosh*, 89 Wis. 540; *Selleck v. Tallman*, 93 Wis. 246.

In *Pennsylvania* the abutting owner is apparently held to be primarily liable when it is made his duty to repair. *Brookville v. Arthurs*, 130 Pa. St. 501, 152 Pa. St. 334; *Chester v. Chester First Nat. Bank*, 9 Pa. Super. Ct. 517.

3. *Continuing Liability of City.* — *Russell v. Canastota*, 98 N. Y. 496; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; and cases in the next preceding note.

4. *City Cannot Transfer Liability for Injuries unless Specially Authorized* — *Connecticut.* — *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189.

*Louisiana.* — *Betz v. Limingi*, 46 La. Ann. 1113, 49 Am. St. Rep. 344.

*Missouri.* — *Welsh v. St. Louis*, 73 Mo. 71; *Norton v. St. Louis*, 97 Mo. 537.

*Nebraska.* — *Davis v. Omaha*, 47 Neb. 836.

*Ohio.* — *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

*Rhode Island.* — *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502.

5. *Statutory Provision Invalid.* — *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23. And see *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *Weller v. McCormick*, 47 N. J. L. 397, 54 Am. Rep. 175.

*Exemption of Municipality.* — So a statute making the abutter solely liable has been held unconstitutional in so far as it exempted the municipality. *Seward v. Wilmington*, 2 Marv. (Del.) 189.

6. *Liability Over to Municipality.* — *Detroit v. Chaffee*, 70 Mich. 80; *Lynch v. Hubbard*, 101 Mich. 43. See also *Brookville v. Arthurs*, 152 Pa. St. 334.

7. *Dangerous Place Near Highway* — *England.* — *Coupland v. Hardingham*, 3 Campb. 398; *Kearney v. London, etc., R. Co.*, L. R. 6 Q. B. 759; *Welfare v. London, etc., R. Co.*, L. R. 4 Q. B. 693.

*Connecticut.* — *Birge v. Gardner*, 19 Conn. 512, 50 Am. Dec. 261.

*Massachusetts.* — *Milford v. Hallowbrook*, 6 Allen (Mass.) 17, 85 Am. Dec. 735; *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324.

principle has been applied most frequently in the case of excavations on the abutting property, for injuries for which the owner is liable in the absence of proper railings or barriers to prevent such injuries.<sup>1</sup> In *Massachusetts*, however, an abutting owner is, it seems, under no obligation to protect travelers from injuries by excavations outside the highway.<sup>2</sup> And it has been decided that there is no duty on the part of a property owner to alter conditions already existing before the dedication of the highway.<sup>3</sup> The dangerous object or place must be of such a character<sup>4</sup> and so close to the highway as to render the highway itself unsafe for travel,<sup>5</sup> and it is stated that if the distance is so great that the traveler must actually wander from the highway on to the abutting property in order to encounter the danger, the abutting owner cannot be held liable for the resulting injuries.<sup>6</sup> If, however, the owner of land allows

*New Jersey*. — *Vanderbeck v. Hendry*, 34 N. J. L. 471; *Weller v. McCormick*, 47 N. J. L. 397, 54 Am. Rep. 175, 52 N. J. L. 470.

And see cases cited *infra*.

1. *Unguarded Excavation* — *England*. — *Wetcor v. Dunk*, 4 F. & F. 298; *Firmstone v. Wheeley*, 2 Dowl. & L. 208; *Hardcastle v. South Yorkshire R., etc., Co.*, 4 H. & N. 67; *Barnes v. Ward*, 9 C. B. 392, 67 E. C. L. 392, 14 Jur. 334; *Hadley v. Taylor*, L. R. 1 C. P. 53.

*Connecticut*. — *Norwich v. Breed*, 30 Conn. 547; *Croghan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88.

*Indiana*. — *Graves v. Thomas*, 95 Ind. 364, 48 Am. Rep. 727; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65.

*Iowa*. — *Haughey v. Hart*, 62 Iowa 96, 49 Am. Rep. 138.

*Maryland*. — *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367.

*Mississippi*. — *Lepnick v. Gaddis*, 72 Miss. 200, 48 Am. St. Rep. 547.

*Missouri*. — *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503.

*New Jersey*. — *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260.

*South Dakota*. — *Sanders v. Reister*, 1 Dak. 251.

**Character of Highway.** — But it was held that an abutting owner was not liable for injuries from an excavation where the highway was an alley closed at one end and used only by persons having business at the rear ends of the buildings abutting on the alley, who would generally be acquainted with its condition. *Bond v. Smith*, 113 N. Y. 378, reversing 44 Hun 51.

2. *Massachusetts Rule.* — *Howland v. Vincent*, 10 Met. (Mass.) 371, 43 Am. Dec. 442; *McIntire v. Roberts*, 149 Mass. 450, 14 Am. St. Rep. 432. Compare *Moynihan v. Whidden*, 143 Mass. 287, in which case it was held that persons who placed a wheel with a rope attached just within a certain building were liable to a child injured by grasping the rope while on the street; and *Holmes v. Drew*, 151 Mass. 578, where it was held that an abutter who extended the sidewalk over his land was liable for injuries received by a traveler going thereon.

3. **Conditions Existing Before Dedication** have been held not to be within the above rule, since, in the words of Blackburn, J., "great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the

owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention." *Fisher v. Prowse*, 2 B. & S. 770, 110 E. C. L. 770, quoted in *Robbins v. Jones*, 15 C. B. N. S. 221, 109 E. C. L. 221. To the same effect see *Cornwell v. Metropolitan Sewer Comrs*, 10 Exch. 771. The doctrine of these cases was approved in *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, L. R. 6 Q. B. 433; *Arnold v. Holbrook*, L. R. 8 Q. B. 96; and a similar decision was rendered in *State v. Society, etc.*, 44 N. J. L. 502, though this involved the criminal, not the civil, liability of the abutting owner.

4. **Character of Danger.** — *Norwich v. Breed*, 30 Conn. 547; *Croghan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88.

5. **Proximity of Danger** — *England*. — *Hardcastle v. South Yorkshire R., etc., Co.*, 4 H. & N. 67; *Hounsell v. Smyth*, 7 C. B. N. S. 731, 97 E. C. L. 731; *Binks v. South Yorkshire R., etc., Co.*, 3 B. & S. 244, 113 E. C. L. 244.

*Minnesota*. — *Ratte v. Dawson*, 50 Minn. 450.

*Missouri*. — *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557.

*Ohio*. — *Kelley v. Columbus*, 41 Ohio St. 263.

*Wisconsin*. — *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854.

6. *Hadley v. Taylor*, L. R. 1 C. P. 53; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Gramlich v. Wurst*, 86 Pa. St. 74, 27 Am. Rep. 684; *Fitzgerald v. Berlin*, 64 Wis. 203; *Gorr v. Mittlestaedt*, 96 Wis. 296.

**Adjudications as to Particular Distances.** — It has been decided that a hole within fourteen inches of the sidewalk was ground for the imposition of liability, the traveler having accidentally slipped and fallen therein. *Hadley v. Taylor*, L. R. 1 C. P. 53. And so in the case of an excavation ten feet away, into which a child fell. *Malloy v. Hibernia Sav., etc., Soc.*, (Cal. 1889) 21 Pac. Rep. 525. But the contrary has been held as to an excavation six feet away from the beaten path. *Early v. Lake Shore, etc., R. Co.*, 66 Mich. 349. And likewise as to excavations twenty feet or over away from the highway. *Binks v. South Yorkshire R., etc., Co.*, 3 B. & S. 244, 113 E. C. L. 244; *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284, 59 Am. Rep. 16; *Vanderbeck v. Hendry*, 34 N. J. L. 471; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Gorr v. Mittlestaedt*, 96 Wis. 296.



it to be used as part of the highway, the question of proximity is to be determined with reference to the location of the property so used, and not of the highway itself.<sup>1</sup> Children playing in or near the street have been held to be entitled to the benefit of this principle,<sup>2</sup> as have the owners of animals straying on the highway.<sup>3</sup>

**Falling of Part of Building.** — An abutting owner is also liable for injuries to a person on the highway caused by the fall of any building or structure on his premises or of any part thereof.<sup>4</sup>

**Articles and Substances Falling from Building.** — On the same principle the owner or person in control of the abutting property may be liable for injuries caused by articles falling on the highway from a building thereon,<sup>5</sup> and he has accordingly been held to be liable for injuries caused by the fall of snow or ice from the roof of his building when the construction of the roof or other circumstances were such as to render injuries probable.<sup>6</sup>

**7. Liabilities of Contractors.** — A person or corporation contracting with the municipality to keep the highway in repair is directly liable to an individual injured by the failure to comply with the contract,<sup>7</sup> and this rule applies in case of a contract by a street-railroad company to keep the part of the highway occupied by its road in proper repair.<sup>8</sup>

**1. Private Property Used as Highway.** — Corby v. Hill, 4 C. B. N. S. 562, 93 E. C. L. 562; Crogan v. Schiele, 53 Conn. 186, 55 Am. Rep. 88; Tomle v. Hampton, 129 Ill. 379; Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727.

So in Beck v. Carter, 68 N. Y. 293, 23 Am. Rep. 175, the excavation was ten feet from the established boundary of the thoroughfare, but since the premises between the boundary and the excavation had been for a long time used as part of the highway and were in such condition as naturally to deceive persons who traveled over it, it could not be said, as matter of law, that the excavation was not in dangerous proximity to the highway.

**2. Injuries to Children Playing.** — Malloy v. Hibernian Sav., etc., Soc., (Cal. 1889) 21 Pac. Rep. 525; Pekin v. McMahon, 154 Ill. 141, 45 Am. St. Rep. 114; Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Hargreaves v. Deacon, 25 Mich. 1; Mullaney v. Spence, (Brooklyn City Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 319.

**3. Injuries to Animals.** — Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575; Sisk v. Crump, 112 Ind. 504, 2 Am. St. Rep. 213; Haughey v. Hart, 62 Iowa 96, 49 Am. Rep. 138. Compare Jordin v. Crump, 8 M. & W. 782.

**4. Falling of Part of Structure.** — Reg. v. Watts, 1 Salk. 357.

*Maryland.* — Deford v. State, 30 Md. 179.

*Massachusetts.* — Khron v. Brock, 144 Mass. 516.

*New York.* — Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Rector v. Buckhart, 3 Hill (N. Y.) 193; Vincett v. Cook, 4 Hun (N. Y.) 318.

See also Grogan v. Broadway Foundry Co., 87 Mo. 321.

**Illustrations.** — So in Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367, the owners of a house were held liable to one who, while passing on the street, stopped on the doorsill of the house to adjust his shoe, and who was injured by a loose brick in the wall falling on his head, which projected into the street. And so the owner may be liable for injuries caused by the fall of a chimney. Gray v. Bos-

ton Gas Light Co., 114 Mass. 149, 19 Am. Rep. 324.

**5. Falling of Articles from Building.** — Byrne v. Boadle, 2 H. & C. 722; Scott v. London, etc., Docks Co., 3 H. & C. 596; Tarry v. Ashton, 1 Q. B. D. 314; Hungerford v. Bent, 55 Hun (N. Y.) 6.

In Jager v. Adams, 123 Mass. 26, 25 Am. Rep. 7, it was held that one who was constructing a brick wall abutting upon a highway might be liable for negligence in putting men to handle bricks where a passing traveler would be liable to injury, without erecting any barriers to prevent such injury, although his servants actually handling the bricks were not negligent.

**Objects Suspended over Highway.** — So one is bound to exercise care that a sign suspended over the highway shall be safely fastened so as not to endanger the safety of travelers. St. Louis, etc., R. Co. v. Hopkins, 54 Ark. 209. And the same rule applies in the case of a lantern so suspended. Tarry v. Ashton, 1 Q. B. D. 320.

If the suspension is in violation of the city ordinance the question of negligence on the part of the abutting owner is immaterial. Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

**6. Snow or Ice Falling from Roof.** — Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346, 106 Mass. 194; Smethurst v. Independent Cong. Church, 148 Mass. 261, 12 Am. St. Rep. 550; Hannem v. Pence, 40 Minn. 127, 12 Am. St. Rep. 717; Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164; Walsh v. Mead, 8 Hun (N. Y.) 387.

**7. Contract to Repair.** — Weymouth v. New Orleans, 40 La. Ann. 344; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; McMahon v. Second Ave. R. Co., 11 Hun (N. Y.) 347; Phillips v. Com., 44 Pa. St. 197; Brookville v. Arthurs, 130 Pa. St. 501, 152 Pa. St. 334; Kollock v. Madison, 84 Wis. 458.

**8. By Street-railway Company.** — Union St. R. Co. v. Stone, 54 Kan. 83; McMahon v. Second Ave. R. Co., 75 N. Y. 231. See also the title STREET RAILWAYS.



**8. Defects Involving Liability**—*a. QUESTION OF FACT.*—Though questions of law may arise as to alleged defects, in general the question whether a highway is or is not defective must be treated as one of fact for the jury, acting under proper instructions from the court.<sup>1</sup> The reason for this is stated to be that the question depends on a great variety of circumstances which it is impossible to group together in a legal proposition, besides which, as the country progresses in resources and means of improvement, the standard of care required tends to change, and consequently any legal definition might become inappropriate with the passage of time.<sup>2</sup>

*b. UNGUARDED HOLES OR EXCAVATIONS IN HIGHWAY*—(1) *Municipal Liability.*—The municipality is liable for injuries to persons on the highway caused by the presence of holes or excavations in the highway, whether made by its own officers or by third persons, or the result of natural causes, if it fails to erect barriers or take reasonable precautions to prevent such injuries,<sup>3</sup>

**1. Question for Jury**—*United States.*—Hull v. Richmond, 2 Woodb. & M. (U. S.) 337.

*Connecticut.*—Williams v. Clinton, 28 Conn. 266; Congdon v. Norwich, 37 Conn. 418; O'Neil v. East Windsor, 63 Conn. 150; Lee v. Barkhamsted, 46 Conn. 213; Seeley v. Litchfield, 49 Conn. 134, 44 Am. Rep. 213.

*Illinois.*—Grayville v. Whitaker, 85 Ill. 439, 6 Cent. L. J. 97.

*Kentucky.*—Newport v. Miller, 93 Ky. 22.

*Maine.*—Merrill v. Hampden, 26 Me. 234; Bryant v. Biddeford, 39 Me. 193; Whitney v. Cumberland, 64 Me. 541; Weeks v. Parsonsfield, 65 Me. 285; Witham v. Portland, 72 Me. 539; Morse v. Belfast, 77 Me. 44.

*Massachusetts.*—Ghenn v. Provincetown, 105 Mass. 313; Brooks v. Somerville, 106 Mass. 271; Myers v. Springfield, 112 Mass. 489; Dowd v. Chicopee, 116 Mass. 93; Hodgkins v. Rockport, 116 Mass. 573; Howard v. Mendon, 117 Mass. 585; Harris v. Newbury, 128 Mass. 321; Pratt v. Amherst, 140 Mass. 167; Hall v. Lowell, 10 Cush. (Mass.) 260.

*Michigan.*—Malloy v. Walker Tp., 77 Mich. 448.

*Missouri.*—Craig v. Sedalia, 63 Mo. 417.

*New Hampshire.*—Littleton v. Richardson, 32 N. H. 59; Johnson v. Haverhill, 35 N. H. 74; Stark v. Lancaster, 57 N. H. 88; Downes v. Hopkinton, 67 N. H. 456.

*New York.*—Hume v. New York, 47 N. Y. 639; Chamberlain v. Wheatland, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 190; Bryant v. Randolph, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 844; Rankert v. Junius, 25 N. Y. App. Div. 470.

*Rhode Island.*—McCloskey v. Moies, 19 R. I. 297.

*Vermont.*—Leicester v. Pittsford, 6 Vt. 245; Kelsey v. Glover, 15 Vt. 708; Cassidy v. Stockbridge, 21 Vt. 391; Willard v. Newbury, 22 Vt. 458; Sessions v. Newport, 23 Vt. 9; Bagley v. Ludlow, 41 Vt. 425.

*Wisconsin.*—Wheeler v. Westport, 30 Wis. 392; McMaugh v. Milwaukee, 32 Wis. 200; Barstow v. Berlin, 34 Wis. 357; Draper v. Ironton, 42 Wis. 696; Hein v. Fairchild, 87 Wis. 258; Vass v. Waukesha, 90 Wis. 337.

*Canada.*—Walton v. York County, 6 Ont. App. 181; Ferguson v. Southwold Tp., 27 Ont. 66.

2. Congdon v. Norwich, 37 Conn. 414.

**3. Unguarded Holes or Excavations in Highway**—*United States.*—Chicago v. Robbins, 2 Black (U. S.) 418.

*Alabama.*—Birmingham v. McCary, 84 Ala. 469; Birmingham v. Lewis, 92 Ala. 352.

*California.*—James v. San Francisco, 6 Cal. 529, 65 Am. Dec. 526.

*Connecticut.*—Boucher v. New Haven, 40 Conn. 457.

*Delaware.*—Pierce v. Wilmington, 2 Marv. (Del.) 306; Seward v. Wilmington, 2 Marv. (Del.) 189; Carswell v. Wilmington, 2 Marv. (Del.) 360.

*Georgia.*—Savannah v. Donnelly, 71 Ga. 258; Americus v. Chapman, 94 Ga. 711; Dempsey v. Rome, 94 Ga. 420.

*Illinois.*—Aurora v. Seidelman, 34 Ill. App. 285; Chicago v. Gallagher, 44 Ill. 295; Springfield v. Le Claire, 49 Ill. 476; Chicago v. Johnson, 53 Ill. 91; Sterling v. Thomas, 60 Ill. 264; Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Chicago v. Hesing, 83 Ill. 204, 25 Am. Rep. 378.

*Indiana.*—Decatur v. Stoops, 21 Ind. App. 397; Indianapolis v. Scott, 72 Ind. 197; Aurora v. Bitner, 100 Ind. 396; Dooley v. Sullivan, 112 Ind. 451, 2 Am. St. Rep. 209.

*Iowa.*—Koester v. Ottumwa, 34 Iowa 41.

*Kansas.*—Fletcher v. Ellsworth, 53 Kan. 751.

*Kentucky.*—Covington v. Bryant, 7 Bush (Ky.) 248.

*Louisiana.*—Cline v. Crescent City R. Co., 41 La. Ann. 1031.

*Maine.*—Kimball v. Bath, 38 Me. 219, 61 Am. Dec. 243; Philips v. Veazie, 40 Me. 96; Morton v. Frankfort, 55 Me. 46; Butler v. Bangor, 67 Me. 385.

*Maryland.*—Baltimore v. Pendleton, 15 Md. 13.

*Massachusetts.*—Burnham v. Boston, 10 Allen (Mass.) 290; Doherty v. Waltham, 4 Gray (Mass.) 596; Reed v. Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Prentiss v. Boston, 112 Mass. 43; Myers v. Springfield, 112 Mass. 489; Hodgkins v. Rockport, 116 Mass. 573; Howard v. Mendon, 117 Mass. 585; Marvin v. New Bedford, 158 Mass. 464.

*Michigan.*—Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Alexander v. Big Rapids, 76 Mich. 282.

*Minnesota.*—Cleveland v. St. Paul, 18 Minn. 279; O'Gorman v. Morris, 26 Minn. 267.

*Missouri.*—Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Bowie v. Kansas City, 51 Mo. 454; Hull v. Kansas City, 54 Mo. 598, 14 Am. Rep. 487; Fink v. St. Louis, 71 Mo. 52;

provided there was a reasonable likelihood that such a hole or excavation would cause an accident,<sup>1</sup> and provided further that the municipality had sufficient notice thereof to enable it to remove the danger.<sup>2</sup>

(2) *Individual Liability.* — Such excavations are also ground for imposing liability upon the individual originally creating them, or whose duty it was to fill or protect them.<sup>3</sup>

c. *FAILURE TO LIGHT HIGHWAY.* — In the absence of a statutory or charter requirement, a municipality is under no obligation to light the highways, even city streets, within its jurisdiction, and is not liable for injuries resulting from failure to light them or from insufficient lighting.<sup>4</sup>

*Obstructed or Defective Highway.* — But since a way, though partially obstructed

Welsh v. St. Louis, 73 Mo. 71; Russell v. Columbia, 74 Mo. 480, 41 Am. Rep. 325; Halpin v. Kansas City, 76 Mo. 335; Baldwin v. Springfield, 141 Mo. 205; Brennan v. St. Louis, 92 Mo. 482.

Nebraska. — Omaha v. Randolph, 30 Neb. 699; Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432; Lincoln v. Calvert, 39 Neb. 305.

New Hampshire. — Grimes v. Keene, 52 N. H. 330; Sides v. Portsmouth, 59 N. H. 24.

New York. — Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550; Hutson v. New York, 9 N. Y. 163, 59 Am. Dec. 526; Brewer v. New York, 31 N. Y. App. Div. 244; Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 441; Rankert v. Junius, 25 N. Y. App. Div. 470; Diamond v. Brooklyn, (Supm. Ct. Gen. T.) 36 N. Y. Supp. 97; Crowther v. Yonkers, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 588; Wilson v. Troy, 60 Hun (N. Y.) 183; Grant v. Brooklyn, 41 Barb. (N. Y.) 381; Childs v. West Troy, 23 Hun (N. Y.) 68; Herrington v. Phoenix, 41 Hun (N. Y.) 270; Beltz v. Yonkers, 74 Hun (N. Y.) 73; Foels v. Tonawanda, 75 Hun (N. Y.) 363; Roach v. Ogdensburg, 91 Hun (N. Y.) 9; Smith v. Clarkstown, 69 Hun (N. Y.) 155; Wallace v. New York, (C. Pl. Gen. T.) 18 How. Pr. (N. Y.) 169.

Ohio. — Circleville v. Neuding, 41 Ohio St. 465.

Oregon. — McAllister v. Albany, 18 Oregon 426.

Pennsylvania. — Sutter v. Young Tp., 130 Pa. St. 72; Schaeffer v. Jackson Tp., 150 Pa. St. 145, 30 Am. St. Rep. 792.

Rhode Island. — Seamons v. Fitts, 20 R. I. 443, 4 Am. Neg. Rep. 224.

Tennessee. — Memphis v. Lasser, 9 Humph. (Tenn.) 757; Nashville v. Brown, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289.

Vermont. — Willard v. Newbury, 22 Vt. 458; Batty v. Duxbury, 24 Vt. 155.

Washington. — Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847; Sproul v. Seattle, 17 Wash. 256; Rowe v. Ballard, 19 Wash. 1.

Wisconsin. — Seward v. Milford, 21 Wis. 485; Hart v. Red Cedar, 63 Wis. 634; Wiltse v. Tilden, 77 Wis. 152; Rumrill v. Delafield, 82 Wis. 184; Little v. Iron River, 102 Wis. 250.

1. *Likelihood of Accident.* — Morse v. Belfast, 77 Me. 44; Grant v. Enfield, 11 N. Y. App. Div. 358; Beltz v. Yonkers, 148 N. Y. 67.

2. *Notice.* — See *infra*, this section, *Notice of Defect*.

3. *Excavation Ground of Individual Liability.* — England. — Sandford v. Clarke, 21 Q. B. D.

Arkansas. — Pine Bluff Water, etc., Co. v. Derrisseaux, 56 Ark. 132.

California. — Barton v. McDonald, 81 Cal. 265.

Illinois. — Stephani v. Brown, 40 Ill. 428.

Indiana. — Lebanon Light, etc., Co. v. Leap, 139 Ind. 443.

Iowa. — Case v. Waverly, 36 Iowa 545; Calder v. Smalley, 66 Iowa 219, 55 Am. Rep. 270.

Kansas. — Osage City v. Larkin, 40 Kan. 206, 10 Am. St. Rep. 186.

Maine. — Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720.

Massachusetts. — Boston v. Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678; Lowell v. Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Dalay v. Savage, 145 Mass. 38, 1 Am. St. Rep. 429.

New York. — Whalen v. Gloucester, 4 Hun (N. Y.) 24; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Bliss v. Schaub, 48 Barb. (N. Y.) 339; Johnson v. Friel, 50 N. Y. 679; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603; Charlock v. Freel, 125 N. Y. 357.

Oregon. — Milarkey v. Foster, 6 Oregon 379, 25 Am. Rep. 531.

Pennsylvania. — Grier v. Sampson, 27 Pa. St. 183.

Texas. — Houston, etc., R. Co. v. Dunn, 17 Tex. Civ. App. 687.

Vermont. — Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 296.

4. *No Obligation to Light Highway.* — Gaskins v. Atlanta, 73 Ga. 746; Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136; Chicago v. Apel, 50 Ill. App. 132; Chicago v. McDonald, 57 Ill. App. 250; Sparhawk v. Salem, 1 Allen (Mass.) 30, 79 Am. Dec. 700; Macomber v. Taunton, 100 Mass. 255; Lyon v. Cambridge, 136 Mass. 419; Randall v. Eastern R. Co., 106 Mass. 276, 8 Am. Rep. 327; Miller v. St. Paul, 38 Minn. 134; McHugh v. St. Paul, 67 Minn. 441; Canavan v. Oil City, 183 Pa. St. 611, 41 W. N. C. (Pa.) 495.

So the fact that a city, under no statutory obligation to light its streets, does it so insufficiently as not to render visible an obstruction rightly in the street, such as a water plug, does not render it liable in damages. Columbus v. Sims, 94 Ga. 483.

*City Ordinance Requirement.* — And the omission to light an obstructed or unsafe street was held not to be a "defect in the way"

or out of repair, may be safe if lighted, the question whether it is lighted may be material on the question of negligence.<sup>1</sup>

*d. GUARDS, SIGNALS, AND LIGHTS* — (1) *In General*. — The municipality is under the obligation of erecting guards and placing lights to protect travelers from injuries from any excavation or obstruction, whether made by it or by an individual, and is liable in case of failure so to do.<sup>2</sup> An individual, likewise, who is originally responsible for the excavation or obstruction is liable in case of his failure properly to guard or light it.<sup>3</sup> And this duty exists on the part of a municipality when a dangerous condition is created by changing the grade of a street.<sup>4</sup> But guards are not necessary to prevent passage along the side of an excavation,<sup>5</sup> and a municipality has been held not to be liable because an excavation was left unguarded during the absence

within the statute, though a city ordinance required the superintendent of streets to place barriers and lights across any unsafe street. *Lyon v. Cambridge*, 136 Mass. 419.

1. *Lighting of Defective Street*. — *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Indianapolis v. Scott*, 72 Ind. 197; *Miller v. St. Paul*, 38 Minn. 134.

As to the duty of lighting bridges and approaches, see the title *BRIDGES*, vol. 4, p. 943, note.

2. *Guards, Signals, and Lights — Duty of Municipality* — *United States*. — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Cleveland v. King*, 132 U. S. 295.

*Connecticut*. — *Boucher v. New Haven*, 40 Conn. 456; *Cummings v. Hartford*, 70 Conn. 115.

*Georgia*. — *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. Rep. 108.

*Illinois*. — *Chicago v. Johnson*, 53 Ill. 91; *Canton v. Dewey*, 71 Ill. App. 346; *Aurora v. Rockabrand*, 149 Ill. 399; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136.

*Indiana*. — *Alexandria v. Young*, 20 Ind. App. 673.

*Maine*. — *Kimball v. Bath*, 38 Me. 219, 61 Am. Dec. 243; *Butler v. Bangor*, 67 Me. 385.

*Massachusetts*. — *Prentiss v. Boston*, 112 Mass. 43; *Howard v. Mendon*, 117 Mass. 585; *Fox v. Chelsea*, 171 Mass. 297.

*Nebraska*. — *Lincoln v. Calvert*, 39 Neb. 305.

*New York*. — *Tompert v. Hastings Pavement Co.*, 35 N. Y. App. Div. 578; *O'Hara v. Buffalo*, 39 N. Y. App. Div. 443; *McGuinness v. Westchester*, 66 Hun (N. Y.) 356; *Grant v. Brooklyn*, 41 Barb. (N. Y.) 381; *Weed v. Ballston Spa*, 76 N. Y. 329; *Brusso v. Buffalo*, 90 N. Y. 679; *Turner v. Newburgh*, 109 N. Y. 311, 4 Am. St. Rep. 453; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; *Bryant v. Randolph*, 133 N. Y. 70.

*Ohio*. — *Newark v. McDowell*, 9 Ohio Cir. Dec. 260; *Newark v. Jones*, 16 Ohio Cir. Ct. 563, 9 Ohio Cir. Dec. 196.

*Oregon*. — *McAllister v. Albany*, 18 Oregon 426.

*Pennsylvania*. — *Erie City v. Schwingle*, 22 Pa. St. 384, 60 Am. Dec. 87.

*Utah*. — *Naylor v. Salt Lake City*, 9 Utah 491.

*Virginia*. — *Norfolk v. Johnakin*, 94 Va. 285.

*Washington*. — *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847.

*Wisconsin*. — *Milwaukee v. Davis*, 6 Wis. 377; *Seward v. Milford*, 21 Wis. 485; *Ward v. Jefferson*, 24 Wis. 342; *Hammond v. Mukwa*, 40 Wis. 35; *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759.

*Canada*. — *Rice v. Whitby*, 28 Ont. 598.

3. *Duty of Individual — United States*. — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

*Arkansas*. — *Pine Bluff Water, etc., Co. v. Derrisseaux*, 56 Ark. 132.

*Illinois*. — *Pfau v. William*, 63 Ill. 16; *Keppler v. Ramsden*, 83 Ill. 354.

*Indiana*. — *Ft. Wayne v. De Witt*, 47 Ind. 391; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123.

*Massachusetts*. — *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224.

*Missouri*. — *Wiggin v. St. Louis*, 135 Mo. 558.

*New Jersey*. — *Thomas v. Consolidated Traction Co.*, 62 N. J. 36.

*New York*. — *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Bliss v. Schaub*, 48 Barb. (N. Y.) 339; *Charlock v. Freely*, 125 N. Y. 357.

*Ohio*. — *Hawver v. Whalen*, 49 Ohio St. 69; *Clark v. Fry*, 8 Ohio St. 359, 72 Am. Dec. 590.

*Pennsylvania*. — *Homan v. Stanley*, 66 Pa. St. 464, 5 Am. Rep. 389; *Beck v. Hood*, 185 Pa. St. 32.

*Warning to Children*. — It has been held the duty of the municipality to have guards to warn children away from an attractive excavation in a street. *Aurora v. Seidelman*, 34 Ill. App. 285.

4. *Change of Grade*. — So it was held to be the duty of the city to erect a barrier where the grade of the street was lowered and a person coming across an adjoining lot was injured. *Orme v. Richmond*, 79 Va. 86; *Burnham v. Boston*, 10 Allen (Mass.) 290.

And where the authorities raised one-half in width of a street by an embankment six feet high, the side of which, next to the half of the street which was left in its natural state, was precipitous and without railing or barrier, it was held that the street was unsafe, as a matter of law, even though each half was safe of itself. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

5. *Passage on Side of Excavation*. — *O'Rourke v. Monroe*, 98 Mich. 520.



for a few minutes of the workman employed thereat.<sup>1</sup> The accident must, moreover, in order to render the municipality liable, have been such that the presence of the guard or signal would have prevented its occurrence.<sup>2</sup>

(2) *On Road Not in Use.* — The duty to place barriers or lights, or to give warning signals in some other manner, also exists when a highway or the previously used track thereon is either permanently or temporarily discontinued and is in an unsafe condition for travelers.<sup>3</sup>

(3) *Sufficiency.* — Only ordinary care is required in respect to placing such barriers or signals,<sup>4</sup> and their sufficiency is a question for the jury under proper instructions from the court.<sup>5</sup>

(4) *Unauthorized Removal.* — If proper guards are erected, or lights or signals are established, in order to prevent accidents, neither the municipality nor the individual directly responsible for the condition of the highway will as a rule be subject to liability merely because such barriers, lights, or signals are removed or rendered ineffective by persons acting without authority.<sup>6</sup> But ordinary care must be exercised, and a right of action arises if either the municipality or the individual has notice of such removal,<sup>7</sup> or has grounds for

1. *Temporary Absence of Workman.* — Jones v. Clinton, 100 Iowa 333.

2. *Absence of Guard Not Causing Injury.* — Stacy v. Phelps, 47 Hun (N. Y.) 4, where it was decided that since the object of a guard is merely to warn travelers and not absolutely to prevent contact with the danger, a municipality was not liable for injuries caused by the fall of a runaway team into an unguarded excavation, since a guard would not have prevented the accident.

3. *Guarding of Closed or Abandoned Track or Highway* — Connecticut. — Munson v. Derby, 37 Conn. 298, 9 Am. Rep. 332.

Maine. — Kimball v. Bath, 38 Me. 219, 61 Am. Dec. 243; Phillips v. Veazie, 40 Me. 96.

Michigan. — Southwell v. Detroit, 74 Mich. 438; Alexander v. Big Rapids, 76 Mich. 284.

Minnesota. — O'Leary v. Mankato, 21 Minn. 65.

Missouri. — Stephens v. Macon, 83 Mo. 345.

New York. — Ireland v. Oswego, etc., Plank Road Co., 13 N. Y. 526.

Wisconsin. — Wiltse v. Tilden, 77 Wis. 152; Schuenke v. Pine River, 84 Wis. 669; Bills v. Kaukauna, 94 Wis. 310.

4. *Placing of Barriers — Ordinary Care.* — Weirs v. Jones County, 86 Iowa 351, 29 Am. & Eng. Corp. Cas. 470; Lincoln v. Calvert, 39 Neb. 305; Klatt v. Milwaukee, 53 Wis. 196, 40 Am. Rep. 759.

5. *Sufficiency of Barrier or Signal.* — Weirs v. Jones County, 86 Iowa 625; Morton v. Frankfort, 55 Me. 46; Howard v. Mendon, 117 Mass. 585; Norwood v. Somerville, 159 Mass. 105; Welsh v. Lansing, 111 Mich. 589; Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847.

In White v. Boston, 122 Mass. 491, Lord, J., said that the sufficiency of the signal or barrier may depend upon a variety of circumstances, such as the situation of the way, the travel it was to accommodate, and the modes of giving notice commonly adopted.

A sign in the English language that a place is not passable is sufficient, though the person injured cannot read such language. Weirs v. Jones County, 86 Iowa 625.

It was held that a plank eight feet long and

about a foot wide, standing in a hole in the highway, was a reasonable notice that that part of the road was not in a proper condition for use. Morton v. Frankfort, 55 Me. 46.

*Sufficiency of Lights.* — So the jury was held to be justified in finding that the duty of giving a signal was not performed by leaving a lantern with so little oil in it that it would not remain lighted throughout the night, Baker v. Grand Rapids, 111 Mich. 447; nor where a lantern was merely set at either end of an excavation fifty feet long, without any other guard, Cummings v. Hartford, 70 Conn. 115.

*Effect of General Custom.* — In T. A. Gillespie Co. v. Cummings, 62 N. J. L. 370, it was held that the fact that the general practice was to place a red light at each end of an obstruction on a highway, while in the particular case they were placed at each end of the unobstructed portion, might be considered as bearing on both the plaintiff's and the defendant's case.

*Extinction of Light — Notice to Municipality.* — A municipality was held not to be liable because a light had gone out at the time of the accident, if it had been burning brightly an hour before, when a policeman passed the spot. Mills v. Philadelphia, 187 Pa. St. 287, 42 W. N. C. (Pa.) 397.

6. *Unauthorized Removal of Guards or Signals* — Indiana. — Dooley v. Sullivan, 112 Ind. 451, 2 Am. St. Rep. 209.

Iowa. — Weirs v. Jones County, 86 Iowa 351, 29 Am. & Eng. Corp. Cas. 470; Theissen v. Belle Plaine, 81 Iowa 119.

Massachusetts. — Doherty v. Waltham, 4 Gray (Mass.) 596.

Michigan. — Welsh v. Lansing, 111 Mich. 589; Walker v. Ann Arbor, 111 Mich. 1.

Missouri. — Myers v. Kansas City, 108 Mo. 480.

New York. — Sevestre v. New York, 47 N. Y. Super. Ct. 341.

Vermont. — Mullen v. Rutland, 55 Vt. 77.

Wisconsin. — Seward v. Milford, 21 Wis. 485.

7. *Care to Be Exercised.* — Weirs v. Jones County, 86 Iowa 351, 29 Am. & Eng. Corp. Cas. 470; Klatt v. Milwaukee, 53 Wis. 196, 40 Am. Rep. 759.

anticipating it, and fails to take action accordingly.<sup>1</sup>

**C. OBJECTS OBSTRUCTING HIGHWAY.** — One injured by a collision with an object improperly in the highway may recover therefor against the municipality or against the person who placed the obstruction there. So one may recover on account of a stump left in a highway in such a position as to render travel dangerous,<sup>2</sup> or because of a post erected for the purpose of hitching horses or for other purposes, placed in an improper position in the highway,<sup>3</sup> though there is no liability if the post is properly placed.<sup>4</sup> So a municipality has been held liable for injuries occasioned by a water plug, owned by a water company,<sup>5</sup> and also for injuries caused by rails projecting four inches above the plank surface of a street.<sup>6</sup> The municipality is likewise liable for articles improperly left lying in the highway,<sup>7</sup> such as large stones<sup>8</sup> or piles of brick,<sup>9</sup> or in the case of lumber or logs<sup>10</sup> or a pile of dirt<sup>11</sup> unnecessarily and improperly placed in the highway. But objects placed in the highway to serve a necessary and convenient purpose, and not in such a position as to interfere unnecessarily with travel on the highway, will not give rise to liability for injuries caused thereby.<sup>12</sup> Nor is the municipality liable for

**1. Failure to Provide Against Removal.** — *Myers v. Springfield*, 112 Mass. 489; *Howard v. Mendon*, 117 Mass. 585; *Fox v. Chelsea*, 171 Mass. 297.

**Application of Rule.** — So the municipality has been held not to be freed from liability by the erection of barriers when it knew or should have known that it was necessary to remove the barrier from time to time in order to permit cars to pass. *Prentiss v. Boston*, 112 Mass. 43; *Blessington v. Boston*, 153 Mass. 409.

And in *Beck v. Hood*, 185 Pa. St. 32, it was said that a builder did not perform his whole duty by fencing off a dangerous place in a sidewalk and putting up lights in the evening, and then giving no more attention to it, and that he must give some attention to it in the early part of the night, while the walks are actively occupied, in order to be sure that the lights and barriers are in place and are doing their work.

**2. Stump in Highway.** — *New York v. Sheffield*, 4 Wall. (U. S.) 189; *Newport v. Miller*, 93 Ky. 22; *Tilton v. Wenham*, 172 Mass. 407; *Phelps v. Mankato*, 23 Minn. 276; *Ward v. Jefferson*, 24 Wis. 342; *Boltz v. Sullivan*, 101 Wis. 608; *Hinkley v. Rosendale*, 95 Wis. 271; *Stricker v. Reedsburg*, 101 Wis. 457. See also *Foley v. East Flamborough Tp.*, 29 Ont. 139.

**3. Post in Highway.** — *Kansas*. — *Pleasant Grove Tp. v. Ware*, 7 Kan. App. 648.

*Massachusetts*. — *Snow v. Adams*, 1 Cush. (Mass.) 443; *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Warner v. Holyoke*, 112 Mass. 362; *Hayden v. Attleborough*, 7 Gray (Mass.) 338; *Arey v. Newton*, 148 Mass. 598, 12 Am. St. Rep. 604.

*New Hampshire*. — *Willey v. Portsmouth*, 35 N. H. 304; *Chamberlain v. Enfield*, 43 N. H. 356.

*Rhode Island*. — *Yeaw v. Williams*, 15 R. I. 20.

*Vermont*. — *Cassedy v. Stockbridge*, 21 Vt. 391.

*Canada*. — *Atkinson v. Chatham*, 29 Ont. 518; *Therien v. Montreal*, 15 Quebec Super. Ct. 380.

**4. Weinstein v. Terre Haute**, 147 Ind. 556; *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482; *Macomber v. Taunton*, 100 Mass.

255; *Taylor v. Woburn*, 130 Mass. 494; *Yeaw v. Williams*, 15 R. I. 20.

**5. Water Plug.** — *Scranton v. Catterson*, 94 Pa. St. 202.

**6. Projecting Rails.** — *Michigan City v. Boeckling*, 122 Ind. 39. And see *Central R. Co. v. State*, 82 Md. 647.

**7. Articles Lying in Highway.** — *Lebanon Light, etc., Co. v. Leap*, 139 Ind. 443; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687; *Whitney v. Ticonderoga*, 127 N. Y. 40; *Galveston v. Reagan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 48. But see *Simons v. Casco Tp.*, 105 Mich. 588.

**8. Stones in Highway.** — *Bigelow v. Weston*, 3 Pick. (Mass.) 267; *Naylor v. Salt Lake City*, 9 Utah 491.

But loose stones in a highway do not necessarily constitute a statutory insufficiency therein merely because a statute requires their monthly removal. *Washburn v. Woodstock*, 49 Vt. 503.

**9. Piles of Brick.** — *Frost v. Portland*, 11 Me. 271.

A municipality has also been held liable for injuries caused by a piece of brick in the highway, on which a horse stepped. *Hazard v. Council Bluffs*, 87 Iowa 51.

**10. Lumber and Logs.** — *Indiana*. — *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222.

*Maine*. — *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721.

*Massachusetts*. — *Snow v. Adams*, 1 Cush. (Mass.) 443.

*Michigan*. — *Langworthy v. Green Tp.*, 88 Mich. 207.

*New York*. — *Tinker v. New York etc., R. Co.*, 157 N. Y. 312, affirming 92 Hun (N. Y.) 269.

*Vermont*. — *Bagley v. Ludlow*, 41 Vt. 425.

*Washington*. — *Saylor v. Montesano*, 11 Wash. 328.

*Wisconsin*. — *Slivitski v. Wien*, 93 Wis. 460.

**11. Pile of Dirt.** — *Champaign v. Jones*, 132 Ill. 304; *Griffin v. New York*, 9 N. Y. 456, 61 Am. Dec. 700; *Stafford v. Oskaloosa*, 57 Iowa 748.

**12. Objects Rightfully in Highway.** — *Macomber v. Taunton*, 100 Mass. 255; *Ring v. Co-*

injuries caused by obstructions necessarily created in the making of repairs on the highway, provided travelers are properly warned of the presence of such obstructions.<sup>1</sup>

*f. OBJECTS FRIGHTENING HORSES* — (1) *Municipal Liability*. — It is generally held that a municipality is liable for injuries caused by objects allowed by it to remain in the highway which are of a character to frighten horses.<sup>2</sup> In *Massachusetts* and *South Carolina*, however, the presence of such an object is not considered to constitute a defect in the highway, so as to authorize a recovery under the statute,<sup>3</sup> and a like view has been taken in *Canada*.<sup>4</sup> In *Michigan*, it seems, the municipal liability is limited to cases in which the object is within the traveled part of the highway,<sup>5</sup> and this is as far as the actual decisions go in *Maine*.<sup>6</sup> But generally the fact that the object is in the untraveled rather than the traveled part does not relieve the

hoses, 77 N. Y. 83, 33 Am. Rep. 574; Dougherty v. Horseheads, 159 N. Y. 154, reversing 5 N. Y. App. Div. 625; Dubois v. Kingston, 102 N. Y. 210; Cushing v. Boston, 128 Mass. 330.

*Trees Planted Near the Sidewalk* and boxed to prevent injury from cattle or vehicles do not show negligence *per se* on the part of the municipality. The circumstances of each case are controlling. The same considerations apply in regard to hitching posts. Brewer, J., in *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482.

1. *Obstructions Created in Course of Repair*. — *Jacobs v. Bangor*, 16 Me. 187, 33 Am. Dec. 652; *Morton v. Frankfort*, 55 Me. 46; *Lane v. Lewiston*, 91 Me. 292; *Southwell v. Detroit*, 74 Mich. 438; *Williams v. Tripp*, 11 R. I. 447.

2. *Objects Frightening Horses* — *Connecticut*. — *Dimock v. Suffield*, 30 Conn. 129; *Ayer v. Norwich*, 39 Conn. 381, 12 Am. Rep. 396; *Young v. New Haven*, 39 Conn. 435.

*Illinois*. — *Vandalia v. Huss*, 41 Ill. App. 517.

*Indiana*. — *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124.

*Maine*. — *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722.

*Maryland*. — *Kennedy v. Cecil County*, 69 Md. 65.

*Michigan*. — *Simons v. Casco Tp.*, 105 Mich. 588.

*New Hampshire*. — *Winship v. Enfield*, 42 N. H. 197; *Chamberlain v. Enfield*, 43 N. H. 356; *Bartlett v. Hooksett*, 48 N. H. 18. See *Hebbard v. Berlin*, 66 N. H. 623, 32 Atl. Rep. 229; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55.

*New York*. — *Whitney v. Ticonderoga*, 53 Hun (N. Y.) 214; *Eggleston v. Columbia Turnpike Road*, 82 N. Y. 278; *Wilson v. Spafford*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 649; *Burns v. Farmington*, 31 N. Y. App. Div. 364; *Studeor v. Gouverneur*, 15 N. Y. App. Div. 229; *Champlin v. Penn Yan*, 34 Hun (N. Y.) 33, affirmed 102 N. Y. 680.

*Pennsylvania*. — *North Manheim Tp. v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650; *Baker v. North East*, 151 Pa. St. 234.

*Rhode Island*. — *Bennett v. Fifeild*, 13 R. I. 139, 43 Am. Rep. 17; *Stone v. Pendleton*, (R. I. 1898) 43 Atl. Rep. 643.

*Texas*. — *Patterson v. Austin*, 15 Tex. Civ. App. 201.

*Vermont*. — *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

*Wisconsin*. — *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Bloor v. Delafield*, 69 Wis. 273; *Cairncross v. Pewaukee*, 78 Wis. 70; *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69.

3. In *Massachusetts* it is ruled that a town is not liable for an injury caused by the presence of an object in the highway frightening a horse, if the horse or vehicle does not actually come in contact with such object and it is not an incumbrance or obstruction in the way of travel. *Keith v. Easton*, 2 Allen (Mass.) 552; *Kingsbury v. Dedham*, 13 Allen (Mass.) 186, 90 Am. Dec. 191; *Cook v. Charlestown*, 13 Allen (Mass.) 190, note, 98 Mass. 80; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Montague*, 115 Mass. 571; *Lincoln v. Boston*, 148 Mass. 578, 12 Am. St. Rep. 601; *Bowes v. Boston*, 155 Mass. 344. Compare *Pierce v. New Bedford*, 129 Mass. 534, 37 Am. Rep. 387.

And it is immaterial that the horse would have come in contact with the object if it had not been frightened. *Cook v. Charlestown*, 98 Mass. 80.

But a town may be answerable for damages where an injury is caused by the horse shying at one defect, and the carriage hitting the same or some other defect. *Bigelow v. Weston*, 3 Pick. (Mass.) 267; *Bly v. Haverhill*, 110 Mass. 520; *Woods v. Groton*, 111 Mass. 357; *Cushing v. Bedford*, 125 Mass. 526.

*South Carolina Cases*. — *Dunn v. Barnwell*, 43 S. Car. 398, 49 Am. St. Rep. 843; *Brown v. Laurens County*, 38 S. Car. 282; *Mason v. Spartanburg County*, 40 S. Car. 390, 42 Am. St. Rep. 887.

4. *Canada Cases*. — *Maxwell v. Clarke Tp.*, 4 Ont. App. 466; *O'Neil v. Windham*, 24 Ont. App. 341.

5. In *Michigan* the earlier cases stated that such an object standing in the untraveled part of the highway was not a lack of repair within the meaning of the statute, and consequently not a ground of action against the municipality. *Agnew v. Corunna*, 55 Mich. 429, 54 Am. Rep. 383; *Beall v. Athens Tp.*, 81 Mich. 536. But in the latest case it is stated that the municipality is liable if the object is within the traveled part of the highway. See *Simons v. Casco Tp.*, 105 Mich. 588.

6. *Maine Decisions*. — *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Nichols v. Athens*, 66 Me. 402; *Farrell v. Oldtown*, 60 Me. 72.



municipality from liability.<sup>1</sup>

(2) *Individual Liability*.—An individual or corporation placing objects in the highway calculated to frighten horses is also liable for resulting damage<sup>2</sup> if such use of the highway involves an unreasonable interference with the rights of the public.<sup>3</sup> And the fact that he is the owner of the fee in the road is immaterial.<sup>4</sup> It has been decided that one transporting on the highway objects calculated to frighten horses is liable for the results of such fright if he fails to exercise precaution to avoid any injurious consequences, by warning the driver of the horses or aiding him to pass such object.<sup>5</sup>

(3) *Character of Object*.—The object must be calculated to frighten a horse of reasonable gentleness,<sup>6</sup> and whether it is of such a character is generally a question for the jury,<sup>7</sup> though in a few cases objects have been declared, as

**1. Objects in Untraveled Part of Road.**—*Dimoch v. Suffield*, 30 Conn. 129; *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; *Chamberlain v. Enfield*, 43 N. H. 356; *North Manheim Tp. v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650; *Patterson v. Austin*, 15 Tex. Civ. App. 201; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73. See also *infra*, this section and subsection, *Defects Outside of Traveled Path*.

**2. Individual Liability—England.**—*Harris v. Mobbs*, 3 Ex. D. 268, 39 L. T. N. S. 164.

*Connecticut*.—*Clinton v. Howard*, 42 Conn. 294.

*Delaware*.—*Kyne v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 185.

*Illinois*.—*Baltimore, etc., R. Co. v. Faith*, 71 Ill. App. 59.

*Indiana*.—*Pittsburgh, etc., R. Co. v. Kitely*, 118 Ind. 155.

*Kansas*.—*Topeka Water Co. v. Whiting*, 58 Kan. 639.

*Maine*.—*Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456.

*Massachusetts*.—*Jones v. Housatonic R. Co.*, 107 Mass. 261; *Barnes v. Chapin*, 4 Allen (Mass.) 444, 81 Am. Dec. 710; *Bemis v. Temple*, 162 Mass. 342.

*New York*.—*Stewart v. Porter Mfg. Co.*, (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 220; *Tinker v. New York, etc., R. Co.*, 157 N. Y. 312, 5 Am. Neg. Rep. 208, affirming 92 Hun (N. Y.) 269, distinguishing *Eggleston v. Columbia Turnpike Road*, 82 N. Y. 281.

*North Carolina*.—*Myers v. Railroad*, 87 N. Car. 345.

*Pennsylvania*.—*Mallory v. Griffey*, 85 Pa. St. 275; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580; *Piollet v. Simmers*, 106 Pa. St. 95, 51 Am. Rep. 496; *Brunner v. American Tel., etc., Co.*, 160 Pa. St. 300.

*Canada*.—*Rice v. Whitby*, 28 Ont. 598.

So it was decided that one was liable where he placed boards in the street, the rattling of which, when driven over by another person, frightened a horse on the highway. *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456.

**Liability of Railroad Company for Frightening Horse.**—See the titles **CROSSINGS**, vol. 8, p. 335; **RAILROADS**; **STREET RAILROADS**.

**3. Reasonableness of Use of Highway.**—*Wilkins v. Day*, 12 Q. B. D. 110, 49 L. T. N. S. 399; *Tinker v. New York, etc., R. Co.*, 157 N. Y. 312; *Judd v. Fargo*, 107 Mass. 264, in

which last case it was held that the question whether a sled and tubs thereon left in the highway near the defendant's premises, preparatory to unloading, constituted a nuisance rendering the defendant liable for the frightening of a horse thereby, depended upon whether they had been in the highway for an unreasonable time, and on this issue the fact that the highway was little frequented might be considered, though not whether it was convenient to leave the articles in the highway nor whether the defendant's neighbors were accustomed to do so.

**4. Ownership of Fee.**—*Tinker v. New York, etc., R. Co.*, 157 N. Y. 312.

**5. Objects in Course of Transportation.**—*Bennett v. Lovell*, 12 R. I. 167, 34 Am. Rep. 628.

**6. Object Must Be Calculated to Frighten Ordinary Horse—Connecticut.**—*Ayer v. Norwich*, 39 Conn. 381, 12 Am. Rep. 396.

*Iowa*.—*Hanson v. Chicago, etc., R. Co.*, 94 Iowa 409.

*Maine*.—*Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722.

*New Hampshire*.—*Bartlett v. Hooksett*, 48 N. H. 18.

*Pennsylvania*.—*Mallory v. Griffey*, 85 Pa. St. 275; *Pittsburgh v. Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580; *Piollet v. Simmers*, 106 Pa. St. 95, 51 Am. Rep. 496.

*Canada*.—*Macdonald v. Yarmouth Tp.*, 29 Ont. 259.

**7. Question for Jury—Connecticut.**—*Ayer v. Norwich*, 39 Conn. 381, 12 Am. Rep. 396.

*Illinois*.—*Vandalia v. Huss*, 41 Ill. App. 517.

*New Hampshire*.—*Chamberlain v. Enfield*, 43 N. H. 356; *Bartlett v. Hooksett*, 48 N. H. 18.

*New York*.—*Burns v. Farmington*, 31 N. Y. App. Div. 364; *Tinker v. New York, etc., R. Co.*, 157 N. Y. 312.

*Pennsylvania*.—*Fritsch v. Allegheny*, 91 Pa. St. 226.

*Wisconsin*.—*Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Cairncross v. Pewaukee*, 78 Wis. 66; *Laird v. Otsego*, 90 Wis. 25.

**Particular Articles Supporting Recovery.**—*A Steam Roller* left in the street in the intervals of using it has been held to justify a recovery against a municipality. *Young v. New Haven*, 39 Conn. 435; *Hughes v. Fond du Lac*, 73 Wis. 380. But see *Keeley v. Shanley*, 140 Pa. St. 213.

But the use of such a roller by individuals, though calculated to frighten horses, is not a defect which will authorize a recovery against

a matter of law, not to be of such a character.<sup>1</sup>

An Improper Use of the Highway must be involved in the presence of the object therein, since otherwise the municipality could not enforce its removal,<sup>2</sup> and the mere fact that the leaving of an object of an ordinary character in the street involves the violation of an ordinance will not render the municipality liable.<sup>3</sup>

Evidence that Other Horses Were Frightened by a particular object is admissible to show that it was reasonably calculated to frighten horses.<sup>4</sup>

*g. SNOW AND ICE* — (1) *Municipal Liability* — (a) *In General*. — The liability imposed on a municipality for injuries caused by snow and ice on a highway is primarily based on its negligence in failing to remove them;<sup>5</sup> and in this, as in other cases, the municipality is bound merely to exercise reasonable care and diligence to render the highway safe,<sup>6</sup> and this is a question for determination by the jury.<sup>7</sup> It is generally held that where the highway is properly

a town, though if the town itself used it, without taking proper precautions to warn persons approaching, it will be liable. *Mullen v. Glens Falls*, 11 N. Y. App. Div. 275; *Paine v. Rochester*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 587.

*Material or Lumber* placed on the roadside has been held to support a verdict against the town. *Laird v. Otsego*, 90 Wis. 25; *North Manheim Tp. v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650.

A Banner hung over the highway which frightened a horse was held to be a ground of liability on the part of the municipality. *Champlin v. Penn Yan*, 34 Hun (N. Y.) 33.

1. **Objects Not Ground of Recovery as Matter of Law.** — So it has been held that a wagon left in the margin of the road will not support an action, *Rounds v. Stratford*, 26 U. C. C. P. 11; *Nichols v. Athens*, 66 Me. 402; nor blocks of granite placed in the highway for the purpose of making repairs, *Farrell v. Oldtown*, 69 Me. 72; nor a natural boulder of large size around which the road was constructed, *Barrett v. Walworth*, 64 Hun (N. Y.) 526.

2. **Improper Use of Highway.** — *Bartlett v. Hooksett*, 48 N. H. 18; *North Manheim Tp. v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650; *Cairncross v. Pewaukee*, 78 Wis. 66.

**Illustration of Distinction.** — In *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, it was held that the municipality was not liable for an injury resulting from the fright of a horse at a mortar box placed by an abutting owner on the highway while it was necessarily used in plastering his house, this being a proper use of the highway; while in the previous case of *Bloor v. Delafield*, 69 Wis. 273, it was held that such liability did arise where a mortar box was placed on the margin of the highway merely as a temporary place of deposit from which it was to be taken, it not being proper to use the highway for such a purpose.

3. **Violation of Ordinance.** — *Studeor v. Gouverneur*, 15 N. Y. App. Div. 229.

4. **Proof of Other Horses Being Frightened by Objects** — *England*. — *Brown v. Eastern*, etc., R. Co., 22 Q. B. D. 391.

*Connecticut*. — *House v. Metcalf*, 27 Conn. 631.

*Maine*. — *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611.

*Massachusetts*. — *Bemis v. Temple*, 162 Mass. 342.

*Michigan*. — *Smith v. Sherwood Tp.*, 62 Mich. 159.

*New Hampshire*. — *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55.

*New York*. — *Stewart v. Porter Mfg. Co.*, (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 221; *Scott v. Hough*, (Supm. Ct. Gen. T.) 14 N. Y. St. Rep. 401; *Wilson v. Spafford*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 649; *Champlin v. Penn Yan*, 34 Hun (N. Y.) 33.

But the contrary was apparently the view taken in a *Wisconsin* case, in which it was held that the fact that other horses had not been frightened at the object was not admissible to show that it was not calculated to frighten horses. *Bloor v. Delafield*, 69 Wis. 273.

5. **Liability Based on Negligence.** — *Michigan City v. Boeckling*, 122 Ind. 39; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Todd v. Troy*, 61 N. Y. 506; *Kaveny v. Troy*, 108 N. Y. 571; *Harrington v. Buffalo*, 121 N. Y. 147.

6. **Reasonable Care and Diligence** — *Connecticut*. — *Landolt v. Norwich*, 37 Conn. 615; *Congdon v. Norwich*, 37 Conn. 419; *Burr v. Plymouth*, 48 Conn. 460; *Cloughessey v. Waterbury*, 51 Conn. 405, 51 Am. Rep. 38.

*Illinois*. — *Chicago v. Richardson*, 75 Ill. App. 198.

*Massachusetts*. — *Shea v. Lowell*, 8 Allen (Mass.) 136; *Rooney v. Randolph*, 128 Mass. 580; *Hayes v. Cambridge*, 136 Mass. 402; *Blake v. Lowell*, 143 Mass. 296.

*New York*. — *Kaveny v. Troy*, 108 N. Y. 571; *Battersby v. New York*, 7 Daly (N. Y.) 16.

*Ohio*. — *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 843.

*Rhode Island*. — *Providence v. Clapp*, 17 How. (U. S.) 161.

*Canada*. — *Caswell v. St. Mary's*, etc., Road Co., 28 U. C. Q. B. 247.

7. **Question for Jury** — *Colorado*. — *Boulder v. Niles*, 9 Colo. 415.

*Connecticut*. — *Congdon v. Norwich*, 37 Conn. 414.

*Massachusetts*. — *Gerald v. Boston*, 108 Mass. 580.

*Nebraska*. — *Nebraska City v. Rathbone*, 20 Neb. 288; *Bell v. York*, 31 Neb. 842.

*New York*. — *Woolsey v. Ellenville*, 61 Hun (N. Y.) 136; *Todd v. Troy*, 61 N. Y. 506; *Allison v. Middletown*, 101 N. Y. 667.



constructed, the mere fact that it is rendered slippery by the presence of ice or snow will not ordinarily make the municipality liable for resulting injuries.<sup>1</sup> It is, on the other hand, generally agreed that if ice or snow is suffered to remain until it forms into mounds or ridges, the municipality will be liable therefor, on the theory that it then actually forms an obstruction in the highway.<sup>2</sup> Nor can the municipality free itself from liability by requiring an abutting owner to remove snow and ice.<sup>3</sup> This distinction seems to be adopted in *New York*, though not clearly brought out in the adjudged cases,<sup>4</sup> but it is emphatically repudiated in *Connecticut*, as being based on no sufficient reason.<sup>5</sup> The municipality may also be liable for failure to clear away snow-

*Rhode Island*.—*Providence v. Clapp*, 17 How. (U. S.) 161.

*Wisconsin*.—*McMaugh v. Milwaukee*, 32 Wis. 200; *Hill v. Fond du Lac*, 56 Wis. 242; *Morrison v. Madison*, 96 Wis. 452.

**1. No Liability for Mere Slippery Condition**—*Colorado*.—*Boulder v. Niles*, 9 Colo. 415.

*Illinois*.—*Chicago v. McGiven*, 78 Ill. 347; *Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Gibson v. Johnson*, 4 Ill. App. 288; *Aurora v. Parks*, 21 Ill. App. 459.

*Iowa*.—*Broburg v. Des Moines*, 63 Iowa 523, 50 Am. Rep. 756.

*Maine*.—*Smyth v. Bangor*, 72 Me. 249.

*Massachusetts*.—*Stanton v. Springfield*, 12 Allen (Mass.) 566; *Johnson v. Lowell*, 12 Allen (Mass.) 572, note; *Nason v. Boston*, 14 Allen (Mass.) 508; *Luther v. Worcester*, 97 Mass. 268; *Stone v. Hubbardston*, 100 Mass. 49; *Gilbert v. Roxbury*, 100 Mass. 185; *Pinkham v. Topsfield*, 104 Mass. 78; *Hughes v. Lawrence*, 160 Mass. 474.

*Michigan*.—*McKeller v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357; *Kannenberg v. Alpena*, 96 Mich. 53.

*Minnesota*.—*Henkes v. Minneapolis*, 42 Minn. 530.

*Nebraska*.—*Nebraska City v. Rathbone*, 20 Neb. 288; *Bell v. York*, 31 Neb. 842.

*New York*.—*Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Kinney v. Troy*, 108 N. Y. 567; *Buck v. Glens Falls*, 4 N. Y. App. Div. 323; *Tobey v. Hudson*, 49 Hun (N. Y.) 318; *Corbett v. Troy*, 53 Hun (N. Y.) 228.

*Pennsylvania*.—*Mauch Chunk v. Kline*, 100 Pa. St. 119, 45 Am. Rep. 364; *Wyman v. Philadelphia*, 175 Pa. St. 117.

*Virginia*.—*Lynchburg v. Wallace*, 95 Va. 640.

*Washington*.—*Calder v. Walla Walla*, 6 Wash. 377.

*Wisconsin*.—*Cook v. Milwaukee*, 24 Wis. 270, 1 Am. Rep. 183; *Perkins v. Fond du Lac*, 34 Wis. 435; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614; *Chamberlain v. Oshkosh*, 84 Wis. 289, 36 Am. St. Rep. 928; *Beaton v. Milwaukee*, 97 Wis. 416; *Cooper v. Waterloo*, 98 Wis. 424.

*Canada*.—*Bleakley v. Prescott*, 12 Ont. App. 637; *Ringland v. Toronto*, 23 U. C. C. P. 93.

So a municipality was held not to be liable for the slippery condition of a sidewalk caused by an even coating of snow about two inches in depth, which, becoming soft, had been indented with numerous footprints, and had frozen in that condition when the weather became colder. *Hyer v. Janesville*, 101 Wis. 371, 5 Am. Neg. Rep. 268.

**2. Mounds and Ridges**—*United States*.—*Smith v. Chicago*, 38 Fed. Rep. 388.

*Illinois*.—*Macomb v. Smithers*, 6 Ill. App. 470; *Aurora v. Parks*, 21 Ill. App. 459.

*Iowa*.—*Collins v. Council Bluffs*, 32 Iowa 324, 7 Am. Rep. 200; *Broburg v. Des Moines*, 63 Iowa 523, 50 Am. Rep. 756; *Huston v. Council Bluffs*, 101 Iowa 33.

*Massachusetts*.—*Luther v. Worcester*, 97 Mass. 268; *Hutchins v. Boston*, 97 Mass. 272; *Street v. Holyoke*, 105 Mass. 82, 7 Am. Rep. 500; *Morse v. Boston*, 109 Mass. 446; *Fitzgerald v. Woburn*, 109 Mass. 204; *McAuley v. Boston*, 113 Mass. 503; *Williams v. Lawrence*, 113 Mass. 506, note; *McKean v. Salem*, 148 Mass. 109; *Hughes v. Lawrence*, 160 Mass. 474; *Loker v. Brookline*, 13 Pick. (Mass.) 343.

*Missouri*.—*Norton v. St. Louis*, 97 Mo. 537.

*Nebraska*.—*Nebraska City v. Rathbone*, 20 Neb. 288; *Foxworthy v. Hastings*, 23 Neb. 772.

*New York*.—*Todd v. Troy*, 61 N. Y. 506; *Smith v. Brooklyn*, 107 N. Y. 655; *Harrington v. Buffalo*, 121 N. Y. 147; *Keane v. Waterford*, 130 N. Y. 188; *Stone v. Poughkeepsie*, 15 N. Y. App. Div. 582.

*Pennsylvania*.—*McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432; *Mauch Chunk v. Kline*, 100 Pa. St. 119, 45 Am. Rep. 364; *Wyman v. Philadelphia*, 175 Pa. St. 117; *Miller v. Bradford*, 186 Pa. St. 164; *Scott v. Scranton*, 5 Lack. Leg. N. (Pa.) 73; *Dehnhardt v. Philadelphia*, 15 W. N. C. (Pa.) 214.

*Rhode Island*.—*Providence v. Clapp*, 17 How. (U. S.) 161.

*Virginia*.—*Lynchburg v. Wallace*, 95 Va. 640.

*Washington*.—*Calder v. Walla Walla*, 6 Wash. 377.

*Wisconsin*.—*Cook v. Milwaukee*, 24 Wis. 274, 1 Am. Rep. 183; *McDonald v. Ashland*, 78 Wis. 251; *Paulson v. Pelican*, 79 Wis. 445.

**3. Delegation of Duty to Property Owner**.—*Norton v. St. Louis*, 97 Mo. 537; *Taylor v. Yonkers*, 105 N. Y. 202; *Rochester v. Campbell*, 123 N. Y. 405. See also *infra*, this subdivision, *Individual Liability*.

**4.** See *Tobey v. Hudson*, 49 Hun (N. Y.) 318, and the *New York* cases in the preceding notes.

**5. Connecticut Rule**.—In *Cloughessey v. Waterbury*, 51 Conn. 405, 50 Am. Rep. 38, it was held that the duty of the municipality was to exercise ordinary care to keep the highway safe, and that if the municipality has ample notice of the presence of ice in any form on a much frequented sidewalk, which it can with a reasonable expenditure remove, it is liable for failure to do so, while such liability does not follow if a large territory is suddenly covered



drifts in a country road,<sup>1</sup> and if the general state of the road is such that wheeled vehicles are used, snow and ice rendering travel unsafe should be removed.<sup>2</sup>

(b) **Rules in Particular States.** — In *Ohio* it seems that a municipality is not bound, save under very exceptional conditions, to remove snow and ice, this not being considered reasonable and practicable.<sup>3</sup> And in *Michigan* it has been decided that the statutory duty of the municipality to keep highways in a reasonably safe condition does not generally involve the removal of snow or ice.<sup>4</sup> In *Massachusetts* and *Rhode Island* the municipal liability is now restricted by statute.<sup>5</sup>

(c) **Ice Resulting from Negligence.** — The municipality is liable for an accumulation of ice which results from its own negligence,<sup>6</sup> such as its failure to make proper and sufficient drains to carry off water,<sup>7</sup> or to clear a gutter,<sup>8</sup> or to prevent such accumulation from a conductor on a building overhanging or near to the sidewalk;<sup>9</sup> and in such a case the fact that the accumulation is smooth and level is no defense.<sup>10</sup> The municipality is liable also for injuries caused by smooth or rough ice which would not have formed had there not been a structural defect in the highway preventing water thereon from flowing off.<sup>11</sup>

**Drippings from Building.** — But the municipality is not liable for injuries caused by ice formed by the dripping of water from an abutting building,<sup>12</sup> unless it forms a ridge or mound which should be removed in the exercise of reasonable care.<sup>13</sup>

with ice; and in its discussion of the question the court showed that the cases sustaining the distinction referred to in the text were all based upon the *Massachusetts* case of *Stanton v. Springfield*, 12 Allen (Mass.) 566, which was a decision under the statute of that state. See also *Landolt v. Norwich*, 37 Conn. 615; *Congden v. Norwich*, 37 Conn. 419; *Dooley v. Meriden*, 44 Conn. 117, 26 Am. Rep. 433; *Hartford v. Talcott*, 43 Conn. 525, 40 Am. Rep. 189.

1. **Failure to Remove Drifts.** — *Rogers v. Newport*, 62 Me. 101; *Green v. Danby*, 12 Vt. 338; *McCabe v. Hammond*, 34 Wis. 590.

2. *Carville v. Westford*, 163 Mass. 544; *Dutton v. Weare*, 17 N. H. 34, 43 Am. Dec. 590.

3. **Ohio Decisions.** — *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 843; *McDonald v. Toledo*, 63 Fed. Rep. 60. And see *Conneaut v. Naef*, 54 Ohio St. 529.

4. **Michigan Decisions.** — *McKellar v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357; *Kannenbergh v. Alpena*, 96 Mich. 53; *Rolf v. Greenville*, 102 Mich. 544; *Hutchinson v. Ypsilanti*, 103 Mich. 12; *Gavett v. Jackson*, 109 Mich. 408.

5. In *Massachusetts*, Stat. 1896, c. 540, provides that no city or town shall be liable for any injury to person or property in consequence of snow or ice on a highway or bridge, if the place at which the injury was received was otherwise reasonably safe and convenient. See *Newton v. Worcester*, 169 Mass. 516.

In *Rhode Island* it is provided (Gen. Laws 1896, c. 72, § 13) that the municipality shall not be liable for an injury caused by snow or ice obstructing a highway, unless notice in writing of the existence of the particular obstruction has been given to the surveyor of highways within reasonable time before the injury. See *McCloskey v. Moies*, 19 R. I. 297.

6. **Accumulation of Ice Caused by Negligence.** — *Chicago v. Smith*, 48 Ill. 107; *Hall v. Lowell*, 10 Cush. (Mass.) 260; *Corbett v. Troy*, 53

*Hun* (N. Y.) 228; *Bishop v. Goshen*, 120 N. Y. 337.

7. **Insufficient Drains.** — *Woolsey v. Ellenville*, 61 Hun (N. Y.) 136; *Decker v. Scranton*, 151 Pa. St. 241, 31 Am. St. Rep. 757.

8. *Gaylord v. New Britain*, 58 Conn. 398.

9. **Accumulation from Conductor.** — *McGowan v. Boston*, 170 Mass. 384; *Todd v. Troy*, 61 N. Y. 506; *Allison v. Middletown*, 101 N. Y. 667; *Darling v. New York*, 18 Hun (N. Y.) 340; *Scoville v. Salt Lake City*, 11 Utah 60. But see *Gavett v. Jackson*, 109 Mich. 408.

10. **Character of Ice Immaterial.** — *Decker v. Scranton*, 151 Pa. St. 241, 31 Am. St. Rep. 757.

11. **Ice Resulting from Structural Defect in Highway.** — *Pinkham v. Topsfield*, 104 Mass. 78; *Fitzgerald v. Woburn*, 109 Mass. 204; *Adams v. Chicopee*, 147 Mass. 440; *Gilbie v. Lockport*, 122 N. Y. 403; *Decker v. Scranton*, 151 Pa. St. 241, 31 Am. St. Rep. 757. *Contra*, *Chamberlain v. Oshkosh*, 84 Wis. 289, 36 Am. St. Rep. 928.

In *Rhode Island* it has been held that where the accident was caused by slipping on ice which formed in a defective depression in a sidewalk, this was not an obstruction caused solely by ice or snow within a statute exempting municipalities from liability for injuries caused by such an obstruction, if no notice of the obstruction had previously been given to the surveyor of highways. *McCloskey v. Moies*, 19 R. I. 297.

12. **Ice Formed by Drippings from Building.** — *Kaveny v. Troy*, 108 N. Y. 571; *Hausmann v. Madison*, 85 Wis. 187, 39 Am. St. Rep. 834. And see *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

13. *Thompson v. Saratoga Springs*, 22 N. Y. App. Div. 186; *Miller v. Bradford*, 186 Pa. St. 164; *Hausmann v. Madison*, 85 Wis. 187, 39 Am. St. Rep. 834.

(d) **Pre-existing Defect in Highway.** — If the accident results from a pre-existing defect in the highway, the municipal liability therefor will not be removed by the fact that the accident would not have happened had it not been for the presence of snow or ice, it being the duty of the municipality to construct the highways with a view to that contingency.<sup>1</sup> And so a municipality has been held liable for injuries caused by a pre-existing defective condition, consisting of an accumulation of snow and ice, concurring with a subsequent condition of slipperiness to cause the accident.<sup>2</sup> In *New York*, however, the possible concurrence of such pre-existing defect in producing the injury is not sufficient to justify a recovery, without positive evidence that it did so.<sup>3</sup> And likewise it is held in that state that if new ice forms in a place where there is already snow or ice, the municipality is not liable on account of the old formation if not negligent in failing to remove the new formation.<sup>4</sup>

(e) **Notice to Municipality.** — The municipality will not be liable for injuries caused by ice or snow unless it had notice of the condition of the highway resulting therefrom.<sup>5</sup> Such notice may, however, as in other cases, be implied from the long continuance of the condition;<sup>6</sup> and it has been held that it is chargeable with notice, upon the occurrence of a heavy snow, of the conditions which will naturally result therefrom.<sup>7</sup>

(f) **Reasonable Time for Removal.** — The municipality is entitled to a reasonable time after the discovery of accumulations of ice and snow in which to remove them,<sup>8</sup> and it may wait a reasonable time for action by the property owners.<sup>9</sup>

**All the Circumstances Are to Be Considered,** and it has been stated that negligence

1. **Pre-existing Defect Combining with Snow or Ice** — *Kansas*. — *Atchison v. King*, 9 Kan. 550.

*Nebraska*. — *Lincoln v. Smith*, 28 Neb. 762.

*Rhode Island*. — *Hampson v. Taylor*, 15 R. I. 83.

*Vermont*. — *Barton v. Montpelier*, 30 Vt. 650.

*Wisconsin*. — *Perkins v. Fond du Lac*, 34 Wis. 435; *Stilling v. Thorp*, 54 Wis. 537, 41 Am. Rep. 60; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614; *Beaton v. Milwaukee*, 97 Wis. 416.

2. *Satzer v. Milwaukee*, 97 Wis. 471.

3. **New York Decisions.** — See *Taylor v. Yonkers*, 105 N. Y. 202; *Ayres v. Hammondsport*, 130 N. Y. 665; *Tobey v. Hudson*, 49 Hun (N. Y.) 318.

4. **New Formation of Ice or Snow.** — *Kaveny v. Troy*, 108 N. Y. 571; *Harrington v. Buffalo*, 121 N. Y. 147; *McNally v. Cohoes*, 127 N. Y. 350; *Blakely v. Troy*, 18 Hun (N. Y.) 167; *Tobey v. Hudson*, 49 Hun (N. Y.) 318; *Johnson v. Glens Falls*, (Supm. Ct. Gen. T.) 41 N. Y. St. Rep. 820; *Lawless v. Troy*, (Supm. Ct. Gen. T.) 44 N. Y. St. Rep. 735; *O'Keeffe v. New York*, 29 N. Y. App. Div. 524.

5. **Notice to Municipality** — *Colorado*. — *Boulder v. Niles*, 9 Colo. 415.  
*Massachusetts*. — *Fortin v. Easthampton*, 145 Mass. 196.

*Minnesota*. — *Stanke v. St. Paul*, 71 Minn. 51, 4 Am. Neg. Rep. 61.

*New Hampshire*. — *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

*New York*. — *Blakeley v. Troy*, 18 Hun (N. Y.) 167; *Foley v. Troy*, 45 Hun (N. Y.) 396; *Todd v. Troy*, 61 N. Y. 506; *Twogood v. New York*, 102 N. Y. 216; *Hunt v. New York*, 109 N. Y. 134; *Harrington v. Buffalo*, 121 N. Y. 147; *McNally v. Cohoes*, 127 N. Y. 350; *Smith v. Brooklyn*, 36 Hun (N. Y.) 224.

*Ohio*. — *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 843.

*Pennsylvania*. — *Mauch Chunk v. Kline*, 100 Pa. St. 119, 45 Am. Rep. 364.

*Utah*. — *Scoville v. Salt Lake City*, 11 Utah 60.

See also *infra*, this section, *Notice of Defect*.

6. **Constructive Notice.** — *Savage v. Bangor*, 40 Me. 176, 63 Am. Dec. 658; *Reich v. New York*, 12 Daly (N. Y.) 72; *Corbett v. Troy*, 53 Hun (N. Y.) 228; *Todd v. Troy*, 61 N. Y. 506; *Gillrie v. Lockport*, 122 N. Y. 403; *Masters v. Troy*, 50 Hun (N. Y.) 485; *Walsh v. Buffalo*, 17 N. Y. App. Div. 112.

In the following cases it was held that the circumstances were not such as to charge the municipality with notice. *O'Connor v. New York*, 16 Daly (N. Y.) 58; *Tracey v. Poughkeepsie*, 46 Hun (N. Y.) 569; *Anthony v. Glens Falls*, 4 N. Y. App. Div. 218.

7. *Corts v. District of Columbia*, 18 D. C. 277; *Foxworthy v. Hastings*, 25 Neb. 133; *McCabe v. Hammond*, 34 Wis. 590. And see *Holt v. Penobscot*, 56 Me. 15, 96 Am. Dec. 429.

8. **Reasonable Time for Removal.** — *Smith v. Chicago*, 38 Fed. Rep. 388; *Payne v. Lowell*, 10 Allen (Mass.) 147; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *O'Connor v. New York*, 16 Daly (N. Y.) 58; *Blakeley v. Troy*, 18 Hun (N. Y.) 167; *Winne v. Albany*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 603; *Dorn v. Oyster Bay*, 84 Hun (N. Y.) 510; *Lynchburg v. Wallace*, 95 Va. 640. See also *Hayes v. Cambridge*, 136 Mass. 402.

9. *Taylor v. Yonkers*, 105 N. Y. 202.

So in *Seeley v. Litchfield*, 49 Conn. 134, 44 Am. Rep. 213, it was held that the selectmen of the town were excused from taking action by the existence of a custom among the inhabitants of the town to join and break paths through the snow.



cannot be inferred from the fact that the highway has for three months been rendered impassable by snowdrifts.<sup>1</sup>

(g) *Impossibility of Removal.* — The formation of ice may in some cases be such as to render it practically impossible to remove it, in which case the municipality may await a thaw.<sup>2</sup>

*Sprinkling Ashes and Sand.* — And it is stated that while the municipality, if it cannot remove the ice, should require householders, if the danger is great, to sprinkle ashes or sand, it is not responsible for their omission so to do.<sup>3</sup>

(2) *Individual Liability.* — An individual, being under no obligation to keep the highway safe for travel, is not liable for injuries caused by snow or ice thereon, unless he actually causes the accumulation,<sup>4</sup> and a property owner is not rendered liable by the fact that a municipal ordinance requires him to remove the snow and ice.<sup>5</sup>

*h. DEFECTS OUTSIDE OF TRAVELED PATH* — (1) *Municipality Generally Not Liable.* — Though the municipality is required to keep in repair a traveled path, of suitable and sufficient width, within the limits of the highway, the law does not ordinarily require such path to be the whole width of the highway, and hence the municipality will not be liable for defects or obstructions in the part of the highway outside this traveled or "wrought" portion, and not so connected with it as to affect its safety.<sup>6</sup>

1. *Burr v. Plymouth*, 48 Conn. 460.

2. *Impossibility of Removal.* — *Peard v. Mt. Vernon*, 83 Hun (N. Y.) 250; *Kleng v. Buffalo*, 72 Hun (N. Y.) 541, affirmed 156 N. Y. 700; *Betts v. Gloversville*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 331; *O'Keeffe v. New York*, 29 N. Y. App. Div. 524; *Staley v. New York*, 37 N. Y. App. Div. 598; *Harrington v. Buffalo*, 121 N. Y. 147; *Taylor v. Yonkers*, 105 N. Y. 202.

3. *Ashes or Sand on Sidewalk.* — *Taylor v. Yonkers*, 105 N. Y. 202. See also *McGuinness v. Worcester*, 160 Mass. 272; *Buck v. Glens Falls*, 4 N. Y. App. Div. 323.

4. *Individual Liability.* — See *Lumley v. Backus Mfg. Co.*, 73 Fed. Rep. 767; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *Rohling v. Eich*, 23 N. Y. App. Div. 179.

5. *Effect of Municipal Ordinance* — *Connecticut.* — *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189.

*Maryland.* — *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.

*Massachusetts.* — *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682.

*Missouri.* — *St. Louis v. Connecticut Mut. L. Ins. Co.*, 107 Mo. 92, 28 Am. St. Rep. 402.

*New York.* — *Moore v. Gadsden*, 93 N. Y. 12; *Rohling v. Eich*, 23 N. Y. App. Div. 179.

*Ohio.* — *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

*Rhode Island.* — *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502.

6. *Only Traveled or Wrought Portion of Highway Need Be Fit for Travel* —

*Hull v. Richmond*, 2 Woodb. & M. (U. S.) 337.

*Kansas.* — *Wellington* — *Gregg v. Kansas*, 99, 47 Am. Rep. 482.

*Maine.* — *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Philbrick v. Pittston*, 63 Me. 477; *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84; *Blake v. Newfield*, 68 Me. 365; *Farrell v. Oldtown*, 69 Me. 72; *Morse v. Belfast*, 77 Me. 44; *Brown v. Skowhegan*, 82 Me. 273; *Tasker v. Farmingdale*, 85 Me. 523.

*Massachusetts.* — *Macomber v. Taunton*, 100 Mass. 255; *Harwood v. Oakham*, 152 Mass. 421; *Carey v. Hubbardston*, 172 Mass. 106; *Kellogg v. Northampton*, 4 Gray (Mass.) 65; *Smith v. Wendell*, 7 Cush. (Mass.) 498; *Howard v. North Bridgewater*, 16 Pick. (Mass.) 189.

*Michigan.* — *Keyes v. Marcellus*, 50 Mich. 439; *Pringle v. Miller*, 111 Mich. 663.

*New Hampshire.* — *Wiley v. Portsmouth*, 35 N. H. 303; *Graves v. Shattuck*, 35 N. H. 258, 69 Am. Dec. 536.

*New York.* — *Dougherty v. Horseheads*, 159 N. Y. 154.

*Pennsylvania.* — *Scranton v. Hill*, 102 Pa. St. 378, 48 Am. Rep. 211; *Monongahela City v. Fischer*, 111 Pa. St. 9, 56 Am. Rep. 241, 13 Am. & Eng. Corp. Cas. 431.

*Vermont.* — *Rice v. Montpelier*, 19 Vt. 470; *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295; *Ozier v. Hinesburgh*, 44 Vt. 220.

*Wisconsin.* — *Kelley v. Fond du Lac*, 31 Wis. 179; *Hawes v. Fox Lake*, 33 Wis. 443; *Matthews v. Baraboo*, 39 Wis. 677; *Prideaux v. Mineral Point*, 43 Wis. 523, 28 Am. Rep. 558; *James v. Portage*, 48 Wis. 681; *Cartright v. Belmont*, 58 Wis. 373; *Goeltz v. Ashland*, 75 Wis. 642; *Rhyner v. Menasha*, 97 Wis. 523.

So in *Farnum v. Concord*, 2 N. H. 392, the town was held not liable for an injury occasioned by an excavation by the side of the road, although the traveled way was only twelve feet wide, and another excavation existed on the opposite side, and the whole vicinity, by the side of a river, was covered by nearly two feet of water; the court saying that it was no fault of the town that the guide, even under these circumstances, conducted the plaintiff's team out of the traveled way.

*The Object of Working* a certain part of the highway, as when done to accommodate abutting owners, cannot be shown as a defense to an action for injuries caused by defects therein. *Kellogg v. Northampton*, 8 Gray (Mass.) 504.

*Obstructions by Private Persons.* — The rule that only the traveled part of the way need be



**Natural and Artificial Obstacles.** — In *Maine*, however, it is said that persons have the right to travel over the whole width of the highway as located without being subject to other or greater dangers than may be presented by natural obstacles, or than may be occasioned by repairing the traveled path, and that consequently the municipality is liable for injuries caused by artificial, as distinct from natural, obstructions or defects in the untraveled portion.<sup>1</sup>

**Width of Traveled Path.** — The cases do not lay down any rule as to what width a municipality is bound to open and prepare for travel, but it is stated that it need not be made passable by two teams if this cannot be done without great expense and the travel is small.<sup>2</sup>

**Narrowness of Highway.** — A municipality is not, it seems, liable for injuries which would not have occurred had the highway, as established and located, not been unduly narrow and crooked.<sup>3</sup>

In **Regard to City Streets** it would seem that the rule might well be different from that prevailing in the case of country roads, and accordingly it is stated in some cases that there is an absolute duty to keep in repair the whole width of a street.<sup>4</sup> These statements may, however, be viewed with reference to the particular circumstances under which they were made, and in the best-considered cases it is stated that even in the case of city streets the width which must be kept in repair is a matter dependent on particular circumstances, among which, apparently to be considered, are the amount of travel and the question whether the city has ever opened the whole street for travel by doing work thereon, so as to induce persons to use the whole width thereof.<sup>5</sup>

(2) **Resulting Danger to Persons on Traveled Path.** — But though the untraveled part need not, as a rule, be kept free from defects, it must not contain any objects, obstructions, or excavations which will render the traveled way defective or dangerous.<sup>6</sup>

safe applies only as between the traveler and the municipality, and private persons who place obstructions upon the untraveled portion of the highway are liable for injuries received by a traveler going outside the traveled track. *Dickey v. Maine Tel. Co.*, 46 Me. 483. See also *infra*, this title, *Obstructions and Encroachments*.

**Beaten Track.** — The traveled way, as it is called, is not merely the beaten track, and one may travel on any part of the road worked and prepared as a highway, although outside the beaten track. *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

1. **Artificial Obstructions in Margin.** — *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721; *Leslie v. Lewiston*, 62 Me. 468. And see *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

2. **Width of Traveled Path.** — *Hull v. Richmond*, 2 Woodb. & M. (U. S.) 337; *Perry Tp. v. John*, 79 Pa. St. 412; *Mochler v. Shaftsbury*, 46 Vt. 580, 14 Am. Rep. 634. And see *Hawks v. Hawley*, 123 Mass. 270; *Harris v. Great Barrington*, 169 Mass. 271. But see *Fopper v. Wheatland*, 59 Wis. 623, to the effect that the town is liable if the highway is not wide enough for teams to pass, and teams cannot see each other till very near. See also *Wheeler v. Westport*, 30 Wis. 392.

3. *Smith v. Wakefield*, 105 Mass. 473.

4. **Whole Width of City Street to Be Passable.** — *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Buck v. Biddeford*, 82 Me. 433; *Bacon v. Boston*, 3 Cush. (Mass.) 174; *Wright v. Saunders*, 65 Barb. (N. Y.) 214. And see

*Monongahela City v. Fischer*, 111 Pa. St. 9, 56 Am. Rep. 241, 13 Am. & Eng. Corp. Cas. 431.

5. **Width of Street to Be Made Passable Depends on Circumstances** — *Iowa*. — *Fulliam v. Muscatine*, 70 Iowa 436.

*Kansas*. — *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482.

*Maine*. — *Bryant v. Biddeford*, 39 Me. 193. *Massachusetts*. — *Fitz v. Boston*, 4 Cush. (Mass.) 365.

*Michigan*. — *Keyes v. Marcellus*, 50 Mich. 439.

*Missouri*. — *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Brown v. Glasgow*, 57 Mo. 156.

*Wisconsin*. — *Fitzgerald v. Berlin*, 64 Wis. 203. And see *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69.

So it is stated that if the street is opened for travel for its whole width it must be kept reasonably safe for such width. *Stafford v. Oskaloosa*, 57 Iowa 748, 64 Iowa 251.

**New York Rule.** — In *Dougherty v. Horseheads*, 159 N. Y. 154, Vann, J., said that while a municipality must use reasonable care to keep in its streets an unobstructed driveway of ample width, in safe condition for the passage of teams, it may, to a reasonable extent, devote the sides of the street to other useful public purposes. Thus it may construct on different grades sidewalks, gutters, and curbs, erect hydrants, authorize telegraph or telephone poles, or lay out and protect grass plots and trees.

6. **Untraveled Portion Not to Render Traveled Portion Unsafe** — *Connecticut*. — Seeley v. Litch-

(3) *Widening or Extension of Traveled Path.* — The municipality will also be liable if it suffers the traveled part to be widened or extended by the work of others, or by travel, so as to lead travelers to go on any part within the limits as so widened, and an injury arises from a defect within such limits.<sup>1</sup>

(4) *Justification for Leaving Traveled Path.* — A traveler may, however, under some circumstances, be justified in leaving the traveled path, so that the municipality will be liable for injuries received on the other portion of the road, as where the traveled portion is so obstructed or dangerous as to be impassable,<sup>2</sup> or when it is necessary to do so to pass another vehicle,<sup>3</sup> and one has likewise been held entitled to recover when he was forced on the

field, 49 Conn. 134, 44 Am. Rep. 213; *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718.

*Indiana.* — *Fowler v. Linquist*, 138 Ind. 566.

*Maine.* — *Bryant v. Biddeford*, 39 Me. 193.

*Massachusetts.* — *Moran v. Palmer*, 162 Mass. 196; *Snow v. Adams*, 1 Cush. (Mass.) 443; *Kellogg v. Northampton*, 4 Gray (Mass.) 69; *Bigelow v. Weston*, 3 Pick. (Mass.) 267; *Tilton v. Wenham*, 172 Mass. 407.

*New Hampshire.* — *Willey v. Portsmouth*, 35 N. H. 303.

*Vermont.* — *Cassedy v. Stockbridge*, 21 Vt. 391; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644.

*Wisconsin.* — *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Cremer v. Portland*, 36 Wis. 92; *Cartright v. Belmont*, 58 Wis. 370; *Fitzgerald v. Berlin*, 64 Wis. 203; *Slivitski v. Wien*, 93 Wis. 460; *Boltz v. Sullivan*, 101 Wis. 608; *Stricker v. Reedsburg*, 101 Wis. 457.

*Canada.* — *Foley v. East Flamborough Tp.*, 26 Ont. App. 43.

*Illustrations.* — So in *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, where a vehicle was overturned by striking a post placed at the corner of two streets, close to the traveled track, for the purpose of protecting shade trees between it and the abutting property, it was held to be a question for the jury whether placing the post in such location, so as to be struck by a vehicle partly in the traveled track, rendered the traveled track unsafe.

And where a rectangular strip of land projected from fourteen to twenty feet into a highway of which the general width was about fifty feet, and there was a line of boulders from one to two feet wide along the three sides of the strip adjoining the road, though within such strip, and the direction of the traveled track changed twice abruptly in order to avoid this strip, it was held that, in an action for injuries caused by striking the boulders at night, the jury might well find the road insufficient. *Wheeler v. Westport*, 30 Wis. 392.

*Hole Near Traveled Way.* — So a township was held to be liable for negligence in leaving unguarded, in the untraveled part of a highway, for an unreasonable length of time, a hole so near the traveled part that persons would be likely to get into it in seeking to avoid a hole in the traveled part. *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

*Watering Place as Pitfall.* — A town has been held liable for allowing a natural watering place within the original location of a highway, but outside the traveled portion, to become a deep miry pit, so that the horse of a

traveler, who drove it thereto, was drowned. *Cobb v. Standish*, 14 Me. 198. But see the comment on this case in *Rice v. Montpelier*, 19 Vt. 470, and compare *Hall v. Unity*, 57 Me. 529.

As to the Necessity of Barriers to render the traveled part of the road safe as against dangerous places, see *infra*, this section, *Barriers*.

As to Objects Calculated to Frighten Horses, placed in the untraveled part of the road, see *supra*, this section, *Objects Frightening Horses*.

1. *Widening or Extension of Traveled Path.* — *Moran v. Palmer*, 162 Mass. 196; *Aston v. Newton*, 134 Mass. 507, 45 Am. Rep. 347; *Weare v. Fitchburg*, 110 Mass. 334; *Tilton v. Wenham*, 172 Mass. 407; *Willey v. Portsmouth*, 35 N. H. 313; *Saltmarsh v. Bow*, 56 N. H. 428; *Stark v. Lancaster*, 57 N. H. 88; *Whitney v. Essex*, 42 Vt. 520; *Potter v. Castleton*, 53 Vt. 435; *Ozier v. Hinesburgh*, 44 Vt. 220; *Cartright v. Belmont*, 58 Wis. 370.

*Notice Not to Use Path.* — When the public travel diverges from the prepared track and forms another track equally accessible to travelers, and apparently as much traveled as the other, a town must give some reasonable notice to the public that the use of the side track is unauthorized, and this may be done by placing obstructions therein, by putting up notices, or in any other manner which will sufficiently notify travelers that such track is not to be used. *Cartright v. Belmont*, 58 Wis. 370.

2. *Justification for Leaving Traveled or Worked Part of Road — Obstructions.* — *Pomeroy v. Westfield*, 154 Mass. 462; *Kelley v. Fond du Lac*, 31 Wis. 186. And see *Joyner v. Great Barrington*, 118 Mass. 463, and *Shepardson v. Colerain*, 13 Met. (Mass.) 55.

*Snow on Traveled Path.* — So where the traveled road was blocked with snowdrifts for four or six weeks. *Green v. Danby*, 12 Vt. 338.

But where the traveled road was reasonably open and safe in spite of snow, one cannot recover for injuries received on a side track merely because he thought that safer than the traveled way. *Burr v. Plymouth*, 48 Conn. 460.

3. *Passing Vehicles.* — *Hull v. Richmond*, 2 Woodb. & M. (U. S.) 337.

It was held that one was justified in diverging from the traveled way in order to pass a team going in the same direction and so to keep in the company of one with whom he had been traveling, the traveled part of the road being safe and unobstructed for the purpose. *Mochler v. Shaftsbury*, 46 Vt. 580, 14 Am. Rep. 634.



untraveled portion by the swerving of his horse.<sup>1</sup> But in so purposely deviating from the traveled track one must have been in the exercise of ordinary care and prudence, this being a question for the jury.<sup>2</sup>

1. **DANGERS OUTSIDE OF HIGHWAY.** — A municipality is, as a general rule, under no obligation to have the premises adjoining the highway safe for persons straying thereon from the highway, and is not liable for injuries to persons so straying;<sup>3</sup> nor is it, as a general rule, under any obligation to erect a barrier to prevent such straying.<sup>4</sup>

But if the **Boundary Line of the Highway Is Not Indicated** by visible objects, and a traveler, while keeping within the general course of travel, and close to the highway, and within what he believes to be the highway, is injured by a defect outside thereof, the municipality will be liable as if the defect existed within the highway.<sup>5</sup> But such a rule has not, apparently, been applied with strictness in the case of sidewalks.<sup>6</sup>

**Structure Dangerous in Use.** — A structure upon abutting property which results in injuries to one on the highway is not, it has been decided, an insufficiency or want of repair of the highway within a statute rendering the municipality liable for injuries caused thereby;<sup>7</sup> and even apart from statute, a structure

1. **Swerving of Horse.** — *Cassedy v. Stockbridge*, 21 Vt. 391; *Boltz v. Sullivan*, 101 Wis. 608.

2. **Ordinary Care.** — *Ramsey v. Rushville*, etc., Gravel Road Co., 81 Ind. 394; *Austin v. Ritz*, 72 Tex. 391; *Kelley v. Fond du Lac*, 31 Wis. 186.

3. **Municipality Not Liable for Injuries Received Outside the Highway** — *District of Columbia*. — *Young v. District of Columbia*, 3 MacArthur (D. C.) 137.

*Georgia*. — *Zettler v. Atlanta*, 66 Ga. 195.

*Iowa*. — *O'Laughlin v. Dubuque*, 42 Iowa 539; *Ely v. Des Moines*, 86 Iowa 55.

*Maine*. — *Morgan v. Hallowell*, 57 Me. 375; *Willey v. Ellsworth*, 64 Me. 57.

*Massachusetts*. — *Stockwell v. Fitchburg*, 110 Mass. 305; *Sullivan v. Boston*, 126 Mass. 540; *Lowe v. Clinton*, 136 Mass. 24; *Stone v. Attleborough*, 140 Mass. 328; *Jones v. Waltham*, 4 Cush. (Mass.) 299, 50 Am. Dec. 783; *Tisdale v. Norton*, 8 Met. (Mass.) 388; *Carey v. Hubbardston*, 172 Mass. 106.

*New Hampshire*. — *Knowlton v. Pittsfield*, 62 N. H. 535.

*Ohio*. — *Kelley v. Columbus*, 41 Ohio St. 263.

*Pennsylvania*. — *Scranton v. Hill*, 102 Pa. St. 378, 48 Am. Rep. 211; *Worrilow v. Upper Chichester Tp.*, 149 Pa. St. 40.

*Texas*. — *Denison v. Warren*, (Tex. Civ. App. 1895) 36 S. W. Rep. 296.

*Vermont*. — *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295.

*West Virginia*. — *Biggs v. Huntington*, 32 W. Va. 55.

*Wisconsin*. — *Bogie v. Waupun*, 75 Wis. 1; *Stricker v. Reedsburg*, 101 Wis. 457.

See also *infra*, this section, *Barriers and Railings*.

**Illustrations.** — So it was held that a city was not liable for injuries to a child resulting from its going outside the street on to private property and climbing a wall thereon. *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281.

And a town was held not liable for injuries received from driving against a stump beside a highway, by one who, without any necessity therefor, was driving in a temporary track

outside the highway. *Stricker v. Reedsburg*, 101 Wis. 457.

**Extrinsic Danger Not a Statutory Defect.** — It was held that an injury was not occasioned by a "defect or want of repair" in the highway, within the statute, when it was received on an adjacent lot across which the person was attempting to travel owing to defects in the highway rendering it impassable. *Tisdale v. Norton*, 8 Met. (Mass.) 388.

So, under a practically similar statute, when the accident occurred on a road which deviated from the regular highway and was laid out by the overseer of the road hands without authority, no recovery was allowed. *Hill v. Laurens County*, 34 S. Car. 141.

4. **Barriers to Prevent Straying from Highway.** — See *infra*, this section, *Barriers and Railings* — *To Prevent Straying from Highway*.

5. **Apparent Limits of Highway.** — *Coggswell v. Lexington*, 4 Cush. (Mass.) 307; *Hayden v. Attleborough*, 7 Gray (Mass.) 338; *Davis v. Hill*, 41 N. H. 329; *Jewhurst v. Syracuse*, 108 N. Y. 303; *Kelley v. Columbus*, 41 Ohio St. 263; *Wheeler v. Westport*, 30 Wis. 392; *Badams v. Toronto*, 24 Ont. App. 8. Compare *Marshall v. Ipswich*, 110 Mass. 522.

**Terminal Limits.** — So where a city deposited and permitted others to deposit refuse in a river at the end of a graded public street, so that the deposit appeared to be a prolongation of the street, it was held that the city was liable in case of failure to take measures to prevent persons going upon such refuse. *Ray v. St. Paul*, 40 Minn. 458.

6. **Sidewalks.** — In *Stockwell v. Fitchburg*, 110 Mass. 305; *Stone v. Attleborough*, 140 Mass. 328; *Damon v. Boston*, 149 Mass. 147; *Lorenzo v. Wirth*, 170 Mass. 596, and *Knowlton v. Pittsfield*, 62 N. H. 535, the town was held not to be liable for defects in a part of the sidewalk outside the line of the street, though such line did not appear. See, however, to the contrary, *Kinney v. Tekamah*, 30 Neb. 605.

7. **Structure Dangerous in Use.** — *Hubbell v. Viroqua*, 67 Wis. 343, 58 Am. Rep. 866, where the municipality was held not to be liable for injuries to a traveler caused by a stray shot from a shooting gallery on abutting property.



so erected for a legitimate business purpose was held not to be ground of liability to one injured thereby, the municipality having no power to remove it.<sup>1</sup>

*J. BARRIERS AND RAILINGS* — (1) *To Prevent Straying from Highway*. — It is well settled that a municipality is under no obligation to fence its road or to put up barriers simply to prevent travelers from straying from the highway, and that, consequently, if a traveler so strays on to adjoining property and there meets with an accident at some distance from the highway, the municipality is not liable, though the barrier would have prevented such straying.<sup>2</sup>

(2) *At Dangerous Places Near Road*. — If there is a dangerous place, however, such as a declivity or excavation, so close to the highway or to the traveled part thereof as to render the latter unsafe for travelers in the absence of a railing or barrier, the want of such railing or barrier constitutes a defect in the highway itself, for injuries from which the municipality is liable.<sup>3</sup> But

1. *Haines v. Barclay Tp.*, 181 Pa. St. 521, where a traveler was injured by the operation of a log chute on abutting property.

2. *Barriers Not Necessary to Prevent Traveler Straying from Highway* — *United States*. — *Hannibal v. Campbell*, 86 Fed. Rep. 297, 57 U. S. App. 484.

*Maine*. — *Wiley v. Ellsworth*, 64 Me. 57; *Morgan v. Hallowell*, 57 Me. 375.

*Massachusetts*. — *Macomber v. Taunton*, 100 Mass. 255; *Murphy v. Gloucester*, 105 Mass. 470; *Com. v. Wilmington*, 105 Mass. 599; *Warner v. Holyoke*, 112 Mass. 362; *Puffer v. Orange*, 122 Mass. 389, 23 Am. Rep. 368; *Stone v. Attleborough*, 140 Mass. 328; *Damon v. Boston*, 149 Mass. 147; *Logan v. New Bedford*, 157 Mass. 534; *Sparhawk v. Salem*, 1 Allen (Mass.) 30, 79 Am. Dec. 700; *Adams v. Natick*, 13 Allen (Mass.) 429.

*Minnesota*. — *McHugh v. St. Paul*, 67 Minn. 441.

*Ohio*. — *Kelley v. Columbus*, 41 Ohio St. 263.

*Rhode Island*. — *Chapman v. Cook*, 10 R. I. 304, 14 Am. Rep. 686.

*Wisconsin*. — *Green v. Bridge Creek*, 38 Wis. 449, 20 Am. Rep. 18.

*Illustrations*. — So it was held that the municipality was not liable for injuries received by one who mistook a private way for a highway and was injured by a defect on such private way, although there was no fence or sign at the place of its divergence from the public highway to show that it was not a part thereof. *Chapman v. Cook*, 10 R. I. 304, 14 Am. Rep. 686.

*Children Straying from Street*. — In *Talty v. Atlantic*, 92 Iowa 135, it was held that a city was not negligent in failing to erect a barrier along the traveled part of the street, though on another part of it was a sandpit in which some children who strayed from the street were killed by their digging into and undermining the banks of the pit, the city not being bound to anticipate such an event.

3. *Barrier Necessary Against Dangerous Places* — *Connecticut*. — *Munson v. Derby*, 37 Conn. 314; *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677.

*Georgia*. — *Zettler v. Atlanta*, 66 Ga. 195.

*Illinois*. — *Danville v. Makemson*, 32 Ill. App. 112; *Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Chicago v. Gallagher*, 41 Ill. 295.

*Indiana*. — *Higert v. Greencastle*, 43 Ind. 571.

*Iowa*. — *Manderschid v. Dubuque*, 29 Iowa 73, 4 Am. Rep. 196; *Hall v. Manson*, 99 Iowa 698.

*Maine*. — *Wiley v. Ellsworth*, 64 Me. 57; *Haskell v. New Gloucester*, 70 Me. 305. See also *Nichols v. Brunswick*, 3 Cliff. (U. S.) 81.

*Massachusetts*. — *Macomber v. Taunton*, 100 Mass. 255; *Harris v. Great Barrington*, 169 Mass. 271; *Babson v. Rockport*, 101 Mass. 93; *Murphy v. Gloucester*, 105 Mass. 470; *Britton v. Cummington*, 107 Mass. 347; *Warner v. Holyoke*, 112 Mass. 362; *Stockwell v. Fitchburg*, 110 Mass. 305; *Woods v. Groton*, 111 Mass. 357; *Harris v. Newbury*, 128 Mass. 321; *Puffer v. Orange*, 122 Mass. 389, 23 Am. Rep. 368; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Stevens v. Boxford*, 10 Allen (Mass.) 25, 87 Am. Dec. 616; *Adams v. Natick*, 13 Allen (Mass.) 429; *Palmer v. Andover*, 2 Cush. (Mass.) 600; *Jones v. Waltham*, 4 Cush. (Mass.) 299, 50 Am. Dec. 783; *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Hayden v. Attleborough*, 7 Gray (Mass.) 338.

*Michigan*. — *Harris v. Clinton Tp.*, 64 Mich. 447, 8 Am. St. Rep. 842; *Sharp v. Evergreen Tp.*, 67 Mich. 443; *Malloy v. Walker Tp.*, 77 Mich. 448; *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

*Minnesota*. — *St. Paul v. Kuby*, 8 Minn. 154.

*Missouri*. — *Bassett v. St. Joseph*, 53 Mo. 204, 14 Am. Rep. 446.

*Nebraska*. — *South Omaha v. Cunningham*, 31 Neb. 316.

*New Hampshire*. — *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Wiley v. Portsmouth*, 35 N. H. 303; *Davis v. Hill*, 41 N. H. 329.

*New York*. — *Maxim v. Champion*, 50 Hun (N. Y.) 88, affirmed 119 N. Y. 626; *Holcomb v. Champion*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 882, affirmed 128 N. Y. 599; *Ireland v. Oswego*, etc., Plank Road Co., 13 N. Y. 526; *Ivory v. Deerpark*, 116 N. Y. 476; *Bryant v. Randolph*, 133 N. Y. 70; *Fay v. Lindley*, 58 Hun (N. Y.) 601, 11 N. Y. Supp. 355.

*North Carolina*. — *Bunch v. Edenton*, 90 N. Car. 431.

*Pennsylvania*. — *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 276; *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867; *Trexler v. Greenwich Tp.*, 168 Pa. St. 214; *Glaub v. Goshen Tp.*, 7 Kulp (Pa.) 292.

the danger which requires a barrier must be of an unusual character, such as a bridge, declivity, excavation, steep bank, or deep water, and a space adjoining a road or street may be left without a barrier though it is rough and entirely unsuitable for travel.<sup>1</sup>

In Determining the Necessity of a Barrier the primary question is whether the highway is safe without one,<sup>2</sup> and this quite generally resolves itself into considerations of the character and proximity of the danger. The question of proximity is to be considered with reference to the highway as traveled or worked rather than as laid out.<sup>3</sup> The general character of the road<sup>4</sup> and the presence of other objects serving as guards<sup>5</sup> may also, it appears, be considered, as may be the presence of some object or agent, such as a railroad, liable to frighten a horse.<sup>6</sup>

Questions of Law and Fact.—The question of the necessity of the barrier is generally one for the jury,<sup>7</sup> as is also that of the sufficiency of the

*Rhode Island.*—*Chapman v. Cook*, 10 R. I. 304, 14 Am. Rep. 686.

*Tennessee.*—*Franklin Turnpike Co. v. Crockett*, 2 Sneed (Tenn.) 271; *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 758.

*Vermont.*—*Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644.

*Wisconsin.*—*Green v. Bridge Creek*, 38 Wis. 449, 20 Am. Rep. 18.

*Canada.*—*Toms v. Whitby Tp.*, 37 U. C. Q. B. 100.

1. Character of Danger.—*Damon v. Boston*, 149 Mass. 151.

So a barrier was not necessary because broken brick had been spread over a surface several feet square and a few inches high, outside of the traveled part of the highway. *Marshall v. Ipswich*, 110 Mass. 522.

2. Considerations Determining Necessity of Barrier.—In *Alger v. Lowell*, 3 Allen (Mass.) 402, Hoar, J., said: "The true test \* \* \* is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

3. Distance to Be Measured from Traveled Part of Way.—*Hannibal v. Campbell*, 86 Fed. Rep. 297, 57 U. S. App. 484; *Warner v. Holyoke*, 112 Mass. 362; *Barnes v. Chicopee*, 138 Mass. 67, 52 Am. Rep. 259; *Ivory v. Deerpark*, 116 N. Y. 476.

4. General Character of Road.—In *Lane v. Hancock*, 142 N. Y. 510, it was held that a town is not liable for injuries caused by a failure to replace guards which were on top of a retaining wall along the lower side of a road which ran along the side of a steep hill; the court considering the fact that there were in the town about two hundred and thirty miles of road, eighty of which were along dugways and up steep ravines; that the road passed through a mountainous section used chiefly for hauling lumber, and on which for a distance of five miles but two or three families lived; and also the fact that the law gave a right of action over in favor of the town against the highway commissioners, and that

it could not have been intended to hold the commissioners to such extreme diligence.

5. Objects Serving as Guards.—Where streets are bounded by gutters, curbstones, and elevated sidewalks, there is no necessity for guards to protect persons driving in the street from the danger of falling down embankments outside the sidewalks. *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522; *Monk v. New Utrecht*, 104 N. Y. 552.

6. Object or Agent Frightening Horse.—*Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567; *Tarras v. Winona*, 71 Minn. 22; *Pittston v. Hart*, 89 Pa. St. 389; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867; *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145, 30 Am. St. Rep. 792; *Wellman v. Susquehanna Depot*, 167 Pa. St. 239; *Kitchen v. Union Tp.*, 171 Pa. St. 145.

But it has been decided that in the absence of a dangerous place, such as itself to call for a barrier, the mere presence of a railroad track does not necessitate a barrier to prevent frightened horses from escaping into adjoining fields. *Adams v. Natick*, 13 Allen (Mass.) 429.

7. Question for Jury—*Georgia.*—*Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396.

*Iowa.*—*Manderschid v. Dubuque*, 29 Iowa 73, 4 Am. Rep. 196.

*Massachusetts.*—*Britton v. Cummington*, 107 Mass. 347; *Warner v. Holyoke*, 112 Mass. 362; *Spurr v. Shelburne*, 131 Mass. 429; *Harris v. Great Barrington*, 169 Mass. 271.

*Michigan.*—*Malloy v. Walker Tp.*, 77 Mich. 448.

*Nebraska.*—*South Omaha v. Cunningham*, 31 Neb. 316.

*New Hampshire.*—*Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *Stack v. Portsmouth*, 52 N. H. 221.

*New York.*—*Roble v. Indian Lake*, 11 N. Y. App. Div. 435; *Ivory v. Deerpark*, 116 N. Y. 476; *Holcomb v. Champion*, 59 Hun (N. Y.) 620, 12 N. Y. Supp. 882; *Reid v. Ripley*, 59 Hun (N. Y.) 628, 14 N. Y. Supp. 124; *Lane v. Hancock*, 67 Hun (N. Y.) 623; *Wood v. Gilboa*, 76 Hun (N. Y.) 175, affirmed 146 N. Y. 383; *Van Gaasbeck v. Saugerties*, 82 Hun (N. Y.) 415; *Burns v. Yonkers*, 83 Hun (N. Y.) 211; *Kiernan v. New York*, 14 N. Y. App. Div. 156.

*Pennsylvania.*—*Mechesney v. Unity Tp.*, 164 Pa. St. 358; *Wellman v. Susquehanna Depot*, 167 Pa. St. 239; *Trexler v. Greenwich*



barrier.<sup>1</sup> In clear cases, however, the court may decide the necessity of a barrier as a matter of law,<sup>2</sup> and it has accordingly been held that a barrier is not called for when the dangerous place is twenty-five feet or more from the traveled part of the highway.<sup>3</sup>

The Duty of an Abutting Owner as regards such dangerous places adjoining the highway is considered elsewhere.<sup>4</sup>

**k. OBJECTS AND STRUCTURES OVERHANGING HIGHWAY.**—It is generally held that anything which is allowed to remain above the highway so as to interfere with its ordinary and reasonable use for travel shows a breach of duty on the part of the municipality. It has accordingly been decided that a branch of a tree extending over the line of travel, and so near thereto as to cause one on top of a load of hay to be injured thereby, renders the municipality liable;<sup>5</sup> and the municipality is also liable if it raises the grade so as to leave an insufficient space between the surface of the way and a bridge thereover.<sup>6</sup>

A Rope or Wire Stretched Across a Highway may also render the municipality liable for injuries caused thereby,<sup>7</sup> though a rope so stretched was held not to be a defect in the highway if it was in motion from human agency.<sup>8</sup> An individual so stretching a rope or wire across a highway is also liable for injuries caused thereby.<sup>9</sup>

Tp., 168 Pa. St. 214; *Ewing v. North Versailles Tp.*, 146 Pa. St. 309.

*Vermont.*—*Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644.

**Illustrations.**—So it was held to be a question for the jury whether the road was defective when the space between the traveled part of a road, seventeen feet wide, and a steep slope on the side running into a ditch three feet deep, was only six inches, and there was no barrier or railing. *Harris v. Great Barrington*, 169 Mass. 271.

And it was for the jury whether it was negligence not to erect a barrier when the traveled track was only seven feet wide, and three feet away therefrom was a slope of thirteen feet with a descent of sixteen feet vertically in a horizontal distance of thirty-one feet. *Burns v. Yonkers*, 83 Hun (N. Y.) 211.

**1. Sufficiency of Barrier.**—*Lyman v. Amherst*, 107 Mass. 339.

**As Against Children.**—A municipality was held not to be liable because a child crawled through or over a fence between the road and a precipice, the fence consisting of posts with three boards nailed across them with a space between the boards of about ten inches. *Lineburg v. St. Paul*, 71 Minn. 245, *distinguishing* *St. Paul v. Kuby*, 8 Minn. 154, in which it was held to be a question for the jury whether the city was liable for constructing a barrier of a single rail only, through which a child fell.

**2. Barrier Not Necessary as Matter of Law.**—*McHugh v. St. Paul*, 67 Minn. 441; *Tarras v. Winona*, 71 Minn. 22; *Waller v. Hebron*, 5 N. Y. App. Div. 577; *Patchen v. Walton*, 17 N. Y. App. Div. 158.

**Illustrations.**—Where a bank at the side of a road sloped downward from the edge of the road for eight feet to a pond, and the bank was protected by trees, except for a space of less than twelve feet, it was held that failure to guard such a short distance was not sufficient evidence of negligence to submit to the jury. *Glazier v. Hebron*, 131 N. Y. 447, *reversing* 62 Hun (N. Y.) 137.

And it was held that the want of a barrier where the highway is seventeen feet wide and level does not show negligence. *Glazier v. Hebron*, 82 Hun (N. Y.) 311.

**Ditches on Margin of Way.**—A way is not defective because on each side of it there are ditches constructed for purposes of drainage, and it is, as a matter of law, not necessary to place railings between the ditches and the traveled way. *Spaulding v. Winslow*, 74 Me. 537; *Morse v. Belfast*, 77 Me. 44; *Macomber v. Taunton*, 100 Mass. 256.

**Negligence as Matter of Law.**—But the absence of any barrier or guard when an excavation two feet deep was but two feet from the traveled track has been held to make the highway unsafe, as a matter of law. *Seymer v. Lake*, 66 Wis. 651.

**3. Distance from Travel.**—*Murphy v. Gloucester*, 105 Mass. 470; *Hudson v. Marlborough*, 154 Mass. 218.

So it has been decided that no barrier is needed when the dangerous place is twenty-eight feet to thirty feet away, *Puffer v. Orange*, 122 Mass. 389, 23 Am. Rep. 368; *Daily v. Worcester*, 131 Mass. 452; or thirty-four feet, *Barnes v. Chicopee*, 138 Mass. 67, 52 Am. Rep. 259.

**4. Abutting Owners.**—See *supra*, this section, *Liabilities of Abutting Owners—Dangerous Condition of Property*.

**5. Objects Overhanging Highway.**—*Ferguson v. Southwold Tp.*, 27 Ont. 66; *Embler v. Wallkill*, 132 N. Y. 222, *affirming* 57 Hun (N. Y.) 384. See also *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718.

**6. Overhead Bridge.**—*Gray v. Danbury*, 54 Conn. 574; *Talbot v. Taunton*, 140 Mass. 552.

**7. Rope or Wire Across Highway.**—*Chicago v. Fowler*, 60 Ill. 322; *French v. Brunswick*, 21 Me. 29, 38 Am. Dec. 250; *Hayes v. Hyde Park*, 153 Mass. 514. And see *Neuert v. Boston*, 120 Mass. 338.

**8. Barber v. Roxbury**, 11 Allen (Mass.) 318.

**9. Individual Liability.**—*Dickey v. Maine Tel. Co.*, 43 Me. 492; *Larson v. Ring*, 43 Minn. 88; *Lundeen v. Livingston Electric*



**7. FALLING OBJECTS.** — The municipality has generally been held liable for injuries caused by the falling on a highway of an object placed over or close to the way, such as an awning over the sidewalk,<sup>1</sup> a cornice improperly fastened to a building abutting on the way,<sup>2</sup> or a ruinous wall adjoining the highway.<sup>3</sup> Its liability in respect to such objects or structures, when outside the highway, is, however, limited by its power to cause their removal.<sup>4</sup> A municipality is also bound to look to the safety of trees within the highway limits, and is liable for injuries caused by their decay and consequent fall, if chargeable with notice of such condition,<sup>5</sup> and is generally liable in case of the fall of structures erected in the highway.<sup>6</sup>

**Liabilities under Statutes.** — The liability of an object to fall on persons in the highway has, however, been decided not to be a "defect" or "want of repair" within the meaning of the statutes imposing liabilities on municipalities,<sup>7</sup> though in *Massachusetts*, it seems, the municipality is liable if the falling structure was erected with reference, in part at least, to the use of the highway as such.<sup>8</sup>

**Individuals** may also be liable for injuries caused by falling objects.<sup>9</sup>  
**m. SLIPPERY SURFACES.** — The presence of slippery surfaces, as glass or

Light Co., 17 Mont. 32; *Sheldon v. Western Union Tel. Co.*, 51 Hun (N. Y.) 591.

So it was held that one might be liable for tethering a cow by a chain fastened to a stake, over which chain a horse stumbled. *Gulliver v. Blauvelt*, 14 N. Y. App. Div. 523.

**1. Falling Objects — Awnings.** — *Day v. Milford*, 5 Allen (Mass.) 98; *Drake v. Lowell*, 13 Met. (Mass.) 292; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564; *Hume v. New York*, 47 N. Y. 639, 74 N. Y. 264; *Bieling v. Brooklyn*, 120 N. Y. 98.

**2. Cornice on Building.** — *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262, distinguished and questioned in *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35.

**3. Wall Abutting on Highway.** — *Parker v. Macon*, 39 Ga. 729, 99 Am. Dec. 486; *Savannah v. Waldner*, 49 Ga. 316; *Kiley v. Kansas City*, 69 Mo. 102, 33 Am. Rep. 491.

**4. Liability Limited by Power of Removal.** — *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486; *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Knowlton v. Pittsfield*, 62 N. H. 535; *Cain v. Syracuse*, 95 N. Y. 83; *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578.

**5. Trees in Highway.** — *Jones v. New Haven*, 34 Conn. 1; *Chase v. Lowell*, 151 Mass. 422; *Vosper v. New York*, 49 N. Y. Super. Ct. 296; *Gubasko v. New York*, 12 Daly (N. Y.) 186. Compare *Jones v. Greensboro*, 124 N. Car. 310, in which case recovery was denied in view of the want of notice of the decayed condition of the tree.

**6. Structures in Highway.** — *Duffy v. Dubuque*, 63 Iowa 171, 50 Am. Rep. 743; *Hardy v. Keene*, 52 N. H. 370; *Norristown v. Moyer*, 67 Pa. St. 355, in which last case the municipality was held liable for the fall of a "liberty pole" erected by third persons some years before in a part of the highway where it did not obstruct travel.

**7. Falling Objects Not Within Statute.** — So held in cases of a weight falling from a flag hung over the highway, *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; of the

falling of a suspended sign, *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578; and of the falling of a tree five feet from the highway, *Watkins v. County Ct.*, 30 W. Va. 657.

In *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718, *Carpenter, J.*, said: "Those objects which have no necessary connection with the roadbed, or the public travel thereon, and which may expose a person to danger, not as a traveler, but independent of the highway, do not ordinarily render the road defective. For example, trees or walls of a building standing beside the road, and liable to fall by reason of age and decay, or from other cause; or any object suspended over the highway so high as to be entirely out of the way of travelers; these, and like objects, may be more or less dangerous, but they do not obstruct travel."

**8. Massachusetts Decisions.** — *Jones v. Boston*, 104 Mass. 75, 6 Am. Rep. 194, in which case the municipality was held not liable for the fall of an overhanging sign, the court *distinguishing* the case, on the ground stated in the text, from *Drake v. Lowell*, 13 Met. (Mass.) 292, and *Day v. Milford*, 5 Allen (Mass.) 98, cases of an awning falling upon a traveler, for which the city was held liable. See the discussion of these cases in *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691.

So in *Hixon v. Lowell*, 13 Gray (Mass.) 59, a city was held not liable for injuries from the fall of an overhanging mass of snow and ice from the roof of a building not owned by the city. Compare *West v. Lynn*, 110 Mass. 514, in which case a city was held liable for injuries caused by the fall of a pole supporting one end of a transparency, the other end of which was fastened to a building.

**9. Individual Liability.** — *Maddox v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500; *Mahar v. Steuer*, 170 Mass. 454; *Earl v. Crouch*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 13; in all of which cases individuals negligently piling materials or goods in the highway were held liable for injuries caused by the fall thereof. See *supra*, this section, *Liabilities of Abutting Owners*.

metal inserted in a sidewalk for a particular purpose, is, it seems, a defect, giving a right of action to one injured thereby,<sup>1</sup> slipperiness from such a cause being viewed differently from that produced by the presence of snow or ice.<sup>2</sup>

*u. OBJECTS IN MOTION OR SUBJECT TO HUMAN CONTROL.* — The defect, insufficiency, or want of repair for which a municipality is liable is either inert matter encumbering the highway, or a structural defect therein, and an illegal use of the highway by men, animals, vehicles, engines, or other objects, while movable and actually being moved by human will or direction, and neither fixed to nor stationary in one position within the highway, does not render the municipality liable.<sup>3</sup> Accordingly, the municipality has been held free from liability to persons injured by sleds on which boys were coasting or sliding,<sup>4</sup> or to one struck by a locomotive on a railroad track illegally laid on the highway,<sup>5</sup> or to one injured by a rope stretched across a highway, at the time in motion from human agency.<sup>6</sup>

**9. Proximate and Concurring Causes** — *a. PROXIMATE CAUSE.* — It is generally conceded that in order to recover on account of a defect in the highway the defect must have been a proximate cause of the injuries, but as to what will constitute such proximate cause no general rule can be given.<sup>7</sup> It seems

**1. Slippery Surfaces.** — *Blackmore v. Mile End Old Town*, 9 Q. B. D. 451; *Chicago v. McGiven*, 78 Ill. 347; *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381.

**2. Snow and Ice.** — See the two cases last above cited, and also *supra*, this section, *Snow and Ice*.

**3. Objects in Motion or under Human Control** — *Indiana*. — *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1.

*Maine*. — *Davis v. Bangor*, 42 Me. 522.

*Massachusetts*. — *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691; *Cole v. Newburyport*, 129 Mass. 594, 37 Am. Rep. 394; *Barber v. Roxbury*, 11 Allen (Mass.) 318.

*New Hampshire*. — *Edgerly v. Concord*, 59 N. H. 79.

*Vermont*. — *Hutchinson v. Concord*, 41 Vt. 271, 98 Am. Dec. 584.

**4. Coasting** — *Delaware*. — *Wilmington v. Vandegrift*, 1 Marv. (Del.) 5.

*Indiana*. — *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Lafayette v. Timberlake*, 88 Ind. 330.

*Massachusetts*. — *Pierce v. New Bedford*, 129 Mass. 534, 37 Am. Rep. 387; *Cole v. Newburyport*, 129 Mass. 594, 37 Am. Rep. 394; *Shepherd v. Chelsea*, 4 Allen (Mass.) 113.

*Michigan*. — *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105.

*New Hampshire*. — *Ray v. Manchester*, 46 N. H. 59, 88 Am. Dec. 192.

*Vermont*. — *Hutchinson v. Concord*, 41 Vt. 271, 98 Am. Dec. 584; *Wheeler v. Burlington*, 60 Vt. 28.

*Wisconsin*. — *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779.

**5. Locomotive.** — *Vinal v. Dorchester*, 7 Gray (Mass.) 421.

**6. Rope in Highway.** — *Barber v. Roxbury*, 11 Allen (Mass.) 318.

**7. Defect Must Be Proximate Cause of Injury** — *Indiana*. — *Bluffton v. Mathews*, 92 Ind. 213; *Alexander v. New Castle*, 115 Ind. 51.

*Maine*. — *Rogers v. Newport*, 62 Me. 101; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722.

*Maryland*. — *Kennedy v. Cecil County*, 69 Md. 65.

*Massachusetts*. — *Marble v. Worcester*, 4 Gray (Mass.) 395.

*Michigan*. — *McKeller v. Monitor Tp.*, 78 Mich. 485; *Beall v. Athens Tp.*, 81 Mich. 536; *Smith v. Walker Tp.*, 117 Mich. 14.

*New Hampshire*. — *Judd v. Claremont*, 66 N. H. 418.

*Pennsylvania*. — *Yoders v. Amwell Tp.*, 172 Pa. St. 447, 51 Am. St. Rep. 750; *Bitting v. Maxatawny Tp.*, 180 Pa. St. 357, 177 Pa. St. 213.

*Texas*. — *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17.

*Vermont*. — *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84; *Hyde v. Jamaica*, 27 Vt. 443; *Stickney v. Maidstone*, 30 Vt. 738.

*West Virginia*. — *Childrey v. Huntington*, 34 W. Va. 457.

For a general discussion of this question see the title NEGLIGENCE. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

**What Constitutes Proximate Cause** — *Illustrations.* — Where there was on the side of the road a drinking trough, so painted and of such a character as to frighten steady horses, and it did frighten the plaintiff's horse, causing him to spring to one side of the road and to throw the carriage into a hole in the road while so shying, and occasioning the injuries complained of, and the carriage would not have struck the defect had it not been for such shying of the horse from fright, it was held that the jury might find that the hole in the highway was the proximate and sole cause of the injury. *Cushing v. Bedford*, 125 Mass. 526. See also *Flagg v. Hudson*, 142 Mass. 280, 56 Am. Rep. 674; *Hayes v. Hyde Park*, 153 Mass. 514.

But where horses struck an obstruction on the road and ran upon a railroad track, where they were overtaken by a train, whereupon they ran on another track, where they were killed by another train, it was held that the obstruction was not the proximate cause of the loss of the horses. *West Mahony Tp. v. Watson*, 116 Pa. St. 344, 2 Am. St. Rep. 604.

**Injury to Person Struggling with Another.** — In *Alexander v. New Castle*, 115 Ind. 51, it



to be agreed, however, that a defect in a highway is a proximate cause of injuries received by a person or a horse by reason of endeavors to escape from the difficulty caused by the defect.<sup>1</sup>

**b. CONCURRING CAUSES.**—When two causes combine to produce an injury to the traveler upon a highway, both of which are in their nature proximate—one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible—the municipality is liable, by the weight of authority, provided injury would not have been sustained but for such defect.<sup>2</sup> In a few cases a distinction has been taken according to the character of the cause concurring with the defect to produce the injury, it being stated that if it is a natural cause or pure accident the municipality will not be liable, while the rule is otherwise if it is the independent act of a responsible person.<sup>3</sup> And in a quite recent *Massachusetts* case it is stated that a concurring cause relieves a municipality from liability only when it is the wrongful act of a third person.<sup>4</sup> Other authorities hold that the defect must always be the sole cause

was held that the existence of an excavation in the street was not the proximate cause of an injury to a constable who was thrown therein by a prisoner while endeavoring to escape; and in *Childrey v. Huntington*, 34 W. Va. 457, it was held that a hole in the street was not a proximate cause of injuries received by a policeman who placed his foot therein while struggling with a prisoner.

**1. Injury Received in Endeavors for Extrication.**—Page *v. Bucksport*, 64 Me. 51; Tuttle *v. Holyoke*, 6 Gray (Mass.) 447; Davis *v. Longmeadow*, 169 Mass. 551; La Duke *v. Exeter Tp.*, 97 Mich. 450, 37 Am. St. Rep. 357; Stickney *v. Maidstone*, 30 Vt. 738.

**2. Recovery though Other Causes Concur.**—*Illinois*.—Joliet *v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; Bloomington *v. Bay*, 42 Ill. 503; Lacon *v. Page*, 48 Ill. 500; Carterville *v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248; Belleville *v. Hoffman*, 74 Ill. App. 503.

*Indiana*.—Crawfordsville *v. Smith*, 79 Ind. 308, 41 Am. Rep. 612; Fowler *v. Linquist*, 138 Ind. 566.

*Iowa*.—Langhammer *v. Manchester*, 99 Iowa 295.

*Kansas*.—Atchison *v. King*, 9 Kan. 550.

*Missouri*.—Bassett *v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; Hull *v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487; Brennan *v. St. Louis*, 92 Mo. 482; Vogelgesang *v. St. Louis*, 139 Mo. 127; Vogel *v. West Plains*, 73 Mo. App. 588.

*Montana*.—Lundeen *v. Livingston Electric Light Co.*, 17 Mont. 32.

*New Hampshire*.—Norris *v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; Clark *v. Barrington*, 41 N. H. 44; Winship *v. Enfield*, 42 N. H. 197.

*New York*.—Ayres *v. Hammondsport*, 130 N. Y. 665; Ring *v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; Roblee *v. Indian Lake*, 11 N. Y. App. Div. 435.

*North Carolina*.—Dillon *v. Raleigh*, 124 N. Car. 184.

*Rhode Island*.—Hampson *v. Taylor*, 15 R. I. 83.

*Vermont*.—Hunt *v. Pownal*, 9 Vt. 411; Kelsey *v. Glover*, 15 Vt. 708; Allen *v. Hancock*, 16 Vt. 230; Fletcher *v. Barnett*, 43 Vt. 192.

*Canada*.—Sherwood *v. Hamilton*, 37 U. C. Q. B. 410.

See for a full discussion of this question the title NEGLIGENCE.

So in Bassett *v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446, it was held that one could recover against a city for injuries caused by an excavation in the street, though the fall would not have occurred had not the plaintiff been attempting to avoid a mule which was trying to kick him.

**3. Act of Responsible Person.**—Rowell *v. Lowell*, 7 Gray (Mass.) 100, 66 Am. Dec. 464; Mahogany *v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753; Houfe *v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; Hawes *v. Fox Lake*, 33 Wis. 438. And see Bartram *v. Sharon*, 71 Conn. 686; Baldwin *v. Greenwoods Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33; White *v. Ballard*, 19 Wash. 284.

**Contrary Decision.**—In Carterville *v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, such a distinction was expressly denied, it being there held that one who was injured by being pushed off an elevated walk which was unprotected by guards could not recover against the village, the court, *per* Scholfield, J., saying that the intervention of the negligent act of a third person over whom neither the plaintiff nor the defendant has any control cannot be different in its consequences from the intervention of an accident, since the injured party can no more anticipate the one than the other, and the elements which constitute the negligence of a city or village must be precisely the same in each case.

**4. Act of Third Person Must Be Wrongful.**—Hayes *v. Hyde Park*, 153 Mass. 514, where Holmes, J., said that a town is not exonerated because other causes co-operate with the defect, since if it were so the town would never be liable, and that the mere fact that another human being intervenes is not enough, but it is because the act is wrongful, not because it is a concurring cause, that the defendant town escapes; and that if the concurring act is innocent, and is such as a town is bound to expect, the jury may find against the town, as well as when a particular state of the weather is a concurrent cause. Citing Flagg *v. Hudson*, 142 Mass. 280, 56 Am. Rep. 674, where the town was held liable when the defect caused a driver to turn in a certain direction and consequently to collide with a carriage,



of the injury to authorize a recovery, and that the direct intervention of an accidental cause or a wrongful act by a third person relieves the municipality from liability.<sup>1</sup>

c. **ESCAPE OF HORSES FROM CONTROL.** — While there is no obligation to make a highway safe for horses which have escaped from control or are running away,<sup>2</sup> it is generally held that one's right of recovery for injuries caused by defects or obstructions in the highway is not affected by the fact that when the accident occurred he had lost control of his horse, or it was running away, if this was not the result of negligence on his part.<sup>3</sup>

the intervention of such carriage and its owner being held not to relieve the town. Compare the *Massachusetts* cases in the next following note.

1. **No Recovery When Other Causes Concur** — *United States*. — *Merrill v. Portland*, 4 Cliff. (U. S.) 138.

*Connecticut*. — *Bartram v. Sharon*, 71 Conn. 691 (no recovery in case of culpable negligence of third person).

*Maine*. — *Moore v. Abbot*, 32 Me. 46; *Farrar v. Greene*, 32 Me. 574; *Coombs v. Topsham*, 38 Me. 204; *Anderson v. Bath*, 42 Me. 346; *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84; *Aldrich v. Graham*, 77 Me. 287.

*Massachusetts*. — *Marble v. Worcester*, 4 Gray (Mass.) 395; *Murdock v. Warwick*, 4 Gray (Mass.) 178; *Kidder v. Dunstable*, 7 Gray (Mass.) 104; *Jenks v. Wilbraham*, 11 Gray (Mass.) 142; *Richards v. Enfield*, 13 Gray (Mass.) 344; *Shepherd v. Chelsea*, 4 Allen (Mass.) 113; *Bliss v. Wilbraham*, 8 Allen (Mass.) 564; *Horriggan v. Clarksburg*, 150 Mass. 218. Compare *Massachusetts* cases in next preceding notes.

*Michigan*. — *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; *Smith v. Walker Tp.*, 117 Mich. 14; *Hembling v. Grand Rapids*, 99 Mich. 292.

*Pennsylvania*. — *Chartiers Tp. v. Phillips*, 122 Pa. St. 601; *Herr v. Lebanon*, 149 Pa. St. 222, 34 Am. St. Rep. 603. But compare *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867.

**Illustrations.** — So in *Shepherd v. Chelsea*, 4 Allen (Mass.) 113, where one was, while walking upon the sidewalk, run down by a boy upon his sled, it was held that there could be no right of recovery against the city, although the slippery condition of the sidewalk was such that the plaintiff could not have avoided the accident.

And in *Herr v. Lebanon*, 149 Pa. St. 222, 34 Am. St. Rep. 603, where a horse drawing a vehicle fell near the middle of the roadway, and in its struggles to regain its feet, went over a declivity on one side, which the city had negligently failed to guard, it was held that the city was not liable.

2. **Highway Need Not Be Safe for Uncontrolled or Runaway Horses** — *Illinois*. — *Bureau Junction v. Long*, 56 Ill. App. 458.

*Iowa*. — *Moss v. Burlington*, 60 Iowa 438, 46 Am. Rep. 82.

*Maine*. — *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84.

*Massachusetts*. — *Adams v. Natick*, 13 Allen (Mass.) 432.

*Mississippi*. — *Butler v. Oxford*, 69 Miss. 61.

*Missouri*. — *Brown v. Glasgow*, 57 Mo. 156.

*New York*. — *Lane v. Wheeler*, 35 Hun (N. Y.) 606; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

*Pennsylvania*. — *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833; *Johnston v. Philadelphia*, 139 Pa. St. 646; *Worrlow v. Upper Chichester Tp.*, 149 Pa. St. 40; *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145, 30 Am. St. Rep. 792; *Kieffer v. Hummelstown*, 151 Pa. St. 304; *Trexler v. Greenwich Tp.*, 163 Pa. St. 214.

*Wisconsin*. — *Jackson v. Bellevue*, 30 Wis. 251.

*Canada*. — *Foley v. East Flamborough Tp.*, 29 Ont. 139.

In *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833, it was said: "Township officers are bound to anticipate and provide against the ordinary needs of travel conducted in the ordinary manner, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along the highways, but the township is not an insurer against all possible accidents, nor is it bound to anticipate the danger to which a broken wagon or a frightened horse may expose the driver. Such a burden would be too heavy for any township to bear, and the law does not impose it."

3. **Loss of Control of Horse Does Not Prevent Recovery** — *United States*. — *Chicago, etc., R. Co. v. Prescott*, 19 U. S. App. 291.

*Connecticut*. — *Baldwin v. Greenwood Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33.

*Georgia*. — *Augusta v. Hudson*, 94 Ga. 135; *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 301.

*Illinois*. — *Lacon v. Page*, 48 Ill. 499; *Joliet v. Shufeldt*, 144 Ill. 403, 36 Am. St. Rep. 453; *Rockford v. Russell*, 9 Ill. App. 229; *Belleville v. Hoffman*, 74 Ill. App. 503.

*Indiana*. — *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612; *Boone County v. Mutchler*, 137 Ind. 140; *Fowler v. Linquist*, 138 Ind. 566.

*Iowa*. — *Byerly v. Anamosa*, 79 Iowa 204; *Manderschid v. Dubuque*, 25 Iowa 108; *Fowler v. Strawberry Hill*, 74 Iowa 644; *Andrews v. Mason City, etc., R. Co.*, 77 Iowa 672.

*Maryland*. — *Kennedy v. Cecil County*, 69 Md. 65; *Baltimore, etc., Turnpike Co. v. Bate-man*, 68 Md. 389, 6 Am. St. Rep. 449.

*Minnesota*. — *Nelson v. Chicago, etc., R. Co.*, 30 Minn. 74; *Maier v. Winona, etc., R. Co.*, 31 Minn. 401; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567; *Corey v. Northern Pac. R. Co.*, 32 Minn. 457; *Skjeggerud v. Minneapolis, etc., R. Co.*, 38 Minn. 56.

*Missouri*. — *Vogelgesang v. St. Louis*, 139 Mo. 127; *Hull v. Kansas City*, 54 Mo. 601, 14 Am. Rep. 487.

In Some States, however, namely, *Maine*, *Massachusetts*, *Michigan*, *South Carolina*, *West Virginia*, and *Wisconsin*, it is held that there is no right of recovery in such cases, the conduct of the horse being regarded as a primary cause of the accident.<sup>1</sup> But a mere momentary loss of control, caused by the shying or swerving of the horse, will not, even in these states, prevent recovery for injuries received from a defect in the road.<sup>2</sup>

**Loss of Control Due to Defect.** — If the loss of control of the horse is due to the existence of the defect in the highway, which results in frightening the horse, such defect is to be considered the proximate cause of the injury, for which the municipality is liable, though the injury does not actually occur until the horse has gone some distance from the place of the defect.<sup>3</sup>

*Montana.* — *Lundeen v. Livingston Electric Light Co.*, 17 Mont. 32.

*New Hampshire.* — *Winship v. Enfield*, 42 N. H. 197; *Stark v. Lancaster*, 57 N. H. 92.

*New York.* — *Smith v. Clarkstown*, 69 Hun (N. Y.) 155; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Ivory v. Deerpark*, 116 N. Y. 476.

*North Carolina.* — *Dillon v. Raleigh*, 124 N. Car. 184.

*Ohio.* — *Farmer v. Findlay St. R. Co.*, 60 Ohio St. 36.

*Texas.* — *Baldrige, etc., Bridge Co. v. Cartrell*, 75 Tex. 628; *Eads v. Marshall*, (Tex. Civ. App. 1894) 29 S. W. Rep. 170.

*Vermont.* — *Hunt v. Pownal*, 9 Vt. 411; *Kelsey v. Glover*, 15 Vt. 713.

*Washington.* — *White v. Ballard*, 19 Wash. 284.

*Canada.* — *Toms v. Whitby Tp.*, 35 U. C. Q. B. 195; *Sherwood v. Hamilton*, 37 U. C. Q. B. 470.

In *Pennsylvania* the absence of a railing has in numerous cases been regarded as the proximate cause of an accident following the fright of a horse, the municipal liability being conditioned on whether a railing was necessary in that place in view of the tendency of horse to take fright. *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 276; *Newlin Tp. v. Davis*, 77 Pa. St. 317; *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733; *Yoders v. Amwell Tp.*, 172 Pa. St. 447, 51 Am. St. Rep. 750; *Bitting v. Maxatawny*, 177 Pa. St. 213, 180 Pa. St. 357; *Wellman v. Susquehanna Depot*, 167 Pa. St. 239.

In the following cases the municipality was held not to be liable: *Chartiers Tp. v. Phillips*, 122 Pa. St. 601; *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833; *Herr v. Lebanon*, 149 Pa. St. 222, 34 Am. St. Rep. 603; *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145, 30 Am. St. Rep. 792; *Kieffer v. Hummelstown*, 151 Pa. St. 304; *Heister v. Fawn Tp.*, 189 Pa. St. 253.

**1. Loss of Control of Horse Prevents Recovery** — *Maine.* — *Coombs v. Topsham*, 38 Me. 204; *Moulton v. Sanford*, 51 Me. 127; *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287; *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84; *Nichols v. Athens*, 66 Me. 402.

*Massachusetts.* — *Davis v. Dudley*, 4 Allen (Mass.) 557; *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; *Fogg v. Nahant*, 98 Mass. 578; *Murdock v. Warwick*, 4 Gray (Mass.) 178; *Higgins v. Boston*, 148 Mass. 484; *Scannal v. Cambridge*, 163 Mass. 91.

*Michigan.* — *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; *Smith v. Sherwood Tp.*, 62 Mich. 159; *Beall v. Athens Tp.*, 81 Mich. 536; *Bleil v. Detroit St. R. Co.*, 98 Mich. 228.

*South Carolina.* — *Brown v. Laurens County*, 38 S. Car. 282; *Mason v. Spartanburg County*, 40 S. Car. 390, 42 Am. St. Rep. 887.

*West Virginia.* — *Smith v. County Ct.*, 33 W. Va. 713; *Rohrbough v. Barbour County Ct.*, 39 W. Va. 472, 45 Am. St. Rep. 925.

*Wisconsin.* — *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Jackson v. Bellevue*, 30 Wis. 250; *Kelley v. Fond du Lac*, 31 Wis. 179; *Goldsworthy v. Linden*, 75 Wis. 24; *McFarlane v. Sullivan*, 99 Wis. 361; *Ritger v. Milwaukee*, 99 Wis. 190.

**Illustrations.** — So it was held that where the horse threw his tail over the rein, so as to free himself for a considerable time from control, and while so freed from control came upon a defect in the way, by which an injury was occasioned, the town was not liable for the injury, though at the moment thereof the rein was disengaged from the horse's tail. *Fogg v. Nahant*, 98 Mass. 578, 106 Mass. 278.

**2. Momentary Loss of Control** — *Maine.* — *Aldrich v. Gorham*, 77 Me. 291; *Spaulding v. Winslow*, 74 Me. 528; *Morsman v. Rockland*, 91 Me. 264.

*Massachusetts.* — *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; *Stone v. Hubbardston*, 100 Mass. 54; *Babson v. Rockport*, 101 Mass. 93; *Bemis v. Arlington*, 114 Mass. 508; *Wright v. Templeton*, 132 Mass. 49; *Hinckley v. Somerset*, 145 Mass. 326.

*Michigan.* — *Langworthy v. Green Tp.*, 95 Mich. 93.

*Rhode Island.* — *Yeaw v. Williams*, 15 R. I. 20.

*West Virginia.* — *Rohrbough v. Barbour County Ct.*, 39 W. Va. 472, 45 Am. St. Rep. 925.

*Wisconsin.* — *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *McFarlane v. Sullivan*, 99 Wis. 361; *Ritger v. Milwaukee*, 99 Wis. 190.

**3. Defect Causing Fright of Horse** — *Connecticut.* — *Goshen, etc., Turnpike Co. v. Sears*, 7 Conn. 86; *Ward v. North Haven*, 43 Conn. 148.

*Indiana.* — *Brookville, etc., Turnpike Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76.

*Maine.* — *Willey v. Belfast*, 61 Me. 569.

*New Hampshire.* — *Merrill v. Claremont*, 58 N. H. 468.

*Vermont.* — *Hodge v. Bennington*, 43 Vt. 451.

*Wisconsin.* — *Kelley v. Fond du Lac*, 31 Wis. 179; *Donohue v. Warren*, 95 Wis. 367.



**10. Persons Entitled to Protection — a. NECESSITY OF SPECIAL DAMAGE.** — There is no right of action for injury from defects in a highway, in persons who have not suffered from the defects in a manner different from other persons in the community, and hence one cannot recover damages because deprived by the defects of the use of the highway.<sup>1</sup>

**b. UNDER STATUTES.** — The benefit of the statutes giving a right of action for injuries caused by defects in the highway is generally, either expressly or by implication, limited to those who were using the highway for the purpose of travel thereon when injured.<sup>2</sup> It follows that the statute gives no right of recovery for the loss of use of the highway through defects therein.<sup>3</sup> Nor does it authorize a recovery for injuries caused directly to the abutting land by the defective condition of the highway.<sup>4</sup>

A Liberal Construction, however, has been put on the word "travel" in this connection, and it is held that one is entitled to the protection of the statute if he has occasion to pass over the highway for any purpose of business, convenience, or pleasure,<sup>5</sup> or, as stated in another case, when he is making a reasonable use of the highway as a way.<sup>6</sup>

One Using the Highway for Racing has been held not entitled to the protection of the statute,<sup>7</sup> and it seems that this may be the case apart from any statute.<sup>8</sup>

**Question for Jury.** — The question whether the person injured was, at the time,

See also *supra*, this section, *Defects Involving Liability — Objects Frightening Horses.*

So where a well-broken horse was frightened by the carriage striking raised logs in the highway, and, becoming uncontrollable, ran away, and one hundred and twenty-five feet further on threw out the driver and injured him, it was held that the defect in the highway was the proximate cause of the injury. *Clark v. Lebanon*, 63 Me. 393.

**1. No Right of Action for Deprivation of Use of Highway — Indiana.** — *Sohn v. Cambern*, 106 Ind. 302.

*Iowa.* — *Brant v. Plumer*, 64 Iowa 33.

*Maryland.* — *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332.

*Massachusetts.* — *Willard v. Cambridge*, 3 Allen (Mass.) 574; *Smith v. Dedham*, 8 Cush. (Mass.) 522; *Harvard College v. Stearns*, 15 Gray (Mass.) 1; *Holman v. Townsend*, 13 Met. (Mass.) 297.

*New Hampshire.* — *Griffin v. Sanbornton*, 44 N. H. 246.

*Ohio.* — *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516.

*Pennsylvania.* — *Gold v. Philadelphia*, 115 Pa. St. 184.

*Rhode Island.* — *Williams v. Tripp*, 11 R. I. 447.

*West Virginia.* — *Hale v. Weston*, 40 W. Va. 313.

See also *infra*, this title, *Obstructions and Encroachments.*

**2. Travelers Only Entitled to Remedy — Maine.** — *Leslie v. Lewiston*, 62 Me. 468; *Philbrick v. Pittston*, 63 Me. 477; *Brown v. Skowhegan*, 82 Me. 273.

*Massachusetts.* — *Stickney v. Salem*, 3 Allen (Mass.) 374; *Blodgett v. Boston*, 8 Allen (Mass.) 237.

*Michigan.* — *Tatman v. Benton Harbor*, 115 Mich. 695.

*New Hampshire.* — *Ball v. Winchester*, 32 N. H. 435; *Hardy v. Keene*, 52 N. H. 370.

*Vermont.* — *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295.

*Wisconsin.* — *Harper v. Milwaukee*, 30 Wis. 365; *Kelley v. Fond du Lac*, 31 Wis. 179; *Hawes v. Fox Lake*, 33 Wis. 438; *Draper v. Ironton*, 42 Wis. 696; *Goeltz v. Ashland*, 75 Wis. 642.

**3. Loss of Use of Highway.** — *Brailley v. Southborough*, 6 Cush. (Mass.) 141; *Smith v. Dedham*, 8 Cush. (Mass.) 522; *Holman v. Townsend*, 13 Met. (Mass.) 297; *Griffin v. Sanbornton*, 44 N. H. 246. Compare *Williams v. Tripp*, 11 R. I. 447, where the statute was regarded as being open to a broader construction, it making a town liable to all persons who might "in any wise" suffer injury to their person or property.

**4. Injuries to Abutting Land — Maine.** — *Peck v. Ellsworth*, 36 Me. 393.

*Michigan.* — *Tatman v. Benton Harbor*, 115 Mich. 695.

*New Hampshire.* — *Ball v. Winchester*, 32 N. H. 435.

*New York.* — *Acker v. New Castle*, 48 Hun (N. Y.) 312; *Barber v. New Scotland*, 88 Hun (N. Y.) 522.

*Wisconsin.* — *Harper v. Milwaukee*, 30 Wis. 365.

**5. Who Are Travelers.** — *Blodgett v. Boston*, 8 Allen (Mass.) 237.

**6. Varney v. Manchester**, 58 N. H. 430, 42 Am. Rep. 592.

So where two children were sent out into the street by their mother, for air and exercise, and they went across the street, where they stopped to watch other boys at play, they were held to be entitled to the rights of travelers. *Bliss v. South Hadley*, 145 Mass. 91, 1 Am. St. Rep. 441.

**7. Racing.** — *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23.

**8. Sindlinger v. Kansas City**, 126 Mo. 315, where the injury occurred while the plaintiff was running a footrace in the night, the decision being based apparently on the ground of both contributory negligence and improper use of the highway.



traveling on the highway so as to be entitled to relief under the statute, is, it seems, a question for the jury, if there is any evidence which would sustain a finding that the use being made of the highway was a proper one.<sup>1</sup>

*c. TRAVELER STOPPING IN HIGHWAY.* — One does not lose his rights as a traveler by stopping in a reasonable manner for the purpose of alighting or of unloading his vehicle,<sup>2</sup> nor does he lose such rights by stopping for a reasonable time, even though such stop has no connection with the journey or the purpose thereof.<sup>3</sup> But one who stops and ties his horse outside the limits of the highway thereupon ceases to be a traveler, and consequently cannot recover for injuries to the horse caused by defects in the highway, if the horse gets loose and runs thereon.<sup>4</sup> So one leaning against, or sitting on, a fence or barrier erected on the side of the highway has been held in *New England* not to be making such a use of the highway as to entitle him to complain of injuries received,<sup>5</sup> but elsewhere a different view has been taken.<sup>6</sup>

*d. CHILDREN PLAYING IN HIGHWAY.* — It is generally held that children playing in the highway are entitled to recover for injuries caused by defective highways, the only decisions to the contrary being under statutes above referred to giving a remedy to travelers only for injuries caused by defects.<sup>7</sup> But even under those statutes, if the child is actually traveling on the highway the fact that incidentally he is engaged in play or amusement does not prevent recovery.<sup>8</sup>

*e. PERSONS OUTSIDE TRAVELED PATH.* — It has also been held, under the statutes referred to, that a person who goes voluntarily outside the traveled part of the road, though within the limits of the road as located, or who uses

1. *Question for Jury.* — *Babson v. Rockport*, 101 Mass. 93; *Hunt v. Salem*, 121 Mass. 294; *Hardy v. Keene*, 52 N. H. 370; *Cummings v. Center Harbor*, 57 N. H. 17; *Strong v. Stevens Point*, 62 Wis. 255.

2. *Smethurst v. Independent Cong. Church*, 148 Mass. 261, 12 Am. St. Rep. 550.

3. *Traveler Stopping in Highway.* — *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367; *Hunt v. Salem*, 121 Mass. 294; *Bliss v. South Hadley*, 145 Mass. 91, 1 Am. St. Rep. 441.

It was so held where one stopped to drink at a hydrant in the highway, *Duffy v. Dubuque*, 63 Iowa 171, 50 Am. Rep. 743; and likewise in the case of one stopping to pick berries at the side of the highway, *Britton v. Cumington*, 107 Mass. 347; or to repair a hole which he had discovered in the road, *Babson v. Rockport*, 101 Mass. 93; and also when one stopped a few minutes merely for the purpose of watching a procession, *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 592.

4. *Runaway Horse.* — *Richards v. Enfield*, 13 Gray (Mass.) 344.

To the same effect is *Cummings v. Center Harbor*, 57 N. H. 17, where the finding of the referee that in such case the owner of the horse was not a traveler was approved.

For a Contrary Decision see *Ward v. North Haven*, 43 Conn. 148, where the court said that the passage of the traveler along the highway is not, as a rule, continuous, but the demands of his business often compel him to withdraw temporarily from the limits of the road, and that such temporary withdrawals with intent to return to the road and pursue the journey, are all so necessary to the use of the road by the public that they should be considered as necessary incidents to the passage over the road.

5. *Persons Sitting or Leaning in Highway.* — *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500; *Stickney v. Salem*, 3 Allen (Mass.) 374. See also the title *BRIDGES*, vol. 4, p. 94, note.

6. *Jackson v. Boone*, 93 Ga. 662; *Langlois v. Cohoes*, 58 Hun (N. Y.) 226. And see the title *BRIDGES*, vol. 4, p. 942, note.

7. *Children Playing in Highway.* — *Illinois.* — *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860.

*Indiana.* — *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65.

*Missouri.* — *Donoho v. Vulcan Iron Works*, 75 Mo. 401, affirming 7 Mo. App. 447.

*New York.* — *McGarry v. Loomis*, 63 N. Y. 108, 20 Am. Rep. 510; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668.

*West Virginia.* — *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853.

See also *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23; *Blodgett v. Boston*, 8 Allen (Mass.) 237; *Tighe v. Lowell*, 119 Mass. 472; *Lyons v. Brookline*, 119 Mass. 491; *Strong v. Stevens Point*, 62 Wis. 255.

8. *Play Incidental to Travel.* — *Blodgett v. Boston*, 8 Allen (Mass.) 237; *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102; *Bliss v. South Hadley*, 145 Mass. 91, 1 Am. St. Rep. 441; *Graham v. Boston*, 156 Mass. 75; *Reed v. Madison*, 83 Wis. 171.

So it was held that a boy who, on his return from an errand, crossed the street to look at some toys in a window, and in turning away from the window was injured by a defective grating in the sidewalk, was not necessarily debarred of recovery. *Hunt v. Salem*, 121 Mass. 294.

such untraveled part merely for purposes of passing to or from his private way or path, cannot recover against the municipality.<sup>1</sup>

*f. STREET LABORERS.* — Persons working on a street are likewise entitled to claim damages for defects in the street.<sup>2</sup>

*g. HIGHWAY OFFICERS.* — A highway officer who is directly responsible for the existence of the defect cannot recover for injuries suffered by him.<sup>3</sup>

*h. MUNICIPAL EMPLOYEES.* — The firemen of a municipality may recover against it for injuries caused by defects in the street,<sup>4</sup> as may policemen.<sup>5</sup>

*i. PERSONS VIOLATING LAW.* — The fact that one is at the time of the accident violating a statute or ordinance does not ordinarily prevent his recovery of damages if the commission of the illegal act did not in any degree contribute to produce the injury.<sup>6</sup> And it has accordingly been held that one may recover though at the time of the accident he was traveling at an illegal rate of speed,<sup>7</sup> or was passing another vehicle on the wrong side of the highway, in violation of law.<sup>8</sup>

*Traveling on Sunday.* — In *Maine*, *Massachusetts*, and *Vermont* it has been held that statutes forbidding travel on Sunday have the effect of preventing recovery by one so unlawfully traveling for injuries caused by defects in the highway. In other states, however, no such effect is given to the Sunday laws.<sup>9</sup>

**11. Contributory Negligence** — *a. IN GENERAL.* — The recovery of damages caused by a defective highway is dependent upon the exercise of ordinary care by the person injured, the term "ordinary care" meaning such care as is usually exercised under like circumstances by persons of average prudence.<sup>10</sup>

**1. Persons Outside Traveled Path** — *Maine.* — *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Leslie v. Lewiston*, 62 Me. 468; *Philbrick v. Pittston*, 63 Me. 477; *Brown v. Skowhegan*, 82 Me. 273.

*Massachusetts.* — *Kellogg v. Northampton*, 4 Gray (Mass.) 65; *Howard v. North Bridgewater*, 16 Pick. (Mass.) 189; *Shepardson v. Colerain*, 13 Met. (Mass.) 55; *Smith v. Wendell*, 7 Cush. (Mass.) 498.

*Vermont.* — *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295.

*Wisconsin.* — *Hawes v. Fox Lake*, 33 Wis. 438.

See also *supra*, this section, *Defects Involving Liability—Defects Outside of Traveled Path.*

So it was held that the town was not liable to a traveler who, to aid his servant who had fallen into the water by the side of the road, knowingly passed beyond the traveled part at a point where the rails were down, and himself fell into the water. *Harwood v. Oakham*, 152 Mass. 421.

**2. Laborers on Street.** — *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657.

**3. Recovery by Highway Officer.** — *Wood v. Waterville*, 5 Mass. 294; *Todd v. Rowley*, 8 Allen (Mass.) 51.

**4. Firemen.** — *Turner v. Indianapolis*, 96 Ind. 51; *Port v. Detroit*, 75 Mich. 628; *Palmer v. Portsmouth*, 43 N. H. 265; *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511.

**5. Policemen.** — *Kimball v. Boston*, 1 Allen (Mass.) 417; *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828.

**6. Injury to Person Violating Law.** — *Davies v. Mann*, 10 M. & W. 546, 6 Jur. 954; *Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274; *Davidson v. Portland*, 69 Me. 116, 31 Am. Rep. 253; *Kidder v. Dunstable*, 11 Gray

(Mass.) 342. See also *Arey v. Newton*, 148 Mass. 598, 12 Am. St. Rep. 604. See further the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 401.

**7. Illegal Rate of Speed.** — *Cullman v. McMinn*, 109 Ala. 614; *Pueblo v. Smith*, 3 Colo. App. 386; *Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274. See the titles STREET RAILWAYS; STREETS AND SIDEWALKS.

In *Massachusetts* the view stated in the text is adopted in *Hall v. Ripley*, 119 Mass. 135, apparently overruling *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670, where the fact that one was driving across a bridge faster than a walk, in violation of an ordinance, was viewed as absolutely debarring him from recovery for injuries.

In *Tuttle v. Lawrence*, 119 Mass. 276, however, it was held that it was incumbent upon one suing for injuries to show that at the time of the accident she was not violating an ordinance limiting the rate of speed.

**8. Violation of Law of the Road.** — *O'Neil v. East Windsor*, 63 Conn. 150; *Spofford v. Harlow*, 3 Allen (Mass.) 176; *Smith v. Gardner*, 11 Gray (Mass.) 418; *Wynn v. Jones*, 111 Mass. 360; *Damon v. Scituate*, 119 Mass. 66, 20 Am. Rep. 315; *Smith v. Conway*, 121 Mass. 216; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Gale v. Lisbon*, 52 N. H. 174. See also *Decatur v. Stoops*, 21 Ind. App. 397, and generally the title LAW OF THE ROAD.

**9. Sunday Traveling.** — See the title SUNDAY.

The rule in *Massachusetts* has been changed by statute making the Sunday law no defense in actions of tort. Stat. 1884, c. 37, § 1.

**10. Ordinary Care** — *England.* — *Butterfield v. Forrester*, 11 East 60.

*United States.* — *Merrill v. Portland*, 4 Cliff. (U. S.) 138.

*Georgia.* — *Massey v. Columbus*, 75 Ga. 658.



*b. RIGHT TO ASSUME SAFETY OF HIGHWAY.* — One using the highway has a right to assume that it is reasonably safe for ordinary travel and to conduct himself accordingly.<sup>1</sup> It has consequently been held that one walking on a sidewalk is not bound to keep his eyes on the sidewalk all the time,<sup>2</sup> and hence is not necessarily negligent because he steps into an opening therein,<sup>3</sup>

*Idaho.* — *Giffen v. Lewiston*, (Idaho 1898) 55 Pac. Rep. 545.

*Illinois.* — *Chicago v. Babcock*, 143 Ill. 358.

*Maine.* — *Merrill v. Hampden*, 26 Me. 234; *Farrar v. Greene*, 32 Me. 574; *Garmon v. Bangor*, 38 Me. 443; *Gleason v. Bremen*, 50 Me. 222; *Morse v. Belfast*, 77 Me. 44.

*Maryland.* — *Baltimore v. Brannan*, 14 Md. 227.

*Massachusetts.* — *Fallon v. Boston*, 3 Allen (Mass.) 38; *Smith v. Smith*, 2 Pick. (Mass.) 621, 13 Am. Dec. 464; *Thompson v. Bridge-water*, 7 Pick. (Mass.) 188; *Hill v. Seekonk*, 119 Mass. 85; *Adams v. Carlisle*, 21 Pick. (Mass.) 146.

*Michigan.* — *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

*Missouri.* — *Shonhoff v. Jackson Branch R. Co.*, 97 Mo. 151.

*New Hampshire.* — *Sleeper v. Sandown*, 52 N. H. 244.

*Texas.* — *Austin v. Ritz*, 72 Tex. 391.

*Vermont.* — *Kelsey v. Glover*, 15 Vt. 711.

*Virginia.* — *Gordon v. Richmond*, 83 Va. 436; *Moore v. Richmond*, 85 Va. 538.

*Wisconsin.* — *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Bloor v. Delafield*, 69 Wis. 273; *Griffin v. Willow*, 43 Wis. 509; *Doan v. Willow Spring*, 101 Wis. 112.

See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368, especially pp. 378, 411.

**1. Presumption of Safety** — *Alabama.* — *Birmingham v. Starr*, 112 Ala. 98.

*California.* — *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55.

*Connecticut.* — *Lutton v. Vernon*, 62 Conn. 1.

*Delaware.* — *Robinson v. Wilmington*, 8 Houst. (Del.) 409; *Carswell v. Wilmington*, 2 Marv. (Del.) 360; *Pierce v. Wilmington*, 2 Marv. (Del.) 306.

*Illinois.* — *East Dubuque v. Burhyte*, 173 Ill. 553; *Vieths v. Skinner*, 47 Ill. App. 325.

*Indiana.* — *Stevens v. Logansport*, 76 Ind. 498; *Kenyon v. Indianapolis*, 1 Wils. (Ind.) 129; *Indianapolis v. Gaston*, 58 Ind. 224; *Evansville v. Wilter*, 86 Ind. 414; *Columbus v. Strassner*, 124 Ind. 482; *Noblesville Gas, etc., Co. v. Loehr*, 124 Ind. 79; *Lyon v. Logansport*, 9 Ind. App. 21.

*Iowa.* — *Robinson v. Cedar Rapids*, 100 Iowa 662.

*Kansas.* — *Topeka Water Co. v. Whiting*, 58 Kan. 639.

*Louisiana.* — *Mahan v. Everett*, 50 La. Ann. 1162.

*Massachusetts.* — *Hill v. Seekonk*, 119 Mass. 85; *Hawks v. Northampton*, 121 Mass. 10; *Street v. Holyoke*, 105 Mass. 85.

*Michigan.* — *Le Beau v. Telephone, etc., Constr. Co.*, 109 Mich. 302.

*New Jersey.* — *Durant v. Palmer*, 29 N. J. L. 544.

*New York.* — *Beltz v. Yonkers*, 74 Hun (N. Y.) 73; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Weed v. Ballston Spa*, 76 N. Y.

329; *Brusso v. Buffalo*, 90 N. Y. 679; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459; *Shook v. Cohoes*, 108 N. Y. 648; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; *Chisholm v. State*, 141 N. Y. 246; *Downey v. Low*, 22 N. Y. App. Div. 460; *Campbell v. Wood*, 22 N. Y. App. Div. 599.

*North Dakota.* — *Heckman v. Evenson*, 7 N. Dak. 173.

*Vermont.* — *Glidden v. Reading*, 38 Vt. 52, 88 Am. Dec. 639; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644.

*Virginia.* — *Gordon v. Richmond*, 83 Va. 436, 18 Am. & Eng. Corp. Cas. 251.

*Wisconsin.* — *Milwaukee v. Davis*, 6 Wis. 377; *Seward v. Milford*, 21 Wis. 485; *Wall v. Highland*, 72 Wis. 435.

See further the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 411.

**2. Need Not Watch for Defects.** — *Chicago v. Babcock*, 143 Ill. 358; *Baxter v. Cedar Rapids*, 103 Iowa 599; *Woods v. Boston*, 121 Mass. 337; *Fuller v. Hyde Park*, 162 Mass. 51; *Le Beau v. Telephone, etc., Constr. Co.*, 109 Mich. 302; *Laverdure v. New York*, 28 N. Y. App. Div. 65; *West v. Eau Claire*, 89 Wis. 31.

**3. Stepping into Excavation.** — *Osborne v. Detroit*, 32 Fed. Rep. 36; *Chicago v. Babcock*, 143 Ill. 358; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459; *Dale v. Syracuse*, 71 Hun (N. Y.) 449; *O'Hara v. Buffalo*, 39 N. Y. App. Div. 443; *Barnes v. Marcus*, 96 Iowa 675; *Cantwell v. Appleton*, 71 Wis. 463.

So in *Mathews v. Cedar Rapids*, 80 Iowa 459, 20 Am. St. Rep. 436, it was held that one was not necessarily negligent because he failed to discover an open areaway extending from beneath the building about five inches into the sidewalk, but situated under a well-lighted and attractive store window. The court distinguished such a case from one in which there were actual obstructions on a street or sidewalk such as to challenge the attention of a traveler, and also said that what might be diligence on a sidewalk might not be such in driving a team on a public thoroughfare.

In *Pennsylvania* it is held that one is bound to see obstructions or defects which are of a visible character. *King v. Thompson*, 87 Pa. St. 365, 30 Am. Rep. 364; *Robb v. Connells-ville*, 137 Pa. St. 42; *Stackhouse v. Vendig*, 166 Pa. St. 582; *Dehnhardt v. Philadelphia*, 15 W. N. C. (Pa.) 214; *Philadelphia v. Smith*, 23 W. N. C. (Pa.) 242; *Shallcross v. Philadelphia*, 187 Pa. St. 143.

So where the plaintiff, after passing around a mound of earth three feet high, thrown up while making an excavation in the sidewalk, and then, after passing between the mound and a building and stopping to look at a shop window in the building, stepped backwards into the excavation, she was held to be negligent as a matter of law. *Barnes v. Sowden*, 119 Pa. St. 53.



though one who failed to observe such a visible defect was held not to be free from contributory negligence as a matter of law.<sup>1</sup> The defect or obstruction may, however, be of such magnitude and so obvious that a failure to observe it will be negligence.<sup>2</sup> Likewise one driving on a highway is not compelled to look far ahead for defects which should not exist.<sup>3</sup>

*c. QUESTIONS OF LAW OR FACT.* — Whether one using the highway was in the exercise of ordinary care is generally a question of fact for the jury under proper instructions from the court,<sup>4</sup> but the negligence of the plaintiff may be of such character as to preclude recovery as a matter of law. So it has been held that one who drove into an obstruction while looking in another

**1. Not Free from Negligence as Matter of Law.** — *Mackie v. West Bay City*, 106 Mich. 242; *Le Beau v. Telephone, etc., Constr. Co.*, 109 Mich. 302. And see *Moore v. Richmond*, 85 Va. 538, where one was held to be negligent as a matter of law in failing to see at night an excavation which he might have seen by looking, there being a gaslight near it.

**2. Obvious Defect.** — *Pierce v. Wilmington*, 2 Marv. (Del.) 306; *Wilkins v. Wilmington*, 2 Marv. (Del.) 132; *Weston v. Troy*, 139 N. Y. 281; *Whalen v. Citizens' Gas Light Co.*, 151 N. Y. 70; *Cummings v. New Rochelle*, 38 N. Y. App. Div. 583.

So where one walked into a ditch nearly two feet wide and over two feet deep, the earth from which was piled two and one-half feet high on one side of it across the pavement, and a cart and implements used in the work were standing on the pavement, it was held that one who fell into the ditch because she did not look in that direction was negligent. *Osborn v. Pulaski Light, etc., Co.*, 95 Va. 16.

**3. Thompson v. Bridgewater**, 7 Pick. (Mass.) 188, where the person injured might, from an eminence in the road, have seen that a causeway at a considerable distance, which he intended to pass over, was covered with water, but failed to see it until he had descended the hill and had proceeded too far to turn back or go on in safety, and he was held not to be guilty of negligence.

**4. Question for Jury** — *England*. — *Marriott v. Stanley*, 1 Scott N. R. 392, 4 Jur. 320.

*Alabama*. — *Birmingham v. McCary*, 84 Ala. 469.

*Connecticut*. — *Lutton v. Vernon*, 62 Conn. 1; *Davis v. Guilford*, 55 Conn. 351.

*Illinois*. — *Chicago v. McLean*, 133 Ill. 148; *Sandwich v. Dolan*, 133 Ill. 177, 23 Am. St. Rep. 598, 31 Am. & Eng. Corp. Cas. 122; *Chicago v. Babcock*, 143 Ill. 358.

*Indiana*. — *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 220.

*Iowa*. — *Ryerly v. Anamosa*, 79 Iowa 204.

*Maine*. — *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721; *French v. Brunswick*, 21 Me. 29, 38 Am. Dec. 250; *Gleason v. Bretnen*, 50 Me. 222.

*Massachusetts*. — *Smith v. Smith*, 2 Pick. (Mass.) 621, 13 Am. Dec. 464; *Fox v. Sackett*, 10 Allen (Mass.) 535; *Britton v. Cummington*, 107 Mass. 347; *Joyner v. Great Barrington*, 118 Mass. 463; *Hill v. Seekonk*, 119 Mass. 85; *Hunt v. Salem*, 121 Mass. 294; *Talbot v. Taunton*, 146 Mass. 118; *Clark v. Hallowell*, 147 Mass. 280, 56 Am. Rep. 674; *Carville v. Westford*, 163 Mass. 544; *Harris v. Great Barrington*, 169 Mass. 271; *Bigelow v. Rutland*, 4 Cush. (Mass.)

247; *Adams v. Carlisle*, 21 Pick. (Mass.) 146; *Brackenridge v. Fitchburg*, 145 Mass. 160, 18 Am. & Eng. Corp. Cas. 287.

*Michigan*. — *Malloy v. Walker Tp.*, 77 Mich. 448; *Dundas v. Lansing*, 75 Mich. 499, 13 Am. St. Rep. 457, 25 Am. & Eng. Corp. Cas. 239; *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

*Nebraska*. — *Orleans v. Perry*, 24 Neb. 831.

*New Hampshire*. — *Farnum v. Concord*, 2 N. H. 392; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Daniels v. Lebanon*, 58 N. H. 284.

*New York*. — *Embler v. Wallkill*, 132 N. Y. 222; *O'Reilly v. Sing Sing*, (Supreme Ct. Gen. T.) 1 N. Y. Supp. 582; *Holloway v. Lockport*, 54 Hun (N. Y.) 153; *Harlow v. Humiston*, 6 Cow. (N. Y.) 189; *Byrne v. Syracuse*, 79 Hun (N. Y.) 555; *Lichtenstein v. New York*, 29 N. Y. App. Div. 542; *Schubert v. Cowles*, 31 N. Y. App. Div. 418; *Bryant v. Randolph*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 438; *Shook v. Cohoes*, 108 N. Y. 648; *Atwater v. Veteran*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 907.

*Pennsylvania*. — *Forker v. Sandy Lake*, 130 Pa. St. 123, 31 Am. & Eng. Corp. Cas. 61; *Hookey v. Oakdale*, 5 Pa. Super. Ct. 404; *Shenandoah v. Erdman*, (Pa. 1888) 12 Atl. Rep. 814; *Scranton v. Gore*, 124 Pa. St. 595; *Wellman v. Susquehanna Depot*, 167 Pa. St. 239; *Winner v. Oakland Tp.*, 158 Pa. St. 405, 33 W. N. C. (Pa.) 298; *Sprolows v. Morris Tp.*, 179 Pa. St. 219, 39 W. N. C. (Pa.) 555; *Bauerle v. Philadelphia*, 184 Pa. St. 545.

*Rhode Island*. — *Hampson v. Taylor*, 15 R. I. 83.

*Texas*. — *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828.

*Wisconsin*. — *Jung v. Stevens Point*, 74 Wis. 547.

See the title CONTRIBUTORY NEGLIGENCE, vol. 7, 10, 450.

**Running on the Street** is not negligence as a matter of law, though one fails to look where he is going. *Penrose v. Fehr*, 113 Mich. 517; *Barr v. Kansas City*, 105 Mo. 550.

**Objects Liable to Fall.** — So it was held to be a question for the jury whether one was negligent in passing by an unfastened billboard which fell. *Cason v. Ottumwa*, 102 Iowa 99; or in standing near a pile of heavy building stones, one of which was shaken down by a passing team. *Mahar v. Steuer*, 170 Mass. 454.

**Entanglement of Reins.** — It has also been held to be a question for the jury whether the plaintiff was negligent in allowing the reins to become entangled. *Hallowell v. Bates*, 4 Cush. (Mass.) 247; *Hull v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487.

direction, without any special necessity for so looking, could not recover;<sup>1</sup> nor can a traveler who places himself in a dangerous position in the highway recover for resulting injuries;<sup>2</sup> and this has been held to be so when one drove too near an unguarded embankment while turning out to pass another vehicle.<sup>3</sup>

The Driving of a Horse by a Woman does not show contributory negligence as a matter of law,<sup>4</sup> but she is, it seems, bound to exercise the same amount of skill and care as a person of the opposite sex.<sup>5</sup>

*d. KNOWLEDGE OF DEFECT*—(1) *Effect in General*.—It is generally agreed that a traveler's previous knowledge of the defect in the highway whereby he is injured is not of itself sufficient, as a matter of law, to prevent his recovery on the ground of contributory negligence.<sup>6</sup> But when one knows of a defect, he has no right to act on the usual presumption that the highway

1. *Negligence as Matter of Law*.—Wilkins v. Wilmington, 2 Marv. (Del.) 132; Tuffree v. State Center, 57 Iowa 538; Tasker v. Farmingdale, 91 Me. 521. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 456.

So if one knowing of the presence of stones upon a walk attempts to pass over them instead of around them, he is held to be liable, as a matter of law, for injuries caused by tripping thereupon. Nicholas v. Peck, 20 R. I. 533; Grandorf v. Detroit Citizens' St. R. Co., 113 Mich. 496.

2. *Occupying Dangerous Position*.—Kuhn v. Walker Tp., 97 Mich. 306; Cleveland v. Pittsford, 72 Hun (N. Y.) 552; Sutphen v. North Hempstead, 80 Hun (N. Y.) 409.

So where one drove so near the edge of the highway that he could not stop because his wheel was going over the edge thereof, and could not drive towards the centre of the highway because other teams interfered, and consequently felt compelled to adopt the hazardous alternative of driving his team down a steep embankment, it was held that he could not recover. Little v. Brockton, 123 Mass. 511.

3. *Approaching Unguarded Embankment*.—Tasker v. Farmingdale, 88 Me. 103; Glazier v. Hebron, 62 Hun (N. Y.) 137. And compare Snow v. Provincetown, 120 Mass. 580; Harris v. Great Barrington, 169 Mass. 271.

4. *Woman as Driver*.—Cobb v. Standish, 14 Me. 198; Bigelow v. Rutland, 4 Cush. (Mass.) 247; Blood v. Tyngsborough, 103 Mass. 509; Snow v. Provincetown, 120 Mass. 580.

5. Tucker v. Henniker, 41 N. H. 317. Compare Snow v. Provincetown, 120 Mass. 580.

6. *Knowledge of Defect Not Conclusive of Contributory Negligence*—Alabama.—Montgomery v. Wright, 72 Ala. 411, 47 Am. Rep. 422; Elyton Land Co. v. Mingea, 89 Ala. 521.

Connecticut.—Fox v. Glastenbury, 29 Conn. 204; Dooley v. Meriden, 44 Conn. 117, 26 Am. Rep. 433.

District of Columbia.—District of Columbia v. Crumbaugh, 13 App. Cas. (D. C.) 553, 27 Wash. L. Rep. 73.

Georgia.—Samples v. Atlanta, 95 Ga. 110; Dempsey v. Rome, 94 Ga. 420.

Idaho.—Giffen v. Lewiston, (Idaho 1898) 55 Pac. Rep. 545.

Illinois.—Clayton v. Brooks, 150 Ill. 97; St. Louis Bridge Co. v. Miller, 138 Ill. 465; Ellis v. Peru, 23 Ill. App. 35; Aurora v. Dale, 90

Ill. 46; Peoria v. Gerber, 68 Ill. App. 255; East St. Louis v. Dougherty, 74 Ill. App. 490.

Indiana.—Richmond v. Mulholland, 116 Ind. 173; Salem v. Walker, 16 Ind. App. 687; Williamsport v. Lisk, 21 Ind. App. 414; Huntington v. Breen, 77 Ind. 29; Murphy v. Indianapolis, 83 Ind. 76; Ft. Wayne v. Breese, 123 Ind. 581; Wilson v. Trafalgar, etc., Gravel Road Co., 83 Ind. 326; Henry County Turnpike Co. v. Jackson, 86 Ind. 111, 44 Am. Rep. 274; Citizens' St. R. Co. v. Sutton, 148 Ind. 169.

Iowa.—Larsh v. Des Moines, 74 Iowa 512; Troxel v. Vinton, 77 Iowa 90; Waud v. Polk County, 88 Iowa 617; Fulliam v. Muscatine, 70 Iowa 436; Kendall v. Albia, 73 Iowa 248; Walker v. Decatur County, 67 Iowa 308; Munger v. Marshalltown, 59 Iowa 763; Ross v. Davenport, 66 Iowa 551; Rice v. Des Moines, 40 Iowa 642; Kendall v. Lucas County, 26 Iowa 397; Graham v. Oxford, 105 Iowa 705; Hall v. Manson, 99 Iowa 698.

Kansas.—Maultby v. Leavenworth, 28 Kan. 745; Emporia v. Schmidling, 33 Kan. 485; Langan v. Atchison, 35 Kan. 318, 57 Am. Rep. 165.

Maryland.—Prince George's County v. Burgess, 61 Md. 29, 48 Am. Rep. 88; Alleghany County v. Broadwaters, 69 Md. 533.

Massachusetts.—Whittaker v. West Boylston, 97 Mass. 273; Frost v. Waltham, 12 Allen (Mass.) 85; Reed v. Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Thomas v. Western Union Tel. Co., 100 Mass. 158; Lyman v. Amherst, 107 Mass. 339; Dewire v. Bailey, 131 Mass. 169; Lyman v. Hampshire County, 140 Mass. 311; Fox v. Chelsea, 171 Mass. 207; Norwood v. Somerville, 159 Mass. 105; McGuinness v. Worcester, 160 Mass. 272.

Michigan.—Lowell v. Watertown Tp., 58 Mich. 568; Argus v. Sturgis, 86 Mich. 344; Schwingschlegel v. Monroe, 113 Mich. 683.

Minnesota.—Erd v. St. Paul, 22 Minn. 443; Kelly v. Southern Minnesota R. Co., 28 Minn. 98; Estelle v. Lake Crystal, 27 Minn. 243; McKenzie v. Northfield, 30 Minn. 456; Nichols v. Minneapolis, 33 Minn. 430, 53 Am. Rep. 56.

Missouri.—Smith v. St. Joseph, 45 Mo. 449; Loewer v. Sedalia, 77 Mo. 431; Maus v. Springfield, 101 Mo. 613, 20 Am. St. Rep. 634; Flynn v. Neosho, 114 Mo. 567; Waltemeyer v. Kansas City, 71 Mo. App. 354; Boulton v. Columbia, 71 Mo. App. 519; Graney v. St. Louis, 141 Mo. 180; Stevens v. Walpole, 76 Mo. App. 213.

is safe,<sup>1</sup> though it has been held that one has the right to assume that an obstruction of which he knows is not dangerous, unless he is warned to the contrary, or the danger is apparent upon a casual inspection;<sup>2</sup> and in some cases there may be a presumption that the defect has been repaired.<sup>3</sup>

(2) *To Be Considered in Determining Negligence.* — Knowledge of the defect imposes upon one the obligation of taking reasonable care to avoid any injuries from it, and is to be considered with the other circumstances in the case, in determining whether the plaintiff has been guilty of negligence preventing his recovery of damages;<sup>4</sup> and in some cases it has been held to raise

*New York.* — *Bond v. Smith*, 44 Hun (N. Y.) 219; *Bullock v. New York*, 51 N. Y. Super. Ct. 36, 99 N. Y. 654, 8 Am. & Eng. Corp. Cas. 583; *Weed v. Ballston Spa*, 76 N. Y. 329; *Niven v. Rochester*, 76 N. Y. 619.

*North Dakota.* — *Ouverson v. Grafton*, 5 N. Dak. 281.

*Ohio.* — *Toledo v. Center*, 16 Ohio Cir. Ct. 308, 8 Ohio Cir. Dec. 503.

*Pennsylvania.* — *Millcreek Tp. v. Perry*, 20 W. N. C. (Pa.) 359; *Humphreys v. Armstrong County*, 56 Pa. St. 204; *Merriman v. Phillipsburg*, 158 Pa. St. 78.

*Rhode Island.* — *Hampson v. Taylor*, 15 R. I. 83.

*Texas.* — *Denison v. Sanford*, 2 Tex. Civ. App. 661; *Gulf, etc., R. Co. v. Gasscamp*, 69 Tex. 545; *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828; *Austin v. Ritz*, 72 Tex. 391; *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621.

*Vermont.* — *Templeton v. Montpelier*, 56 Vt. 328; *Coates v. Canaan*, 51 Vt. 131.

*Washington.* — *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799. And see *Bothell v. Seattle*, 17 Wash. 263.

*Wisconsin.* — *Kavanaugh v. Janesville*, 24 Wis. 618; *Kenworthy v. Ironton*, 41 Wis. 647; *Salzer v. Milwaukee*, 97 Wis. 471; *Crites v. New Richmond*, 98 Wis. 55.

*Canada.* — *Maw v. King, etc., Tps.*, 8 Ont. App. 248.

See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 412.

**Duty to Give Notice of or Repair Defect.** — The fact that one omitted to give notice to the town of the defect, which was known to him, does not prevent his recovery. *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662. And it was held that the fact that the overseer of the highway had told the plaintiff that whenever he found a bad place on the road he should fix it, and that he would be allowed therefor on his road taxes, and that the plaintiff said he would do so, did not prevent his recovery for injuries caused by a defect which was known to him and which he had done nothing towards remedying. *Doan v. Willow Springs*, 101 Wis. 112.

**1. No Presumption of Safety.** — *McGraw v. Friend, etc., Lumber Co.*, 120 Cal. 574; *Kewanee v. Depew*, 80 Ill. 121; *Scanlon v. Watertown*, 14 N. Y. App. Div. 1; *Neddo v. Ticonderoga*, 77 Hun (N. Y.) 524; *Weston v. Troy*, 139 N. Y. 281; *Chisholm v. State*, 141 N. Y. 246.

So in *Hopkins v. Rush River*, 70 Wis. 10, it was held error to tell the jury that one has a right to assume that the road is safe, when the accident occurred while one was attempting to cross a stream which he could see was

much increased in width by recent rains, as were other streams which he had already crossed, he being well acquainted with the character of the stream and its liability to rise suddenly.

**2. Presumption as to Character of Obstruction.** — *Atchison v. Plunkett*, (Kan. App. 1899) 55 Pac. Rep. 677.

**3. Presumption of Repair.** — In *Finn v. Adrian*, 93 Mich. 504, it was held that one was not negligent in attempting to cross a street at a crossing, merely because he knew that the crosswalk was torn up eight days before, he having a right to presume that it had been repaired. See also, as to the presumption of repair, *Watseka v. Smith*, 75 Ill. App. 391; *Dale v. Webster County*, 76 Iowa 370; *Whoram v. Argentine Tp.*, 112 Mich. 20.

But one cannot assume after the lapse of several days that ice on a sidewalk has been removed by the city, where the weather has been cold in the meantime. *Lynchburg v. Wallace*, 95 Va. 640.

**4. Knowledge Is Element to Be Considered** — *California.* — *McGraw v. Friend, etc., Lumber Co.*, 120 Cal. 574.

*Connecticut.* — *Congdon v. Norwich*, 37 Conn. 414.

*Illinois.* — *Aurora v. Hillman*, 90 Ill. 61; *Bloomington v. Chamberlain*, 104 Ill. 268; *Flora v. Naney*, 136 Ill. 45; *East St. Louis v. Donahue*, 77 Ill. App. 574.

*Indiana.* — *Huntington v. Breen*, 77 Ind. 29; *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164; *Richmond v. Mulholland*, 116 Ind. 173; *Ft. Wayne v. Breese*, 123 Ind. 581; *Boswell v. Wakley*, 149 Ind. 64; *Columbus v. Strassner*, 124 Ind. 482; *Poseyville v. Lewis*, 126 Ind. 80; *Bedford v. Neal*, 143 Ind. 425; *Frankfort v. Coleman*, 19 Ind. App. 368.

*Iowa.* — *Walker v. Decatur County*, 67 Iowa 308.

*Kansas.* — *Corlett v. Leavenworth*, 27 Kan. 673; *Osage City v. Brown*, 27 Kan. 74; *Osborne v. Hamilton*, 29 Kan. 1; *Emporia v. Schmidling*, 33 Kan. 485.

*Maryland.* — *Prince George's County v. Burgess*, 61 Md. 31, 48 Am. Rep. 88.

*Massachusetts.* — *Smith v. Leavelle & Allen* (Mass.) 39; *Frost v. Waltham*, 12 Allen (Mass.) 85; *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; *Lyman v. Amherst*, 107 Mass. 339; *Whitford v. Southbridge*, 119 Mass. 564.

*Michigan.* — *Sias v. Reed City*, 103 Mich. 312; *Dittrich v. Detroit*, 98 Mich. 245; *Church v. Howard City*, 111 Mich. 298.

*Minnesota.* — *Estelle v. Lake Crystal*, 27 Minn. 243; *Kelly v. Southern Minnesota R. Co.*, 28 Minn. 98; *Hudson v. Little Falls*, 68 Minn. 463.

*Missouri.* — *Foster v. Swope*, 41 Mo. App.



a presumption of negligence on his part.<sup>1</sup>

**Degree of Care Required.** — The knowledge of the defect, however, though it renders greater vigilance necessary, does not impose on the plaintiff the duty of exercising more than ordinary care as determined by the circumstances of the particular case, and it is therefore error to require the jury to find that the plaintiff exercised extraordinary care.<sup>2</sup>

(3) *Duty to Refrain from Using Highway.* — In accordance with the rule above stated, it has been decided that the fact that a highway is known to be defective does not necessarily impose on one the duty of refraining from traveling thereon.<sup>3</sup>

**Defective Sidewalk.** — And in other cases one knowing that a sidewalk was defective was held not to be bound on that account to walk in the roadway or on the sidewalk on the opposite side of the street.<sup>4</sup> But it has been held to be error to state, as a matter of law, that it was not negligence not to leave the sidewalk under such circumstances,<sup>5</sup> and under some circumstances it would be negligence as a matter of law not to do so.<sup>6</sup>

**Negligence as Matter of Law.** — If the danger arising from the known defect is obviously of such character that no person, in the exercise of ordinary prudence, would attempt to pass over the highway at that point, or over a particular part thereof, or, in other words, if such an attempt would of itself, plainly and unequivocally, amount to want of ordinary care and diligence, it may be so decided as a matter of law.<sup>7</sup> In some cases the rule is stated to be that

137; *Smith v. St. Joseph*, 45 Mo. 449; *Cohn v. Kansas City*, 108 Mo. 387.

*Nebraska.* — *Plattsmouth v. Mitchell*, 20 Neb. 228; *Orleans v. Perry*, 24 Neb. 831.

*New Hampshire.* — *Griffin v. Auburn*, 58 N. H. 121.

*Ohio.* — *Schaefer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533.

*Pennsylvania.* — *Easton v. Neff*, 102 Pa. St. 474, 48 Am. Rep. 213; *Erskine v. McNichol*, 13 W. N. C. (Pa.) 224.

*Wisconsin.* — *Nicks v. Marshall*, 24 Wis. 139; *Kelley v. Fond du Lac*, 31 Wis. 179; *Kenworthy v. Ironton*, 41 Wis. 647.

1. **Presumption of Negligence.** — *Clayton v. Brooks*, 150 Ill. 97; *Achtenhagen v. Watertown*, 18 Wis. 331, 86 Am. Dec. 769; *Cumisky v. Kenosha*, 87 Wis. 286.

2. **Extraordinary Care Not Required.** — *Wilson v. Trafalgar, etc., Gravel Road Co.*, 93 Ind. 287; *Hanlon v. Keokuk*, 7 Iowa 488, 74 Am. Dec. 276; *Kinsley v. Morse*, 40 Kan. 577; *McGuinness v. Worcester*, 160 Mass. 272; *Koch v. Ashland*, 88 Wis. 603.

3. **Not Bound to Refrain from Using Highway** — *Indiana.* — *Madison County v. Brown*, 89 Ind. 48; *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164; *Evansville, etc., R. Co. v. Carver*, 113 Ind. 51; *Ft. Wayne v. Breese*, 123 Ind. 581.

*Kansas.* — *Falls Tp. v. Stewart*, 3 Kan. App. 403.

*Massachusetts.* — *Pomeroy v. Westfield*, 154 Mass. 462.

*North Dakota.* — *Ouverson v. Grafton*, 5 N. Dak. 281.

*Pennsylvania.* — *Chilton v. Carbondale*, 160 Pa. St. 463; *Stokes v. Ralpho Tp.*, 187 Pa. St. 333.

*South Carolina.* — *Laney v. Chesterfield County*, 29 S. Car. 140.

4. **Leaving Sidewalk** — *Illinois.* — *Aurora v. Hillman*, 90 Ill. 61; *Flora v. Naney*, 136 Ill. 45; *Sandwich v. Dolan*, 141 Ill. 430.

*Iowa.* — *Parkhill v. Brighton*, 61 Iowa 103; *Kendall v. Albia*, 73 Iowa 241.

*Kansas.* — *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165.

*Michigan.* — *Germaine v. Muskegon*, 105 Mich. 213.

*Nebraska.* — *Plattsmouth v. Mitchell*, 20 Neb. 231.

*New York.* — *Holloway v. Lockport*, 54 Hun (N. Y.) 153; *Shook v. Cohoes*, 108 N. Y. 648.

5. *Lovenguth v. Bloomington*, 71 Ill. 238; *Sandwich v. Dolan*, 133 Ill. 177, 23 Am. St. Rep. 598. See also *Centralia v. Krouse*, 64 Ill. 21.

6. *McGraw v. Friend, etc., Lumber Co.*, 120 Cal. 574; *Lynch v. Erie*, 151 Pa. St. 380. See also cases in the next note.

7. **Care as to Whether to Make Attempt** — *England.* — *Clayards v. Dethick*, 12 Q. B. 439, 64 E. C. L. 439.

*Connecticut.* — *Fox v. Glastenbury*, 29 Conn. 204.

*Georgia.* — *Samples v. Atlanta*, 95 Ga. 114; *Branan v. May*, 17 Ga. 136.

*Indiana.* — *Bloomington v. Rogers*, 9 Ind. App. 230; *Gosport v. Evans*, 120 Ind. 133, 2 Am. St. Rep. 164; *Salem v. Walker*, 16 Ind. App. 687; *Ft. Wayne v. Breese*, 123 Ind. 581.

*Iowa.* — *Nichols v. Laurens*, 96 Iowa 388.

*Kansas.* — *Corlett v. Leavenworth*, 27 Kan. 673.

*Maine.* — *Merrill v. North Yarmouth*, 78 Me. 200, 57 Am. Rep. 794.

*Maryland.* — *Baltimore v. Holmes*, 39 Md. 243.

*Massachusetts.* — *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Hayes v. Hyde Park*, 153 Mass. 514; *Rindge v. Coleraine*, 11 Gray (Mass.) 157; *Horton v. Ipswich*, 12 Cush. (Mass.) 488; *Thompson v. Bridgewater*, 7 Pick. (Mass.) 189; *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73; *Casey v.*

one is bound not to use the highway or walk if he knows it to be practically impassable,<sup>1</sup> while in other cases his knowledge that it is unsafe or dangerous is said to be the criterion.<sup>2</sup>

**Accessibility of Other Way.** — The question of the right to make the attempt to pass is frequently to be determined not only by the character of the defect or danger, but likewise, it seems, by the convenience or accessibility of another route or pathway and the necessity of using this particular route.<sup>3</sup> This consideration of the facility of avoiding the defect has been quite frequently applied in the case of icy places on sidewalks, to cross which when they could readily be avoided has been decided to be negligence.<sup>4</sup>

Fitchburg, 162 Mass. 321; *Smith v. Lowell*, 6 Allen (Mass.) 39.

*Michigan.* — *Grandorf v. Detroit Citizens' St. R. Co.*, 113 Mich. 496; *Harris v. Clinton Tp.*, 64 Mich. 447, 8 Am. St. Rep. 842; *Smith v. Walker Tp.*, 117 Mich. 14.

*Mississippi.* — *Meridian v. Hyde*, (Miss. 1891) 11 So. Rep. 108.

*Missouri.* — *Ray v. Poplar Bluff*, 70 Mo. App. 252.

*New Hampshire.* — *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Griffin v. Auburn*, 58 N. H. 121.

*New York.* — *Morrell v. Peck*, 88 N. Y. 398, reversing 24 Hun (N. Y.) 37; *Evans v. Utica*, 69 N. Y. 166, 25 Am. Rep. 165; *Sandman v. Baylies*, (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 523.

*Pennsylvania.* — *Forks Tp. v. King*, 84 Pa. St. 230; *Erie City v. Magill*, 101 Pa. St. 616, 47 Am. Rep. 739; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580; *Winner v. Oakland Tp.*, 158 Pa. St. 405, 33 W. N. C. (Pa.) 298; *Crescent Tp. v. Anderson*, 114 Pa. St. 643, 60 Am. Rep. 367.

*South Carolina.* — *Acker v. Anderson County*, 20 S. Car. 495, and *Laney v. Chesterfield County*, 29 S. Car. 140, followed in *Magill v. Lancaster County*, 39 S. Car. 27.

*Texas.* — *Houston, etc., R. Co. v. Dunn*, 17 Tex. Civ. App. 687, 692.

*West Virginia.* — *Phillips v. Ritchie County*, 31 W. Va. 477.

*Wisconsin.* — *Welsh v. Argyle*, 89 Wis. 649; *Groundwater v. Washington*, 92 Wis. 56.

Where a flagstone had been removed from a part of a sidewalk and placed upon an adjoining flagstone, but an undisturbed and unobstructed place several feet wide was left, it was held that a traveler who unnecessarily attempted to step over the flagstone, instead of using the safe passageway afforded by the undisturbed part of the sidewalk, was negligent and could not recover for injuries caused by passing over the flagstone. *Whalen v. Citizens' Gas Light Co.*, 151 N. Y. 70.

**1. Way Practically Impassable.** — *Muller v. District of Columbia*, 5 Mackey (D. C.) 286; *Corts v. District of Columbia*, 18 D. C. 277; *Prince George's County v. Burgess*, 61 Md. 31, 48 Am. Rep. 88; *Farnum v. Concord*, 2 N. H. 394; *Folsom v. Underhill*, 36 Vt. 581.

**2. Knowledge of Danger.** — *Lovenguth v. Bloomington*, 71 Ill. 238; *Troxel v. Vinton*, 77 Iowa 91; *Lane v. Lewiston*, 91 Me. 292; *Walters v. Wayne Tp.*, 16 Pa. Co. Ct. 613; *Forks Tp. v. King*, 84 Pa. St. 230; *Hill v. Tionesta Tp.*, 146 Pa. St. 11, 29 W. N. C. (Pa.) 399; *Wellman v. Susquehanna Depot*, 154 Pa.

St. 239; *Bloomsburg Steam Co. v. Gardner*, 126 Pa. St. 80; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580; *Stokes v. Ralpho Tp.*, 187 Pa. St. 333. And see *Farmer v. Findlay St. R. Co.*, 60 Ohio St. 36.

In *Horton v. Ipswich*, 12 Cush. (Mass.) 488, it was held that if a road was obstructed by snow, and the plaintiff knew that it was dangerous or impassable, but persisted in going on, he could not recover; but that if he only knew that it was obstructed, but not so as to indicate to him that he could not pass with safety, and he met with injury in proceeding with due care, he might maintain his action.

**3. Accessibility of Other Road or Path.** — *Illinois.* — *Centralia v. Krouse*, 64 Ill. 19.

*Indiana.* — *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 18 Am. & Eng. Corp. Cas. 275; *Seybold v. Terre Haute, etc., R. Co.*, 18 Ind. App. 367.

*Iowa.* — *Walker v. Decatur County*, 67 Iowa 307; *Hartman v. Muscatine*, 70 Iowa 511; *Parkhill v. Brighton*, 61 Iowa 103.

*Massachusetts.* — *Pomeroy v. Westfield*, 154 Mass. 462; *Wilson v. Charlestown*, 8 Allen (Mass.) 137, 85 Am. Dec. 693.

*Minnesota.* — *Skjeggerrud v. Minneapolis, etc., R. Co.*, 38 Minn. 56.

*Missouri.* — *Cohn v. Kansas City*, 108 Mo. 393.

*New York.* — *Powers v. Creem*, 22 N. Y. App. Div. 480.

*Ohio.* — *Schaefer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Bond Hill v. Atkinson*, 16 Ohio Cir. Ct. 470, 9 Ohio Cir. Dec. 185.

*Pennsylvania.* — *Erie v. Magill*, 101 Pa. St. 616, 47 Am. Rep. 739; *Hill v. Tionesta Tp.*, 146 Pa. St. 11; *Wellman v. Susquehanna Depot*, 167 Pa. St. 239; *Glaub v. Goshen Tp.*, 7 Kulp (Pa.) 292.

*Texas.* — *Gulf, etc., R. Co. v. Gasscamp*, 69 Tex. 547.

**4. Icy Sidewalk.** — *Illinois.* — *Chicago v. Richardson*, 75 Ill. App. 198. Compare *Rockford v. Rannie*, 77 Ill. App. 665.

*Iowa.* — *Hartman v. Muscatine*, 70 Iowa 511; *Cosner v. Centerville*, 90 Iowa 33; *Marshall v. Belle Plaine*, 106 Iowa 508.

*Massachusetts.* — *Wilson v. Charlestown*, 8 Allen (Mass.) 137, 85 Am. Dec. 693.

*Michigan.* — *Black v. Manistee*, 107 Mich. 60.

*Minnesota.* — *Wright v. St. Cloud*, 54 Minn. 98.

*New York.* — *Durkin v. Troy*, 61 Barb. (N. Y.) 437; *Kleng v. Buffalo*, 72 Hun (N. Y.) 541, affirmed 156 N. Y. 700.

*Ohio.* — *Schaefer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Conneaut v. Naef*, 54 Ohio St. 529.



(4) *Duty to Remember and Locate Defect.* — It is generally held that one is not necessarily negligent because, though knowing of the defect, he fails to bear it in mind at the time of approaching it;<sup>1</sup> and the fact that he was mistaken as to the location of the defect does not necessarily prevent recovery.<sup>2</sup>

*e. ACTS IN PRESENCE OF DANGER.* — In the presence of danger caused by a defect in the highway one is not called upon to do the best and wisest thing,<sup>3</sup> though he is still bound to exercise such prudence as a person of ordinary discretion would exercise;<sup>4</sup> and accordingly one may recover for injuries caused by leaping from a vehicle under such circumstances.<sup>5</sup>

*f. TRAVELING AT NIGHT* — (1) *In General.* — One traveling at night has the same right as one traveling by day to assume that the highway is safe,<sup>6</sup>

*Pennsylvania.* — *Erie v. Magill*, 101 Pa. St. 616, 47 Am. Rep. 739; *Boyle v. Mahanoy City*, 187 Pa. St. 1.

But see *Evans v. Utica*, 69 N. Y. 166, 25 Am. Rep. 165, and *Gilbert v. Boston*, 139 Mass. 313, where it was decided, under the circumstances of the particular case, that it was a question for the jury whether the plaintiff was negligent in attempting to cross an icy place in a city street.

1. *Failure to Bear Defect in Mind Not Necessarily Negligence* — *Georgia.* — *Dempsey v. Rome*, 94 Ga. 420.

*Illinois.* — *Springfield v. Rosenmeyer*, 52 Ill. App. 301; *Normal v. Gresham*, 49 Ill. App. 196.

*Massachusetts.* — *George v. Haverhill*, 110 Mass. 506; *Barton v. Springfield*, 110 Mass. 131; *Parker v. Springfield*, 147 Mass. 391.

*Michigan.* — *Bouga v. Weare Tp.*, 109 Mich. 520.

*Minnesota.* — *Maloy v. St. Paul*, 54 Minn. 398.

*Washington.* — *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799.

*Wisconsin.* — *Wheeler v. Westport*, 30 Wis. 392; *Cumisky v. Kenosha*, 87 Wis. 286; *Simonds v. Baraboo*, 93 Wis. 40, 57 Am. St. Rep. 895; *Doan v. Willow Springs*, 101 Wis. 112.

*Decisions of Opposite Tendency.* — In *Gilman v. Deerfield*, 15 Gray (Mass.) 577, it was decided that one who was injured while driving a high-spirited horse past a defect of which he knew, but of which he did not think at the time because occupied with his business affairs, was negligent. This case was distinguished in *Weare v. Fitchburg*, 110 Mass. 334, on the ground that the plaintiff's testimony therein was equivalent to a positive declaration that he took no care, and has been disapproved in *Wheeler v. Westport*, 30 Wis. 392, and *Simonds v. Baraboo*, 93 Wis. 40, 57 Am. St. Rep. 895.

Decisions to the effect that one knowing of the defect is bound to look out therefor (especially if there is nothing to distract his attention, *Barce v. Shenandoah*, 106 Iowa 426) are also to be found. See *Birmingham v. Starr*, 112 Ala. 98; *Kewanee v. Depew*, 80 Ill. 119; *Walker v. Reidsville*, 96 N. Car. 382.

*Excuse for Not Remembering Defect.* — In a few of the cases the fact that the traveler's attention was occupied by matters of a pressing nature, or that he had particular reasons for hurrying, seems to have been considered as tending to excuse him. *Barton v. Springfield*, 110 Mass. 131; *Dundas v. Lansing*, 75 Mich. 499, 13 Am. St. Rep. 457; *Maloy v. St. Paul*,

54 Minn. 398; *Cumisky v. Kenosha*, 87 Wis. 286.

So in *Weare v. Fitchburg*, 110 Mass. 334, the fact that the person injured was hurrying home upon a sudden call to come home to prevent the explosion of a lamp, and that she was occupied with the danger of her children, seems to have been considered as ground of excuse for failure to remember a defect.

2. *Mistake as to Location of Defect.* — *Aurora v. Dale*, 90 Ill. 46; *Chicago v. Fitzgerald*, 75 Ill. App. 174; *Blood v. Tyngsborough*, 103 Mass. 509; *Millcreek Tp. v. Perry*, (Pa. 1887) 12 Atl. Rep. 149.

3. *Acts in Presence of Danger.* — *Ferguson v. Southwold Tp.*, 27 Ont. 66; *Malloy v. Walker Tp.*, 77 Mich. 448.

4. *Brooks v. Petersham*, 16 Gray (Mass.) 181.

5. *Leaping from Vehicle.* — *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563, 59 Am. Dec. 159; *Sears v. Dennis*, 105 Mass. 310; *Ingalls v. Bills*, 9 Met. (Mass.) 1, 43 Am. Dec. 346; *Williams v. Leyden*, 119 Mass. 237; *Houghtaling v. Shelley*, 51 Hun (N. Y.) 598.

6. *Presumption of Safety* — *California.* — *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55. *Connecticut.* — *Lutton v. Vernon*, 62 Conn. 1. *Delaware.* — *Robinson v. Wilmington*, 8 Houst. (Del.) 409; *Seward v. Wilmington*, 2 Marv. (Del.) 189.

*Illinois.* — *Vieths v. Skinner*, 47 Ill. App. 325; *Mr. Sterling v. Crummy*, 73 Ill. App. 572.

*Indiana.* — *Noblesville Gas, etc., Co. v. Lochr*, 124 Ind. 79.

*Iowa.* — *Keyes v. Cedar Falls*, 107 Iowa 509. *Louisiana.* — *Shidet v. Jules Dreyfuss Co.*, 50 La. Ann. 281.

*Michigan.* — *Baker v. Grand Rapids*, 111 Mich. 447.

*New York.* — *Crowther v. Yonkers*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 588; *Davenport v. Ruckman*, 37 N. Y. 573; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459; *Chisholm v. State*, 141 N. Y. 246.

*North Dakota.* — *Heckman v. Evenson*, 7 N. Dak. 173.

*Pennsylvania.* — *Glaub v. Goshen Tp.*, 7 Kulp (Pa.) 292.

*Vermont.* — *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644.

*Wisconsin.* — *Seward v. Milford*, 21 Wis. 485.

So it has been held that it is not necessarily a want of ordinary care to drive at night through a violent storm. *Glaub v. Goshen Tp.*, 7 Kulp (Pa.) 292; *Milwaukee v. Davis*, 6 Wis. 377; *Hart v. Red Cedar*, 63 Wis. 634.



and though he is bound to exercise greater vigilance to avoid injury,<sup>1</sup> only ordinary care on his part, as determined by the particular circumstances, is required,<sup>2</sup> the question whether such care was exercised being generally for the jury.<sup>3</sup>

**Carrying Light.** — It has been held that there is no positive legal obligation to carry a light, but that the necessity of doing so under the particular circumstances is a question for the jury.<sup>4</sup>

(2) **Rate of Speed.** — Recovery of damages is not prevented by the fact that the person injured was riding or driving faster than a walk,<sup>5</sup> or that he was running instead of walking.<sup>6</sup>

(3) **Knowledge of Defect.** — Nor does the plaintiff's previous knowledge of the defect render him guilty of negligence, as a matter of law.<sup>7</sup>

**g. WALKING IN ROADWAY.** — A pedestrian is not guilty of negligence because he walks in the roadway,<sup>8</sup> and he may cross a street at any point without waiting to reach a crossing.<sup>9</sup>

**h. PERSONS UNDER PHYSICAL DISABILITIES** — (1) **Defective Sight.** — Since highways are for the benefit of all conditions of people, and all persons have the right in using them to assume that they are in good condition and to

**1. Greater Vigilance Required at Night.** — *Stier v. Oskaloosa*, 41 Iowa 353; *Hall v. Manson*, 90 Iowa 585; *Cummins v. Syracuse*, 100 N. Y. 637; *Splitdorf v. New York*, 108 N. Y. 205; *Parcells v. Auburn*, 77 Hun (N. Y.) 137; *McNish v. Peekskill*, 71 Hun (N. Y.) 324; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

**Giving Horses Their Head.** — In *Mueller v. Ross Tp.*, 152 Pa. St. 399, it was decided that it was negligence for one, on arriving at a curve in the road, which was on the side of a hill and which was protected by an embankment one or two feet high, to give the horses their head and allow them to go at will. But see *Titus v. New Scotland*, 11 N. Y. App. Div. 266, where it was held proper to trust to one's horses to keep the beaten track in going upon a bridge.

**2. Only Ordinary Care Required** — *Connecticut*. — *Williams v. Clinton*, 28 Conn. 264.

*Illinois*. — *Normal v. Gresham*, 49 Ill. App. 196; *Elgin v. Renwick*, 86 Ill. 498; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136.

*Iowa*. — *Stier v. Oskaloosa*, 41 Iowa 353; *Owen v. Ft. Dodge*, 98 Iowa 281; *Hall v. Manson*, 90 Iowa 585.

*Massachusetts*. — *McGuinness v. Worcester*, 160 Mass. 272.

*Wisconsin*. — *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

**3. Question for Jury** — *Connecticut*. — *Williams v. Clinton*, 28 Conn. 264.

*Illinois*. — *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136.

*Maine*. — *Haskell v. New Gloucester*, 70 Me. 300.

*Massachusetts*. — *Pollard v. Woburn*, 104 Mass. 84; *Coffin v. Palmer*, 162 Mass. 192.

*Pennsylvania*. — *Bitting v. Maxatawny Tp.*, 177 Pa. St. 213, 180 Pa. St. 357.

*Wisconsin*. — *Hart v. Red Cedar*, 63 Wis. 634; *Berg v. Milwaukee*, 83 Wis. 599.

So it was held to be a question for the jury whether want of ordinary care was shown by riding a safe horse, on a dark night, bareback and without martingales, over a familiar road, by a person accustomed to the use of horses

and to that horse. *Stevens v. Boxford*, 10 Allen (Mass.) 25, 87 Am. Dec. 616.

**4. Need Not Carry Light.** — *Williams v. Clinton*, 28 Conn. 264; *Haskell v. New Gloucester*, 70 Me. 305; *Alleghany County v. Broadwaters*, 60 Md. 533; *Daniels v. Lebanon*, 58 N. H. 284.

**5. Speed of Travel.** — *Bly v. Haverhill*, 110 Mass. 520; *Bills v. Kaukauna*, 94 Wis. 310.

So it was decided that it was a question of fact for the jury and not of law for the court, whether a want of ordinary care was shown by driving a safe horse, with a tight rein, at night, at his usual speed of ten miles an hour, by a skilful driver, over a wide and level road, with which the driver was familiar, and over which he had passed in safety within an hour without perceiving any obstruction. *Reed v. Deerfield*, 8 Allen (Mass.) 522.

**6. Noblesville Gas, etc., Co. v. Lochr**, 124 Ind. 80.

**7. Knowledge of Defect** — *Illinois*. — *Normal v. Gresham*, 49 Ill. App. 196.

*Kansas*. — *Maultby v. Leavenworth*, 28 Kan. 715.

*Massachusetts*. — *Barton v. Springfield*, 116 Mass. 131; *Coffin v. Palmer*, 162 Mass. 192.

*Michigan*. — *Sias v. Reed City*, 103 Mich. 312.

*New York*. — *Bly v. Whitehall*, 120 N. Y. 506; *Bateman v. Ruth*, 3 Daly (N. Y.) 378.

*Pennsylvania*. — *Millcreek Tp. v. Perry*, (Pa. 1887) 12 Atl. Rep. 149.

*Wisconsin*. — *Perkins v. Fond du Lac*, 34 Wis. 435.

**Contrary Decision.** — But in *Perry v. Cedar Falls*, 87 Iowa 315, it was decided that where one drove over an embankment off the traveled road, it was proper to charge that he could not recover if he knew the topography of the place, and if it was so dark that he could not see where he was going.

**8. Walking in Roadway.** — *Denver v. Sherret*, 88 Fed. Rep. 226, 60 U. S. App. 104; *Junction City v. Blades*, 59 Kan. 774, 52 Pac. Rep. 444. *Contra*, *O'Laughlin v. Dubuque*, 42 Iowa 539.

**9. Crossing Highway.** — *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; *Lincoln v. Detroit*, 101 Mich. 241; *Baker v. Grand Rapids*, 111 Mich. 447; *Brusso v. Buffalo*, 90 N. Y. 679.

regulate their conduct accordingly, one is not guilty of negligence in using the highway merely because his sight is defective.<sup>1</sup> And the same is true in the case of one totally blind, who, it has been decided, is not necessarily negligent because he walks on the streets of a city or on a country road unattended, it being a question for the jury whether, in view of his infirmity and all the circumstances, he was guilty of negligence.<sup>2</sup> But defects in one's eyesight impose upon him the duty of using greater care in walking upon the streets and avoiding obstructions than is required of persons of normal sight, and it has been held to be error to refuse so to instruct the jury in a proper case.<sup>3</sup> And in *Tennessee* it was decided that the facts that one was blind and unattended at the time of the accident and that he had knowledge of the existence of the defect in the street were sufficient of themselves to impose upon him the burden of showing that he was free from negligence.<sup>4</sup>

(2) *Defective Powers of Locomotion*. — On the same principles, persons who are crippled or suffering under any physical infirmity affecting their powers of locomotion are bound to exercise care commensurate with the infirmity.<sup>5</sup>

i. **INTOXICATION**. — The intoxication of the person injured, at the time of the accident, is not conclusive evidence that he was not exercising due care, but it will prevent recovery if it contributed to the accident.<sup>6</sup>

j. **DEFECTS IN VEHICLE, HORSE, OR HARNESS**. — It is the general rule that one is not precluded from recovery for injuries caused by a defective highway by the fact that defects in the vehicle or harness, or vices in the horse, contributed also to the accident, provided these defects were not actually or constructively known to him.<sup>7</sup>

**Question of Ordinary Care**. — But he must have exercised ordinary care in selecting for use the particular horse, vehicle, or harness, and it is not sufficient to show ignorance of the defects, but justification for such ignorance must likewise be shown.<sup>8</sup> It is generally the province of the jury to determine the

1. **Persons under Disabilities — Defective Sight**. — *Mahan v. Everett*, 50 La. Ann. 1162; *Robbins v. Springfield St. R. Co.*, 165 Mass. 30; *Sweeney v. Butte City*, 15 Mont. 274; *Davenport v. Ruckman*, 37 N. Y. 568, *affirming* 10 Bosw. (N. Y.) 20.

2. **Total Blindness**. — *Franklin v. Harter*, 127 Ind. 446; *Neff v. Wellesley*, 148 Mass. 487.

So in *Smith v. Wildes*, 143 Mass. 556, the fact that the person injured was used to going about alone and was well acquainted with the particular locality was referred to as tending to show an absence of negligence on his part; and in *Sleeper v. Sandown*, 52 N. H. 244, Ladd, J., referred to these same considerations and also to the possible activity, fidelity, and power of the man's other senses consequent upon his blindness, as matters to be considered.

3. **Vigilance Necessary**. — *Winn v. Lowell*, 1 Allen (Mass.) 177.

4. **Burden of Proof**. — *Stewart v. Nashville*, 96 Tenn. 50.

5. **Defective Powers of Locomotion**. — *Mt. Vernon v. Brooks*, 39 Ill. App. 426; *Smith v. Cairo*, 48 Ill. App. 166; *Ryerson v. Abington*, 102 Mass. 526; *Higgins v. Glens Falls*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 289.

6. **Intoxication as Defense**. — *Ashborn v. Waterbury*, 70 Conn. 551; *Woods v. Tipton County*, 128 Ind. 289; *Cramer v. Burlington*, 42 Iowa 315; *Stuart v. Machias Port*, 48 Me. 477; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Monk v. New Utrecht*, 104 N. Y. 552; *Lynch v. New York*, 47 Hun (N. Y.) 524; *Parris v.*

*Green Island*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 703.

So where an intoxicated person was injured while attempting to drive over a washout, which he could have easily seen and avoided had he been sober, he was held not to be entitled to recover. *Woods v. Tipton County*, 128 Ind. 289.

7. **Defects in Vehicle, Horse, or Harness** — *Connecticut*. — *Daniels v. Saybrook*, 34 Conn. 382; *Baldwin v. Greenwood's Turnpike Co.*, 40 Conn. 243, 16 Am. Rep. 33.

*New Hampshire*. — *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317; *Judd v. Claremont*, 66 N. H. 418.

*Vermont*. — *Fletcher v. Barnet*, 43 Vt. 192; *Hunt v. Pownal*, 9 Vt. 411; *Cheney v. Ryegate*, 55 Vt. 499.

*Wisconsin*. — *Hammond v. Mukwa*, 40 Wis. 35; *Jennings v. Albion*, 90 Wis. 22.

8. **Care in Selection for Use**. — *Baltimore, etc., Turnpike Road v. Crowther*, 63 Md. 567; *Winship v. Enfield*, 42 N. H. 199; *Tuttle v. Farmington*, 58 N. H. 13. And see the cases in the next preceding note.

**Illustrations**. — So it was held that one was not entitled to recover if the injuries resulted from his attempt to drive with a heavy wagon up a steep hill, the harness having the iron rings fastening the traces to the collar half worn through. *Patchen v. Walton*, 17 N. Y. App. Div. 158.

And so in *Allen v. Hancock*, 16 Vt. 230, where the accident was caused jointly by the slipping of one's horse and the insufficiency

suitability of the vehicle,<sup>1</sup> and it is likewise for the jury to determine whether it was negligence to drive a balky horse,<sup>2</sup> or a horse which had previously run away,<sup>3</sup> or a young colt.<sup>4</sup>

**Different Rule in Some States.** — In *Maine*, however, a different view has been taken, under a statute giving a right to damages for injury "through any defect or want of repair," and it has been held that if any defect in the vehicle, horse, or harness contributed to the injury, it is not within the statute, and there can be no recovery, although the person injured was not negligent in this regard.<sup>5</sup> A similar view appears to be taken in *Massachusetts* under the statute of that state,<sup>6</sup> and likewise in *Pennsylvania*.<sup>7</sup>

**12. Notice of Defect — a. NECESSITY.** — It is generally agreed that a municipality is liable for injuries caused by defects or obstructions in the highway, not resulting from its own direct act, only if it had actual or constructive notice of such defect or obstruction a sufficient time before the accident to show negligence on its part in failing to make the highway safe.<sup>8</sup> The notice

of the road, it was held proper to tell the jury that there could be no recovery, although the road was unsafe and insufficient, if the plaintiff was wanting in prudence and ordinary care in attempting to go down a hill with his horses smooth-shod and without chaining the wheel.

**1. Question for Jury — Fitness of Vehicle.** — *Malloy v. Walker* Tp., 77 Mich. 448.

So whether the seats of a wagon were properly attached, the fastening being of a customary character, is for the jury. *Hammond v. Mukwa*, 40 Wis. 35; *Jennings v. Albion*, 90 Wis. 22. And see *Luedke v. Mukwa*, 90 Wis. 57.

**2. Fitness of Horse.** — *Holcomb v. Champion*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 882, 59 Hun (N. Y.) 620; *Chamberlain v. Wheatland*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 190; *Glaub v. Goshen Tp.*, 7 Kulp (Pa.) 292.

**3. Atkinson v. Chatham**, 29 Ont. 518; *Centuria v. Scott*, 59 Ill. 129.

**4. Wood v. Gilboa**, 76 Hun (N. Y.) 175.

In *Pennsylvania* it is stated that it is the duty of the township to provide a reasonably safe highway for ordinary travel by the ordinary horse, and that there is no duty on the township to provide for travel by exceptionally vicious, untrained, and unmanageable animals. *Trexler v. Greenwich Tp.*, 168 Pa. St. 218; *Bitting v. Maxatawny Tp.*, 177 Pa. St. 213.

**5. Maine Decisions.** — *Moore v. Abbot*, 32 Me. 46; *Farrar v. Greene*, 32 Me. 574; *Coombs v. Topsham*, 38 Me. 204; *Anderson v. Bath*, 42 Me. 346.

So it was held that if a defect in the harness contributed to produce the injury, there could be no recovery though the existence of the defect was unknown to the plaintiff and he could not have discovered it by the exercise of common and ordinary care. *Anderson v. Bath*, 42 Me. 346.

**6. Massachusetts Decisions.** — *Murdock v. Warwick*, 4 Gray (Mass.) 178; *Jenks v. Wilbraham*, 11 Gray (Mass.) 142; *Brooks v. Acton*, 117 Mass. 204; *Bliss v. Wilbraham*, 8 Allen (Mass.) 564.

In *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91, the court said that it was of opinion that "when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or

regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable." Citing *Davis v. Dudley*, 4 Allen (Mass.) 557; *Rowell v. Lowell*, 7 Gray (Mass.) 100, 66 Am. Dec. 464; and *distinguishing Palmer v. Andover*, 2 Cush. (Mass.) 600.

But a Defect in the Horse's Vision was held not to prevent recovery if the horse was suitable for driving, though such defect contributed to the accident. *Wright v. Templeton*, 132 Mass. 49.

**7. Pennsylvania Decisions.** — *Chartiers Tp. v. Phillips*, 122 Pa. St. 601, where the fact that the accident was caused in part by the choking of the horse by an excessively tight collar was held to be a good defense without reference to whether the plaintiff knew or ought to have known that the collar was too tight. See also *Trexler v. Greenwich Tp.*, 168 Pa. St. 218; *Bitting v. Maxatawny Tp.*, 177 Pa. St. 213; *Willis v. Armstrong County*, 183 Pa. St. 184.

**8. Necessity of Notice — United States.** — *New York v. Sheffield*, 4 Wall. (U. S.) 189; *District of Columbia v. Woodbury*, 136 U. S. 463.

*Alabama.* — *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

*Colorado.* — *Boulder v. Niles*, 9 Colo. 415; *Denver v. Dean*, 10 Colo. 375, 3 Am. St. Rep. 594; *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212.

*Connecticut.* — *Cummings v. Hartford*, 70 Conn. 115.

*Delaware.* — *Seward v. Wilmington*, 2 Marv. (Del.) 189.

*District of Columbia.* — *Woodbury v. District of Columbia*, 5 Mackey (D. C.) 127; *District of Columbia v. Payne*, 27 Wash. L. Rep. 24, 13 App. Cas. (D. C.) 500.

*Georgia.* — *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95; *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. Rep. 108; *Montezuma v. Wilson*, 82 Ga. 206, 14 Am. St. Rep. 150.

*Illinois.* — *Chatsworth v. Ward*, 10 Ill. App. 75; *Fahey v. Harvard*, 62 Ill. 28; *Chicago v. McCarthy*, 75 Ill. 602; *Ryan v. Chicago*, 70 Ill. App. 28; *Chicago v. Stearns*, 105 Ill. 554; *Mansfield v. Moore*, 124 Ill. 133.



necessary is of the condition of things which constitutes a defect, and it is immaterial that the municipal authorities do not consider it a defect.<sup>1</sup>

**Obstruction Originally Lawful.** — If an object which caused an injury by obstructing the highway was originally placed in the highway lawfully, but was thereafter unlawfully suffered to continue there, the municipality is not liable unless it had notice, actual or constructive, of such unlawful use of the highway.<sup>2</sup>

**Direct Act of Municipality.** — There are many cases to the effect that when the defect is the direct act of the municipality, as in the case of the original defective construction of the highway, such act itself shows negligence on the part of the municipality, and it is liable irrespective of notice,<sup>3</sup> as is any individual

*Indiana.* — *Ft. Wayne v. De Witt*, 47 Ind. 391; *Madison v. Baker*, 103 Ind. 41; *Goshen v. England*, 119 Ind. 368; *Evansville v. Senhenn*, 151 Ind. 42; *Kenyon v. Indianapolis*, 1 Wils. (Ind.) 129.

*Kansas.* — *Jansen v. Atchison*, 16 Kan. 358; *McFarland v. Emporia Tp.*, 59 Kan. 568.

*Maine.* — *Bartlett v. Kittery*, 68 Me. 358; *Farrell v. Oldtown*, 69 Me. 72.

*Massachusetts.* — *Doherty v. Waltham*, 4 Gray (Mass.) 596; *Bourget v. Cambridge*, 159 Mass. 388.

*Michigan.* — *Dewey v. Detroit*, 15 Mich. 307; *Woodbury v. Owosso*, 64 Mich. 239; *Fuller v. Jackson*, 82 Mich. 480; *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

*Minnesota.* — *Pottner v. Minneapolis*, 41 Minn. 73.

*Missouri.* — *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Bonine v. Richmond*, 75 Mo. 437.

*New Hampshire.* — *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Johnson v. Haverhill*, 35 N. H. 74; *Palmer v. Portsmouth*, 43 N. H. 265; *Lambert v. Pembroke*, 65 N. H. 280.

*New York.* — *Griffin v. New York*, 9 N. Y. 456, 61 Am. Dec. 700; *Hume v. New York*, 47 N. Y. 639, 74 N. Y. 264; *Heintze v. New York*, 50 N. Y. Super. Ct. 295; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453; *Hart v. Brooklyn*, 36 Barb. (N. Y.) 226; *Seaman v. New York*, 3 Daly (N. Y.) 147; *McGinity v. New York*, 5 Duer (N. Y.) 674; *Wallace v. New York*, 2 Hilt. (N. Y.) 440, 18 How. Pr. (N. Y.) 169; *Sweet v. Gloversville*, 12 Hun (N. Y.) 302; *Blakeley v. Troy*, 18 Hun (N. Y.) 167; *Muller v. Newburgh*, 32 Hun (N. Y.) 24.

*North Carolina.* — *Jones v. Greensboro*, 124 N. Car. 310.

*Ohio.* — *Shelby v. Clagett*, 46 Ohio St. 549.

*Oregon.* — *Mack v. Salem*, 6 Oregon 275; *Ford v. Umatilla County*, 15 Oregon 313.

*Pennsylvania.* — *Rapho Tp. v. Moore*, 68 Pa. St. 408, 8 Am. Rep. 202; *Burns v. Bradford*, 137 Pa. St. 361; *Mattimore v. Erie*, 144 Pa. St. 14; *Fitzpatrick v. Darby*, 184 Pa. St. 645; *Eisenbrey v. Philadelphia*, 24 W. N. C. (Pa.) 231, 46 Leg. Int. (Pa.) 250.

*Tennessee.* — *Knoxville v. Bell*, 12 Lea (Tenn.) 157.

*Texas.* — *Austin v. Ritz*, 72 Tex. 391; *Galveston v. Smith*, 80 Tex. 69.

*Vermont.* — *Prindle v. Fletcher*, 39 Vt. 255; *Ozier v. Hinesburgh*, 44 Vt. 220; *Campbell v. Fair Haven*, 54 Vt. 336.

*Virginia.* — *Noble v. Richmond*, 31 Gratt. (Va.) 271, 31 Am. Rep. 726.

*Wisconsin.* — *Ward v. Jefferson*, 24 Wis. 342; *Goodnough v. Oshkosh*, 24 Wis. 549, 1 Am. Rep. 202; *Jaquish v. Ithaca*, 36 Wis. 108; *Bailey v. Spring Lake*, 61 Wis. 227.

*Canada.* — *McGregor v. Harwich Tp.*, 29 Can. Sup. Ct. 443; *Legault v. La Corporation*, 12 Quebec Super. Ct. 479.

**1. Opinion of Authorities Immaterial.** — *Hinckley v. Somerset*, 145 Mass. 326.

**2. Obstruction Originally Lawful.** — *Bartlett v. Kittery*, 68 Me. 358; *Davis v. Corry*, 154 Pa. St. 598; *Cairncross v. Pewaukee*, 86 Wis. 181. And see *Mattimore v. Erie*, 144 Pa. St. 14.

So where a house was being moved from one part of a town to another, the town was held not to be liable for injuries caused by unlawfully leaving the house in the highway at night without any guards or lights, unless the town had notice that it was so unlawfully left. *Rice v. Whitby*, 25 Ont. App. 191, reversing 28 Ont. 598.

**3. Direct Act of Municipality.** — *United States.* — *New York v. Sheffield*, 4 Wall. (U. S.) 189.

*Colorado.* — *Denver v. Aron*, 6 Colo. App. 232.

*Georgia.* — *Brunswick v. Braxton*, 70 Ga. 193.

*Illinois.* — *Springfield v. Le Claire*, 49 Ill. 476; *Chicago v. Johnson*, 53 Ill. 91; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Chicago v. Langlass*, 66 Ill. 361; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136.

*Indiana.* — *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82; *Warsaw v. Dunlap*, 112 Ind. 576; *Wabash County v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325; *Ft. Wayne v. Patterson*, 3 Ind. App. 34.

*Iowa.* — *Doulon v. Clinton*, 33 Iowa 397; *Barnes v. Newton*, 46 Iowa 567; *Stein v. Council Bluffs*, 72 Iowa 180.

*Maine.* — *Holmes v. Paris*, 75 Me. 559; *Buck v. Biddeford*, 82 Me. 433.

*Massachusetts.* — *Brooks v. Somerville*, 106 Mass. 271; *Hinckley v. Somerset*, 145 Mass. 326.

*Michigan.* — *Baker v. Grand Rapids*, 111 Mich. 447.

*Missouri.* — *Barr v. Kansas City*, 105 Mo. 550.

*Nebraska.* — *Lincoln v. Calvert*, 39 Neb. 305.

*New York.* — *Brusso v. Buffalo*, 90 N. Y. 679; *Stedman v. Rome*, 88 Hun (N. Y.) 279; *Wilson v. Troy*, 135 N. Y. 96, 31 Am. St. Rep. 817.

*North Dakota.* — *Ludlow v. Fargo*, 3 N. Dak. 485.

*Tennessee.* — *Poole v. Jackson*, 93 Tenn. 62.

*Texas.* — *Klein v. Dallas*, 71 Tex. 280;

wrongdoer.<sup>1</sup> Nor is notice rendered necessary in such a case by the fact that the notice, as a condition of municipal liability, is expressly provided for by statute<sup>2</sup> or by the municipal charter.<sup>3</sup>

**Statutory Liability Irrespective of Notice.** — Another exception to the requirement of notice may exist in the case of statutes imposing in terms absolute liability for injuries caused by defective highways and construed as imposing such liability irrespective of notice.<sup>4</sup>

**Acts of Licensees.** — The giving by the municipality of a license or permit to make excavations in the highway will, under certain circumstances, render the municipality liable for resulting danger to travelers irrespective of notice.<sup>5</sup>

**b. WHAT CONSTITUTES NOTICE.** — (1) *Actual Notice.* — The municipality is regarded as having actual notice of the defect within this rule if notice reaches one or more of the municipal officers or employees having some duties in regard to the removal of defects or obstructions in highways.<sup>6</sup> It has accordingly been held that the municipality has notice if knowledge of the defect is brought home to the mayor of a city,<sup>7</sup> the president of a village,<sup>8</sup> the city council,<sup>9</sup> a member of the city or town council,<sup>10</sup> or of the board of

Ringlestein v. San Antonio, (Tex. Civ. App. 1893) 21 S. W. Rep. 634.

*Wisconsin.* — Moore v. Platteville, 78 Wis. 644; Stephani v. Manitowoc, 89 Wis. 467; Boltz v. Sullivan, 101 Wis. 608, 5 Am. Neg. Rep. 508.

**Illustrations.** — So where an excavation in a highway is made by the municipality itself, or by its servants within the scope of their authority, it is not necessary to prove any notice to the municipality in order to render it liable. Brooks v. Somerville, 106 Mass. 271; Baker v. Grand Rapids, 111 Mich. 447; Brusso v. Buffalo, 90 N. Y. 679.

And where one was injured by the falling in of the cover of a manhole in the highway, which was the result of its originally defective construction by the municipality, it was held that notice was not necessary. Barr v. Kansas City, 105 Mo. 550.

**1. Notice to Individuals Unnecessary.** — Southern Express Co. v. Texarkana Water Co., 54 Ark. 131; Cairncross v. Pewaukee, 86 Wis. 181.

**2. Statutory Provision.** — Holmes v. Paris, 75 Me. 559; Buck v. Biddeford, 82 Me. 433.

**3. Charter Provision.** — Springfield v. Le Claire, 49 Ill. 476; Houston v. Isaacks, 68 Tex. 116.

**4. Statutory Liability.** — In *Massachusetts*, under the former statutes, the municipality was absolutely liable if the defect had existed twenty-four hours, and if the defect had existed a less time was liable provided it had "reasonable notice." Howe v. Lowell, 101 Mass. 99; Crocker v. Springfield, 110 Mass. 135; George v. Haverhill, 110 Mass. 506; Bodwell v. North Andover, 110 Mass. 511, note; Maccarty v. Brookline, 114 Mass. 527; Harriman v. Boston, 114 Mass. 241; Hodgkins v. Rockport, 116 Mass. 573; Blood v. Hubbardston, 121 Mass. 233; Monies v. Lynn, 121 Mass. 442, 124 Mass. 165; Hutchins v. Littleton, 124 Mass. 289; Whitehead v. Lowell, 124 Mass. 281; Winn v. Lowell, 1 Allen (Mass.) 177; Brady v. Lowell, 3 Cush. (Mass.) 121; Flagg v. Millbury, 4 Cush. (Mass.) 243. See also Donaldson v. Boston, 16 Gray (Mass.) 508.

But since 1877 (Pub. Stat., 1882, c. 52, § 18), the municipality is liable only if it has had

"reasonable notice" and has been lacking in reasonable care and diligence. See as to the present requirement of notice, Rooney v. Randolph, 128 Mass. 580; Hayes v. Cambridge, 136 Mass. 402, 138 Mass. 461; Hanscom v. Boston, 141 Mass. 242; Post v. Boston, 141 Mass. 189; Blake v. Lowell, 143 Mass. 296; Hinckley v. Somerset, 145 Mass. 326; McGaffigan v. Boston, 149 Mass. 293; Whitney v. Lowell, 151 Mass. 212.

In *West Virginia* the statute has been held to impose absolute liability irrespective of notice. Sheff v. Huntington, 16 W. Va. 307; Chapman v. Milton, 31 W. Va. 384; Evans v. Huntington, 37 W. Va. 601.

**5. Acts of Licensees.** — See *supra*, this section, *Defects Created by Individuals* — *Effect of License* — *On Municipal Liability* — *Duty to Supervise Work*.

**6. Notice to Municipal Officers** — *Georgia.* — Columbus v. Ogletree, 96 Ga. 177, 102 Ga. 293.

*Iowa.* — Smith v. Des Moines, 84 Iowa 685; Smith v. Pella, 86 Iowa 236; Cason v. Ottumwa, 102 Iowa 99.

*Rhode Island.* — Jordan v. Peckham, 19 R. I. 28.

*Tennessee.* — Poole v. Jackson, 93 Tenn. 62.

*Texas.* — Palestine v. Hassell, 15 Tex. Civ. App. 519; Austin v. Colgate, (Tex. Civ. App. 1894) 27 S. W. Rep. 896.

*Virginia.* — Lynchburg v. Wallace, 95 Va. 640.

**7. To Mayor.** — Salina v. Trosper, 27 Kan. 544; Michigan City v. Ballance, 123 Ind. 334.

**8. President of Village.** — Edwards v. Three Rivers, 96 Mich. 625.

**9. City Council.** — Aurora v. Hillman, 90 Ill. 61.

**10. Member of Council.** — *Indiana.* — Logansport v. Justice, 74 Ind. 378, 39 Am. Rep. 79; Columbus v. Strassner, 124 Ind. 482.

*Iowa.* — Carter v. Monticello, 68 Iowa 178; Owen v. Ft. Dodge, 98 Iowa 281; Keyes v. Cedar Falls, 107 Iowa 509.

*Michigan.* — Dandas v. Lansing, 75 Mich. 499, 13 Am. St. Rep. 457; Fuller v. Jackson, 82 Mich. 480; McKormick v. West Bay City, 110 Mich. 265.

*Wisconsin.* — McKeigue v. Janesville, 68 Wis. 57.

county supervisors,<sup>1</sup> a town supervisor,<sup>2</sup> or a selectman of the town.<sup>3</sup> The same result has been held to follow from notice to a highway officer, whether known as commissioner, supervisor, overseer, or surveyor,<sup>4</sup> to the superintendent or commissioner of streets,<sup>5</sup> to the superintendent of public works,<sup>6</sup> to the city marshal,<sup>7</sup> to the chief of police,<sup>8</sup> and to an ordinary policeman or patrolman,<sup>9</sup> provided he has some duties to perform in regard to defects.<sup>10</sup> Notice to a citizen or inhabitant of the municipality is, however, not sufficient to affect the municipality,<sup>11</sup> nor is notice to a mere municipal employee,<sup>12</sup> unless his employment involves the oversight or repair of the highway.<sup>13</sup>

A Notice to a *De Facto* Officer is as effective as one to a *de jure* officer.<sup>14</sup>

Notice to an Officer Before His Election is, however, not sufficient to affect the municipality.<sup>15</sup>

*Contra — New York.* — *Peach v. Utica*, 10 Hun (N. Y.) 477; *McDermott v. Kingston*, 19 Hun (N. Y.) 198.

*Pennsylvania.* — *Vanderslice v. Philadelphia*, 103 Pa. St. 102.

*Rhode Island.* — *Jordan v. Peckham*, 19 R. I. 28.

See also *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Sorento v. Johnson*, 52 Ill. App. 659.

1. **County Supervisor.** — *Waud v. Polk County*, 88 Iowa 617; *Morgan v. Fremont County*, 92 Iowa 644.

2. **Town Supervisor.** — *Jaquish v. Ithaca*, 36 Wis. 108; *Bailey v. Spring Lake*, 61 Wis. 230; *Little v. Iron River*, 102 Wis. 250.

3. **Selectman of Town.** — *Davis v. Guilford*, 55 Conn. 351.

4. **Highway Officers** — *United States.* — *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

*Michigan.* — *Moore v. Kenockee Tp.*, 75 Mich. 332.

*Pennsylvania.* — *Platz v. McKean Tp.*, 178 Pa. St. 601, 39 W. N. C. (Pa.) 480.

*Rhode Island.* — *Seamons v. Fitts*, 20 R. I. 443, 4 Am. Neg. Rep. 224.

*Wisconsin.* — *Parish v. Eden*, 62 Wis. 272; *Bloor v. Delafield*, 69 Wis. 273; *Goldsworthy v. Linden*, 75 Wis. 24.

In *Sprague v. Rochester*, 159 N. Y. 20, reversing 88 Hun (N. Y.) 613, notice of a defect in a sidewalk to one employed by an executive board, upon which board was imposed the duty of keeping the streets in repair, was held to be notice to a city officer "having charge of the highways" within the meaning of a charter requirement.

5. **Superintendent or Commissioner of Streets** — *Alabama.* — *Bradford v. Anniston*, 92 Ala. 349, 25 Am. St. Rep. 60.

*Illinois.* — *Joliet v. Walker*, 7 Ill. App. 267; *Brownlee v. Alexis*, 39 Ill. App. 135; *Joliet v. McCraney*, 49 Ill. App. 381.

*Indiana.* — *Lafayette v. Larson*, 73 Ind. 367.

*Iowa.* — *Ledgerwood v. Webster City*, 93 Iowa 326.

*Michigan.* — *Dotton v. Albion*, 50 Mich. 129.

*Nebraska.* — *Lincoln v. Woodward*, 19 Neb. 259.

*New York.* — *Hawley v. Gloversville*, 4 N. Y. App. Div. 343; *Shook v. Cohoes*, 108 N. Y. 648; *McSherry v. Canandaigua*, 129 N. Y. 612; *Deyoe v. Saratoga Springs*, 3 Thomp. & C. (N. Y.) 504, 1 Hun (N. Y.) 341.

*Washington.* — *Saylor v. Montesano*, 11 Wash. 328.

6. **Superintendent of Public Works.** — *Michels v. Syracuse*, 92 Hun (N. Y.) 365.

7. **City Marshal.** — *Hayes v. West Bay City*, 91 Mich. 418.

8. **Chief of Police.** — *Denver v. Dean*, 10 Colo. 375, 3 Am. St. Rep. 594.

9. **Policeman** — *Connecticut.* — *Cummings v. Hartford*, 70 Conn. 115.

*Georgia.* — *Columbus v. Ogletree*, 102 Ga. 293.

*Missouri.* — *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108.

*New York.* — *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657; *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511.

See also *McGaffigan v. Boston*, 149 Mass. 289.

10. *Columbus v. Ogletree*, 96 Ga. 177; *Cason v. Ottumwa*, 102 Iowa 99; *Taylor v. Mt. Vernon*, 58 Hun (N. Y.) 384.

So it was held that notice to a policeman was notice to the municipality if he was charged with the duty of reporting defects or obstructions in the highway or if his habit of so doing was recognized by the authorities. *Looney v. Joliet*, 49 Ill. App. 621; *Twogood v. New York*, 102 N. Y. 216.

The municipality cannot avoid liability by the fact that an ordinance required police officers to report defects, and that the defect which caused the injury was not reported. *Goodfellow v. New York*, 100 N. Y. 15.

11. **To Citizen.** — *Bill v. Norwich*, 39 Conn. 222; *Kenyon v. Indianapolis*, 1 Wils. (Ind.) 129; *Cramer v. Burlington*, 39 Iowa 512; *Donaldson v. Boston*, 16 Gray (Mass.) 508.

In *Maine* it was formerly held that knowledge by individual inhabitants of a town of a defect in a road was notice to the town. *Springer v. Bowdoinham*, 7 Me. 442; *French v. Brunswick*, 21 Me. 29, 38 Am. Dec. 250; *Tuell v. Paris*, 23 Me. 556; *Mason v. Ellsworth*, 32 Me. 271. But this rule no longer prevails under the statutory requirement as to notice to officers. *Rogers v. Shirley*, 74 Me. 144.

12. **To Employee.** — *Rich v. Rockland*, 87 Me. 188; *Monies v. Lyon*, 119 Mass. 273; *Foster v. Boston*, 127 Mass. 290.

13. *Atlanta v. Buchanan*, 76 Ga. 585; *Smith v. Pella*, 86 Iowa 236; *Garmany v. Gainesville*, (Tex. Civ. App. 1897) 41 S. W. Rep. 730, 3 Am. Neg. Rep. 292.

14. **De Facto Officer.** — *Pease v. Parsonsfield*, 92 Me. 345; *McSherry v. Canandaigua*, 129 N. Y. 612.

15. **Notice to Officer Before Election.** — *Lohr v. Philipsburg*, 156 Pa. St. 246.



(2) *Implied or Constructive Notice* — (a) *In General*. — Unless actual notice is required by statute<sup>1</sup> or by charter provisions,<sup>2</sup> notice of existing defects to the municipality may be implied, this implication being based sometimes on the conclusive presumption that the municipality has exercised proper and reasonable diligence to discover the defects, and sometimes on the theory that it has been culpably negligent in not employing such diligence, the effect being the same, however, whichever one of these two theories is adopted;<sup>3</sup> and it is said that notice should be imputed to the municipality if the defect is a matter of public notoriety and is well known by almost every one who travels on the highway.<sup>4</sup>

(b) *Time of Existence of Defect*. — The chief consideration in determining whether such notice should be implied is the time during which the defect has existed, since this determines to a great extent whether the municipality had an opportunity to notice it.<sup>5</sup> So notice of the defect has been held to be

1. *Actual Notice Required by Statute*. — In *Maine* the present statute (Stat. 1883, c. 18, § 80) requires "twenty-four hours' actual notice" on the part of "the commissioners of such county, or the municipal officers, highway surveyors, or road commissioners of such town." *Rogers v. Shirley*, 74 Me. 144; *Welch v. Portland*, 77 Me. 384; *Haines v. Lewiston*, 84 Me. 18; *Pease v. Parsonsfield*, 92 Me. 345. And the notice must be of the actual defect which caused the injury, notice of another defect or of the existence of a cause likely to produce the defect not being sufficient. *Smyth v. Bangor*, 72 Me. 249; *Rogers v. Shirley*, 74 Me. 144; *Hurley v. Bowdoinham*, 88 Me. 293; *Pendleton v. Northport*, 80 Me. 598; *Littlefield v. Webster*, 90 Me. 213. See also *Rogers v. Shirley*, 74 Me. 144. But such notice is not necessary when the defect was created by the municipal officers. *Holmes v. Paris*, 75 Me. 559; *Buck v. Biddeford*, 82 Me. 433. Compare *Rich v. Rockland*, 87 Me. 188.

2. *Actual Notice Required by Charter*. — *Springfield v. Le Claire*, 49 Ill. 476; *McNally v. Cohoes*, 127 N. Y. 350, affirming 53 Hun (N. Y.) 202; *Smith v. Rochester*, 79 Hun (N. Y.) 174; *Houston v. Isaacks*, 68 Tex. 116; *Sullivan v. Oshkosh*, 55 Wis. 508.

3. *Implied Notice Sufficient* — *Connecticut*. — *Manchester v. Hartford*, 30 Conn. 121; *Cusick v. Norwich*, 40 Conn. 376; *Littlefield v. Norwich*, 40 Conn. 406.

*Michigan*. — *Dotton v. Albion*, 50 Mich. 129; *More v. Kenoskee Tp.*, 75 Mich. 332; *Campbell v. Kalamazoo*, 80 Mich. 655.

*Minnesota*. — *Lindholm v. St. Paul*, 19 Minn. 245.

*Mississippi*. — *Sigman v. Lundy*, 66 Miss. 522.

*New Hampshire*. — *Howe v. Plainfield*, 41 N. H. 135.

*New York*. — *Hover v. Barkhoof*, 44 N. Y. 113; *Todd v. Troy*, 61 N. Y. 509.

*Virginia*. — *Noble v. Richmond*, 31 Gratt. (Va.) 271, 31 Am. Rep. 726.

And see other authorities cited in this subsection.

4. *Matter of Notoriety*. — *Elster v. Seattle*, 18 Wash. 304. See to the same effect *Albritton v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. Rep. 596.

5. *Time of Existence of Defect* — *Alabama*. — *Birmingham v. Starr*, 112 Ala. 98.

*Connecticut*. — *Bill v. Norwich*, 39 Conn. 222. *Delaware*. — *Pierce v. Wilmington*, 2 Marv. (Del.) 306.

*Georgia*. — *Atlanta v. Perdue*, 53 Ga. 607; *Enright v. Atlanta*, 78 Ga. 288; *Griffin v. Johnson*, 84 Ga. 279.

*Illinois*. — *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Springfield v. Doyle*, 76 Ill. 202; *Schmidt v. Chicago, etc.*, R. Co., 83 Ill. 405; *Chicago v. Dalle*, 115 Ill. 386; *La Salle v. Porterfield*, 138 Ill. 114; *Hogan v. Chicago*, 168 Ill. 551, reversing 59 Ill. App. 446; *Joliet v. Johnson*, 177 Ill. 178, affirming 71 Ill. App. 423; *La Salle v. Porterfield*, 138 Ill. 114.

*Indiana*. — *Indianapolis v. Scott*, 72 Ind. 196; *Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79; *Evansville v. Wilter*, 86 Ind. 414; *Porter County v. Dombke*, 94 Ind. 72; *Indianapolis v. Murphy*, 91 Ind. 382; *Spiceland v. Alier*, 98 Ind. 467; *Michigan City v. Boeckling*, 122 Ind. 39.

*Iowa*. — *Rice v. Des Moines*, 40 Iowa 641; *Barker v. Perry*, 67 Iowa 146.

*Kansas*. — *Atchison v. King*, 9 Kan. 550.

*Massachusetts*. — *Olson v. Worcester*, 142 Mass. 536; *Noyes v. Gardner*, 147 Mass. 505; *Reed v. Northfield*, 13 Pick. (Mass.) 94, 24 Am. Dec. 662.

*Michigan*. — *Alberts v. Vernon*, 96 Mich. 549; *Handy v. Meridian Tp.*, 114 Mich. 454.

*Minnesota*. — *Cleveland v. St. Paul*, 18 Minn. 279; *Gude v. Mankato*, 30 Minn. 256.

*Missouri*. — *Yocum v. Trenton*, 20 Mo. App. 489; *Shipley v. Bolivar*, 42 Mo. App. 401; *Bonine v. Richmond*, 75 Mo. 437; *Barr v. Kansas City*, 105 Mo. 550; *Richardson v. Marceline*, 73 Mo. App. 360, 1 Mo. App. Rep. 61.

*Nebraska*. — *Lincoln v. Woodward*, 19 Neb. 259; *Lincoln v. Smith*, 28 Neb. 762.

*New Hampshire*. — *Howe v. Plainfield*, 41 N. H. 135.

*New York*. — *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Diveny v. Elmira*, 51 N. Y. 506; *Hume v. New York*, 74 N. Y. 264; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508; *Pomfrey v. Saratoga Springs*, 104 N. Y. 450; *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511; *Mosey v. Troy*, 61 Barb. (N. Y.) 581; *Reinhard v. New York*, 2 Daly (N. Y.) 243; *Kirk v. Homer*, 77 Hun (N. Y.) 459.

*Pennsylvania*. — *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432; *Fee v. Columbus*, 168 Pa. St. 382.

rightfully imputed to the municipality when the defect had existed for a period of a year or more,<sup>1</sup> or of a month or more,<sup>2</sup> of a part of a month greater than a week,<sup>3</sup> or of less than a week and more than a day.<sup>4</sup> Generally, when the defect has existed a day or less, notice has not been implied.<sup>5</sup>

**Defect Not Continuous.** — Though the defect or obstruction is not absolutely

*Utah.* — *Naylor v. Salt Lake City*, 9 Utah 491.

*Virginia.* — *Moore v. Richmond*, 85 Va. 538; *Lynchburg v. Wallace*, 95 Va. 640.

*Wisconsin.* — *Goodno v. Oshkosh*, 28 Wis. 300; *Colby v. Beaver Dam*, 34 Wis. 285; *West v. Eau Claire*, 89 Wis. 31; *Cooper v. Milwaukee*, 97 Wis. 458.

**1. Time Sufficient to Sustain Implication of Notice — Defect Existing a Year or More** — *Illinois.* — *Galesburg v. Higley*, 61 Ill. 287; *Aurora v. Hillman*, 90 Ill. 61.

*Kentucky.* — *Newport v. Miller*, 93 Ky. 22. *Massachusetts.* — *Lyman v. Hampshire County*, 140 Mass. 311; *Whitfield v. Meridian*, 66 Mass. 570, 14 Am. St. Rep. 596.

*New York.* — *Rankert v. Junius*, 25 N. Y. App. Div. 470; *Diamond v. Brooklyn*, (Supm. Ct. Gen. T.) 36 N. Y. Supp. 97; *Bullock v. Durham*, 64 Hun (N. Y.) 380; *Lane v. Hancock*, 67 Hun (N. Y.) 623; *Beltz v. Yonkers*, 74 Hun (N. Y.) 73; *Goodfellow v. New York*, 100 N. Y. 15.

*Wisconsin.* — *Barstow v. Berlin*, 34 Wis. 357; *Laue v. Madison*, 86 Wis. 453.

**2. Defect Existing a Month or More** — *Connecticut.* — *Davis v. Guilford*, 55 Conn. 351.

*Delaware.* — *Robinson v. Wilmington*, 8 Houst. (Del.) 409.

*Illinois.* — *Chicago v. Crooker*, 2 Ill. App. 279.

*Indiana.* — *Indianapolis v. Murphy*, 91 Ind. 382.

*Iowa.* — *Waud v. Polk County*, 83 Iowa 617. *Massachusetts.* — *Purple v. Greenfield*, 138 Mass. 1.

*Michigan.* — *Tice v. Bay City*, 84 Mich. 461. *Minnesota.* — *Moore v. Minneapolis*, 19 Minn. 300.

*Missouri.* — *Yocum v. Trenton*, 20 Mo. App. 489; *Market v. St. Louis*, 56 Mo. 189; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634.

*New York.* — *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; *Pettengill v. Olean*, 65 Hun (N. Y.) 624, 20 N. Y. Supp. 367, *affirmed* 141 N. Y. 573; *McVee v. Watertown*, 92 Hun (N. Y.) 306.

*Wisconsin.* — *Schuenke v. Pine River*, 84 Wis. 669.

So notice was properly imputed where an excavation defectively filled had existed in a street for seven weeks, *Rosenberg v. Des Moines*, 41 Iowa 415; and where a hole in a sidewalk had existed for several months, *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Hall v. Fond du Lac*, 42 Wis. 274; and where half a dozen holes six inches in diameter had existed from April to July, *Frankfort v. Coleman*, 19 Ind. App. 368; and where a billboard weighing one hundred and forty pounds was allowed to stand for four or five months near the sidewalk without any fastening to prevent its being blown down, *Cason v. Ottumwa*, 102 Iowa 99.

**3. Defect Existing Between a Week and a**

**Month** — *Illinois.* — *Bloomington v. Annett*, 16 Ill. App. 199.

*Iowa.* — *Baxter v. Cedar Rapids*, 103 Iowa 599.

*Massachusetts.* — *Fortin v. Easthampton*, 145 Mass. 196.

*New York.* — *Smid v. New York*, 49 N. Y. Super. Ct. 126; *Foels v. Tonawanda*, 75 Hun (N. Y.) 363.

*Texas.* — *Palestine v. Hassell*, 15 Tex. Civ. App. 519.

So notice was imputable where a defect visible ten or fifteen feet away had existed for four weeks, *Ronn v. Des Moines*, 78 Iowa 63; and where a hole in a plank crossing in a frequented street had existed for two weeks, *Dempsey v. Rome*, 94 Ga. 420. And so a city was held not to be free, as a matter of law, from liability when it failed to discover that the cover of a coal hole would tip up when stepped upon, where such condition had lasted for two weeks in a sidewalk much traveled upon. *L'Herauld v. Minneapolis*, 69 Minn. 261.

**4. Defect Existing Less than a Week.** — *Weed v. Ballston Spa*, 76 N. Y. 329.

So notice was held to be imputable when from 2 o'clock P. M. to 3 o'clock P. M. on the next day a dead horse was lying in the street, *Chicago v. Hoy*, 75 Ill. 530; and when for two or three days a guard was absent from a long existent and dangerous excavation in a sidewalk, *Salina v. Trosper*, 27 Kan. 544; or where for several days a hole remained in the sidewalk on a much frequented street, *Murphysboro v. O'Riley*, 36 Ill. App. 157; and when a rope was hung for two or three days across a crowded thoroughfare, *Chicago v. Fowler*, 60 Ill. 322.

**5. Defect Existing One Day or Less.** — So notice to the municipality was not imputed when a snowbank had existed for one day in a country road, *Dorn v. Oyster Bay*, 84 Hun (N. Y.) 510; when a sidewalk was in proper condition on the day before the accident caused by a defect therein, *Jackson v. Boone*, 93 Ga. 662; *Dittrich v. Detroit*, 98 Mich. 245; where a small hole in a country road had been there for eight hours, *Carroll v. Allen*, 20 R. I. 541; and where the defect had existed but five hours, *McGregor v. Harwich Tp.*, 29 Can. Sup. Ct. 443; *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759; an hour or two, *Butler v. Oxford*, 69 Miss. 618; *Stoddard v. Winchester*, 154 Mass. 149, 26 Am. St. Rep. 223; *Theissen v. Belle Plaine*, 81 Iowa 118; or only fifteen minutes, *Chapman v. Macon*, 55 Ga. 566; *Sikes v. Manchester*, 59 Iowa 65.

But notice was held to be imputable to the municipality where a cellar door was left open for three hours in a much traveled street, *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108; and where a pile of dirt was left in the street for ten hours, *Parsons v. Manchester*, 67 N. H. 163. See also *Stone v. Charlestown*, 114 Mass. 214.

continuous, but is the result of a frequently repeated unlawful act, the municipality may be affected with notice as if the defect were continuously existent.<sup>1</sup>

(c) **Character of Highway.** — The character of the highway as to the frequency of use is also to be considered, it being stated that the same diligence to look out for defects is not required in a country road as in a crowded city street.<sup>2</sup>

(d) **Character of Defect.** — The character of the defect, as being plainly visible or the reverse, is also to be considered in connection with the time of its existence,<sup>3</sup> and if the defect is entirely of a latent character the municipality will not, in the absence of special circumstances, be charged with notice of its existence.<sup>4</sup>

(e) **Structures Liable to Decay.** — It has been held that a municipality is chargeable with notice of the liability to deterioration or decay of a wooden structure in the highway,<sup>5</sup> such as a sidewalk,<sup>6</sup> a rule which has been frequently applied

1. **Repetition of Unlawful Acts.** — *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95; *McGaffigan v. Boston*, 149 Mass. 289; *Davis v. Corry*, 154 Pa. St. 598.

So the municipality was held to be affected with notice of a long-continued habit of leaving a cellar door in the highway open at frequent intervals. *Chapman v. Macon*, 55 Ga. 566.

2. **Character of Highway** — *District of Columbia v. Woodbury v. District of Columbia*, 5 Mackey (D. C.) 127.

*Illinois*. — *Decatur v. Besten*, 169 Ill. 340.

*Massachusetts*. — *Noyes v. Gardner*, 147 Mass. 505; *Welsh v. Annesbury*, 170 Mass. 437.

*Minnesota*. — *Moore v. Minneapolis*, 19 Minn. 300; *L'Herauld v. Minneapolis*, 69 Minn. 261.

*Missouri*. — *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108.

*New Hampshire*. — *Parsons v. Manchester*, 67 N. H. 163.

*New York*. — *Lane v. Hancock*, 142 N. Y. 510.

*Pennsylvania*. — *Fritsch v. Allegheny*, 91 Pa. St. 226; *Otto Tp. v. Wolf*, 106 Pa. St. 608.

*Rhode Island*. — *Carroll v. Allen*, 20 R. I. 541.

*Texas*. — *Klein v. Dallas*, 71 Tex. 280.

*Wisconsin*. — *Hall v. Fond du Lac*, 42 Wis. 274.

3. **Character of Defect.** — *Woodbury v. District of Columbia*, 5 Mackey (D. C.) 127; *Noyes v. Gardner*, 147 Mass. 505; *Welsh v. Amesbury*, 170 Mass. 437; *Klein v. Dallas*, 71 Tex. 280. And see cases cited *supra*, this section and subsection, *Time of Existence of Defect*.

4. **Latent Defects.** — *Wakeham v. St. Clair Tp.*, 91 Mich. 15; *Jackson v. Pool*, 91 Tenn. 450; *Brown v. Mt. Holly*, 69 Vt. 364.

In *Duncan v. Philadelphia*, 173 Pa. St. 550, 51 Am. St. Rep. 780, it was stated that the municipality is not chargeable with notice of a defect not discoverable without removing and examining objects apparently in place. But see *infra*, this section and subsection, *Structures Liable to Decay*.

**Sinking of Ground.** — So the municipality has been held not to be liable for injuries caused by the sinking of ground in the highway; the liability of this to occur not appearing on the surface. *Richfort v. Adirondack*, 111 Mass. 140, 26 Am. St. Rep. 221; *Stoddard v. Winchester*, 154 Mass. 149, 26 Am. St. Rep. 223; *Fitzpatrick v. Darby*, 184 Pa. St. 645;

*Dixon v. San Antonio*, (Tex. Civ. App. 1895) 30 S. W. Rep. 359; *Prindle v. Fletcher*, 39 Vt. 255; *Brown v. Mt. Holly*, 69 Vt. 364.

**Loose Cover of Coal Hole.** — Nor is a municipality liable for injuries caused by the looseness of the cover of a coal hole unless there is something apparent on the surface to call the attention of the officials to its condition. *Hanscom v. Boston*, 141 Mass. 242; *Cooper v. Milwaukee*, 97 Wis. 458. Compare *McGaffigan v. Boston*, 149 Mass. 289.

5. **Notice of Decay.** — *Williams v. Louisiana Electric Light, etc., Co.*, 43 La. Ann. 295.

**Of Covering over Well.** — The District of Columbia was held liable for injuries caused by the giving way, through decay, of a wooden platform placed over a well located on a public highway, the platform being covered with a brick pavement level with the sidewalk and it having remained in that condition without examination for nine years. *Sherwood v. District of Columbia*, 3 Mackey (D. C.) 276, 51 Am. Rep. 776.

**Of Tree in Highway.** — See *Vosper v. New York*, 49 N. Y. Super. Ct. 296; *Jones v. Greensboro*, 124 N. Car. 310. See also *supra*, this section, *Defects Involving Liability* — *Falling Objects*.

6. **Of Sidewalk** — *Colorado*. — *Denver v. Dean*, 10 Colo. 375, 3 Am. St. Rep. 594.

*Georgia*. — *Atlanta v. Buchanan*, 76 Ga. 585.

*Illinois*. — *Joliet v. McCraney*, 49 Ill. App. 511.

*Indiana*. — *Indianapolis v. Scott*, 72 Ind. 196.

*Iowa*. — *Weber v. Creston*, 75 Iowa 16.

*Minnesota*. — *Furnell v. St. Paul*, 20 Minn. 117.

See also *Lambert v. Pembroke*, 66 N. H. 280.

**Contra.** — *Hembling v. Grand Rapids*, 99 Mich. 292; *Jackson v. Pool*, 91 Tenn. 450.

In *Lohr v. Philipsburg*, 156 Pa. St. 246, 165 Pa. St. 109, it was decided that a borough is not obliged to seek for defects resulting from decay in a walk erected by the abutting owner, *distinguishing* *Rapho Tp. v. Moore*, 68 Pa. St. 404, 8 Am. Rep. 202, on the ground that in that case the duty of maintaining the structure (a bridge) was primarily on the municipality.

**Illustration of Rule.** — A city whose officers knew that the general condition of a walk was such that from mere decay an accident was liable to happen was held to be negligent in neglecting to repair, although the authorities had no actual knowledge of the looseness of



in the case of wooden bridges on highways.<sup>1</sup>

(f) **Defects Noticed by Persons Passing.** — It has been held in a number of cases that the municipality cannot be charged with notice of the defect unless it is so palpable as to attract the attention of persons in the habit of passing along the highway at that point.<sup>2</sup> The question, however, is said to be, not whether all passers noticed the defect, but whether it was noticeable,<sup>3</sup> and in one or two cases it is stated that a municipality must exercise greater diligence than mere passers-by, and therefore is not exempt from liability merely because they would not have discovered the defect.<sup>4</sup>

(g) **Generally Defective Condition of Highway.** — The fact that the municipality has notice that the highway at a particular point is generally defective will affect it with knowledge of particular defects therein at that point,<sup>5</sup> provided the general defect is of the same general character as the particular one which causes the accident, or the latter is a usual concomitant of the former.<sup>6</sup> But a mere notice to a city that one has been injured by a defect in a highway, without any statement as to the character or location thereof, will not render it liable for a subsequent accident at that point as having notice of the defect.<sup>7</sup>

(h) **Notice of Other Defects.** — Notice of a defect which has been removed will not charge the municipality with notice of a similar one occurring in the same place,<sup>8</sup> nor will knowledge of a defect of a different character charge the municipality with notice;<sup>9</sup> but where the town authorities had an opportunity to perceive the defect while repairing another defect, they were held to be chargeable with notice.<sup>10</sup> Notice of a defect is, moreover, sufficient to charge the municipality with notice of a particular danger arising therefrom.<sup>11</sup>

the particular plank which occasioned the injury. *Shaw v. Sun Prairie*, 74 Wis. 108.

1. **Notice of Decay of Bridge.** — See the title BRIDGES, vol. 4, p. 945, note.

2. **Sufficiency to Attract Notice of Passers.** — *Iowa*. — *Doulon v. Clinton*, 33 Iowa 397; *Broburg v. Des Moines*, 63 Iowa 523, 50 Am. Rep. 756.

*Michigan*. — *Tice v. Bay City*, 84 Mich. 465; *McGrail v. Kalamazoo*, 94 Mich. 52.

*New York*. — *Riley v. Eastchester*, 18 N. Y. App. Div. 94.

*Pennsylvania*. — *Otto Tp. v. Wolf*, 106 Pa. St. 608; *Burns v. Bradford*, 137 Pa. St. 361; *Lohr v. Philipsburg*, 165 Pa. St. 109; *Fee v. Columbus*, 168 Pa. St. 382.

*Tennessee*. — *Poole v. Jackson*, 93 Tenn. 62.

3. *Rosevere v. Osceola Mills*, 169 Pa. St. 555.

4. **Greater Diligence Required of Municipality than of Passers.** — *Looney v. Joliet*, 49 Ill. App. 622; *Squires v. Chillicothe*, 89 Mo. 226.

5. **General Disrepair of Highway.** — *United States*. — *Osborne v. Detroit*, 32 Fed. Rep. 36.

*Illinois*. — *Brownlee v. Alexis*, 39 Ill. App. 135.

*Iowa*. — *Ruggles v. Nevada*, 63 Iowa 185; *Armstrong v. Ackley*, 71 Iowa 76; *Munger v. Waterloo*, 83 Iowa 559; *Smith v. Des Moines*, 84 Iowa 685; *Aryman v. Marshalltown*, 90 Iowa 350; *Ledgerwood v. Webster City*, 93 Iowa 726; *Riley v. Iowa Falls*, 83 Iowa 761; *Faulk v. Iowa County*, 103 Iowa 442.

*Massachusetts*. — *Noyes v. Gardner*, 147 Mass. 505.

*Michigan*. — *Campbell v. Kalamazoo*, 80 Mich. 655, *distinguishing* *Dundas v. Lansing*, 75 Mich. 499, 13 Am. St. Rep. 457, and *Tice v. Bay City*, 78 Mich. 209; *O'Neil v. West Branch*, 81 Mich. 546; *Fuller v. Jackson*, 92

Mich. 197; *Edwards v. Three Rivers*, 102

Mich. 153; *Moore v. Kalamazoo*, 109 Mich. 176.

*Minnesota*. — *Gude v. Mankato*, 30 Minn. 256.

*North Dakota*. — *Chacey v. Fargo*, 5 N. Dak. 175.

*Wisconsin*. — *Weisenberg v. Appleton*, 26 Wis. 58, 7 Am. Rep. 39; *Ripon v. Bittel*, 30 Wis. 614; *Shaw v. Sun Prairie*, 74 Wis. 105; *Barrett v. Hammond*, 87 Wis. 654.

6. *Fuller v. Jackson*, 82 Mich. 480; *Shelby v. Clagett*, 46 Ohio St. 549.

7. **Notice of Prior Accident.** — *Rogers v. Orion*, 116 Mich. 324.

8. **Notice of Previous Defect in Same Place.** — *Carter v. Monticello*, 68 Iowa 180; *Donaldson v. Boston*, 16 Gray (Mass.) 510.

9. **Defect of Different Character.** — *Dundas v. Lansing*, 75 Mich. 499, 13 Am. St. Rep. 457; *Fuller v. Jackson*, 82 Mich. 480; *Shelby v. Clagett*, 46 Ohio St. 549. But see *Dallas v. McAllister*, (Tex. Civ. App. 1897) 39 S. W. Rep. 173, 1 Am. Neg. Rep. 690, where a city was held to be chargeable with notice of a defect in a sewer which reasonable diligence in remedying another defect in the sewer would have brought to its notice.

10. **Defect Apparent During Repairs.** — *Wheaton v. Hadley*, 131 Ill. 640.

11. **Notice of Defect as Notice of Danger.** — *Murphysboro v. O'Riley*, 36 Ill. App. 157; *Post v. Boston*, 141 Mass. 189; *Olson v. Worcester*, 142 Mass. 536.

So it was held that where a gully which caused the accident was the direct result of a defect in a sluice, of which the municipality had long known, its ignorance of the existence of the gully was immaterial. *Brown v. Swanton*, 69 Vt. 53.

(i) **Question for Jury.** — The question whether notice should be imputed to the municipality is generally for the jury,<sup>1</sup> and it has been held error to instruct it that the existence of the defect for a particular time constituted notice.<sup>2</sup>

(j) **Evidence.** — Resolutions or reports of the city or town authorities bearing upon the necessity of repairs at a particular point or ordering them to be made are admissible to show notice of the defective condition of the highway at that point.<sup>3</sup> And likewise complaints to the council of the condition of the highway are competent for this purpose.<sup>4</sup> By the weight of authority, evidence that another person had previously met with an accident as a result of the same defect is admissible to show the length of time the road had been out of repair as bearing on the question of notice,<sup>5</sup> and reasonable presumptions and inferences may be indulged in this as in other cases.<sup>6</sup>

**13. Notice Preliminary to Suit** — *a. IN GENERAL.* — A statutory requirement that in order to maintain an action for injuries the injured person shall give notice to the municipality of the accident and the cause thereof is mandatory.<sup>7</sup>

**1. Notice Question for Jury** — *District of Columbia.* — *District of Columbia v. Payne*, 13 App. Cas. (D. C.) 500.

*Illinois.* — *Joliet v. Walker*, 7 Ill. App. 267; *Chicago v. McCulloch*, 10 Ill. App. 459.

*Indiana.* — *Washington v. Small*, 86 Ind. 462; *Indianapolis v. Murphy*, 91 Ind. 382; *Aurora v. Bitner*, 100 Ind. 396.

*Kansas.* — *Kansas City v. Bradbury*, 45 Kan. 381, 23 Am. St. Rep. 731.

*Maine.* — *Bradbury v. Falmouth*, 18 Me. 64; *Bunker v. Gouldsboro*, 81 Me. 188.

*Massachusetts.* — *Purple v. Greenfield*, 138 Mass. 1; *Fortin v. Easthampton*, 145 Mass. 196.

*Michigan.* — *Dotton v. Albion*, 50 Mich. 129; *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

*New Hampshire.* — *Lambert v. Pembroke*, 66 N. H. 280.

*New York.* — *Avery v. Syracuse*, 29 Hun (N. Y.) 537; *Roach v. Ogdensburg*, 91 Hun (N. Y.) 9.

*Pennsylvania.* — *Otto Tp. v. Wolf*, 106 Pa. St. 608.

*Texas.* — *Klein v. Dallas*, 71 Tex. 280.

*Vermont.* — *Brown v. Swanton*, 69 Vt. 53.

*Wisconsin.* — *Sheel v. Appleton*, 49 Wis. 125.

**Sufficiency of Evidence.** — So it was held to be a question for the jury whether the city had notice of the dangerous condition of a sidewalk, where a deep excavation therein in front of a building in course of erection in the business part of the city, across which stringers for a new sidewalk had been laid, had been in that condition for several weeks, guarded by a small scantling resting upon a box and a barrel, and for several hours prior to the accident this barrier had been removed. *Sproul v. Seattle*, 17 Wash. 256.

**2.** *Decatur v. Besten*, 169 Ill. 340; *Colley v. Westbrook*, 57 Me. 181, 2 Am. Rep. 30.

**3. Evidence — Resolutions and Reports** — *Illinois.* — *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

*Indiana.* — *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98.

*Iowa.* — *Butler v. Malvern*, 91 Iowa 397.

*Maine.* — *Bond v. Biddeford*, 75 Me. 538.

*Michigan.* — *Thompson v. Quincy*, 83 Mich. 173.

*Minnesota.* — *Erd v. St. Paul*, 22 Minn. 443.

*Nebraska.* — *Lincoln v. Smith*, 28 Neb. 762.

*New York.* — *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

**Contra.** — *Dudley v. Weston*, 1 Met. (Mass.) 477; *Collins v. Dorchester*, 6 Cush. (Mass.) 396. *Compare Blake v. Lowell*, 143 Mass. 296.

**4. Complaints.** — *Trapnell v. Red Oak Junction*, 76 Iowa 744.

**5. Other Accidents** — *United States.* — *District of Columbia v. Armes*, 107 U. S. 519; *Osborne v. Detroit*, 32 Fed. Rep. 36.

*Georgia.* — *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95.

*Illinois.* — *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

*Indiana.* — *Delphi v. Lowery*, 74 Ind. 521, 39 Am. Rep. 98.

*Iowa.* — *Moore v. Burlington*, 49 Iowa 136.

*Michigan.* — *Alberts v. Vernon*, 96 Mich. 549.

*Minnesota.* — *Burrows v. Lake Crystal*, 61 Minn. 357.

*New Hampshire.* — *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55.

*New York.* — *Quinlan v. Utica*, 11 Hun (N. Y.) 217, affirmed 74 N. Y. 603.

*Vermont.* — *Kent v. Lincoln*, 32 Vt. 591.

*Washington.* — *Elster v. Seattle*, 18 Wash. 304.

**Contra** — *Massachusetts.* — *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Blair v. Pelham*, 118 Mass. 420; *Aldrich v. Pelham*, 1 Gray (Mass.) 510; *Kidder v. Dunstable*, 11 Gray (Mass.) 342.

And see *Moore v. Richmond*, 85 Va. 538; *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810.

As to the admissibility of such evidence to show the defective character of the highway see *infra*, this section, *Evidence as to Defective Condition — Experience of Others at Same Place*.

**6. Presumptions and Inferences.** — So where a coal hole was open in the morning, and also at noon at which time a person fell into it, it was held that it might be presumed that it remained open for the intervening time, so as to charge the city with notice. *Stone v. Charlestown*, 114 Mass. 214.

And the fact that the stump which caused the accident appeared to have been there for a long time was held sufficient to cause an inference that the defendant had notice thereof. *Tilton v. Wenham*, 172 Mass. 407.

**7. Necessity of Notice** — *Colorado.* — *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212.

and accordingly the municipality has no power to waive such notice,<sup>1</sup> and the giving of the notice being a condition precedent to the action, it must generally be alleged in the complaint or declaration.<sup>2</sup> The notice is not rendered unnecessary by the fact that the municipal authorities have acquired full information as to the accident from other sources.<sup>3</sup>

**Direct Act of Municipality.** — It has been decided in *Wisconsin* that the notice is not required when the injury was caused by the direct act of the municipality.<sup>4</sup>

**Notice to Individuals.** — A requirement of notice to the persons obliged by law to keep a highway in repair does not necessitate notice to an individual sued for causing a defect in the highway.<sup>5</sup>

**When Death Results** immediately from the injury, the statutory requirement has been held in *Maine* not to apply,<sup>6</sup> and in *New Hampshire* the same rule prevails, irrespective, apparently, of whether the death is immediate.<sup>7</sup>

**Questions of Law and Fact.** — The sufficiency of the notice is a matter of law for the court,<sup>8</sup> while the question whether the injury was received at the place described is stated to be a question for the jury.<sup>9</sup>

**b. BY WHOM TO BE GIVEN.** — A requirement that "any person" injured shall give notice includes infants.<sup>10</sup> The notice may be given by an agent or representative of the person injured,<sup>11</sup> but it should appear in whose behalf the claim is made.<sup>12</sup>

**c. SUFFICIENCY** — (1) *Statement of Time of Injury.* — A requirement that the time of the injury be stated is sufficiently complied with by stating the day on which it occurred,<sup>13</sup> unless the particular hour is in some way material,<sup>14</sup> but the year must be stated,<sup>15</sup> and a considerable variation between the time stated and the actual time invalidates the notice.<sup>16</sup>

*Maine.* — *Greenleaf v. Norridgwick*, 82 Me. 62.

*Massachusetts.* — *Shea v. Lowell*, 132 Mass. 187.

*New Hampshire.* — *Sargent v. Gilford*, 66 N. H. 543.

*New York.* — *Borst v. Sharon*, 24 N. Y. App. Div. 599.

*Vermont.* — *Babcock v. Guilford*, 47 Vt. 519.

*Wisconsin.* — *Susenguth v. Rantoul*, 48 Wis. 334; *Sowle v. Tomah*, 81 Wis. 349.

And see other cases cited *infra*.

**1. Waiver.** — *Starling v. Bedford*, 94 Iowa 194; *Gay v. Cambridge*, 128 Mass. 387; *Borst v. Sharon*, 24 N. Y. App. Div. 599. And see *Hoyle v. Putnam*, 46 Conn. 56; *Veazie v. Rockland*, 68 Me. 511; *Hubbard v. Fayette*, 70 Me. 121; *Shea v. Lowell*, 132 Mass. 187.

**Payment of Claim Without Notice Mere Gratuity.** — Accordingly it was held that in the absence of such notice of the claim, a vote by the town to pay the claim was the giving of a mere gratuity, and was not binding, it being beyond the powers of the town. *Clark v. Tremont*, 83 Me. 426.

**2. Allegation in Pleading.** — *Maddox v. Randolph County*, 65 Ga. 216; *Reining v. Buffalo*, 102 N. Y. 308; *Benware v. Pine Valley*, 53 Wis. 527; *Wentworth v. Summit*, 60 Wis. 281; *Dorsey v. Racine*, 60 Wis. 292. *Contra*, *Kent v. Lincoln*, 32 Vt. 591.

**3. Information from Other Sources.** — *Gardner v. New London*, 63 Conn. 267; *Crocker v. Hartford*, 66 Conn. 387.

**4. Direct Act of Municipality.** — *Hughes v. Fond du Lac*, 73 Wis. 380.

**5. Notice to Individual.** — *Fisher v. Cushing*, 134 Mass. 374; *Stevenson v. Joy*, 152 Mass. 45.

**6. Effect of Death.** — *Perkins v. Oxford*, 66 Me. 545.

*7. Clark v. Manchester*, 62 N. H. 577; *Jewett v. Keene*, 62 N. H. 701.

**8. Question of Law or Fact.** — *Rogers v. Shirley*, 74 Me. 144; *Chapman v. Nobleboro*, 76 Me. 427; *Shea v. Lowell*, 132 Mass. 187.

*9. Robin v. Bartlett*, 64 N. H. 426.

**10. By Whom Notice to Be Given.** — *Madden v. Springfield*, 131 Mass. 441.

And the father may give notice for his minor child when the statute provides that the notice may be given by the person injured or by any other person "in his behalf." *Taylor v. Woburn*, 130 Mass. 494.

**11. By Third Person.** — *Ayer v. Somersworth*, 66 N. H. 476, where a statement of injuries to one's horse was held to be properly filed by his agent. As to the *Massachusetts* statute expressly so providing, see *Harris v. Newbury*, 128 Mass. 321, and the next preceding note.

As to notice by an executor or administrator under the *Massachusetts* statute, see *Taylor v. Woburn*, 130 Mass. 494; *Nash v. South Hadley*, 145 Mass. 105.

*12. Hubbard v. Fayette*, 70 Me. 121; *Keller v. Winslow*, 84 Me. 147; *McNulty v. Cambridge*, 130 Mass. 275; *Roach v. Somerville*, 131 Mass. 189. *Compare* *Teegarden v. Caledonia*, 50 Wis. 292, where a notice was held to be sufficient if presented by the person injured, though signed by his attorneys, who did not describe themselves as such.

**13. Statement of Time.** — *Lilly v. Woodstock*, 59 Conn. 219; *Madden v. Springfield*, 131 Mass. 441; *Sherry v. Rochester*, 62 N. H. 346; *Holcomb v. Danby*, 51 Vt. 428.

*14. Donnelly v. Fall River*, 132 Mass. 299; *Sherry v. Rochester*, 62 N. H. 346.

*15. White v. Stowe*, 54 Vt. 510.

**16. Variance as to Time.** — *Shaw v. Waterbury*, 46 Conn. 263, where the notice stated that the



(2) *Description of Place.* — The statute generally requires that the notice shall describe the place where the injury was received, and a failure to comply therewith prevents recovery.<sup>1</sup> Such description is sufficient if it will enable the municipal authorities to ascertain the place by the exercise of reasonable diligence.<sup>2</sup> It should state that the place was on a highway within the particular municipality,<sup>3</sup> but a statement that it was on a named highway, without naming the particular location thereon, is not sufficient.<sup>4</sup> The description may be by reference to particular buildings,<sup>5</sup> or it may be by a reference to another highway<sup>6</sup> or to natural objects,<sup>7</sup> and the fact that the monuments mentioned are unknown to the town officers is immaterial.<sup>8</sup>

(3) *Description of Defect.* — The statute generally requires that the nature of the defect shall be stated,<sup>9</sup> and the same requirement is involved in the provision of the *Massachusetts* statute that "the cause of the injury" shall be stated.<sup>10</sup>

(4) *Description of Injuries.* — A requirement that the nature of the injuries injury occurred on April 16, and a charge that the notice was sufficient if the injury occurred at any time in April or May was held to be error. *Compare Sullivan v. Syracuse*, 77 Hun (N. Y.) 440, where a variance of one day was held to be immaterial.

1. *Description of Place.* — *Underhill v. Washington*, 46 Vt. 767, and cases cited *infra*.

2. *Connecticut.* — *Shaw v. Waterbury*, 46 Conn. 263.

*Maine.* — *Chapman v. Nobleboro*, 76 Me. 427.

*New Hampshire.* — *Horne v. Rochester*, 62 N. H. 347; *Carr v. Ashland*, 62 N. H. 665; *Robin v. Bartlett*, 64 N. H. 426.

*New York.* — *Werner v. Rochester*, 77 Hun (N. Y.) 33; *Cross v. Elmira*, 86 Hun (N. Y.) 467.

*Vermont.* — *Fassett v. Roxbury*, 55 Vt. 552.

*Wisconsin.* — *Fopper v. Wheatland*, 59 Wis. 623; *Weber v. Greenfield*, 74 Wis. 234; *Wall v. Highland*, 72 Wis. 435.

3. *White v. Stowe*, 54 Vt. 510; *Farnsworth v. Mt. Holly*, 63 Vt. 293.

4. *Name of Highway Insufficient.* — *Rogers v. Shirley*, 74 Me. 144; *Larkin v. Boston*, 128 Mass. 521; *Donnelly v. Fall River*, 130 Mass. 115; *Post v. Foxborough*, 131 Mass. 202; *Dalton v. Salem*, 139 Mass. 91; *Babcock v. Guilford*, 47 Vt. 519; *Sowle v. Tomah*, 81 Wis. 349.

*Illustrations.* — So a notice that the defect was in a sidewalk between two streets nearly two hundred feet apart was held to be insufficient. *Cronin v. Boston*, 135 Mass. 110. And so of a notice stating that the injury was received on the road between two towns which were four and one-half miles apart, *Law v. Fairfield*, 46 Vt. 425; and where the accident was located in certain woods which extended along the road for a mile and a half, *Rogers v. Shirley*, 74 Me. 144.

5. *Reference to House.* — *White v. Vassalborough*, 82 Me. 67; *Low v. Clinton*, 133 Mass. 526; *Pendergast v. Clinton*, 147 Mass. 402; *Davis v. Rumney*, 67 N. H. 591; *Ranney v. Sheffield*, 49 Vt. 191; *Harris v. Townshend*, 56 Vt. 716; *Salladay v. Dodgeville*, 85 Wis. 318.

6. *Reference to Other Highway.* — *Sargent v. Lynn*, 138 Mass. 599; *McCabe v. Cambridge*, 134 Mass. 484.

7. *Natural Objects.* — *Welch v. Gardner*, 133 Mass. 529; *Melendy v. Bradford*, 56 Vt. 148; *Weiting v. Millston*, 77 Wis. 523.

8. *Monuments Unknown to Authorities.* — *Robin v. Bartlett*, 64 N. H. 426.

*Aider of Notice.* — Where the best practical description of the place was given, the fact that the precise defect was pointed out to the supervisor was considered. *Salladay v. Dodgeville*, 85 Wis. 318. See also *Owen v. Ft. Dodge*, 98 Iowa 281.

But a statement appended to the notice that the plaintiff will point out to the authorities the place of the injury will not cure defects in the notice. *Biesiegel v. Seymour*, 58 Conn. 43.

9. *Nature of Defect.* — *Biesiegel v. Seymour*, 58 Conn. 43; *Hubbard v. Fayette*, 70 Me. 121.

A statement that the defect consisted of a dangerous embankment has been held to be a sufficient compliance with such requirement. *Lilly v. Woodstock*, 59 Conn. 219; *Manning v. Woodstock*, 59 Conn. 224. And so of a statement that the injury was caused by a hole into which the wagon fell. *Wieting v. Millston*, 77 Wis. 523.

The *Vermont* Statute providing for recovery in case of injuries on a highway caused by a defect in a culvert requires the notice to point out in what respect the culvert was insufficient and out of repair. See, as to the sufficiency of a notice under such statute, *Farnsworth v. Mt. Holly*, 63 Vt. 293; *Cook v. Barton*, 66 Vt. 65.

10. *Massachusetts Statute.* — *Miles v. Lynn*, 130 Mass. 398; *Taylor v. Woburn*, 130 Mass. 494; *Madden v. Springfield*, 131 Mass. 441.

As to the sufficiency of the statement of the cause of the injury, see *McNulty v. Cambridge*, 130 Mass. 275; *Savory v. Haverhill*, 132 Mass. 324; *Dalton v. Salem*, 136 Mass. 278; *Aston v. Newton*, 134 Mass. 507. 45 Am. Rep. 347; *Fortin v. Easthampton*, 142 Mass. 486.

A mere statement that the injury was caused by a defect or a defective construction or condition of the highway is not sufficient. *Dalton v. Salem*, 131 Mass. 551; *Noonan v. Lawrence*, 130 Mass. 161; *Madden v. Springfield*, 131 Mass. 441; *Roberts v. Douglas*, 130 Mass. 129.

In *New York*, under a charter provision similar to the *Massachusetts* statute, it was held that a statement that the injury resulted from a defective and dangerous sidewalk was insufficient. *Paddock v. Syracuse*, 61 Hun (N. Y.) 11.

be specified must be complied with,<sup>1</sup> but the injury need not be described in technical terms or in detail,<sup>2</sup> and the naming of the parts of the body injured seems to be regarded as sufficient.<sup>3</sup>

(5) *Statement of Purpose of Notice.* — The notice need not expressly state the intention to hold the municipality responsible, unless this is required by the statute,<sup>4</sup> but it should show, apparently, that it is intended as a notice for the purpose of fixing the right of action.<sup>5</sup>

(6) *Statement of Claim for Damages.* — A statutory requirement that the person injured shall set forth his claim for damages has been held not to require a statement of the amount claimed, it being sufficient if the sufferer states that he makes claim for damages;<sup>6</sup> and in another state it has been held that such a requirement does not prevent recovery of a sum greater than that claimed, if the injury thereafter appears to be greater.<sup>7</sup>

*d. VARIANCE BETWEEN NOTICE AND PROOF.* — The notice must be in accord with the proof as regards the place at which the injury was received,<sup>8</sup> but the variance must be material to affect the right of recovery.<sup>9</sup> So a mistake as to the defect causing the accident may prevent recovery,<sup>10</sup> but such variance likewise must be material to have any effect.<sup>11</sup>

1. *Nature of Injuries.* — *Bradbury v. Benton*, 69 Me. 194; *Low v. Windham*, 75 Me. 113.

Accordingly a statement that the plaintiff received "severe bodily injuries" was held to be insufficient. *Goodwin v. Gardiner*, 84 Me. 278.

The plaintiff may, however, recover for all consequences directly resulting from the injuries specified. *Robin v. Bartlett*, 64 N. H. 426; *Wadleigh v. Mt. Vernon*, 75 Me. 79.

2. *Brown v. Southbury*, 53 Conn. 212; *Lilly v. Woodstock*, 59 Conn. 219.

In *Robin v. Bartlett*, 64 N. H. 426, it was said that the notice is sufficient in this regard if it gives such a reasonably complete account of the injury as a person of ordinary intelligence is capable of giving and naturally would give to his neighbor whom he desired to inform as to the part of his person in which he was injured and the extent of the injury.

*Illustrations of Requirement.* — So in *Lilly v. Woodstock*, 59 Conn. 219, a description of the injuries as being "the bruising, wounding, and laming of my person" was held to be sufficient; *distinguishing* the case of *Biesiegel v. Seymour*, 58 Conn. 43, in which a notice stating that the plaintiff's mare was "greatly bruised, cut, sprained, and lamed, in and upon the feet, legs, chest, shoulders, back, and other parts, and otherwise injured," was held insufficient as being obviously an attempt, not to give notice of the nature of the injury, but to hide it under a multiplicity of statements. See also *Manning v. Woodstock*, 59 Conn. 224.

A demand for damages for an injury to the plaintiff's horse was held to be a sufficient statement. *Blackington v. Rockland*, 66 Me. 332, *distinguished* in *Goodwin v. Gardiner*, 84 Me. 278.

3. *Naming Parts of Body.* — *White v. Vassalborough*, 82 Me. 67; *Robin v. Bartlett*, 64 N. H. 426.

A contrary view has obtained in *Vermont* under a statute requiring a statement of the "extent" of the injuries. *Nourse v. Victory*, 51 Vt. 275; *Perry v. Putney*, 52 Vt. 533; *Prait v. Sherburne*, 53 Vt. 370; *Fassett v. Roxbury*, 55 Vt. 552. But see *Willard v. Sherburne*, 59 Vt. 361.

4. *Stating Purpose of Notice.* — *Taylor v. Woburn*, 130 Mass. 494; *Savory v. Haverhill*, 132 Mass. 324.

5. *Kenady v. Lawrence*, 128 Mass. 318; *Mooney v. Salem*, 130 Mass. 402.

6. *Amount of Damages.* — *Sawyer v. Naples*, 66 Me. 453; *Morgan v. Lewiston*, 91 Me. 566, *distinguishing* *Lord v. Saco*, 87 Me. 231.

7. *Noble v. Portsmouth*, 67 N. H. 183. And see *Minick v. Troy*, 83 N. Y. 514.

8. *Variance as to Place of Injury.* — *Learned v. New York*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 601; *Weber v. Greenfield*, 74 Wis. 234.

9. *Sargent v. Lynn*, 138 Mass. 599; *Donohue v. Warren*, 95 Wis. 367; *Doan v. Willow Springs*, 101 Wis. 112.

So while it may be material that the wrong side of the street was named as the place of the injury, this is so only in case the mistake does not appear from other parts of the description. *Cloughessey v. Waterbury*, 51 Conn. 405, 50 Am. Rep. 38; *Shallow v. Salem*, 136 Mass. 136.

*Substantial Correspondence.* — A statement that one was injured by falling on the sidewalk near a certain corner was held to be supported by evidence that she fell sixty-five feet away from the corner. *Masters v. Troy*, 50 Hun (N. Y.) 485, *affirmed* 123 N. Y. 628.

And a notice that one was injured "just northerly" of a certain point was supported by evidence that the injury occurred a short distance from that point and not more than fifteen or twenty feet northerly of it. *Coffin v. Palmer*, 162 Mass. 192.

10. *Variance as to Defect.* — *Benson v. Madison*, 101 Wis. 312.

So a notice that the plaintiff was injured by a grating is not sustained by proof that she was injured by slipping on ice and falling on the grating. *McDougall v. Boston*, 134 Mass. 149.

11. *McCabe v. Cambridge*, 134 Mass. 484; *Davis v. Charlton*, 140 Mass. 422.

So a statement that the injury was caused by loose stones is not rendered defective by proof that the accident was caused by a stone partly imbedded in the ground. *Salladay v. Dodgeville*, 85 Wis. 318.

*e.* **TIME OF GIVING NOTICE.** — A statutory provision as to the time after the accident in which the notice must be given must be complied with,<sup>1</sup> but the statute generally provides for an extension of such time in case the person injured is mentally or physically unable to give the notice.<sup>2</sup>

*f.* **MODE OF SERVICE.** — The service of the notice is regulated by statute, but it is generally regarded as sufficient, provided the notice reaches the proper officer or board in due time, though it first passes through the hands of others.<sup>3</sup>

**14. Evidence as to Defective Condition.** — *a.* **EXPERIENCE OF OTHERS AT SAME PLACE.** — Evidence that other accidents had occurred at the same place is, according to a number of authorities, admissible to show that the highway was defective at that point,<sup>4</sup> while by another line of authorities, in accordance with the law as established in *Massachusetts*, such evidence is excluded as tending to raise a collateral issue.<sup>5</sup> The fact that others passed the place

**A Statement of the Lack of a Railing** is not insufficient though another defect also contributed to the injury. *Ashborn v. Waterbury*, 70 Conn. 551; *Grogan v. Worcester*, 140 Mass. 227; *Quinn v. Sempronius*, 33 N. Y. App. Div. 70.

**Variance as to Time.** — See *supra*, this subsection, *Statement of Time of Injury*.

**A Massachusetts Statute** (Stat. 1882, c. 36) provides that an inaccuracy in the notice shall not invalidate it if there was no intention to mislead and the party entitled to notice was not misled. *Canterbury v. Boston*, 141 Mass. 215; *Shallow v. Salem*, 136 Mass. 136; *Young v. Douglas*, 157 Mass. 383. But such statute will not validate a notice which makes no attempt to designate the place of the injury. *Gardner v. Weymouth*, 155 Mass. 595.

**Amendment of the notice** after the bringing of suit cannot be allowed. *Leonard v. Bath*, 61 N. H. 67.

**1. Time of Giving Notice.** — *Veazie v. Rockland*, 68 Me. 511; *Mitchell v. Worcester*, 129 Mass. 525; *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487; *Giddings v. Ira*, 54 Vt. 346.

**2. Disability of Person Injured.** — In *Massachusetts* it is decided that a person is not disabled to give notice within such a provision by the fact that he is unable to leave his bed. *McNulty v. Cambridge*, 130 Mass. 275; *Lyons v. Cambridge*, 132 Mass. 534. The question of such capacity is for the jury, *Welch v. Gardner*, 133 Mass. 529; and the plaintiff in the action against the city has the burden of showing such disability, *May v. Boston*, 150 Mass. 517.

In *New Hampshire* it is provided that one unavoidably prevented from filing his claim within the statutory ten days may within six months petition the trial term of the Supreme Court for leave to file his claim. *Gitchell v. Andover*, 59 N. H. 363; *Sewell v. Webster*, 59 N. H. 586; *Page v. Campton*, 63 N. H. 197; *Hayes v. Rochester*, 64 N. H. 41. And it has been held that ignorance of law on the part of the plaintiff's counsel was ground for granting such leave. *Bolles v. Dalton*, 59 N. H. 479; *Kelsea v. Manchester*, 64 N. H. 570.

**The Absence of a Statutory Provision** extending the time in case of disability, it has been held, will not prevent recovery against a city by one who was so disabled that he could not give notice within the statutory time, where the constitution guarantees a remedy for all

wrongs, and a right of action for the negligence of the municipality in the care of its highways exists independently of statute. *Webster v. Beaver Dam*, 84 Fed. Rep. 280.

**3. Mode of Service.** — *McCabe v. Cambridge*, 134 Mass. 484; *Taylor v. Woburn*, 130 Mass. 494; *Wormwood v. Waltham*, 144 Mass. 184; *Coleman v. Fargo*, 8 N. Dak. 69; *Wieting v. Millston*, 77 Wis. 523. But see *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487; *Burford v. New York*, 26 N. Y. App. Div. 225; *Denver v. Saulcey*, 5 Colo. App. 420.

**A Notice to the Mayor** is held to be notice to the city. *Blackington v. Rockland*, 66 Me. 332.

**Service by Mail** is insufficient when the statute requires the filing of the notice. *Sowter v. Grafton*, 65 N. H. 207; *Burford v. New York* 26 N. Y. App. Div. 225. In *Maine* such service is expressly allowed by statute, *Blackington v. Rockland*, 66 Me. 332; but the notice must be actually received within the statutory time, *Chase v. Surry*, 88 Me. 468.

**A Notice Addressed to a Municipal Officer** is sufficient if it is evidently intended for the municipality. *Lyman v. Hampshire*, 138 Mass. 74; *Leonard v. Holyoke* 138 Mass. 78.

**4. Other Accidents at Same Place — Evidence Admissible — England.** — *Brown v. Eastern*, etc., R. Co., 22 Q. B. D. 391.

*United States.* — *District of Columbia v. Armes*, 107 U. S. 519.

*Connecticut.* — *House v. Metcalf*, 27 Conn. 631.

*Georgia.* — *Augusta v. Haifers*, 61 Ga. 48, 34 Am. Rep. 95.

*Illinois.* — *Aurora v. Brown*, 12 Ill. App. 122.

*New Hampshire.* — *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Cook v. New Durham*, 64 N. H. 419.

*New York.* — *Quinlan v. Utica*, 11 Hun (N. Y.) 217, affirmed 74 N. Y. 603; *Stewart v. Porter Mfg. Co.*, (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 221; *Eggleston v. Columbia Turnpike Road*, 18 Hun (N. Y.) 146; *Burns v. Schenectady*, 24 Hun (N. Y.) 10; *Wooley v. Grand St.*, etc., R. Co., 83 N. Y. 121.

*Vermont.* — *Kent v. Lincoln*, 32 Vt. 591.

**5. Evidence Inadmissible — Maine.** — *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810; *Bremner v. Newcastle*, 83 Me. 415, 23 Am. St. Rep. 782.

*Massachusetts.* — *Collins v. Manchester*, 130 Mass.



of the alleged defect in safety cannot be introduced to show that no defect exists,<sup>1</sup> unless, according to a *Connecticut* case, the alleged defect is such as to attract the attention of all passing and their experience of its effect in obstructing travel is substantially the same.<sup>2</sup>

*b. LONG CONTINUANCE OF SAME CONDITIONS.* — The fact that the highway had remained in the same condition for many years and that an accident had never previously happened may, it seems, be considered on the question of negligence, provided the accident resulted from the general construction of the highway and not from a special defect therein,<sup>3</sup> and provided, further, the use and test of the road by other persons were substantially similar to those by the person injured.<sup>4</sup>

*c. CUSTOM AS TO CARE OF HIGHWAYS.* — The fact that the same dangerous conditions exist in highways in other municipalities is no excuse for their existence in the defendant municipality, and evidence to that effect is inadmissible.<sup>5</sup> Nor can it be shown, as an excuse for failure to remedy such conditions, that they are customary in the defendant municipality.<sup>6</sup>

**15. Damages Recoverable.** — The amount of damages recoverable for injuries caused by defective highways is, in general, governed by the same principles as apply in other actions for torts.<sup>7</sup> But when the right of recovery is based upon a statute, some peculiar questions arise. It has been held that where the statute allows recovery for bodily injury, the person injured is entitled to compensation for loss of time and medical expenses incurred,<sup>8</sup> and likewise for bodily pain.<sup>9</sup>

**Injuries to Property.** — Under a provision allowing damages for injury to one's property the plaintiff was held not entitled to recover for loss of the use of a vehicle while being repaired,<sup>10</sup> nor for a loss of time or additional expenses caused by inability to use the road;<sup>11</sup> and it has been held that one cannot recover for loss of services of a relative injured on the highway as damage to property,<sup>12</sup> though the *Wisconsin* statute has been construed differently.<sup>13</sup>

(Mass.) 396; *Merrill v. Bradford*, 110 Mass. 505; *Schoonmaker v. Wilbraham*, 110 Mass. 134. But see remarks in *Bemis v. Temple*, 162 Mass. 342.

*Michigan.* — *Langworthy v. Green Tp.*, 88 Mich. 207.

*Virginia.* — *Moore v. Richmond*, 85 Va. 538.

*Wisconsin.* — *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114.

**1. Evidence that Others Passed in Safety Inadmissible.** — *Bauer v. Indianapolis*, 99 Ind. 56; *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810; *Aldrich v. Pelham*, 1 Gray (Mass.) 510; *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260.

**2. Connecticut Case.** — *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194. And see comments in *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260.

**As to Objects Frightening Horses**, admissibility of evidence that other horses were frightened, see *supra*, this section, *Defects Involving Liability — Objects Frightening Horses*.

**3. Continuous Existence of Highway in Same Condition.** — *Glazier v. Hebron*, 131 N. Y. 447, reversing 62 Hun (N. Y.) 137; *Maxim v. Champion*, 50 Hun (N. Y.) 88, affirmed 119 N. Y. 626; *Bryant v. Randolph*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 438. See also *Littlefield v. Norwich*, 40 Conn. 406.

**4. Taylor v. Monroe**, 43 Conn. 36; *Lutton v. Vernon*, 62 Conn. 1.

**5. Custom as to Care of Highways — Illinois.** — *Champaign v. Patterson*, 50 Ill. 61.

*Massachusetts.* — *Hinckley v. Barnstable*, 109 Mass. 126; *George v. Haverhill*, 110 Mass.

506. Compare *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; *Packard v. New Bedford*, 9 Allen (Mass.) 200.

*Michigan.* — *Malloy v. Walker Tp.*, 77 Mich. 448.

*New Hampshire.* — *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

**6. Custom of Defendant Municipality Inadmissible.** — *Weber v. Creston*, 75 Iowa 16; *Bacon v. Boston*, 3 Cush. (Mass.) 174; *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Langworthy v. Green Tp.*, 88 Mich. 207; *Rowell v. Hollis*, 62 N. H. 129.

**7. Damages Recoverable.** — See generally the title DAMAGES, vol. 8, p. 537.

**8. Amount of Damages.** — *Sanford v. Augusta*, 32 Me. 536. And see the title DAMAGES, vol. 8, pp. 645, 648.

**9. Bodily Pain.** — *Verrill v. Minot*, 31 Me. 299; *Mason v. Ellsworth*, 32 Me. 271; *Canning v. Williamstown*, 1 Cush. (Mass.) 451. And see the title DAMAGES, vol. 8, p. 655.

**10. Loss of Use of Article.** — *McLaughlin v. Bangor*, 58 Me. 398. But see *Brown v. Southbury*, 53 Conn. 212.

**11. Inability to Use Road.** — *Weeks v. Shirley*, 33 Me. 271; *Brailey v. Southborough*, 6 Cush. (Mass.) 141. See also *Ball v. Winchester*, 32 N. H. 435.

**12. Loss of Services.** — *Chidsey v. Canton*, 17 Conn. 475; *Reed v. Belfast*, 20 Me. 246; *Harwood v. Lowell*, 4 Cush. (Mass.) 310. See also *Frazer v. Lewiston*, 76 Me. 531; *Wheeler v. Troy*, 20 N. H. 77.

**13. Hunt v. Winfield**, 36 Wis. 154, 17 Am. Rep. 482.

**Exemplary Damages and Interest.** — It has been decided that under a statute making a town liable for "damages," compensatory damages only can be recovered,<sup>1</sup> and that the jury cannot add interest to the sum it finds as damages.<sup>2</sup>

**16. Action Over Against Wrongdoer** — *a. IN GENERAL.* — It is well settled that a municipal corporation which has been compelled to pay a claim on account of damages sustained by an individual through a defect in the highway may bring an action over against a person who negligently or unlawfully created the defect.<sup>3</sup> The liability in such a case is based upon the general principle which makes a party responsible for the consequences of his own wrongful conduct, and exists only when the third person would be directly liable to the person injured,<sup>4</sup> unless this is altered by statute.<sup>5</sup> The person who caused the defect and the municipality which failed to repair it are not considered to be *in pari delicto* within the rule forbidding contribution between joint wrongdoers,<sup>6</sup> but in a few cases the municipality has been held to have been to such an extent liable for the defective condition as to debar it from recovery as against the other wrongdoer.<sup>7</sup>

**For Breach of Contract.** — The municipality may likewise recover of one the damages which it has been compelled to pay by his failure to comply with a contract with it to keep the highway in repair.<sup>8</sup>

*b. EFFECT OF PREVIOUS JUDGMENT.* — The judgment in the former action against the municipality is conclusive as against the defendant in the action over for indemnity, if he had notice of the pendency of such former action and an

**1. Compensatory Damages Only.** — *Burr v. Plymouth*, 48 Conn. 460.

As to the principles involved in the allowance of exemplary damages, see the title EXEMPLARY DAMAGES, vol. 12, p. 2.

**2. Interest Not Allowed.** — *Sargent v. Hampden*, 38 Me. 581. See generally the title INTEREST.

**3. Action Over by Municipality** — *United States*. — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

*Connecticut*. — *Norwich v. Breed*, 30 Conn. 535.

*Georgia*. — *Western, etc., R. Co. v. Atlanta*, 74 Ga. 774.

*Illinois*. — *Severin v. Eddy*, 52 Ill. 189; *Gridley v. Bloomington*, 68 Ill. 47.

*Indiana*. — *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Elkhart v. Wickwire*, 87 Ind. 77.

*Iowa*. — *Sioux City v. Weare*, 59 Iowa 95.

*Massachusetts*. — *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 32, 34 Am. Dec. 33; *Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735; *Lowell v. Short, 4 Cush.* (Mass.) 275; *West Boylston v. Mason*, 102 Mass. 341; *Woburn v. Boston, etc., R. Corp.*, 109 Mass. 283; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Woods v. Groton*, 111 Mass. 357.

*New Hampshire*. — *Elliot v. Concord*, 27 N. H. 204; *Littleton v. Richardson*, 32 N. H. 59.

*New York*. — *Rochester v. Montgomery*, 72 N. Y. 65; *Canandaigua v. Foster*, 81 Hun (N. Y.) 147.

*Pennsylvania*. — *Brookville v. Arthurs*, 152 Pa. St. 334; *Reading v. Reiner*, 167 Pa. St. 41.

*Texas*. — *Ft. Worth St. R. Co. v. Allen*, (Tex. Civ. App. 1897) 39 S. W. Rep. 125, 1 Am. Neg. Rep. 529.

*Vermont*. — *Newbury v. Connecticut, etc., R. Co.*, 25 Vt. 377.

See generally the title CONTRIBUTION AND EXONERATION, vol. 7, p. 365 *et seq.*

**4. Recovery Over Only if Defendant Originally Liable to Person Injured** — *Iowa*. — *Keokuk v. Independent Dist.*, 53 Iowa 352, 36 Am. Rep. 226.

*Massachusetts*. — *Boston v. Gray*, 144 Mass. 53; *Lowell v. Glidden*, 159 Mass. 317.

*Missouri*. — *St. Louis v. Connecticut Mut. L. Ins. Co.*, 107 Mo. 92, 28 Am. St. Rep. 402.

*New York*. — *Fulton v. Tucker*, 3 Hun (N. Y.) 529; *Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760.

*5. See Detroit v. Chaffee*, 70 Mich. 80.

**6. Not in Pari Delicto** — *Massachusetts*. — *Lowell v. Short, 4 Cush.* (Mass.) 275; *Swansey v. Chace*, 16 Gray (Mass.) 303; *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33; *Campbell v. Somerville*, 114 Mass. 334.

*Michigan*. — *Detroit v. Chaffee*, 70 Mich. 80.

*New York*. — *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *New York v. Dimick*, 49 Hun (N. Y.) 241.

**7. Municipal Negligence Preventing Recovery.** — So it was held that the municipality could not recover when it had allowed lumber to be piled in the street for years though the attention of the officer was called to it, *Galveston v. Gonzales*, 6 Tex. Civ. App. 538; and where the injuries were caused by a telegraph or electric-light pole located at a certain point with the consent or by the direction of the municipality, *Atkinson v. Chatham*, 29 Ont. 518; *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.) 581.

**8. Contract to Keep Highway in Repair.** — *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *Brookville v. Arthurs*, 130 Pa. St. 501.

**On the Same Principle** a municipality has been held to be entitled to recover of an individual



opportunity to defend, as to the amount of damages, the existence of the defect or obstruction, and that the injured person was himself free from negligence.<sup>1</sup> But such judgment is not conclusive that the defendant in the second action was guilty of negligence and is therefore liable over to the municipality,<sup>2</sup> unless his negligence necessarily results from the facts on which the municipal liability was based.<sup>3</sup>

*c. NOTICE OF PREVIOUS SUIT.* — The liability of the author of the defect does not depend upon his receiving notice of the action by the injured person against the municipality, but a failure by the municipality to give such notice imposes upon it the necessity of again litigating and establishing in its suit against the wrongdoer all the actionable facts.<sup>4</sup> It seems that direct notice is not necessary if the wrongdoer has knowledge of the bringing of the suit against the municipality,<sup>5</sup> but a notice which does not state the nature of the accident nor show the interest therein of the person to whom it is given is not sufficient.<sup>6</sup>

*d. AMOUNT OF RECOVERY.* — The municipality is entitled to recover all the damages which it has been compelled to pay and the costs and expenses reasonably and fairly incurred,<sup>7</sup> including interest and taxable costs,<sup>8</sup> and also counsel fees,<sup>9</sup> but it was held that the expense of defending the suit could not be recovered where the statute provided that the recovery should be of damages and costs.<sup>10</sup> There can be no recovery of costs of an appeal by the

the expense of repairing defects created by him. *Centerville v. Woods*, 57 Ind. 192.

**1. Effect of Previous Judgment** — *United States*. — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 670; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316.

*Georgia*. — *Western, etc., R. Co. v. Atlanta*, 74 Ga. 774.

*Indiana*. — *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627.

*Maine*. — *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720.

*Massachusetts*. — *Boston v. Worthington*, 10 Gray (Mass.) 496, 71 Am. Dec. 678; *Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735.

*Missouri*. — *St. Joseph v. Union R. Co.*, 116 Mo. 636, 38 Am. St. Rep. 626.

*New Hampshire*. — *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759; *Manchester v. Quimby*, 60 N. H. 10.

*New York*. — *Rochester v. Montgomery*, 72 N. Y. 65; *Port Jervis v. Port Jervis First Nat. Bank*, 96 N. Y. 550.

*Pennsylvania*. — *West Chester v. Apple*, 35 Pa. St. 284, 78 Am. Dec. 336.

**2. As to Negligence of Individual.** — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Knox v. Sterling*, 73 Ill. 214; *Independence v. Jelke*, 38 Iowa 427; *Boston v. Worthington*, 10 Gray (Mass.) 496, 71 Am. Dec. 678; *St. Joseph v. Union R. Co.*, 116 Mo. 636, 38 Am. St. Rep. 626.

**3. Washington Gas Light Co. v. District of Columbia**, 161 U. S. 316, where Justice White, after referring to the statement in *Chicago v. Robbins*, 2 Black (U. S.) 418, to the effect that the defendant was not estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened, went on to say that in that case the liability of the city rested on actual notice of the defect and

not on implied negligence based on the continued existence of the defect; and distinguished the later case on the ground that the verdict against the district necessarily determined that the defect in the gas box on the sidewalk, which caused the injury, had existed so long as to impute negligence to the gas company, which was bound to keep it in repair.

**4. Notice Necessary Only to Render Judgment Conclusive.** — *Chicago v. Robbins*, 2 Black (U. S.) 423; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Port Jervis v. Port Jervis First Nat. Bank*, 96 N. Y. 550.

**5. Sufficiency of Notice.** — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Veazie v. Penobscot R. Co.*, 49 Me. 119. But see *Lebanon v. Mead*, 64 N. H. 8.

**6. Lebanon v. Mead**, 64 N. H. 8. See further as to sufficiency of notice *Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759.

**A Charter Requirement of notice to the person primarily liable was held not to prevent the municipality from recovery over against him if he was made a party defendant to the original suit against the municipality.** *Waltmeyer v. Kansas City*, 71 Mo. App. 354.

**7. Amount of Recovery.** — *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Duxbury v. Vermont Cent. R. Co.*, 26 Vt. 751.

**8. Ottumwa v. Parks**, 43 Iowa 119.

**9. Counsel Fees.** — *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292, *distinguishing* *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33, in which case it was decided that costs and counsel fees could not be recovered because the defense by the city was chiefly on its own account in order to avoid the statutory double liability.

**10. Littleton v. Richardson**, 32 N. H. 59.



municipality unless it was taken at the instance of the wrongdoer;<sup>1</sup> nor is the municipality entitled to recover double damages because the statute compelled it to pay them to the person injured.<sup>2</sup>

*e. PAYMENT BY MUNICIPALITY WITHOUT SUIT.* — The municipality may maintain such action over although it paid the claim of the person injured without awaiting suit therefor, but in such case it has the burden of proving all the facts going to show the defendant's liability.<sup>3</sup>

*f. INDEMNITY TO INDIVIDUAL.* — An individual who, as occupant or owner of abutting property, is made liable for injuries to a traveler in the highway may maintain an action for indemnity against a third person whose direct act caused the injury, provided they are not both *in pari delicto*.<sup>4</sup>

**XIV. OBSTRUCTIONS AND ENCROACHMENTS** — 1. General Considerations. — While highways are primarily designed for the purpose of travel and must therefore be kept clear of obstructions, the law justifies obstructions of a partial and temporary character, from the necessity of the case and for the convenience of mankind, when those obstructions occur in the customary or contemplated use of the highway, they being reasonably necessary and not unduly prolonged.<sup>5</sup> As to what is a proper obstruction, as being based on a reasonable and necessary use, it is impossible to lay down any general rule, each case being determinable by the particular circumstances thereof.<sup>6</sup>

**Question for Jury.** — The question whether a particular use of a highway involves an improper obstruction thereof is generally a question for the jury,<sup>7</sup>

1. **Costs of Appeal.** — *Ottumwa v. Parks*, 43 Ind. 119.

2. **Double Damages.** — *Lowell v. Boston, etc.*, R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33.

3. **Payment Without Suit.** — *Fahey v. Harvard*, 62 Ill. 28; *Swansey v. Chace*, 16 Gray (Mass.) 303; *Wabasha v. Southworth*, 54 Minn. 79.

4. **Indemnity to Individual.** — *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355, 131 Mass. 67, 41 Am. Rep. 191.

So the owner of a building, the chimney of which fell upon a traveler owing to the act of a gas company in affixing a wire to the chimney, and who was compelled to pay damages to one injured by such a fall, was held to have a right of recovery against the company. *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324.

5. **Partial Obstructions Occasionally Allowed.** — *Rex v. Russell*, 6 East 427; *Rex v. Jones*, 3 Campb. 230; *Atty.-Gen. v. Sheffield Gas Consumers' Co.*, 19 Eng. L. & Eq. 639; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Com. v. Passmore*, 1 S. & R. (Pa.) 219; *Com. v. Hauck*, 103 Pa. St. 536.

6. **No General Rule Applicable.** — *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Hudson v. Caryl*, 44 N. Y. 553; *St. John v. New York*, 6 Duer (N. Y.) 315; *Flynn v. Taylor*, 127 N. Y. 596.

A Distinction has occasionally been taken, in the wording and construction of statutes, between encroachments and obstructions. *Grand Rapids v. Hughes*, 15 Mich. 54; *Gorham v. Withey*, 52 Mich. 50; *State v. Leaver*, 62 Wis. 387; *Pauer v. Albrecht*, 72 Wis. 416; *State v. Pomeroy*, 73 Wis. 664.

In *State v. Edens*, 85 N. Car. 522, *Ruffin, J.*, said: "The question as to which is a proper and reasonable use of a highway must depend in a great measure upon its locality, its accus-

tomed usage, and the exigencies of the public, it being apparent that what would obstruct travel and work an inconvenience to the public in the crowded streets of London, or on Broadway in New York, might be harmless in the streets of a less populous place."

A Liberty Pole in the highway has been held not to be a nuisance. *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649.

A Hitching Post, if properly placed, is not unlawful. *Weinstein v. Terre Haute*, 147 Ind. 556. *Compare Gray v. Henry County*, (Ky. 1897) 42 S. W. Rep. 333. See also *supra*, this title, *Defective and Unsafe Highways — Defects Involving Liability — Objects Obstructing Highway*.

A Horse Block, properly placed, is not an illegal obstruction. *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804.

If an Accident caused the deposit of an article in the highway, as in the case of the breaking down of a wagon, it must be removed in a reasonable time. *Northrop v. Burrows*, (Supm. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 365.

7. **Question for Jury — England.** — *Rex v. Ward*, 4 Ad. & El. 384, 31 E. C. L. 92; *Rex v. Morris*, 1 B. & Ad. 441, 20 E. C. L. 421; *Rex v. Russell*, 6 B. & C. 566, 13 E. C. L. 254.

*Connecticut.* — *Burnham v. Hotchkiss*, 14 Conn. 311; *State v. Meritt*, 35 Conn. 314.

*Indiana.* — *Zimmerman v. State*, 4 Ind. App.

*Kentucky.* — *Harrison County Ct. v. Wall*, (Ky. 1889) 12 S. W. Rep. 130.

*New Hampshire.* — *Hopkins v. Crombie*, 4 N. H. 525; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536.

*New York.* — *St. John v. New York*, 6 Duer (N. Y.) 315.

*Pennsylvania.* — *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649.

*Wisconsin.* — *Loberg v. Amherst*, 87 Wis.

but this, it appears, is not the case when there is a permanent structure located on a highway which necessarily excludes the public in part from the use thereof, this being regarded as a nuisance *per se*.<sup>1</sup> And it has been decided that where the facts are not disputed, and there is no claim that the use of the highway for the deposit of building material was unreasonably prolonged, the court should decide as a matter of law that the use of the highway was proper.<sup>2</sup>

**Existence of Other Obstructions.** — It is no excuse for an unlawful obstruction that it is the custom of the neighborhood to create such obstructions,<sup>3</sup> or that there are other similar obstructions on the same road,<sup>4</sup> nor is one estopped to complain of an obstruction by the fact that he himself has obstructed another part of the road.<sup>5</sup>

**Ownership of the Fee** by the person creating an obstruction is no excuse for the obstruction,<sup>6</sup> though he has the full right to use the land provided he does not obstruct travel.<sup>7</sup>

**Improper Obstruction Is Nuisance.** — The improper obstruction of a highway is generally recognized to be a nuisance, and is subject to the same general principles as are applicable to that branch of the law.<sup>8</sup>

**The Right of Recovery by a Traveler** for injuries caused by an illegal obstruction of a highway, and incidentally the question of what constitutes an illegal obstruction for that purpose, are considered in another part of this article.<sup>9</sup>

**2. Illegality Not Dependent on Prevention of Travel.** — The right of the public to use a highway extends to the whole breadth thereof and not merely to the part which is worked or actually traveled; and consequently an obstruction upon the untraveled part is a proper subject of complaint by the public

634, 41 Am. St. Rep. 69; *Jochem v. Robinson*, 72 Wis. 199.

**1. Occasionally for Court.** — *Costello v. State*, 108 Ala. 45; *Laing v. Americus*, 86 Ga. 756; *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117; *State v. Edens*, 85 N. Car. 526; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Com. v. Marshall*, 137 Pa. St. 170; *Com. v. McNaugher*, 131 Pa. St. 55; *State v. Woodward*, 23 Vt. 92.

**2. Loberg v. Amherst**, 87 Wis. 634, 41 Am. St. Rep. 69. See also *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298.

**3. Existence of Other Obstructions.** — *McCloughry v. Finney*, 37 La. Ann. 31; *Judd v. Fargo*, 107 Mass. 264; *Com. v. Northern Cent. R. Co.*, 7 Pa. Super. Ct. 234.

**4. Bateman v. Burge**, 6 C. & P. 391, 25 E. C. L. 454; *Henline v. People*, 81 Ill. 269; *Robinson v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 509. And see *Whitley Tp. v. Linville*, 174 Ill. 579.

**5. Langsdale v. Bonton**, 12 Ind. 467; *Miller v. Schenck*, 78 Iowa 372; *Van Brunt v. Lynch*, 76 Mich. 455.

**6. Ownership of Fee Immaterial.** — *Montgomery v. Parker*, 114 Ala. 118; *Langsdale v. Bonton*, 12 Ind. 467; *State v. Walters*, 69 Mo. 463; *Parker v. Van Houten*, 7 Wend. (N. Y.) 145; *Tinker v. New York, etc., R. Co.*, 157 N. Y. 312.

But in *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54, it was held that the fact that owners of land on opposite sides of the highway also owned the fee therein justified the municipality in the exercise of its control over the public ways, in granting such abutters the right to construct a railroad track across the highway so as to connect their respective premises, it being apparently considered that such per-

mission should not have been granted if the ownership of the fee had not been in the applicants.

**7. See supra**, this title, *Ownership of Fee*.

**8. Improper Obstruction Is Nuisance** — *England*. — *Rex v. Russell*, 6 East 427; *Rex v. Cross*, 3 Campb. 226.

*Alabama*. — *Webb v. Demopolis*, 95 Ala. 116.

*California*. — *San Francisco v. Buckman*, 111 Cal. 25.

*Georgia*. — *Columbus v. Jaques*, 30 Ga. 506; *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

*Illinois*. — *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620.

*Indiana*. — *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117.

*Massachusetts*. — *Com. v. Nashua, etc., R. Corp.*, 2 Gray (Mass.) 54; *Com. v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 93.

*New Jersey*. — *Smith v. State*, 23 N. J. L. 712, 130.

*New York*. — *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; *Babbage v. Powers*, 130 N. Y. 281; *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Ely v. Campbell*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 333.

*Pennsylvania*. — *Philadelphia v. Thirteenth, etc., Sts. Pass. R. Co.*, 8 Phila. (Pa.) 648.

*Wisconsin*. — *Hubbell v. Goodrich*, 37 Wis. 84; *State v. Leaver*, 62 Wis. 392; *State v. Carpenter*, 68 Wis. 165, 60 Am. Rep. 848.

**9. Injuries to Travelers.** — See *supra*, this title, *Defective and Unsafe Highways*.

or persons specially injured.<sup>1</sup> In *Pennsylvania*, however, it appears that one is not liable criminally for obstructing a highway unless the obstruction is upon the part thereof which is actually opened and traveled.<sup>2</sup> Nor is one justified in obstructing a highway by the fact that he leaves sufficient room for the passage of the public,<sup>3</sup> it being stated that the obstruction is unlawful if the highway is thereby rendered less commodious or convenient for the use of the public.<sup>4</sup>

**3. What Are Highways Subject to Obstruction — a. IN GENERAL.** — In order to render the obstruction of a road a public offense or nuisance, it must be shown that the road is an actually existing public highway,<sup>5</sup> but the fact that there is a dispute as to the existence of the highway will not prevent a proceeding by indictment.<sup>6</sup> That travel is diverted elsewhere does not authorize the obstruction of the highway if it is not legally surrendered or vacated,<sup>7</sup> nor will a proceeding for vacation which was absolutely void for want of jurisdiction justify an obstruction.<sup>8</sup> A turnpike is a public highway, for the obstruction of which an indictment will lie as for a public nuisance.<sup>9</sup>

**1. Obstructions Outside of Traveled Path —**  
*England.* — *Rex v. Wright*, 3 B. & Ad. 681, 23 E. C. L. 159; *Reg. v. United Kingdom Electric Tel. Co.*, 3 F. & F. 73, 31 L. J. M. C. 166, 8 Jur. N. S. 1153, 6 L. T. N. S. 378, 10 W. R. 538, 9 Cox C. C. 174; *Nicol v. Beaumont*, 53 L. J. Ch. 853, 50 L. T. N. S. 112.

*Illinois.* — *Scott v. New Boston*, 26 Ill. App. 108.

*Iowa.* — *Mosher v. Vincent*, 39 Iowa 607.

*Maine.* — *Dickey v. Maine Tel. Co.*, 46 Me. 483.

*Massachusetts.* — *Com. v. Boston, etc.*, R. Corp., 12 Cush. (Mass.) 254; *Com. v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654. See also *Com. v. King*, 13 Met. (Mass.) 115.

*New Hampshire.* — *Chamberlain v. Enfield*, 43 N. H. 356.

*New York.* — *Wright v. Saunders*, 65 Barb. (N. Y.) 214.

*Pennsylvania.* — *Com. v. McNaugher*, 131 Pa. St. 55; *Com. v. Royce*, 152 Pa. St. 88.

*Texas.* — *Robinson v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 509.

*2. Com. v. Marshall*, 137 Pa. St. 170; *Com. v. Royce*, 152 Pa. St. 88.

**3. Obstruction Need Not Be of Entire Highway —**  
*Georgia.* — *Laing v. Americus*, 86 Ga. 756.

*Illinois.* — *Smith v. McDowell*, 148 Ill. 51; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339.

*Indiana.* — *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117.

*Iowa.* — *Patterson v. Vail*, 43 Iowa 142; *Platt v. Chicago, etc.*, R. Co., 74 Iowa 127; *Emerson v. Babcock*, 66 Iowa 257, 55 Am. Rep. 273.

*Massachusetts.* — *Com. v. Ruggles*, 6 Allen (Mass.) 588; *Wilbur v. Tobey*, 16 Pick. (Mass.) 177.

*New York.* — *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506.

*Pennsylvania.* — *Com. v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599; *Atty.-Gen. v. Lombard, etc.*, Pass. R. Co., 1 W. N. C. (Pa.) 479.

*Virginia.* — *Dimmett v. Eskridge*, 6 Munf. (Va.) 308.

*Wisconsin.* — *State v. Leaver*, 62 Wis. 387.

In 1 Hawk. P. C., c. 76, § 49, it was said that it is no excuse for one who laid logs of timber along a highway that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs.

**4. England.** — 1 Hawk. P. C., c. 76, § 48; *Reg. v. United Kingdom Electric Tel. Co.*, 31 L. J. M. C. 166.

*Alabama.* — *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Hoole v. Atty.-Gen.*, 22 Ala. 190.

*Connecticut.* — *Burnham v. Hotchkiss*, 14 Conn. 311; *State v. Merrit*, 35 Conn. 314.

*Delaware.* — *State v. Peckard*, 5 Harr. (Del.) 500.

*Pennsylvania.* — *Com. v. Northern Cent. R. Co.*, 7 Pa. Super. Ct. 234.

In *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117, however, it was stated that a permanent obstruction is a public nuisance without showing that it "essentially interferes" with the comfortable enjoyment of the sidewalk or highway.

**5. Existence of Highway — United States.** — *U. S. v. Schwarz*, 4 Cranch (C. C.) 160.

*Alabama.* — *Whaley v. Wilson*, (Ala. 1898) 24 So. Rep. 855.

*Florida.* — *Bowden v. Adams*, 22 Fla. 208.

*Indiana.* — *State v. Trove*, 1 Ind. App. 553.

*Michigan.* — *People v. Jackson*, 7 Mich. 432, 74 Am. Dec. 729.

*Missouri.* — *State v. Cunningham*, 1 Mo. App. Rep. 361; *State v. Scott*, 27 Mo. App. 541; *Mexico v. Jones*, 27 Mo. App. 534; *State v. Parsons*, 53 Mo. App. 135; *State v. Cunningham*, 61 Mo. App. 188.

*North Carolina.* — *State v. McDaniel*, 8 Jones L. (53 N. Car.) 284; *State v. Gross*, 119 N. Car. 868; *State v. Lucas*, 124 N. Car. 804.

*Pennsylvania.* — *Clark v. Com.*, 33 Pa. St. 112.

*Tennessee.* — *Anderson v. State*, 10 Humph. (Tenn.) 119.

*Texas.* — *Owen v. State*, 24 Tex. App. 201.

**6. State v. Eisele**, 37 Minn. 256.

**7. Phelps v. Pacific R. Co.**, 51 Mo. 477.

**8. Felton v. Ackerman**, 61 Fed. Rep. 225, 22 U. S. App. 154.

**9. Northern Cent. R. Co. v. Com.**, 90 Pa. St. 300.



*b. MODE OF CREATION.* — Provided the road is a highway, the mode in which it became such is immaterial, and consequently there may, in the absence of a statutory limitation,<sup>1</sup> be an obstruction of a highway by prescription<sup>2</sup> or by dedication,<sup>3</sup> provided the dedication has been accepted.<sup>4</sup> In the case of a highway established by statutory proceedings the general rule prohibiting a collateral attack thereon applies, and consequently on an issue as to one's liability for obstructing a highway it is not permissible to question the validity of the establishment<sup>5</sup> unless the proceedings were entirely void for want of jurisdiction.<sup>6</sup> It may, it seems, be shown that the establishment was upon a condition which has not been complied with,<sup>7</sup> and one who is alleged to have obstructed a highway laid out across his land may, it seems, show that he received no notice of the proceedings for establishment,<sup>8</sup> or that his property was never condemned for highway purposes.<sup>9</sup> And it has been decided that a landowner to whom compensation was not made for the land taken for the highway cannot be made liable for obstructing the highway,<sup>10</sup> though in *New York* a different view is taken.<sup>11</sup>

*c. NECESSITY AND EFFECT OF OPENING.* — It is generally held that an illegal obstruction of a highway cannot occur unless the highway has been actually opened and rendered passable for travelers;<sup>12</sup> a partial opening, however, is apparently sufficient,<sup>13</sup> and a few cases imply that the opening of the highway is immaterial.<sup>14</sup> One is not, it seems, justified in obstructing a high-

1. *Mode of Creation.* — See *Freshour v. Hihn*, 99 Cal. 443; *Krueger v. Le Blanc*, 62 Mich. 70; *Devenpeck v. Lambert*, 44 Barb. (N. Y.) 596.

2. *Highway Created by Prescription* — *Arkansas*. — *Howard v. State*, 47 Ark. 431; *Patton v. State*, 50 Ark. 53.

*Indiana*. — *Zimmerman v. State*, 4 Ind. App. 583.

*Iowa*. — *State v. Snyder*, 25 Iowa 208; *State v. Teeters*, 97 Iowa 458.

*Missouri*. — *State v. Walters*, 69 Mo. 463; *State v. Proctor*, 90 Mo. 334; *State v. Davis*, 27 Mo. App. 624; *State v. Bradley*, 31 Mo. App. 308; *State v. Pullen*, 43 Mo. App. 620; *State v. Baldrige*, 53 Mo. App. 415.

*New York*. — *People v. Hunting*, 39 Hun (N. Y.) 452.

*North Carolina*. — *State v. Stewart*, 91 N. Car. 566.

*South Carolina*. — *State v. Sartor*, 2 Strobb. L. (S. Car.) 60; *State v. Tyler*, (S. Car. 1899) 32 S. E. Rep. 422.

*Texas*. — *Lensing v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 572.

3. *Highway Created by Dedication.* — *State v. Teeters*, 97 Iowa 458; *State v. Junker*, 37 Tex. 478; *State v. Horlacher*, 16 Wash. 325.

4. *Gedge v. Co.*, 9 Bush (Ky.) 61; *State v. Paine Lumber Co.*, 84 Wis. 205.

5. *Collateral Attack on Establishment* — *Arkansas*. — *Howard v. State*, 47 Ark. 431.

*Illinois*. — *Galbraith v. Little*, 73 Ill. 209.

*Indiana*. — *Miller v. Porter*, 71 Ind. 521.

*Iowa*. — *State v. Robinson*, 28 Iowa 514.

*Kentucky*. — *Com. v. Ditto*, Hard. (Ky.) 450.

*Maine*. — *State v. Madison*, 33 Me. 267.

*Missouri*. — *State v. Gilbert*, 73 Mo. 20.

*North Carolina*. — *State v. Davis*, 68 N. Car. 297; *State v. Smith*, 100 N. Car. 550.

*Texas*. — *Ewing v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 618.

See also *supra*, this title, *Establishment of Highways* — *Collateral Attack*.

6. *When Allowable.* — *State v. Farrelly*, 36

Mo. App. 282; *State v. Spainhour*, 2 Dev. & B. L. (19 N. Car.) 547; *Laroe v. State*, 30 Tex. App. 374.

7. *State v. Ratliff*, 32 Iowa 189; *State v. Glass*, 42 Iowa 56.

8. *State v. Weimer*, 64 Iowa 243; *State v. Whitaker*, 66 N. Car. 630. And see *Smithers v. Fitch*, 82 Cal. 153.

9. *Golahar v. Gates*, 20 Mo. 236.

10. *Thompson v. State*, 22 Tex. App. 328; *Bradley v. State*, 22 Tex. App. 330.

11. *Chapman v. Gates*, 54 N. Y. 132.

12. *Obstruction of Unopened Road.* — *State v. Shinkle*, 40 Iowa 131; *Southerland v. Jackson*, 30 Me. 462, 50 Am. Dec. 633; *Rankin v. State*, 25 Tex. App. 694; *Kennedy v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 590; *Bailey v. Com.*, 78 Va. 19; *State v. Huck*, 29 Wis. 202; *State v. Babcock*, 42 Wis. 138. See, to the same effect apparently, *Zimmerman v. State*, 4 Ind. App. 583; *State v. Kendall*, (S. Car. 1899) 32 S. E. Rep. 300. Compare with the Iowa case above cited *Harrow v. State*, 1 Greene (Iowa) 439; *Prince v. McCoy*, 40 Iowa 533; *State v. McGee*, 40 Iowa 595.

13. *Calder v. Chapman*, 8 Pa. St. 522. See also *supra*, this section, *Illegality Not Dependent on Prevention of Travel*.

14. *Seeger v. Mueller*, 28 Ill. App. 28; *Morgan v. Monmouth Plank Road Co.*, 26 N. J. L. 99; *Com. v. McNaughter*, 131 Pa. St. 55.

In *Iowa* it has been stated that opening is immaterial, *Harrow v. State*, 1 Greene (Iowa) 439; but a later decision is apparently in conflict with this. See *State v. Shinkle*, 40 Iowa 131, *supra*, where Beck, J., said: "If, under the law or by dedication, a right to use a way is acquired which cannot be exercised on account of natural obstacles, it cannot be said that the public are prevented using the way on account of a fence or house built on the land over which the right of way has been acquired. The act of erecting the structure did not obstruct the road; the obstruction was complete before the act was done."

way as opened and traveled merely because it does not correspond with the road as established,<sup>1</sup> but if the highway officer in opening the highway removes fences off the line of the survey, the landowner is not liable to indictment for replacing them.<sup>2</sup> The failure to remove a fence or building which was in the highway at the time of its laying out has been held not to be an obstruction, at least until notice to remove was given by the officials.<sup>3</sup>

*d. EVIDENCE OF HIGHWAY CHARACTER.* — It has been held sufficient *prima facie* evidence of the existence of the highway to produce the order establishing the road together with evidence that it has been used as such,<sup>4</sup> and there may be a statutory provision to such effect.<sup>5</sup> Elsewhere it is stated that the highway character of the road may be shown by evidence of long continued user as such and orders directing work on it.<sup>6</sup> And occasionally evidence of user for a time less than that required to give title by prescription seems to be regarded as sufficient *prima facie* evidence of the existence of the highway.<sup>7</sup>

*4. Authority of Legislature or Municipality.* — Since that which the state has legally authorized cannot be a public nuisance, obstructions which would otherwise constitute nuisances are frequently rendered valid by a legislative enactment authorizing their creation.<sup>8</sup> Instances of such legislation are most frequently seen in the case of corporations of a semi-public character, such as railroad, gas, telegraph, and water companies, the rights of which in respect to the use of highways under statutory authority are considered in other parts of this work.<sup>9</sup> This power of the legislature cannot, however, be exercised so as to affect private property rights,<sup>10</sup> and such grants of authority are, as gen-

*1. Road Varying from That Established.* — *Com. v. Jackson*, 10 Pa. Super. Ct. 524; *Com. v. Dicken*, 145 Pa. St. 453. But see *Clark v. Com.*, 33 Pa. St. 112; *Day v. State*, 14 Tex. App. 26.

*2. Ward v. State*, 12 Lea (Tenn.) 469.

*3. Wiley v. Brimfield*, 59 Ill. 306; *People v. Young*, 72 Ill. 411; *State v. Clark*, 67 Wis. 229. See also *State v. Robinson*, 52 Iowa 228; *Carver v. Com.*, 12 Bush (Ky.) 264.

In *Illinois* the obstructing of a highway and the continuing of an obstruction thereon are, under the statute, distinct offenses. *Crosby v. Gipps*, 19 Ill. 309; *Burke v. People*, 23 Ill. App. 36; *Hoadley v. People*, 23 Ill. App. 39; *Lowe v. People*, 28 Ill. 518; *Sweeney v. People*, 28 Ill. 208.

*4. Evidence of Establishment.* — *Sage v. Barnes*, 9 Johns. (N. Y.) 365; *Chapman v. Gates*, 46 Barb. (N. Y.) 313; *Arnold v. Flatery*, 5 Ohio 271.

*5. State v. Gilbert*, 73 Mo. 20; *State v. Ramsey*, 76 Mo. 398.

*6. Howard v. State*, 47 Ark. 431; *McWhorter v. State*, 43 Tex. 666; *Hall v. State*, 13 Tex. App. 269.

*A Statutory Provision* that in a prosecution for obstructing a way "it shall be sufficient to prove that it is used and worked as such" does not render such proof conclusive, but merely *prima facie* evidence of the existence of the highway. *Johns v. State*, 104 Ind. 557.

*7. Com. v. Abney*, 4 T. B. Mon. (Ky.) 477; *Little v. Denn*, 34 N. Y. 452.

*8. Legislative Power to Permit Obstructions.* — *Dill* (U. S.) 393, *Miller v. New York*, 109 U. S. 385; *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *District of Columbia v. Baltimore*, etc., R. Co., 114 U. S. 453.

*Alabama.* — *Perry v. New Orleans*, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740.

*Georgia.* — *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Kirtland v. Macon*, 66 Ga. 385; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

*Illinois.* — *Quincy v. Bull*, 106 Ill. 337, 4 Am. & Eng. Corp. Cas. 554.

*Indiana.* — *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *North Vernon v. Voegler*, 103 Ind. 327.

*Kansas.* — *Leavenworth v. Douglass*, 59 Kan. 416, citing 16 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1000.

*Louisiana.* — *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63.

*Massachusetts.* — *Cushing v. Boston*, 128 Mass. 330; *Com. v. Old Colony*, etc., R. Co., 14 Gray (Mass.) 93.

*Missouri.* — *Porter v. North Missouri R. Co.*, 33 Mo. 128; *Hisey v. Mexico*, 61 Mo. App. 248; *Dubach v. Hannibal*, etc., R. Co., 89 Mo. 483.

*New York.* — *First Baptist Church v. Utica*, etc., R. Co., 6 Barb. (N. Y.) 313; *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.) 222; *Matter of Prospect Park*, etc., R. Co., 67 N. Y. 371; *Hoey v. Gilroy*, 129 N. Y. 132.

*Ohio.* — *Kumler v. Sisbee*, 38 Ohio St. 445.

*Pennsylvania.* — *Reading v. Com.*, 11 Pa. St. 196, 51 Am. Dec. 534; *Com. v. Capp*, 48 Pa. St. 53.

*9. See the titles GAS COMPANIES*, vol. 14, p. 915; *MUNICIPAL CORPORATIONS*; *PIPE LINES*; *RAILROADS*; *STREET RAILWAYS*; *STREETS AND SIDEWALKS*; *TELEGRAPHS AND TELEPHONES*; *W* — — — — —

*10. Power Cannot Be Exercised as Against Private Property Rights.* — *Baltimore*, etc., R. Co. v. *Fifth Baptist Church*, 108 U. S. 317; *State*



erally in the case of legislative grants, to be strictly construed.<sup>1</sup> This power to authorize obstructions may also be delegated by the legislature to the municipal authorities,<sup>2</sup> and such delegation is likewise to be strictly construed.<sup>3</sup> A grant to an individual by a municipality, under such power, of the right to place an obstruction in the highway may be revoked,<sup>4</sup> unless, it seems, expenses have been incurred on account of such license, in which case the municipality may be estopped to revoke it until after a reasonable time, or unless the obstruction becomes an actual nuisance.<sup>5</sup> In the absence of any statutory authorization to the municipality, the latter has no power to authorize obstructions which would otherwise be unlawful,<sup>6</sup> and its want of power in this respect is such that it cannot itself place in the highway obstructions of a permanent character to be used for municipal purposes.<sup>7</sup>

*v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1; *McCaffrey v. Smith*, 41 Hun (N. Y.) 117; *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268. And see the titles *ABUTTING OWNERS*, vol. 1, p. 224; *EMINENT DOMAIN*, vol. 10, p. 1043; *NUISANCES*.

**1. Legislative Grant Strictly Construed**—*District of Columbia*.—*Potomac Electric Power Co. v. U. S. Electric Lighting Co.*, (D. C.) 26 Wash. L. Rep. 19.

*New Jersey*.—*Bordentown, etc., Turnpike Road v. Camden, etc., R., etc., Co.*, 17 N. J. L. 314; *Newark v. Delaware, etc., R. Co.*, 42 N. J. Eq. 196; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417.

*New York*.—*Buckholz v. New York, etc., R. Co.*, 148 N. Y. 640.

*Pennsylvania*.—*Pittsburgh, etc., Bridge Co. v. Com.*, (Pa. 1886) 8 Atl. Rep. 217; *Stormfeltz v. Manor Turnpike Co.*, 13 Pa. St. 558; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514.

*Rhode Island*.—*Hughes v. Providence, etc., R. Co.*, 2 R. I. 493.

**2. Power May Be Delegated to Municipality**—*United States*.—*Barnes v. District of Columbia*, 91 U. S. 540; *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Detroit Citizens' St. R. Co. v. Detroit R. Co.*, 171 U. S. 48.

*Alabama*.—*Montgomery v. Parker*, 114 Ala. 118.

*California*.—*Sinton v. Ashbury*, 41 Cal. 525.

*Colorado*.—*Denver, etc., R. Co. v. Domke*, 11 Colo. 247.

*Illinois*.—*Chicago Dock, etc., Co. v. Garrit*, 115 Ill. 155.

*Indiana*.—*Michigan City v. Boeckling*, 122 Ind. 39.

*Iowa*.—*Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa 105.

*New Jersey*.—*Benton v. Elizabeth*, 61 N. J. L. 411, 693, 8 Am. & Eng. Corp. Cas. N. S. 745.

*New York*.—*People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893; *Hoey v. Gilroy*, 129 N. Y. 132; *Broadbelt v. Loew*, 15 N. Y. App. Div. 343; *Utica v. Utica Telephone Co.*, 24 N. Y. App. Div. 361.

*Pennsylvania*.—*Mercer v. Pittsburgh, etc., R. Co.*, 36 Pa. St. 99.

*Tennessee*.—*Iron Mountain R. Co. v. Birmingham*, 87 Tenn. 522.

**3. Delegation Strictly Construed**.—*Grand Rapids Electric Light, etc., Co. v. Grand Rapids Edison Electric Light, etc., Co.*, 33

Fed. Rep. 659; *Cushing v. Boston*, 128 Mass. 330; *Smith v. Westerly*, 19 R. I. 437.

**4. Revocation of Municipal License**.—*Winter v. Montgomery*, 83 Ala. 589; *Ex p. Taylor*, 87 Cal. 91; *Augusta v. Burum*, 93 Ga. 68; *Hibbard v. Chicago*, 173 Ill. 91; *Snyder v. Mt. Pulaski*, 176 Ill. 397; *Detroit v. Detroit, etc., Plank Road Co.*, 12 Mich. 333; *Reading v. Com.*, 11 Pa. St. 196, 51 Am. Dec. 534; *Norfolk v. Chamberlaine*, 29 Gratt. (Va.) 534.

*Georgia*.—*Augusta v. Burum*, 93 Ga. 68. *Iowa*.—*Spencer v. Andrew*, 82 Iowa 14.

*Massachusetts*.—*Com. v. Boston*, 97 Mass. 555.

*New Jersey*.—*Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619.

*Oregon*.—*Savage v. Salem*, 23 Oregon 381, 37 Am. St. Rep. 688.

**6. No Municipal Power in Absence of Statute**—*Alabama*.—*Costello v. State*, 108 Ala. 45.

*Georgia*.—*Augusta v. Burum*, 93 Ga. 68.

*Illinois*.—*Snyder v. Mt. Pulaski*, 176 Ill. 397.

*Indiana*.—*Pettis v. Johnson*, 56 Ind. 139; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117.

*Kansas*.—*Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496; *Mikesell v. Durkee*, 34 Kan. 509.

*Kentucky*.—*Flemingsburg v. Wilson*, 1 Bush (Ky.) 203.

*Massachusetts*.—*Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123.

*Missouri*.—*Glaessner v. Anheuser-Busch Brewing Assoc.*, 100 Mo. 508.

*New Jersey*.—*Atty. Gen. v. Heishon*, 18 N. J. Eq. 410; *State v. Morris, etc., R. Co.*, 23 N. J. L. 360; *McDonald v. Newark*, 42 N. J. Eq. 136.

*New York*.—*New York Cent., etc., R. Co. v. Utica*, (N. Y. 1871) 3 Alb. L. J. 151; *Trenor v. Jackson*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 115; *Ely v. Campbell*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 333; *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506; *Delaware, etc., R. Co. v. Buffalo*, 158 N. Y. 273, affirming 4 N. Y. App. Div. 562.

*Pennsylvania*.—*Com. v. Rush*, 14 Pa. St. 186.

**7. Erection for Municipal Purposes**.—*Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Pettis v. Johnson*, 56 Ind. 139; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Tell City v. Bielefeld*, 20 Ind. App. 1.

So it has been held that the municipality cannot utilize a highway for the purpose of a public market house. *State v. Mobile*, 5 Port.



**5. Use for Municipal Purposes.** — As stated above, the municipality has generally no right to place obstructions of a permanent character on a highway for municipal purposes,<sup>1</sup> but temporary obstructions may be permitted for such purposes when apparently necessary or desirable,<sup>2</sup> and it has even been held that the municipality may occupy a part of the highway with a water tank or reservoir to hold water for the purpose of sprinkling streets.<sup>3</sup>

**6. Authorized Uses by Abutting Owners.** — It is conceded that owners of property abutting on the highway may make certain uses of a part of the highway which are necessary for the proper utilization and enjoyment of the property.<sup>4</sup> These rights of the abutting owner are principally those of leaving building materials and accessories in the highway<sup>5</sup> and also of leaving therein for a reasonable time articles about to be moved from or into a building<sup>6</sup> and apparatus or vehicles for the purpose of aiding in such removal;<sup>7</sup> and a wagon may be placed on the sidewalk for this purpose.<sup>8</sup> The obstruction by the abutting owner must, however, be of a reasonably necessary character, and it must not unreasonably interfere with the rights of the public to use the highway.<sup>9</sup>

(Ala.) 279, 30 Am. Dec. 564; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Columbus v. Jaques*, 30 Ga. 506.

**1. Use for Municipal Purposes.** — See *supra*, this section, *Authority of Legislature or Municipality*.

**2.** *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739, where it was held proper to stretch ropes across a highway during a parade or practice by the fire department of a city, this being conclusive to the efficiency of such a department.

**3.** *Savage v. Salem*, 23 Oregon 381, 37 Am. St. Rep. 688; *West v. Bancroft*, 32 Vt. 371. But see *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77, in which case a water tank was placed by the city in the centre of the highway so as to cover half the width thereof, and a steam engine was operated in connection therewith, and such placing of the tank was held to be an improper use of the highway.

**4. Uses by Abutting Owners.** — In *Loberg v. Amherst*, 87 Wis. 641, 41 Am. St. Rep. 69, Pinney, J., said: "As fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time; and, because building is necessary, materials proper and adapted to that purpose may be placed in the street, provided it be done in the most convenient manner; and so, as to the repairing of a house, the public must submit to the inconvenience necessarily incident thereto, but if prolonged for an unreasonable time such use of the street becomes unlawful." *Citing Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; *Clark v. Fry*, 8 Ohio St. 373, 72 Am. Dec. 590; *Hundhausen v. Bond*, 36 Wis. 29; *Raymond v. Keseberg*, 84 Wis. 302. See also the title ABUTTING OWNERS, vol. 1, p. 224.

**5. Deposit of Building Materials and Accessories Permitted** — *England*. — *Rex v. Ward*, 4 Ad. & El. 384, 31 E. C. L. 92; *Rex v. Jones*, 3 Campb. 230.

*United States*. — *Chicago v. Robbins*, 2 Black (U. S.) 418; *Cleveland v. King*, 132 U. S. 295.

*Indiana*. — *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222.

*Massachusetts*. — *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

*New York*. — *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709.

*Ohio*. — *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

*Pennsylvania*. — *Com. v. Passmore*, 1 S. & R. (Pa.) 217; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Mallory v. Griffey*, 85 Pa. St. 275.

*Wisconsin*. — *Hundhausen v. Bond*, 36 Wis. 29; *Raymond v. Keseberg*, 84 Wis. 302; *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69.

**A Railroad Company** improving land adjoining a highway for railroad purposes has the same right as an abutting owner to utilize a part of the highway for the purpose of construction work. *Fitch v. New York, etc., R. Co.*, 59 Conn. 414.

**6. Deposit of Goods in Transit** — *England*. — *Benjamin v. Storr*, L. R. 9 C. P. 400.

*Iowa*. — *Haight v. Keokuk*, 4 Iowa 214.

*Louisiana*. — *McCloughry v. Finney*, 37 La. Ann. 31.

*Missouri*. — *Gerdes v. Christopher, etc., Agricultural Iron, etc., Co.*, 124 Mo. 347.

*New Jersey*. — *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380.

*New York*. — *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698.

*Ohio*. — *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

*Pennsylvania*. — *Davis v. Corry*, 154 Pa. St. 602.

**7. Apparatus for Moving Goods.** — *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248; *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698; *Jochem v. Robinson*, 72 Wis. 199. Compare *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; *Flynn v. Taylor*, 127 N. Y. 596.

**Vehicles.** — *Sikes v. Manchester*, 59 Iowa 65; *Manley v. Leggett*, 62 Hun (N. Y.) 562; *Norristown v. Moyer*, 67 Pa. St. 355.

**8. Wagon on Sidewalk.** — *Hand v. Klinker*, 54 N. Y. Super. Ct. 433.

**9. Use by Abutting Owner Must Be Reasonable.** — *Fritz v. Hobson*, 42 L. T. N. S. 225, 14 Ch. D. 542, 49 L. J. Ch. 321; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Kerr v. Fergue*, 54 Ill. 482,

And the obstruction is unreasonable if it is practically continuous.<sup>1</sup> It has been held not to be a reasonable use of the highway to keep teams or vehicles constantly in front of the premises and in such numbers as to interfere with the use of the highway by others.<sup>2</sup>

**7. Particular Modes of Obstruction — a. BUILDINGS.** — An encroachment on a highway by the erection thereon of a building, or a part of a building, has been frequently held to be illegal.<sup>3</sup> A part of a building may be an encroachment even though it is some distance above the surface of the highway.<sup>4</sup>

**b. FENCES, WALLS, AND GATES.** — A fence erected upon the highway without authority, by an abutting owner or other person, is an obstruction and a nuisance,<sup>5</sup> and it may be an encroachment within a particular statutory

5 Am. Rep. 146; *McCloughry v. Finney*, 37 La. Ann. 31; *Stuart v. Havens*, 17 Neb. 211; *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; *Flynn v. Taylor*, 127 N. Y. 596.

In *Flynn v. Taylor*, 127 N. Y. 596, while the court recognized the right of the owner of land abutting upon a public street to encroach, when necessary, upon the primary right of the public to a limited extent and for a temporary purpose, it said: "Two facts, however, must exist to render the encroachment lawful: 1. The obstruction must be reasonably necessary for the transaction of business. 2. It must not unreasonably interfere with the rights of the public."

**1. Obstruction Unduly Continuous.** — *Coburn v. Ames*, 52 Cal. 387, 28 Am. Rep. 634; *Gerdes v. Christopher*, etc., *Agricultural Iron*, etc., Co., 124 Mo. 347; *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Flynn v. Taylor*, 127 N. Y. 596.

In *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, it was held that a bridge made of skids, three feet wide and fifteen feet long, extending over the sidewalk for the purpose of loading and unloading goods, and so remaining the greater part of every business day, constituted an unlawful obstruction.

**2. Vehicles Improperly Left in Highway.** — *Rex v. Russell*, 6 East 427; *Benjamin v. Storr*, L. R. 9 C. P. 400; *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Flynn v. Taylor*, 127 N. Y. 596, 53 Hun (N. Y.) 167; *Manley v. Leggett*, 62 Hun (N. Y.) 562. See also *infra*, this section, *Particular Modes of Obstruction — Vehicles*.

**3. Buildings Encroaching on Highway — United States.** — *Barney v. Keokuk*, 94 U. S. 324.

*California.* — *People v. Holladay*, 93 Cal. 248, 27 Am. St. Rep. 186.

*Connecticut.* — *Hawley v. Harrall*, 19 Conn. 142.

*Indiana.* — *Pettis v. Johnson*, 56 Ind. 139; *Cheek v. Aurora*, 92 Ind. 107.

*Massachusetts.* — *Day v. Green*, 4 Cush. (Mass.) 433; *Com. v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654; *Com. v. Blaisdell*, 107 Mass. 234.

*New Hampshire.* — *Hopkins v. Crombie*, 4 N. H. 525; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164.

*New Jersey.* — *Smith v. State*, 23 N. J. L. 712.

*New York.* — *Cook v. Harris*, 61 N. Y. 448;

*People v. Maher*, 141 N. Y. 330; *Van Wyck v. Lent*, 33 Hun (N. Y.) 301.

*Pennsylvania.* — *Barclay v. Com.*, 25 Pa. St. 503, 64 Am. Dec. 715; *Philadelphia v. Philadelphia*, etc., R. Co., 58 Pa. St. 256; *Com. v. Rush*, 14 Pa. St. 186.

*Wisconsin.* — *State v. Leaver*, 62 Wis. 387.

*Canada.* — *Brown v. Edmonton*, 23 Can. Sup. Ct. 308.

**4. Encroachments Above Highway.** — *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262 (overhanging cornice); *Bybee v. State*, 94 Ind. 443, 48 Am. Rep. 175 (passageway over street fourteen feet above it).

**A Bay Window** placed over the highway without authority is an illegal obstruction. *Simis v. Brookfield*, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 569; *Reimer's Appeal*, 100 Pa. St. 182, 45 Am. Rep. 373; *Livingston v. Wolf*, 136 Pa. St. 519, 20 Am. St. Rep. 936.

**Steps** projecting into the highway are a nuisance at common law. *Pettis v. Johnson*, 56 Ind. 139; *Com. v. Blaisdell*, 107 Mass. 234.

**5. Fence in Highway — California.** — *Bequette v. Patterson*, 104 Cal. 282.

*Connecticut.* — *Hubbard v. Deming*, 21 Conn. 356; *State v. Merrit*, 35 Conn. 314; *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571.

*Illinois.* — *Boyd v. Farm Ridge*, 103 Ill. 408; *Lake View v. Le Bahn*, 120 Ill. 92.

*Indiana.* — *State v. Miskimmons*, 2 Ind. 440; *Blue v. Briggs*, 12 Ind. App. 105; *Langsdale v. Bonton*, 12 Ind. 467; *State v. Buxton*, 31 Ind. 67; *Jeffries v. McNamara*, 49 Ind. 142.

*Kentucky.* — *Gregory v. Com.*, 2 Dana (Ky.) 417.

*Maine.* — *Heald v. Moore*, 79 Me. 271.

*Massachusetts.* — *Com. v. Gowen*, 7 Mass. 378.

*Missouri.* — *State v. Walters*, 69 Mo. 463; *State v. Ramsey*, 76 Mo. 398.

*New York.* — *Wetmore v. Tracy*, 14 Wend. (N. Y.) 252, 28 Am. Dec. 525; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Wakeman v. Wilbur*, 147 N. Y. 657.

*Ohio.* — *Baird v. Clark*, 12 Ohio St. 87.

*Pennsylvania.* — *Kelly v. Com.*, 11 S. & R. (Pa.) 345.

*Utah.* — *Whittaker v. Ferguson*, 16 Utah 240.

*Virginia.* — *Yates v. Warrenton*, 84 Va. 337,

10 Am. St. Rep. 860.  
*Wisconsin.* — *Neff v. Paddock*, 26 Wis. 546; *State v. Wertzel*, 62 Wis. 184; *Childs v. Nelson*, 69 Wis. 125; *Bartlett v. Beardmore*, 77 Wis. 356. Compare *State v. Pomeroy*, 73 Wis. 664.

provision.<sup>1</sup> The same is true of a stone wall<sup>2</sup> or of gates<sup>3</sup> constructed in the highway without authority.

**An Unauthorized Alteration of the Route of a highway by the construction of a fence constitutes an illegal obstruction.**<sup>4</sup> The owner of the land may, however, it seems, move his fence to correspond with the proper line of the highway,<sup>5</sup> but after the highway has been used with the fence upon a particular line for a sufficient length of time to give prescriptive rights to the public the owner cannot move forward his fence so as to narrow the road.<sup>6</sup>

**c. AWNINGS.** — An awning may be an obstruction and a nuisance if not properly authorized, the matter being generally regulated by the municipal authorities.<sup>7</sup>

**d. TREES.** — Trees in a highway are not unlawful unless their location, or other circumstances of the case, are such as to render them an unreasonable obstruction to travel, or unless there is some statutory or municipal regulation forbidding them.<sup>8</sup>

**e. USE OF HIGHWAY FOR TRADE PURPOSES.** — Though, as stated above, an abutting owner has certain recognized rights as to the use of the highway for the transfer of articles to and from his property,<sup>9</sup> he cannot, as a general rule, make use of a part of the highway merely because this will enable him to conduct his business more advantageously.<sup>10</sup> It has accordingly been held

**1. Statutory Provision.** — *Barton v. Campbell*, 54 Ohio St. 147; *State v. Pomeroy*, 73 Wis. 664.

**2. Wall.** — *Allen v. Lyon*, 2 Root (Conn.) 213; *State v. Knapp*, 6 Conn. 415, 16 Am. Dec. 68; *Smith v. McDowell*, 148 Ill. 51; *Holmes v. Cortell*, 80 Me. 31; *Com. v. King*, 13 Met. (Mass.) 415.

**3. Gates** — *England*. — *Jarvis v. Hayward*, Cro. Car. 184; *Greasly v. Codling*, 2 Bing. 263, 9 E. C. L. 407; *Bateman v. Burge*, 6 C. & P. 391, 25 E. C. L. 454.

*Delaware*. — *Johnson v. Stayton*, 5 Harr. (Del.) 448.

*Illinois*. — *Henline v. People*, 81 Ill. 269.

*Indiana*. — *Clift v. State*, 6 Ind. App. 199.

*New York*. — *Adams v. Beach*, 6 Hill (N. Y.) 271.

**4. Alteration of Highway.** — *Oliver v. Loftin*, 4 Ala. 240; *McKibbin v. State*, 40 Ark. 480; *Weathered v. Bray*, 7 Ind. 706; *Blue v. Briggs*, 12 Ind. App. 105; *State v. Harden*, 11 S. Car. 360.

**5. State v. Crow**, 30 Iowa 258; *State v. Schilb*, 47 Iowa 611.

**6. Rights Fixed by User.** — *Kruger v. Le Blanc*, 70 Mich. 76; *Wyman v. St. Johns*, 100 Mich. 571; *Gulick v. Groendyke*, 38 N. J. L. 114; *Wiggins v. Tallmadge*, 11 Barb. (N. Y.) 457; *Com. v. Marshall*, 137 Pa. St. 170, 27 W. N. C. (Pa.) 67.

**7. Awnings.** — See *Augusta v. Burum*, 93 Ga. 68; *Pedrick v. Bailey*, 12 Gray (Mass.) 161; *Drake v. Lowell*, 13 Met. (Mass.) 292; *Day v. Milford*, 5 Allen (Mass.) 98; *Hawkins v. Sanders*, 45 Mich. 471; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564; *Fox v. Winona*, 23 Minn. 10; *Hisey v. Mexico*, 61 Mo. App. 248; *Simis v. Brookfield*, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 569; *Brinkman v. Eisler*, (City Ct. Gen. T.) 40 N. Y. St. Rep. 865; *Farrell v. New York*, (Supm. Ct.) 20 N. Y. St. Rep. 12, 22 N. Y. St. Rep. 469; *Hume v. New York*, 74 N. Y. 264; *Hoey v. Gilroy*, 129 N. Y. 132; *Trenor v. Jackson*, (N. Y. Super. Ct.) 46 How. Pr. (N. Y.) 389.

**8. Trees** — *California*. — *Vanderhurst v. Tholcke*, 113 Cal. 147; *Taylor v. Reynolds*, 92 Cal. 573.

*Connecticut*. — *Burnham v. Hotchkiss*, 14 Conn. 311.

*Iowa*. — *Bills v. Belknap*, 36 Iowa 583; *Patterson v. Vail*, 43 Iowa 142; *Everett v. Council Bluffs*, 46 Iowa 66; *Quinton v. Burton*, 61 Iowa 471; *Crismon v. Deck*, 84 Iowa 344.

*Kansas*. — *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482.

*Maine*. — *Wellman v. Dickey*, 78 Me. 29.

*Michigan*. — *Clark v. Dasso*, 34 Mich. 86.

*New York*. — *Dougherty v. Horseheads*, 159 N. Y. 154; *Wheatfield v. Shasley*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 100.

*Pennsylvania*. — *Com. v. Hauck*, 103 Pa. St. 536; *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649; *Com. v. Beaver*, 171 Pa. St. 542, 43 Pa. L. J. 153.

*Wisconsin*. — *Chase v. Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 898.

See also *supra*, this title, *Ownership of Fee*.

**A Hedge**, it has been held, cannot be placed in the street on the same theory as that which allows trees to be placed there by the owner of the fee. *Philbrick v. University Place*, 88 Iowa 354. See also *Shawnee County v. Beckwith*, 10 Kan. 608.

The question whether the tree constitutes a nuisance is a matter on which the decision of the municipal authorities is generally conclusive. *Vanderhurst v. Tholcke*, 113 Cal. 147; *Bliss v. Bill*, 99 Mass. 597; *Tate v. Greensboro*, 114 N. Car. 392. Compare *Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311. But see *Avis v. Vineland*, 56 N. J. L. 474; *Gitt v. Hanover*, 4 Pa. Dist. 606.

**9. Use for Trade Purposes.** — See *supra*, this

**10. Business Convenience No Justification.** — *Rex v. Jones*, 3 Campb. 230; *State v. Chicago*, etc., R. Co., 77 Iowa 442; *Jenks v. Lansing Lumber Co.*, 97 Iowa 342.



that it is improper to occupy the highway for trade or market purposes;<sup>1</sup> and so stands or booths for trade, although erected by abutting owners, have been held to involve an improper obstruction of the highway,<sup>2</sup> as have showcases<sup>3</sup> and weighing scales, when not properly licensed.<sup>4</sup> Nor can the highway be used for a fair or an agricultural exhibition.<sup>5</sup>

*f. VEHICLES.* — The highway cannot be regularly used as a place for standing or storing vehicles of any description,<sup>6</sup> though they may occasionally stand therein for a particular purpose and during a reasonable time.<sup>7</sup>

*g. COLLECTING CROWDS.* — If one carries on his business or in any way conducts himself so as to collect a crowd of people in the highway and thereby incommode travelers, he is guilty of an unlawful use of the highway.<sup>8</sup>

*h. EXCAVATIONS IN HIGHWAY.* — The unauthorized making in or near the highway of an excavation which is calculated to interfere with travel constitutes an obstruction and nuisance,<sup>9</sup> subjecting the maker to liability in damages in case any person is injured thereby,<sup>10</sup> unless it is necessarily made in the improvement of abutting property, in which case it must not be unnecessarily extended or continued, and must be properly guarded to prevent accidents.<sup>11</sup>

**8. Persons Liable.** — The person who maintains an obstruction in the highway is, as in the case of other nuisances, civilly liable therefor as if he himself had originally created it;<sup>12</sup> and so one may be guilty of obstructing a

**1. Use for Purposes of Trade.** — *State v. Laverack*, 34 N. J. L. 201; *McDonald v. Newark*, 42 N. J. Eq. 136; *St. John v. New York*, 3 Bosw. (N. Y.) 484; *Com. v. Passmore*, 1 S. & R. (Pa.) 217; *Com. v. Milliman*, 13 S. & R. (Pa.) 403. *Compare St. John v. New York*, 6 Daer (N. Y.) 319; *Elwood v. Bullock*, 13 L. J. Q. B. 330; *Rex v. Smith*, 4 Esp. 111. But in *State v. Edens*, 85 N. Car. 526, it was held that it was not necessarily illegal to keep a market cart an hour and a half on the street for the purpose of selling farm products.

**Ordinances restraining sales in the highway** have been held valid *Com. v. Ellis*, 158 Mass. 555; *White v. Kent*, 11 Ohio St. 550.

**2. Stands and Booths for Trade.** — *Costello v. State*, 108 Ala. 45; *Ely v. Campbell*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 333; *Com. v. Wentworth, Bright*, (Pa.) 318; *City v. Daub*, 1 Lanc. L. Rev. (Pa.) 306. *Compare Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.

**3. Showcases.** — *Simis v. Brookfield*, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 569; *People v. New York*, (Supm. Ct.) 18 Ab. N. Cas. (N. Y.) 123.

**4. Weighing Scales.** — *Spencer v. Andrew*, 82 Iowa 14; *Emerson v. Babcock*, 66 Iowa 258, 55 Am. Rep. 273.

**5. Fair.** — *Com. v. Ruggles*, 6 Allen (Mass.) 588; *State v. Laverack*, 34 N. J. L. 201.

**6. Standing and Storing Vehicles.** — *Rex v. Cross*, 3 Campb. 224; *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361; *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506; *Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333. See also *supra*, this section, *Authorized Uses by Abutting Owners*.

**7. Sikes v. Manchester, 59 Iowa 65; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 297, 32 Am. Dec. 261; *Norristown v. Moyer*, 67 Pa. St. 367.**

**8. Collecting Crowds.** — *Rex v. Carlile*, 6 C. & P. 636, 25 E. C. L. 571; *Horner v. Cadman*, 55 L. J. M. C. 110, 54 L. T. N. S. 421, 16 Cox C. C. 51; *Barker v. Penley*, 62 L. J. Ch. 623,

(1893) 2 Ch. 447; *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Barker v. Com.*, 19 Pa. St. 412. See also *infra*, this title, *User for Passage and Transit*.

In *Rex v. Carlile*, 6 C. & P. 636, 25 E. C. L. 571, a case frequently referred to, a bookseller in London was convicted of creating a nuisance because he placed in his shop window an effigy of a bishop with a placard thereon containing the words "spiritual broker," with a figure of the devil beside it, which attracted such crowds as to compel passers to walk in the roadway.

**9. Excavations.** — *Lewiston v. Booth*, (Idaho 1893) 34 Pac. Rep. 809; *Canoe Creek v. McEniry*, 23 Ill. App. 227; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260; *Runyon v. Bordine*, 14 N. J. L. 472.

So it has been held that one is criminally liable as for the obstruction of a highway if he cuts and removes ice from a river in such a way as to interfere with a winter way used for over twenty years by the public across the river, *Com. v. Christie*, 13 Pa. Co. Ct. 149; as he is civilly liable to those injured by such action, *French v. Camp*, 18 Me. 433, 36 Am. Dec. 728.

**10.** See also *supra*, this title, *Defective and Unsafe Highways — Defects Involving Liability — Unguarded Holes or Excavations in Highway*.

**11.** *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590. *Compare Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Congreve v. Smith*, 18 N. Y. 79. See also *supra*, this title, *Ownership of Fee — Excavations by Owner of Fee; and Defective and Unsafe Highways — Defects Created by Individuals — Individual Liability — Based on Creation of Nuisance*.

**12. Persons Liable.** — *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316; *Caldwell v. Pre-emption*, 74 Ill. App. 32; *Stoughton v. Porter*, 13 Allen (Mass.) 191;

highway when he orders or consents to the felling of timber on his property which falls so as to obstruct the highway, and he makes no attempt to remove such obstruction.<sup>1</sup> One cannot, however, excuse his obstruction of the highway by showing that the person who owned the particular articles told him to place them in the highway.<sup>2</sup>

**Railroad Companies**, like individuals, cannot create obstructions in the highway, except as authorized by statute,<sup>3</sup> and are consequently liable to indictment in case they permit cars or engines to remain on the highway for an unreasonable length of time.<sup>4</sup> And such obstruction may render the company liable to a person suffering damage therefrom.<sup>5</sup>

**9. Remedies — a. CRIMINAL PROSECUTION.** — Since the improper obstruction of a highway constitutes a nuisance, it may be, and frequently is, the ground of a criminal prosecution.<sup>6</sup> Though such a prosecution will lie at

State *v.* Pierson, 37 N. J. L. 216; Schaefer *v.* Fond du Lac, 99 Wis. 333. See also Schubert *v.* Cowles, 31 N. Y. App. Div. 418.

**1. Consent or Direction of Property Owner.** — Sanders *v.* State, 18 Ark. 198; Nagle *v.* Brown, 37 Ohio St. 7.

**2.** McDermott *v.* Conley, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 560.

**3. Railroads Obstructing Highways — Arkansas.** — St. Louis, etc., R. Co. *v.* State, 52 Ark. 51.

*Colorado.* — Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

*Florida.* — Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 11 Am. St. Rep. 395.

*Indiana.* — State *v.* Baltimore, etc., R. Co., 120 Ind. 298.

*Iowa.* — Cain *v.* Chicago, etc., R. Co., 54 Iowa 255.

*New Jersey.* — Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1.

*New York.* — Fanning *v.* Osborne, 102 N. Y. 441.

*Tennessee.* — Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614.

*West Virginia.* — State *v.* Monongahela River R. Co., 37 W. Va. 108.

See for full treatment of this subject the title RAILROADS.

**4. Standing Cars — Iowa.** — State *v.* Chicago, etc., R. Co., 77 Iowa 442.

*Massachusetts.* — Com. *v.* New York, etc., R. Co., 112 Mass. 412.

*New Jersey.* — State *v.* Morris, etc., R. Co., 23 N. J. L. 360.

*New York.* — Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661.

*North Carolina.* — State *v.* Western North Carolina R. Co., 95 N. Car. 602.

*Pennsylvania.* — Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

*South Carolina.* — Murray *v.* South Carolina R. Co., 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219.

*Tennessee.* — Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State *v.* Louisville, etc., R. Co., 91 Tenn. 445.

The statute quite frequently contains provisions in regard to such obstructions by railroad companies. See State *v.* Grand Trunk R. Co., 59 Me. 189; Com. *v.* New York, etc., R. Co., 112 Mass. 412; Selleck *v.* Lake Shore, etc., R. Co., 93 Mich. 375; Com. *v.* Capp, 48 Pa. St. 53.

**5.** Jackson *v.* Kiel, 13 Colo. 378, 16 Am. St.

Rep. 207; Young *v.* Detroit, etc., R. Co., 56 Mich. 430; Peterson *v.* Chicago, etc., R. Co., 64 Mich. 621; Murray *v.* South Carolina R. Co., 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219.

**6. Criminal Prosecution — England.** — Rex *v.* Russell, 6 East 427; Rex *v.* Cross, 3 Campb. 226; Rex *v.* Jones, 3 Campb. 230; Rex *v.* Wright, 3 B. & Ad. 681, 23 E. C. L. 159; Rex *v.* Grosvenor, 2 Stark. 511, 3 E. C. L. 509; Reg. *v.* Betts, 16 Q. B. 1022, 71 E. C. L. 1022; Rex *v.* Morris, 1 B. & Ad. 441, 20 E. C. L. 421; Rex *v.* Tindall, 6 Ad. & El. 143, 33 E. C. L. 26; Rex *v.* Ward, 4 Ad. & El. 384, 31 E. C. L. 92.

*Arkansas.* — State *v.* Holman, 29 Ark. 58; State *v.* Withrow, 47 Ark. 551; Howard *v.* State, 47 Ark. 431; Patton *v.* State, 50 Ark. 53.

*Illinois.* — Martin *v.* People, 23 Ill. 395; Grube *v.* Nichols, 36 Ill. 92; Houston *v.* People, 63 Ill. 185; Henline *v.* People, 81 Ill. 269.

*Indiana.* — Boyer *v.* State, 16 Ind. 451; State *v.* Buxton, 31 Ind. 67; Jeffries *v.* McNamara, 49 Ind. 142; Sullivan *v.* State, 52 Ind. 309; State *v.* Day, 52 Ind. 483; State *v.* Stewart, 66 Ind. 555; Clift *v.* State, 6 Ind. App. 199.

*Iowa.* — State *v.* Birmingham, 74 Iowa 407.

*Kentucky.* — Clark *v.* Com., 14 Bush (Ky.) 166; Gregory *v.* Com., 2 Dana (Ky.) 417.

*Massachusetts.* — Com. *v.* Belding, 13 Met. (Mass.) 10; Com. *v.* King, 13 Met. (Mass.) 115; Com. *v.* Carr, 143 Mass. 84.

*Minnesota.* — State *v.* Eisele, 37 Minn. 256.

*Missouri.* — State *v.* Turner, 21 Mo. App. 324; State *v.* Pullen, 43 Mo. App. 620; State *v.* Macy, 67 Mo. App. 326; State *v.* Weese, 67 Mo. App. 466; Beauden *v.* Cape Girardeau, 71 Mo. 392; State *v.* Gilbert, 73 Mo. 20.

*New Hampshire.* — State *v.* Atherton, 16 N. H. 203. And see Bryant *v.* Tamworth, (N. H. 1896) 39 Atl. Rep. 431.

*New York.* — People *v.* Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351.

*North Carolina.* — State *v.* Crumpler, 88 N. Car. 647; State *v.* Smith, 100 N. Car. 550.

*Oregon.* — State *v.* Officer, 4 Oregon 182; State *v.* Hume, 12 Oregon 133; State *v.* Myers, 20 Oregon 442.

*Pennsylvania.* — Glenn *v.* Com., (Pa. 1886) 5 Cent. Rep. 492; Kelly *v.* Com., 11 S. & R. (Pa.) 345.

*South Carolina.* — State *v.* Sartor, 2 Strobb. L. (S. Car.) 60; State *v.* Carver, 5 Strobb. L. (S. Car.) 217.

And see other criminal cases cited in this section.

common law, there are in many of the states statutory provisions making the obstruction of a highway a misdemeanor, and the prosecution is brought under such a provision when it exists.<sup>1</sup> In the absence of a statutory provision to the contrary, the knowledge or intent with which one acts in placing an obstruction in a highway is immaterial.<sup>2</sup> The statute, however, frequently creates a criminal liability for a "wilful" obstruction only.<sup>3</sup> The meaning to be given to the term "wilful" in this connection does not clearly appear. In *Iowa* it is stated to mean intentional,<sup>4</sup> but elsewhere it is stated to signify evil intent or an absence of reasonable ground for believing an act to be lawful.<sup>5</sup> It has been held that one is not liable under such a statute if he was justifiably ignorant of the existence of the highway, or of its proper location,<sup>6</sup> but one is not excused by the fact that he acts under a mistake as to his legal rights,<sup>7</sup> and his action is regarded as wilful if it is in direct defiance of the directions of the highway officers.<sup>8</sup>

*b. ACTION FOR PENALTY.* — Occasionally the statute provides for a civil proceeding to recover a penalty for the creation of an obstruction, the action being brought in the name of the state, the municipality, the highway officers, or an individual for the public benefit, as the statute may provide.<sup>9</sup> When

**1. Prosecutions under Statutes.** — In the following cases it appears from the report of the case that the prosecution was under a statute:

*Alabama.* — *Thompson v. State*, 20 Ala. 54; *Johnson v. State*, 32 Ala. 583.

*Arkansas.* — *State v. Lemay*, 13 Ark. 405.

*Connecticut.* — *State v. Merritt*, 35 Conn. 314.

*Florida.* — *Palatka, etc., R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395.

*Indiana.* — *State v. Craig*, 23 Ind. 185; *Jeffries v. McNamara*, 49 Ind. 142; *State v. Baker*, 58 Ind. 417; *State v. Stewart*, 66 Ind. 555; *Miller v. State*, 72 Ind. 421; *Hoch v. State*, 20 Ind. App. 64.

*Iowa.* — *State v. Berry*, 12 Iowa 58; *State v. Finney*, 99 Iowa 43.

*Kentucky.* — *Com. v. Illinois Cent. R. Co.*, (Ky. 1898) 47 S. W. Rep. 258.

*Maine.* — *State v. Beeman*, 35 Me. 242; *State v. Bradbury*, 40 Me. 154.

*Massachusetts.* — *Com. v. King*, 13 Met. (Mass.) 115.

*Missouri.* — *State v. Bradley*, 31 Mo. App. 308; *State v. Rhodes*, 35 Mo. App. 360; *State v. Pullen*, 43 Mo. App. 620; *State v. Parsons*, 53 Mo. App. 135; *State v. Cunningham*, 61 Mo. App. 188; *State v. Proctor*, 90 Mo. 334.

*North Carolina.* — *State v. Eastman*, 109 N. Car. 785.

*Ohio.* — *Matthews v. State*, 25 Ohio St. 536.

*Texas.* — *Conner v. State*, 21 Tex. App. 176; *McClanahan v. State*, 21 Tex. App. 429; *Fuller v. State*, 41 Tex. 140; *Pierce v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 587; *Laroe v. State*, 30 Tex. App. 374; *Baker v. State*, 21 Tex. App. 264.

*Virginia.* — *M'Clintic v. Com.*, 1 Rob. (Va.) 786.

*Washington.* — *State v. Horlacher*, 16 Wash. 325.

*West Virginia.* — *State v. Monongahela River R. Co.*, 37 W. Va. 108.

**2. Knowledge and Intent.** — *Nichols v. State*, 89 Ind. 298; *State v. Wells*, 70 Mo. 635; *Com. v. Dicken*, 145 Pa. St. 453; *State v. Chesapeake, etc., R. Co.*, 24 W. Va. 809. And see the title CRIMINAL LAW, vol. 8, p. 291.

**3. Wilful Obstruction.** — *Alabama.* — *Prim v. State*, 36 Ala. 244.

*Florida.* — *Savannah, etc., R. Co. v. State*, 23 Fla. 579.

*Kansas.* — *State v. Raypholtz*, 32 Kan. 450.

*Texas.* — *Murphy v. State*, 23 Tex. App. 333; *Brinkoeter v. State*, 14 Tex. App. 67; *Shubert v. State*, 16 Tex. App. 645; *Trice v. State*, 17 Tex. App. 43; *Sanborn v. State*, 21 Tex. App. 155; *Baker v. State*, 23 Tex. App. 657; *Guthrie v. State*, 23 Tex. App. 339; *Sneed v. State*, 28 Tex. App. 56; *Johnson v. State*, (Tex. App. 1890) 14 S. W. Rep. 396; *Laroe v. State*, 30 Tex. App. 374; *Myers v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 255; *Lensing v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 572; *Dodson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 78.

*Virginia.* — *Bailey v. Com.*, 78 Va. 19.

**4. Meaning of Term.** — *State v. Teeters*, 97 Iowa 458. And see *State v. Chicago, etc., R. Co.*, 77 Iowa 442.

**5. Baker v. State, 21 Tex. App. 264; *Cornelison v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 384.**

**6. Ignorance as to Highway.** — *State v. Cummerford*, 16 Kan. 507; *Guthrie v. State*, 23 Tex. App. 339; *Parsons v. State*, 26 Tex. App. 192; *Sanborn v. State*, 21 Tex. App. 155; *State v. Preston*, 34 Wis. 675. But see *State v. Bradley*, 31 Mo. App. 308; *Cornelison v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 384.

**7. Mistake of Law.** — *Highway Com.'s v. Ely*, 54 Mich. 173; *Crouch v. State*, 39 Tex. Crim. 145. But see *Meers v. State*, (Tex. App. 1891) 16 S. W. Rep. 653.

**8. Disobedience to Official Order.** — *State v. Raypholtz*, 32 Kan. 450; *State v. Castle*, 44 Wis. 670.

So the mere omission to remove an obstruction was held to be "wilful" under an English statute, when the owner of a wall, which had fallen across a highway, failed to remove the debris after notice. *Gully v. Smith*, 12 Q. B. D. 121.

**9. Action for Penalty.** — *California.* — *Bailey v. Dale*, 71 Cal. 34. See also *Freshour v. Hilm*, 99 Cal. 443.

*Connecticut.* — *Canfield v. Mitchell*, 43 Conn. 169; *Blakeslee v. Tyler*, 55 Conn. 397.

*Illinois.* — *Lewiston v. Proctor*, 27 Ill. 414; *Sweeney v. People*, 28 Ill. 208; *Chatham v.*



the statute provides for an action for a penalty on account of the obstruction, there cannot, it seems, be a prosecution as for a nuisance at common law.<sup>1</sup> But it has been held that statutes providing for a civil action for a penalty and for prosecution by indictment furnish cumulative remedies, and that a statute providing for one of such remedies is not repealed by an enactment providing for the other.<sup>2</sup>

c. PROCEEDINGS BY HIGHWAY OFFICERS FOR REMOVAL. — It seems that highway officers have power, under the general authority given to them to keep the highways in repair and free from obstructions, to cause the removal of objects constituting obstructions or encroachments on the highway,<sup>3</sup> though they cannot encroach upon private property for the purpose of removing a possible cause of obstruction.<sup>4</sup> Moreover, the statute frequently in express terms authorizes them to remove obstructions in a summary manner,<sup>5</sup> and sometimes provides for a judicial proceeding by them of some

Mason, 53 Ill. 411; Havana v. Biggs, 58 Ill. 483; Waddle v. Duncan, 63 Ill. 223; Partridge v. Snyder, 78 Ill. 519; Kile v. Yellowhead, 80 Ill. 208; Wragg v. Penn Tp., 94 Ill. 11, 34 Am. Rep. 199; Boyd v. Farm Ridge, 103 Ill. 408; Madison Tp. v. Gallagher, 159 Ill. 105; Samuell v. Sherman, 170 Ill. 265; Tully v. Northfield, 6 Ill. App. 356; Scott v. New Boston, 26 Ill. App. 108; Bloomington v. Graves, 28 Ill. App. 614; Rice v. Chicago, etc., R. Co., 30 Ill. App. 481; Chicago, etc., R. Co. v. People, 44 Ill. App. 632; Williams v. Hardin, 46 Ill. App. 67; Ferris v. Ward, 9 Ill. 499.

Indiana. — Nowels v. Alter, 53 Ind. 18; Aldrich v. Hawkins, 6 Blackf. (Ind.) 125.

Michigan. — Pettinger v. People, 20 Mich. 336; Parker v. People, 22 Mich. 93; Varden v. Ritchie, 86 Mich. 197; Hines v. Darling, 99 Mich. 47.

New York. — Talmage v. Huntting, 29 N. Y. 447, 39 Barb. (N. Y.) 654; Corning v. Head, 86 Hun (N. Y.) 12; Fowler v. Mott, 19 Barb. (N. Y.) 204; Sardinia v. Butler, 149 N. Y. 505; Doughty v. Brill, 3 Keyes (N. Y.) 612, 1 Abb. App. Dec. (N. Y.) 524, 36 Barb. (N. Y.) 488; Saunders v. Townsend, 26 Hun (N. Y.) 308; Rue v. Sprague, 1 Johns. (N. Y.) 510; Bisbee v. Mansfield, 6 Johns. (N. Y.) 84; Sage v. Barnes, 9 Johns. (N. Y.) 365; Spicer v. Slade, 9 Johns. (N. Y.) 359; Bronson v. Mann, 13 Johns. (N. Y.) 460; Paine v. East, 15 N. Y. Wkly. Dig. 281; Fleet v. Youngs, 7 Wend. (N. Y.) 291; Parker v. Van Houten, 7 Wend. (N. Y.) 145; Fitch v. Highway Com'rs, 22 Wend. (N. Y.) 132; Briggs v. Doughty, 7 Hun (N. Y.) 82; Bayles v. Roe, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 279.

Ohio. — Burton Tp. v. Tuttle, 30 Ohio St. 62; Higgins v. Grove, 40 Ohio St. 521.

Pennsylvania. — Calder v. Chapman, 8 Pa. St. 522; Meeker v. Com., 42 Pa. St. 283.

South Carolina. — Woodward v. South Carolina, etc., R. Co., 47 S. Car. 233.

Vermont. — State v. Smith, 54 Vt. 403.

Wisconsin. — State v. Hayden, 32 Wis. 663; State v. Gillen, 49 Wis. 683; State v. Smith, 52 Wis. 134; State v. Wertzel, 84 Wis. 344.

See the title FINES AND PENALTIES, vol. 13, p. 52.

1. State v. Smith, 7 Conn. 428; State v. Hyde, 11 Conn. 541; State v. Smith, 54 Vt. 403.

2. Cumulative Remedies. — St. Louis, etc., R.

Co. v. State, 52 Ark. 51; Wragg v. Penn Tp., 94 Ill. 11, 34 Am. Rep. 199; State v. Virt, 3 Ind. 447.

3. Removal by Officials — Connecticut. — Ely v. Parsons, 55 Conn. 83; Atwood v. Partree, 56 Conn. 80.

Georgia. — Jones v. Williams, 70 Ga. 704.

Kentucky. — Hurst v. Cassidy, 5 Ky. L. Rep. 771, 930.

New Hampshire. — Graves v. Shattuck, 35 N. H. 258, 69 Am. Dec. 536.

New York. — Cook v. Harris, 61 N. Y. 448; Kellogg v. Thompson, 66 N. Y. 88; Hathaway v. Jenks, 67 Hun (N. Y.) 289; Griffith v. McCullum, 46 Barb. (N. Y.) 561; Van Wyck v. Lent, 33 Hun (N. Y.) 301; Kline v. Hibbard, 80 Hun (N. Y.) 50; M'Fadden v. Kingsbury, 11 Wend. (N. Y.) 667.

A City, under its general powers of control over streets, or occasionally by special provisions, has a right to remove obstructions on the streets.

United States. — Wabash R. Co. v. Defiance, 167 U. S. 88.

Indiana. — Terre Haute v. Turner, 36 Ind. 522.

Kentucky. — Dudley v. Frankfort, 12 B. Mon. (Ky.) 610.

Louisiana. — Tourne v. Lee, 8 Mart. N. S. (La.) 548, 20 Am. Dec. 261.

Michigan. — Grand Rapids v. Hughes, 15 Mich. 54.

New York. — Delaware, etc., R. Co. v. Buffalo, 4 N. Y. App. Div. 562.

Pennsylvania. — Philadelphia v. Philadelphia, etc., R. Co., 58 Pa. St. 253.

Texas. — Compton v. Waco Bridge Co., 62 Tex. 715.

See also the titles MUNICIPAL CORPORATIONS; NUISANCES; STREETS AND SIDEWALKS.

4. Goodin v. Des Moines, 55 Iowa 67; Haines v. Barclay Tp., 181 Pa. St. 521.

The breaking of a gate lock in the course of removal of a gate wrongfully obstructing the highway is justified. Vogt v. Bexar County, 16 Tex. Civ. App. 567, 91 Tex. 285.

5. Summary Removal — California. — Peck v. Los Angeles County, 90 Cal. 384; Bequette v. Patterson, 104 Cal. 282.

Illinois. — Caldwell v. Pre-emption, 74 Ill. App. 32; Brokaw v. Highway Com'rs, 130 Ill. 482.

Iowa. — Cook v. Gaylord, 91 Iowa 219.

sort to compel the removal of obstructions.<sup>1</sup> In *New Jersey* and in *New York* there are special statutory provisions for a tribunal to determine the question of the existence of the alleged highway and of the obstructions or encroachments thereon.<sup>2</sup>

**Preliminary Notice or Order.** — The statute, in providing for proceedings by the officers, frequently requires a preliminary notice or order to the person creating the obstruction, requiring him to remove it.<sup>3</sup>

**d. REMEDIES OF PRIVATE INDIVIDUALS — Action for Damages.** — An action at law will lie in favor of an individual for damages caused by an obstruction of a highway, only when his injuries are different in kind from those suffered by the public. This is but an application of a general rule which controls in the case of all nuisances of a public nature, and a discussion thereof will be found in another part of this work.<sup>4</sup>

**Injunction** will also lie in a proper case to prevent an obstruction of the highway, the principles upon which the relief is granted being similar to those which control in other cases.<sup>5</sup>

**Abatement by an Individual** of the particular obstruction is also permissible in accordance with the principles applicable in the case of other nuisances.<sup>6</sup>

**XV. USER FOR PASSAGE AND TRANSIT — 1. In General.** — The question of the mutual duties of persons using the highway for ordinary travel, in order to avoid accidents, will be considered in another part of this work,<sup>7</sup> and the questions arising in case of injuries to travelers from defects and obstructions have already been considered in this article.<sup>8</sup>

*Kentucky.* — *Gray v. Henry County*, (Ky. 1897) 42 S. W. Rep. 333.

*Maine.* — *Cool v. Crommet*, 13 Me. 250; *Whittier v. McIntyre*, 59 Me. 143.

*Massachusetts.* — *Morrison v. Howe*, 120 Mass. 505.

*Michigan.* — *Lebanon Tp. v. Burch*, 78 Mich. 645.

*Mississippi.* — *Hairston v. Francher*, 7 Smed. & M. (Miss.) 249.

*Missouri.* — *Kurz v. Turley*, 54 Mo. App. 237; *State v. Emerson*, 90 Mo. 237.

*New York.* — *Metropolitan Exhibition Co. v. Newton*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 593.

*Wisconsin.* — *Hubbell v. Goodrich*, 37 Wis. 84; *State v. Leaver*, 62 Wis. 387; *Childs v. Nelson*, 69 Wis. 125; *Pauer v. Albrecht*, 72 Wis. 416; *Nicolai v. Davis*, 91 Wis. 370.

**1. Judicial Proceedings — California.** — *Smith v. Talbot*, 77 Cal. 16; *Freshour v. Hihn*, 99 Cal. 443; *Hall v. Kauffman*, 106 Cal. 451.

*Michigan.* — *Gregory v. Knight*, 50 Mich. 61; *Lebanon Tp. v. Burch*, 78 Mich. 641; *White v. Carlisle*, 95 Mich. 288.

*New York.* — *Wheatfield v. Shasley*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 100; *Hempstead v. Ball Electric Light Co.*, 9 N. Y. App. Div. 48; *Highway Com'rs v. Van Allen*, 32 Hun (N. Y.) 61.

**2. New Jersey.** — *State v. Pierson*, 37 N. J. L. 216; *Jameson v. Hoppock*, 46 N. J. L. 516; *Christie v. Vanderburgh*, 46 N. J. L. 280; *Amerman v. Briggs*, 50 N. J. L. 114; *Lindsley v. Freeman*, 27 N. J. L. 250; *Tainter v. Morristown*, 19 N. J. Eq. 46; *Gulick v. Groendyke*, 38 N. J. L. 114; *Vantilburgh v. Shann*, 24 N. J. L. 740.

*New York.* — *Walker v. Caywood*, 31 N. Y. 51; *Hyatt v. Bates*, 40 N. Y. 164; *Lane v. Cary*, 19 Barb. (N. Y.) 537; *People v. Hunting*, 39 Hun (N. Y.) 452; *Alpaugh v. Bennett*, 59

Hun (N. Y.) 45; *Bronson v. Mann*, 13 Johns. (N. Y.) 460; *Pugsley v. Anderson*, 3 Wend. (N. Y.) 468.

**3. Preliminary Notice or Order — California.** — *Smith v. Talbot*, 77 Cal. 16.

*Illinois.* — *People v. Young*, 72 Ill. 411; *Brokaw v. Highway Com'rs*, 130 Ill. 482.

*Iowa.* — *Mosier v. Vincent*, 34 Iowa 478; *Mosher v. Vincent*, 39 Iowa 607; *Blackburn v. Powers*, 40 Iowa 681; *Cook v. Gaylord*, 91 Iowa 219.

*Michigan.* — *People v. Smith*, 42 Mich. 138; *Gregory v. Knight*, 50 Mich. 61; *Krueger v. Le Blanc*, 62 Mich. 70; *Osborn v. Longsduff*, 70 Mich. 127; *Le Blanc v. Kruger*, 75 Mich. 561; *Cronenwaite v. Hoffman*, 88 Mich. 617.

*Minnesota.* — *Hunter v. Jones*, 13 Minn. 307.

*Missouri.* — *Kurz v. Turley*, 54 Mo. App. 237.

*New York.* — *Sardinia v. Butler*, 149 N. Y. 505; *Olendorf v. Sullivan*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 74; *Kerr v. Hammer*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 708; *Hathaway v. Jenks*, 67 Hun (N. Y.) 289; *James v. Sammis*, 132 N. Y. 239; *Mott v. Highway Com'rs*, 2 Hill (N. Y.) 472; *Phillips v. Schumacher*, 10 Hun (N. Y.) 405; *Borries v. Horton*, 16 Hun (N. Y.) 139; *Cook v. Covil*, 18 Hun (N. Y.) 288; *Olendorf v. Sullivan*, 59 Hun (N. Y.) 620, 13 N. Y. Supp. 6; *Spicer v. Slade*, 9 Johns. (N. Y.) 359.

*Vermont.* — *Verder v. Ellsworth*, 59 Vt. 354.

*Wisconsin.* — *State v. Babcock*, 42 Wis. 138; *State v. Egerer*, 55 Wis. 527.

**4. Remedies of Individuals.** — See the titles ABATEMENT OF NUISANCES, vol. 1, p. 63; NUISANCES.

**5.** See the titles INJUNCTION; NUISANCES.

**6.** See the title ABATEMENT OF NUISANCES, vol. 1, p. 63.

**7.** See the title LAW OF THE ROAD.

**8.** See *supra*, this title, *Defective and Unsafe Highways*.

**Animals in Highway.** — The questions of the right of one to allow domestic animals, whether horses, cattle, or other species, to wander at large on the highway, and his liability for injuries resulting therefrom, as well as the duties of one driving animals not attached to any vehicle, are likewise considered elsewhere.<sup>1</sup>

**Sliding on the Highway** has been held not to be in itself illegal, or a public nuisance,<sup>2</sup> though it may be so if especially prohibited.<sup>3</sup>

**2. Extraordinary Traffic.** — The use of the highway for the passage of an object or vehicle of an unusual character, and therefore calculated to frighten horses, is not in itself illegal,<sup>4</sup> and it has accordingly been decided that the propulsion of objects by steam is not necessarily a nuisance.<sup>5</sup> The question seems to be dependent to some extent upon the frequency of the use of the highway in such manner, and also upon the particular form of the moving object.<sup>6</sup> And it seems that if one so uses a highway for transportation of extraordinary objects, he is bound to take precautions to warn travelers and to aid them in passing with safety.<sup>7</sup>

**3. Moving of Houses.** — The moving of a house along a highway is not generally regarded as improper in itself,<sup>8</sup> it being well said that it is only a question of degree between a frame building and a huge van of merchandise, beams of timber, etc.<sup>9</sup> The exercise of this right is generally, however, regulated by ordinance,<sup>10</sup> and it may, it seems, be entirely prohibited.<sup>11</sup>

**4. Parades.** — It is generally conceded that the use of highways for the pur-

1. See the title ANIMALS, vol. 2, p. 341.

2. **Sliding on Highway.** — *Jackson v. Castle*, 80 Me. 119, 82 Me. 579.

3. *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759. See also *supra*, this title, *Defective and Unsafe Highways — Defects Involving Liability — Objects in Motion or Subject to Human Control*.

4. **Passage of Extraordinary Objects.** — *Bennett v. Lovell*, 12 R. I. 167, 34 Am. Rep. 628.

In *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522, Cooley, C. J., said: "Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods."

5. **Propulsion by Steam.** — *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522. See also *Moses v. Pittsburgh*, etc., R. Co., 21 Ill. 516.

6. *Com. v. Allen*, 148 Pa. St. 358, 33 Am. St. Rep. 830, where it was decided that while the running of a traction engine upon a single occasion would not constitute a public nuisance, since it might be necessary to remove it from one location to another, the making of two trips daily, for a distance of about two miles, with a traction engine having two wagons attached thereto, making a train over fifty feet long, which frightened horses, was an indictable offense. See also *Watkins v. Reddin*, 2 F. & F. 629, where one was held liable for injuries caused by a horse taking

fright at a traction engine used by the defendant on the highway.

7. **Precautions to Be Taken.** — *Bennett v. Lovell*, 12 R. I. 167, 34 Am. Rep. 628.

The statute occasionally provides for special precautions to be taken. See *State v. Kowolski*, 96 Iowa 346; *Mullen v. Glens Falls*, 11 N. Y. App. Div. 275.

8. **Moving of Houses.** — *Rice v. Whitby*, 25 Ont. App. 191, reversing 28 Ont. 598; *Rice v. Buffalo Steel House Co.*, 17 N. Y. App. Div. 462. See also *Caldwell v. Pre-emption*, 74 Ill. App. 32; *Dickson v. Kewanee Electric Light, etc., Co.*, 53 Ill. App. 379.

In *Graves v. Shattuck*, 35 N. H. 258, 69 Am. Dec. 536, Fowler, J., said that if the public highways in a particular locality had been commonly used for moving buildings, one was not guilty of a nuisance in moving his building through them "provided he selected suitable streets, used proper expedition, and was in the reasonable use of such streets, under all the circumstances shown in evidence, causing no unnecessary obstruction therein," and that it was proper that this whole question should be submitted to the jury.

9. *Toronto St. R. Co. v. Dollery*, 12 Ont. App. 679.

10. **Regulation by Ordinance.** — See *Concord v. Burleigh*, 67 N. H. 106; *Eureka City v. Wilson*, 15 Utah 53.

In *Day v. Green*, 4 Cush. (Mass.) 433, Shaw, C. J., said: "That it is often useful and convenient that buildings should be so removed, is found by experience; it may often be done with little or no inconvenience to the public, under suitable and proper restrictions, adapted to each particular case; and therefore it seems highly proper that the power to authorize and regulate it should exist somewhere."

11. **Prohibition.** — *Woodward v. Boston*, 115 Mass. 81; *Eureka City v. Wilson*, 15 Utah 53.



pose of parades and processions is lawful,<sup>1</sup> and it has been held in several cases that the municipality cannot make the right to parade absolutely dependent upon a grant of permission by the municipal authorities or discriminate as between particular organizations in this regard.<sup>2</sup> But if a parade is so prolonged or frequent as materially to obstruct or impede public travel, or to be an actual annoyance to the public, it may be prohibited.<sup>3</sup>

**5. Right of Traveler to Pass on Abutting Land.** — It has been quite frequently stated in *English* decisions that where a highway becomes obstructed and impassable from temporary causes, a traveler may go outside the highway on the adjacent land without subjecting himself to liability,<sup>4</sup> but apparently the right is now regarded in England as being limited to cases in which there is a prescriptive highway with a prescriptive right of deviation, or where the obstruction is created by the abutting owner.<sup>5</sup> In the *United States* such a right of deviation has, on the strength of the early English authorities, been generally acknowledged to exist, without reference apparently to the mode in which the highway became such; and this view has been taken in *Canada*.<sup>6</sup>

See also *Dickson v. Kewanee Electric Light, etc., Co.*, 53 Ill. App. 379.

**1. Parades** — *California*. — *Matter of Flaherty*, 105 Cal. 558.

*Illinois*. — *Chicago v. Trotter*, 136 Ill. 430, *affirming* 33 Ill. App. 206.

*Kansas*. — *Anderson v. Wellington*, 40 Kan. 173, 10 Am. St. Rep. 175.

*New York*. — *People v. Rochester*, 44 Hun (N. Y.) 166.

*North Carolina*. — *State v. Hughes*, 72 N. Car. 25.

In *Chicago v. Trotter*, 136 Ill. 430, Baker, J., said: "Parades and processions upon the streets of a city are not necessarily so productive of danger and disorder as to render them *per se* the creators of public disturbances, nor are they necessarily nuisances. There is no authority, therefore, in the municipal corporation to suppress such demonstrations of all kinds, at all times and under all circumstances. Citizens have the constitutional right 'of pursuing their own happiness,' and on suitable occasions and for lawful purposes, and in a peaceable manner, they may gather together in street parades and processions, if they so desire, provided they do not disturb or threaten the public peace or substantially interfere with the rights of others."

**2. Not Dependent on Municipal Discretion.** — *Chicago v. Trotter*, 136 Ill. 430, *affirming* 33 Ill. 206; *Rich v. Naperville*, 42 Ill. App. 222; *Anderson v. Wellington*, 40 Kan. 173, 10 Am. St. Rep. 175; *Matter of Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310; *State v. Dering*, 84 Wis. 585, 36 Am. St. Rep. 948.

**3. Illegality under Some Circumstances.** — *Chariton v. Simmons*, 87 Iowa 226; *Mackall v. Ratchford*, 82 Fed. Rep. 41; *Cook v. Dolan*, 19 Pa. Co. Ct. 401, 6 Pa. Dist. 524, in the last two of which cases parades by striking miners, constantly repeated and intended to intimidate other employees as well as the mining companies, were held to be illegal.

**4. Right of Passage Extra Viam.** — *Duncomb's Case*, Cro. Car. 366; *Taylor v. Whitehead*, 2 Dougl. 749; *Bullard v. Harrison*, 4 M. & S. 387; *Dawes v. Hawkins*, 8 C. B. N. S. 848, 98 E. C. L. 848; *Robertson v. Gantlett*, 16 M. & W. 296; *Young v. —*, 1 Ld. Raym. 725; *Henn's Case*, 1 W. Jones 296.

**5. Arnold v. Holbrook**, L. R. 8 Q. B. 96. See also *Reg. v. Ramsden*, El. Bl. & El. 949, 96 E. C. L. 949.

**6. United States and Canadian Decisions** — *California*. — *Carey v. Rae*, 58 Cal. 159.

*Iowa*. — *Irwin v. Yeager*, 74 Iowa 174.

*Maine*. — *Savage v. Bangor*, 40 Me. 176, 63 Am. Dec. 658; *Kent v. Judkins*, 53 Me. 160, 87 Am. Dec. 544.

*Maryland*. — *Murray v. McShane*, 52 Md. 217.

*Massachusetts*. — *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728. See also *Tisdale v. Norton*, 8 Met. (Mass.) 388.

*New Hampshire*. — *State v. Northumberland*, 44 N. H. 628.

*New York*. — *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 652; *White v. Wiley*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 102.

*North Carolina*. — *State v. Brown*, 109 N. Car. 802.

*Texas*. — *Hedgepoch v. Robertson*, 18 Tex. 858.

*Vermont*. — *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

*Canada*. — *Carrick v. Johnston*, 26 U. C. Q. B. 65.

**Reason for Rule.** — In *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728, the leading case in the *United States* on the subject, Bigelow, J., said: "If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity so to do. \* \* \* If this right were denied to those who have occasion to pass over the public ways, not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the seacoast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases the only escape is by turning out of the usually traveled way and seeking an outlet over the fields adjoining the highway. If a necessity is not

This right, based upon necessity, gives to the public no permanent easement in the abutting land.<sup>1</sup> If a traveler has notice of the existence of the obstruction and can reach his destination by another route, which is more circuitous but not unreasonably long, he will not be permitted to exercise this right of deviation;<sup>2</sup> and if he can remove the obstruction without material delay, it is apparently his duty to do so in order to avoid passing upon the abutting property.<sup>3</sup>

**XVI. INJURIES TO HIGHWAYS** — 1. **Civil Liability.** — Counties, towns, and cities, which are bound by law to maintain and keep in repair highways within their limits, have a property interest therein, and may recover damages of any person who wilfully or negligently destroys or injures such ways.<sup>4</sup> The statute sometimes provides, however, that the action shall be brought by particular officers.<sup>5</sup>

2. **Criminal Liability.** — One injuring the highway in any manner so as to affect the public right of passage thereon is liable at common law as for the creation of a nuisance,<sup>6</sup> and one is so liable in case he uses the highway for traffic of a character liable to cause injury thereto.<sup>7</sup> Statutes also sometimes provide special penalties in this regard.<sup>8</sup>

**HIM.** — See *HE*, *ante*, p. 303.

**HINDER.** (See also the titles **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 1; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, pp. 210, 392; **ILLEGAL CONTRACTS**, *post*; **INSOLVENCY AND BANKRUPTCY**; **OBSTRUCTING JUSTICE**. And see **DELAY**, vol. 9, p. 188.) — To "hinder and delay" a creditor is to do something which is an attempt to defraud him rather than a successful fraud; to put some obstacle in the path, or interpose some time unjustifiably, before the creditor can realize what is owed to him out of the debtor's property.<sup>9</sup>

created, under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law."

1. **No Permanent Easement.** — *Carey v. Rae*, 58 Cal. 159; *State v. Northumberland*, 44 N. H. 623.

2. **Passage Extra Viam Must Be Unavoidable.** — *State v. Brown*, 109 N. Car. 802; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

3. **Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811.**

4. **Civil Liability for Injuries** — *Kentucky*. — *Louisville, etc., R. Co. v. Whitbey County Ct.*, 95 Ky. 215, 15 Ky. L. Rep. 734; *Maysville, etc., R. Co. v. Greenup County*, 12 Ky. L. Rep. 46; *Lawrence County v. Chattahoochee R. Co.*, 81 Ky. 225.

*Maine*. — *Monmouth v. Gardiner*, 35 Me. 247. Compare *Augusta v. Moulton*, 75 Me. 254.

*Massachusetts*. — *Brookfield v. Walker*, 100 Mass. 94.

*New Hampshire*. — *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Laconia v. Gilman*, 55 N. H. 127; *Concord v. Burleigh*, 67 N. H. 103; *Monroe v. Connecticut River Lumber Co.*, (N. H. 1894) 39 Atl. Rep. 1010.

*Pennsylvania*. — *Woodring v. Forks Tp.*, 28 Pa. St. 355, 70 Am. Dec. 134; *Pottsville v. Norwegian Tp.*, 14 Pa. St. 543.

**Cost of Maintenance.** — If the municipality is compelled to build another road in place of one injured, it may recover from the person causing the injury any additional expense

which is involved in maintaining the new road as against the old one. *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Monroe v. Connecticut River Lumber Co.*, (N. H. 1894) 39 Atl. Rep. 1019.

5. **Statutory Provision.** — *Highway Com'rs v. Stockman*, 5 Mich. 528; *Denver Tp. v. White River Log, etc., Co.*, 51 Mich. 472; *Bidelman v. State*, 110 N. Y. 232; *Lawrence R. Co. v. Mahoning County*, 35 Ohio St. 1.

6. **Criminal Liability.** — *Griesly's Case*, 1 Vent. 4; *Alexander v. State*, 117 Ala. 220; *State v. Phipps*, 4 Ind. 515; *Milburn v. Fowler*, 27 Hun (N. Y.) 568; *State v. Smith*, 54 Vt. 403.

7. **Injurious Traffic.** — *Egerly's Case*, 3 Salk. 183; *Com. v. Allen*, 148 Pa. St. 358, 33 Am. St. Rep. 830.

8. **Statutory Provisions.** — *Moll v. Pickaway*, 14 Ill. App. 343; *Canoe Creek v. McEniry*, 23 Ill. App. 227; *Brown v. Barrett*, 38 Ill. App. 248; *State v. Hunter*, 68 Iowa 447.

9. *Burnham v. Brennan*, 42 N. Y. Super. Ct. 63.

**Hinder, Delay, and Defraud.** — In *Petrovitzky v. Brigham*, 14 Utah 472, it was held that the words "hinder" and "delay" had practically the same meaning, and that the omission of the word "hinder" and the use of the word "delay" or "defraud" did not render an affidavit defective as to a third person; that a valid mortgage should be accompanied by an affidavit that the mortgage was made in good faith to secure the amount named therein, and without design to hinder or delay creditors. See also *Gallagher v. Goldfrank*, 75 Tex. 562;



**HINGE.** — A hinge is defined to be an artificial movable joint; a device for joining two pieces together in such manner that one may be turned over the other.<sup>1</sup>

**HIRE, HIRER, ETC.** (See also the titles BAILMENTS, vol. 3, p. 742; CONTRACTS OF HIRE (LAW OF BAILMENTS), vol. 7, p. 299; LEASES; MASTER AND SERVANT. And see FREIGHT, vol. 14, p. 546.) — A bailment in which compensation is to be given for the use of a thing, or for labor and services about it.<sup>2</sup> The word "hire" signifies a reward or recompense for the use of a thing.<sup>3</sup>

**HIS.** — See HE, *ante*, p. 303.

Armstrong v. Ames, etc., Co., 17 Tex. Civ. App. 46. And see DELAY, vol. 9, p. 189.

**Hinder or Obstruct — Logs.** (See also the title BOOM COMPANIES, vol. 4, p. 707.) — A statute authorized a person who was *hindered* and obstructed in driving logs, by the logs of A, to drive such obstructing or *hindering* logs and to recover a reasonable compensation therefor. It was held that if the logs of A were in the way of the logs of B so that B could not drive his logs until A's were got out of the way, B was *hindered* or obstructed within the meaning of the statute. To constitute such hindrance or obstruction it is not necessary that the logs of B should come in actual contact with those of A. Anderson v. Maloy, 32 Minn. 76.

**As to Pleadings,** see ENCYC. OF PL. AND PR., title SHAM AND FRIVOLOUS PLEADINGS.

1. Cent. Dict., *followed* in Griswold v. Wagner, 68 Fed. Rep. 497. This was a patent case.

2. Bouv. L. Dict.

The lending of property for a compensation is termed *hiring* or renting. Kinney v. Hynds, (Wyo. 1897) 49 Pac. Rep. 404.

**Hire — Employ.** — "*Hiring* and 'employing' are words of different meaning. To *hire* is to engage in service for a stipulated reward, as to *hire* a servant for a year, or laborers by the day or month; to engage a man to temporary service for wages. To *employ* is a word of more enlarged signification. A man *hired* to labor is employed, but a man may be employed in a work who is not *hired*. Materials are employed for building locks, but they are not *hired*; and a man who does his own work or the work of another is employed in it, although he receives no wages. To *employ* is to use as an instrument or means of effecting an object." McCluskey v. Cromwell, 11 N. Y. 605 (dissenting opinion).

**Contract Implied.** — "*Hired* to the defendant' implies a contract, and is equivalent to saying 'let to *hire* to the defendant.'" Brown v. Garnier, 6 Taunt. 389, 1 E. C. L. 421.

**Poor Laws.** (See also the title POOR AND POOR LAWS.) — A poor law provided that any person who should lawfully be bound or be *hired* as a servant within a district, and should continue in such service for one year, should gain a settlement. It was held that a voluntary service without compensation did not constitute a *hiring* within the statute. Lewistown v. Granville, 5 Pa. St. 283. See also Tetbury v. Ilam, 1 Wils. C. Pl. 307.

**Partnership.** — A contract that one party shall provide a shop, loom, and tackle, the other perform the labor of weaving, and each shall receive one-half the profits, constitutes a

partnership, but not a *hiring*, within the meaning of a statute charging the township with the maintenance of a laborer as a pauper when he becomes chargeable. Gregg Tp. v. Half Moon Tp., 2 Watts (Pa.) 342. See generally the title POOR AND POOR LAWS.

**Lease and Hire.** — These terms were held equivalent in a statute allowing a railroad corporation to contract with other corporations for the leasing and *hiring* of its cars. See Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 51.

**"Hired and to Freight Taken."** — "The words are, on the part of the shipowner, 'granted and to freight let,' and of the charterer, '*hired* and to freight taken,' than which, of themselves, I know no words more apt to let pass the possession of a ship as well as of a house, though I agree the subjects are different; they are words of grant and demise, and pass possession in the particular case." Christie v. Lewis, 2 Brod. & B. 428, 6 E. C. L. 214. See also the title CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES, vol. 7, p. 156.

3. Carr v. State, 50 Ind. 180.

**Hire in the Sense of Wages.** — See Moore v. Heaney, 14 Md. 563.

**Rent and Hire.** — In Learned-Letcher Lumber Co. v. Fowler, 109 Ala. 169, it was said: "The contract in reference to the oxen is styled a 'rent contract,' and the promise of the maker is to 'rent' the oxen. This verbal inaccuracy must be disregarded in the interpretation of the contract. In its true significance, technical and ordinary, 'rent' is compensation for the possession and use of lands or of things corporeal. *Hire* pertains to things personal, and is the reward or compensation to be yielded for their possession or use. It is, of consequence, plain that the word 'rent' was by the parties intended to bear the meaning of *hire*."

**Value of the Use of a Thing.** — In an action by the proprietors of a portable sawmill for their wrongful deprivation thereof, the court said upon the question of damages: "The defendants' question in their fifth exception, 'What is the fair *hire* for such a machine as this is?' should have been allowed. The rental value or *hire* of a sawmill with a known capacity is not difficult of ascertainment. Equivalent words to 'rental value' or *hire* as applied to a sawmill would be 'the value of the use of the same.'" Wood v. State, 66 Md. 67.

**License.** (See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.) — A judgment *nisi* on a recognizance reciting the charge to be the exhibition of a circus without first obtaining a license according to law cannot be supported, the statute making it indictable to



**HOARDING.**—A fence inclosing a house and materials while builders are at work. It does not, however, necessarily mean something of a mere temporary character, but may be of so permanent a character that the right of the reversioner may be thereby injured.<sup>1</sup>

**HOCUSSED.**—See note 2.

**HOG.**—The term "hog" in a penal statute or indictment includes "pig"<sup>3</sup> and "sow,"<sup>4</sup> and is included in and synonymous with the term "swine."<sup>5</sup> In an act making the stealing of a hog grand larceny, the hog must be a live one;<sup>6</sup> but a contract for the delivery of "hogs" to be paid for at a certain price per hundred pounds net has been held, in the absence of explanatory evidence, to mean dead ones.<sup>7</sup>

**HOLDER.** (See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 282.)—The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another.<sup>8</sup> It is a word of the same import as "bearer," and both may acquire a title by lawful delivery, according to the terms of the contract.<sup>9</sup>

exhibit a circus for hire, pay, or emolument, without a license. *Badger v. State*, 5 Ala. 21.

**Hirer—Receiver.**—A statute gave a right of action against the proprietor, owner, charterer, or *hirer* of a railroad for negligent injuries resulting in death. It was held that the receiver was not the *hirer* within this statute. *Bonner v. Thomas*, (Tex. Civ. App. 1892) 20 S. W. Rep. 722; *Turner v. Cross*, 83 Tex. 223. See also the titles **DEATH BY WRONGFUL ACT**, vol. 8, p. 906; **RECEIVERS**.

**Hired Person.**—An independent contractor has been held not to be a *hired* person. *Lang v. Simmons*, 64 Wis. 529; *Heard v. Crum*, 73 Miss. 157. See generally the title **INDEPENDENT CONTRACTORS**.

**Hireling.**—A statute provided that if any *hireling* should set fire to any woods, so as to occasion damage to any other person, his employer should be liable. It was held that *hireling* did not include independent contractors. The court said: "The statute does not control the question. The word *hireling* means 'servant,' and this is clearly demonstrated by reference to the following: Webster's Dictionary, *hireling*; Worcester's Dictionary, *hireling*; *Boniface v. Scott*, 3 S. & R. (Pa.) 353; *Gravatt v. State*, 25 Ohio St. 168; *Heygood v. State*, 59 Ala. 51; *Williamson v. Wadsworth*, 49 Barb. (N. Y.) 298; *Morgan v. Bowman*, 22 Mo. 546." *St. Louis, etc., R. Co. v. Yonley*, 53 Ark. 505. See also the title **FIRES**, vol. 13, p. 441.

1. *Metropolitan Assoc., etc., v. Petch*, 5 C. B. N. S. 504, 94 E. C. L. 504.

2. **Hocussed.**—A libel alleged that a gentleman was, on a certain night, "*hocussed* and robbed of forty pounds" in the plaintiff's public house. An innuendo "meaning thereby \* \* \* that the said public house of the plaintiff was the resort of and frequented by felons, thieves, and depraved and bad characters," after verdict for the defendant, was held too wide, "turning that which may have been an accidental occurrence into habitual misconduct and negligence on the part of the keeper of the house." *Broome v. Gosden*, 1 C. B. 728, 50 E. C. L. 728. See generally the title **LIBEL AND Slander**.

3. **Pig.**—*Lavender v. State*, 60 Ala. 60; *Washington v. State*, 58 Ala. 355.

4. **Sow.**—*Shubrick v. State*, 2 S. Car. 21.

5. **Swine.**—*Rivers v. State*, 10 Tex. App. 177.

The word *hog* in a carrier's contract was held to mean swine of either sex. *Matson v. Aiona*, 7 Hawaii 158.

**Cattle.**—In *Decatur Bank v. St. Louis Bank*, 21 Wall. (U. S.) 204, it was held that the term "cattle" included *hogs*. See also *Hewitt v. Watertown F. Ins. Co.*, 55 Iowa 325.

**Hard-fed Hogs—Soft Hogs.**—As to the meaning of these terms in a contract, see *Bartlett v. Hoppock*, 34 N. Y. 118.

**Stock Hogs.**—In *Byous v. Mount*, 89 Tenn. 361, it was held that "stock *hogs*," within the meaning of the exemption laws, are such as are capable of reproduction, and do not therefore include barrows and spayed sows.

6. **Larceny.** (See also the title **LARCENY**.)—*Hunt v. State*, 55 Ala. 138.

7. *Whitson v. Culbertson*, 7 Ind. 195. See also *Alexander v. Dunn*, 5 Ind. 122.

8. *Bowling v. Harrison*, 6 How. (U. S.) 258.

9. *Putnam v. Crymes*, 1 McMull. L. (S. Car.) 9, 36 Am. Dec. 250.

A clause in a note gave to the *holder* an option upon maturity to convert it into bonds. In construing this clause the court said: "By the terms of the note itself the *holder* had the option to convert it into bonds. The word *holder* must be construed to mean any one who had lawful title, and cannot be confined to a person whose name was written on the face as payee. It is only as holder that a person has a right to fill in the name of a payee, and of course he may, in the same character, do the act which the statute prescribes, and elect to take bonds instead of money." *Dinsmore v. Duncan*, 57 N. Y. 581.

**Drawer.**—In *Rice v. Hogan*, 8 Dana (Ky.) 133, it was said: "The *holder* of a bill is he who is in possession of the bill and is legally entitled to the benefit of it; and therefore the drawer as well as any other party may become the *holder*."

**Tax Certificate.** (See also the title **TAX SALES**.)—The *Iowa* Code provided that notice to redeem from tax sales should be given by "the lawful *holder* of the certificate." A per-

**HOLD, HOLDING, ETC.** (See **HELD**, *ante*, p. 333.)—To hold means to possess by lawful title; as, to hold a note, bond, lands, or property.<sup>1</sup> For

son purchased real estate at a tax sale, in partnership with another, and took the certificates in his own name. In dividing the certificates with his partner, he wrote his name on one and delivered it to his partner with the object of transferring it. It was held that such partner was "the lawful *holder*," notwithstanding the informality of the assignment. The court said: "By 'the lawful *holder*' is meant the one who in law is the owner of the certificate and entitled to the rights and benefits which may accrue under it." *Swan v. Whaley*, 75 Iowa 623.

1. *Jack v. Walker*, 79 Fed. Rep. 140.

**Occupancy and Hold.** (See also **OCCUPY**.)—In *Tibbitts v. Ah Tong*, 4 Mont. 539, it was said: "The right to occupancy is the right to possess and to *hold*."

In *Thompson v. Sandford*, 13 Ga. 241, it was said: "*Holding* embraces any tenure involving title."

**Own and Hold in Same Sense — Shares of Stock.** (See also the titles **STOCKS**; **STOCKHOLDERS**.)—A statute provided that each stockholder, either in person or by proxy, should be entitled to as many votes as he or she might own, or represent by proxy, of shares of stock. It was held that "own" and *hold* were used in the statute in the same sense, and that one who held shares of stock was recognized as a stockholder as well as one who owned them. *State v. Leete*, 16 Nev. 249.

In *Reg. v. Government Stock Invest. Co.*, 3 Q. B. D. 442, Cockburn, C. J., said: "I think no one can be said to be *holding* shares within the meaning of this article when, instead of *holding* shares, he is *holding* the proxies of other persons who do *hold* them." This was upon a provision that if a poll was demanded by shareholders qualified to vote and *holding* a certain number of shares it should be taken.

A bequest of "two hundred and fifty shares of capital stock which I *hold* in the Union Bank" is a specific legacy. The court said: "The words 'which I *hold*' certainly individuate the stock as a *corpus* with as much precision as would the words 'standing in my name' \* \* \* or 'all the stock which I have in the three per cents.'" *Blackstone v. Blackstone*, 3 Watts (Pa.) 335.

**Same — Actual Occupancy.**—A statute provided that all persons *holding* lands, etc., might have partition. The court said: "We do not construe the word *holding*, thus used, as requiring actual occupancy, but as equivalent to owning or having title to lands." *Godfrey v. Godfrey*, 17 Ind. 6, *quoted* in *Jack v. Walker*, 79 Fed. Rep. 141. See also *Smith v. Gaines*, 39 N. J. Eq. 545. And see the title **PARTITION**.

**Actual Possession.**—A statute provided that the several boards of supervisors should *hold* and manage the securities given to the school fund. In construing this provision in *Madison County v. Tullis*, 69 Iowa 723, the court said: "The auditor is the clerk of the board, and has the custody of the records of the board, and all papers of which the board has any cognizance. The word *hold* should there-

fore not be construed as having manual possession of, but in the sense of power and dominion over, for the purpose of managing the fund." See generally the title **SCHOOLS**.

A statute provided that sheep owners who did not *hold* an acre of land for each two sheep should procure a license. In construing this provision the court said: "As defined by the law dictionaries, the word *holder* means one who is legally in possession of a negotiable instrument; but of course that is not the meaning intended here. Webster gives it also the legal meaning of one who *holds* land, etc., under another; a tenant. But its popular meaning is one who *holds*, and as used here it was probably intended to mean one who is in possession, actual or constructive, of land." *State v. Wheeler*, 23 Nev. 143.

**Restraint on Alienation.**—A devise was to a party and the heirs of his body so long as they should *hold* and till the land. In construing this provision the court said: "Manifestly it is a condition the testator designed should follow the land into the hands of the successive takers as heirs of the body of the devisee. To *hold* in that connection must mean 'to retain,' 'to keep.' These are meanings assigned to the word in Worcester's Dictionary, and are the only meanings which make sense in that connection. In Andrew's Dictionary of Law, as relating to land, it is said to embrace the idea of 'actual possession.' The same authority says that in the *habendum* clause of a deed 'to have and to *hold*, etc.,' the word 'to *hold*' includes the twofold idea of actual possession of the thing and being invested with the legal title. The definition in Burrill's Law Dictionary of the word *hold* is to the same effect. In *Leazure v. Hillegas*, 7 S. & R. (Pa.) 320, it has the meaning of 'retain.' It would seem therefore to be a plain attempt to restrain alienation, which is void as against public policy." *Stansbury v. Hubner*, 73 Md. 231.

**Hold and Enjoy — Gift.**—In an antenuptial settlement it was agreed that the husband and wife should "*hold and enjoy*" their real property during their joint lives as if the articles of settlement had not been made. In construing this provision the court below said: "Giving it away without any valuable consideration whatever is neither *holding* nor 'enjoying' it, but is disposing of it to another to '*hold and enjoy*.'" But the appellate court refused to sustain this position, and held that during the marriage the husband had the power to make a gift of personality if he perfected it by delivery during his life. *Withers v. Weaver*, 10 Pa. St. 393.

**Liens.**—In *Willingham v. Rushing*, 105 Ga. 78, it was said: "While it is true that a factor's rights are those secured by a lien, the fact that his lien is, as has been stated, a strict common-law lien, existing only when he is in possession of the property upon which it is claimed, and lost if it is surrendered, distinguishes his case from liens which are creations of statutory law. The actual *holding* which was absolutely essential to the

other meanings of the term see note 1.

common-law lien does not in fact exist in the case of statutory liens, but the *holding* which constitutes the latter class of liens is one in contemplation of law only." See also the title FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 676.

**Quarantine.**—A statute provided that a widow might remain in and *hold* and enjoy the mansion house of her husband for a certain time. Upon the question whether the widow was bound to pay taxes during such occupation of the mansion house the court said: "But occupancy is not tenancy; and while the phrase employed in the act is 'remain in, *hold*, and enjoy the mansion house,' it is clear the word *hold* cannot here be used in any technical sense, that is, to have an estate on condition of paying rent or performing service, or to be tenant to another, because the statute provides that the widow shall *hold* without rent, nor does it define of whom she is to *hold*." *Spinning v. Spinning*, 43 N. J. Eq. 238. See also the title DOWER, vol. 10, p. 148.

**Trustees.**—A testator gave to his executors as trustees the power to sell and convey his estate. The premises were partitioned by commissioners in partition, and certain premises were set off to the trust for one K. A trustee who had been appointed having resigned, an order was made appointing a trustee under the will to *hold* the premises set apart by the commissioners in partition for the benefit of the said K. It was held that the phrase "to *hold*" in this order was used for purposes of identification, and not for the purpose of restricting any power which the trustee might otherwise have had, including that of the power of sale. *Lahey v. Kortright*, 56 N. Y. Super. Ct. 527.

**Person Receiving Profits.**—Where a tax is payable by "all persons having or *holding* lands," "the words apply to persons receiving the rents and profits; and where a party receives the whole of the profits, he is to be charged with the whole. But where one person receives the profits to a limited extent only, and another receives the residue, the words 'having and *holding*' embrace both." *Ward v. Const*, 10 B. & C. 635, 21 E. C. L. 141.

**Preservation of Life Interest.**—Where land was conveyed by an owner in fee simple, and in the deed he said: "And it is further understood that I, S. H., *hold* a life interest in the above-described tract of land," it was held that the word *hold* here had the effect of a reservation in behalf of the grantor for his life. *Hurst v. Hurst*, 7 W. Va. 289.

**A Covenant in a lease that the lessee should "hold and occupy"** the demised premises during the term was held to amount to a general covenant for quiet enjoyment during the term. *Ellis v. Welch*, 6 Mass. 246. See generally the titles COVENANTS, vol. 8, p. 97; LEASES.

**Homestead.**—A constitutional provision that a householder shall be entitled to *hold*, or may *hold* a homestead, does not, *stricto jure* confer a right to a homestead. The court said: "If therefore the emphatic expression 'shall be entitled to *hold*' means that the householder, or head of the family,

may, if he chooses, have the right to *hold*, certainly it cannot be questioned that the expression 'may *hold* a homestead' admits of no broader interpretation." *Speidel v. Schlosser*, 13 W. Va. 694. See also *Reed v. Union Bank*, 29 Gratt. (Va.) 723. And see the title HOMESTEAD, *post*.

**Corporations.**—Power given to a corporation to *hold* and manage a fund was held to imply a power to sue for it, and to give a right to leave the fund in the hands of an executor and demand only the annual interest. *White School House v. Post*, 31 Conn. 240.

A restriction on a corporation from purchasing and *holding* lands does not prohibit purchasing alone, subject to the statutes of mortmain. "Purchasing and *holding* are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor *hold*, then it could have done neither one nor the other." *Leazure v. Hillegas*, 7 S. & R. (Pa.) 320. And see *Hickory Farm Oil Co. v. Buffalo, etc., R. Co.*, 32 Fed. Rep. 22; *Runyan v. Coster*, 14 Pet. (U. S.) 131, where this distinction is sustained. See also the titles CORPORATIONS (PRIVATE), vol. 7, p. 714; FOREIGN CORPORATIONS, vol. 13, p. 851.

**Irish Acts.**—Under the Agricultural Holdings Act, 1875, *holding* includes all land held by the same tenant of the same landlord, for the same term, under the same contract of tenancy. Under the Land Law (Ireland) Act, 1881, *holding* during the continuance of a tenancy means a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy, and upon the determination of such tenancy means the same parcel of land discharged from the tenancy. This means not only the land comprised in the contract of tenancy, and actually let to the tenant, but includes such profits *à prendre* or easements as are appurtenant to the land so let. *In re Hutchinson*, 12 L. R. Ir. 79.

But where, under the contract of tenancy, the turbary was excepted to the landlord, the *holding* was held not to include the right of cutting turf. *Knox v. Baxter*, 19 L. R. Ir. 460.

**1. Holding to Bail.**—A statute authorized the *holding* to bail of persons suspected of certain offenses. It was held that this did not comprehend a power to take a recognizance to the injured party for treble damages allowed to him by statute. *Vose v. Deane*, 7 Mass. 283. See also the title BAIL AND RECOGNIZANCE, vol. 3, p. 651.

**Hold Responsible.**—In an action against a town for personal injuries occasioned by a defect in a highway, a notice by the husband of the plaintiff to the selectmen was in the following language: "I hereby give notice that I *hold* the town of North Andover responsible for serious injury sustained by my wife, Susie B. Hill." Upon the effect of this notice the court said: "But it is not the necessary meaning of these words that he *holds* the town responsible to himself. The situation of the parties may be taken into account in determining the meaning of the terms of such a notice, as well as those of a deed or other written



**HOLE.** — See note 1.

**HOLIDAY.** (See also the title SUNDAYS AND HOLIDAYS.) — Holiday means first, a consecrated day, a general festival; and second, a day on which the ordinary occupations are suspended; a day of exemption or cessation from work; a day of festivity, recreation, or amusement.<sup>2</sup>

instrument. It is both proper and usual for a husband to act as the protector of the rights of his wife, and he is very commonly her agent." *Higgins v. North Andover*, 168 Mass. 253.

In an act providing that the managers of a lottery "shall be *holden* to account for all the tickets in every class in said lottery," the expression "*holden* to account for," "means not merely to render an account of, but to be responsible for; it stands in opposition to the right of appropriation to one's own use and benefit." *Thomas v. Mahan*, 4 Me. 513.

**Holding Office.** (See also the title PUBLIC OFFICERS.) — The constitution of a state provided against the election or appointment to state offices of persons *holding* United States offices. In construing this provision the court said: "To constitute the *holding* of an office within the meaning of the constitution there must be the concurrence of two wills; that of the appointing power and that of the person appointed. If the mere tender of a commission could produce this result, then it would be in the power of the President to disqualify any person from *holding* a state office without his consent." *People v. Whitman*, 10 Cal. 44.

In an English act abolishing the sessions for Westminster, and directing that the county sessions for Middlesex should be *holden* in Westminster, and that the persons *holding* the offices of bailiff of Westminster, etc., should execute the duties of sheriff, etc., of Middlesex, the word *holding* was construed to mean "now *holding*," *i. e.*, at the time of the passing of the act. *Nicholson v. Ellis*, El. Bl. & El. 275, 96 E. C. L. 275.

**Same — De Facto Officer.** — A civil service act provided that no veteran of the United States army *holding* a position should be discharged except on hearing for incompetency or misconduct. It was held that this statute did not apply to an officer *holding* a position merely by a *de facto* title or whose employment was for any other reason illegal. The court said: "In a civilized community '*holding* a position' means lawfully *holding* it, and it would be unreasonable to declare that the legislature meant by that expression to include those who held office by force, fraud, mistake, or without any right thereto." *People v. Board of Health*, 153 N. Y. 513. See also the titles CIVIL SERVICE, vol. 6, p. 88; DE FACTO OFFICERS, vol. 8, p. 771.

**Holding Over — Officers.** — See the titles DE FACTO OFFICERS, vol. 8, p. 771; OFFICIAL BONDS; PUBLIC OFFICERS; and see such specific titles as JUDGES; JUSTICES OF THE PEACE; SHERIFFS, etc.

**Holding Over — Tenants.** — *Holding over* is defined to be the act of keeping possession of the premises. *Frost v. Akron Iron Co.*, 1 N. Y. App. Div. 454. See also the titles LANDLORD AND TENANT; LEASES.

1. *Hole or Other Place Near a Street.* — The

defendants, a local board, left unfenced a goit (gote) adjoining a public footpath within their district, by reason of which the plaintiff's husband, while using the footpath, fell into the goit and was drowned. It was held that the defendants were not liable under a statute rendering them liable for leaving unprotected a *hole* or other place near a street dangerous to passengers, as a goit was not a *hole*. *Wilson v. Halifax*, L. R. 3 Exch. 114.

2. *Foster v. Toronto R. Co.*, 31 Ont. 3; *Phillips v. Innes*, 4 Cl. & F. 234.

**Sunday.** — In *Glenn v. Eddy*, 51 N. J. L. 255, it was said: "*Holiday*, in its present conventional meaning, is scarcely applicable to Sunday." See also *Phillips v. Innes*, 4 Cl. & F. 234; *Smith v. Ihling*, 47 Mich. 614.

**Dies Non.** — In *Foster v. Toronto R. Co.*, 31 Ont. 3, it was said: "It is held in *Lampe v. Manning*, 38 Wis. 673, cited for the plaintiff, that the term *holiday* used in a statute means *dies non juridicus*, and that such being the case the court had no power to hear a cause and render judgment on such a day. This I conceive to be an entirely erroneous view of the word, first of all translating it into a dead language and then imputing to it an ecclesiastical meaning which is foreign to the atmosphere of a new country where no established church exists." See also *Didsbury v. Van Tassell*, 56 Hun (N. Y.) 423; *Brunker v. Mariposa Tp.*, 22 Ont. 120; *Harrison v. Smith*, 9 B. & C. 243, 17 E. C. L. 367. And for a full discussion of the distinction see the title SUNDAYS AND HOLIDAYS.

**Contracts.** — Where a contract specifies "working lay lays," Sundays and *holidays* are excluded in the computation. *Brooks v. Minturn*, 1 Cal. 481. See also the title DEMURRAGE, vol. 9, p. 220.

**Intoxicating Liquors — Christmas.** (See also the title INTOXICATING LIQUORS.) — In *Reithmiller v. People*, 44 Mich. 280, it was held that Christmas was a legal *holiday* within the meaning of the statute of 1879 directing that saloons be closed on legal *holidays*, Sundays, and election days.

**Same — Fourth of July.** — In *Ruge v. State*, 62 Ind. 388, an indictment for a violation of a liquor law charged the defendant with having sold intoxicating liquor, for a specific price, on the fourth day of July, 1876, "the said fourth of July being then and there a legal *holiday*." The statute upon which the indictment was brought prohibited the sale of liquor upon Sunday or "any legal *holiday*." The court held that the indictment could not be sustained, as, at the time when it was formed, there was no act making the fourth day of July a legal *holiday*. The Act of March 16, 1875, made it a *holiday* "for all purposes of presenting for payment or acceptance for the maturity and protest, and giving notice for the dishonor of bills of exchange," etc. But this did not make it a legal *holiday* within the

**HOLOGRAPH WILLS.** — See the title **WILLS**.

**HOME.** (See also the titles **DOMICIL**, vol. 10, p. 6; **POOR AND POOR LAWS**; **RESIDENCE**; **WILLS**; and see **DWELLING**, **DWELLING HOUSE**, ETC., vol. 10, p. 353.) — Home is defined as a dwelling house; a house where one resides; a residence.<sup>1</sup> The word "home" means some permanent abode, or residence

meaning of the section upon which the indictment was founded.

**Commencement Day.** — It has been held in *Massachusetts* that the day of commencement at Harvard College is not a *holiday*; but a usage of any bank in respect to notes falling due on that day, to make a demand on the maker and give notice to the indorser on the day preceding, will be binding on an indorser of a note discounted for him at the bank, who is cognizant of such usage. *City Bank v. Cutter*, 3 Pick. (Mass.) 414.

**Fast Day** was a *holiday* in *Massachusetts*, but by custom; not like Sunday, by positive law. In the absence of any statute or usage it was regarded as a working day. The proclamation of the governor was only a recommendation and had not the force of law. *The Bark Tangier*, 1 Cliff. (U. S.) 386. See also *Richardson v. Goddard*, 23 How. (U. S.) 40.

1. **Home.** — Webster's Dict., followed in *Coit v. Comstock*, 51 Conn. 382.

In *Barney v. Leeds*, 51 N. H. 265, it was said: "The *home*, according to all lexicographers, and in common parlance, is a residence or dwelling place — it may be a palace or a cot; and so the homestead or *home* place of a family \* \* \* must mean the residence or dwelling place of a family." This was a homestead case.

A testator created a trust, the object of which was the founding of a *home* for aged women who had been or were residents of a certain city. It was held that the term *home* sufficiently expressed the idea of the house for the permanent residence of the beneficiaries. *Coit v. Comstock*, 51 Conn. 382.

**Home — Lodgings.** — A person's *home* may be his own house or his hired lodgings. *School Dist No. 2 v. Pollard*, 55 N. H. 505. This was a settlement case. See generally the title **LODGINGS**.

**Home People in the Sense of Blood Relations.** — See *Fishburne v. Ferguson*, 84 Va. 112.

**Home Ranch.** — In *State v. Shaw*, 21 Nev. 222, it was said: "The usual meaning of the words '*home ranch*,' as used in the range country, is that it is the headquarters of the range. It is the place from which the riders start upon their rounds to rodeo and brand the stock, and to which they return when through; for the time being it is their *home*. But this does not necessarily make it the *home* of the cattle. If gathered and herded and cared for there regularly each year, it would doubtless become such; and it was in connection with these circumstances that this *home ranch* was held to cut some figure in *Barnes v. Woodbury*, 17 Nev. 383." This case arose upon the question where cattle were assessable for taxation.

**Home Farm.** — See *Hamilton v. Sharpe*, 20 L. R. Ir. 224; *Gamble v. Simpson*, 17 Ir. L. T. 44.

**Home Place.** — Where the issue was whether a certain tract of land in dispute was intended by a testator to pass under a devise of his '*home place*,' evidence that he had given par-

cels of land to certain of his sons, before his death, was irrelevant. *Waggoner v. Ball*, 95 N. Car. 323.

**Home Port.** (See also the titles **MARITIME LIENS**; **SEAMEN**; **SHIPS AND SHIPPING**.) — It has been held that the question of a vessel's *home* port is to be determined upon the locality of her owner's residence, and not upon the place of her enrolment. *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 431; *The Lotus No. 2*, 26 Fed. Rep. 642; *The Jennie B. Gilkey*, 19 Fed. Rep. 127; *The Charlotte Vanderbuilt*, 19 Fed. Rep. 219.

But in *The Favorite*, 3 Sawy. (U. S.) 411, Judge Deady said: "Under the ruling of *The Lottawana*, lately decided by the Supreme Court (21 Wall. (U. S.) 558), what constitutes a *home* port is yet an open question. But I think upon reason and convenience, the *home* port ought to be the one where the vessel is enrolled. Away from that place, whether in or out of the state in which her owner resides, she is supposed to be *in itinere*, and therefore relying upon her credit for the purchase of the necessary supplies to complete her voyage."

Whereas in *The Albany*, 4 Dill. (U. S.) 448, Judge Dillon said: "As respects the rights and remedies of materialmen, the *home* port or state of a vessel is the state wherein the owner resides, and not the state or district in which she is enrolled, where the two are different. To hold in such a case that the enrolment controlled would destroy the only foundation upon which a distinction between the rights of domestic and foreign materialmen has been made, viz., that the former are presumed to extend credit to the owner, whom they are supposed to know, or whom, at all events, they may pursue in the courts of their own state."

This view was adopted in *Rees v. Steamboat Gen. Terry*, 3 Dak. 166, where the court concluded: "After an examination of all the cases upon this subject within our reach, we are satisfied the clear weight of authority, as well as the effect of the decisions of the Supreme Court of the United States, is with the doctrine that the *home* port of a vessel is any port of the state or territory where the owner, or if more than one, where the managing owner, resides, so far as the question of *home* port affects the rights and remedies of the materialmen."

The *home* port of the vessel is the port in the office of whose collector the bill of sale, mortgage, etc., should be recorded; not the port of last registry or enrolment when not such *home* port. *White's Bank v. Smith*, 7 Wall. (U. S.) 646.

A *home* port is any port in which the owner happens to be with his vessel; but in *England* a *home* port is any port within the jurisdiction of the common-law courts of that island, if the owner resides in that country. *Case v. Woolley*, 6 Dana (Ky.) 17, 32 Am. Dec. 55.

Same — **Port of Shipment.** (See also the title



with intention to remain.<sup>1</sup>

**Support and Maintenance.** (See also the titles **SUPPORT**; **WILLS**.)—In a will, a gift of a home at the testator's dwelling and other place gives rise to the

**SEAMEN.**)—In *Purves v. Straits of Dover Steamship Co.*, (1899) 2 Q. B. 217, it was held that when the service of a seaman belonging to a British ship terminated at a foreign port, and the master elected to provide him with a passage home under the Merchants Shipping Act of 1894, the master was bound to provide him with the passage to the port at which he was shipped. See also *Edwards v. Steel*, (1897) 1 Q. B. 712. So in the same case on appeal, (1897) 2 Q. B. 327, it was held that the master was bound to provide the seaman with a passage to the port at which he was originally shipped or to a port in the United Kingdom agreed to by him.

1. *Turner v. Buckfield*, 3 Me. 231; *Jefferson v. Washington*, 19 Me. 301.

Where a person takes up his abode without any present intention of removing therefrom permanently, such place is his *home*. *Warren v. Thomaston*, 43 Me. 418.

A Contract required the complainants to fix their *home* on certain lands. In construing this provision the court said: "When a man makes his *home* in a particular place he does not thereby absolutely make it his residence for life, or for any fixed period. That is a man's *home* which, for the time at least, he does not contemplate changing, and which he expects to retain unless some event not then in view may make it desirable or necessary to give it up." *Welch v. Whelpley*, 62 Mich. 20.

**Home and Domicil.**—*Home* and "domicil" do not correspond, yet *home* is the fundamental idea of domicil. "The law takes the conception of *home*, and, moulding it by means of certain fictions and technical rules to suit its own requirements, calls it 'domicil;' or perhaps this may be best expressed by slightly altering Westlake's statement and saying: 'Domicil is the legal conception of *home*.' To combine, then, what has been said in this and the last preceding sections, 'domicil' expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent *home*." *Jacobs on Domicil*, quoted in *Dean v. Cannon*, 37 W. Va. 127. See also *Long v. Ryan*, 30 Gratt. (Va.) 718.

In *White v. Brown*, 1 Wall. Jr. (C. C.) 262, it was said: "It may be correctly said, however, that no one word is more nearly synonymous with the word 'domicil' than our word *home*." See also *Hart v. Horn*, 4 Kan. 232.

In *In re Craignish*, (1892) 3 Ch. 192, it was said: "A man may be in fact homeless, but he cannot in law be without a domicil. Subject to this distinction the term *home*, in its ordinary popular sense, is practically identical with the legal idea of domicil." See also *Jefferson v. Washington*, 19 Me. 301; *Exeter v. Brighton*, 15 Me. 60.

**Colonist.**—Upon the question of a party's domicil it appeared in evidence that he had referred in letters a number of times to England as his *home*. Upon the strength of this evidence the court said: "An Englishman permanently settled in one of the English

colonies may without impropriety speak of going *home* when he is paying a visit to England. If asked to explain himself, he would probably say that he used the term in reference to the mother country from which he and his brother colonists had emigrated or originally sprung, and that his own true *home* was in the colony." *In re Craignish*, (1892) 3 Ch. 191.

**Residence and Home.**—Upon the use of the words "residence" and "resident" in a constitutional provision prescribing the qualification of electors, the court said: "Without entering into a labored disquisition upon the import of the words 'resident' and 'residence,' it may be safely assumed that, in the proper interpretation of the constitution, the word 'residence' may be regarded as synonymous with *home*; and that to reside in a particular place means to have one's *home* there." *Lehman v. McBride*, 15 Ohio St. 600. See also *State v. Aldrich*, 14 R. I. 174; *Fry's Election Case*, 71 Pa. St. 302. And see *Tyler v. Murray*, 57 Md. 442; *State v. Gittings*, 35 Md. 169, where it was held that to constitute residence at a certain place the party must make such place his *home*.

**Permanency.**—"The legislature intended, by the use of the expression 'dwells and has his *home*,' to designate some permanent abode, a residence with an intention to remain, or at least without an intention of removal—something more than the habits and life of a wanderer who has no place where he has a right to continue and call it and claim it as his rightful *home*." *Turner v. Buckfield*, 3 Me. 231. See also *Warren v. Thomaston*, 43 Me. 418. But in *Campbell v. State*, 28 Tex. App. 44, it was held that a person's temporary residence was for the time being his *home* and his own premises, within the exception of the statute against carrying weapons.

**Poor and Poor Laws.** (See also the title **POOR AND POOR LAWS**.)—In *Guilford v. Gilman-town*, 1 N. H. 194, it was held that where the parents of a single woman lived in one town, and she, when of age, labored for wages in another, her "dwelling place or *home*," under the *New Hampshire* statute as to the settlement of paupers, was in the town where she labored.

A pauper, while supported as such, was held to have no "dwelling place or *home*" within the meaning of a statute regulating settlements. *Wilmington v. Somerset*, 35 Vt. 232. See also *Jamaica v. Townshend*, 19 Vt. 271; *Berlin v. Worcester*, 50 Vt. 23.

In *Rockland v. Morrill*, 71 Me. 455, it was held that a person who had died prior to the division of a town could not be considered as having had his *home* in the new town.

**The Principal Place of Abode** of a man and his family, when it is only a temporary abode, is not his *home* in the sense here required." *Thayer v. Boston*, 124 Mass. 147.

In *Phillips v. Kingfield*, 19 Me. 381, it was said: "In our pauper laws there is a marked distinction between the place of residence, or *home*, and the place of legal settlement. The



question whether "home" includes support or maintenance. This question must be determined by the testator's intention, having due regard to the context and surrounding circumstances.<sup>1</sup>

**HOMESTALL.** — "Homestall" is used in old English law to designate the mansion house.<sup>2</sup>

latter cannot be changed without acquiring a new one. The former may be abandoned without evidence that another residence has been secured." See also *Jefferson v. Washington*, 19 Me. 300.

**Usual Place of Abode.** — In *Fowler v. Mosher*, 85 Va. 421, it was held that a return stating that the person to be notified was not at *home* was sufficient to authorize service upon a member of his family, under a statute providing that if a person was not found at his usual place of abode service might be made upon a member of his family. See generally *ENCYC. OF PL. AND PR.*, title *SERVICE OF PROCESS*.

**1. Held to Include Support and Maintenance.** — In *Willett v. Carroll*, 13 Md. 460, where a testatrix devised a farm to W. in fee, and added, "I do hereby will and direct that the said C. shall have a *home* during her natural life on the farm hereinbefore bequeathed," it was held that the devise of the *home* was not void for uncertainty, nor was it confined to a mere room and shelter in the house on the farm, but extended to the board and maintenance of the devisee, and was a charge upon the land. See also *Lyon v. Lyon*, 65 N. Y. 339.

A testator gave to his sister "a home at my house as long as she lives, and I direct that my executors attend to this." It was held, considering all the circumstances, such as his moderate income, the character of the testator's family, the extent of his property, and the slender provision made for the legatee in the will, etc., that the testator intended that the legatee should not only be allowed to live in the house, but that the executors should furnish her with necessary food and fuel, though not with clothing. *Denfield*, Petitioner, 156 Mass. 265.

**Held Not to Include Support and Maintenance.** — A father conveyed a tract of land to his two sons upon the consideration that the grantees would, at his death, give to their unmarried sisters the sum of two hundred dollars each and a *home* upon the land. It was held that the expression "have a *home* on said land,"

as used in this deed, did not include the right to support and maintenance therefrom. *Shuttleworth v. Shuttleworth*, 34 W. Va. 23. See also *Kennedy's Appeal*, 81\* Pa. St. 163.

In *Augustine v. Schrier*, 18 Ont. 192, where a testator bequeathed to his daughter a *home* in the dwelling house as long as she should remain single, it was held that though in the case of an infant *home* would probably include maintenance, yet that as the legatee in this case was of age, and as there were no express words giving maintenance to her, she was not entitled to it under the bequest.

In *Nelson v. Nelson*, 19 Ohio 284, where a testator divided all his property except his homestead among his children, and devised that, after the death of his widow, to his three sons, with the proviso that his unmarried daughter should not be deprived of a *home* upon it, it was held that this proviso gave to the daughter a right to reside on the homestead, but not to a maintenance from the rents and profits.

A testator directed that his property be kept together and his family supported out of it, under the government of his wife, and that no expenses should be charged to his children while they remained at *home*, etc. It was held that a daughter who left the family after she attained full age was not entitled to maintenance. The court said: "It is plain, we think, that the *home* mentioned in the will is that household of which the testator was the head while living, and the government whereof he committed to his wife upon his death." *Manning v. Woff*, 2 Dev. & B. Eq. (22 N. Car.) 11.

So where a testator left to his unmarried daughter "a *home* and maintenance during the time she remains unmarried," this was held to mean a *home* and maintenance on the premises where he lived at the time of his death, and she was not entitled to be supported elsewhere. *Parker v. Parker*, 126 Mass. 433.

**2. Dickinson v. Mayer**, 11 Heisk. (Tenn.) 521.  
Volume XV.

# HOMESTEAD.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *HOMESTEADS AND EXEMPTIONS*, 10 *ENCYCLOPEDIA OF PLEADING AND PRACTICE* 55.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONSTITUTIONAL LAW*, vol. 6, p. 882; *EXECUTIONS*, vol. 11, p. 604; *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 59; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, *post*; *SHERIFFS, MARSHALS, AND CONSTABLES*; *STATUTES*.

**I. SCOPE OF TITLE.** — The exemption of personal property from seizure and sale on execution, attachment, and other process and the exemption of debts from garnishment and trustee process are treated at length under another title.<sup>1</sup> Under this title it is proposed to deal with those statutes only which exempt a homestead. The treatment will cover, however, not only the exemption of land, but also the exemption of other property, as a part of the homestead, or in lieu of a homestead. Many of the questions which will be discussed are substantially the same as those discussed in treating of personal property exemptions, and many of the cases there cited are also applicable here, but to avoid repetition the cases cited under this title will be limited, as far as possible, to those which have been decided under the homestead laws. Throughout the article specific cross-references will be given to particular pages of the title *EXEMPTIONS (FROM EXECUTION)*.

**II. DEFINITION, ORIGIN, AND NATURE OF HOMESTEAD EXEMPTION — 1. Definition.** — The homestead may be defined generally as real property owned by the head of a family and occupied by the family as a home.<sup>2</sup> It includes the house in which the family resides and the adjoining land, together with the usual and customary appurtenances.<sup>3</sup> In a few jurisdictions the term "homestead" is applied to personal property exempted to a debtor, as well as to real property,<sup>4</sup> but strictly speaking this is a misapplication of the term.

**2. Origin of Homestead Exemption.** — At common law a creditor could not seize and sell land of his debtor to satisfy the debt, but he might reach the present profits by the writs of *fiery facias* or *levari facias*. He could not take possession, nor could he cause the land to be sold.<sup>5</sup> This, however, has long since ceased to be the law. In England and in all of the United States stat-

1. *Personal Property Exemptions.* — See the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 59.

2. *Homestead Defined.* — *Century Dict.* And see *Bouvier's L. Dict.*

3. *Gregg v. Bostwick*, 33 Cal. 227, 91 Am. Dec. 637.

In *Hoitt v. Webb*, 36 N. H. 158, it was said by Eastman, J.: "'Steithe, or sted,' says Lord Coke, 'betokeneth properly a bank of a river, and many times a place.' Co. Litt. 4, 6. The homestead, according to that definition, means the home place — the place where the house is; and such is its legal acception at the present day. It is the home, the house, and the adjoining land, where the head of the family dwells; the home farm." See also *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Cook v. McChristian*, 4 Cal. 23;

*Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Barney v. Leeds*, 51 N. H. 253; *Austin v. Stanley*, 46 N. H. 51; *Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425; *Iken v. Olenick*, 42 Tex. 198; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Philleo v. Smalley*, 23 Tex. 498; *Bunker v. Locke*, 15 Wis. 638. And see *infra*, this title, *Property in Which Exemption May Be Claimed*.

"Homestead is the house and land constituting a family residence. In law it is such family residence exempt from forced sale." *McCanna v. Anderson*, 6 N. Dak. 482, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 424.

4. See 2 Code Ga. (1895), § 2827 *et seq.*; Civ. Stat. S. Car. (1893), § 2126 *et seq.*

5. *At Common Law.* — 3 Black. Com. 418.

utes have been enacted subjecting the real property of a debtor to seizure and sale to satisfy his debts.<sup>1</sup> After the enactment of such statutes, it came to be very generally considered, at least in the *United States*, that public policy required the home of a debtor and his family to be exempted from seizure and sale for his debts, and in most of the states constitutional provisions or statutes or both have been adopted or enacted for this purpose and are now in force. These provisions are not in derogation of the common law, for the debtor's land could not be seized and sold at all at common law.<sup>2</sup>

**3. Object of Homestead Laws.** — The principal if not the sole object of most of the homestead exemption laws is to protect debtors and their families in the possession and enjoyment of homes, so as to give to them shelter beyond the reach of financial misfortune.<sup>3</sup>

**4. Nature of Estate or Right** — *a. IN GENERAL.* — The homestead estate or right is purely a creature of the constitution or statute, and there is no precisely similar interest or estate known to the common law.<sup>4</sup> The entire object of the homestead exemption laws is to secure a homestead — in most jurisdictions, a home for the family — and no infringement upon rights of property and titles is intended, except such as may be necessary for this object.<sup>5</sup>

*b. TITLE TO PROPERTY.* — A claim of homestead does not give any new title, nor does it strengthen or enlarge the one existing. It does not create any interest in the property when the parties claiming homestead have no title or estate therein, and therefore it is no defense in an action to quiet title or of ejectment.<sup>6</sup>

*c. WHETHER ESTATE OR MERE PRIVILEGE.* — In some jurisdictions the courts have held that the right of homestead exemption is an estate in the land,<sup>7</sup> and in different jurisdictions it has been designated as, or likened to, a

1. See the title *EXECUTIONS*, vol. II, p. 630.

2. **Homestead Laws Not in Derogation of Common Law.** — See the opinion of Sherwood, J., in *Riggs v. Sterling*, 60 M'ch. 643, 1 Am. St. Rep. 554, where an interesting account is given of the extent of the creditor's rights against the debtor's realty under the ancient English statutes. See also *Barnett v. Knight*, 7 Colo. 365; *Lindley v. Davis*, 7 Mont. 206, overruling 6 Mont. 453. And see further *infra*, this title, *Rules for Construction of Homestead Laws*.

Some courts, however, have held that the homestead exemption laws are in derogation of the common law. *Duchamp v. Butterly*, 11 La. Ann. 67; *Fuselier v. Buckner*, 28 La. Ann. 594; *Galligar v. Payne*, 34 La. Ann. 1057; *Bossier v. Raines*, 37 La. Ann. 263; *Olson v. Nelson*, 3 Minn. 53; *Garaty v. DuBose*, 5 S. Car. 493.

3. **Object of Homestead Laws.** — *Miller v. Marx*, 55 Ala. 322; *Tumlinson v. Swinney*, 22 Ark. 400; *Tromans v. Mahlman*, 92 Cal. 1; *Parsons v. Livingston*, 11 Iowa 106, 77 Am. Dec. 135; *Howell v. McCrie*, 36 Kan. 644; *Hebert v. Mayer*, 48 La. Ann. 938; *Beecher v. Baldy*, 7 Mich. 488; *Blandy v. Asher*, 72 Mo. 27. And see *infra*, this title, *Rules for Construction of Homestead Laws; Persons Entitled to Benefit of Homestead Exemption*.

4. **Nature of Homestead Estate or Right.** — See 1 *Washburn on Real Prop.* (5th ed.) 353, 354; *Barney v. Leeds*, 51 N. H. 253.

5. **Property Rights Not Generally Infringed.** — *Bowman v. Norton*, 16 Cal. 214; *Burns v. Keas*, 21 Iowa 257; *Citizens' Nat. Bank v. Green*, 78 N. Car. 247.

6. **Title Not Affected.** — *Calderwood v. Tevis*, 23 Cal. 335; *Brooks v. Hyde*, 37 Cal. 366; *Johnston v. Bush*, 49 Cal. 198; *Snodgrass v. Parks*, 79 Cal. 55; *Patterson v. Patterson*, 49 Mich. 176; *Buckingham v. Buckingham*, 81 Mich. 89; *Trimmier v. Winsmith*, 41 S. Car. 109; *Chalmers v. Turnipseed*, 21 S. Car. 136.

**Title as Between Husband and Wife.** — If premises are the separate property of either husband or wife, or the common property of both, before they become impressed with the homestead character, they remain such separate or common property afterwards. *Johnston v. Bush*, 49 Cal. 198.

**"Artificial Estate."** — In *Buckingham v. Buckingham*, 81 Mich. 89, it was said that the homestead was an artificial estate in land, devised for the purpose of protecting the possession of the owner against the claims of creditors while the land is occupied as a home; but that it does not protect the person in possession against the claims of the legal owner of the land.

7. **An Estate** — *California.* — *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108.

*Illinois.* — *Warner v. Crosby*, 89 Ill. 320; *Eldridge v. Pierce*, 90 Ill. 474; *Browning v. Harris*, 99 Ill. 456; *Hartman v. Schultz*, 101 Ill. 437; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Hagerty v. Hagerty*, 149 Ill. 655; *Mueller v. Conrad*, 178 Ill. 276; *Lorimer v. Marshall*, 44 Ill. App. 645; *Alexander v. Alexander*, 52 Ill. App. 795. It was different under the former statute. See *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112, referred to in a note following (p. 528).



joint tenancy,<sup>1</sup> a life estate,<sup>2</sup> a determinable fee,<sup>3</sup> a trust estate,<sup>4</sup> or a freehold estate.<sup>5</sup> In other jurisdictions it is held that the right of homestead is a mere privilege, or right of exemption, and not an estate at all.<sup>6</sup> The importance of this distinction will be seen in subsequent sections.

*Massachusetts.* — Silloway v. Brown, 12 Allen (Mass.) 30; Kerley v. Kerley, 13 Allen (Mass.) 286; Woodbury v. Luddy, 14 Allen (Mass.) 1, 92 Am. Dec. 731; Abbott v. Abbott, 97 Mass. 136.

*Michigan.* — Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554. But see Robinson v. Baker, 47 Mich. 619; Patterson v. Patterson, 49 Mich. 176; Chamberlain v. Lyell, 3 Mich. 448.

*Nebraska.* — Galligher v. Smiley, 28 Neb. 189, 26 Am. St. Rep. 319.

*New Hampshire.* — Cross v. Weare, 62 N. H. 125, and cases cited in the second note following.

*Tennessee.* — Gilbert v. Cowan, 3 Lea (Tenn.) 203; Fauver v. Fleenor, 13 Lea (Tenn.) 622; Flatt v. Stadler, 16 Lea (Tenn.) 371. But see Carrigan v. Rowell, 96 Tenn. 185.

*Texas.* — Hargadene v. Whitfield, 71 Tex. 482.

Where the Homestead Has Not Been Set Off or Assigned, it is not such an interest in land as is alienable separately from the fee. *Lagger v. Mutual Union Loan, etc., Assoc.*, 146 Ill. 283; *Best v. Jenks*, 123 Ill. 447. See also *Gunnison v. Twitchel*, 38 N. H. 62; *Bennett v. Cutler*, 44 N. H. 69.

1. **As Joint Tenancy.** — In *California*, where the homestead law, in order to protect the homestead for the benefit of the wife as well as the husband, prohibited any alienation or incumbrance by the husband without the wife's consent and joinder, and gave to the wife the right thereto on the death of the husband, it was at first held that the homestead was "a sort of joint tenancy, with the right of survivorship, at least as between husband and wife." *Taylor v. Hargous*, 4 Cal. 268, 60 Am. Dec. 606; *Poole v. Gerrard*, 6 Cal. 71, 65 Am. Dec. 481; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Matter of Buchanan*, 8 Cal. 507; *Matter of Tompkins*, 12 Cal. 114.

In later cases, however, this view was repudiated, and it was held that the homestead was a mere privilege. *Gee v. Moore*, 14 Cal. 472. And see *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Bowman v. Norton*, 16 Cal. 213; *Brennan v. Wallace*, 25 Cal. 108.

After these decisions a statute was enacted, in 1860, expressly declaring that the husband and wife should hold the homestead "as joint tenants." *Barber v. Babel*, 36 Cal. 11.

In *Arkansas* the earlier *California* cases were followed, and it was held that the homestead right of husband and wife and children was like "a joint tenancy, with right of survivorship." *Johnston v. Turner*, 29 Ark. 280.

2. **Estate for Life.** — In some states the homestead has been treated as being within the category of estates for life. 1 Washburn on Real Prop. (5th ed.) 353, 354.

*Illinois.* — *Browning v. Harris*, 99 Ill. 456; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526.

*Massachusetts.* — *Smith v. Provin*, 4 Allen (Mass.) 516; *White v. Rice*, 5 Allen (Mass.) 73; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Silloway*

*v. Brown*, 12 Allen (Mass.) 30; *Kerley v. Kerley*, 13 Allen (Mass.) 286, and other Massachusetts cases cited in the second note preceding.

*New Hampshire.* — *Norris v. Moulton*, 34 N. H. 392; *Fletcher v. State Capital Bank*, 37 N. H. 369; *Barney v. Leeds*, 51 N. H. 253; *Cross v. Weare*, 62 N. H. 125.

*Tennessee.* — *Gilbert v. Cowan*, 3 Lea (Tenn.) 203; *Flatt v. Stadler*, 16 Lea (Tenn.) 371; *Fauver v. Fleenor*, 13 Lea (Tenn.) 622.

*Vermont.* — *Davis v. Andrews*, 30 Vt. 678.

3. **Determinable Fee.** — In *North Carolina* the homestead was held in one case to be a determinable fee. *Poe v. Hardie*, 65 N. Car. 447. But this case was shortly afterwards overruled. *Citizens' Nat. Bank v. Green*, 78 N. Car. 247; *Jones v. Britton*, 102 N. Car. 166. Not being a determinable fee, it is now held in this state that a creditor can, by injunction, restrain waste. *Jones v. Britton*, 102 N. Car. 166.

4. **Trust Estate.** — In *Georgia* it has been held that the title to land set apart as a homestead is for the use and benefit of the family and is in the nature of a trust estate. *Willingham v. Maynard*, 59 Ga. 330; *Wilder v. Frederick*, 67 Ga. 669.

5. **Freehold Estate.** — In *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, it was held that the surviving wife's homestead right in her deceased husband's land constituted a freehold estate within the meaning of the statute granting the right of appeal in cases where freehold estates were involved. See also *Silloway v. Brown*, 12 Allen (Mass.) 30; *Kerley v. Kerley*, 13 Allen (Mass.) 286; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731; *Abbott v. Abbott*, 97 Mass. 136; *Gilbert v. Cowan*, 3 Lea (Tenn.) 203; *Fauver v. Fleenor*, 13 Lea (Tenn.) 622; *Flatt v. Stadler*, 16 Lea (Tenn.) 371.

6. **Mere Privilege.** — *Georgia.* — *Sparger v. Cumpton*, 54 Ga. 355; *Harris v. Glenn*, 56 Ga. 96.

*Iowa.* — *Burns v. Keas*, 21 Iowa 257.

*Kentucky.* — *Brame v. Craig*, 12 Bush (Ky.) 404; *Little v. Woodward*, 14 Bush (Ky.) 585; *Eby v. Lovelace*, 4 Ky. L. Rep. 449; *Schmidt v. Oliges*, 6 Ky. L. Rep. 296.

*North Carolina.* — *Citizens' Nat. Bank v. Green*, 78 N. Car. 253; *Markham v. Hicks*, 90 N. Car. 204; *Jones v. Britton*, 102 N. Car. 166; *Hughes v. Hodges*, 102 N. Car. 236; *Fleming v. Graham*, 110 N. Car. 374. These cases overruled *Adrian v. Shaw*, 82 N. Car. 474, 84 N. Car. 832.

*Tennessee.* — *Carrigan v. Rowell*, 96 Tenn. 185.

In *Citizens' Nat. Bank v. Green*, 78 N. Car. 247, it was said by Judge Bynum: "The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemp-

5. **What Law Governs.** — The right to claim a homestead exemption, and its value, quantity, and extent, are to be determined, as against a creditor, by the law that was in force at the time the debt was contracted.<sup>1</sup>

**Lex Loci or Lex Fori.** — The right to a homestead exemption relates to the remedy, and is not regulated by the law of the place of the contract.<sup>2</sup>

**III. CONSTITUTIONAL PROVISIONS** — 1. **In General.** — The exemption of the homestead from forced sale for the payment of debts is guaranteed in some states by constitutional provisions.<sup>3</sup> These provisions vary in the different states.

2. **Power of People to Adopt Such Provisions.** — There can be no doubt that the people of a state, in their constitution, and in so far as future debts may affect it, have the right to provide for any sort of a homestead, guarded as they please, subject to restrictions or without restrictions, and to prohibit the owner of the homestead from encumbering it, or to permit it to be done as in their wisdom they may deem fit.<sup>4</sup>

3. **Whether Self-executing.** — Some of the constitutional provisions are self-executing; that is, they themselves give the right of exemption, and no legislation at all is necessary to carry them into effect.<sup>5</sup> Others are not self-executing, but merely expressly or impliedly direct the legislature to pass laws in accordance with them.<sup>6</sup> In such a case no exemption can be claimed until

tion from the payment of his debts in respect to the particular property allotted to him."

**Under the Former Illinois Statute** the homestead was a mere privilege. *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112. See also *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Hewitt v. Templeton*, 48 Ill. 367. But under the present statute it is an estate. See the Illinois cases in the sixth note preceding (p. 526).

1. **What Law Governs Right to Homestead Exemption** — *Alabama.* — *Nelson v. McCrary*, 60 Ala. 301; *Peevey v. Cabaniss*, 70 Ala. 253; *Cochran v. Miller*, 74 Ala. 50.

*Iowa.* — *Bridgman v. Wilcut*, 4 Greene (Iowa) 563.

*Louisiana.* — *Thomas v. Guilbeau*, 35 La. Ann. 927.

*Nebraska.* — *Dorrington v. Myers*, 11 Neb. 388; *De Witt v. Wheeler, etc.*, *Sewing Mach. Co.*, 17 Neb. 533; *McHugh v. Smiley*, 17 Neb. 620; *Gallagher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319.

*South Carolina.* — *McClenaghan v. McEachern*, 47 S. Car. 446.

**For a Full Collection of Cases** to the effect that the homestead exemption laws do not apply as against debts contracted before their enactment, see *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

**Date of Contract Not Appearing.** — When it is sought to subject a homestead to satisfaction of a judgment, and the date of the contract on which the judgment was rendered does not appear, the law as it existed at the time when the judgment was recovered will be applied. *McHugh v. Smiley*, 17 Neb. 620.

2. **Law of Forum Governs.** — *Helfenstein v. Cave*, 3 Iowa 287.

3. **Constitutional Provisions for Homestead Exemption.** — See the various state constitutions.

4. *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

**Limitation as to Amount of Homestead Exemption.** — In a *Kansas* case it was said that the state (not the legislature) is not omnipotent as

to the amount of property which it may exempt to a debtor as his homestead, and that a homestead exemption could not be upheld if it should be apparent that the object was not so much to secure the well being of the citizens as to enable them to hold large amounts of property for their own aggrandizement and for other purposes than that of homesteads. But it was held that the state has the power to provide for a reasonable homestead exemption, and that such provision must be sustained, notwithstanding individual hardship, so long as the extent of the homestead is in accordance with sound policy and humanity, and no greater than is reasonably necessary to protect the citizens in the pursuits necessary to their existence and well being. *Cusic v. Douglass*, 3 Kan. 123, 87 Am. Dec. 458.

5. **Self-executing Provisions.** — See *Miller v. Marx*, 55 Ala. 322; *Beecher v. Baldy*, 7 Mich. 488; *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553. See also *Martin v. Hughes*, 67 N. Car. 296; *Reed v. Union Bank*, 29 Gratt. (Va.) 719; and the following constitutional provisions, all of which are clearly self-executing: Const. Ala., art. 10, §§ 2-7; Const. Ark., art. 9, §§ 3-6, 10; Const. Fla., art. 10, §§ 1-6; Const. Kan., art. 15, § 9; Const. La., art. 244; Const. Va., art. 11, §§ 1-7. This matter is further considered under the title CONSTITUTIONAL LAW, vol. 6, p. 913, and p. 914, note 1.

**Exception of Particular Debts.** — In *Nickerson v. Crawford*, (Minn. 1898) 77 N. W. Rep. 292, it was held that the constitutional provision in *Minnesota* that exempted property "shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair, or improvement of the same," is self-executing.

6. **Provisions Not Self-executing.** — See *Cary v. Tice*, 6 Cal. 625; *Pfeiffer v. Riehn*, 13 Cal. 643; *Noble v. Hook*, 24 Cal. 638; *Gee v. Moore*, 14 Cal. 472; *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Kelly v. Dill*, 23 Minn.



the legislature has provided therefor.<sup>1</sup>

**IV. CONSTITUTIONALITY OF STATUTORY PROVISIONS — 1. Power of Legislature in General.** — There can be no question as to the power of the state legislatures to exempt the homestead of a debtor from liability to seizure and sale for the satisfaction of his debts, subject to restrictions or not, as they may see fit, provided that in doing so they violate no express provision of the state or federal constitutions; and the discretion of the legislature as to the extent of the exemption, so long as it is within the constitution, cannot be reviewed by the courts.<sup>2</sup>

**Conferring Homestead upon Widow and Children of Deceased Owner.** — It is within the power of the legislature to confer the right to claim a homestead upon the wife or minor children of the deceased owner of the land who has not claimed and set apart his homestead in his lifetime.<sup>3</sup>

**2. Constitutional Provisions and Limitations — a. IN GENERAL.** — Of course it is not within the power of any state legislature to pass a law that is in conflict with a provision of either the state or the federal constitution; and there are some provisions in both constitutions which operate as limitations on the power of the legislatures to enact laws exempting homesteads.<sup>4</sup>

**b. SPECIAL OR CLASS LEGISLATION.** — Of course homestead exemption laws are, like any other law, subject to the constitutional prohibition against special or class legislation.<sup>5</sup>

**c. TITLE OF ACTS AND UNITY OF SUBJECT-MATTER.** — Homestead exemption laws are, of course, within the provision of the various constitutions that no act shall embrace more than one subject, and that this subject shall be expressed in its title. This provision is not violated, however, because the title of an act does not amount to a complete analysis or abstract of its text. It is sufficient if the subject-matter of the act is fairly expressed in general language.<sup>6</sup>

435. And see Const. Colo., art. 18, § 1; Const. Ill., art. 4, § 32; Const. Utah, art. 22, § 1; Const. Wash., art. 19, § 1; Const. Wis., art. 1, § 17.

The West Virginia Decisions holding the homestead provision of the constitution of 1872 of that state not self-executing (*Speidel v. Schlosser*, 13 W. Va. 686; *Holt v. Williams*, 13 W. Va. 704; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66) do not seem sound, and seem clearly contrary to the *Michigan* decision and the other decisions referred to in the note preceding.

**1. No Right of Homestead Without Legislation.** — *Kelly v. Dill*, 23 Minn. 435.

Generally as to When Constitutional Provisions Are Self-executing, and when they require legislative action to give them effect, see the title CONSTITUTIONAL LAW, vol. 6, p. 912, especially the paragraph *Homestead Exemption*, pp. 913, 914.

See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 71.

**2. Homestead Exemption Laws Are Within Power of Legislatures — California.** — *Pfeiffer v. Riehn*, 13 Cal. 643.

*Kansas.* — *Cusic v. Douglass*, 3 Kan. 123, 87 Am. Dec. 458.

*Minnesota.* — *Coleman v. Ballandi*, 22 Minn. 141.

*Texas.* — *Alsop v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 53.

*Virginia.* — *Helm v. Helm*, 30 Gratt. (Va.) 404.

*West Virginia.* — *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

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And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 72.

**3. Giving Homestead to Widow or Children.** — *Hatorff v. Wellford*, 27 Gratt. (Va.) 356; *Helm v. Helm*, 30 Gratt. (Va.) 404. See *infra*, this title, *Homestead Rights of Surviving Spouse and Children*.

**4. Constitutional Limitations — Kentucky.** — *Eubank v. Eubank*, 7 Ky. L. Rep. 295.

*North Carolina.* — *Wharton v. Taylor*, 88 N. Car. 230.

*South Carolina.* — *Duncan v. Barnett*, 11 S. Car. 333, 32 Am. Rep. 476.

And see other cases cited in the notes following.

**5. Special or Class Legislation.** — *Burrows v. Brooks*, 113 Mich. 307; *Coleman v. Ballandi*, 22 Minn. 144; *Bull v. Conroe*, 13 Wis. 233. And see the title STATUTES.

**Liability for Purchase Money.** — It has been held that the statute making property otherwise exempt subject to execution upon a judgment rendered in an action for the purchase money thereof is not unconstitutional as class legislation. *Rogers v. Brackett*, 34 Minn. 279.

**A Homestead Law Excluding Negroes from its benefits violates the Fourteenth Amendment of the Federal Constitution.** *Eubank v. Eubank*, 7 Ky. L. Rep. 295; *Custard v. Posten*, 8 Ky. L. Rep. 260. And see the title CIVIL RIGHTS, vol. 6, p. 78, note.

**6. Title of Acts and Unity of Subject-matter.** — *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Barton v. Drake*, 21 Minn. 209. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 73; and generally the title STATUTES.



*d. RETROACTIVE HOMESTEAD LAWS.* — It is now settled that the provision of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts prevents any state from passing a law allowing a homestead exemption as against debts or liens previously contracted or existing. This question will be dealt with in a subsequent section.<sup>1</sup>

*e. EFFECT OF CONSTITUTIONAL PROVISIONS FOR EXEMPTION — (1) In General.* — If, as is the case in some states, the state constitution itself exempts the homestead of a debtor from forced sale, and prescribes the extent of the exemption, no act of the legislature is valid if it impairs the constitutional exemption or otherwise conflicts with the constitution.<sup>2</sup>

When the Constitution Directs the Legislature to Enact Laws granting exemptions, no act of the legislature in pursuance thereof is valid if it fails to comply with the constitutional directions.<sup>3</sup>

*(2) Discretion of Legislature.* — Under a constitutional provision directing the legislature to enact reasonable exemption laws, or to exempt a reasonable amount of property, it is, as a general proposition, for the legislature to say what amount of property may reasonably be exempted, and otherwise to fix the right of exemption;<sup>4</sup> but its discretion is not absolute and unlimited, nor is its action entirely beyond the reach or control of the courts.<sup>5</sup> A statute giving an unreasonable exemption cannot be sustained.<sup>6</sup>

*(3) Enlarging Constitutional Exemption.* — Some of the courts have held that when the constitution exempts a homestead of a certain character or amount, or for a certain period, or gives a right of homestead exemption to a particular class of persons, this does not prevent the legislature from enlarging the exemption as to either its character, duration, or amount, or as to the persons entitled to claim it, while other courts have held that in such a case the constitution operates as a limitation upon the power of the legislature and prevents it from either restricting or enlarging the right of exemption.<sup>7</sup>

**1. Retroactive Homestead Laws Are Unconstitutional.** — See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

**2. Constitutional Provisions for Exemptions Limit Legislative Power** — *Alabama.* — *Miller v. Marx*, 55 Ala. 322.

*Georgia.* — *Calhoun v. McLendon*, 42 Ga. 405.

*Minnesota.* — *Coleman v. Ballandi*, 22 Minn. 144; *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108.

*North Carolina.* — *Martin v. Hughes*, 67 N. Car. 293.

**3. Directory Constitutional Provisions — Compliance by Legislature.** — *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Coleman v. Ballandi*, 22 Minn. 144.

**Provisions as to Mode of Claiming and Setting Apart.** — The fact that the homestead exemption is given by the constitution, and its limitations, etc., are therein specified, does not prevent the legislature from prescribing the mode of setting it apart and requiring the debtor to claim it, provided the benefits of the constitutional provision for the homestead are not thereby defeated or impaired. *Wray v. Davenport*, 79 Va. 19. See also *Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397.

**4. Discretion of Legislature.** — *Pfeiffer v. Riehn*, 13 Cal. 643; *Wray v. Davenport*, 79 Va. 19; *Bull v. Conroe*, 13 Wis. 233.

**5.** See *Bull v. Conroe*, 13 Wis. 233.

**6. Unreasonable Exemption.** — See *In re How*, 59 Minn. 415, and the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 73, note 1.

**Limiting Homestead by Area Alone.** — A statute exempting a homestead without limita-

tion as to value, but limiting it by area, is not unreasonable. *Cogel v. Mickow*, 11 Minn. 475; *Barton v. Drake*, 21 Minn. 299.

**7. Power to Enlarge Exemption.** — The Constitution of *North Carolina* provided for a homestead "not exceeding the value of one thousand dollars," and further declared that after the owner's death the homestead should be exempt during the minority of his children. An act of the legislature permitting the homestead to include different tracts not contiguous was held not in conflict with the constitution. *Martin v. Hughes*, 67 N. Car. 293. An expression of *Rodman, J.*, in this case to the effect that under the constitution the legislature had "absolute power to enlarge the homestead given by the constitution in the matter of value or duration of estate," though it could not "reduce what the constitution provides," was *overruled* in *Wharton v. Taylor*, 88 N. Car. 230, holding unconstitutional an act which perpetually exempted the land on which the homestead was placed, to the full extent of the debtor's interest therein, without any limitation as to time. In the latter case it was held that an act affecting either an enlargement or a diminution of the value or duration of the exemption provided in the constitution was invalid.

In accord with the declaration of Judge *Rodman* in the earlier cases above cited is *Miller v. Marx*, 55 Ala. 322, holding that where the constitution provided for a homestead "not exceeding eighty acres," the legislature might increase but could not diminish the exemption given. Other cases have held a provision for

(4) *Particular Debts.* — The legislature has no power to except certain debts from the operation of the homestead exemption law, or, what amounts to the same thing, to grant the right of exemption as against particular debts only, when the constitution provides for or directs an exemption as against all debts.<sup>1</sup> And on the other hand, if the constitution excepts a particular debt, the legislature cannot exempt as against that debt.<sup>2</sup>

(5) *Discrimination Between Creditors.* — In *Minnesota*, where the constitution requires the legislature to exempt a reasonable amount of property, it has been held that it is not within the power of the legislature, in giving a right of homestead exemption, to discriminate between different classes of creditors and kinds of debts or liabilities, by allowing the homestead to be claimed against one class of creditors but not against another class.<sup>3</sup>

(6) *Restraint on Alienation.* — In *California*, where the constitution declared that the legislature should protect from forced sale a certain portion of the homestead of all heads of families, it seems to have been considered that the legislature could not, in addition to giving a right of homestead exemption, restrain the voluntary alienation thereof.<sup>4</sup> But statutes requiring the wife's joinder in a conveyance or incumbrance of the homestead have been upheld.<sup>5</sup>

(7) *Allowing Alienation.* — If the constitution should expressly prohibit alienation of the homestead, or if such an intention on the part of the people should clearly appear from the scheme of the homestead exemption as established by the constitution, the legislature would have no power to allow alienation.<sup>6</sup>

(8) *Allowing Waiver of Exemption.* — A statute authorizing a waiver of the homestead exemption is not in conflict with a constitutional provision giving to debtors the right to a homestead exemption, without expressly prohibiting a waiver thereof.<sup>7</sup>

a homestead "not exceeding" a certain value as fixing a limit which the legislature cannot exceed. *Beecher v. Baldy*, 7 Mich. 488; *Duncan v. Barnett*, 11 S. Car. 333, 32 Am. Rep. 476.

**Persons Entitled.** — It has been held in *Virginia* that where the constitution exempts a homestead for the benefit of a certain class of persons, without saying anything about any other class, the legislature may extend the right of exemption to other classes. Thus a right provided for every householder or head of a family may be conferred by statute upon the widow and minor children of a decedent who has not claimed nor set apart his homestead in his lifetime. *Hatorff v. Wellford*, 27 Gratt. (Va.) 356; *Helm v. Helm*, 30 Gratt. (Va.) 404.

In *Georgia*, on the other hand, where the constitution allowed a homestead exemption to persons having a family, it was held that the legislature could not allow an exemption to single persons having no one dependent upon them for support. *Calhoun v. McLendon*, 42 Ga. 405.

**1. Power to Exempt Certain Debts.** — *Burrows v. Brooks*, 113 Mich. 307; *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Cumming v. Bloodworth*, 87 N. Car. 83; *Donaldson v. Voltz*, 19 W. Va. 156. And see *Coleman v. Ballandi*, 22 Minn. 144, and the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 73, note 2.

**2. Constitutional Exception of Certain Debts.** — A statute which provides that no lien created by the husband and wife upon the homestead "shall be valid for any purpose

whatsoever" is invalid where the constitution expressly excepts such liens from the benefit of the exemption. *Dunker v. Chedic*, 4 Nev. 378.

**3. Discrimination Between Different Classes of Creditors.** — *Coleman v. Ballandi*, 22 Minn. 144.

**Liability for Purchase Money.** — A statute making property otherwise exempt subject to execution upon a judgment rendered in an action for the purchase money thereof is not unconstitutional as discriminating between different kinds of liabilities and thereby infringing the constitutional provision for exemption. *Rogers v. Brackett*, 34 Minn. 279, *distinguishing Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108.

**4. Power to Restrain Alienation.** — *Gee v. Moore*, 14 Cal. 472.

**5. Requiring Joinder by Wife.** — *Gee v. Moore*, 14 Cal. 472; *Barton v. Drake*, 21 Minn. 299. See *infra*, this title, *Sales, Conveyances, and Incumbrances*. But compare the opinion of Anderson, J., in *White v. Owen*, 30 Gratt. (Va.) 43, applying the declaration in the homestead exemption provision of the *Virginia Constitution* that nothing contained therein "shall be construed to interfere with the sale of the property aforesaid, or any part thereof, by virtue of any mortgage, deed of trust, pledge, or other security thereon."

**6. Allowing Alienation Contrary to Constitution.** — *Roberts v. Trammell*, 55 Ga. 383. See also *Saulsbury v. McCallum*, 65 Ga. 102.

**7. Statute May Allow Waiver of Exemption.** — *Reed v. Union Bank*, 29 Gratt. (Va.) 719.



(9) *Statutory Definition of Terms Used in Constitution.* — The legislature cannot change the exemption granted by the constitution by construing and defining the terms used therein, for the courts alone are empowered to construe the constitution.<sup>1</sup>

**V. REPEAL OR MODIFICATION OF HOMESTEAD LAWS — 1. Power to Modify or Repeal — a. IN GENERAL.** — In some states, as was shown in a previous paragraph, it was held that the right of homestead exemption is not an estate, but a mere privilege,<sup>2</sup> and where such is the case it is clearly within the power of the people of the state, by the adoption of constitutional provisions, or of the legislature, where there is no constitutional restriction in the way, to repeal the homestead exemption laws; and to do so not only as to future debts, and property subsequently acquired, but also as to existing property and debts.<sup>3</sup> In these jurisdictions the right of exemption is not regarded as a vested right, so as to be within that provision of the constitution which protects vested rights;<sup>4</sup> nor is the modification or repeal of homestead exemption laws objectionable as impairing the obligation of contracts.<sup>5</sup>

**Contrary View.** — In some states the homestead exemption is regarded, not as a mere privilege for the time being, but as a vested right, or an estate, and it is held that after the right has once vested under the statute the legislature cannot deprive the debtor thereof, or diminish or otherwise impair it, by subsequent modification or repeal of the statute.<sup>6</sup>

**b. EFFECT OF CONSTITUTIONAL PROVISIONS FOR EXEMPTION.** — When the constitution directs the legislature to exempt a reasonable amount of property, and it does so, its power to legislate on the subject is not at an end. It may afterwards modify the existing law, or substitute another law, provided it still gives to the debtor a reasonable exemption as required by the constitution.<sup>7</sup> It has been held, however, that it cannot altogether repeal the law, unless at the same time it substitutes another reasonable one in its place.<sup>8</sup>

**2. What Constitutes Repeal.** — It is not always easy to say whether a homestead exemption law repeals or merely supplements a prior law on the same subject. The question depends entirely upon a construction of the particular statutes, and the rules of construction by which the question is determined are the same as in the case of statutes on any other subject.<sup>9</sup>

**1. Statutory Definition of Constitutional Terms.** — *Calhoun v. McLendon*, 42 Ga. 405. *Compare Hesnard v. Plunkett*, 6 S. Dak. 73. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1036.

**2. Repeal or Modification of Homestead Exemption Laws.** — See *supra*, this title, *Definition, Origin, and Nature of Homestead Exemption — Nature of Estate or Right*.

**3. When Homestead a Privilege, Repeal Permissible.** — *Sparger v. Cumpton*, 54 Ga. 355; *Harris v. Glenn*, 56 Ga. 96; *Mooney v. Moriarty*, 36 Ill. App. 175; *Bramble v. State*, 41 Md. 435; *Bull v. Conroe*, 13 Wis. 233. And see *Coleman v. Ballandi*, 22 Minn. 144; *Allen v. Harley*, 3 S. Car. 412.

**4. Right to Homestead Exemption Not a Vested Right.** — *Harris v. Glenn*, 56 Ga. 96. See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 74, and generally the title CONSTITUTIONAL LAW, vol. 6, p. 937 *et seq.*

**5. Impairment of Obligation of Contract.** — In *Sparger v. Cumpton*, 54 Ga. 355, it was held that a statute providing that an exemption taken under section 2040 of the Code in force in 1875 should be subject to the purchase money, applied to exemptions laid off at any time after the passage of the act though the debt on which the judgment was based was

incurred before its passage. See generally the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, *post*.

**6. View that Exemption Cannot Be Diminished.** — *Galligher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319. See also *Finley v. Dietrick*, 12 Iowa 516.

It is in accordance with this view that some of the courts have held that where the owner of a tract of land near a city has acquired a homestead right therein, such right cannot be diminished by the subsequent enactment, without his consent or procurement, of a law by which the land is included within the corporate limits of a city. See *infra*, this title, *Property in Which Exemption May Be Claimed*.

**7. Effect of Constitutional Provisions for Exemption.** — *Bull v. Conroe*, 13 Wis. 233; *Parker v. King*, 16 Wis. 223. And see *Noble v. Hook*, 24 Cal. 638; *Coleman v. Ballandi*, 22 Minn. 144.

**8. Bull v. Conroe**, 13 Wis. 233.

**9. What Constitutes Repeal.** — See the title STATUTES.

Repeals by Implication are not favored, and are held to have occurred only in cases of irreconcilable repugnancy between the latter and former enactments. *Davenport v. Alston*, 14 Ga. 271; *Walley's Estate*, 11 Nev. 260.



**3. Effect of Repeal.** — It follows from what has been said in the preceding paragraphs that when the legislature validly repeals a homestead exemption law without a saving clause,<sup>1</sup> the debtor, except in some jurisdictions, as above explained, is in the same position as to debts previously contracted as if the law had never existed,<sup>2</sup> except as to rights which have become vested by a setting apart of the property as exempt or other proceedings under the statute.<sup>3</sup>

**VI. RULES FOR CONSTRUCTION OF HOMESTEAD LAWS — 1. In General — Intention Governs.** — The primary rule of statutory construction is that the intention of the legislature governs. The courts, so long as the statute is within the constitutional powers of the legislature, must give effect to it according to its terms. They cannot question its propriety or expediency, nor add to or subtract from its terms.<sup>4</sup>

**2. Liberal Construction.** — Since homestead exemption laws, as was stated in another section, are not in derogation of the common law, the rule that statutes in derogation of the common law must be strictly construed does not apply. Aside from this, the courts, in view of the benevolent purpose of these statutes, have almost universally held that they are to be liberally construed. In other words, the courts do not stick to the letter of the statutes, but give effect to them in accordance with their reason and spirit.<sup>5</sup> This rule,

Wherever this is the case, however, the earlier enactment is repealed. *Wixom's Estate*, 35 Cal. 320; *Howard v. Marshall*, 48 Tex. 471.

**Constitutional Provisions** for a homestead exemption impliedly repeal prior statutes if repugnant, but not otherwise. *Beecher v. Baldy*, 7 Mich. 488.

In *Georgia* the homestead law under the Constitution of 1868 provided that any debtor who did not desire to take advantage of its provision and the legislation in furtherance thereof (2 Code Ga. 1895, § 2827 *et seq.*) might take the benefit of the old exemption laws (2 Code Ga. 1895, § 2866 *et seq.*); but his choice was an alternative one, and he could not take advantage of both systems. *Hollingsworth v. Smith*, 45 Ga. 583; *Larence v. Evans*, 50 Ga. 216; *Connally v. Hardwick*, 61 Ga. 501; *Johnson v. Roberts*, 63 Ga. 167. See also Const. Ga. (1877), art. 9, § 4; 2 Code Ga. (1895), § 2854 (Code 1882, § 2032).

A homestead taken under the Constitution of 1868 was not destroyed by the Constitution of 1877, and a debtor who had a homestead assigned to him under the Constitution of 1868 could not have another assigned under that of 1877, for the former homestead "continues to exist as long as the family for whose benefit it was taken continues to exist as such family." *Chattanooga First Nat. Bank v. Massengill*, 80 Ga. 333.

But a homestead taken under the Constitution of 1868 may be supplemented under the provision of the Constitution of 1877 (art. 9, § 6; 2 Code Ga. 1895, § 2865), provided rights vested in one as a creditor before the adoption of the latter constitution are not infringed. *Johnson v. Redwine*, 105 Ga. 449, *discussing and reconciling* *Mitchell v. Wolfe*, 70 Ga. 625 and *Chattanooga First Nat. Bank v. Massengill*, 80 Ga. 333.

In *Louisiana* by the provision of the Constitution of 1879 (art. 220) prior rights of homestead, arising under prior laws, were entirely unaffected, and it was therefore held that in cases of homestead exemption laws, upon the repeal of

1865 the court must construe and apply that law precisely as if the Constitution of 1879 had never been adopted. *Gilmer v. O'Neal*, 32 La. Ann. 971.

**1. Clause Saving Rights Acquired under Former Laws.** — *Clark v. Potter*, 13 Gray (Mass.) 21. And see *Gilmer v. O'Neal*, 32 La. Ann. 979, *cited in* the last note *supra*.

**2. Effect of Repeal.** — See as to the effect of repeal *Nelson v. McCrary*, 60 Ala. 301; *Lovelace v. Webb*, 62 Ala. 271; *Clark v. Snodgrass*, 66 Ala. 233; *Hawkins v. Mosher*, 8 Colo. App. 32. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 74.

**3. Rights Vested by Proceedings under the Statute.** — *Bramble v. State*, 41 Md. 435.

**4. Construction of Statutes — Intention of Legislature.** — *Ex p. Brien*, 2 Tenn. Ch. 33. See also *Fearn v. Ward*, 65 Ala. 33. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 75, and generally the title STATUTES.

**5. Homestead Laws to Be Liberally Construed — United States.** — *Sellon v. Reed*, 5 Biss. (U. S.) 125; *Green v. Root*, 62 Fed. Rep. 191.

*Alabama.* — *McGuire v. Van Pelt*, 55 Ala. 344; *Cofe v. Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54; *Enzor v. Hurt*, 76 Ala. 595; *Fearn v. Ward*, 65 Ala. 33; *Webb v. Edwards*, 46 Ala. 17.

*Arizona.* — *Wilson v. Lowry*, (Ariz. 1898) 52 Pac. Rep. 777.

*Arkansas.* — *Wassell v. Tunnah*, 25 Ark. 101.

*California.* — *Moss v. Warner*, 10 Cal. 296; *Schuyler v. Broughton*, 76 Cal. 524; *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296; *Southwick v. Davis*, 78 Cal. 504; *Tromans v. Mahlman*, 92 Cal. 1; *Heathman v. Holmes*, 94 Cal. 291; *Gaylord v. Place*, 98 Cal. 472; *Quackenbush v. Reed*, 102 Cal. 493.

*Colorado.* — *Barnett v. Knight*, 7 Colo. 365.

*Florida.* — *Drucker v. Rosenstein*, 19 Fla.

191.

*Georgia.* — *Roff v. Johnson*, 40 Ga. 555.

*Illinois.* — *Kitchell v. Burgwin*, 21 Ill. 40; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350.

however, does not authorize the court to go beyond the spirit and intent of the statute.<sup>1</sup>

**Provisos and Exceptions.** — The rule of liberal construction applies to the statutes only in so far as they allow the exemption. It does not apply to exceptions and provisions in a statute by which a general allowance of property as exempt is qualified or restricted; nor does it apply to a proviso which declares that

*Iowa.* — *Bevan v. Hayden*, 13 Iowa 122; *Woods v. Davis*, 34 Iowa 264; *Kaiser v. Seaton*, 62 Iowa 466; *Huskins v. Hanlon*, 72 Iowa 37; *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234; *Schuttoffel v. Collins*, 98 Iowa 576.

*Kansas.* — *Howell v. McCrie*, 36 Kan. 644.

*Kentucky.* — *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636; *Bennett v. Baird*, 81 Ky. 554, 5 Ky. L. Rep. 636.

*Michigan.* — *Barber v. Rorabeck*, 36 Mich. 399; *Lozo v. Sutherland*, 38 Mich. 168; *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554; *Bouchard v. Bourassa*, 57 Mich. 8.

*Minnesota.* — *Kiewert v. Anderson*, 65 Minn. 491, 60 Am. St. Rep. 487.

*Mississippi.* — *Campbell v. Adair*, 45 Miss. 178.

*Missouri.* — *Blandy v. Asher*, 72 Mo. 27; *Vogler v. Montgomery*, 54 Mo. 577; *Casebolt v. Donaldson*, 67 Mo. 308; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649.

*Montana.* — *Lindley v. Davis*, 7 Mont. 206, *overruling* 6 Mont. 453; *Ferguson v. Speith*, 13 Mont. 487, 40 Am. St. Rep. 459.

*Nebraska.* — *Mitchelson v. Smith*, 28 Neb. 583, 26 Am. St. Rep. 357.

*New Hampshire.* — *Peverly v. Sayles*, 10 N. H. 356; *Gunnison v. Twitchel*, 38 N. H. 69; *Buxton v. Dearborn*, 46 N. H. 44; *Barney v. Leeds*, 51 N. H. 253.

*North Carolina.* — *Shepherd v. Murrill*, 90 N. Car. 208.

*Ohio.* — *Hill v. Myers*, 46 Ohio St. 183; *Wildermuth v. Koenig*, 41 Ohio St. 180; *McConville v. Lee*, 31 Ohio St. 447; *Sears v. Hanks*, 14 Ohio St. 298.

*South Carolina.* — *Rollings v. Evans*, 23 S. Car. 316.

*South Dakota.* — *Noyes v. Belding*, 5 S. Dak. 603.

*Tennessee.* — *Arnold v. Jones*, 9 Lea (Tenn.) 548; *Ren v. Driskell*, 11 Lea (Tenn.) 642; *Jackson v. Shelton*, 89 Tenn. 82.

*Texas.* — *Trawick v. Harris*, 8 Tex. 312; *Cobbs v. Coleman*, 14 Tex. 594; *Schneider v. Bray*, 59 Tex. 668.

*Vermont.* — *Howe v. Adams*, 28 Vt. 541; *True v. Morrill*, 28 Vt. 674; *Mills v. Grant*, 36 Vt. 271; *McElroy v. Bixby*, 36 Vt. 254, 84 Am. Dec. 684; *Jewett v. Guyer*, 38 Vt. 218.

*Washington.* — *Puget Sound Dressed Beef, etc., Co. v. Jeffs*, 11 Wash. 466, 48 Am. St. Rep. 885.

*West Virginia.* — *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

*Wisconsin.* — *Connaughton v. Sands*, 32 Wis. 387; *Kuntz v. Kinney*, 33 Wis. 510; *Weisbrod v. Daenicke*, 36 Wis. 73; *Krueger v. Pierce*, 37 Wis. 269; *Zimmer v. Pauley*, 51 Wis. 282; *Scofield v. Hopkins*, 61 Wis. 370; *Binzel v. Grogan*, 67 Wis. 147.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 75.

**Rule of Strict Construction.** — In some cases it has been said that statutes exempting the homestead are in derogation of the common law, and therefore not entitled to a liberal construction.

*Louisiana.* — *Duchamp v. Butterly*, 11 La. Ann. 67; *Fuselier v. Buckner*, 28 La. Ann. 594; *Tilton v. Vignes*, 33 La. Ann. 240; *Galligar v. Payne*, 34 La. Ann. 1057; *Bossier v. Raines*, 37 La. Ann. 263; *Kinder v. Lyons*, 38 La. Ann. 713. But see *Hebert v. Mayer*, 48 La. Ann. 938, where it is said that the statutes should not be too strictly construed.

*Minnesota.* — *Olson v. Nelson*, 3 Minn. 53; *Ward v. Huhn*, 16 Minn. 159.

*South Carolina.* — *Garaty v. Du Bose*, 5 S. Car. 493. But see *Rollings v. Evans*, 23 S. Car. 316.

*Canada.* — *London, etc., Loan, etc., Co. v. Connell*, 11 Manitoba 115; *Harris v. Rankin*, 4 Manitoba 115.

And see *Pegram v. Hancock*, 105 Ga. 185.

This, however, is clearly wrong, for real estate was not liable to execution at common law. See *supra*, this title, *Definition, Origin, and Nature of Homestead Exemption*.

**1. Case Must Be Within Spirit and Intent of Law** — *Alabama.* — *McGuire v. Van Pelt*, 55 Ala. 344; *Fearn v. Ward*, 65 Ala. 33.

*Iowa.* — *Charles v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457; *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234.

*Kentucky.* — *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636; *Little v. Woodward*, 14 Bush (Ky.) 585.

*Mississippi.* — *Thoms v. Thoms*, 45 Miss. 263.

*Missouri.* — *Casebolt v. Donaldson*, 67 Mo. 308.

*South Carolina.* — *Garaty v. Du Bose*, 5 S. Car. 493.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 77.

**Reasonable Construction.** — The statutes should be sensibly and reasonably construed. *Southwick v. Davis*, 78 Cal. 504; *Gibson v. Jenney*, 15 Mass. 205; *Campbell v. Adair*, 45 Miss. 170.

**Equitable Principles.** — In *Casebolt v. Donaldson*, 67 Mo. 308, it was held that while the exemption law should be liberally construed, still the homestead right is strictly legal, and equitable principles other than those recognized by the statute cannot be invoked by one claiming the right. See also *McGuire v. Van Pelt*, 55 Ala. 344; *Little v. Woodward*, 14 Bush (Ky.) 585.

**Prevention of Fraud.** — Great care should be taken, while liberally construing homestead laws, to prevent them from becoming instruments of fraud. *Drucker v. Rosenstein*, 19 Fla. 191. See also *Bennett v. Baird*, 81 Ky. 554, 5 Ky. L. Rep. 636.



the statute shall not apply as against certain debts or liabilities.<sup>1</sup>

**3. Construction of Statutes Together.** -- When there are several statutes in the same state, enacted at different times, they are all to be construed together as if they were one act, in accordance with the rule that a remedial statute shall be extended to later provisions by subsequent statutes and the rule that all acts of the legislature *in pari materia* are to be taken together as if they were one act.<sup>2</sup>

**4. Retroactive Operation.** -- Statutes allowing a homestead exemption should not be construed retroactively, unless such an intention on the part of the legislature is clear, even if they can constitutionally apply retroactively.<sup>3</sup>

**VII. PERSONS ENTITLED TO BENEFIT OF HOMESTEAD EXEMPTION** -- **1. In General** -- *a. NECESSITY FOR FAMILY.* -- In most states the object of the homestead exemption law is not to protect debtors, merely as such, by exempting their property from liability to seizure and sale for payment of their debts, but it is rather to protect the family by exempting the family home.<sup>4</sup> The statutes, therefore, as a general rule, give the right of homestead exemption only to the head of a family, or to a householder or house-keeper having a family.<sup>5</sup> In a few states there is no such restriction, but the right is given to every person, whether he has or has not a family.<sup>6</sup> It has

**1. Construction of Provisos and Exceptions.** -- *Epps v. Epps*, 17 Ill. App. 196. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 76.

**2. Statutes to Be Construed Together.** -- *McQuade v. Whaley*, 31 Cal. 526. See the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 77; STATUTES.

**3. Retroactive Construction.** -- *Allen v. Russell*, 39 Ohio St. 336. See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*, and generally the title STATUTES.

**4. Protection of Family Object of Acts.** -- See *Wassell v. Tunnah*, 25 Ark. 103; *Harbison v. Vaughan*, 42 Ark. 539; *Barnett v. Knight*, 7 Colo. 365; *Charles v. Lamberson*, 1 Iowa 441, 63 Am. Dec. 457; *Cook v. McChristian*, 4 Cal. 26; *McMurray v. Shuck*, 6 Bush (Ky.) 111; *Fore v. Fore*, 2 N. Dak. 267; *Franklin v. Coffee*, 18 Tex. 415, 70 Am. Dec. 292.

**5. Family Necessary** -- *Arkansas.* -- *Harbison v. Vaughan*, 42 Ark. 539; *Gates v. Steele*, 48 Ark. 539.

*Florida.* -- *Miller v. Finegan*, 26 Fla. 29.

*Georgia.* -- *Lynch v. Pace*, 40 Ga. 173; *Calhoun v. McLendon*, 42 Ga. 406; *Johnson v. Little*, 90 Ga. 781.

*Illinois.* -- *Kimbrel v. Willis*, 97 Ill. 494; *Ryhiner v. Frank*, 105 Ill. 326; *Rock v. Haas*, 110 Ill. 528; *Holnback v. Wilson*, 159 Ill. 148.

*Kansas.* -- *Farlin v. Sook*, 26 Kan. 397.

*Kentucky.* -- *Dowd v. Hurley*, 78 Ky. 260; *Ellis v. Davis*, 90 Ky. 183; *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404, 12 Ky. L. Rep. 433.

*Massachusetts.* -- *Woodworth v. Comstock*, 10 Allen (Mass.) 425.

*Mississippi.* -- *Hand v. Winn*, 52 Miss. 784; *Hill v. Franklin*, 54 Miss. 632; *Powers v. Sample*, 72 Miss. 187.

*Missouri.* -- *Murdock v. Dalby*, 13 Mo. App. 41; *State v. Kane*, 42 Mo. App. 253; *Graham v. Lee*, 69 Mo. 334; *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165.

*Montana.* -- *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530.

*South Carolina.* -- *Garaty v. Du Bose*, 5 S. Car. 498.

*Tennessee.* -- *Evans v. Van Valkenburg*, (Tenn. Ch. 1898) 47 S. W. Rep. 1101.

*Texas.* -- *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Wilson v. Cochran*, 31 Tex. 680, 98 Am. Dec. 553; *Howard v. Marshall*, 48 Tex. 471.

*Virginia.* -- *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

**6. Laws Not Requiring a Family.** -- In Alabama the statute at one time confined the homestead exemption to the head of a family. See *Cochran v. Miller*, 74 Ala. 50. But the present statute, following the provision of the constitution, secures the right to "every resident" of the state, and is not restricted to the head of a family. Code 1886, § 2507; Civ. Code 1896, § 2033; *Beard v. Johnson*, 87 Ala. 729.

In Arkansas, prior to the Constitution of 1874, the right to a homestead exemption was given to any resident of the state and was not restricted to married men or heads of families. *Greenwood v. Maddox*, 27 Ark. 648. Now it is restricted to any resident of the state "who is married or the head of a family." Const. Ark. 1874, art. 9, § 3; Sand. & H. Dig. Stat. Ark. (1894), § 3710. See the cases cited in the notes preceding.

These expressions, however, are held not to be synonymous, or mere equivalents the one for the other. All residents of either sex who are either married or the heads of families are entitled to the exemption. *Memphis, etc., R. Co. v. Adams*, 46 Ark. 159; *Thompson v. King*, 54 Ark. 9.

In Illinois the statute entitles "every householder having a family" to a homestead. This requires the person to have a family to be entitled to a homestead exemption, but it does not require that he or she shall be the head of a family. *Zander v. Scott*, 165 Ill. 51. But compare *Brokaw v. Ogle*, 170 Ill. 126. In the first of these cases it is held therefore under this statute that a married woman, who has a family, may claim such property as a homestead. See *infra*, this



been held, however, that the courts, in view of the general policy and object of the homestead exemption laws, should not construe them as allowing a homestead to a person who has no family, unless such an intention upon the part of the legislature is clearly expressed.<sup>1</sup>

*b. "HOUSEHOLDER" AND "HOUSEKEEPER."* — In some states the statute, in describing the persons entitled to a homestead exemption, uses the term "householder" or "housekeeper."

**Householder.** — Any person owning a dwelling house that is capable of being occupied as such is a householder.<sup>2</sup> Generally the statutes also require that he shall have a family, so that a householder without a family is not within the statutes.<sup>3</sup> And some of the courts, though not all, hold that even where the statute does not expressly require that the householder shall have a family, this is to be implied.<sup>4</sup>

**Housekeeper.** — To be entitled to a homestead under a statute allowing a homestead to a housekeeper with a family, it is clear that a person must keep house in the state. When he ceases to do so he ceases to be a housekeeper. But the mere intention to move to another state, though accompanied by preparations to do so, does not deprive one of the character of a housekeeper.<sup>5</sup>

*c. PERSONS HAVING CARE AND SUPPORT OF DEPENDENT FEMALES.* — In *Georgia* a homestead exemption is given by the present constitution of 1877, not only to the head of a family, but also to any "person having the care and support of dependent females of any age, who is not the head of a family," and any person occupying such a position, whether married or single, or male or female, is entitled to the exemption.<sup>6</sup>

*d. GUARDIANS AND TRUSTEES.* — In *Georgia*, by express statutory provision, the exemption may be claimed by the guardian or trustee of a family of minor children.<sup>7</sup>

*e. SOLVENCY OF DEBTOR.* — In order that a person may be entitled to claim a homestead exemption, he need not be insolvent, unless the statute so provides.<sup>8</sup>

section, *Rights of Married Women — Separate Property.*

In *Michigan*, *Minnesota*, and *Wisconsin*, a homestead "owned and occupied by any resident" of the state is exempted. Const. Mich. (1850), art. 16, § 2; 2 How. Annot. Stat. Mich. (1882), § 7721; Stat. Minn. (1894), § 5521; Stat. Wis. (1898), § 2983. Under such a provision as this the right to a homestead exemption is not limited either to heads of families or to married men, but extends to any resident of the state. See *Myers v. Ford*, 22 Wis. 139, where it was held that a homestead could be claimed by a widower whose children had all married and left home, and who had rented the premises, but boarded and lodged there with the tenants.

1. *Construction of Statutes.* — *McCanna v. Anderson*, 6 N. Dak. 484. As to the particular point involved in this case, see *infra*, this section, subdiv. 2. *b. Statutory Definition.*

2. *Householder.* — *Rock v. Haas*, 110 Ill. 528.

The ordinary meaning of "householder" is that such a person is the head of the family, upon whom the other members are dependent, and it does not apply to subordinate inmates. *Brokaw v. Ogle*, 170 Ill. 126. But compare last note but one *supra*.

A man living with an adult married son in a house built and controlled by the son, though on land owned by the father, is not a householder. *Powers v. Sample*, 72 Miss. 187.

3. *Necessity for Family.* — *Rock v. Haas*, 110 Ill. 528.

4. In *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759, it was said that the terms "householder" and "head of a family" have the same meaning in the provisions of the constitution and statutes relating to homesteads.

In *Illinois*, however, it has been held that to constitute a person a "householder having a family," within the meaning of the homestead exemption law of that state, he need not be the head of a family, though it is necessary that there shall be a family. *Zander v. Scott*, 165 Ill. 51.

Further as to this question, and the meaning of the term "householder," see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 89.

5. *Housekeeper.* — *Rasco v. Sheet*, 8 Ky. L. Rep. 703.

6. *Persons Supporting Dependent Females.* — *Johnson v. Little*, 90 Ga. 781.

7. *Guardian or Trustee of Minor Children.* — Code Ga. (1895), § 2827. See *Roff v. Johnson*, 40 Ga. 555.

A guardian of one minor child is within the law. *Rountree v. Dennard*, 59 Ga. 629, 27 Am. Rep. 401.

8. *Insolvency Not Necessary.* — *Matter of Henkel*, 2 Sawy. (U. S.) 305, 11 Fed. Cas. No. 6,362, reversing 2 Nat. Bankr. Reg. 546, 11 Fed. Cas. No. 6,361.

**2. Definition of "Family" and "Head of a Family" — a. IN GENERAL. —** According to the decided weight of authority, to constitute a "family" within the meaning of the homestead exemption laws, however it may be under other laws, there must at the least be a collection of persons living together under one head. The term does not embrace a single man without any person dependent upon him, or separate individuals who have no common home.<sup>1</sup> This, however, is not alone enough. Every aggregation of individuals is not necessarily a family, though they may live together, and though there may be a head. It is also necessary, by the weight of authority, that they shall be living together under such circumstances or conditions that the head is under either a legal or a natural obligation to support the other members, and the other members are dependent upon him for support.<sup>2</sup>

**b. STATUTORY DEFINITION. —** In some states the legislature has not been content with merely using the terms "family" and "head of a family," but has expressly defined these terms, and specified what they shall include.<sup>3</sup> Even this, however, has not prevented difficulty in determining who is entitled to the benefit of the statutes.<sup>4</sup>

**c. NUMBER OF PERSONS. —** There must be more than one person to constitute a family. A single person, without any other person dependent upon him for support, cannot be the head of a family.<sup>5</sup> On the other hand, there need not be more than two persons. A husband and his wife, without any children at all, or a father or mother, without wife or husband, and his or her child, may constitute a family.<sup>6</sup>

**d. NECESSITY FOR MARRIAGE. —** A man and woman living together in adultery do not constitute a family within the meaning of the homestead

**1. "Family" and "Head of a Family" Defined. —** Jones v. Gray, 3 Woods (U. S.) 494, 13 Fed. Cas. No. 7,463; Rock v. Haas, 110 Ill. 528; Holnback v. Wilson, 159 Ill. 148, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 449, note 2; Brokaw v. Ogle, 170 Ill. 115; Arnold v. Waltz, 53 Iowa 706, 36 Am. Rep. 248; Farlin v. Sook, 26 Kan. 397; Wilson v. Cochran, 31 Tex. 677, 98 Am. Dec. 553.

**A "Head of a Family,"** within the meaning of the homestead act, said the *Missouri* court, is "one who controls, supervises, and manages the affairs about the house, not necessarily a father or a husband." And a "family" is "a collective body of persons who live in one house under one head or manager." Ridenour-Baker Grocery Co. v. Monroe, 142 Mo. 165, *citing* State v. Slater, 22 Mo. 464; Spender v. Kaufman, 46 Mo. App. 644; Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; State v. Kane, 42 Mo. App. 253; Duncan v. Frank, 8 Mo. App. 286. A husband remains the "head of a family" while the marriage subsists, though there are no children and the wife lives separated from him. Brown v. Stratton, (Mo. 1878) 8 Cent. L. J. 46.

**2. Necessary Relation Between Head of Family and Other Members. —** Bailey v. Comings, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733; Dendy v. Gamble, 64 Ga. 528; Farlin v. Sook, 26 Kan. 397; Ellis v. Davis, 90 Ky. 183; Whitehead v. Nickelson, 48 Tex. 517; Roco v. Green, 50 Tex. 490. See *infra*, this section, *Obligation to Support and Condition of Dependence*.

**3. See, for instance, the elaborate definition in Civ. Code Cal., § 1261.**

**4. Conflict in Construction of Statutes. —** Thus

under the *Dakota* statutes, which expressly declare that a "family" shall include "one or more persons" in actual occupancy of a homestead, it has been held in *North Dakota* that a single person who has no one dependent upon him is not within the statute, McCanna v. Anderson, 6 N. Dak. 482; while in *South Dakota* the contrary was held, Hesnard v. Plunkett, 6 S. Dak. 73.

**5. Number of Persons — More than One Necessary —** *United States. — In re Lambson*, 2 Hughes (U. S.) 233.

*Illinois. —* Rock v. Haas, 110 Ill. 528; Holnback v. Wilson, 159 Ill. 148.

*Kansas. —* Farlin v. Sook, 26 Kan. 397.

*Massachusetts. —* Woodworth v. Comstock, 10 Allen (Mass.) 425.

*Missouri. —* Murdock v. Dalby, 13 Mo. App. 41.

*North Dakota. —* McCanna v. Anderson, 6 N. Dak. 482.

*South Carolina. —* Garaty v. Du Bose, 5 S. Car. 493.

*Texas. —* Wilson v. Cochran, 31 Tex. 677, 98 Am. Dec. 553.

And see *infra*, this section, *Widowers and Widows; Unmarried Persons*.

**6. Two Persons Enough —** *Arkansas. —* Gates v. Steele, 48 Ark. 539.

*Florida. —* Miller v. Finegan, 26 Fla. 29.

*Illinois. —* Kitchell v. Burgwin, 21 Ill. 40.

*Kentucky. —* Nichols v. Lancaster, (Ky. 1895) 32 S. W. Rep. 676.

*New Hampshire. —* Barney v. Leeds, 51 N. H. 263.

*South Carolina. —* Bradley v. Rodelsperger, 3 S. Car. 226; Myers v. Ham, 20 S. Car.



exemption laws.<sup>1</sup> A marriage, to constitute a man and woman who are living together a family, so as to entitle them to a homestead, where the statute requires a family, must be valid.<sup>2</sup>

**3. Obligation to Support and Condition of Dependence** — *a. IN GENERAL.* — According to the great weight of authority, in order to constitute one the head of a family there must be a condition of dependence on the part of the other members upon him, and either a legal or a moral obligation on his part to support them, and a mere aggregation of persons living together under one head is not enough.<sup>3</sup> A few cases, however, hold that no such relation of obligation to support on one side and dependence on the other is necessary.<sup>4</sup>

**Illustrations.** — Applying the prevailing doctrine, it has been held that a homestead cannot be claimed by a widow having a daughter and grandchildren living with her, unless they are dependent upon her;<sup>5</sup> by a man who supports a brother who is unable to support himself, or a nephew whom he has adopted but whose parents are able to support him;<sup>6</sup> or by a widower having married daughters, who, with their husbands, board with him.<sup>7</sup> Other decisions are given in the note below.<sup>8</sup>

**1. Man and Woman Living in Adultery.** — *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 471. And see *Rock v. Haas*, 110 Ill. 528.

**2. Marriage Must Be Valid.** — See *Rock v. Haas*, 110 Ill. 528; *Dowd v. Hurley*, 78 Ky. 260.

In *South Carolina* slaves married before emancipation, according to the custom among plantation negroes, and living together as man and wife in 1865, were declared by the act of that year (13 Stat. 269) to be lawfully married, and this gave them the status of a family. *Myers v. Ham*, 20 S. Car. 522.

**3. Prevailing Doctrine that Obligation to Support and Dependence Are Necessary** — *United States.* — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733; *In re Lambson*, 2 Hughes (U. S.) 233, 14 Fed. Cas. No. 8,029; *In re Summers*, 3 Nat. Bankr. Reg. 84, 23 Fed. Cas. No. 13,604; *In re Taylor*, 3 Nat. Bankr. Reg. 157, 23 Fed. Cas. No. 13,775.

*Alabama.* — *Cochran v. Miller*, 74 Ala. 50.

*Arkansas.* — *Greenwood v. Maddox*, 27 Ark. 648; *Harbison v. Vaughan*, 42 Ark. 539.

*Georgia.* — *Marsh v. Lazenby*, 41 Ga. 153; *Calhoun v. McLendon*, 42 Ga. 405; *Blackwell v. Broughton*, 56 Ga. 390; *Dendy v. Gamble*, 64 Ga. 528; *Johnson v. Little*, 90 Ga. 781.

*Illinois.* — *Rock v. Haas*, 110 Ill. 528; *Holnback v. Wilson*, 159 Ill. 148, quoting 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 449, note 2; *Brokaw v. Ogle*, 170 Ill. 115.

*Iowa.* — *Whalen v. Cadman*, 11 Iowa 226.

*Kansas.* — *Farlin v. Sook*, 26 Kan. 397.

*Kentucky.* — *Brooks v. Collins*, 11 Bush (Ky.) 622; *Ellis v. Davis*, 90 Ky. 183, 11 Ky. L. Rep. 893; *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636; *National Bank v. Slavin*, 1 Ky. L. Rep. 315; *Carter v. Adams*, 9 Ky. L. Rep. 91; *Robinson v. Turner*, 14 Ky. L. Rep. 79.

*Louisiana.* — *Decuir v. Benker*, 33 La. Ann. 320.

*Mississippi.* — *Powers v. Sample*, 72 Miss. 187; *Hill v. Franklin*, 54 Miss. 632.

*Missouri.* — *Murdock v. Dalby*, 13 Mo. App. 41; *State v. Kane*, 42 Mo. App. 253.

*South Carolina.* — *Garaty v. Du Bose*, 5 S. Car. 493; *Fant v. Gist*, 36 S. Car. 576; *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep.

850. Compare *Wagener v. Parrott*, 51 S. Car. 489.

*Tennessee.* — *Evans v. Van Valkenburg*, (Tenn. Ch. 1898) 47 S. W. Rep. 1101.

*Texas.* — *Howard v. Marshall*, 48 Tex. 471; *Whitehead v. Nickelson*, 48 Tex. 530; *Roco v. Green*, 50 Tex. 490; *Ramey v. Allison*, 64 Tex. 697; *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 471; *Mullins v. Looke*, 8 Tex. Civ. App. 138; *Barry v. Hale*, 2 Tex. Civ. App. 668; *Trammell v. Neal*, 1 Tex. Unrep. Cas. 51.

*Virginia.* — *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 90.

**Strangers in Blood.** — In *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404, it seems to have been considered that a debtor supporting persons who are strangers in blood is not the head of a family; but this view, as will be seen from the cases hereafter referred to, cannot be sustained.

**Progeny of Common Ancestors.** — A federal judge has held that the word "family" in a constitutional provision for a homestead exemption was used "to represent the progeny of common ancestors." *In re Lambson*, 2 Hughes (U. S.) 233. But this view is also erroneous, as cases hereafter referred to will show.

**4. Tyson v. Reynolds**, 52 Iowa 431; *Wagener v. Parrott*, 51 S. Car. 489. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 91.

**5. Widow with Daughter and Grandchildren.** — *Ramey v. Allison*, 64 Tex. 697.

**6. Man Supporting Brother or Nephew.** — *National Bank v. Slavin*, 1 Ky. L. Rep. 315.

**7. Widower and Married Daughters.** — *Carter v. Adams*, 9 Ky. L. Rep. 91.

In *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636, it was held that a widower was not entitled to a homestead exemption as head of a family, where the only person living with him was a married daughter whose husband was neither legally nor actually separated from her, although he was away from her during most of the time, and although he contributed very little towards her support.

**8. An Unmarried Woman with Whom Live a Sister and an Aunt** not dependent upon her for



**Louisiana Homestead Law.** — The Louisiana Constitution exempts the homestead of a debtor, if he or she is the "head of a family, or person having a mother or father or a person or persons dependent on him or her for support."<sup>1</sup> The words quoted mean persons dependent upon the debtor for actual and necessary support, and not persons who are able to earn a living, and they must also have some legal or natural claim upon him for support.<sup>2</sup>

**b. MERE NATURAL OR MORAL OBLIGATION TO SUPPORT.** — A few of the courts have held, or have said, that there must be a legal obligation to support on the part of a person to constitute him the head of a family, as in the case of the relation of husband and wife or parent and child.<sup>3</sup> Most courts, however, have repudiated this view, and the overwhelming weight of authority is in favor of the doctrine that a mere moral or natural obligation to support and a condition of dependence and actual support are sufficient.<sup>4</sup>

**Particular Cases — In General.** — In accordance with the latter doctrine, the courts, under statutes exempting the homestead of a family, or of the head of

support, is not entitled to a homestead as the head of a family. *Robinson v. Turner*, 14 Ky. L. Rep. 79.

**An Aged Widower Living in the Family of a Married Son**, the father not contributing to the support of the family, for which the son provides, is not the head of a family, though the house in which the family resides and which the son built and has long used as a residence is upon the father's land. *Powers v. Sample*, 72 Miss. 187.

**An Unmarried Son with Whom His Father Resides** for a portion of his time, the father being independent, is not the head of a family. *Harbison v. Vaughan*, 42 Ark. 539.

**An Uncle with Whom Live Two Nephews** not dependent on him for support is not the head of a family. *Harbison v. Vaughan*, 42 Ark. 539.

**1. Homestead Exemption in Louisiana.** — Const. 1899, art. 244. And see Const. 1879, art. 219; Voorhies's Rev. Laws La. (1832), § 1691; Garland's Rev. Code Prac. La. (1894), § 645.

**2. "Persons Dependent."** — *Decuir v. Benker*, 33 La. Ann. 320; *Galligar v. Payne*, 34 La. Ann. 1057.

**Adult Daughters.** — The statute, it has been held, does not apply to a woman who has living with her healthy, robust, adult daughters, particularly where they work about the place, and for others, so as to earn their own living. *Decuir v. Benker*, 33 La. Ann. 320.

**But Minor Children** who do not own property sufficient to maintain them are "persons dependent" within the meaning of the law, though they work and partly earn their own living. *Woods v. Perkins*, 43 La. Ann. 347.

**Second Marriage.** — A man who is married the second time and has a wife and dependent children, whom he supports, is entitled to a homestead, though the children of his first marriage may have grown up and may be no longer dependent. See *Hebert v. Mayer*, 47 La. Ann. 563, 48 La. Ann. 938.

**3. Legal Obligation Essential.** — *In re Lambson*, 2 Hughes (U. S.) 233; *In re Taylor*, 3 Nat. Bankr. Reg. 157, 23 Fed. Cas. No. 13,775; *Dendy v. Gamble*, 64 Ga. 528; *Whitehead v. Nickelson*, 48 Tex. 517. But see the *Georgia* and *Texas* cases referred to in the note following. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 91.

**4. Either Legal or Natural Obligation Sufficient** — *United States*. — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

*California*. — *Ellis v. White*, 47 Cal. 73.

*Georgia*. — *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 804.

*Illinois*. — *Holnback v. Wilson*, 159 Ill. 148.

*Iowa*. — *Parsons v. Livingston*, 11 Iowa 104, 77 Am. Dec. 135; *Tyson v. Reynolds*, 52 Iowa 431; *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248.

*Kentucky*. — *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Bell v. Keach*, 80 Ky. 42, 3 Ky. L. Rep. 520, 653; *Riley v. Smith*, 9 Ky. L. Rep. 615; *Doolin v. Dugan*, 12 Ky. L. Rep. 749; *Ross v. Sweeney*, 12 Ky. L. Rep. 861, (Ky. 1891) 15 S. W. Rep. 357; *Scholl v. Laurenz*, 13 Ky. L. Rep. 971, 14 Ky. L. Rep. 228; *Brooks v. Collins*, 11 Bush (Ky.) 622.

*Missouri*. — *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *State v. Kane*, 42 Mo. App. 253; *Versailles Bank v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621.

*South Carolina*. — *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850 [citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 804, note 2]; *Chamberlain v. Brown*, 33 S. Car. 597; *Wagener v. Parrott*, 51 S. Car. 489; *Scott v. Mosely*, 54 S. Car. 375.

*Tennessee*. — *Ex p. Brien*, 2 Tenn. Ch. 33.

*Texas*. — *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642; *Roco v. Green*, 50 Tex. 483; *Wolfe v. Buckley*, 52 Tex. 641; *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 41; *Barry v. Hale*, 2 Tex. Civ. App. 668; *Smith v. Wright*, 13 Tex. Civ. App. 480; *Mullins v. Looke*, 8 Tex. Civ. App. 138. But see *Whitehead v. Nickelson*, 48 Tex. 517.

**In Georgia** several earlier decisions announce that a legal obligation to support is essential. *Dendy v. Gamble*, 64 Ga. 528; *Calhoun v. McLendon*, 42 Ga. 405. See also *Marsh v. Lazenby*, 41 Ga. 153, a decision seemingly founded on this rule, which is reconcilable with the facts of the case, in view of a statute imposing upon a son a legal duty to support an indigent parent. *Blackwell v. Broughton*, 56 Ga. 390, is, however, in accord with the later *Georgia* case cited above in this note, upholding the sufficiency of a moral obligation.

a family, or of a person having a family, have sustained claims of homestead exemption by a widow who had no children of her own, but who had the care and maintenance of orphan children of a sister of her deceased husband;<sup>1</sup> by a widow caring for and supporting the minor children of her deceased husband by a former wife;<sup>2</sup> by a woman having a grandchild or grandchildren living with her and supported by her;<sup>3</sup> and by an unmarried man or widower maintaining an indigent and dependent father, mother, brother, or sisters.<sup>4</sup> The same is true of an unmarried woman.<sup>5</sup> Other decisions will be found in the note below.<sup>6</sup>

*c. GOOD FAITH.* — When a person claims a homestead as the head of a family, or as having a family, because of the fact that he has persons other than a wife or children living with him and dependent upon him for support, it must appear that they are legitimately members of his family, or, in other words, that they were brought into his household in good faith, and not merely for the purpose of avoiding payment of his debts.<sup>7</sup>

*d. FAILURE TO SUPPORT FAMILY.* — If a man occupies his land as a home with his wife and children he is the head of a family, notwithstanding the fact that he does not work and contribute to the support of the family.<sup>8</sup>

*e. ADOPTED CHILDREN.* — It has been held that mere adoption of another's child by a person does not make such person the head of a family within the meaning of the homestead law, in the absence of a statute making

**1. Widow with Orphan Nieces and Stepnieces.** — *Ex p. Brien*, 2 Tenn. Ch. 33. See also *Fant v. Gist*, 36 S. Car. 576, where a widower had living with him and supported an orphaned step-niece.

So a Single Woman who has taken to live with her and supports two minor children of her deceased sister at the latter's request. *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248.

**2. Widow and Stepchildren.** — *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484.

**3. Grandmother and Grandson.** — *Smith v. Wright*, 13 Tex. Civ. App. 480.

**Grandchildren Not Orphaned.** — In a *Kentucky* case it was held that a widow who had living with her and supported a son and his wife and minor children was entitled to a homestead as a housekeeper having a family, on the ground that she was under a natural and moral duty to support the grandchildren. *Riley v. Smith*, 9 Ky. L. Rep. 615.

**4. Man Supporting Indigent Father, Mother, Brother, or Sister.** — *Marsh v. Lazenby*, 41 Ga. 153; *Parsons v. Livingston*, 11 Iowa 104, 77 Am. Dec. 135; *State v. Kane*, 42 Mo. App. 253; *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850; *Barry v. Hale*, 2 Tex. Civ. App. 668. And see the dictum in *Bell v. Keach*, 80 Ky. 42, 3 Ky. L. Rep. 520, 653.

A Man Supporting His Widowed Sister and Her Children was held in *Dendy v. Gamble*, 64 Ga. 528, not to be entitled to a homestead as the head of a family. But this case cannot now be sustained, even in *Georgia*, unless the sister and her children were independent. See the *Georgia* cases referred to in the fourth note preceding.

**5. An Unmarried Woman Supporting a Dependent Invalid Sister** has been held to be the head of a family. *Chamberlain v. Brown*, 33 S. Car. 597.

**6. A Father and His Adult Daughter** who supported herself by teaching school, and when residing with him performed household duties

in compensation for her board, have been held to constitute a family. *Doolin v. Dugan*, 12 Ky. L. Rep. 749.

A father residing on his own land with an adult son and daughter, both of whom worked for him without wages, has been held to be the head of a family. *Versailles Bank v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621. See also *Rollings v. Evans*, 23 S. Car. 316. Compare *Powers v. Sample*, 72 Miss. 187; *Trammell v. Neal*, 1 Tex. Unrep. Cas. 51.

**Widow and Adult Children.** — In *Kentucky* a widow occupying a homestead, but having two adult children living with her, was held to be a housekeeper having a family. *Brooks v. Collins*, 11 Bush (Ky.) 622.

**A Father and His Widowed Daughter and Her Children** constitute a family, and the father is entitled to claim a homestead as the head of a family, or as a housekeeper having a family. *Blackwell v. Broughton*, 56 Ga. 390; *Ross v. Sweeney*, 12 Ky. L. Rep. 861, (Ky. 1891) 15 S. W. Rep. 357; *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636.

**Daughter Abandoned by Husband.** — The same would be true of a father who has living with him and supports an adult daughter abandoned by her husband. See a dictum in *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636.

**A Widow Living with Dependent Grandchildren of Her Deceased Husband by a Former Wife** has been held to be the head of a family. *Wolfe v. Buckley*, 52 Tex. 641.

**A Widower Living with a Dependent Mother-in-law** has been held to be a housekeeper with a family within the meaning of the *Kentucky* homestead laws. *Scholl v. Laurenz*, 13 Ky. L. Rep. 971, 14 Ky. L. Rep. 228.

**7. Question of Good Faith.** — *Blackwell v. Broughton*, 56 Ga. 390.

**8. Nonsupport of Family by Husband.** — *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530.



such adoption binding and imposing the duties and obligations of a parent;<sup>1</sup> but there are some decisions to the contrary.<sup>2</sup> The contrary is certainly the rule where there has been a regular and formal statutory adoption and the statute gives the adopted child the same rights and status as a child of the blood.<sup>3</sup>

*f. ILLEGITIMATE CHILDREN.* — The fact that a child who is living with and supported by his or her parent is illegitimate does not make the parent any the less the head of a family within the meaning of the homestead law.<sup>4</sup>

*g. MERE CONTRACT RELATION.* — The family relation is a relation of status, and not merely of contract, and it may be regarded as settled that a collection of persons who sustain a mere contract relation towards each other is not a family, though the persons may live together and be under one head.<sup>5</sup>

**Master and Servant.** — For example, a man or woman who lives in a house with servants only, having no relative or other person dependent upon him or her, is not the head of a family so as to be entitled to claim a homestead exemption.<sup>6</sup>

**Persons Keeping Boarders.** — Nor is a person who keeps a boarding house the head of a family, where there are no other persons besides the boarders, that is, no other persons dependent upon him or her for support.<sup>7</sup>

**4. Living Together and Keeping House** — *a. IN GENERAL.* — In a number of cases it has been held that to constitute a family within the meaning of the homestead exemption laws there must be at least a collection of persons living together in one house, and under one head, and that a homestead allowed to the head of a family, or a householder having a family, cannot be claimed by a person who does not maintain a home and live with those who are dependent upon him, though he may support them by his contributions.<sup>8</sup> This would seem clearly to be the proper view, but there are decisions to the con-

**1. Adoption of Children.** — *In re Lambson*, 2 Hughes (U. S.) 233, 14 Fed. Cas. No. 8,029. See also *In re Summers*, 3 Nat. Bankr. Reg. 84, 23 Fed. Cas. No. 13,604; *National Bank v. Slavin*, 1 Ky. L. Rep. 315; *Mullins v. Looke*, 8 Tex. Civ. App. 138.

**2.** *Fant v. Gist*, 36 S. Car. 576; *Wagener v. Parrott*, 51 S. Car. 489.

**3.** *Cofer v. Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54.

**4. Illegitimate Children.** — *Ellis v. White*, 47 Cal. 73; *Bell v. Keach*, 80 Ky. 42, 3 Ky. L. Rep. 520, 653; *Lane v. Philips*, 69 Tex. 240, 5 Am. St. Rep. 41. And see *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404.

**5. Mere Contract Relation Not Enough.** — *In re Summers*, 3 Nat. Bankr. Reg. 84, 23 Fed. Cas. No. 13,604; *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733; *Holnback v. Wilson*, 159 Ill. 148; *Whalen v. Cadman*, 11 Iowa 226; *Ellis v. Davis*, 90 Ky. 183, 11 Ky. L. Rep. 893; *Roco v. Green*, 50 Tex. 483. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 92.

**6. Servants** — *United States.* — *In re Lambson*, 2 Hughes (U. S.) 233, 14 Fed. Cas. No. 8,029; *In re Summers*, 3 Nat. Bankr. Reg. 84, 23 Fed. Cas. No. 13,604. Compare *In re Taylor*, 3 Nat. Bankr. Reg. 157, 23 Fed. Cas. No. 13,775.

*Alabama.* — *Cochran v. Miller*, 74 Ala. 50.

*Arkansas.* — *Harbison v. Vaughan*, 42 Ark. 531.

*Georgia.* — *Calhoun v. McLendon*, 42 Ga. 405.

*Kentucky.* — *Ellis v. Davis*, 90 Ky. 183, 11 Ky. L. Rep. 893.

*Missouri.* — *Murdock v. Dalby*, 13 Mo. App. 41.

*South Carolina.* — *Garaty v. Du Bose*, 5 S. Car. 493.

*Texas.* — *Howard v. Marshall*, 48 Tex. 471, disapproving a dictum in *Wilson v. Cochran*, 31 Tex. 680, 98 Am. Dec. 553; *Whitehead v. Nickelson*, 48 Tex. 530; *Roco v. Green*, 50 Tex. 483.

*Virginia.* — *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 92.

**Apprentices.** — In the case of *In re Summers*, 3 Nat. Bankr. Reg. 84, 23 Fed. Cas. No. 13,604, it was held that the fact that an unmarried man had orphan children bound to him under the apprentice laws of *Texas*, and conducted a household, did not entitle him to a homestead as the head of a family.

**Housekeeper.** — A person whose family consists only of himself and a housekeeper is not a housekeeper "with a family" within the meaning of the homestead law of *Kentucky*, and is not entitled to a homestead in his own right. *Ellis v. Davis*, 90 Ky. 183, 11 Ky. L. Rep. 893.

**7. Boarders.** — *Whitehead v. Nickelson*, 48 Tex. 530; *Roco v. Green*, 50 Tex. 483. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 92.

**8. Living Together and Keeping House** — View that This Is Necessary. — *Woods v. Haas*, 110 Ill. 528; *Linton v. Crosby*, 56 Iowa 386, 41 Am. Rep. 107; *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165.

See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 93.



trary in some states, under the personal property exemption laws.<sup>1</sup>

*b. COHABITATION OF HUSBAND AND WIFE.* — Where an owner of land occupies it as a residence with his wife and children, he is none the less the head of a family, so as to be entitled to claim the land as his homestead, because of the fact that he is on bad terms with his wife and does not cohabit with her.<sup>2</sup>

*c. REMOVAL OF HUSBAND.* — Where a man owns land and resides thereon with his wife and family, the fact that he leaves home from time to time, because of difficulties with his wife, or for any other reason, does not deprive him of his status as the head of a family.<sup>3</sup>

*d. LEASE OF HOMESTEAD.* — The owner of a house does not cease to be the head of a family because he has rented the house and farm to a tenant, and the tenant lives therein with his family, when the owner also lives there.<sup>4</sup>

**5. Widowers and Widows.** — A widower or widow may clearly claim the benefit of the homestead exemption laws in those jurisdictions in which the right of exemption is given to every resident of the state, without requiring that there shall be any family.<sup>5</sup> And even when a family is required, they may be within the law. It is not necessary, to constitute a family, that there shall be husband and wife. A widower having a child or children, or, in most jurisdictions, other relatives, dependent upon him, may be the head of a family.<sup>6</sup> And the same is true of a widow having a child or children dependent upon her.<sup>7</sup> In most states, however, neither a widower nor a widow can claim a homestead as the head of a family unless he or she has a child or some other relative dependent upon him or her for support.<sup>8</sup> The effect of ceasing

A man cannot claim a homestead under the *Kansas* statute which exempts premises "occupied as a residence by the family of the owner," where he lives alone on the land, and his wife and children reside in another state, and he has no intention of bringing them into the state. *Farlin v. Sook*, 26 Kan. 397.

**1. Living Together Not Necessary.** — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 93.

**Separation of Family After Acquisition of Homestead.** — See *infra*, this section, *Termination of Status*.

**2. Cohabitation of Husband and Wife.** — *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530, holding, also, that in such a case, though the husband contributes nothing to the family support, the wife cannot claim a homestead as the head of the family.

**3. Removal of Husband.** — *Carrington v. Herrin*, 4 Bush (Ky.) 624. And see *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel*.

**4. Effect of Lease.** — *Brown v. Brown*, 68 Mo. 388. And see *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel*.

**5. Widowers and Widows.** — See *supra*, this section, *In General — Necessity for Family*.

**6. Widower Head of Family** — *Illinois*. — *Holnback v. Wilson*, 159 Ill. 149.

*Iowa*. — *Parsons v. Livingston*, 11 Iowa 104, 77 Am. Dec. 135; *Tyson v. Reynolds*, 52 Iowa 431.

*Kentucky*. — *Riley v. Smith*, 9 Ky. L. Rep. 615; *Ross v. Sweeney*, 12 Ky. L. Rep. 861, (Ky. 1891) 15 S. W. Rep. 357; *Scholl v. Laurenz*, 13 Ky. L. Rep. 971, 14 Ky. L. Rep. 228.

*Missouri*. — *Versailles Bank v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621.

*New Hampshire*. — *Barney v. Leeds*, 51 N. H. 263.

*South Carolina*. — *Myers v. Ham*, 20 S. Car. 522; *Fant v. Gist*, 36 S. Car. 576; *Wagener v. Parrott*, 51 S. Car. 489.

*Tennessee*. — *Flannegan v. Stifel*, 3 Tenn. Ch. 465.

See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 94.

**7. Widows with Children or Dependents** — *Idaho*. — *Coughanour v. Hoffman*, 2 Idaho 267.

*Iowa*. — *Whalen v. Cadman*, 11 Iowa 226.

*Kentucky*. — *Brooks v. Collins*, 11 Bush (Ky.) 622.

*Tennessee*. — *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163; *Ex p. Brien*, 2 Tenn. Ch. 33.

*Texas*. — *Wolfe v. Buckley*, 52 Tex. 641; *Smith v. Wright*, 13 Tex. Civ. App. 480.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 94.

**8. Widower or Widow Without Children or Dependents** — *Georgia*. — *Kidd v. Lester*, 46 Ga. 231.

*Illinois*. — *Rock v. Haas*, 110 Ill. 528; *Holnback v. Wilson*, 159 Ill. 148.

*Kentucky*. — *Ellis v. Davis*, 90 Ky. 183; *Carter v. Adams*, 9 Ky. L. Rep. 91; *Louisville Banking Co. v. Anderson*, (Ky. 1898) 44 S. W. Rep. 636.

*Mississippi*. — *Hill v. Franklin*, 54 Miss. 632; *Powers v. Sample*, 72 Miss. 187.

*Missouri*. — *Murdock v. Dalby*, 13 Mo. App. 41.

*Texas*. — *Whitehead v. Nickelson*, 48 Tex. 517.

See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 94.

**Contrary Decisions.** — There are some decisions to the contrary, or apparently so. Thus in *Missouri* it was held that a widow who was without children, but who continuously resided at the homestead, keeping house with

to be the head of a family after the homestead right has attached is elsewhere considered.<sup>1</sup>

**Express Statutory Provision.** — In many states there are statutes which expressly protect the homestead for the benefit of the surviving wife or husband.<sup>2</sup>

**6. Unmarried Persons.** — An Unmarried Man may claim the benefit of homestead exemption laws which do not require a family.<sup>3</sup> And under statutes restricting the right to the head of a family or to a householder having a family, although he is not entitled to a homestead exemption if there is no one who is dependent upon him, and whom he is either legally or naturally bound to support,<sup>4</sup> yet it is otherwise if he maintains a home and supports persons who are dependent upon him, and whom he is under such a duty to support, as a father, mother, sister, illegitimate child, or the like.<sup>5</sup>

**Unmarried Woman.** — The same is true of an unmarried woman. She is not entitled to a homestead as the head of a family, if she has no person living with her who is dependent upon her for support and whom she is under a legal or natural duty to support.<sup>6</sup> But a woman, though unmarried, is the head of a family if she has living with her and supports such a person, as a mother, an

her brother, was the head of a family. *Leake v. King*, 85 Mo. 413. See also *Bradley v. Rodelsperger*, 3 S. Car. 226; *Hesnard v. Plunkett*, 6 S. Dak. 73. Compare with the last case *McCanna v. Anderson*, 6 N. Dak. 484.

In *Vermont*, a widower with no family but a servant has been held a "housekeeper" entitled to a homestead. *Pierce v. Kusic*, 56 Vt. 418.

**1. Termination of Status.** — See *infra*, this section, *Termination of Status*.

**2. Express Statutory Provision — Surviving Spouse.** — See *infra*, this title, *Rights of Surviving Spouse and Children*.

The Ohio Statute (Bates's Annot. Stat. Ohio, 1897, § 5435) gives a homestead to "husband and wife living together, a widow or a widower living with an unmarried daughter or unmarried minor son." This statute is to be read as if there were a comma after "widow," and the words following "widower" limit that word alone. *Allen v. Russell*, 39 Ohio St. 336.

A widower whose family consists only of an adult unmarried daughter is within the benefit of the statute; the son only is required to be a minor. *Boettger v. Fischer*, 9 Cinc. L. Bul. 337, 8 Ohio Dec. (Reprint) 776.

A divorced man living with an unmarried minor son was held to be a widower within the meaning of the statute. *Kunkle v. Reeser*, (Prob. Ct.) 5 Ohio N. P. 401.

Under the Former California Statute it was held that where a widower with minor children, residing on a tract of land, declared a homestead thereon, the homestead ceased upon the children becoming of age. *Santa Cruz Bank v. Cooper*, 56 Cal. 339. Perhaps the same construction applies to the present statute, Civ. Code Cal., § 1261.

**3. Unmarried Men.** — See *supra*, this section, *In General — Necessity for Family*.

**4. Statutes Requiring Family — Unmarried Man Without Dependents.** — *Leake v. King*, 85 Mo. 413; *Lambson*, 2 Hughes (U. S.) 233, 14 Fed. Cas. No. 8,029; *In re Summers*, 3 Nat. Bankr. Reg. 84, 23 Fed. Cas. No. 13,604.

*Alabama.* — *Cochran v. Miller*, 74 Ala. 50.

*Arkansas.* — *Harbison v. Vaughan*, 42 Ark. 539.

*Georgia.* — *Calhoun v. McLendon*, 42 Ga. 405.

*Illinois.* — *Rock v. Haas*, 110 Ill. 528.

*Massachusetts.* — *Woodworth v. Comstock*, 10 Allen (Mass.) 425.

*North Dakota.* — *McCanna v. Anderson*, 6 N. Dak. 482.

*South Carolina.* — *Garaty v. Du Bose*, 5 S. Car. 493.

*Texas.* — *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Mullins v. Looke*, 8 Tex. Civ. App. 138.

*Virginia.* — *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 97.

With the *North Dakota* case cited compare the *South Dakota* case of *Hesnard v. Plunkett*, 6 S. Dak. 73, decided under a similar statute.

**5. Unmarried Man Supporting Dependents.** — *United States.* — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

*California.* — *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304.

*Georgia.* — *Marsh v. Lazenby*, 41 Ga. 153.

*Illinois.* — *Holnback v. Wilson*, 159 Ill. 148; *Wike v. Garner*, 179 Ill. 257.

*Iowa.* — *Parsons v. Livingston*, 11 Iowa 104, 77 Am. Dec. 135; *Whalen v. Cadman*, 11 Iowa 226.

*Kentucky.* — *Bell v. Keach*, 80 Ky. 42, 3 Ky. L. Rep. 520, 653.

*Missouri.* — *State v. Kane*, 42 Mo. App. 253.

*South Carolina.* — *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850 [citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 804, note 2]; *Scott v. Mosely*, 54 S. Car. 375.

*Tennessee.* — *Ex p. Brien*, 2 Tenn. Ch. 33.

*Texas.* — *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 41.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 97.

**6. Unmarried Women Without Dependents.** — *Robinson v. Turner*, 14 Ky. L. Rep. 79; *Woodworth v. Comstock*, 10 Allen (Mass.) 425; *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 97.



illegitimate minor child, etc.<sup>1</sup>

**7. Time of Acquiring Status**—*a. IN GENERAL.*—When a statute allows a homestead exemption to every head of a family residing in the state, or every householder, etc., a person to be entitled to the benefit of the statute need not have been the head of a family, or a householder, at the time of contracting the debt as against which he claims a homestead, but it is sufficient if he has acquired such a status at the time when the property is levied upon and claimed as exempt, or, according to some of the decisions, at any time before the property is sold, provided the creditor has acquired no fixed lien thereon.<sup>2</sup>

*b. LIENS ATTACHING BEFORE MARRIAGE.*—If a creditor obtains a valid lien upon land before the debtor's marriage, the lien will not be divested by the subsequent marriage of the debtor and claim of the premises as a homestead.<sup>3</sup> This principle has been applied to the lien of an attachment.<sup>4</sup>

*c. JUDGMENT OBTAINED BEFORE MARRIAGE.*—It has been held that where a judgment is made a lien on land when docketed, and is duly docketed before the owner of the land acquires the status of the head of a family, his subsequent marriage does not divest the lien so as to entitle him to claim a homestead as against the judgment.<sup>5</sup> In some states, however, this is not the rule, but a homestead exemption may be claimed by one who becomes the head of a family after rendition of a judgment and before levy of an execution thereon.<sup>6</sup>

**8. Termination of Status**—*a. TEMPORARY SEPARATION OF FAMILY.*—Even though it is necessary that there shall be living together and keeping house, in order to constitute a family, it is not necessary that the members shall be kept together continuously, nor that the head of the family shall

**1. Unmarried Woman Supporting Dependents.**—*Ellis v. White*, 47 Cal. 73; *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248; *Chamberlain v. Brown*, 33 S. Car. 597. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 97.

**2. Time of Acquiring Status as Head of a Family**—*Kentucky.*—*Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404, 12 Ky. L. Rep. 433.

*Mississippi.*—*Trotter v. Dobbs*, 38 Miss. 198.

*Nevada.*—*Walley's Estate*, 11 Nev. 260.

*South Carolina.*—*Chafee v. Rainey*, 21 S. Car. 11 [*distinguishing Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720]; *Rollings v. Evans*, 23 S. Car. 316; *Gray v. Putnam*, 51 S. Car. 97.

*Tennessee.*—*Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882.

See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 98.

**Marriage After Levy.**—In *Ohio* the right to a homestead must exist at the time when a levy is made, and a subsequent marriage does not entitle the debtor to the exemption. *Nixon v. Vandyke*, 2 Ohio Cir. Ct. 63, 1 Ohio Cir. Dec. 364, reversing 15 Cinc. L. Bul. 358, 9 Ohio Dec. (Reprint) 622. See also *Selders v. Lane*, 40 Ohio St. 345.

In *Mississippi* the rule is different, and the judgment debtor is entitled to his homestead if he becomes a householder and the head of a family before the sale of the property. *Trotter v. Dobbs*, 38 Miss. 198.

And in *South Carolina* the same rule obtains. *Chafee v. Rainey*, 21 S. Car. 11; *Rollings v. Evans*, 23 S. Car. 316, *distinguishing Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720, a case of chattel exemption.

**3. Marriage After Lien Attaches.**—*Richardson v. Adler*, 46 Ark. 43; *Rock v. Haas*, 110 Ill.

528; *Selders v. Lane*, 40 Ohio St. 345; *Kennerly v. Swartz*, 83 Va. 704; *Wilkinson v. Merrill*, 87 Va. 513.

**4. Attachment Lien.**—To become the head of a family after an attachment is levied on property will not exempt the property from sale under a judgment of condemnation. The judgment lien relates to the levy of the attachment, and perfects the inchoate charge created by the levy, and cannot be displaced by any change in the status of the debtor. *Richardson v. Adler*, 46 Ark. 43. See also *Selders v. Lane*, 40 Ohio St. 345.

**5. Judgment Liens.**—*Rock v. Haas*, 110 Ill. 528; *Kennerly v. Swartz*, 83 Va. 704; *Wilkinson v. Merrill*, 87 Va. 513.

**A Marriage Between Persons Who Had Been Living in Adultery** does not relate back so as to cut out the lien of a prior judgment, although they may have been residing on the premises at the time when the judgment was rendered. *Rock v. Haas*, 110 Ill. 528.

**6. Rule Allowing Homestead as Against Judgment Rendered Before Marriage.**—*Trotter v. Dobbs*, 38 Miss. 198; *Chafee v. Rainey*, 21 S. Car. 11; *Rollings v. Evans*, 23 S. Car. 316. See also *Gray v. Putnam*, 51 S. Car. 97.

**Invalid Marriage Legalized ab Initio.**—Where persons of color had cohabited as man and wife, and, after a suit was brought to subject premises conveyed by the man to the woman on the ground that the conveyance was in fraud of his creditors, made a declaration before the county clerk, as provided by the *Kentucky* statute, it was held that the effect was the same as if they had been originally legally married, and that the man could afterwards claim the land as his homestead as the head of a family. *Dowd v. Hurley*, 78 Ky. 260.



always remain at home. The family is not broken up, nor the head of the family deprived of his right to claim homestead exemption, by any temporary separation of the family, either by the absence of the head or by the absence of a member or members; and it can make no difference how protracted such absence is.<sup>1</sup>

**b. PERMANENT SEPARATION OR LOSS OF FAMILY.** — In Some States it has been held that when a debtor loses his status as the head of a family by the permanent separation of the family, or by the death of the members, he also loses his right to a homestead exemption previously acquired, as the right is dependent upon such a status.<sup>2</sup> This was formerly the rule in *California*, but it has been expressly changed by statute.<sup>3</sup>

**Prevailing Doctrine.** — In most of the states in which the question has arisen, this doctrine has been repudiated, and it has been held that after a homestead has once been acquired, it is not lost by the death or removal of the members of the family other than the head, but continues to be exempt so long as he occupies it as a home.<sup>4</sup>

**Death or Removal of Wife.** — According to this doctrine the death or permanent removal of the wife does not defeat or affect the homestead right of the husband, where he continues to occupy the homestead, even when there are no children.<sup>5</sup> Certainly her death or removal does not affect his homestead right

**1. Temporary Separation Does Not Break Up Family.** — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733; *Johnston v. Turner*, 29 Ark. 280; *State v. Finn*, 8 Mo. App. 261. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 93.

**2. Permanent Loss of Status as Head of a Family — California.** — *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304. But see the next note, *infra*.

*Georgia.* — *Johnson v. Little*, 90 Ga. 781.

*Louisiana.* — *Denis v. Gayle*, 40 La. Ann. 256.

*Mississippi.* — *Hand v. Winn*, 52 Miss. 784; *Hill v. Franklin*, 54 Miss. 632.

*Ohio.* — *Cooper v. Cooper*, 24 Ohio St. 488.

Where a debtor moves for the custody of a fund in the hands of the court, in lieu of a homestead, the right to the fund must be determined upon the state of facts existing at the time when it is finally disposed of by the court; and if the debtor has then ceased to be the head of a family within the meaning of the homestead exemption act, he is not entitled to any exemption. *Cooper v. Cooper*, 24 Ohio St. 488.

**3. Rule in California.** — Thus under the former California statute, it was held that when a person having a homestead ceases to be the head of a family, by the death of his wife without children, his right of homestead ceases. *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304. And see *McQuade v. Whaley*, 31 Cal. 535.

And so the death of the wife after suit brought by herself and husband for the homestead, defeated a recovery by her husband. *Gee v. Moore*, 14 Cal. 472.

Under the present California statute (Civ. Code, § 1265, as amended 1880) a homestead once declared continues to exist except as otherwise provided, though the debtor to whom it was set apart may have lost his status as head of a family. *Roth v. Insley*, 86 Cal. 131.

**4. Prevailing Doctrine Against Cessation of**

**Right — Arkansas.** — *Stanley v. Snyder*, 43 Ark. 429; *Gates v. Steele*, 48 Ark. 539.

*Illinois.* — *Bonnell v. Smith*, 53 Ill. 375; *Kimbrel v. Willis*, 97 Ill. 494.

*Iowa.* — *Woods v. Davis*, 34 Iowa 264.

*Kentucky.* — *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575; *Gowdy v. Johnson*, (Ky. 1898) 47 S. W. Rep. 624.

*Massachusetts.* — *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Silloway v. Brown*, 12 Allen (Mass.) 30.

*Missouri.* — *Brown v. Brown*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415; *Beckmann v. Meyer*, 75 Mo. 333, 7 Mo. App. 577; *Leake v. King*, 85 Mo. 413; *Versailles Bank v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621.

*New Hampshire.* — *Meader v. Place*, 43 N. H. 307.

*South Carolina.* — See *Rollings v. Evans*, 23 S. Car. 316.

*Tennessee.* — *Webb v. Cowley*, 5 Lea (Tenn.) 722.

*Texas.* — *Wood v. Wheeler*, 7 Tex. 13; *Taylor v. Boulware*, 17 Tex. 75, 67 Am. Dec. 642; *Kessler v. Draub*, 52 Tex. 575, 36 Am. Rep. 727; *Blum v. Gaines*, 57 Tex. 119; *Zapp v. Strohmeier*, 75 Tex. 638; *Hall v. Fields*, 81 Tex. 553. *Compare Burns v. Jones*, 37 Tex. 50; *Whitehead v. Nickelson*, 48 Tex. 517; *Roco v. Green*, 50 Tex. 483.

*Virginia.* — *Wilkinson v. Merrill*, 87 Va. 513, overruling on this point *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

**The Homestead Right of a Widower with Whom Lives a Minor Child** is not terminated by the majority and removal of the child. *Barney v. Leeds*, 51 N. H. 263.

**5. Death of Wife Without Children.** — *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642. And see *Kimbrel v. Willis*, 97 Ill. 494; *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575; *Whitehead v. Tapp*, 69 Mo. 415.

**The Removal or Desertion of the Wife** has been held not to terminate the husband's right to a homestead. *Gates v. Steele*, 48 Ark. 539; *Bonnell v. Smith*, 53 Ill. 375; *Pardo v. Bittorf*,

where there are children and he has the care and custody of them.<sup>1</sup>

**Death or Removal of Wife and Children.** — Most of the courts have also held that the homestead exemption acquired by the head of a family is not defeated by the death or removal of both the wife and the children, if the head of the family continues to reside thereon.<sup>2</sup>

**c. TEMPORARY LOSS OF STATUS.** — Perhaps all courts would hold that temporary loss of status as the head of a family would not affect the homestead right.<sup>3</sup>

**d. PERSONS HAVING CARE AND SUPPORT OF DEPENDENT FEMALES.** — In *Georgia*, where the constitution allows a homestead exemption to any person "having the care and support of dependent females of any age, who is not the head of a family," the right to exemption ceases when the females cease to be dependent.<sup>4</sup>

**9. Rights of Married Women** — **a. SEPARATE PROPERTY** — (1) *In General.* — It is the general rule that where husband and wife are living together, the husband is the head of the family. His domicile is the wife's domicile, and wherever he may erect a homestead it is, in contemplation of the law, the homestead of the husband and wife.<sup>5</sup> And for this reason it has been held in a number of cases that in such a case, in the absence of some provision in the statute clearly allowing it, there can be no such thing as a homestead of the wife as the "head of a family," even in her own property, separate and apart from her husband.<sup>6</sup>

**Statutes Allowing to Married Women Homestead Exemption in Separate Property.** — In some states, however, the statutes either expressly allow a married woman to

48 Mich. 275; *Brown v. Brown*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415.

**Voluntary Separation of Husband and Wife** does not destroy the family relation or defeat the homestead exemption. *Meador v. Place*, 43 N. H. 307; *Atkinson v. Atkinson*, 40 N. H. 249, 77 Am. Dec. 712.

**1. Death or Removal of Wife Leaving Children.** — *Redfern v. Redfern*, 38 Ill. 509; *Byers v. Byers*, 21 Iowa 268; *Weber v. Beier*, 14 Ohio Cir. Ct. 277, 7 Ohio Cir. Dec. 381.

**2. Death or Removal of Both Wife and Children** — *Arkansas*. — *Stanley v. Snyder*, 43 Ark. 429.

*Georgia*. — *Torrance v. Boyd*, 63 Ga. 22.

*Illinois*. — *Kimbrel v. Willis*, 97 Ill. 494.

*Iowa*. — *Woods v. Davis*, 34 Iowa 264.

*Kentucky*. — *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575.

*Massachusetts*. — *Dovle v. Coburn* 6 Allen (Mass.) 71; *Silloway v. Brown*, 12 Allen (Mass.) 30.

*Missouri*. — *Beckmann v. Meyer*, 75 Mo. 333, 7 Mo. App. 577.

*Tennessee*. — *Webb v. Cowley*, 5 Lea (Tenn.) 722.

*Texas*. — *Taylor v. Boulware*, 17 Tex. 75, 67 Am. Dec. 642; *Kessler v. Draub*, 52 Tex. 575, 36 Am. Rep. 727; *Zapp v. Strohmeier*, 75 Tex. 638.

*Virginia*. — *Wilkinson v. Merrill*, 87 Va. 513.

In *Silloway v. Brown*, 12 Allen (Mass.) 30, it was said: "Although a homestead estate cannot be acquired except by a householder having a family, yet when once acquired, and still occupied by him, it has been held not to be defeated or lost by the death or absence of his wife and children."

An Iowa Statute (Code 1897, § 2973) saves the right of a widow or widower, though without children, who continues to reside on the

homestead. See *Stewart v. Brand*, 23 Iowa 477.

**3. Temporary Loss of Status.** — If at the time when the debt was contracted the debtor was the head of a dependent family, and there were other dependent members at the date of the seizure of the property, the exemption is not lost although there were short periods of time in the intervening years during which the dependence of a member of the family was not shown to be direct. *Hebert v. Mayer*, 48 La. Ann. 938.

**4. Persons Supporting Dependent Females.** — Const. Ga., art. 9, § 1; *Johnson v. Little*, 90 Ga. 781.

**5. Married Women — Domicil of Wife.** — *Rosenberg v. Jett*, 72 Fed. Rep. 90; *Creath v. Creath*, 86 Tenn. 659.

**6. Homestead in Separate Property** — *United States*. — *Rosenberg v. Jett*, 72 Fed. Rep. 90.

*Georgia*. — *Neal v. Sawyer*, 62 Ga. 352; *Bechtoldt v. Fain*, 71 Ga. 495; *Johnson v. Little*, 90 Ga. 781; *Williams v. Webb*, 99 Ga. 301; *Pegram v. Hancock*, 105 Ga. 185; *Bennett v. Trust Co.*, 106 Ga. 578. But in this state a married woman may now claim a homestead in her separate property if she has the care and support of dependent females. See the next note following.

*Louisiana*. — *Fuselier v. Buckner*, 28 La. Ann. 594. See also *Taylor v. McElvin*, 31 La. Ann. 283; *Borron v. Sollibellos*, 28 La. Ann. 355.

*Oklahoma*. — *McGinnis v. Wood*, 4 Okla. 490.

*Tennessee*. — *Turner v. Argo*, 89 Tenn. 443; *Producers' Nat. Bank v. Cumberland Lumber Co.*, 100 Tenn. 389; *Adcock v. Mann*, (Tenn. Ch. 1896) 38 S. W. Rep. 99.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 95.

claim a homestead in her separate property, even though she may be living with her husband, where the premises are occupied as a family homestead, or else they are construed, contrary to decisions already referred to, as including her within the phrases "head of a family," or "person having a family," etc.<sup>1</sup>

(2) *Wife Supporting Family*. — By the weight of authority the wife becomes the head of the family, and as such entitled to a homestead exemption in her separate property, where her husband is disabled, or for any other reason is unable to support the family, and she is compelled to furnish the support.<sup>2</sup>

(3) *Deserted Wife*. — The same is true of a wife who has been deserted by her husband, and who has the care and maintenance of the family.<sup>3</sup>

(4) *Separation by Agreement*. — It has even been held that after a permanent separation of husband and wife by agreement, and his refusal or failure to furnish her with a home and support, she may be the head of a family, and entitled to a homestead.<sup>4</sup>

**b. HUSBAND'S PROPERTY** — (1) *In General*. — As a rule, in the absence of express provision in the statute to the contrary, the wife, so long as her husband is living, and there has been no separation, cannot claim a homestead in

**1. Statutes Allowing to Married Women Homestead in Separate Property** — *Alabama*. — A married woman is within the statute as a resident of the state. *Bender v. Meyer*, 55 Ala. 576; *Schuessler v. Wilson*, 56 Ala. 516; *Weiner v. Sterling*, 61 Ala. 98; *Beard v. Johnson*, 87 Ala. 729.

Under the Alabama statute there cannot, at the same time, be two separate valid homestead claims, the one by the husband and the other by the wife, when one alone owes the debt against which the homestead is asserted. *Beard v. Johnson*, 87 Ala. 729.

*Arkansas*. — *Thompson v. King*, 54 Ark. 9 (entitled as a resident of the state who is married).

*Colorado*. — A married woman, while occupying her property with her husband as a home, has the status of the head of a family, and may claim the property as exempt from seizure and sale for the joint debts of herself and husband. *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579.

*Georgia*. — Under the Constitution of 1877, a married woman "having the care and support of defendant females" may claim a homestead in her separate estate, notwithstanding she is living with her husband. *Johnson v. Little*, 90 Ga. 781; *Sparks v. Shelnut*, 99 Ga. 629. And see *Robson v. Walker*, 74 Ga. 823. But under neither the Constitution of 1868 nor that of 1877 can a wife living with her husband be entitled to a homestead as head of a family. *Neal v. Sawyer*, 62 Ga. 352; *Bechtoldt v. Fain*, 71 Ga. 495; *Johnson v. Little*, 90 Ga. 781; *Williams v. Webb*, 99 Ga. 301; *Pegram v. Hancock*, 105 Ga. 185; *Bennett v. Trust Co.*, 106 Ga. 578.

*Illinois*. — *Tourville v. Pierson*, 39 Ill. 446; *Zander v. Scott*, 165 Ill. 51 (entitled as a householder having a family, not as the head of a family). Compare *Clinton v. Kidwell*, 82 Ill. 429.

*Iowa*. — Under the statute exempting "the homestead of every family, whether owned by the husband or wife" (Code 1897, § 2972), the wife may select her homestead in her separate property. *Ehrck v. Ehrck*, 106 Iowa 614.

*Michigan*. — A married woman is within the benefit of a statute giving a homestead in

lands, etc., "owned and occupied by any resident of this state" (How. Annot. Stat. 1882, § 7721), though the husband is the head of the family. *Kruger v. Le Blanc*, 75 Mich. 424.

*Mississippi*. — A married woman may claim a homestead in her separate property, though living with her husband, under a statute allowing a homestead to every citizen of the state, male or female, being a householder, and having a family, in land owned and occupied as a residence by him or her. *Partee v. Stewart*, 50 Miss. 717. See also *Hand v. Winn*, 52 Miss. 784.

*Ohio*. — A married woman living with her husband may claim a homestead exemption in her separate property as against her creditors. *Hill v. Myers*, 46 Ohio St. 183.

**2. Wife Supporting Family** — *Illinois*. — *Temple v. Freed*, 21 Ill. App. 238. And see *Vanzant v. Vanzant*, 23 Ill. 536; *Bonnell v. Smith*, 53 Ill. 375.

*Kansas*. — *Fish v. Street*, 27 Kan. 270.

*Kentucky*. — *Wilson v. Wilson*, (Ky. 1897) 42 S. W. Rep. 404.

*South Dakota*. — *Linander v. Longstaff*, 7 S. Dak. 157. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 95, 96.

The Contrary has been held in some states.

*Georgia*. — *Neal v. Sawyer*, 62 Ga. 352; *Johnson v. Little*, 90 Ga. 781; *Sparks v. Shelnut*, 99 Ga. 629.

In *Louisiana*, applying the rule at one time, at least, in force there, that the homestead laws must be strictly construed, it has been held that a married woman, though she may own and occupy premises and support dependent persons, cannot claim a homestead. *Fuselie v. Buckner*, 28 La. Ann. 594.

**3. Deserted Wife**. — *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31; *Nash v. Norment*, 5 Mo. App. 545. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 96.

**4. Separation by Agreement** — *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31.

In *Georgia*, by statute, a wife living in a state of separation from her husband, and having with her or being entitled to the possession of, minor children, may have a homestead in her separate property. *Pegram v. Hancock*, 105 Ga. 185, 2 Code Ga. (1895),



his property. He is the head of the family, and it is for him to select and claim the homestead.<sup>1</sup> During his life the wife has no estate in his homestead, even when the right to occupy it is given to her and alienation by the husband without her consent and joinder is expressly prohibited.<sup>2</sup> In some states, however, the statute expressly gives to the wife substantial rights in the homestead during the lifetime of the husband, as well as after his death, and even allows either the husband or the wife to select or claim the homestead.<sup>3</sup>

(2) *Deserted Wife*. — In some of the statutes it is expressly provided that where a husband deserts his family, the homestead shall continue in favor of the wife, if she continues to reside thereon, and she may then claim it.<sup>4</sup> This is held in some states, even in the absence of such a provision, where the statute prohibits the husband from alienating or encumbering the homestead without his wife's consent and joinder, since it is considered that such prohibition shows an intention on the part of the legislature that the homestead shall not be liable to be lost to the wife by conduct of the husband alone.<sup>5</sup> In other states, however, a wife, during her husband's lifetime, has no interest at all in the homestead after her husband has deserted her, and cannot appeal to the courts for its protection.<sup>6</sup>

§ 2842. The wife cannot claim under this statute when living with her husband, though she may have minor children by a former husband. *Neal v. Sawyer*, 62 Ga. 352.

1. *Claim by Wife in Husband's Property* — *California*. — *Guio v. Guio*, 14 Cal. 506, 76 Am. Dec. 440.

*Georgia*. — *Davis v. Lumpkin*, 106 Ga. 582.

*Illinois*. — *Richards v. Greene*, 73 Ill. 54; *Getzler v. Saroni*, 18 Ill. 511.

*Louisiana*. — *Fuselier v. Buckner*, 28 La. Ann. 594.

*Mississippi*. — *Thoms v. Thoms*, 45 Miss. 263.

*Tennessee*. — *Creath v. Creath*, 86 Tenn. 659.

*Texas*. — *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762.

And cases cited in notes following.

2. *Wife Has No Estate in Homestead During Life of Husband*. — *Creath v. Creath*, 86 Tenn. 659 (*distinguishing* *Jarman v. Jarman*, 4 Lea (Tenn.) 671); *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762; *Howe v. Adams*, 28 Vt. 541. And see *Gee v. Moore*, 14 Cal. 472; *Jenness v. Cutler*, 12 Kan. 500.

*Relief in Equity*. — In *Mississippi* the wife has not such an interest in the homestead, during the lifetime of her husband, as to entitle her to appeal to a court of equity for its protection. *Thoms v. Thoms*, 45 Miss. 263.

3. *Statutes Giving to Wife Right to Claim*. — In *New Hampshire* the statute expressly provides that the wife of the owner of a homestead shall be entitled to occupy the same during the owner's lifetime, and allows the homestead to be set off on her petition. Pub. Stat. (1891), c. 138, §§ 2, 16; *Folsom v. Folsom*, (N. H. 1895) 34 Atl. Rep. 743.

In *Alabama*, by statute, the wife, being a resident of the state, of one who has absconded or abandoned his family, or is confined for crime, or is under a disability, is entitled to interpose all claims of homestead which the husband could have interposed. See *Cofer v. Scrogins*, 98 Ala. 342, 39 Am. St. Rep. 54.

*Husband Fugitive from Justice*. — In *Arkansas* a wife is entitled to claim a homestead for herself and children out of the property of her

husband after he has become a fugitive from justice, if she and her children continue to remain on and occupy the land. *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28.

4. *Desertion of Wife by Husband* — *Express Provision*. — *Hotchkiss v. Brooks*, 93 Ill. 386, *affirming* 4 Ill. App. 175; *Hagerty v. Hagerty*, 149 Ill. 655.

The Wife Has a Right to the Rent of the Homestead Premises after the desertion of her husband, and the tenant cannot deprive her of this right by paying the rent to the husband, or by applying it to an indebtedness of the husband to him. *Alexander v. Alexander*, 52 Ill. App. 195.

5. *Under Statute Prohibiting Alienation by Husband*. — *Morrill v. Skinner*, 57 Neb. 164; *Rhea v. Rhea*, 15 Lea (Tenn.) 527. And see *McDannell v. Ragsdale*, 71 Tex. 23, 10 Am. St. Rep. 729.

In *Iowa*, where the statute exempts the homestead of every family, whether owned by the husband or by the wife, it has been held that where the husband and the wife occupy the premises owned by the former as a homestead, until he deserts the wife, and she afterwards continues to occupy the premises, she has an existing right therein, and may take proceedings necessary to protect them against execution. *Byers v. Johnson*, 89 Iowa 278. See also *Adams v. Beale*, 19 Iowa 67.

By the *Michigan Statute*, when a homestead is "owned and occupied by any resident of this state," it is protected against the assignee in bankruptcy of the husband, though he be absconding, if his family still resides thereon, unless the proof be clear that he has fixed his domicile in another state. *In re Pratt*, 1 Flipp. (U. S.) 353.

In *Montana* a deserted wife may claim the homestead exemption of her husband. *Waterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527.

6. *Statutes Not Allowing Claim by Deserted Wife*. — *Thoms v. Thoms*, 45 Miss. 263. This case was decided before the enactment of the present statute, prohibiting the conveyance or incumbrance of a homestead without the join-

**Occupancy of Homestead by Wife.** — Statutes giving to a wife deserted by her husband a right of homestead in her husband's property generally require that she shall continue to occupy the premises. She does not lose her right of homestead, however, by being out of possession, where she has been forcibly and unlawfully dispossessed under color of legal process.<sup>1</sup>

(3) **Refusal or Failure of Husband to Claim Exemption.** — In many states, either by reason of express provision to such effect in the statute or by implication from the fact that the homestead exemption is expressly given for the benefit of the wife and children as well as of the husband, or that the husband is prohibited from alienating or encumbering the homestead without the wife's consent and joinder, or from other provisions which are regarded as showing an intention on the part of the legislature to protect the wife and children in the enjoyment of the home, it is held that the right to the exemption of the homestead may be asserted and enforced by the wife if the husband neglects or refuses to claim or enforce it.<sup>2</sup>

(4) **Conveyance or Incumbrance by Husband.** — In some states, where the homestead law declares invalid any mortgage or alienation of the homestead by the husband, unless the wife joins therein, the wife, where the husband has assumed to convey or mortgage the homestead without her consent and joinder, may assert the right of exemption as against the grantee or mortgagee, and institute proceedings to protect such right.<sup>3</sup>

der of the wife of the owner, "if he be married and living with his wife." See Annot. Code Miss. (1892), § 1983.

**1. Occupancy by Abandoned Wife.** — *Mix v. King*, 66 Ill. 145.

**2. Claim by Wife on Failure or Refusal of Husband to Claim** — *Arkansas*. — *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28.

*California*. — *Booth v. Galt*, 58 Cal. 254.

*Kentucky*. — *Hemphill v. Haas*, 88 Ky. 492, 11 Ky. L. Rep. 62.

*Michigan*. — *Comstock v. Comstock*, 27 Mich. 97.

*North Dakota*. — *McCanna v. Anderson*, 6 N. Dak. 482.

*Ohio*. — *Dithey v. Ellifritz*, 8 Ohio Cir. Ct. 278, 4 Ohio Cir. Dec. 465.

In Georgia it is provided that if the husband refuses to apply for the exemption, his wife or any person acting as her next friend may do so. 2 Code Ga. (1895), §§ 2843, 2867. And see *Larence v. Evans*, 50 Ga. 216; *Bowen v. Bowen*, 55 Ga. 182; *Jones v. Crumley*, 61 Ga. 105; *Connally v. Hardwick*, 61 Ga. 501; *Davis v. Lumpkin*, 106 Ga. 582.

The husband's refusal to apply is necessary to support an application by the wife. Mere failure on his part is not enough. *Bowen v. Bowen*, 55 Ga. 182; *Mapp v. Long*, 62 Ga. 568; *Coffee v. Adams*, 65 Ga. 347; *Wilder v. Frederick*, 67 Ga. 669; *Langford v. Driver*, 70 Ga. 588; *Pegram v. Hancock*, 105 Ga. 185; *Davis v. Lumpkin*, 106 Ga. 582.

But there is a distinction between the husband's refusing to apply in person and his objecting to his wife's application. In the latter case the application cannot be granted. The homestead exemption is voluntary, not compulsory, and a homestead cannot be set apart out of the husband's property over his objection. "The statute will be construed to mean that though he refuse to act, his wife's application will be granted unless he object by plea; then it will be refused." *Bowen v.*

*Bowen*, 55 Ga. 182. If the husband merely refuses to apply, his assent to his wife's application will be presumed as against his creditors. *Connally v. Hardwick*, 61 Ga. 501.

**Wife Living Separate from Husband.** — Under the *Ohio* statute a wife cannot assert a right of homestead in her husband's property, occupied by him as a home, if she is not living with him; but a mere temporary absence, with intent to return, does not defeat her right. *Elliott v. Plattor*, 43 Ohio St. 198; *Moerlein Brewing Co. v. Westmeier*, 4 Ohio Cir. Ct. 296, 2 Ohio Cir. Dec. 555; *Lugauer v. Weisgerber*, 13 Cinc. L. Bul. 637, 9 Ohio Dec. (Reprint) 458.

**Action or Defense by Wife Alone.** — See title HOMESTEADS AND EXEMPTIONS, ENCYC. OF PL. AND PR., vol. 10, p. 58 *et seq.*

**3. Claim by Wife After Conveyance or Mortgage by Husband Alone.** — *Comstock v. Comstock*, 27 Mich. 97. Compare *Thoms v. Thoms*, 45 Miss. 263.

**Husband Furnishing Another Home.** — The wife's right to have the homestead set off to her cannot be defeated by showing that at the time of the complaint her husband provided her with a comfortable home. *Comstock v. Comstock*, 27 Mich. 97.

**Where Husband and Wife Are Living Together,** though the husband has executed a deed of trust containing a release of the homestead, in which the wife did not join, the homestead must be set off to the husband, for the release is void even as against him. *Richards v. Greene*, 73 Ill. 54.

**The Proceeds of a Sale of the Homestead** by the husband in which the wife joined only on condition, assented to by the husband, that the proceeds should be paid to her, are, under the law of *New Hampshire* and *Vermont*, the property of the wife and exempt from attachment for the husband's debts. *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707.

(5) *Separation by Agreement*. — Where the statute gives to the wife of the owner of a homestead the right to occupy the homestead during his wife's lifetime, and allows the homestead right to be set off on her petition, the voluntary separation of the husband and wife does not deprive the wife of such right.<sup>1</sup>

(6) *Wife Who Has Left Her Husband*. — In most states it is held that a wife who, without sufficient cause, voluntarily leaves her husband and goes to another place to reside, particularly where she goes to another state, is not entitled to any rights in his homestead.<sup>2</sup> But this rule does not apply where a wife is driven from her home by the cruelty of her husband, even though she may go to another state to live.<sup>3</sup>

The Rights of a Nonresident Wife with respect to a homestead owned and occupied as a residence by her husband are shown in another place.<sup>4</sup>

c. COMMUNITY PROPERTY. — In Texas it has been held that a wife may maintain an action to protect the homestead in community property, where the husband is absent or refuses to join in the suit.<sup>5</sup>

10. Rights of Children. — In the absence of express provision to the contrary, children, during the life of their father and mother, have no vested right or interest in the homestead which they can assert as against their parents or as against creditors. The parents have the whole title, and whatever concludes them concludes the children.<sup>6</sup> In some states, however, children are expressly protected in the enjoyment of the homestead.<sup>7</sup>

11. Effect of Divorce — a. IN GENERAL — Effect of Guilt of Claimant. — When husband and wife have been divorced, the claim of either party to a homestead

1. Voluntary Separation. — Meader v. Place, 43 N. H. 307; Folsom v. Folsom, (N. H. 1895) 34 Atl. Rep. 743.

2. Wife Who Has Left Husband Without Excuse. — Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821; Trawick v. Harris, 8 Tex. 312; Earle v. Earle, 9 Tex. 630; Sears v. Sears, 45 Tex. 557; Newland v. Holland, 45 Tex. 588. But compare Brown v. Stratton, (Mo. 1878) 8 Cent. L. J. 46; Atkinson v. Atkinson, 40 N. H. 249, holding that so long as the marriage subsists *de jure*, the homestead right continues.

In Iowa the selection of a homestead in lands belonging to the wife is primarily in the wife, and a selection made by her is controlling against the husband, at least in the absence of evidence of bad faith on her part; but if she chooses to live apart from her husband, he, residing on the land, is entitled to the full enjoyment of the homestead to the exclusion of the wife. Ehrck v. Ehrck, 106 Iowa 614.

3. Wife Leaving through Husband's Fault. — Sherrid v. Southwick, 43 Mich. 515; Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821; Barker v. Dayton, 28 Wis. 367; Keyes v. Scanlan, 63 Wis. 345.

4. Nonresident Wife. — See *infra*, this section, subdiv. 12. a. (5) (b) *Rights of Nonresident Wife*.

5. Wife's Rights as to Community Property. — Kelley v. Whitmore, 41 Tex. 647.

A wife who has been abandoned by her husband may claim a homestead exemption in community property. Cullers v. James, 66 Tex. 494.

6. Rights of Children During Life of Parents — Illinois. — Brown v. Coon, 36 Ill. 243, 85 Am. Dec. 402; Wright v. Dunning, 46 Ill. 271, 92

Am. Dec. 257; Buck v. Conlogue, 49 Ill. 391; Clubb v. Wise, 64 Ill. 160; Shepard v. Brewer, 65 Ill. 383.

Pennsylvania. — Nevins's Appeal, 47 Pa. St. 230.

South Carolina. — Howze v. Howze, 2 S. Car. 232.

Texas. — Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Dawson v. Holt, 44 Tex. 179; Morrill v. Hopkins, 36 Tex. 686.

Effect of Adjudication Against Father. — Where a claim of homestead is adjudged against the father, his children are bound thereby. Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213.

7. Statutes Protecting Children. — In New Hampshire it is expressly provided by the statutes that the minor children of the owner of a homestead shall be entitled to occupy the homestead during the owner's lifetime. Pub. Stat. N. H. (1891), c. 138, § 2. See Squire v. Mudgett, 61 N. H. 149; Folsom v. Folsom, (N. H. 1895) 34 Atl. Rep. 743.

Children have no homestead right in a homestead owned by their father but not occupied by any one but him. Wiggan v. Buzzell, 58 N. H. 329.

In Alabama the statute expressly provides that if the father entitled to a homestead absconds, or abandons his family, or is confined for crime, or is under any other disability, and there is no wife, the minor children shall be entitled to interpose all claims of homestead which the father could have interposed. The exemption continues only as long as the minor children remain *bona fide* residents of the state and are minors. Cofer v. Scroggins, 98 Ala. 343, 39 Am. St. Rep. 54.

Adopted Child. — The right conferred upon a child or children by the Alabama statute exists in favor of an adopted child as well as of



exemption is not affected by the fact that such claimant is guilty of the misconduct for which the divorce is granted; for such misconduct does not work a forfeiture of homestead rights,<sup>1</sup> unless the statute, as it does in some jurisdictions, contains express provisions for forfeiture.<sup>2</sup>

*b. RIGHTS OF HUSBAND* — (1) *In His Own Property*. — In those jurisdictions in which it is held that a man who has once acquired a right of homestead exemption as the head of a family does not lose the right by reason of the loss of his family by the death or removal of the members,<sup>3</sup> a man who has acquired a homestead exemption in property owned by him, and who continues to occupy the premises, does not lose his right of homestead on obtaining a divorce from his wife, unless there is some special statutory provision to the contrary, or some disposition of the homestead in the decree of divorce.<sup>4</sup> The same is true where a divorce is obtained by the wife for the misconduct of the husband.<sup>5</sup> And it makes no difference in either case whether the children remain in the custody of the husband<sup>6</sup> or are awarded to the wife.<sup>7</sup>

(2) *In Separate Property of His Wife*. — When the statute, however, gives to the husband a right of homestead in the separate property of his wife, his right thereto will cease if a decree of divorce is granted either in her favor or in his, unless the right to the homestead is permitted by the statute to be

a natural one. *Cofer v. Scroggins*, 98 Ala. 343, 39 Am. St. Rep. 54.

And see *infra*, this title, *Rights of Surviving Spouse and Children*.

**1. No Forfeiture of Homestead Right by Party in Fault** — *Iowa*. — *Byers v. Byers*, 21 Iowa 263.

*Missouri*. — *Biffle v. Pullam*, 114 Mo. 50.

*Texas*. — *Zapp v. Strohmeier*, 75 Tex. 638; *Hall v. Fields*, 81 Tex. 553.

And see other cases cited *infra*, under this subdivision.

**2. In Illinois** the statute so provides. *Rendleman v. Rendleman*, 118 Ill. 257.

The forfeiture applies to the homestead right acquired under the *Illinois* statute by reason of desertion by the husband. *Rendleman v. Rendleman*, 118 Ill. 257.

But in *Missouri*, in *Biffle v. Pullam*, 114 Mo. 50, it was held that a statute (Rev. Stat. 1889, § 4508) declaring that in case of divorce "the guilty party shall forfeit all rights and claims under and by virtue of the marriage" does not affect homestead rights, since they are not acquired by virtue of the marriage.

**3. Rights of Husband in His Own Property**. — See *supra*, this section, *Termination of Status*.

**4. Divorce Obtained by Husband**. — *Redfern v. Redfern*, 38 Ill. 509.

**Effect of Conveyance Before Divorce**. — Where a wife from whom her husband has obtained a divorce takes a conveyance of the homestead to herself from one to whom she and her husband had conveyed before the divorce without a release of the homestead right, as required by the statute, her right of homestead will be subordinate to that of the husband. *Redfern v. Redfern*, 38 Ill. 509.

**5. Divorce Obtained by Wife** — *Illinois*. — *Stahl v. Stahl*, 114 Ill. 375.

*Iowa*. — *Byers v. Byers*, 21 Iowa 263; *Woods v. Davis*, 34 Iowa 264.

*Massachusetts*. — *Doyle v. Coburn*, 6 Allen (Mass.) 71.

*Missouri*. — *Biffle v. Pullam*, 114 Mo. 50; *Stamm v. Stamm*, 11 Mo. App. 593. Compare *Dobson v. Butler*, 17 Mo. 87.

*South Dakota*. — *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771.

*Texas*. — *Zapp v. Strohmeier*, 75 Tex. 638; *Hall v. Fields*, 81 Tex. 553.

*Washington*. — *Philbrick v. Andrews*, 8 Wash. 7.

This rule does not apply to a divorced husband without children in those jurisdictions in which it is held that the right of a man to a homestead terminates when he ceases to have a family. *Cooper v. Cooper*, 24 Ohio St. 489. See *supra*, this section, *Termination of Status*.

**Judgment for Alimony**. — As a rule, the husband's homestead is exempt as against a general judgment in favor of the wife for alimony. See *infra*, this title, *Liabilities As Against Which Homestead May Be Claimed*.

**6. Husband Having Custody of Children**. — *Redfern v. Redfern*, 38 Ill. 509; *Byers v. Byers*, 21 Iowa 263; *Philbrick v. Andrews*, 8 Wash. 7.

**7. Custody of Children Given to Wife**. — *Woods v. Davis*, 34 Iowa 264; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Biffle v. Pullam*, 114 Mo. 50; *Hall v. Fields*, 81 Tex. 553.

In *Iowa* it has been held that a decree of divorce awarding the custody of the children to the wife and charging her with their support leaves the husband liable for their support if she is unable to provide for them, and that the exemption of the homestead, if still occupied by him, continues. *Woods v. Davis*, 34 Iowa 264. See the title *DIVORCE*, vol. 9, p. 859, note 6.

**Under a Statute Giving a Homestead Right to "Wife, Widow, and Children"**, but not to husband or father (Laws N. H. 1868, c. 1, § 33), a husband, after a divorce in favor of the wife and the assignment of the custody of the children to her, cannot claim a homestead in the premises previously occupied by the family though he may continue to occupy them as his residence. *Wiggin v. Buzzell*, 58 N. H. 329.

**Divorced Man as "Widower"**. — In *Ohio* a divorced man was held to be a widower within the meaning of that word as used in the

secured to him by the decree of divorce and is so secured; and it can make no difference in such a case that he continues to occupy the premises.<sup>1</sup>

*c. RIGHTS OF WIFE* — (1) *In Her Own Property*. — In the absence of statutory provision to the contrary, it is clear that a divorced wife, like a widow, occupies the same position with respect to her separate property as if she had never been married,<sup>2</sup> and she may claim a homestead exemption therein if she occupies it as a residence and supports her children.<sup>3</sup>

(2) *In Her Husband's Property*. — In the absence of express statutory provision to the contrary, a wife has no homestead rights in her husband's property after a decree of divorce, where he continues to occupy such property, unless a right to the homestead is reserved to her by the decree of divorce; and it makes no difference whether the decree is obtained by him or by her.<sup>4</sup> This is true, in some states, even when the decree gives the custody of the children to the wife.<sup>5</sup> It has been held, however, in some states that where the wife and children continue to occupy the homestead after a decree of divorce, the wife, as the head of the family, may claim it as exempt as against creditors of the husband.<sup>6</sup>

*d. COMMUNITY PROPERTY*. — In *Texas*, where a decree of divorce makes no provision as to community property occupied as a homestead, the former husband and wife hold the property as tenants in common, and either may claim a homestead exemption in his or her share, if he or she has a family, so as to be entitled to the benefit of the homestead laws, but not otherwise.<sup>7</sup>

*e. RIGHTS OF CHILDREN*. — Whether children have any rights in premises occupied as a homestead at the time of a divorce depends largely upon

homestead law of that state. *Kunkle v. Reeser*, (Prob. Ct.) 5 Ohio N. P. 401.

1. *Husband's Rights in Separate Property of Wife*. — *Burkett v. Burkett*, 78 Cal. 312, 12 Am. St. Rep. 58; *Dunham v. Dunham*, 128 Mass. 34; *Arp v. Jacobs*, 3 Wyo. 489. See also a dictum in *Skinner v. Walker*, 98 Ky. 729.

2. *Rights of Wife in Her Separate Property*. — See the title *DIVORCE*, vol. 9, p. 855 *et seq.*

3. *City Store v. Cofer*, 111 Cal. 482; *Dunham v. Dunham*, 128 Mass. 34; *Kirkwood v. Domnau*, 80 Tex. 647, 26 Am. St. Rep. 770; *Southwestern Mfg. Co. v. Swan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 813.

And see *supra*, this section, *Widowers and Widows*.

4. *Wife's Rights in Husband's Property* — *Georgia*. — *Burns v. Lewis*, 86 Ga. 591.

*Illinois*. — *Stahl v. Stahl*, 114 Ill. 375; *Rendleman v. Rendleman*, 118 Ill. 257.

*Kentucky*. — *Skinner v. Walker*, 98 Ky. 729. *New Hampshire*. — *Wiggin v. Buzzell*, 58 N. H. 329.

*North Dakota*. — *Rosholt v. Mehus*, 3 N. Dak. 513.

*South Dakota*. — *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771.

*Texas*. — *Zapp v. Strohmeier*, 75 Tex. 638; *Hall v. Fields*, 81 Tex. 553.

*Vermont*. — *Heaton v. Sawyer*, 60 Vt. 495.

*Compare Barker v. Dayton*, 28 Wis. 367; *Keyes v. Scanlan*, 63 Wis. 345.

See also the title *DIVORCE*, vol. 9, p. 859, note 4.

A Divorce a Mensa et Thoro does not defeat or cut off the wife's homestead rights in her husband's property. *Howell v. Thompson*, 95 Tenn. 396.

5. *Custody of Children Given to Wife*. — *Zapp v. Strohmeier*, 75 Tex. 638; *Heaton v. Sawyer*, 60 Vt. 495.

6. *Wife and Children Occupying Premises*. — *Sellon v. Reed*, 5 Biss. (U. S.) 125; *Vanzant v. Vanzant*, 23 Ill. 536; *Bonnell v. Smith*, 53 Ill. 375; *Blandy v. Asher*, 72 Mo. 27; *Howell v. Thompson*, 95 Tenn. 396.

In *Missouri*, where a homestead claim has been filed, on the ground of abandonment, by a wife before obtaining a divorce from her husband on the ground of desertion, the divorce does not deprive her of her right of the homestead in the premises, where she continues to reside thereon with her minor children. *Blandy v. Asher*, 72 Mo. 27. But after a divorce has been obtained a wife cannot acquire a homestead in her husband's land by filing such a claim, though the land may have been occupied as a homestead by her and the minor child of herself and her husband at the time of the divorce and since. *Stamm v. Stamm*, 11 Mo. App. 598.

*Removal from Premises*. — It has also been held that actual residence on the property is not always indispensable to the claim of a homestead, and that where, from apprehension of harm, a wife was compelled before divorce to leave the premises, this was not an abandonment of her right to the homestead after divorce. *Vanzant v. Vanzant*, 23 Ill. 536; *Bonnell v. Smith*, 53 Ill. 375.

Under the present *Illinois* statute a wife who obtains a divorce from her husband has no right to the homestead unless the court awards it to her. *Stahl v. Stahl*, 114 Ill. 375. See *infra*, this section, *Disposition of Homestead by Court*.

7. *Community Property*. — *Kirkwood v. Domnau*, 80 Tex. 647, 26 Am. St. Rep. 770; *Trigg v. Trigg*, (Tex. 1891) 18 S. W. Rep. 313; *Southwestern Mfg. Co. v. Swan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 813. See also the title *DIVORCE*, vol. 9, p. 860.

the terms of the statute in the particular jurisdiction. They have no rights therein except such as the statute gives to them.<sup>1</sup>

*f. DISPOSITION OF HOMESTEAD BY COURT.* — Though there seems to be some authority for saying that a court in granting a divorce may award the homestead according to the equities of the case, even in the absence of statutory authority to do so,<sup>2</sup> this is extremely doubtful.<sup>3</sup> In many states, however, power to dispose of the homestead by the decree of divorce is expressly conferred upon the court by statute. The statutes vary in the different states. Some allow the homestead to be disposed of according to the equities of the case.<sup>4</sup> Others merely allow it to be awarded to the wife when she obtains a divorce.<sup>5</sup> Others, while not specifically mentioning the homestead, allow the

**1. Rights of Children.** — Under the *New Hampshire* law of 1868, after a divorce in favor of their mother and the assignment of their custody to her, children have no homestead right in a homestead owned and occupied by the father alone. *Wiggin v. Buzzell*, 58 N. H. 329.

Under the statute of *Vermont*, in a like case both wife and children cease to be part of the father's family and lose all right to his homestead. *Heaton v. Sawyer*, 60 Vt. 495.

The *Tennessee* statute provides that "the title to the homestead shall be vested, by decree of the court granting the divorce, in the wife, and after her death it shall pass to the children." See *Jackson v. Shelton*, 89 Tenn. 82.

**2. Power of Court to Dispose of Homestead on Granting Divorce.** — In *Illinois*, prior to the statute of 1871, giving express power to the court, it seems to have been considered that the court, on granting a divorce to a wife and awarding the custody of the children to her, could also award the possession of the homestead to her. *Vanzant v. Vanzant*, 23 Ill. 536. And see *Bonnell v. Smith*, 53 Ill. 375; *Luthe v. Luthe*, 12 Colo. 421; *Barker v. Dayton*, 28 Wis. 367.

**3. Skinner v. Walker**, 98 Ky. 729. See the title *DIVORCE*, vol. 9, p. 860 *et seq.* And see *Dean v. Richmond*, 5 Pick. (Mass.) 461.

**4. Particular Statutory Provisions — California.** — *Gimmy v. Doane*, 22 Cal. 635; *Shoemaker v. Chalfant*, 47 Cal. 432. See also the titles *COMMUNITY PROPERTY*, vol. 6, p. 341; *DIVORCE*, vol. 9, p. 859, note 4, p. 862, note 2.

*Effect of Partition by Decree of Divorce.* — When a homestead is partitioned between husband and wife by a decree of divorce, the homestead is thereby destroyed. *Gimmy v. Doane*, 22 Cal. 635; *Shoemaker v. Chalfant*, 47 Cal. 432; *Grupe v. Byers*, 73 Cal. 271; *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58. And the property of each may afterwards be conveyed or encumbered. See *infra*, this title, *Sales, Conveyances, and Incumbrances*.

*Conveyance by Husband to Wife Before Divorce.* — If a divorce is granted to a wife after her husband has made a conveyance of their homestead to her, and the decree is silent with respect to the disposition to be made of such homestead, her title thereto becomes absolute as against him. *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58.

In *Illinois* it is provided that "in case of a divorce, the court granting the divorce may dispose of the homestead estate according to the equities of the case." *Starr & Curt.*

*Annot. Stat.* (1896), c. 52, par. 5. This provision was first enacted in 1871.

Where, upon divorce, the court fails to make such a disposal of the homestead, the relation of husband and wife being severed by the decree, the wife loses her right to a homestead. *Stahl v. Stahl*, 114 Ill. 375.

*Purchasers from Husband.* — It has been held in *Illinois* that after the filing of a bill by a wife for divorce, and to have the homestead decreed to her as alimony, persons purchasing or taking incumbrances on the homestead from the husband took subject to her equities. *Vanzant v. Vanzant*, 23 Ill. 536.

**Texas.** — See *Rev. Stat. Tex.* (1895), art. 2980, which is set out under the title *DIVORCE*, vol. 9, p. 862, note 2.

Under the statute the court may, on granting a divorce, make such a decree with respect to the use of the homestead as will protect the wife and, when necessary, minor children also, having regard to the proviso of the statute. *Kirkwood v. Domnau*, 80 Tex. 645, 26 Am. St. Rep. 770.

The court cannot set the homestead apart to the wife so that it will be exempted from forced sale on judgment afterwards obtained against her, where she has no family, and therefore does not occupy such a status as entitles her to the benefit of the homestead exemption. *Bahn v. Starcke*, 89 Tex. 203, 59 Am. St. Rep. 40.

**5. Tennessee.** — As to the *Tennessee* statute see *supra*, this section, *Rights of Children*, note.

The statute applies to a homestead owned jointly by the husband and wife before the divorce as tenants in common, and the wife may assert her right therein against her husband's creditors. *Jackson v. Shelton*, 89 Tenn. 82.

When the wife continues in the state, her title to the homestead on divorce is not affected by her husband's removal from the state, or his alienation of the homestead where she does not unite therein. *Rhea v. Rhea*, 15 Lea (Tenn.) 527. See also *Powell v. Warren*, *Jackson Tenn.* 1876.

The *Colorado Statute* was adopted from *Illinois* (quoted under the title *DIVORCE*, vol. 9, p. 863, note 1), and even where a divorce is decreed in favor of the husband, the court may award the homestead to the wife as alimony, if the circumstances render it just and reasonable. *Luthe v. Luthe*, 12 Colo. 421.

Under the *Iowa Statute* (quoted under the title *DIVORCE*, vol. 9, p. 863, note 1) the court in granting a divorce may make such order in relation to the homestead as may be equitable



court to make such an order in relation to property generally as shall be right.<sup>1</sup>

**12. Residence and Citizenship** — *a. RESIDENCE* — (1) *In General.* — In some states, by the express terms of the statute or constitution, the right of homestead exemption is allowed only to residents of the state, and it is clear that in these states a homestead cannot be claimed by one who owns land in the state, but who actually resides in another state.<sup>2</sup> The term "resident of the state" means actual and not merely constructive residence.<sup>3</sup>

*In Absence of Express Restriction.* — Even when the statute does not in express terms require that a person shall be a resident of the state in order to claim the benefit of the statute, it has been held that it is to be construed as so limited, as the manifest policy of the homestead exemption laws is to protect the homes of those residing in the state.<sup>4</sup>

*When Actual Residence on Land* is required to render the land exempt as a homestead, it is clear that no exemption can be claimed by one who actually resides in another state.<sup>5</sup>

*Domicil Not Equivalent to Residence.* — A distinction has been made under the homestead exemption laws in *North Carolina* between domicil and residence, and it has been held that a person who is legally domiciled in the state cannot claim a homestead if he is at the time actually residing in another state.<sup>6</sup> And, on the other hand, it has been held that if a person actually resides in the state, that is, if he has his home and lives there, he is a resident within

under the circumstances. Usually where the husband or wife has the title and is given the custody of the children, he or she will be left in possession of the homestead. *Cole v. Cole*, 23 Iowa 433. See also *Daniels v. Morris*, 54 Iowa 369. But circumstances may justify a different award. *Sesterhen v. Sesterhen*, 60 Iowa 301.

*Under the Kansas Statute* (see the title *DIVORCE*, vol. 9, p. 862, note 2), when a divorce is granted to the husband for the wife's habitual drunkenness, possession of the homestead may be awarded to the wife, she being charged with the care of infant children. *Brandon v. Brandon*, 14 Kan. 342.

*Under the Wisconsin Statute* (see the title *DIVORCE*, vol. 9, p. 863, note) it was held that where the husband's estate was of small value, the wife was in feeble health, and the husband was able to earn his own support, it was not inequitable, in granting a divorce, to set the homestead apart to the wife, although it was of greater value than the rest of the estate. *Webster v. Webster*, 64 Wis. 438. See also *Harran v. Harran*, 85 Wis. 299.

*As to the Division of Property* on the granting of a divorce see generally the title *DIVORCE*, vol. 9, p. 859 *et seq.*

*Making Decree for Alimony Lien on Homestead.* — See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

1. See Code Wash., § 2007.

**2. Express Requirement of Residence** — *Alabama.* — *Auerbach v. Pritchett*, 58 Ala. 451; *Talmadge v. Talmadge*, 66 Ala. 199; *McCrary v. Chase*, 71 Ala. 540; *Murphy v. Hunt*, 75 Ala. 438.

*Arkansas.* — *Brown v. Peters*, 53 Ark. 182.

*California.* — *Cary v. Tice*, 6 Cal. 625; *Rix v. McHenry*, 7 Cal. 89.

*Michigan.* — *McHugh v. Curtis*, 48 Mich. 262; *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821; *Black v. Singley*, 91 Mich. 50.

*North Carolina.* — *Baker v. Legget*, 98 N. Car. 304; *Finley v. Saunders*, 98 N. Car. 462; *Munds v. Cassidey*, 98 N. Car. 558; *Lee v. Moseley*, 101 N. Car. 311; *Fulton v. Roberts*, 113 N. Car. 421.

See the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 84.

**3. Actual Residence Necessary.** — *Rix v. McHenry*, 7 Cal. 89; *Munds v. Cassidey*, 98 N. Car. 558; *Lee v. Moseley*, 101 N. Car. 311.

*Intention to Become a Resident* and to abandon a residence in another state does not give to a person the right to claim the homestead exemption, where residence is required. *Talmadge v. Talmadge*, 66 Ala. 199; *Murphy v. Hunt*, 75 Ala. 438.

**4. Construed as Restricted to Residents, Though Not Expressly So Restricted** — *Tennessee.* — *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623; *Emmett v. Emmett*, 14 Lea (Tenn.) 369; *Farris v. Sipes*, 99 Tenn. 298; *Doran v. O'Neal* (Tenn. Ch. 1896) 37 S. W. Rep. 563.

*Texas.* — *Jordan v. Godman*, 19 Tex. 275; *Alston v. Ulman*, 39 Tex. 157; *Burcham v. Gann*, 1 Tex. Unrep. Cas. 333; *Adams v. Kaufman*, 11 Tex. Civ. App. 179.

*Virginia.* — *Lindsay v. Murphy*, 76 Va. 428. See the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 84.

**"Every Householder or Head of a Family."** — *In Virginia*, where the constitution exempts a homestead for the benefit of "every householder or head of a family," it has been held that the provision is intended to apply only to citizens of the state. *Lindsay v. Murphy*, 76 Va. 428.

**5. Requirement of Residence on Land.** — *Cary v. Tice*, 6 Cal. 625.

**6. Domicil Not Equivalent to Residence.** — *Lee v. Moseley*, 101 N. Car. 311; *Fulton v. Roberts*, 113 N. Car. 421.

See generally the title *DOMICIL*, vol. 10, p. 8 *et seq.*

the meaning of the law though his legal domicile may be in another state.<sup>1</sup> But this distinction is not recognized in some states.<sup>2</sup>

(2) *Removal from State.* — When residence is required, it is clear that a right of homestead cannot be asserted by a person who has given up his residence and removed to another state, without any intention to return.<sup>3</sup> It has also been held in some states, though not in others, that the right ceases when a person gives up his home and removes to another state to reside, though he may intend to return at some time, and may retain his domicile.<sup>4</sup> It is otherwise, however, if he retains his residence as well as his domicile, and the absence is only for business or other temporary purposes.<sup>5</sup>

(3) *Intention to Remove.* — The mere fact that a debtor intends to remove from the state, or even that he is about to do so, and is making preparations to do so, with the intention of changing his residence, does not defeat his right to homestead exemption.<sup>6</sup>

(4) *Residence of Family.* — When the statute requires that the homestead be occupied by the debtor and his family, or by the family, not only the debtor, but the family also, must reside in the state.<sup>7</sup> This, however, is not the rule in all states. In *Iowa* it has been held that a man may claim a homestead exemption in land owned and occupied by him as a home, and to which he intends to bring his wife and children, though they may be living in another state, and may never have been in the state.<sup>8</sup>

(5) *Rights of Married Women.* — (a) *Husband in Another State.* — It has been held that if a woman who resides in one state marries a man who resides and continues to reside in another state, but retains her actual residence in her own state, she does not cease to be a resident of the latter state, so as to prevent her claiming the benefit of the homestead laws.<sup>9</sup>

(b) *Rights of Nonresident Wife.* — In *Michigan* it has been held that where a wife has never been within the state, but has always resided in another state, she has no homestead rights in property of her husband, though he may reside in the state and occupy the premises as a home.<sup>10</sup>

In *Other States* it is held that the residence of the wife, for the purpose of determining her rights under the homestead laws, is that of her husband, and that she acquires the right to the benefit of the exemption if her husband is a

1. *Fulton v. Roberts*, 113 N. Car. 421.

In some cases it has been said that "domicil" in the state is necessary to entitle a person to homestead rights. *Alston v. Ulman*, 39 Tex. 157; *Jordan v. Godman*, 19 Tex. 275. But the term was probably used in the sense of residence.

2. *Lindsay v. Murphy*, 76 Va. 428.

3. *Permanent Removal from State* — *North Carolina*. — *Baker v. Legget*, 98 N. Car. 304; *Finley v. Saunders*, 98 N. Car. 462; *Fulton v. Roberts*, 113 N. Car. 421.

*Virginia*. — *Lindsay v. Murphy*, 76 Va. 428.

And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 85.

4. *Changing Residence Without Change of Domicil.* — *Fulton v. Roberts*, 113 N. Car. 421; *Munds v. Cassidey*, 98 N. Car. 558; *Lee v. Moseley*, 101 N. Car. 311. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 86, note.

The decision in *Lindsay v. Murphy*, 76 Va. 428, is to the contrary.

5. *Mere Temporary Removal.* — *Fulton v. Roberts*, 113 N. Car. 421; *Chitty v. Chitty*, 118 N. Car. 647; *Lindsay v. Murphy*, 76 Va. 428. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 86.

In *Chitty v. Chitty*, 118 N. Car. 647, it was held that a man did not lose his residence in the state, nor his right to a homestead, by leaving the state for the purpose of escaping a criminal prosecution, when his wife and family continued to live in the state on the home place, and he intended to return when the prosecution should be dismissed. *Clark, J.*, dissented.

6. *Mere Intention to Remove from State.* — *Davis v. Land*, 88 Mo. 436; *Rasco v. Sheet*, 8 Ky. L. Rep. 703. See also *Dawley v. Ayers*, 23 Cal. 108. See *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel*. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 85.

7. *Residence of Family.* — *Farlin v. Sock*, 26 Kan. 397.

8. *Williams v. Sweetland*, 10 Iowa 51.

9. *Rights of Married Women.* — *Fish v. Street*, 27 Kan. 270.

10. *Rights of Nonresident Wife.* — *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821; *Black v. Singley*, 91 Mich. 50.

In *South Dakota*, where a husband resides in the state alone, and the wife resides in another state, she acquires such homestead rights only as are acquired by him. *Clark v. Evans*, 6 S. Dak. 244.



resident, though she may be in another state.<sup>1</sup> A wife loses her rights in the homestead if she voluntarily and wrongfully abandons her husband and resides in another state.<sup>2</sup> But it is otherwise if she is driven away by the cruelty of her husband.<sup>3</sup>

(c) *Time of Becoming Resident.* — Where the statute allows a homestead exemption to the head of a family residing in the state, a person, to be entitled to the benefit of the statute, need not have been a resident at the time of contracting the debt which it is sought to enforce against the homestead. It is sufficient if he is a resident at the time when the property is levied on and claimed as exempt.<sup>4</sup> If he is not a resident at the time when a lien of a judgment or a lien under process attaches, his subsequent removal to the state does not entitle him to a homestead exemption as against the lien.<sup>5</sup>

b. **CITIZENSHIP.** — In some states the constitution or statute in terms gives the right of homestead exemption to "citizens" only,<sup>6</sup> but it has been held that the term is used merely in the sense of resident or inhabitant, and that the right extends, therefore, to a citizen or subject of another state or country, if he is residing in the state.<sup>7</sup> When the statute or constitution requires residence, but is silent as to political status, a homestead may be claimed by resident citizens of other states and resident aliens.<sup>8</sup>

#### VIII. TITLE OR INTEREST NECESSARY TO SUPPORT HOMESTEAD EXEMPTION —

1. **In General.** — As a general rule, subject to qualifications to be stated in subsequent paragraphs, the homestead exemption may be claimed in any estate which the debtor may have and which is liable to seizure and sale on execution for the payment of his debts.<sup>9</sup> The homestead law, it has been said, was designed to embrace "all estates liable to such sales."<sup>10</sup> Ownership of the fee is not necessary, even when the statute uses the word "owner," for one who has a less estate is the owner to the extent of his estate.<sup>11</sup>

2. **Possessory Interest Necessary** — a. **IN GENERAL.** — To entitle a debtor to a homestead exemption he must, at least, have a possessory interest in the

1. *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623; *Lacey v. Clements*, 36 Tex. 661; *Clements v. Lacy*, 51 Tex. 157.

2. **Voluntary Abandonment of Husband.** — *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623; *Earle v. Earle*, 9 Tex. 630.

3. **Involuntary Removal.** — In *Michigan*, where a wife once had her home with her husband in the state, she acquires a vested right in the homestead, and her husband cannot deprive her of such right by driving her out. *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821.

The same rule has been applied in other states. *Barker v. Dayton*, 28 Wis. 367; *Keyes v. Scanlan*, 63 Wis. 345.

4. **Time of Becoming Resident of State.** — *Gray v. Putnam*, 51 S. Car. 97; *Finnegan v. Prinderville*, 83 Mo. 517.

5. **Becoming Resident After Lien Attaches.** — *McCrary v. Chase*, 71 Aal. 540 [in effect overruling *Watson v. Simpson*, 5 Ala. 233]; *Murphy v. Hunt*, 75 Ala. 438; *Upman v. Second Ward Bank*, 15 Wis. 449.

6. See for instance Annot. Code Miss. (1892), § 1970 *et seq.*; *Trotter v. Dobbs*, 38 Miss. 198.

7. "Citizens" — Equivalent to "Residents" or Inhabitants. — *McKenzie v. Murphy*, 24 Ark. 155. But see *Lindsay v. Murphy*, 76 Va. 428. See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 87.

8. *Dawley v. Ayers*, 23 Cal. 108. In this case the statute in terms required *bona fide* residence only, and the court said: "The homestead law is not limited in its operation

to any class, but is universal in its application; and all classes of persons are entitled to its benefits, without any distinction as to citizenship, or capability of becoming citizens."

9. **Title or Interest to Support Homestead — Estates Liable to Execution — United States.** — *Bartholomew v. West*, 2 Dill (U. S.) 293, 2 Fed. Cas. No. 1,071.

*Illinois.* — *Deere v. Chapman*, 25 Ill. 610; *Conklin v. Foster*, 57 Ill. 104; *Feldes v. Duncan*, 30 Ill. App. 469.

*Iowa.* — *Pelan v. De Bevard*, 13 Iowa 53.

*Kansas.* — *Randal v. Elder*, 12 Kan. 257.

*Mississippi.* — *Johnson v. Richardson*, 33 Miss. 462; *King v. Sturges*, 56 Miss. 606.

10. *Conklin v. Foster*, 57 Ill. 107; *Deere v. Chapman*, 25 Ill. 610. And see the other cases above cited.

11. **Ownership in Fee Not Necessary.** — *Bartholomew v. West*, 2 Dill. (U. S.) 293; *Deere v. Chapman*, 25 Ill. 610; *Randal v. Elder*, 12 Kan. 257. And see the other cases more specifically cited in the notes following.

"The Policy of the Statute is to secure to the debtor a home for himself and family; whether that home is upon land to which the debtor had an estate in fee simple, or one of less dignity, or a mere possessory interest, it is the occupancy as a residence which the statute had in view, and intended to protect, rather than the title by which he held. The substance thereof is that the creditor shall not break up the home and residence, by a sale of such title as the debtor had." *McGrath v. Sinclair*, 55 Miss. 89.



land claimed. There must be at least a present right of occupancy.<sup>1</sup>

**b. REMAINDER OR REVERSION.**—A homestead cannot exist in a remainder or reversion, since in such case there is no present right of occupancy.<sup>2</sup> But it has been held that a remainderman may claim a homestead after determination of the particular estate, as against creditors who have failed to sell his interest on execution before determination of the particular estate.<sup>3</sup>

**3. Whether Exemption Is Dependent upon Title**—*a. AS AGAINST PARAMOUNT TITLE.*—It is clear that mere occupancy and a claim or dedication of land as a homestead can give to the occupant no homestead rights whatever as against one who has a paramount title. Ownership of the land by a debtor is necessary, therefore, to this extent at least, in order to sustain a claim of homestead exemption.<sup>4</sup>

*b. AS AGAINST CREDITORS*—(1) *View that Title Is Necessary.*—In most states it has been held that where the statute exempts a homestead "owned" and occupied by the debtor, no homestead can be claimed, even as against creditors, in land not owned by the debtor.<sup>5</sup> And it has even been held that where the constitution or statute exempts the homestead from levy or sale "under mesne or final process" issued from any court, it presupposes a title capable of a transfer by such a sale, and does not exempt land unless the claimant has such a title as is subject to levy and sale.<sup>6</sup>

**1. Possessory Interest.**—*Watson v. Saxer*, 102 Ill. 585; *Brokaw v. Ogle*, 170 Ill. 115; *Feldes v. Duncan*, 30 Ill. App. 469; *Murchison v. Plyler*, 87 N. Car. 79.

**2. Remainder or Reversion.**—*Brokaw v. Ogle*, 170 Ill. 115. See also *Murchison v. Plyler*, 87 N. Car. 79; *Cornish v. Frees*, 74 Wis. 490. And see *Wilson v. Counts*, 52 S. Car. 218, where it was held that a woman who acquired land by a devise from her grandfather had no homestead right therein after the death of her father, by reason of the fact that the homestead was assigned to her during her father's lifetime, and while he had a life estate in the land.

**Devisees Occupying under Widow.**—Where a widow remains in possession of her deceased husband's land after his death, having a life estate therein, the husband's devisees, occupying the land under her, do not own and occupy it in the sense of the *Wisconsin* homestead law. *Cornish v. Frees*, 74 Wis. 490.

**3. Stern v. Lee**, 115 N. Car. 426.

**4. No Rights Acquired as Against Paramount Title.**—*Brooks v. Hyde*, 37 Cal. 366. See also *Mann v. Rogers*, 35 Cal. 316; *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248; *Whitehead v. Mundy*, 91 Ga. 198; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 253; *McClurken v. McClurken*, 46 Ill. 327.

**5. Want of Title as Against Creditors**—*View that Title Is Necessary*—*Johnson v. Johnson*, 87 Ala. 729.

*Florida.*—*Hinson v. Booth*, 39 Fla. 333.

*Illinois.*—*Kitchell v. Burgwin*, 21 Ill. 40; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 253; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647.

*Iowa.*—*Johnston v. McPherran*, 81 Iowa 230.

*Kansas.*—*Randal v. Elder*, 12 Kan. 257.

*Louisiana.*—*Denis v. Gayle*, 40 La. Ann. 286.

*Michigan.*—*Wisner v. Farnham*, 2 Mich. 472; *Rentchler v. Lawton*, 113 Mich. 14.

*Minnesota.*—*Sumner v. Sawtelle*, 8 Minn. 309; *Rogers v. McCauley*, 22 Minn. 384.

*Mississippi.*—*Partee v. Stewart*, 50 Miss. 717; *Berry v. Dobson*, 68 Miss. 483. *Compare*, however, *King v. Sturges*, 56 Miss. 606, where it was said that the occupancy of land, whether at will or by any other tenure, except that of mere intrusion or trespass, will sustain the homestead right. And see *Lewis v. White*, 69 Miss. 352, 30 Am. St. Rep. 557; *McGrath v. Sinclair*, 55 Miss. 89.

*Missouri.*—*Stamm v. Stamm*, 11 Mo. App. 598. *Compare*, however, *Vogler v. Montgomery*, 54 Mo. 584.

*New Hampshire.*—*Gerrish v. Hill*, 66 N. H. 171.

*Ohio.*—*Robinett v. Doyle*, 2 West. L. Month. 585, 2 Ohio Dec. (Reprint) 391. *Compare*, however, *Sears v. Hanks*, 14 Ohio St. 301.

*South Carolina.*—*Garaty v. Du Bose*, 5 S. Car. 493; *Ketchin v. McCauley*, 26 S. Car. 1, 4 Am. St. Rep. 674.

*Texas.*—*Smith v. Chenault*, 48 Tex. 455; *Holloway v. McIlhenny Co.*, 77 Tex. 657; *Wortham v. Anderson*, 6 Tex. Civ. App. 18.

In *Illinois* a homestead estate can have no separate existence independently of the title on which it is dependent, and is commensurate with such title, whether the homestead is in the owner of the fee, for life, or for years. *Browning v. Harris*, 99 Ill. 456; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Stafford v. Woods*, 144 Ill. 203.

**A Person Who Settles on County School Land**, but who does not purchase it from the state, acquires no homestead right therein. *Wortham v. Anderson*, 6 Tex. Civ. App. 18.

**6. Title Subject to Levy and Sale.**—*Garaty v. Du Bose*, 5 S. Car. 493. And see *Beard v. Johnson*, 87 Ala. 729; *Robinett v. Doyle*, 2 West. L. Month. 585, 2 Ohio Dec. (Reprint) 391. This, however, is contrary to the weight of authority. See the cases cited in the notes following.

Occupancy under Deed from One Without Title. — Where ownership is held to be necessary to support a claim of homestead, no homestead can be claimed by a person occupying land under a deed which confers no title, because the grantor had none.<sup>1</sup>

Claim After Conveyance of Title. — Nor can a homestead be claimed by the owner of land after he has conveyed the land and thus parted with his title. And it can make no difference that he remains in possession.<sup>2</sup>

(2) *Possession Held Sufficient.* — Some of the courts, contrary to the decisions referred to above, do not require title to support the homestead exemption, but hold that mere possession of land is sufficient as against creditors. According to this view, when land upon which an execution is levied is claimed by the debtor as his homestead, and he is in possession, occupying it as his home, the creditor cannot defeat his claim of exemption on the ground that he has no title to the property.<sup>3</sup>

The Reason given for this doctrine is that if the debtor has no title, the creditor has no right to sell the property at all, and by seeking to sell it he admits title, at least for the purpose of the particular proceeding.<sup>4</sup>

(3) *After-acquired Title.* — According to this view, if a debtor is in possession of land without title or with a defective title, claiming the property as his homestead, and afterwards obtains a good title, he may claim his homestead as against executions levied before he obtained title as well as those levied afterwards.<sup>5</sup> This is clearly so where the debtor has filed a declaration of homestead in accordance with the statute.<sup>6</sup>

4. *Life Estates* — *a. IN GENERAL.* — It is well settled that a homestead exemption may be claimed in a life estate.<sup>7</sup> A person in possession of land

1. *Conveyance from One Without Title.* — Berry v. Dobson, 68 Miss. 483, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.), title HOMESTEAD.

2. *Claim After Conveyance.* — In Ketchin v. McCarley, 26 S. Car. 1, 4 Am. St. Rep. 674, it was held that a debtor who had conveyed his homestead to his wife after the entry of a judgment against him had no interest to which the homestead exemption could attach as against a levy under the judgment so long as the title remained in his wife. The statute under which this decision was rendered exempted a homestead "whether held in fee or any lesser estate."

In Gerrish v. Hill, 66 N. H. 171, it was held that where a levy was made upon land after the debtor had sold it, though before he had removed from it, no homestead could be claimed in it, since in *New Hampshire* title as well as possession was necessary to support the homestead right.

*Contra.* — Pendleton v. Hooper, 87 Ga. 108, 27 Am. St. Rep. 227.

3. *View that Debtor's Want of Title Cannot Be Set Up by Creditor* — *California.* — Brooks v. Hyde, 37 Cal. 366; Spencer v. Geissman, 37 Cal. 96, 99 Am. Dec. 248; Gaylord v. Place, 98 Cal. 472; Perry v. Ross, 104 Cal. 15, 43 Am. St. Rep. 66.

*Georgia.* — Pendleton v. Hooper, 87 Ga. 108, 27 Am. St. Rep. 227; Whitehead v. Mundy, 91 Ga. 198.

*Mississippi.* — McGrath v. Sinclair, 55 Miss. 89; King v. Sturges, 56 Miss. 606; Lewis v. White, 69 Miss. 352, 30 Am. St. Rep. 557. But see Berry v. Dobson, 68 Miss. 483; Partee v. Stewart, 50 Miss. 717.

*Missouri.* — Vogler v. Montgomery, 54 Mo. 584. *Compare* Stamm v. Stamm, 11 Mo. App. 598.

*Montana.* — Watterson v. E. L. Bonner Co., 19 Mont. 554, 61 Am. St. Rep. 527.

*Ohio.* — Sears v. Hanks, 14 Ohio St. 301.

4. *Lewis v. White*, 69 Miss. 352, 30 Am. St. Rep. 557.

A Grantor Retaining Possession after he has parted with the title to his land by deed of gift has, under the *Georgia* statute, been held entitled to assert his homestead exemption. Pendleton v. Hooper, 87 Ga. 108, 27 Am. St. Rep. 227. *Contra*, Gerrish v. Hill, 66 N. H. 171; Ketchin v. McCarley, 26 S. Car. 1, 4 Am. St. Rep. 674.

5. *After-acquired Title Attaches to Homestead.* — Spencer v. Geissman, 37 Cal. 96, 99 Am. Dec. 248.

6. *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248.

Whatever be the character of the title or interest in the land held at the time of filing the declaration, the claim will attach to that title or interest, and whatever may inure to or grow out of that title will be impressed with the homestead right equally with the original title. Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158.

7. *Life Estate Will Support Homestead* — *Alabama.* — Tyler v. Jewett, 82 Ala. 93.

*Illinois.* — Deere v. Chapman, 25 Ill. 610; Potts v. Davenport, 79 Ill. 456.

*Kansas.* — Goodman v. Malcolm, 5 Kan. App. 285.

*Kentucky.* — Burch v. Atchison, 82 Ky. 585, 6 Ky. L. Rep. 592, 636; English v. Studicker, 4 Ky. L. Rep. 721; Pendergast v. Heekin, 94 Ky. 384; Donahue v. Mutual L. Ins. Co., (Ky. 1898) 46 S. W. Rep. 211; Vanmeeter v. Vanmeeter, 12 Ky. L. Rep. 214; Robinson v. Smithey, 80 Ky. 636.

*Missouri.* — Kendall v. Powers, 96 Mo. 142.

and occupying it as his homestead is none the less the "owner," within the meaning of the homestead exemption laws, because he has merely an estate either for his own life or for the life of another.<sup>1</sup> Where title is necessary to support a claim of homestead, the right of a debtor to a homestead in land in which he has an estate for life terminates only when his estate determines.<sup>2</sup>

**b. CURTESY.** — Since a homestead exemption may be claimed in a life estate, a homestead may be claimed in land occupied by the debtor as tenant by curtesy.<sup>3</sup>

**c. DOWER.** — And a widow who has only a dower interest in land is entitled to a homestead therein as against her creditors, to the same extent as if she owned the fee.<sup>4</sup>

**5. Leasehold Estates** — *a. IN GENERAL.* — By express statutory provision in some states a person owning and occupying a dwelling and other improvements on land of which he is rightfully in possession under a lease for a term of years may claim the premises as his homestead.<sup>5</sup> And according to the better opinion, even in the absence of such express provision, a leasehold estate is sufficient to support a claim of homestead, either in the term or in buildings on the leased premises owned by the lessee, if the property is occupied as a home by the lessee.<sup>6</sup> But where title is necessary to support a

9 Am. St. Rep. 326; *Murdock v. Dalby*, 13 Mo. App. 41.

*Ohio.* — *Newton v. Clarke*, 4 Wkly. L. Gaz. 109, 3 Ohio Dec. (Reprint) 165.

*Tennessee.* — *Ex p. Brien*, 2 Tenn. Ch. 33.

1. *Deere v. Chapman*, 25 Ill. 610.

**Devise to Wife for Life.** — Where a husband devised his homestead, not exceeding the statutory limitation as to value, to his wife for life, with a remainder to his son, it was held that the widow was entitled to claim the homestead free from liability for any of her debts. *Pendergast v. Heekin*, 94 Ky. 384.

**2. Determination of Life Estate.** — *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Goodman v. Malcolm*, 5 Kan. App. 285.

**3. Tenant by Curtesy** — *Illinois.* — *Potts v. Davenport*, 79 Ill. 456.

*Kentucky.* — *English v. Studicker*, 4 Ky. L. Rep. 721; *Vanmeeter v. Vanmeeter*, 12 Ky. L. Rep. 214.

*Missouri.* — *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326.

*Ohio.* — *Newton v. Clarke*, 4 Wkly. L. Gaz. 109, 3 Ohio Dec. (Reprint) 165.

**Exemption in Lieu of Homestead.** — It follows that where a particular exemption is allowed to a debtor where he does not own a homestead, the exemption cannot be claimed by a surviving husband who occupies as a home property in which he has a life estate as tenant by the curtesy. *Newton v. Clarke*, 4 Wkly. L. Gaz. 109, 3 Ohio Dec. (Reprint) 165.

**4. Dower Interest Will Support Homestead.** — *Burch v. Atchison*, 82 Ky. 585, 6 Ky. L. Rep. 592, 636.

This right attaches before the dower is set apart. *Murdock v. Dalby*, 13 Mo. App. 41.

**5. Leasehold Estate and Buildings on Leased Land.** — *Platto v. Cady*, 12 Wis. 461, 78 Am. Dec. 752.

**6. Alabama.** — *Weber v. Short*, 55 Ala. 311; *Watts v. Gordon*, 65 Ala. 546; *Tyler v. Jewett*, 82 Ala. 93.

*Arkansas.* — *Robson v. Hough*, 56 Ark. 621.

*Illinois.* — *Conklin v. Foster*, 57 Ill. 104.

*Compare Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258.

*Iowa.* — *Peian v. De Bevard*, 13 Iowa 53; *Wertz v. Merritt*, 74 Iowa 683.

*Kansas.* — *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199; *Hay v. Whitney*, 59 Kan. 771, 51 Pac. Rep. 896.

*Michigan.* — *Bunker v. Paquette*, 37 Mich. 79; *Maatta v. Kippola*, 102 Mich. 116.

*Minnesota.* — *In re Emerson*, 58 Minn. 450.

*Mississippi.* — *Johnson v. Richardson*, 33 Miss. 462; *King v. Sturges*, 56 Miss. 606. But see *Berry v. Dobson*, 68 Miss. 483.

*Texas.* — *Cullers v. James*, 66 Tex. 494; *Phillips v. Warner*, (Tex. App. 1890) 16 S. W. Rep. 423; *Anheuser-Busch Brewing Assoc. v. Smith*, (Tex. Civ. App. 1894) 26 S. W. Rep. 94.

*Wisconsin.* — *Platto v. Cady*, 12 Wis. 461, 78 Am. Dec. 752.

**The Term "Lands,"** as used in the statute exempting the homestead of a debtor from sale under execution, embraces leasehold lands, as well as an estate for life, and any greater estate of freehold. *Johnson v. Richardson*, 33 Miss. 462.

**The Fact that a Dwelling House on Leased Premises Remains Personal Property,** and is subject to removal by the tenant on the termination of the lease, does not prevent his claiming a homestead therein. *Watts v. Gordon*, 65 Ala. 546; *Weber v. Short*, 55 Ala. 311; *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199.

Nor is the right to a homestead affected by the fact that the building is taxable by statute as personal property. *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199.

**Premises Not Claimed as Homestead.** — In *Colwell v. Carper*, 15 Ohio St. 279, it was held that a tenant for a single year of a house, stable, and parcel of land — the tenant not claiming the property as a homestead — was not the owner of a homestead within the meaning of the homestead act, so as to be deprived of the benefit of exemptions from execution of personal property, under the provisions of that act. See also *McConville v. Lee*, 31 Ohio St. 447.



homestead exemption, the homestead right in the land does not survive the termination of the leasehold estate.<sup>1</sup> And the homestead right is no defense whatever in an action by the lessor to recover the premises.<sup>2</sup>

**Removal of Building.** Where the right to the homestead exemption applies to a dwelling house standing on land not owned by the person claiming the exemption, the removal of the house by its owner to another site does not render it subject to seizure and sale on execution while in transit.<sup>3</sup>

**b. HOMESTEAD IN BOTH LESSOR AND LESSEE.** — Since there cannot be two homesteads belonging to different persons in a single tract of land at the same time, the lessee of land, though he may live on it with his family, has no homestead exemption therein, where the lessor also occupies the land under a reservation of a right of occupancy in the lease, and resides thereon with his family as his homestead.<sup>4</sup>

**c. STIPULATION AGAINST USE AS RESIDENCE.** — Since occupation as a residence is necessary to a homestead right, it has been held in *Wisconsin* that a person who occupies premises under a lease stipulating that the premises shall be used and occupied exclusively as a site for a hotel, or for other business purposes, can acquire no homestead rights therein, although he in fact uses it as a residence, since such a stipulation excludes any right to use a building erected on the premises as a residence.<sup>5</sup>

**d. TENANCY AT WILL.** — It has been held in *Mississippi* that a tenant at will may acquire a homestead right.<sup>6</sup> But this has been denied in some of the other states.<sup>7</sup>

**e. TENANCY BY SUFFERANCE.** — In *Iowa* it was held that a tenant by sufferance had no such interest as would support a claim of homestead exemption.<sup>8</sup> This, however, cannot be true in those jurisdictions, as in *California*, in which mere possession alone is held sufficient as against a levying creditor.<sup>9</sup>

**6. Equitable Estate or Interest** — **a. IN GENERAL.** — To entitle a person to claim and hold land as his exempt homestead, he need not have the legal title or interest, even when the statute exempts a homestead "owned" and occupied by the debtor. An equitable estate or interest is sufficient. There are several cases to the contrary,<sup>10</sup> but this doctrine is supported by an overwhelming weight of authority.<sup>11</sup> In some states the statute in express terms extends

1. **Termination of Leasehold Estate Terminates Homestead Right in Land.** — *Kuttner v. Haines*, 35 Ill. App. 307, 135 Ill. 382; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Wertz v. Merritt*, 74 Iowa 683. In the case last cited a son had occupied a portion of his father's land as a tenant of his father and had acquired a homestead right in it. After his father's death the land was allotted to him upon partition of the real estate. It was held that his homestead right did not survive his leasehold estate, which by the terms of the lease ended with his father's death, and that the land was not exempt as a homestead as against a debt contracted prior to the father's death.

2. **Claim as Against Landlord.** — *Kuttner v. Haines*, 35 Ill. App. 307, 135 Ill. 382; *Abbott v. Cromartie*, 72 N. Car. 292, 21 Am. Rep. 457.

3. **Removal of Building to Another Site.** — *Bunker v. Paquette*, 37 Mich. 79.

4. **Homestead Cannot Be in Both Lessor and Lessee.** — *Hay v. Whitney*, 59 Kan. 771, 51 Pac. Rep. 896.

5. **Effect of Stipulation in Lease Against Use as Residence.** — *Green v. Pierce*, 60 Wis. 372.

But in *Minnesota*, where a lease recited that the building on the leased premises was to be used as a hotel, and there was no forfeiture

clause, it was held that the lessee could claim a homestead therein where he occupied it as a residence. *In re Emerson*, 58 Minn. 450.

6. **Tenancy at Will.** — *King v. Sturges*, 56 Miss. 606.

7. *Wertz v. Merritt*, 74 Iowa 683; *Williams v. Wethered*, 37 Tex. 130.

8. **Tenancy by Sufferance.** — *Therme v. Bethenoid*, 106 Iowa 697. In this case it was held that where land was granted to a person subject to a life reservation of use and rents, he could acquire no homestead right in the land by occupancy by sufferance of the life tenant.

9. See *supra*, this section, *Whether Exemption Is Dependent upon Title*.

10. **Equitable Estate or Interest — Held Not Sufficient.** — *Robinett v. Doyle*, 2 West. L. Month. 585, 2 Ohio Dec. (Reprint) 391; *Garaty v. Du Bose*, 5 S. Car. 493. The latter case was limited in *Munro v. Jeter*, 24 S. Car. 29, and the contrary doctrine established. See the note following.

11. **Prevailing Doctrine to the Contrary.** — *United States*, — *Bartholomew v. West*, 2 Dill. (U. S.) 290; *In re Beckerford*, 1 Dill. (U. S.) 45.

*Alabama*. — *Reeves v. Peterman*, 109 Ala. 366; *Tyler v. Jewett*, 82 Ala. 93.

*Arkansas*. — *Rockafellow v. Peay*, 40 Ark. 69. *California*. — *King v. Gotz*, 70 Cal. 236;

the right of exemption to equitable estates.<sup>1</sup>

*b. POSSESSION AS NOTICE.*—When an equitable owner of land is in actual possession thereof as his homestead, all persons are chargeable with notice of his homestead interest.<sup>2</sup>

*c. LAND HELD UNDER CONTRACT TO PURCHASE*—(1) *In General.*—It has repeatedly been said, in accordance with this doctrine, that a person who is occupying land under a contract to purchase it, evidenced by a bond for a deed or otherwise, may claim a homestead exemption therein, except as against his liability under the contract for the unpaid purchase money. The fact that he has not yet received a deed is altogether immaterial.<sup>3</sup> There are some decisions in which the right to a homestead in property so held has been

*Snodgrass v. Parks*, 79 Cal. 55; *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158.

*Georgia.*—*Whitehead v. Mundy*, 91 Ga. 198.

*Illinois.*—*Blue v. Blue*, 38 Ill. 9, 87 Am. Dec. 267; *Tomlin v. Hilyard*, 43 Ill. 300, 92 Am. Dec. 118; *Conklin v. Foster*, 57 Ill. 104; *Allen v. Hawley*, 66 Ill. 164; *Watson v. Saxer*, 102 Ill. 585; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Stafford v. Woods*, 144 Ill. 203.

*Iowa.*—*Pelan v. De Bevard*, 13 Iowa 53; *Fyffe v. Beers*, 18 Iowa 11, 85 Am. Dec. 577; *Hewitt v. Rankin*, 41 Iowa 35; *Stinson v. Richardson*, 44 Iowa 373; *Lessell v. Goodman*, 97 Iowa 681, 59 Am. St. Rep. 432; *Johnson County Sav. Bank v. Carroll*, (Iowa 1899) 78 N. W. Rep. 247.

*Kansas.*—*Tarrant v. Swain*, 15 Kan. 146; *Moore v. Reaves*, 15 Kan. 150; *Hixon v. George*, 18 Kan. 259; *Hogan v. Manners*, 23 Kan. 557, 33 Am. Rep. 199.

*Kentucky.*—*Griffin v. Proctor*, 14 Bush (Ky.) 571; *Persifull v. Hind*, 88 Ky. 296, 10 Ky. L. Rep. 880.

*Michigan.*—*McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Orr v. Shraft*, 22 Mich. 260; *Allen v. Cadwell*, 55 Mich. 8.

*Minnesota.*—*Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107; *Smith v. Lackor*, 23 Minn. 454; *Jelinek v. Stepan*, 41 Minn. 412.

*Mississippi.*—*Edmonson v. Meacham*, 50 Miss. 34.

*Nebraska.*—*Stubendorf v. Hoffman*, 23 Neb. 360.

*New Hampshire.*—*Gunnison v. Twitchel*, 38 N. H. 62; *Norris v. Morrison*, 45 N. H. 490; *Fellows v. Dow*, 58 N. H. 21; *Libbey v. Davis*, (N. H. 1895) 34 Atl. Rep. 744.

*North Carolina.*—*Cheatham v. Jones*, 68 N. Car. 153; *Hinson v. Adrian*, 92 N. Car. 121; *Dortch v. Benton*, 98 N. Car. 190, 2 Am. St. Rep. 331.

*South Carolina.*—*Munro v. Jeter*, 24 S. Car. 29, (explaining and limiting *Garaty v. Du Bose*, 5 S. Car. 493); *Ex p. Kurz*, 24 S. Car. 468; *Ex p. Allison*, 45 S. Car. 338.

*Tennessee.*—*Fauver v. Fleenor*, 13 Lea (Tenn.) 622; *Flannegan v. Stifel*, 3 Tenn. Ch. 465.

*Texas.*—*Macmanus v. Campbell*, 37 Tex. 267; *Smith v. Chenault*, 48 Tex. 455; *Lee v. Welborne*, 71 Tex. 500; *McShan v. Myers*, 1 Tex. Unrep. Cas. 101; *Dotson v. Barnett*, 16 Tex. Civ. App. 258; *McNeil v. Moore*, 7 Tex. Civ. App. 536.

*Vermont.*—*Morgan v. Stearns*, 41 Vt. 398; *Doane v. Doane*, 46 Vt. 485.

*Wisconsin.*—*Chopin v. Runte*, 75 Wis. 361; *McCabe v. Mazzuchelli*, 13 Wis. 478.

1. *Express Statutory Provision.*—See *Flannegan v. Stifel*, 3 Tenn. Ch. 465.

2. *Possession under Equitable Title as Notice.*—*Moore v. Reaves*, 15 Kan. 150; *Tucker v. Vandermark*, 21 Kan. 263.

3. *Land Held under Contract to Purchase—United States.*—*Bartholomew v. West*, 2 Dill. (U. S.) 293.

*California.*—*Snodgrass v. Parks*, 79 Cal. 55; *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158.

*Dakota.*—*Myrick v. Bill*, 5 Dak. 167.

*Illinois.*—*Blue v. Blue*, 38 Ill. 9, 87 Am. Dec. 267; *Allen v. Hawley*, 66 Ill. 164; *Watson v. Saxer*, 102 Ill. 585; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Stafford v. Woods*, 144 Ill. 203.

*Iowa.*—*Fyffe v. Beers*, 18 Iowa 11, 85 Am. Dec. 577; *Hewitt v. Rankin*, 41 Iowa 35; *Stinson v. Richardson*, 44 Iowa 373; *Lessell v. Goodman*, 97 Iowa 681, 59 Am. St. Rep. 432; *Dahl v. Thompson*, 98 Iowa 599.

*Kansas.*—*Moore v. Reaves*, 15 Kan. 150.

*Kentucky.*—*Persifull v. Hind*, 88 Ky. 296, 10 Ky. L. Rep. 880; *Griffin v. Proctor*, 14 Bush (Ky.) 571.

*Michigan.*—*McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Allen v. Cadwell*, 55 Mich. 8.

*Minnesota.*—*Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107; *Smith v. Lackor*, 23 Minn. 454.

*Missouri.*—*State v. Diving*, 66 Mo. 375.

*New Hampshire.*—*Libbey v. Davis*, (N. H. 1895) 34 Atl. Rep. 744.

*North Carolina.*—*Dortch v. Benton*, 98 N. Car. 190, 2 Am. St. Rep. 331.

*South Carolina.*—*Munro v. Jeter*, 24 S. Car. 29; *Ex p. Kurz*, 24 S. Car. 468.

*Tennessee.*—*Fauver v. Fleenor*, 13 Lea (Tenn.) 622.

*Texas.*—*Macmanus v. Campbell*, 37 Tex. 267; *Smith v. Chenault*, 48 Tex. 455; *Lee v. Welborne*, 71 Tex. 500; *McShan v. Myers*, 1 Tex. Unrep. Cas. 101; *McNeil v. Moore*, 7 Tex. Civ. App. 536; *Dotson v. Barnett*, 16 Tex. Civ. App. 258.

*Wisconsin.*—*McCabe v. Mazzuchelli*, 13 Wis. 478; *Chopin v. Runte*, 75 Wis. 361.

Under a statute providing for a homestead in land "owned or rightly possessed," this is clearly so. *Stafford v. Woods*, 144 Ill. 203.

**Claims Accruing After the Declaration of Homestead Was Filed** of record are subordinate to the homestead of a vendee in possession under a contract of purchase whose equitable estate has ripened into a fee by conveyance. *Alex-*



denied,<sup>1</sup> but the overwhelming weight of authority is against them. In order that a case may come within this rule there must be a contract by which the premises are sold, and not merely preliminary negotiations or agreements looking to a contract of sale to be entered into at some future time.<sup>2</sup>

(2) *Oral Contract — Statute of Frauds.* — In those states in which the prevailing doctrine is recognized, it makes no difference whether the contract of sale is in writing, as required by the statute of frauds, or oral, if the price has been partly paid and possession has been given thereunder, for in such a case a court of equity would decree specific performance by the vendor.<sup>3</sup>

(3) *Right to Possession.* — If, under a contract for the purchase of land, the purchaser is not entitled to possession until the price has been paid, his right of homestead will not ordinarily attach until such payment, but the provision as to possession may be waived.<sup>4</sup>

(4) *Purchase of Public Lands.* — This doctrine applies to public lands which are occupied as a homestead under a contract to purchase them from the state. The fact that the purchase has not been completed and the fee still remains in the state does not prevent a claim of homestead therein.<sup>5</sup>

(5) *Claim as Against Vendor.* — No homestead can be acquired in lands held under a contract to purchase them as against the vendor's claim for the purchase money, or as against his right to declare the contract forfeited and to re-enter for nonperformance by the purchaser.<sup>6</sup>

ander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158.

1. *Decisions to the Contrary.* — In *Massachusetts* it was held that an estate of homestead under a deed does not relate back to the date of a bond for the deed, but begins at the date of the deed. *Thurston v. Maddocks*, 6 Allen (Mass.) 427.

A similar ruling was made in *Missouri*. *Griswold v. Johnson*, 22 Mo. App. 466. But see *State v. Diveling*, 66 Mo. 375.

Some decisions are to the effect that the interest of one in possession under a contract to purchase, not being subject to levy and sale on execution, is not the subject of a homestead exemption. See the *Ohio nisi prius* case of *Robinett v. Doyle*, 2 West. L. Month. 585, 2 Ohio Dec. (Reprint) 391. But see *supra*, this section, *Whether Exemption Is Dependent upon Title*.

To this effect is *Garaty v. Du Bose*, 5 S. Car. 493. This case, however, has been limited and the contrary held in later cases. *Munro v. Jeter*, 24 S. Car. 29; *Ex p. Kurz*, 24 S. Car. 468.

*Prior Equities and Incumbrances.* — In *Texas* the general rule is recognized, but it is held that a homestead is not acquired as against parties holding prior equities and incumbrances until the title to the land on which the homestead is sought to be established has been perfected by the payment of the purchase money, and that all liens accruing before the homestead has been established must be raised, or it will be subject to forced sale, for their satisfaction. *Clements v. Lacy*, 51 Tex. 150.

2. *Contract to Be Executed in the Future.* — *Rentchler v. Lawton*, 113 Mich. 14.

3. *Part Performance under Oral Contract — Statute of Frauds.* — *Fyffe v. Beers*, 18 Iowa 11, 85 Am. Dec. 577; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Smith v. Chenault*, 48 Tex. 455; *Dotson v. Barnett*, 16 Tex. Civ. App. 258.

4. *Provision as to Possession — Waiver.* — *Johnson County Sav. Bank v. Carroll*, (Iowa 1899) 78 N. W. Rep. 247.

5. *Purchasers of Public Lands — Purchaser of Land under School Land Certificate.* — *McCabe v. Mazzuchelli*, 13 Wis. 478. And see *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107.

Homestead rights can be claimed in land held under a part-paid certificate of purchase of school land. *Allen v. Cadwell*, 55 Mich. 8.

*Purchaser of University Land.* — *McShan v. Myers*, 1 Tex. Unrep. Cas. 101.

*Other Public Land* is also subject to this rule. In *State v. Diveling*, 66 Mo. 375, it was held that a person who had entered government land, received a certificate of entry, and was living with his family upon it, but had never taken out a patent, had an existing estate therein under a *Missouri* statute giving a homestead in such an estate. *Compare De Land v. Day*, 45 Iowa 37.

6. *No Homestead as Against Liability for Purchase Money.* — *Snodgrass v. Parks*, 79 Cal. 55; *Watson v. Saxer*, 102 Ill. 585; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Stafford v. Woods*, 144 Ill. 203; *Dortch v. Benton*, 98 N. Car. 190, 2 Am. St. Rep. 331; *Lee v. Welborne*, 71 Tex. 500. And see *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

*Ejectment by Vendor's Grantee.* — Where a contract for the purchase of land provides that if the vendee shall fail to make the payments specified therein, the contract shall be forfeited at the vendor's option, the purchaser's right of homestead exemption ceases when he fails to make such payments and an action of ejectment is brought by the vendor's grantee. *Stafford v. Woods*, 144 Ill. 203.

*Acknowledgment of Forfeiture by Husband Alone.* — In *Iowa* a vendee taking possession of property under a bond for a deed with a forfeiture clause has a homestead interest in the



(6) *Abandonment of Contract.* — Nor can a homestead be claimed in land held under such contract, where the contract not only has not been complied with, but has been abandoned because of inability to pay the purchase money. The homestead right is lost with the loss of the rights of the purchaser under the contract.<sup>1</sup>

(7) *Payment of Price by Creditor.* — Where a person occupying land under a bond for a deed claims a homestead therein as against a levying creditor, his right will not be defeated by the fact that the creditor has paid the obligor the balance due from the obligee on the price fixed in the bond.<sup>2</sup>

d. **EQUITY OF REDEMPTION.** — Equitable estates include an equity of redemption, and therefore a debtor who has executed a mortgage on his land, and who has merely the equity of redemption, may claim a homestead exemption therein.<sup>3</sup>

**Deed of Trust.** — In *California* a person residing with his family on community property which he has conveyed by a deed of trust to secure an indebtedness has such an interest in the property, notwithstanding the trust deed, as entitles him to claim a homestead.<sup>4</sup>

e. **TITLE TAKEN IN ANOTHER'S NAME** — (1) *In General.* — In those jurisdictions in which either an equitable or a legal title is necessary to support a claim of homestead exemption, and in which there is a statute declaring that where one person pays the consideration for land, and the land is conveyed to another, no trust results in favor of the former because of his payment of the consideration, no homestead can be claimed by a person who pays the consideration for land and takes the title in another's name, though he occupies the land as a homestead, since he has no interest therein, legal or equitable.<sup>5</sup> The contrary has been held, however, in several states in which there is no such statute, on the ground that the person paying the consideration has such an equitable interest as will support a homestead.<sup>6</sup>

premises, and an acknowledgment of forfeiture made by him without his wife joining therein will be invalid as against the wife. *Lessell v. Goodman*, 97 Iowa 681, 59 Am. St. Rep. 432.

1. **Abandonment of Contract.** — *Snodgrass v. Parks*, 79 Cal. 55; *Dahl v. Thompson*, 98 Iowa 599.

2. **Effect of Payment of Price by Creditor.** — *Libbey v. Davis*, (N. H. 1895) 34 Atl. Rep. 744.

3. **Homestead May Be Claimed in Equity of Redemption** — *Arkansas*, — *Rockafellow v. Peay*, 40 Ark. 69.

*California*, — *King v. Gotz*, 70 Cal. 236.

*New Hampshire*, — *Norris v. Morrison*, 45 N. H. 490; *Fellows v. Dow*, 58 N. H. 21.

*North Carolina*, — *Cheatham v. Jones*, 68 N. Car. 153; *Hinson v. Adrian*, 92 N. Car. 121.

*Tennessee*, — *Flannegan v. Stifel*, 3 Tenn. Ch. 465.

*Vermont*, — *Morgan v. Stearns*, 41 Vt. 398; *Doane v. Doane*, 46 Vt. 485.

4. **Deed of Trust.** — *King v. Gotz*, 70 Cal. 236.

5. **Payment of Consideration for Conveyance to Another.** — In *Minnesota* it is provided by statute that when a grant shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former; but such conveyance shall be presumed fraudulent as against creditors of the person paying the consideration, and a trust shall result in their favor, unless the fraudulent intent is disproved. Stat. Minn. (1894), §§ 4280, 4281. And in that state it has been held that where a person pays the consideration for land, and has the title taken in the

name of another, he cannot claim a homestead in the land though it is occupied by him as a residence with the consent of the holder of the legal title. The reason given is that no trust results in his favor, and therefore he has no equitable interest to which a homestead right can attach. *Sumner v. Sawtelle*, 8 Minn. 309. Compare *Jelinek v. Stepan*, 41 Minn. 412, where there was an express trust. See *infra*, this section, *Property Held in Trust*.

In *Michigan* there is a similar statute. How. Annot. Stat. Mich. (1882), §§ 5569, 5570. In *Orr v. Shraft*, 22 Mich. 260, however, where the consideration for land occupied as a homestead by husband and wife was paid by the husband and the land was conveyed to the wife, but there was no fraudulent intent, it was held that the land was not liable to seizure and sale for the husband's debts. The court did not refer to the statute in this case, but assumed an equitable interest in the husband.

In *Fairbairn v. Middlemiss*, 47 Mich. 372, where a purchaser of land, on completing his payments, caused the land to be conveyed to his brother, with a fraudulent intent, it was held that under the statute above referred to a trust resulted in favor of the purchaser's creditors; but the court expressly said that whether the premises were his homestead was not a question on the appeal.

6. In *Alabama* there is no such statute, and where a husband purchased land and had it conveyed to his wife under an agreement with her to hold the title subject to his disposition, and to convey it as he might direct, and occupied the land as a homestead, it was held that

(2) *Fraud upon Creditors.* — Where the transaction by which a person acquires land and takes the legal title in another's name constitutes a fraud upon his creditors, he cannot claim a homestead therein.<sup>1</sup>

7. *Several Lots or Tracts Held by Different Titles.* — Where a debtor claims a homestead under a statute which allows several lots or tracts to be claimed, it is not necessary that all the lots or tracts shall be held by the same title. The homestead may consist of one lot or tract held under a lease, or in which the debtor has a life estate, and an adjoining lot or tract in which he has a fee-simple title, when both together are occupied as a homestead and do not exceed the statutory limitation as to value.<sup>2</sup>

8. *Property Held in Trust.* — A person who holds a mere naked title to real estate in trust for another has no homestead rights therein at variance with the rights of the *cestui que trust*.<sup>3</sup> This is true in the case of resulting trusts as well as in the case of express trusts.<sup>4</sup> But a homestead may be claimed by the *cestui que trust* if he occupies the land with his family, notwithstanding the fact that the legal title is in the trustee.<sup>5</sup>

9. *Title in Husband or Wife or Both* — *a. SEPARATE PROPERTY OF WIFE.* — Where the circumstances are such as to entitle a married woman to claim a homestead exemption,<sup>6</sup> a married woman living with her family upon land which is her separate property may claim a homestead exemption therein although her husband also resides there.<sup>7</sup>

he had such an interest as entitled him to claim the land as a homestead as against his creditors. *Reeves v. Peterman*, 109 Ala. 366.

In Mississippi, where there is no such statute, there was a similar decision where a husband purchased land and occupied it as his home, though the title was taken in the name of his wife and children. The court held that he had an equitable interest and that this was sufficient. *Edmonson v. Meacham*, 50 Miss. 34.

In Nebraska, also, where there is no such statute, a debtor who had purchased land, and had it conveyed to his brother, but who occupied it himself as a homestead, was held entitled to claim his exemption therein. *Stubendorf v. Hoffman*, 23 Neb. 360.

1. *Transactions in Fraud of Creditors.* — *Bridgers v. Howell*, 27 S. Car. 425.

Where One Makes a Voluntary Conveyance in Fraud of Creditors, receiving from the grantee a power of attorney to control and convey the property, and subsequently marries, he has not at the time of his marriage any interest in the property to which a homestead right can attach. *Johnston v. McPherran*, 81 Iowa 230.

2. *Claiming Several Lots or Tracts Held by Different Titles.* — *Tyler v. Jewett*, 82 Ala. 93.

3. *Title Held in Trust* — *Rights of Trustee.* — *Osborn v. Strachan*, 32 Kan. 52; *Rice v. Rice*, 108 Ill. 199; *Gordon v. English*, 3 Lea (Tenn.) 640; *Shepherd v. White*, 11 Tex. 346.

4. *Resulting Trusts.* — *Gordon v. English*, 3 Lea (Tenn.) 640; *Shepherd v. White*, 11 Tex. 346.

*Guardian and Ward.* — An infant whose money has been used by the guardian in paying for land bought in his own name may follow the money into the land, or have the money declared a charge upon the land, and the land sold for its satisfaction; and the infant's claim will be superior to the guardian's right of homestead in the land. *Gordon v. English*, 3 Lea (Tenn.) 634.

5. *Rights of Cestui Que Trust.* — In *Jelinek v.*

*Stepan*, 41 Minn. 412, the wife of a debtor, while she was dangerously ill, conveyed her property to a third person in trust for her husband, and after her death her husband occupied the premises as a homestead. Afterwards he was married a second time. It was held under these circumstances that the debtor acquired a homestead in the land by virtue of his equitable ownership and occupation, notwithstanding the legal title was in the trustee, and that the trustee could not convey the land without the consent and joinder of the second wife. See also *supra*, this section, *Equitable Estate or Interest*.

*Payment of Consideration and Conveyance to Another.* — Whether a homestead can or cannot be claimed by a debtor who pays the consideration for land and has the conveyance made to another is considered elsewhere. See *supra*, this section, *Equitable Estate or Interest* — *Title Taken in Another's Name*.

6. See *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption* — *Rights of Married Women*.

7. *Homestead Rights in Wife's Separate Property* — *Right of Wife* — *Alabama.* — *Bender v. Meyer*, 55 Ala. 576. See also *Weiner v. Sterling*, 61 Ala. 98.

*Arkansas.* — *Thompson v. King*, 54 Ark. 9.  
*California.* — *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207, holding that a homestead may be declared on real property a part of which is community property and the balance of which is the separate property of the wife, where the declaration of the homestead is made and filed by her. See also Civ. Code Cal., § 1238.

*Illinois.* — *Tourville v. Pierson*, 39 Ill. 446; *Zander v. Scott*, 165 Ill. 51.

*Indiana.* — *Crane v. Waggoner*, 33 Ind. 83, holding that under a statute protecting the "debtor," a wife who is a debtor may supplement her husband's property to the amount exempted out of her land levied upon under execution.



**Claim of Homestead by Husband.** — In some states it is held that the husband may assert a right of homestead exemption in land occupied as a family residence, although the legal title is in the wife, and even though the property is the separate property of the wife.<sup>1</sup> But this is not the case in all states. Under some statutes no homestead can be claimed by a husband in the separate property of his wife, even when the property is used by both as a homestead, though under some circumstances the wife herself may claim the right.<sup>2</sup> The question depends, of course, upon the language of the particular statute.

**b. SEPARATE PROPERTY OF HUSBAND.** — Of course a husband as the head of a family may claim a homestead in his separate property if occupied by him as a family residence. And the homestead rights of the wife will attach to such property to the same extent as they would attach to community property in those jurisdictions in which community property is recognized.<sup>3</sup>

**c. SEPARATE TRACTS OWNED BY EACH.** — It has been held in *Alabama*, where the statute gives a homestead exemption to every resident of the state, that where the family homestead is on land belonging to the wife, and the husband owns and cultivates an adjoining tract, the two holdings cannot be tacked the one to the other, and thus become an individual homestead claimable by either.<sup>4</sup> But in *Mississippi* the homestead may consist of two adjoining tracts, one the husband's, and the other the wife's. The whole, if occupied by them as a homestead, and not exceeding the statutory value, will

*Mississippi.* — *Partee v. Stewart*, 50 Miss. 717. See also *Powers v. Sample*, 69 Miss. 67. *Ohio.* — *Hill v. Myers*, 46 Ohio St. 183.

In *Oklahoma* and *Tennessee* the wife, not being "the head of a family" within the statute (see *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption*, subdiv. 9. a. (1) *In General*), is not entitled to a homestead out of her own property. *McGinnis v. Wood*, 4 Okla. 499; *Turner v. Argo*, 89 Tenn. 443; *Producer's Nat. Bank v. Cumberland Lumber Co.*, 100 Tenn. 389; *Adcock v. Mann*, (Tenn. Ch. 1896) 38 S. W. Rep. 99.

**1. Jurisdictions in Which Homestead May Be Claimed in Wife's Property** — *Georgia.* — *Broome v. Davis*, 87 Ga. 584, where the husband as trustee for his wife and minor children claimed a homestead tract, the title to which was in the wife, as against the wife's mortgagee who was seeking to foreclose.

*Illinois.* — *Herdman v. Cooper*, 39 Ill. App. 330, 138 Ill. 583; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257.

*Iowa.* — The family homestead may be had in the land of either husband or wife, or partly in the land of each. *Henderson v. Rainbow*, 76 Iowa 320; *Code Iowa* (1897), § 2972.

*Kansas.* — *Hixon v. George*, 18 Kan. 253.

*Michigan.* — *Orr v. Shraft*, 22 Mich. 260, where land the legal title to which was in the wife, though the husband had an equitable interest, was protected from levy of execution for the husband's debts.

*Missouri.* — *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Peake v. Cameron*, 102 Mo. 568.

*Nebraska.* — The separate property of the wife may constitute the family homestead so as to exclude the husband from a chattel exemption under the statute. *Stout v. Rapp*, 17 Neb. 462.

*Ohio.* — Land occupied by the family is the homestead, whether owned by the husband or

the wife. *Davis v. Dodds*, 20 Ohio St. 473; *Dwinell v. Edwards*, 23 Ohio St. 603.

*Texas.* — *Ball v. Lowell*, 56 Tex. 579. Where the homestead is assigned in a tract in which each spouse owns an undivided half interest, the homestead will be set out in the tract as a whole, and the whole exemption will not be charged on the husband's share as against his creditors. *Willis v. Matthews*, 46 Tex. 479.

**2. Jurisdictions in Which Husband Has No Homestead in Wife's Property** — *Alabama.* — *Beard v. Johnson*, 87 Ala. 729.

*California.* — *Oaks v. Oaks*, 94 Cal. 66, holding void a declaration of homestead in the wife's separate estate by the husband without the wife's consent.

*Indiana.* — *Holman v. Martin*, 12 Ind. 553.

*Kentucky.* — *Summers v. Sprigg*, (Ky. 1896) 35 S. W. Rep. 1033; *Spratt v. Allen*, (Ky. 1899) 50 S. W. Rep. 270.

*Minnesota.* — See *Sumner v. Sawtelle*, 8 Minn. 309; *Rogers v. McCauley*, 22 Minn. 384; and *supra*, this section, subdiv. 6. c. *Title Taken in Another's Name.*

*New Hampshire.* — *Squire v. Mudgett*, 61 N. H. 149.

*Oklahoma.* — *McGinnis v. Wood*, 4 Okla. 499.

*South Carolina.* — *Ketchin v. McCauley*, 26 S. Car. 1, 4 Am. St. Rep. 674.

*Tennessee.* — *Turner v. Argo*, 89 Tenn. 443; *Producers' Nat. Bank v. Cumberland Lumber Co.*, 100 Tenn. 389; *Adcock v. Mann*, (Tenn. Ch. 1896) 38 S. W. Rep. 99.

**3. Separate Property of Husband — Rights of Wife.** — *Freeman v. Hamblin*, 1 Tex. Civ. App. 157. See *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption — Rights of Married Women.*

**4. Separate Tracts Owned Respectively by Husband and Wife.** — *Beard v. Johnson*, 87 Ala. 729.



be exempt as against the debts of both.<sup>1</sup> And so it has been held in *Iowa*.<sup>2</sup>

*d. SEPARATE HOMESTEADS.* — There cannot, at one and the same time, be two separate valid homestead claims, the one by the husband and the other by the wife.<sup>3</sup>

*e. LAND OWNED IN COMMON OR JOINTLY.* — In most jurisdictions a homestead right may exist in property held in common or in joint tenancy, and a homestead may be claimed in land owned in common by husband and wife.<sup>4</sup>

*f. TENANCY BY ENTIRETIES.* — A homestead exists in land held jointly by husband and wife as tenants by the entireties, under a statute exempting a homestead, or real estate in the possession of, or belonging to, each head of a family.<sup>5</sup>

*g. COMMUNITY PROPERTY.* — In *California* and *Texas* a homestead may be claimed out of the common property of the husband and the wife.<sup>6</sup>

**10. Title Acquired by Descent or Devise.** — Where the constitution or statute is general, and exempts land "owned" and occupied by the debtor, it is clear that the exemption may be claimed in land acquired by descent or devise;<sup>7</sup> but there have been statutes in some jurisdictions exempting land

1. *Powers v. Sample*, 69 Miss. 67. The statute under which this case was decided exempted one hundred and sixty acres, not exceeding two thousand dollars in value, to every citizen, "male or female, being a householder and having a family."

2. In *Iowa*, where the house used as a home is situated upon lands of the wife, the homestead may also include land owned by the husband. It is entirely immaterial whether the legal title be in the husband or the wife, or whether one of them holds the title to one tract and the other to another tract, where the two tracts are used as a homestead. *Lowell v. Shannon*, 60 Iowa 713. See also *Henderson v. Rainbow*, 76 Iowa 320.

3. *Separate Homesteads.* — *Beard v. Johnson*, 87 Ala. 729; *Herdman v. Cooper*, 39 Ill. App. 330, 138 Ill. 583.

In *Kentucky* the statute gives to the surviving husband a homestead right in the homestead of his wife, but no such right attaches during the lifetime of the wife, and therefore the fact that the wife has such property does not prevent the husband claiming a homestead from lands owned by himself. *Summers v. Sprigg*, (Ky. 1896) 35 S. W. Rep. 1033; *Spratt v. Allen*, (Ky. 1899) 50 S. W. Rep. 270.

**Exemption in Lieu of Homestead.** — Since the Act of May 1, 1871, in *Ohio*, when real estate occupied as a family homestead is owned by either husband or wife, neither can hold the exemption allowed in lieu of homestead. *Dwinell v. Edwards*, 23 Ohio St. 603. Formerly the law was otherwise. *Davis v. Dodds*, 20 Ohio St. 473.

4. *Land Owned in Common or Jointly by Husband and Wife* — *Arkansas.* — *Simpson v. Biffle*, 63 Ark. 289.

*Illinois.* — *Capek v. Kropik*, 129 Ill. 509.

*Kentucky.* — *Johnson v. Kessler*, 87 Ky. 458, 10 Ky. L. Rep. 429.

*Michigan.* — *Lozo v. Sutherland*, 38 Mich. 168.

*Mississippi.* — *Krippendorf v. Wolf*, 70 Miss. 81.

*Missouri.* — *Hart v. Leete*, 104 Mo. 315.

*Ohio.* — *Prosek v. Kuchta*, 11 Cinc. L. Bul.

65, 9 Ohio Dec. (Reprint) 129. See *infra*, this section, *Property Held in Common or in Joint Tenancy*.

Where the husband is the head of the family, and both he and his wife have an interest in the same tract of land, each interest exceeding in value the homestead exemption, and the husband is the debtor, the homestead exemption will be allowed to him out of his interest. *Hart v. Leete*, 104 Mo. 315. And see *Krippendorf v. Wolf*, 70 Miss. 81.

Where husband and wife own jointly property in which a right of homestead exists, the husband, as against his debt, is entitled to have the entire homestead allotted to him out of his interest. The wife's interest cannot be required to make up the homestead. *Johnson v. Kessler*, 87 Ky. 458, 10 Ky. L. Rep. 429.

5. *Land Held in Tenancy by Entireties.* — *Jackson v. Shelton*, 89 Tenn. 82. And see *Simpson v. Biffle*, 63 Ark. 289.

6. *Community Property* — *California.* — Civ. Code Cal., § 1238; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Gee v. Moore*, 14 Cal. 472; *Gimmy v. Doane*, 22 Cal. 635; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207. See also *Matter of Lamb*, 95 Cal. 397.

*Texas.* — *Ball v. Lowell*, 56 Tex. 579.

7. *Land Acquired by Descent or Devise* — *Arkansas.* — *Robson v. Hough*, 56 Ark. 621.

*Kentucky.* — *Jewell v. Clark*, 78 Ky. 398; *Meador v. Meador*, 88 Ky. 217, 10 Ky. L. Rep. 783; *Pendergest v. Heekin*, 94 Ky. 384, 15 Ky. L. Rep. 180; *Dwelby v. Galbraith*, 5 Ky. L. Rep. 209, 4 Ky. L. Rep. 891; *Miller v. Bennett*, 11 Ky. L. Rep. 391.

*Missouri.* — *Loring v. Groomer*, 142 Mo. 1.

In *Kentucky*, where a *bona fide* housekeeper with a family resided on his father's land, and after the father's death intestate the land was allotted to him, it was held that it was not subject to a debt which he owed in his father's lifetime. *Jewell v. Clark*, 78 Ky. 398. The same is true where land is acquired by devise. *Pendergest v. Heekin*, 94 Ky. 384, 15 Ky. L. Rep. 180. See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

acquired by deed only, and under these it has been held that a homestead cannot be claimed in land acquired by descent or devise.<sup>1</sup>

**11. Title Acquired by Gift.** — The homestead exemption may be claimed by a debtor in land acquired by gift, and occupied by him as a home, to the same extent as if he had acquired the land by purchase.<sup>2</sup>

**12. Title by Adverse Possession.** — When title to land is necessary to support a claim of homestead, possession of the land for the period prescribed by the statute of limitations gives a title which will support a claim of homestead.<sup>3</sup>

**13. Public Lands of the United States.** — A homestead exemption may be claimed, as against creditors, in public lands belonging to the *United States*, where a debtor is in possession of such lands and is occupying them as his residence.<sup>4</sup>

**14. Vendor Retaining Legal Title.** — Where the owner of land sells it but retains a legal title, the sale does not affect his right to claim a homestead in the land as against his creditors.<sup>5</sup>

**15. Mortgaged Premises.** — The fact that a debtor has given a mortgage on land occupied by him as a residence does not so affect his title as to defeat his right to claim and hold the land as his homestead, even in those jurisdictions in which a mortgage conveys the legal title, instead of merely giving a lien; for the homestead, as was shown in another place, may be claimed in the equity of redemption.<sup>6</sup> *A fortiori*, the homestead exemption may be claimed when the mortgage merely gives a lien.<sup>7</sup>

**16. Appurtenances and Improvements.** — In order that an improvement, or personal property generally, may be exempt because it is upon the homestead, the debtor must have the title. The owner of land occupied as a homestead cannot claim as a part of his homestead exemption machinery or other property situated upon the land, if the title thereto is in another, since under such circumstances the property does not become a part of the realty.<sup>8</sup>

**17. Property Held in Common or in Joint Tenancy** — *a. VIEW THAT HOMESTEAD CANNOT BE CLAIMED.* — Some of the courts, basing their decision generally on the ground of supposed inconvenience of a different rule under the particular statute,<sup>9</sup> have held that a homestead exemption cannot be claimed in land held in joint tenancy or tenancy in common, but that title in severalty is necessary.<sup>10</sup>

1. This was the case in *Missouri*, prior to the amendment of the homestead law in 1887 (Acts 1887, p. 197), but since that amendment homesteads acquired by descent or devise are exempt from attachment, levy, and sale on execution upon all causes of action accruing after the acquisition of such homestead. *Loring v. Groomer*, 142 Mo. 1.

2. **Title Acquired by Gift.** — *Holcomb v. Hood*, 12 K. L. Rep. 240, 8 Ky. L. Rep. 255.

3. **Adverse Possession.** — *Bridges v. Johnson*, 69 Tex. 714.

4. **Public Lands of the United States.** — *Watson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 427. See also *Waters v. Johnson*, 20 Colo. 363, construing *Mills's Annot. Stat. Colo.* (1891), § 2582.

In *Gaylord v. Place*, 98 Cal. 472, it was held that mineral land of the *United States* located and chiefly used by the owner as a placer-mining claim, but also used as a place of residence for himself and family, and to some extent for pasturing stock and raising vegetables, is subject to selection as a homestead.

5. **Claim by Vendor Retaining His Title.** — See *Ex p. Allison*, 45 S. Car. 338.

6. **Mortgaged Premises** — *Arkansas.* — *Rockafellow v. Peay*, 40 Ark. 69.

*California.* — *King v. Gotz*, 70 Cal. 236.

*New Hampshire.* — *Norris v. Morrison*, 45 N. H. 490; *Fellows v. Dow*, 58 N. H. 21.

*North Carolina.* — *Cheatham v. Jones*, 68 N. Car. 153; *Hinson v. Adrian*, 92 N. Car. 121.

*Tennessee.* — *Flannegan v. Stifel*, 3 Tenn. Ch. 465.

*Vermont.* — *Morgan v. Stearns*, 41 Vt. 398; *Doane v. Doane*, 46 Vt. 485.

See *supra*, this section, *Equitable Estate or Interest* — *Equity of Redemption*.

7. *Cheatham v. Jones*, 68 N. Car. 153. See *infra*, this title, *Adverse Possession*, and *Improvements*.

8. **Appurtenances and Improvements** — *Machinery.* — *McNeil v. Moore*, 7 Tex. Civ. App. 536; *Marshall v. Bachelder*, 47 Kan. 442. And see *infra*, this title, *Property in Which Exemption May Be Claimed* — *Appurtenances and Improvements*.

9. See, for instance, the reasoning of the court in the leading *California* case, *Wolf v. Fleischacker*, 5 Cal. 245, 63 Am. Dec. 121.

10. **View that Homestead Cannot Be Claimed in Estates in Common** — *United States* — *Commercial*, etc., *Bank v. Corbett*, 5 Sawy. (U. S.) 543, 6 Fed. Cas. No. 3,058.

*California.* — *Wolf v. Fleischacker*, 5 Cal.



**Exclusive Possession.** — It is so held in these jurisdictions even though a joint tenant or tenant in common who claims the homestead is in exclusive possession and no objection is made by his cotenant.<sup>1</sup>

**Debtor Owning Almost All.** — This rule has been applied even where the debtor claiming a homestead owned almost the entire estate, as where he owned seventeen eighteenths and his cotenant owned only one eighteenth.<sup>2</sup>

**Husband, Wife, and Child.** — It has also been applied where land was owned in common by a husband, his wife, and their child, and they all lived together on the land.<sup>3</sup>

**Conveyance of Undivided Interest.** — Where this doctrine is recognized, it follows that the conveyance of an undivided interest by the owner of land occupied by him as a homestead is an abandonment of the homestead.<sup>4</sup>

*b. PREVAILING DOCTRINE ALLOWS HOMESTEAD* — (1) *In General.* — In most states the view that a person who owns land in joint tenancy or tenancy in common with another or others cannot claim a homestead therein has been repudiated, and the prevailing doctrine is in favor of allowing a homestead exemption to a joint tenant or tenant in common where he occupies the land with his family as a home, to the same extent, except as against his cotenant, as if he owned the land in severalty.<sup>5</sup>

244, 63 Am. Dec. 121; Reynolds v. Pixley, 6 Cal. 165; Giblin v. Jordan, 6 Cal. 416; Kellersberger v. Kopp, 6 Cal. 563; Bishop v. Hubbard, 23 Cal. 514, 83 Am. Dec. 132; Elias v. Verdugo, 27 Cal. 418; Seaton v. Son, 32 Cal. 481; Kingsley v. Kingsley, 39 Cal. 665; Cameto v. Dupuy, 47 Cal. 79; Rousset v. Green, 54 Cal. 136; Santa Barbara First Nat. Bank v. De la Guerra, 61 Cal. 109; Fitzgerald v. Fernandez, 71 Cal. 504; Matter of Carriger, 107 Cal. 618; Rosenthal v. Merced Bank, 110 Cal. 198.

The rule is changed to some extent by statute. Higgins v. Higgins, 46 Cal. 259; Fitzgerald v. Fernandez, 71 Cal. 504. See *infra*, this subdivision, *Statutory Provisions*.

*Louisiana.* — Ventress v. Collins, 28 La. Ann. 783; Simon v. Walker, 28 La. Ann. 608; Borron v. Sollibellos, 28 La. Ann. 355; Greig v. Eastin, 30 La. Ann. 1130; Cole v. La Chamberre, 31 La. Ann. 41. And see Soulier v. Benker, 37 La. Ann. 162.

*Massachusetts.* — Thurston v. Maddocks, 6 Allen (Mass.) 427; Silloway v. Brown, 12 Allen (Mass.) 30; Bates v. Bates, 97 Mass. 392; Bemis v. Driscoll, 101 Mass. 418; Holmes v. Winchester, 138 Mass. 542.

*Nevada.* — Terry v. Berry, 13 Nev. 514.

*Tennessee.* — Avans v. Everett, 3 Lea (Tenn.) 76; J. I. Case Co. v. Joyce, 89 Tenn. 337; Simmons v. Leonard, (Tenn. Ch. 1895) 36 S. W. Rep. 846.

*Wisconsin.* — Kent v. Agard, 22 Wis. 150; Murphy v. Crouch, 24 Wis. 365; West v. Ward, 26 Wis. 579; Riehl v. Bingenheimer, 28 Wis. 84; Russell v. Lennon, 39 Wis. 570, 20 Am. Rep. 60.

The rule in this state has been since changed by statute. Zimmer v. Pauley, 51 Wis. 282. See *infra*, this subdivision, *Statutory Provisions*.

**1. Tenant in Exclusive Possession.** — Seaton v. Son, 32 Cal. 481; Simmons v. Leonard, (Tenn. Ch. 1895) 36 S. W. Rep. 846. And see other cases cited in the note preceding.

**2. Debtor Owning Almost Entire Estate.** — Seaton v. Son, 32 Cal. 481.

**3. Land Owned and Occupied by Husband, Wife, and Child.** — Giblin v. Jordan, 6 Cal. 416.

**4. Conveyance of Undivided Interest Is an Abandonment.** — Kellersberger v. Kopp, 6 Cal. 563. This is not true, of course, where it is held that a tenant in common may claim a homestead. See *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel*.

**5. Prevailing Doctrine Allows Homestead Exemption in Estates in Common** — *United States.* — *In re Swearingin*, 5 Sawy. (U. S.) 52, 23 Fed. Cas. No. 13,683.

*Arkansas.* — Greenwood v. Maddox, 27 Ark. 648; Sentell v. Armor, 35 Ark. 49; Sims v. Thompson, 39 Ark. 301; Ward v. Mayfield, 41 Ark. 94; Thompson v. King, 54 Ark. 9; Robson v. Hough, 56 Ark. 621; Stull v. Graham, 60 Ark. 461.

*Colorado.* — Dallemand v. Mannon, 4 Colo. App. 262.

*Dakota.* — Oswald v. McCauley, 6 Dak. 289. *Georgia.* — Newton v. Summey, 59 Ga. 397; Hunnicutt v. Summey, 63 Ga. 586; Blanchard v. Paschal, 68 Ga. 32, 45 Am. Rep. 474.

*Illinois.* — Tomlin v. Hilyard, 43 Ill. 300, 92 Am. Dec. 118; Capek v. Kropik, 129 Ill. 509; Brokaw v. Ogle, 170 Ill. 115; Wike v. Garner, 179 Ill. 257; Herdman v. Cooper, 29 Ill. App. 589.

*Iowa.* — Thorn v. Thorn, 14 Iowa 49, 81 Am. Dec. 451; Hewitt v. Rankin, 41 Iowa 35; Bolton v. Oberne, 79 Iowa 278.

*Kansas.* — Tarrant v. Swain, 15 Kan. 146; Merchants Nat. Bank v. Kopplin, 1 Kan. App. 599.

*Kentucky.* — Meguiar v. Burr, 81 Ky. 32, 4 Ky. L. Rep. 659; Hope v. Hollis, 5 Ky. L. Rep. 321.

*Michigan.* — Shepard v. Cross, 33 Mich. 98; Lozo v. Sutherland, 38 Mich. 168; Sherid v. Southwick, 43 Mich. 518; Tharp v. Allen, 46 Mich. 389; Cleave v. Bigelow, 61 Mich. 447; Kruger v. Le Blanc, 75 Mich. 424; King v. Welborn, 83 Mich. 195; Hooper v. McAllister, 115 Mich. 174.

*Minnesota.* — Kaser v. Haas, 27 Minn. 406, *distinguishing* Ward v. Huhn, 16 Minn. 159.



(2) *Coparceners*. — According to this doctrine a homestead may be claimed by a coparcener.<sup>1</sup>

(3) *Community Property After Divorce*. — The right to a homestead in community property after a divorce has been stated already.<sup>2</sup>

(4) *Exclusive Possession*. — To entitle a tenant in common or joint tenant to claim a homestead exemption, he must occupy the premises, for this would be necessary even if he owned the property in severalty; but it is not necessary that he shall be in the exclusive possession.<sup>3</sup>

(5) *Claim by Both Tenants*. — Two joint owners of a tract of land, upon which both live with their families in separate buildings, are each entitled to a homestead, even before any partition has been made.<sup>4</sup>

(6) *Interference with Rights of Cotenants*. — This rule is subject, of course, to the qualification that the tenant in common or joint tenant can obtain no such homestead interest as will interfere with the rights or interests of his cotenant or any person rightfully claiming under his cotenant.<sup>5</sup> This, it has been said, is probably the only limitation upon his acquiring a homestead interest in such property.<sup>6</sup>

C. PARTITION BETWEEN COTENANTS — (1) *In General*. — After land held in joint tenancy or tenancy in common is partitioned between the cotenants, homestead rights may no doubt, in all jurisdictions, be acquired to the same extent as if the land had originally been held in severalty.<sup>7</sup> But in those jurisdictions in which it is held that no homestead right attaches to land held in common or joint tenancy, it must be occupied as a homestead after partition. The character of the homestead does not attach to any portion of the land by reason of occupancy as a home prior to partition.<sup>8</sup>

*Mississippi*. — McGrath v. Sinclair, 55 Miss. 89; Lewis v. White, 69 Miss. 352, 30 Am. St. Rep. 557; Krippendorf v. Wolf, 70 Miss. 81.

*Missouri*. — Hart v. Leete, 104 Mo. 315.

*Montana*. — Lindley v. Davis, 7 Mont. 206; Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459.

*Nebraska*. — Giles v. Miller, 36 Neb. 346, 38 Am. St. Rep. 730. See also Lynch v. Lynch, 18 Neb. 586.

*New Hampshire*. — Horn v. Tufts, 39 N. H. 478.

*Ohio*. — Hill v. Myers, 46 Ohio St. 183; Prosek v. Kuchta, 11 Cinc. L. Bul. 65, 9 Ohio Dec. (Reprint) 129; Keys v. Young, 4 Ohio Dec. 113, 2 Ohio N. P. 390.

*Texas*. — Lacy v. Clements, 36 Tex. 663; Williams v. Wethered, 37 Tex. 130; Smith v. Deschaumes, 37 Tex. 429; Clements v. Lacy, 51 Tex. 150; Jenkins v. Volz, 54 Tex. 636; Swearingen v. Bassett, 65 Tex. 267; Lewis v. Sellick, 69 Tex. 379; Watson v. McKinnon, 73 Tex. 210; Kirkwood v. Domnau, 80 Tex. 647, 26 Am. St. Rep. 770; Southwestern Mfg. Co. v. Swan, (Tex. Civ. App. 1897) 43 S. W. Rep. 813; Morgan v. Morgan, 1 Tex. Unrep. Cas. 400.

*Vermont*. — McElroy v. Bixby, 36 Vt. 254, 84 Am. Dec. 684; Danforth v. Beattie, 43 Vt. 138.

*Allotment in Moiety of Land*. — When a homestead estate exists predicated upon an estate held by the debtor as a tenant in common with another, a homestead cannot be allotted to him in a moiety of the land, unless there is express statutory provision therefor. Capek v. Kropik, 129 Ill. 509.

*Excessive Acreage and Value*. — In *Michigan* it has been held that a homestead right will not attach to an undivided interest in a tract of

land which as a whole exceeds the homestead limit both in acreage and in value, where there has been no separation of the undivided interest. Hooper v. McAllister, 115 Mich. 174. See also Tharp v. Allen, 46 Mich. 389; McBride v. Putnam, 99 Mich. 469.

1. *Coparceners*. — Hope v. Hollis, 5 Ky. L. Rep. 321.

2. See *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption*, subdiv. 11. *d. Community Property*.

3. *Exclusive Possession Not Necessary*. — Thompson v. King, 54 Ark. 9; Robson v. Hough, 56 Ark. 621; Meguiar v. Burr, 81 Ky. 32, 4 Kv. L. Rep. 659.

4. *Claim by Both Joint Tenants and Tenants in Common*. — Meguiar v. Burr, 81 Ky. 32, 4 Ky. L. Rep. 659.

5. *Cannot Interfere with Rights of Cotenant*. — Iowa. — Thorn v. Thorn, 14 Iowa 54, 81 Am. Dec. 451.

*Kansas*. — Tarrant v. Swain, 15 Kan. 146.

*Texas*. — Ferguson v. Reed, 45 Tex. 574; Clements v. Lacy, 51 Tex. 150.

6. *Per Valentine, J.*, in Tarrant v. Swain, 15 Kan. 146.

The Consent of the Cotenant is not essential. Lewis v. White, 69 Miss. 352, 30 Am. St. Rep. 557.

A Transfer by Husband and Wife of an Undivided Interest in their homestead carries with it the right to enjoy the interest so conveyed and the consequent right to the vendee to compel partition by any means provided by law. Ferguson v. Reed, 45 Tex. 574.

7. *Effect of Partition*. — Hill v. Myers, 46 Ohio St. 183.

8. *Occupancy*. — Reynolds v. Pixley, 6 Cal. 165.

(2) *Allotment of Improvements.* — When land is partitioned in kind between tenants in common after one of them has established and improved a homestead place thereon, he is entitled to have allotted to him the portion of the land so improved, or so much of it as may be equal in value to his share of the entire tract independent of the improvements.<sup>1</sup>

(3) *Sale of Property.* — If a person erects and occupies a homestead on property which he owns in connection with others, and the property cannot be partitioned so as to award the homestead to him, the property will have to be sold, but in that event the court will see that the value of the homestead and improvements, distinct from the land, is secured to him.<sup>2</sup>

(4) *Proceeds of Partition Sale.* — The homestead exemption law not only protects the home of a debtor when established on land owned in common with another, but when partition with the cotenants is impracticable the homestead right will attach to the proceeds of a sale made for the purpose of partition.<sup>3</sup>

*d. EXTENT OF RIGHT.* — In some states, where a tenant in common is entitled to a homestead, and the entire property exceeds in quantity the statutory limit as to the number of acres, his right of homestead extends to an undivided interest of the statutory number of acres out of the interest owned.<sup>4</sup> In other states this rule is not recognized, but it is held that if the entire property exceeds the number of acres allowed by statute as exempt, though the interest of the debtor would be less if set apart, he can claim as exempt only land occupied by him not exceeding the number of acres and value fixed by the statutes, to be allowed to him just as if he owned the entire tract.<sup>5</sup>

*e. STATUTORY PROVISIONS.* — In some states where it has been held that a homestead cannot be claimed in property held in joint tenancy or tenancy in common, the rule has been expressly changed by statute, and a homestead is allowed in such cases under certain circumstances.<sup>6</sup>

**1. Partition Between Cotenants — Allotment of Homestead.** — *Williams v. Wethered*, 37 Tex. 130; *Clements v. Lacy*, 51 Tex. 150; *Lewis v. Sellick*, 69 Tex. 379.

**Improvements at Joint Expense.** — When improvements on a rural homestead are made at the joint expense of two tenants in common, the homestead being occupied and claimed as such by only one of them, the occupant is entitled to his two hundred acres embracing the homestead improvements, and his cotenant would be entitled in partition to an allowance for the amount expended by him in making such improvements. *Lewis v. Sellick*, 69 Tex. 379.

**Ohio. — Partition After Judgment** against a tenant in common, made in anticipation of a levy of execution, if accomplished before such levy or an order of sale, will avail to protect a homestead established on the land allotted to the debtor on partition. *Hill v. Myers*, 46 Ohio St. 183.

**2. Rights on Sale of Property.** — *Thorn v. Thorn*, 14 Iowa 49, 81 Am. Dec. 451.

**3. Exemption Attaches to Proceeds of Partition Sale.** — *Jenkins v. Volz*, 54 Tex. 636.

**Exemption in Lieu of Homestead.** — Under the *Ohio* statute, where, pending proceedings in partition, a creditor of one of the parties obtained a judgment against him and levied an execution on his undivided interest in the land, and also appeared in the partition suit and set up his right by cross-petition, it was held that the debtor had the same right to the statutory exemption in lieu of a homestead, as against the creditor, that he would have had

if the creditor had levied an execution on the money in dispute; and that the court having control of the fund might, on application of the debtor, refuse to apply the amount of such exemption to the satisfaction of the judgment. *Comer v. Dodson*, 22 Ohio St. 615.

**4. Extent of Exemption of Tenant in Common.** — Thus where the statute exempted a rural homestead not exceeding two hundred acres, it was held that "the homestead estate of a tenant in common is not confined to an undivided interest in the two hundred acres constituting the rural homestead, but extends to an undivided interest of two hundred acres out of the interest owned." *Lewis v. Sellick*, 69 Tex. 379, citing *Clements v. Lacy*, 51 Tex. 150; *Jenkins v. Volz*, 54 Tex. 636. See also *Brown v. McLennan*, 60 Tex. 43; *Smith v. Chenault*, 48 Tex. 456; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

**5. Mississippi.** — *Lewis v. White*, 69 Miss. 352, 30 Am. St. Rep. 557.

In *Minnesota*, under a statute exempting an urban homestead not exceeding in quantity one lot, it was held that a debtor could not claim as his homestead an undivided half interest in two city lots. *Ward v. Huhn*, 16 Minn. 159.

And under a statute allowing a rural homestead not exceeding eighty acres, it was held that a debtor having an undivided half interest in one hundred and sixty acres could not claim an exemption of more than eighty acres thereof. *O'Brien v. Krenz*, 36 Minn. 136.

**6. Statutes Expressly Allowing Homestead in Land Held in Joint Tenancy or in Common —**



**18. Partnership Property — *a*. IN GENERAL.** — As partners own the partnership property in common, it is clear that a homestead cannot be claimed in the partnership property in those jurisdictions in which it is held that a homestead cannot be claimed in property owned by persons as tenants in common.<sup>1</sup> And on the other hand, a partner may claim a homestead in those jurisdictions in which it is held that a tenant in common may do so, unless the difference between partners and tenants in common requires a different rule.<sup>2</sup> Whether the rule is different in the two cases is a question upon which the courts do not agree.<sup>3</sup>

*b*. **PREVAILING DOCTRINE DENIES EXEMPTION.** — Most of the courts which have had occasion to pass upon the question, even where they allow a homestead to be claimed by tenants in common, have held that the same rule does not apply, at least to the full extent, to partnership property, on the ground, among others, that a partner, unlike a tenant in common, has no such absolute title or right in the partnership property that he can take or transfer his interest without the consent of his copartner, and on the ground that the partners have the right to require that the partnership assets shall be applied to the payment of partnership debts.<sup>4</sup> According to this view it is held that a member of a firm, at least if the firm is indebted, cannot withdraw a part of the partnership assets by claiming a right of homestead exemption therein, without the consent of his copartner.<sup>5</sup>

*c*. **CONSENT OF COPARTNER.** — In some states the courts go even further than this and hold that a partner, at least before dissolution of the firm, cannot claim a homestead exemption in the partnership property, as against partnership creditors, even with the consent of his copartners.<sup>6</sup> The better opinion, however, is against this view, and in favor of allowing a homestead

*California.* — Act of March 9, 1868; *Higgins v. Higgins*, 46 Cal. 259; *Cameto v. Dupuy*, 47 Cal. 79; *Rousset v. Green*, 54 Cal. 136; *Santa Barbara First Nat. Bank v. De la Guerra*, 61 Cal. 109; *Fitzgerald v. Fernandez*, 71 Cal. 504; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

*Wisconsin.* — *Zimmer v. Pauley*, 51 Wis. 282.

**1. Partnership Property — View that Homestead Cannot Be Claimed — *California.*** — *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132; *Kingsley v. Kingsley*, 39 Cal. 665.

*Massachusetts.* — *Holmes v. Winchester*, 138 Mass. 542.

*Nevada.* *Rhodes v. Williams*, 12 Nev. 20; *Terry v. Berry*, 13 Nev. 514.

*Tennessee.* — *Chalfant v. Grant*, 3 Lea (Tenn.) 118.

And see *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 543, 6 Fed. Cas. No. 3,058, following the *Nevada* doctrine.

**2. See *supra***, this section, *Property Held in Common or in Joint Tenancy*.

**3. Personal Property Exemption.** — As to the right of partners to claim a personal property exemption in the partnership property, see the title **EXEMPTIONS (FROM EXECUTION)**, vol. 12, p. 154 *et seq.*

**4. Claim of Homestead Without Consent of Copartners.** — <sup>1</sup>*Pond v. Kimball*, 101 Mass. 105; *Robertshaw v. Hanway*, 52 Miss. 713.

See the title **EXEMPTIONS (FROM EXECUTION)**, vol. 12, p. 156.

**5. *Arkansas.*** — *Richardson v. Adler*, 46 Ark. 43.

*Iowa.* — *Drake v. Moore*, 66 Iowa 58; *Hoyt v. Hoyt*, 69 Iowa 174.

*Michigan.* — *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490.

*Mississippi.* — *Robertshaw v. Hanway*, 52 Miss. 713.

*North Carolina.* — *Stout v. McNeill*, 98 N. Car. 1.

*Ohio.* — *Gaylord v. Imhoff*, 26 Ohio St. 317, 20 Am. Rep. 762.

*South Dakota.* — *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771.

**Under the *Dakota* Statute** providing that each member of a partnership may require its property to be applied to the discharge of its debts, and giving to him a lien on the shares of other partners for this purpose, and for the payment of any general balance due to him, neither a partner nor his wife is entitled to a homestead in the firm real estate as against another partner. *Brady v. Kreuger*, 8 S. Dak. 465, 59 Am. St. Rep. 771.

**6. Consent of Copartners to Claim of Homestead — Doctrine Denying Homestead — *United States.*** — *Short v. McGruder*, 22 Fed. Rep. 46.

*Arkansas.* — *Richardson v. Adler*, 46 Ark. 43.

*Iowa.* — *Drake v. Moore*, 66 Iowa 58; *Hoyt v. Hoyt*, 69 Iowa 174.

*Michigan.* — *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490.

*Mississippi.* — *Robertshaw v. Hanway*, 52 Miss. 713; *Hamilton v. Halpin*, 68 Miss. 90.

*Nevada.* — *Rhodes v. Williams*, 12 Nev. 20.

*Ohio.* — *Gaylord v. Imhoff*, 26 Ohio St. 317, 20 Am. Rep. 762; *Aultman v. Wilson*, 55 Ohio St. 138, 60 Am. St. Rep. 677.

*South Carolina.* — *Ex p. Karish*, 32 S. Car. 437, 17 Am. St. Rep. 865, *distinguishing* *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850.



exemption to the members of a firm as against partnership creditors, if all the copartners consent or if they do not object.<sup>1</sup>

**Withdrawal of Consent.** — Where consent of a copartner is held to be necessary to entitle a partner to a homestead in partnership property, and consent has been given, it may be withdrawn at any time before the homestead is claimed or allotted.<sup>2</sup>

**d. CLAIM AFTER PAYMENT OF PARTNERSHIP DEBTS.** — Even where it is held that a homestead cannot be claimed in partnership property as against partnership creditors, a partner may claim a homestead after the partnership debts have been paid,<sup>3</sup> except in those jurisdictions in which it is held that a homestead cannot be claimed in property owned in common.

**e. SOLVENT FIRMS.** — In *Texas*, if a firm is solvent when one of the members files a designation of the firm real estate as a homestead, and is solvent also on final settlement of the firm's affairs, such partner may have a homestead, subject only to equitable partition between the partners.<sup>4</sup>

**f. CLAIM AS AGAINST DEBT TO COPARTNER.** — In the absence of a special contract, one partner has no lien on his copartner's interest in the partnership property for individual debts due from him to the copartner, and the partner therefore is entitled to an exemption in the partnership property on a settlement of the partnership as against a debt due by him individually to his copartner,<sup>5</sup> except in those states in which a homestead cannot be claimed at all in common property.

**g. TITLE AS TENANTS IN COMMON ONLY.** — Partnership property may be withdrawn from the partnership assets and the partners become owners as tenants in common only, in which case their right to claim a homestead would be governed by the rule relating to tenants in common, and not by that relating to partners.<sup>6</sup>

**h. DISSOLUTION OF PARTNERSHIP.** — Where the members of a firm, acting

**1. Contrary Doctrine** — *Georgia*. — *Hunnicut v. Summey*, 63 Ga. 586; *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474.

*Montana*. — *Ferguson v. Speith*, 13 Mont. 487, 40 Am. St. Rep. 459.

*North Carolina*. — *Evans v. Bryan*, 95 N. Car. 174, 59 Am. Rep. 233; *Stout v. McNeill*, 98 N. Car. 1; *McMillan v. Williams*, 109 N. Car. 252.

*Texas*. — *Smith v. Chenault*, 48 Tex. 455; *Swearingen v. Bassett*, 65 Tex. 267; *Watson v. McKinnon*, 73 Tex. 210; *Gorden v. McCall*, (Tex. Civ. App. 1899) 48 S. W. Rep. 1111.

A homestead in the undivided half of real estate belonging to a firm may be set apart to the wife of one of the partners, the husband not applying therefor himself, but consenting to the wife's application, and such homestead will be valid against general creditors of the firm. *Hunnicut v. Summey*, 63 Ga. 586.

In *Iowa* it was held that in determining the solvency of a partnership doing a banking business the homesteads of the partners reserved by them from an assignment for the benefit of creditors are not to be taken into account as assets. *State v. Cadwell*, 79 Iowa 432.

**As to the Right of a Creditor to Be Subrogated to the right of a nonconsenting partner, see** *Hunnicut v. Summey*, 63 Ga. 586.

**2. Withdrawal of Copartner's Consent.** — *Stout v. McNeill*, 98 N. Car. 1.

**3. Claim of Homestead After Payment of Partnership Debts.** — *Ex p. Karish*, 32 S. Car. 437, 17 Am. St. Rep. 865.

**4. Solvent Firm—Rule in Texas.** — *Gorden v.*

*McCall*, (Tex. Civ. App. 1899) 48 S. W. Rep. 1111.

In *Swearingen v. Bassett*, 65 Tex. 267, the court said in substance: "Partners may by agreement make that separate property which before belonged to the firm, and such an agreement may be implied from an acquiescence by the firm in such use of partnership property by one of the members as would withdraw his interest in it from the common burden. A partner, therefore, in a solvent firm may designate his interest in partnership realty as part of his homestead, and thus secure it from forced sale; and his occupying and using such property as his place of business, with the consent of the other members, is such use of it as will effect the destination of his interest therein as homestead, and deprive his creditors, his copartners, and himself of the power thereafter to impose upon it any lien, except for purchase money or for improvements."

**5. Homestead as Against Debt Due to Copartner.** — *Evans v. Bryan*, 95 N. Car. 174, 59 Am. Rep. 233.

**6. Property Withdrawn from Partnership Assets and Held in Common.** — *Lindley v. Davis*, 7 Mont. 206. See also *Watson v. McKinnon*, 73 Tex. 210.

In *Hamilton v. Halpin*, 68 Miss. 99, nine men, desiring to embark in a farming venture, purchased a plantation, executing their joint and several notes therefor, taking title to themselves jointly, each cultivating a separate portion of the land, all under an agreement that the net earnings of each should be applied

in good faith, dissolve the partnership, and one member sells his interest in the partnership property to the other, the latter will not be deprived of the right to hold such property exempt as a homestead from the payment of a debt thereafter asserted against him, on the ground that such debt was a partnership debt at the time of the dissolution.<sup>1</sup> And it can make no difference that the partners knew the firm to be insolvent at the time of such dissolution.<sup>2</sup>

*i. CONVEYANCES BETWEEN PARTNERS.* — If partnership property is conveyed to the partners individually, each, by the requisite occupancy, etc., may acquire a right of homestead in the property conveyed to him, for it is no longer partnership property.<sup>3</sup> But such conveyances cannot be sustained if made to defraud creditors of the firm.<sup>4</sup>

*j. BUSINESS HOMESTEAD.* — The rule in *Texas* that a partner may claim a homestead in the partnership property applies to the business homestead allowed by the laws of that state.<sup>5</sup>

*k. INDIVIDUAL PROPERTY* — (1) *In General.* — A partner, of course, has the same rights with respect to his individual property as any other person, his rights in this respect not being in any way affected by the partnership agreement. It follows, therefore, that a partner's individual homestead acquired during the existence of the partnership cannot be subjected either to the partnership debts or to his indebtedness to the partnership or to his copartner.<sup>6</sup>

(2) *Partnership Property in Name of Partner.* — If property the title to which has been taken in the name of one of the partners individually is in fact

to paying for the plantation, each finally to own an interest in the plantation proportionate to the amount paid by him. They were called by themselves and others the "Bear Camp Colony," and had a chosen representative, styled president. It was held that they were not tenants in common, but partners, and that they could not, as against a debt contracted for their joint benefit, claim homestead exemption, nor defeat a trust deed given to secure such debt, because not signed by their wives.

*1. After Dissolution of Partnership.* — *Mortley v. Flanagan*, 38 Ohio St. 401, *distinguishing* *Gaylord v. Imhoff*, 26 Ohio St. 317, 20 Am. Rep. 762. In other jurisdictions there are decisions to the same effect. *Watson v. McKinnon*, 73 Tex. 210. Compare *Robertshaw v. Hanway*, 52 Miss. 713.

In *Watson v. McKinnon*, 73 Tex. 210, a partnership in the lumber business had its mills and shops upon a tract of land within the corporate limits of a town. One member, to whom the management of the business was intrusted, resided on the land for a time and then moved to rented premises, but continued to work at the business. The other partner deeded half the tract, with all improvements, to his wife. In a litigation by the latter, as a creditor of the firm, it was held that the claim of the managing partner to a homestead exemption to one-half the tract was properly sustained. The conveyance by one of two partners of the land and buildings, machinery, and stock to his wife operated as a dissolution of the firm.

*2. Insolvency of Partnership Immaterial.* — *Mortley v. Flanagan*, 38 Ohio St. 401.

*Exemption in Lieu of Homestead.* — Where members of a partnership retire and convey their interest to a single member of the firm, the property is no longer partnership property, and it has been held that he is entitled, as

against subsequent attachments and judgments against all the former partners, to claim an exemption in lieu of homestead out of the assets. *Long v. Hoban*, 4 Cinc. L. Bul. 986, 7 Ohio Dec. (Reprint) 688.

*3. Effect of Partition Between Partners.* — *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132.

*4. Fraud on Creditors of Firm.* — *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132. See *infra*, this title, *Sales, Conveyances, and Incumbrances*.

*5. Business Homestead.* — *Watson v. McKinnon*, 73 Tex. 210. See *supra*, this title, II. 5. *What Law Governs*.

*6. Individual Property of Partner.* — *Bell v. Wise*, (Ky. 1889) 11 S. W. Rep. 717.

In *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, a partner who owned a homestead individually attempted to convey it to his partner for the latter's interest in the partnership, and abandoned the homestead. Afterwards the firm's creditors, in a suit against the firm, attached the property as the property of the grantor, alleging that the conveyance was void. The grantor then claimed the property as his homestead. It was held that the property, if the conveyance was a nullity, was the individual property of the partner who attempted to convey it, and that it was error therefore for the court to charge the jury that the partner could not claim a homestead exemption out of partnership property, as against partnership creditors.

*Possession of a Partnership House and Lot by a Member of the Partnership*, under a parol understanding that when the partnership shall be wound up the house and some ground shall be his share of the assets, is not a sufficient ownership in the individual partner to exempt it from the partnership debts. *Richardson v. Adler*, 46 Ark. 43. See *Holmes v. Winchester*, 138 Mass. 542.



partnership property, the partner having title cannot claim a homestead therein in those jurisdictions in which it is held that partners cannot claim a homestead in the partnership property.<sup>1</sup>

(3) *Erection of House with Partnership Funds.* — It has been held that if a member of a firm uses partnership funds in erecting a house upon his separate property, the house becomes a part of the land itself, the firm having merely the right to reimbursement, and if he occupies the premises as a home he may claim a homestead exemption therein.<sup>2</sup>

(4) *Partnership Occupation of Separate Property.* — Occupation of a homestead, owned by one of the parties in a firm, for use in the partnership business, not being inconsistent with use as homestead, will not affect the homestead exemption attached to the property before such use.<sup>3</sup>

7. EXTENT OF PARTNER'S RIGHT OF EXEMPTION. — Where it is held that a partner may claim a homestead in the firm's property, a partner cannot assert his right of homestead in the entire property owned by the firm, as against his copartners, or creditors of the firm, but his right is limited to his interest.<sup>4</sup>

**IX. PROPERTY IN WHICH EXEMPTION MAY BE CLAIMED — 1. In General.** — Difficult questions have arisen under the homestead exemption laws in determining what property may be claimed as exempt. On most of the general principles which govern the determination of this question the courts have substantially agreed, but on some points there is a direct conflict in the decisions, even under statutes which are similar in their terms. The courts have very generally held that the term "homestead" involves the idea of a home or place of family residence. This is the ordinary or popular sense of the term, and it is in this sense that it is used in the constitutions and statutes of the different states. In other words, "its legal sense is also its popular sense."<sup>5</sup> A debtor's homestead, therefore, may be defined generally to be the home place or place of residence of himself and his family.<sup>6</sup>

**2. Urban or Rural Property.** — Most statutes expressly provide that a homestead may be claimed either in urban or rural property, according to the circumstances of the case; but a statute merely exempting one hundred and sixty acres of land, together with certain enumerated property of the kind usually attached to a farm, has been held not to create a homestead right in urban property.<sup>7</sup>

**1. Partnership Property in Name of Partner.** — *Drake v. Moore*, 66 Iowa 58.

**2. House Erected on Separate Property with Partnership Funds.** — *In re Parks*, 9 Nat. Bankr. Reg. 272. But see *Rhodes v. Williams*, 12 Nev. 20, where it was held that a decree ordering the sale of property claimed by one of the partners as a homestead would not be set aside where the evidence showed that the partnership was insolvent; that the partner claiming the homestead was largely indebted to it; that partnership funds were used to a considerable extent in building the house claimed as a homestead, and there was some evidence that the land was purchased and improvements made with money derived from that source alone.

**3. Partnership Occupation of Separate Property.** — *Smith v. Chenault*, 48 Tex. 455.

**4. Claim of Entire Property by Partner.** — Thus in *Smith v. Chenault*, 48 Tex. 455, it was held that one member of a partnership residing on a tract of land less than the two hundred acres allowed by the *Texas* statute, owned in common by the partnership, could not, on dissolution of the firm, assert a right of homestead to

the entire tract as against creditors of the firm or other members of the firm.

**5. "Homestead" Defined.** — *Gregg v. Bostwick*, 33 Cal. 227, 91 Am. Dec. 637.

**6. Alabama.** — *McGuire v. Van Pelt*, 55 Ala. 344.

*Florida.* — *Oliver v. Snowden*, 18 Fla. 823, 43 Am. Rep. 338.

*Kansas.* — *Bebb v. Crowe*, 39 Kan. 342.

*Michigan.* — *Beecher v. Baldy*, 7 Mich. 488.

*Minnesota.* — *Kelly v. Baker*, 10 Minn. 156; *Kresin v. Mau*, 15 Minn. 116.

*New Hampshire.* — *Barney v. Leeds*, 51 N. H. 253.

*Texas.* — *Holliman v. Smith*, 39 Tex. 357; *Houston, etc., R. Co. v. Winter*, 44 Tex. 598. See further *supra*, this title, II. 1. *Definition*.

**7. Cilly v. Sheriff**, 25 La. Ann. 219; *Hargrove v. Flournoy*, 26 La. Ann. 645; *Roberts v. Gordy*, 28 La. Ann. 575; *Singleary v. Singletary*, 31 La. Ann. 374; *Poole v. Cook*, 34 La. Ann. 331. These cases state the *Louisiana* law prior to the constitution of 1879.

**A Homestead Partly Within and Partly Without an Incorporated Town** may be had under the *Mississippi* statute. *Fitzgerald v. Rees*, 67



**3. Occupancy** — *a. NECESSITY FOR OCCUPANCY IN GENERAL.* — Having in view the very meaning of the word "homestead" and the policy of the homestead exemption provisions in the various constitutions and statutes,<sup>1</sup> it may be laid down as a general rule that premises of a debtor do not constitute his homestead, and are not exempt as such, unless they are actually occupied and used by him as a residence or home for himself and his family, or, in some jurisdictions, unless there is at least a *bona fide* and clearly defined and manifest intention to apply them to such use within a reasonable time. In many states occupancy is expressly required by the constitution or statute. In others it is held necessary though not expressly required.<sup>2</sup>

Miss. 473. See also *Orr v. Doughty*, 51 Ark. 527. See generally *infra*, this section, subdivisions 11 and 13.

1. See *supra*, this title, II. 1. *Definition and notes*; 3. *Object of Homestead Laws*; VII. 1. *a. Necessity for Family*.

2. **Occupancy as Home Necessary** — *United States.* — *Freeman v. Stewart*, 5 Biss. (U. S.) 19.

*Alabama.* — In *Melton v. Andrews*, 45 Ala. 454, it was held that occupancy was not necessary. But this case has been *overruled*, and the contrary is now settled. *McConaughy v. Baxter*, 55 Ala. 379; *McGuire v. Van Pelt*, 55 Ala. 344; *Chambers v. McPhaul*, 55 Ala. 367; *Dexter v. Strobach*, 56 Ala. 233; *Lyons v. Connor*, 57 Ala. 181; *Daniel v. Collins*, 57 Ala. 625; *Boyle v. Shulman*, 59 Ala. 566; *Preiss v. Campbell*, 59 Ala. 635; *Blum v. Carter*, 63 Ala. 235; *Stow v. Lillie*, 63 Ala. 257; *Martin v. Lile*, 63 Ala. 406; *Watts v. Gordon*, 65 Ala. 546; *Waugh v. Montgomery*, 67 Ala. 573; *Hudson v. Kelly*, 70 Ala. 393; *Lyne v. Wann*, 72 Ala. 43; *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110; *Garrett v. Jones*, 95 Ala. 96; *Bell v. Anniston Hardware Co.*, 114 Ala. 341.

*Arkansas.* — *Williams v. Dorris*, 31 Ark. 466; *Patrick v. Baxter*, 42 Ark. 175; *Stanley v. Snyder*, 43 Ark. 429; *Reynolds v. Tenant*, 51 Ark. 84; *Tillar v. Bass*, 57 Ark. 179.

*California.* — *Cook v. McChristian*, 4 Cal. 23; *Taylor v. Hargous*, 4 Cal. 268, 60 Am. Dec. 606; *Reynolds v. Pixley*, 6 Cal. 165; *Holden v. Pinney*, 6 Cal. 234; *Cary v. Tice*, 6 Cal. 625; *Rix v. McHenry*, 7 Cal. 89; *Benedict v. Bunnell*, 7 Cal. 245; *Dorn v. Howe*, 52 Cal. 630; *Harper v. Forbes*, 15 Cal. 202; *Benson v. Aitken*, 17 Cal. 163; *Mann v. Rogers*, 35 Cal. 316; *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Aucker v. McCoy*, 56 Cal. 524; *Ornbaum v. His Creditors*, 61 Cal. 455; *Ham v. Santa Rosa Bank*, 62 Cal. 125, 45 Am. Rep. 654; *Pfister v. Dascey*, 68 Cal. 572; *Crowey v. Crowey*, 71 Cal. 300; *Waggie v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440; *Matter of Allen*, 78 Cal. 293; *Boreham v. Byrne*, 83 Cal. 23; *Tromans v. Mahlman*, 92 Cal. 1.

*Dakota.* — *Myrick v. Bill*, 5 Dak. 167.

*Florida.* — *Solary v. Hewlett*, 18 Fla. 756; *Oliver v. Snowden*, 18 Fla. 823, 43 Am. Rep. 338; *Drucker v. Rosenstein*, 19 Fla. 191.

*Illinois.* — *Kitchell v. Burgwin*, 21 Ill. 40; *Walters v. People*, 21 Ill. 178; *Vanzant v. Vanzant*, 21 Ill. 178; *Carson v. Stollman*, 21 Ill. 230, 87 Am. Dec. 247; *Tourville v. Pierson*, 39 Ill. 446; *Titman v. Moore*, 43 Ill. 169; *Fergus v. Woodworth*, 44 Ill. 374; *Wright v.*

*Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Fisher v. Cornell*, 70 Ill. 216; *Potts v. Davenport*, 79 Ill. 455; *Eldridge v. Pierce*, 90 Ill. 474; *Greenman v. Greenman*, 107 Ill. 404; *Rock v. Haas*, 110 Ill. 528; *Boyd v. Fullerton*, 125 Ill. 437; *Hagerty v. Hagerty*, 149 Ill. 655; *Brokaw v. Ogle*, 170 Ill. 115; *Shackleford v. Todhunter*, 4 Ill. App. 271; *Webb v. Hollenbeck*, 48 Ill. App. 514.

*Iowa.* — *Charless v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457; *Rhodes v. McCormack*, 4 Iowa 373, 68 Am. Dec. 663; *Yost v. Devault*, 9 Iowa 60; *Williams v. Swetland*, 10 Iowa 51; *Christy v. Dyer*, 14 Iowa 438, 81 Am. Dec. 493; *Cole v. Gill*, 14 Iowa 527; *Hale v. Heaslip*, 16 Iowa 451; *Campbell v. Ayres*, 18 Iowa 252; *Page v. Ewbank*, 18 Iowa 580; *Elston v. Robinson*, 23 Iowa 208; *Neal v. Coe*, 35 Iowa 407; *Givans v. Dewey*, 47 Iowa 414; *Stewart First Nat. Bank v. Hollinsworth*, 78 Iowa 575; *Woolcut v. Lerdell*, 78 Iowa 668; *Schlarb v. Holderbaum*, 80 Iowa 394; *Maguire v. Hanson*, 105 Iowa 215; *Blue v. Heilprin*, 105 Iowa 608.

*Kansas.* — *Monroe v. May*, 9 Kan. 466; *Gapen v. Stephenson*, 18 Kan. 140; *Swenson v. Kiehl*, 21 Kan. 533; *Gilworth v. Cody*, 21 Kan. 702; *Koons v. Rittenhause*, 28 Kan. 359; *Ingels v. Ingels*, 50 Kan. 755; *Edgerton v. Connelly*, 3 Kan. App. 618; *Lenora State Bank v. Peak*, 3 Kan. App. 698; *Bebb v. Crowe*, 39 Kan. 342; *Hay v. Whitney*, 59 Kan. 771, 51 Pac. Rep. 896.

*Kentucky.* — *Nichols v. Sennitt*, 78 Ky. 630, 1 Ky. L. Rep. 397; *Fant v. Talbot*, 81 Ky. 23, 4 Ky. L. Rep. 656; *Bennett v. Baird*, 81 Ky. 554, 5 Ky. L. Rep. 636; *Hayden v. Robinson*, 83 Ky. 615, 7 Ky. L. Rep. 707; *Snapp v. Snapp*, 87 Ky. 554, 10 Ky. L. Rep. 598; *Hensey v. Hensey*, 92 Ky. 164, 13 Ky. L. Rep. 426; *Tohermes v. Beiser*, 93 Ky. 415, 14 Ky. L. Rep. 440; *Moore v. Phillips*, 7 Ky. L. Rep. 221; *Thacker v. Booth*, 9 Ky. L. Rep. 745; *Morehead v. Morehead*, 16 Ky. L. Rep. 34; *Brown v. Martin*, 4 Bush (Ky.) 50; *Carter v. Goodman*, 11 Bush (Ky.) 231; *Stovall v. Hibbs*, (Ky. 1895) 32 S. W. Rep. 1087; *Levy v. Rubarts*, (Ky. 1896) 34 S. W. Rep. 1078.

*Louisiana.* — *Gilmer v. O'Neal*, 32 La. Ann. 979; *Bossier v. Raines*, 37 La. Ann. 263; *Denis v. Gayle*, 40 La. Ann. 286; *Hayden v. Slaughter*, 43 La. Ann. 385.

*Massachusetts.* — *Lee v. Miller*, 11 Allen (Mass.) 37.

*Michigan.* — *People v. Plumsted*, 2 Mich. 465; *Wisner v. Farnham*, 2 Mich. 472; *Beecher v. Baldy*, 7 Mich. 488; *Coolidge v. Wells*, 20 Mich. 79; *Avery v. Stephens*, 48 Mich. 246; *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep.

In South Carolina and Tennessee, however, the statutes and constitutions do not require occupancy of the land, to render it exempt, and it is held that a debtor may claim land as his exempt homestead whether he resides on it or intends to reside on it or not.<sup>1</sup>

**Illustrations of Doctrine.** — Where occupancy of premises as a home is necessary to render them exempt as a homestead, it is clear that premises that are inca-

594; *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852; *Bowles v. Hoard*, 71 Mich. 150; *Mills v. Hobbs*, 76 Mich. 122; *Lake v. Nolan*, 81 Mich. 112; *Trout v. Rumble*, 82 Mich. 202; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606; *Lamont v. Le Fevre*, 96 Mich. 175; *McMonegal v. Wilson*, 103 Mich. 264.

*Minnesota.* — *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429; *Tillotson v. Millard*, 7 Minn. 518, 82 Am. Dec. 112; *Kelly v. Baker*, 10 Minn. 156; *Kresin v. Mau*, 15 Minn. 116; *Kelly v. Dill*, 23 Minn. 435.

*Mississippi.* — *Whitworth v. Lyons*, 39 Miss. 467; *Campbell v. Adair*, 45 Miss. 170; *Pennington v. Seal*, 49 Miss. 518; *Irwin v. Lewis*, 50 Miss. 363; *Partee v. Stewart*, 50 Miss. 717; *Hand v. Winn*, 52 Miss. 784; *Hill v. Franklin*, 54 Miss. 632.

*Missouri.* — *Jackson v. Bowles*, 67 Mo. 609; *Graham v. Lee*, 69 Mo. 334; *Beckmann v. Meyer*, 75 Mo. 333; *Finnegan v. Prindeville*, 83 Mo. 517; *Peake v. Cameron*, 102 Mo. 568; *Hufschmidt v. Gross*, 112 Mo. 649.

*Montana.* — *Power v. Burd*, 18 Mont. 22.

*Nevada.* — *Goldman v. Clark*, 1 Nev. 607.

*New Hampshire.* — *Norris v. Moulton*, 34 N. H. 392; *Hoit v. Webb*, 36 N. H. 166; *Horn v. Tufts*, 39 N. H. 478; *Fogg v. Fogg*, 40 N. H. 282, 77 Am. Dec. 715; *Austin v. Stanley*, 46 N. H. 51; *Locke v. Rowell*, 47 N. H. 46; *Cole v. Laconia Sav. Bank*, 59 N. H. 321; *Currier v. Woodward*, 62 N. H. 63; *Gerrish v. Hill*, 66 N. H. 171.

*Ohio.* — *Moerlein Brewing Co. v. Westmeier*, 4 Ohio Cir. Ct. 296, 2 Ohio Cir. Dec. 555.

*Tennessee.* — *Hicks v. Elder*, *Jackson, Tenn.*, 1875; *Dickinson v. Mayer*, 11 Heisk. (Tenn.) 515.

*Texas.* — *Earle v. Earle*, 9 Tex. 630; *Methery v. Walker*, 17 Tex. 593; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341; *Stone v. Darnell*, 20 Tex. 11; *Philleo v. Smalley*, 23 Tex. 502; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Macmanus v. Campbell*, 37 Tex. 267; *Batts v. Scott*, 37 Tex. 59; *Moore v. Owsley*, 37 Tex. 603; *Holliman v. Smith*, 39 Tex. 357; *Iken v. Olenick*, 42 Tex. 198; *Rogers v. Ragland*, 42 Tex. 443; *Moreland v. Barnhart*, 44 Tex. 275; *Houston, etc., R. Co. v. Winter*, 44 Tex. 598; *Barnes v. White*, 53 Tex. 628; *Brooks v. Chatham*, 57 Tex. 31; *Fort v. Powell*, 59 Tex. 321; *Scott v. Dyer*, 60 Tex. 135; *Axer v. Bassett*, 63 Tex. 545; *Gardner v. Douglass*, 64 Tex. 76; *Ruhl v. Kauffman*, 65 Tex. 723; *Archibald v. Jacobs*, 69 Tex. 248; *Pellat v. Decker*, 72 Tex. 578; *Kempner v. Comer*, 73 Tex. 196; *Parr v. Newby*, 73 Tex. 468; *Johnston v. Martin*, 81 Tex. 18; *Achilles v. Willis*, 81 Tex. 169; *Dobkins v. Kuykendall*, 81 Tex. 180; *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep.

832; *Freeman v. Hamblin*, 1 Tex. Civ. App. 157; *Gallagher v. Keller*, 4 Tex. Civ. App. 454; *Vance v. Doebbler*, 2 Tex. Unrep. Cas. 493; *Stark v. Ingram*, 2 Tex. Unrep. Cas. 630; *Archibald v. Jacobs*, 69 Tex. 248; *Bunton v. Palm*, (Tex. 1888) 9 S. W. Rep. 182; *Little v. Baker*, (Tex. 1889) 11 S. W. Rep. 549; *Allen v. Whitaker*, (Tex. Civ. App. 1894) 27 S. W. Rep. 507; *Haswell v. Forbes*, 8 Tex. Civ. App. 82; *Wolf v. Butler*, 8 Tex. Civ. App. 468; *Bente v. Lange*, 9 Tex. Civ. App. 328; *Stevens v. Whitaker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1026; *Exall v. Security Mortg., etc., Co.*, 15 Tex. Civ. App. 643; *Wilkerson v. Jones*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1046; *Crenshaw v. Bray*, (Tex. Civ. App. 1899) 50 S. W. Rep. 623.

*Utah.* — *Gammatt v. Storrs*, 15 Utah 336.

*Vermont.* — *True v. Morrill*, 28 Vt. 672; *Davis v. Andrews*, 30 Vt. 678; *Spaulding v. Crane*, 46 Vt. 292; *Keyes v. Bump*, 59 Vt. 391; *Woodbury v. Warren*, 67 Vt. 251, 48 Am. St. Rep. 815; *Thorp v. Thorp*, 70 Vt. 46.

*Washington.* — *Philbrick v. Andrews*, 8 Wash. 7.

*Wisconsin.* — *Upman v. Second Ward Bank*, 15 Wis. 449; *Bunker v. Locke*, 15 Wis. 638; *Weisbrod v. Daenicke*, 36 Wis. 73; *Jarvais v. Moe*, 38 Wis. 440; *Schoffen v. Landauer*, 60 Wis. 337; *Scofield v. Hopkins*, 61 Wis. 370.

**1. States in Which Occupancy Is Not Necessary** — *South Carolina.* — *Swandale v. Swandale*, 25 S. Car. 389; *Nance v. Hill*, 26 S. Car. 227; *Chamberlain v. Brown*, 33 S. Car. 597.

In Tennessee prior to the constitution and law of 1870 actual occupancy was essential. By that law the requirement of possession was substituted for occupancy, so that the right of homestead depended "upon the actual possession of the land and the use of it for the purposes of subsistence." *Dickinson v. Mayer*, 11 Heisk. (Tenn.) 515. But possession being essential, the owner of a tract had no homestead right, if he rented it out without living on any part thereof, or if he abandoned possession. *Wade v. Wade*, 9 Baxt. (Tenn.) 612. See also *Hicks v. Elder*, (1875) King's Tenn. Dig. 1234; *Roach v. Hacker*, 2 Lea (Tenn.) 633; *Henry v. Wilson*, 9 Lea (Tenn.) 176. Under these statutes the right of homestead was described as "a possessory right, dependent upon occupation," *Levison v. Abrahams*, 14 Lea (Tenn.) 340; or to which "actual occupancy was essential," *Webb v. Cowley*, 5 Lea (Tenn.) 722.

After the act of 1879, actual occupancy became nonessential, for the statute allowed a homestead in "real estate in the possession of or belonging to each head of a family." *Rhea v. Rhea*, 15 Lea (Tenn.) 527; *Flatt v. Stadler*, 16 Lea (Tenn.) 371; *J. I. Case Co. v. Joyce*, 89 Tenn. 337; *Carrigan v. Rowell*, 96 Tenn. 185.

pable of occupancy as a residence cannot constitute a homestead.<sup>1</sup> Nor can land be exempt as a homestead where the debtor has his residence on other lands, unless the land claimed is used as a part of the land on which he resides.<sup>2</sup> Filing a declaration or claim of homestead does not exempt the property so claimed, unless it be actually occupied as a home.<sup>3</sup> Nor do premises become a homestead by reason of their being marked and platted as a homestead, where there is no occupancy.<sup>4</sup>

**Mortgaged Premises.** — As will be elsewhere shown, the fact that a debtor has given a mortgage on his homestead does not constitute an abandonment of his homestead right or otherwise defeat his right, but in such a case he must reside and continue to reside on the premises.<sup>5</sup>

**b. DOCTRINE THAT ACTUAL OCCUPANCY IS NECESSARY.** — In some states, where occupancy of premises as a residence is required by the homestead law, it is held that there must be actual occupancy.<sup>6</sup> The purchase or improvement of land with the intention of occupying it as a family home, even in the near future, is not enough. And it can make no difference that such intention is afterwards carried out.<sup>7</sup> When occupancy as a residence is

**1. Premises Incapable of Occupancy as Homestead.** — *McConaughy v. Baxter*, 55 Ala. 379; *Drucker v. Rosenstein*, 19 Fla. 191; *Blue v. Heilprin*, 105 Iowa 608.

**2. Residence on Other Premises than Those Claimed.** — *Kentucky* — *Hayden v. Robinson*, 83 Ky. 615, 7 Ky. L. Rep. 707; *Tohermes v. Beiser*, 93 Ky. 415, 14 Ky. L. Rep. 440; *Brown v. Martin*, 4 Bush (Ky.) 50; *Carter v. Goodman*, 11 Bush (Ky.) 231.

*Michigan*. — *McMonegal v. Wilson*, 103 Mich. 264.

*Texas*. — *Batts v. Scott*, 37 Tex. 59; *Archibald v. Jacobs*, 69 Tex. 248; *Johnston v. Martin*, 81 Tex. 18; *Sharp v. Johnston*, (Tex. 1892) 19 S. W. Rep. 259; *Allen v. Whitaker*, (Tex. Civ. App. 1894) 27 S. W. Rep. 507; *Haswell v. Forbes*, 8 Tex. Civ. App. 82.

*Wisconsin*. — *Schoffen v. Landauer*, 60 Wis. 331.

**Actual Residence on Leased Land.** — The fact that the actual residence is on leased land and not on land owned by the debtor in fee is immaterial. *Johnston v. Martin*, 81 Tex. 18.

**3. Filing Declaration or Claim Not Enough.** — *Oliver v. Snowden*, 18 Fla. 823, 43 Am. Rep. 338; *Drucker v. Rosenstein*, 19 Fla. 191; *Laughlin v. Wright*, 63 Cal. 113. And see *Boreham v. Byrne*, 83 Cal. 23; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Mann v. Rogers*, 35 Cal. 316; *Power v. Burd*, 18 Mont. 22.

**4. Effect of Marking and Platting.** — *Cole v. Gill*, 14 Iowa 527.

**A Recital in a Note** that it is given in payment for work and material used and to be used "on my homestead," etc., does not make the land a homestead where it is in fact unimproved, and has never been occupied as a homestead. *Bunton v. Palm*, (Tex. 1888) 9 S. W. Rep. 182.

**5. Occupancy by Mortgagor.** — *Fergus v. Woodworth*, 44 Ill. 374.

That the mortgagor may claim a home in the mortgaged premises, see *supra*, this title, VIII. 6, *d. Equity of Redemption*. And see *infra*, this title, *Sales, Conveyances, and Incumbrances*.

**6. Actual Occupancy Necessary.** — *Alabama*. — *Blum v. Carter*, 63 Ala. 235; *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110.

*Arkansas*. — *Williams v. Dorris*, 31 Ark. 466; *Tillar v. Bass*, 57 Ark. 179.

*California*. — *Holden v. Pinney*, 6 Cal. 234; *Cary v. Tice*, 6 Cal. 625; *Benedict v. Bunnell*, 7 Cal. 245; *Rix v. McHenry*, 7 Cal. 89; *Mann v. Rogers*, 35 Cal. 316; *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, 52 Cal. 630; *Aucker v. McCoy*, 56 Cal. 524; *Pfister v. Dacey*, 68 Cal. 572; *Tromans v. Mahlman*, 92 Cal. 1.

*Florida*. — *Solary v. Hewlett*, 18 Fla. 756; *Oliver v. Snowden*, 18 Fla. 823, 43 Am. Rep. 338.

*Iowa*. — *Charles v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457; *Christy v. Dyer*, 14 Iowa 438, 81 Am. Dec. 493; *Williams v. Swetland*, 10 Iowa 51; *Hale v. Heaslip*, 16 Iowa 451; *Elston v. Robinson*, 23 Iowa 208; *Neal v. Coe*, 35 Iowa 407; *Gwans v. Dewey*, 47 Iowa 414; *Stewart First Nat. Bank v. Hollingsworth*, 78 Iowa 575; *Maguire v. Hanson*, 105 Iowa 215.

*Massachusetts*. — *Lee v. Miller*, 11 Allen (Mass.) 37.

*Minnesota*. — *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112; *Kelly v. Dill*, 23 Minn. 435.

*Mississippi*. — *Campbell v. Adair*, 45 Miss. 177.

*Missouri*. — *Finnegan v. Prindeville*, 83 Mo. 517; *Beckmann v. Meyer*, 7 Mo. App. 577, 75 Mo. 333.

*Montana*. — See *Power v. Burd*, 18 Mont. 22.

*New Hampshire*. — *Austin v. Stanley*, 46 N. H. 51; *Locke v. Rowell*, 47 N. H. 46; *Currier v. Woodward*, 62 N. H. 63.

**7. Purchase or Improvement with Intent to Occupy.** — *Arkansas*. — *Williams v. Dorris*, 31 Ark. 466.

*California*. — *Cary v. Tice*, 6 Cal. 625.

*Florida*. — *Drucker v. Rosenstein*, 19 Fla. 191.

*Illinois*. — *Tourville v. Pierson*, 39 Ill. 446.

*Iowa*. — *Charles v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457; *Christy v. Dyer*, 14 Iowa 438, 81 Am. Dec. 493; *Elston v. Robinson*, 23 Iowa 208; *Stewart First Nat. Bank v. Hollingsworth*, 78 Iowa 575.

*New York*. — *Currier v. Woodward*, 62 N. H. 63.

And see other cases cited in the note preceding.



required, the residence must be real, and not sham or pretended.<sup>1</sup>

*c. DOCTRINE THAT INTENTION TO OCCUPY MAY SUFFICE* — (1) *In General*. — In other jurisdictions actual physical occupancy is not always necessary, but it is held, even where "occupancy" is required by the constitution or statute, that a *bona fide* and clearly defined present intention to acquire and occupy certain premises as a homestead, evidenced by overt acts in fitting them up for such a purpose, and followed within a reasonable time by actual physical occupancy, the delay being only for the time necessary to effect removal to the premises, or to build needed improvements or repairs, or to complete a dwelling house in process of construction, or the like, renders the land exempt as a homestead from the time of its acquisition with such intent.<sup>2</sup>

**1. Residence Must Be Real and Not Pretended.**

— *Tromans v. Mahlman*, 92 Cal. 1.

**Residence at Time of Filing Declaration.** — In *California* a declaration of homestead is required by the statute, as well as residence, in order to give to premises the character of a homestead. There must be actual residence on the premises when a declaration is filed. *Pfister v. Dascey*, 68 Cal. 572; *Tromans v. Mahlman*, 92 Cal. 1; *Mann v. Rogers*, 35 Cal. 316; *Aucker v. McCoy*, 56 Cal. 524; *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, 52 Cal. 630; *Maloney v. Hefer*, (Cal. 1887) 15 Pac. Rep. 763.

**Sufficiency of Occupancy.** — Where a portion of the furniture is placed in a house which is undergoing repairs and the family move to the neighborhood, expecting to occupy it, but on account of the repairs not being completed do not actually sleep and eat in the building, there is such occupancy as will invest the premises with the homestead character. *Neal v. Coe*, 35 Iowa 407.

Where a debtor at the time of an attachment was in the act of moving into a dwelling house purchased by him with a design to occupy it as the family homestead, it was held that the exemption attached though the removing was not completed until the next day. *Fogg v. Fogg*, 40 N. H. 282, 77 Am. Dec. 715.

**2. Intention to Occupy May Suffice** — *Illinois*. —

*Boyd v. Fullerton*, 125 Ill. 437; *Webb v. Hollenbeck*, 48 Ill. App. 514.

*Kansas*. — *Edwards v. Fry*, 9 Kan. 425; *Monroe v. May*, 9 Kan. 466; *Swenson v. Kiehl*, 21 Kan. 533; *Gilworth v. Cody*, 21 Kan. 702; *Ingels v. Ingels*, 50 Kan. 755; *Upton v. Coxen*, 60 Kan. 1; *Moors v. Sandford*, 2 Kan. App. 243; *Lenora State Bank v. Peak*, 3 Kan. App. 698.

*Kentucky*. — *Nichols v. Sennitt*, 78 Ky. 630, 1 Ky. L. Rep. 397; *Bennett v. Baird*, 81 Ky. 554; 5 Ky. L. Rep. 636; *Hemphill v. Haas*, 88 Ky. 492; *Hensey v. Hensey*, 92 Ky. 164, 13 Ky. L. Rep. 426; *Morehead v. Morehead*, 16 Ky. L. Rep. 34; *Miller v. Bennett*, (Ky. 1889) 12 S. W. Rep. 194; *Derickson v. Gillespie*, (Ky. 1895) 32 S. W. Rep. 1084. *Compare Fant v. Talbot*, 81 Ky. 23, 4 Ky. L. Rep. 656.

*Michigan*. — *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594; *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852; *Mills v. Hobbs*, 76 Mich. 122; *Lamont v. Le Fevre*, 96 Mich. 175; *Myers v. Weaver*, 101 Mich. 477.

*South Dakota*. — *Kingman v. O'Callaghan*, 4 S. Dak. 628.

*Texas*. — *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Scott v. Dyer*, 60 Tex. 135; *Gardner v. Douglass*, 64 Tex. 76; *Van Ratcliff v. Call*, 72 Tex. 491; *Kempner v. Comer*, 73 Tex. 196; *Parr v. Newby*, 73 Tex. 468; *White v. Wadlington*, 78 Tex. 159; *Johnston v. Martin*, 81 Tex. 18; *Dobkins v. Kuykendall*, 81 Tex. 180; *Freiberg v. Walzem*, 85 Tex. 264, 34 Am. St. Rep. 808; *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep. 832; *Gallagher v. Keller*, 4 Tex. Civ. App. 454, (Tex. Civ. App. 1895) 30 S. W. Rep. 248; *Moore v. Wills*, 69 Tex. 109; *Ellerman v. Wurz*, (Tex. 1890) 14 S. W. Rep. 333; *Heady v. Bexar Bldg., etc., Assoc.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 468; *Wolf v. Butler*, 8 Tex. Civ. App. 468; *Burgher v. Henderson*, 9 Tex. Civ. App. 521; *Wilkerson v. Jones*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1046; *King v. Wright*, (Tex. Civ. App. 1896) 38 S. W. Rep. 530; *Bente v. Lange*, 9 Tex. Civ. App. 328.

*Vermont*. — In Vermont actual occupancy was formerly necessary to render premises exempt as a homestead. *True v. Morrill*, 28 Vt. 672; *Davis v. Andrews*, 30 Vt. 678; *Spaulding v. Crane*, 46 Vt. 292; *Whiteman v. Field*, 53 Vt. 554; *Thorp v. Thorp*, 70 Vt. 46. But under the present statute (Rev. Laws 1880, § 1894; Stat. 1894, § 2179), land may be claimed as a homestead where a dwelling is being erected thereon with intention to occupy it as a homestead. *Woodbury v. Warren*, 67 Vt. 251, 48 Am. St. Rep. 815.

*Wisconsin*. — *Scofield v. Hopkins*, 61 Wis. 370; *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927; *Hoppe v. Goldberg*, 82 Wis. 660.

**Illustrations.** — In *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852, it was held that a city lot purchased with the intention of making it a homestead for the purchaser and his family was exempt from levy and sale on execution from the time of the purchase, even though unimproved and without a dwelling thereon, where the purchaser inclosed it, and used the proceeds thereof and such means as he could procure to erect a house thereon for his family, within a reasonable time. See also *King v. Wright*, (Tex. Civ. App. 1896) 38 S. W. Rep. 530.

**Temporary Lease.** — Where land was purchased, and a house built thereon, with intention to occupy the premises as a homestead, but the debtor temporarily leased the premises and resided with his sick father-in-law, in order that his wife might nurse the latter, it was held that the premises were exempt as a homestead as against a debt contracted after

**Occupancy of Other Property.**— But the purchase and improvement of property with the intention of making it a homestead will not invest it with the character of a homestead so long as the owner occupies other property as his homestead.<sup>1</sup>

**Actual Occupancy Must Follow.**— In order that premises may be exempt as a homestead because of intention to occupy them as such, the intention must be followed by actual occupancy.<sup>2</sup>

**Abandonment of Intention.**— If the intention to occupy premises as a homestead is abandoned prior to actual residence thereon, they do not become impressed with the character of a homestead merely by reason of such intention and acts of preparation.<sup>3</sup>

(2) **Definiteness of Intention.**— In order that premises may be exempt before actual occupancy because of intention to occupy them as a homestead, there must be something more than an undefined floating intention to build and dwell thereon. There must be a clearly defined intention to occupy the premises presently, and not an intent to occupy them at some indefinite time in the future.<sup>4</sup>

(3) **Manifestation of Intention.**— It is also necessary that the intention to occupy premises as a homestead shall be manifested or evidenced by some overt act. The intention must not be a secret and uncommunicated purpose, but must be shown by acts of preparation of a physical character or by something equivalent. Mere intention of a man and wife to occupy premises purchased by the husband as their home, without any preparation to put such intent into execution, does not render the premises exempt as a homestead.<sup>5</sup>

their purchase. *Derickson v. Gillespie*, (Ky. 1895) 32 S. W. Rep. 1084.

**A Purchase Before Marriage** of a lot, upon which a residence is subsequently built, which the purchaser after marriage occupied as his home, has been held sufficient to exempt such residence. *Bell v. Greathouse*, (Tex. Civ. App. 1899) 49 S. W. Rep. 258. See also *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594.

**1. Occupancy of Other Property as Homestead.**— *Johnston v. Martin*, 81 Tex. 18; *Sharp v. Johnston*, (Tex. 1892) 19 S. W. Rep. 259; *Allen v. Whitaker*, (Tex. Civ. App. 1894) 27 S. W. Rep. 507; *Archibald v. Jacobs*, 69 Tex. 248; *Schoffen v. Landauer*, 65 Wis. 334. And see *Swenson v. Kiehl*, 21 Kan. 533; *Batts v. Scott*, 37 Tex. 59.

But the mere fact that a homestead claimant owns other property does not prevent him from showing the dedication of a particular parcel by intention and preparation to occupy it as a homestead. *Furter v. Edgewood Distilling Co.*, 16 Tex. Civ. App. 359.

**2. Intention to Occupy Must Be Carried Out.**— *Greenman v. Greenman*, 107 Ill. 404.

**3. Intention May Be Abandoned.**— *Kempner v. Comer*, 73 Tex. 196. In this case it was held that where there was a designation of the premises as a homestead, accompanied by acts of distribution, and the intention was abandoned and a mortgage given upon the premises, such mortgage was effectual as against a claim of homestead when the premises were subsequently occupied as a residence.

**4. Indefinite Intention Not Enough.**— *Kansas.*— *Swenson v. Kiehl*, 21 Kan. 533; *Dobson v. Shoup*, 3 Kan. App. 468; *Edgerton v. Connelly*, 3 Kan. App. 618; *Lenora State Bank v. Peak*, 3 Kan. App. 698.

*Kentucky.*— *Lamb v. Talbot*, 88 Ky. 224; *Ky. L. Rep. 656*; *Thacker v. Booth*, 9 Ky. L.

*Rep. 745*; *Stovall v. Hibbs*, (Ky. 1895) 32 S. W. Rep. 1087; *Levy v. Rubarts*, (Ky. 1896) 34 S. W. Rep. 1078; *Hansford v. Holdam*, 14 Bush (Ky.) 210.

*Michigan.*— *Coolidge v. Wells*, 20 Mich. 79; *Lake v. Nolan*, 81 Mich. 112; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606.

*Montana.*— *Power v. Burd*, 18 Mont. 22.

*Texas.*— *Archibald v. Jacobs*, 69 Tex. 248; *Bente v. Lange*, 9 Tex. Civ. App. 328; *Stark v. Ingram*, 2 Tex. Unrep. Cas. 630.

*Vermont.*— *Keyes v. Bump*, 59 Vt. 391.

**5. Intention Must Be Manifested.**— *United States.*— *Grosholz v. Newman*, 21 Wall. (U. S.) 486.

*Kentucky.*— *Stovall v. Hibbs*, (Ky. 1895) 32 S. W. Rep. 1087.

*Michigan.*— *Lake v. Nolan*, 81 Mich. 112.

*Texas.*— *Batts v. Scott*, 37 Tex. 59; *Moreland v. Barnhart*, 44 Tex. 275; *Houston, etc., R. Co. v. Winter*, 44 Tex. 612; *Barnes v. White*, 53 Tex. 628; *Brooks v. Chatham*, 57 Tex. 31; *Wolf v. Butler*, 8 Tex. Civ. App. 468; *Collier v. Betterton*, 8 Tex. Civ. App. 479; *Beute v. Lange*, 9 Tex. Civ. App. 328; *Wilkinson v. Jones*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1046.

**Unoccupied Portion of Homestead Impressed with Homestead Character.**— Where a mansion house was sold, and a part of the homestead ground attached thereto was reserved with the intention of building and again establishing a home thereon, it was held that the reserved portion, though not occupied (the family having no other place for a home), remained impressed with the homestead character. *Scott v. Dyer*, 60 Tex. 135.

**Evidence Showing Intent.**— Intention to occupy premises as a homestead is not shown by proof merely that flowers were planted upon the premises by the debtor's wife, and

(4) *Time of Forming Intention.* — To bring land within the homestead exemption when not actually occupied as such at the time of levy, it must not only appear that there is an intention to occupy it as such, but it must also appear that such intention existed prior to and at the time of the levy. If the idea was conceived after the levy, and for the purpose of defeating the lien created thereby, the claim of exemption cannot be upheld, although after the levy and before sale a dwelling is erected or moved upon the premises and occupied by the owner and his family.<sup>1</sup>

(5) *Lapse of Time Before Actual Occupancy.* — The fact that considerable time elapses before actual occupancy of the premises as a home does not prevent the premises from being exempt as a homestead, if there is in fact a *bona fide* intention to occupy them, manifested by overt acts, and the delay in actually occupying the premises is not unreasonable under the circumstances.<sup>2</sup> It is otherwise, however, if the delay is unreasonable.<sup>3</sup> What is a reasonable time must depend upon the circumstances of each particular case.<sup>4</sup>

(6) *Discontinuance of Building.* — Where a debtor buys lands and commences the erection of a dwelling house thereon, intending in good faith to occupy the house as his residence, the fact that he is compelled to discontinue building for a time because of lack of means does not defeat his right to claim the land as his homestead.<sup>5</sup>

*d. INTENTION IN OCCUPYING PREMISES.* — Not only must there be occupancy of premises to render them exempt as a homestead, subject to the exceptions mentioned in the preceding paragraphs, but it is also necessary that the occupancy shall be with the intention of making the premises a homestead.<sup>6</sup> The fact that premises are occasionally occupied, even as a residence, does not give to them the character of a homestead, particularly where the actual and permanent residence of the debtor and his family is elsewhere.<sup>7</sup>

that she visited the premises. *Bente v. Lange*, 9 Tex. Civ. App. 328.

Evidence that a party had contracted to sell a piece of land upon which he was not actually residing, and that he was from time to time receiving payments upon such contract, is strong evidence to contradict his testimony that he was all the while intending to retain it for his homestead. *Gapen v. Stephenson*, 18 Kan. 140.

1. *Time of Forming Intention.* — *Bowles v. Hoard*, 71 Mich. 150.

2. *A Delay of Two Years* in actual occupancy by the family has been held not to be fatal. *Moore v. Wills*, 69 Tex. 109; *King v. Wright*, (Tex. Civ. App. 1896) 38 S. W. Rep. 530. See also *Mills v. Hobbs*, 76 Mich. 122; *Hanlon v. Pollard*, 17 Neb. 269; *Van Rattcliff v. Call*, 72 Tex. 491; *White v. Wadlington*, 78 Tex. 159; *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927.

3. *Unreasonable Delay.* — In *Edgerton v. Connelly*, 3 Kan. App. 618, it was held that premises were not exempt as a homestead because purchased for such purpose, where the debtor failed to occupy them for such purpose for four years after the purchase. See also *Lenora State Bank v. Peak*, 3 Kan. App. 698.

In *Ingels v. Ingels*, 50 Kan. 755, it was held that a delay of two years and five months after the purchase of land, before occupying it or making any preparations to occupy it, was unreasonable.

Where during eight years a debtor had occupied premises for three days only, and had offered the land for sale, he was held not to

be entitled to a homestead thereon. *Foot v. Powell*, 59 Tex. 321.

4. *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852.

5. *The Effect of Discontinuance of Building.* — *Dobkins v. Kuykendall*, 81 Tex. 180. And see *King v. Wright*, (Tex. Civ. App. 1896) 38 S. W. Rep. 530.

6. *Intention to Occupy as Homestead Necessary* — *Arkansas.* — *Tillar v. Bass*, 57 Ark. 179; *Steenburgen v. Greenwood*, (Ark. 1890) 13 S. W. Rep. 702.

*California.* — *Holden v. Pinney*, 6 Cal. 234; *Tromans v. Mahlman*, 92 Cal. 1.

*Louisiana.* — *Bossier v. Raines*, 37 La. Ann. 263.

*Massachusetts.* — *Lee v. Miller*, 11 Allen (Mass.) 37.

*Michigan.* — *People v. Plumsted*, 2 Mich. 465.

*South Dakota.* — *Clark v. Evans*, 6 S. Dak. 244.

*Vermont.* — *Whiteman v. Field*, 53 Vt. 554.

7. *Occasional Occupancy* — *Arkansas.* — *Tillar v. Bass*, 57 Ark. 179.

*Illinois.* — *Brokaw v. Ogle*, 170 Ill. 115.

*Louisiana.* — *Bossier v. Raines*, 37 La. Ann. 263.

*Massachusetts.* — *Lee v. Miller*, 11 Allen (Mass.) 37.

*Michigan.* — *Bowles v. Hoard*, 71 Mich. 150.

*Texas.* — *Fort v. Powell*, 59 Tex. 321; *Moerlein v. Scottish Mortg., etc., Co.*, 9 Tex. Civ. App. 415.

And see *supra*, this section, *Doctrine that Actual Occupancy Is Necessary*, when the in-



In *California* residence is *prima facie* evidence of intention to dedicate premises to the purposes of a homestead, but the presumption is rebuttable by facts and circumstances *aliunde*.<sup>1</sup> In *Texas*, however, actual occupancy of land as a residence is a conclusive designation of it as a homestead against which no declaration of the parties to the contrary can be considered.<sup>2</sup>

*e. CONTINUOUS OCCUPANCY.* — Even in those jurisdictions in which premises do not become impressed with the legal character of a homestead until actual occupation as a family residence, they need not necessarily be continuously occupied. When they have once acquired the character of a homestead by occupancy, temporary absence, *anima revertendi*, will not constitute an abandonment so as to deprive them of such character.<sup>3</sup> It is otherwise, however, if they are abandoned without any intention of returning and reoccupying them as a home.<sup>4</sup>

*f. TIME OF OCCUPANCY.* — The rule varies in the different states as to the time at which occupancy of premises must commence in order that they may be exempt as against a particular debt. In some states premises need not be occupied as a homestead at the time when a debt is contracted, but it is sufficient if they are occupied before it is sought to subject them to liability for the debt and before they are claimed as a homestead.<sup>5</sup> In other states occupancy or what is equivalent to occupancy<sup>6</sup> before the debt is contracted is necessary.<sup>7</sup> In most states, though not in all, where occupancy is required, if a judgment is docketed and becomes a lien on land before its occupancy, or if an execution or attachment becomes a lien before occupancy, subsequent occupancy cannot defeat the lien.<sup>8</sup> This question will be further treated in a subsequent section.<sup>9</sup>

sufficiency of a merely pretended occupancy is shown.

**Occupancy During Harvest Only** is not sufficient. *Tillar v. Bass*, 57 Ark. 179.

**Sleeping on Premises for a Few Nights to Avoid Lapse of Insurance** thereon does not warrant a finding of occupancy as a homestead. *Moerlein v. Scottish Mortg., etc., Co.*, 9 Tex. Civ. App. 415.

**1. Residence as Evidence of Intention.** — *Holden v. Pinney*, 6 Cal. 234; *Moss v. Warner*, 10 Cal. 296; *Brooks v. Hyde*, 37 Cal. 366.

**Iowa.** — **Failure to Have Premises Platted** does not affect the right to claim them as a homestead where they are actually occupied for the purposes of a home. *Schlarb v. Holderbaum*, 80 Iowa 394.

**The Fact that the Occupancy Includes Premises in Addition to the Homestead** does not show that the occupation is not intended to be for the purposes of a homestead. *Schlarb v. Holderbaum*, 80 Iowa 394.

**South Dakota** — **Testimony as to Intent.** — A person may testify that in occupying premises he intended to occupy them as his homestead. *Clark v. Evans*, 6 S. Dak. 244.

**2. Occupancy Conclusive in Texas.** — *Little v. Baker*, (Tex. 1889) 11 S. W. Rep. 549; *Kempner v. Comer*, 73 Tex. 196; *Medlenka v. Downing*, 59 Tex. 32; *Ruhl v. Kauffman*, 65 Tex. 723; *Pellat v. Decker*, 72 Tex. 578; *Jacobs v. Hawkins*, 63 Tex. 1.

**3. Occupancy Need Not Be Continuous** — *Illinois*. — *Walters v. People*, 21 Ill. 178; *Hagerty v. Hagerty*, 149 Ill. 655.

*Mississippi*. — *Campbell v. Adair*, 45 Miss. 170; *Pennington v. Seal*, 49 Miss. 518; *Hand v. Winn*, 52 Miss. 784.

*Texas*. — *Parr v. Newby*, 73 Tex. 468; *Ingle v. Lea*, 70 Tex. 609.

In *California* a temporary absence of several months which includes the time of filing the declaration of homestead has been held fatal. *Maloney v. Hefer*, (Cal. 1887) 15 Pac. Rep. 763. See *supra*, this section, 2. *b. note*.

See *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel*.

**4.** *Hill v. Franklin*, 54 Miss. 632; *Denis v. Gayle*, 40 La. Ann. 286. See *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel*.

**5. Time of Commencement of Occupancy.** — See *Letchford v. Cary*, 52 Miss. 791; *Jones v. Hart*, 62 Miss. 13; *Finnegan v. Prinderville*, 83 Mo. 517; *Macmanus v. Campbell*, 37 Tex. 267; *Stone v. Darnell*, 20 Tex. 11.

**6.** *Webb v. Hollenbeck*, 48 Ill. App. 514; *Kingman v. O'Callaghan*, 4 S. Dak. 628; *Ellerman v. Wurz*, (Tex. 1890) 14 S. W. Rep. 333. See *supra*, this section, *Doctrine that Intention to Occupy May Suffice*.

**7.** See *Elston v. Robinson*, 23 Iowa 208.

**8. United States.** — *Freeman v. Stewart*, 5 Biss. (U. S.) 19.

*Arkansas.* — *Reynolds v. Tenant*, 51 Ark. 84; *Tillar v. Bass*, 57 Ark. 179.

*Kansas.* — *Ingels v. Ingels*, 50 Kan. 755.

*Michigan.* — *Avery v. Stephens*, 48 Mich. 246.

*Minnesota.* — *Kelly v. Dill*, 23 Minn. 435.

*Missouri.* — *Jackson v. Bowles*, 67 Mo. 609.

*New Hampshire.* — *Austin v. Stanley*, 46 N. H. 51.

*Wisconsin.* — *Upman v. Second Ward Bank*, 15 Wis. 449.

Compare *Irwin v. Lewis*, 50 Miss. 363; *Stone v. Darnell*, 20 Tex. 11; *Macmanus v. Campbell*, 37 Tex. 267.

**9.** See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

*g. OCCUPANCY BY FAMILY.* — In some states the statute in express terms requires the land claimed as a homestead to be occupied as a residence "by the family" of the owner, or as a "family residence," and occupation by the husband and father alone, without any intention to have the family reside thereon, is not enough.<sup>1</sup> In other states actual occupation by the family of the debtor is not required.<sup>2</sup> And generally, if land is occupied, or in some states intended, as a home for the family, temporary separation or absence of the family will not take away its homestead character.<sup>3</sup> Occupation by wife and family in the absence of the husband is equivalent to occupation by husband.<sup>4</sup>

*h. JOINT OCCUPANCY.* — A homestead cannot be occupied jointly by two persons so that both shall have estates of homestead therein.<sup>5</sup>

**4. Use for Other Purposes than as Residence** — *a. IN GENERAL.* — As has been shown in the preceding paragraphs, the homestead laws in most states expressly or impliedly require that premises, to be exempt as a homestead, shall be occupied and used as a residence,<sup>6</sup> and where this is the case it is clear that a debtor cannot claim as his homestead premises used by him solely as a place of business, as a store, a hotel, a mill, etc., and it can make no difference that he has no other property, and lives in a rented house.<sup>7</sup>

*b. PREMISES LEASED TO OTHERS.* — Nor do the exemption laws protect premises which are not used nor intended to be used by the debtor as a residence, but which are leased to others, and used merely as a source of revenue, occupancy by a tenant not being such occupancy as is contemplated and required.<sup>8</sup>

**1. Occupancy by Family** — *Arkansas.* — In *Tillar v. Bass*, 57 Ark. 179, it was held that keeping cooking utensils and a bed and the occasional sleeping by the husband in a house on land claimed as exempt was not sufficient to create a homestead, where the family lived elsewhere.

*California.* — *Cary v. Tice*, 6 Cal. 525. And see *Rix v. McHenry*, 7 Cal. 89; *Benson v. Aitken*, 17 Cal. 163.

*Kansas.* — *Dobson v. Shoup*, 3 Kan. App. 468; *Farlin v. Sook*, 26 Kan. 397; *Koons v. Rittenhouse*, 28 Kan. 359; *Osborn v. Strachan*, 32 Kan. 52.

*Texas.* — Here the statute provides that "the homestead of a family" shall be protected, and requires it to be used for purposes of a home, and it is held that land is not exempt as a homestead unless it is used as a family home. *Moore v. Owsley*, 37 Tex. 603; *Davis v. Cuthbertson*, (Tex. Civ. App. 1898) 45 S. W. Rep. 426.

**2. Thus in Iowa** assent of the wife to the action of the husband in fixing the homestead is not essential. If he adopts it as his home, the absence of his wife will not make it any the less his homestead. *Williams v. Swetland*, 10 Iowa 51.

**3. Temporary Separation of Family.** — See *Johnston v. Turner*, 29 Ark. 280; *Crenshaw v. Bray*, (Tex. Civ. App. 1899) 50 S. W. Rep. 623.

**Permanent Separation of Family.** — As was shown in a previous section, in some states, though not in all, when premises have once acquired the character of a homestead, even the permanent separation of the family, by death or removal of the members, will not deprive them of their homestead character. *Johnston v. Turner*, 29 Ark. 280; *Stanley v. Snyder*, 43 Ark. 429. See *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption*.

**4. Occupation by Wife and Family in Husband's Absence.** — *Bartholomew v. West*, 2 Dill. (U. S.) 290, 2 Fed. Cas. No. 1,071.

**5. Joint Occupancy.** — *Kyle v. Wills*, 166 Ill. 501; *Brokaw v. Ogle*, 170 Ill. 115; *Cornish v. Frees*, 74 Wis. 490.

**6. Use for Other Purposes than as Residence.** — See *supra*, this section, *Necessity for Occupancy in General*.

**7. Premises Used Solely for Business Purposes** — *Alabama.* — *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110.

*Illinois.* — See *Reinbach v. Walter*, 27 Ill. 393.

*Texas.* — *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Iken v. Olenick*, 42 Tex. 198; *Stevens v. Whitaker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1026.

*Wisconsin.* — *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710; *Green v. Pierce*, 60 Wis. 372.

And see *Moore v. Phillips*, 7 Ky. L. Rep. 221.

**A Law Office**, used only as an office, is not exempt as a homestead. *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106.

**8. Premises Not Used as Home, but Leased to Others** — *Alabama.* — *Kaster v. McWilliams*, 41 Ala. 302.

*California.* — *Crowey v. Crowey*, 71 Cal. 300.

*Illinois.* — *Titman v. Moore*, 43 Ill. 169.

*Iowa.* — *Kurz v. Brusch*, 13 Iowa 371, 81 Am. Dec. 435.

*Kentucky.* — *Tohermes v. Beiser*, 93 Ky. 415.

*Michigan.* — *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606.

*New Hampshire.* — *Hoitt v. Webb*, 36 N. H. 158.

*South Carolina.* — *Harrell v. Kea*, 37 S. Car. 369.

*Texas.* — *Charles v. Chaney*, (Tex. Civ. App. 1894) 26 S. W. Rep. 169; *Hendrick v. Hen-*

c. **USE IN PART FOR OTHER PURPOSES** — (1) *In General*. — If premises, however, are in fact used by the owner as a residence for himself and his family, the right to claim them as a homestead is not necessarily defeated by the fact that they are not all required for such purpose, and that they are partly used for other purposes.<sup>1</sup> As a rule, where the constitution or statute exempts a certain quantity of land owned and occupied by a debtor, the whole quantity is exempt if occupied as the residence of the debtor and his family, without regard to the use to which he may put the land or the business he may pursue thereon.<sup>2</sup>

(2) *Use in Part for Business*. — In most states, therefore, the fact that the residence of a debtor is also used in part as his place of business does not prevent the whole of it from being exempt as his homestead.<sup>3</sup>

**Office, Shop, or Store**. — Thus, if a building claimed as a homestead is in fact used as the owner's family residence, the entire building is exempt, though one of the rooms, or even an entire floor, may be used as an office, shop, or store.<sup>4</sup>

**Hotels and Lodging Houses**. — And according to the better opinion, premises which are used by the owner for the purposes of a hotel or lodging house are exempt as his homestead, where he also resides there with his family.<sup>5</sup>

drick, 13 Tex. Civ. App. 49; Waggener v. Haskell, 13 Tex. Civ. App. 630; Henry v. Corpus Christi Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. Rep. 568; McDonald v. Ortiz, (Tex. Civ. App. 1899) 50 S. W. Rep. 478.

*Wisconsin*. — Casselman v. Packard, 16 Wis. 114, 82 Am. Dec. 710; Schoffen v. Landauer, 60 Wis. 334.

**Lease of Part**. — See *infra*, this subdivision, *Use in Part for Other Purposes* — *Lease of Part*.

**1. Use of Homestead in Part for Other Purposes**. — Norris v. Kidd, 28 Ark. 485; Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244; and cases more specifically referred to in the notes following.

**2.** McDougall v. Meginniss, 21 Fla. 362; Clark v. Shannon, 1 Nev. 568; Smith v. Stewart, 13 Nev. 65; Binzel v. Grogan, 67 Wis. 147.

In *Minnesota* the statute exempts as a homestead a quantity of land in a city, not exceeding one lot, without regard to the uses to which it may be put, provided only it is the dwelling of the claimant. Jacoby v. Parkland Distilling Co., 41 Minn. 227.

**3. Homestead May Be Used in Part for Business Purposes** — *United States*. — *In re Tertelling*, 2 Dill. (U. S.) 339, 23 Fed. Cas. No. 13,842.

*Arkansas*. — Klenk v. Knoble, 37 Ark. 298; Norris v. Kidd, 28 Ark. 485.

*California*. — Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Matter of Delaney, 37 Cal. 176; Heathman v. Holmes, 94 Cal. 291; Matter of Ogburn, 105 Cal. 95.

*Florida*. — McDougall v. Meginniss, 21 Fla. 362.

*Idaho*. — Kiesel v. Clemens, (Idaho 1899) 56 Pac. Rep. 84.

*Illinois*. — Stevens v. Hollingsworth, 74 Ill. 202.

*Iowa*. — Wright v. Ditzler, 54 Iowa 620; Smith v. Quiggans, 65 Iowa 637; Groneweg v. Beck, 93 Iowa 717. Compare Rhodes v. McCormack, 4 Iowa 368, 68 Am. Dec. 663; Johnson v. Moser, 66 Iowa 536; Arnold v. Gotshall, 71 Iowa 572; McClure v. Braniiff, 75 Iowa 38.

*Kansas*. — Rush v. Gordon, 38 Kan. 535;

Hogan v. Manners, 23 Kan. 551, 33 Am. Rep. 199; Bebb v. Crowe, 39 Kan. 342.

*Massachusetts*. — Lazell v. Lazell, 8 Allen (Mass.) 575.

*Michigan*. — Orr v. Shraft, 22 Mich. 260; Skinner v. Shannon, 44 Mich. 87, 38 Am. Rep. 232; Stanton v. Hitchcock, 64 Mich. 328, 8 Am. St. Rep. 821; King v. Welborn, 83 Mich. 195; Lamont v. Le Fevre, 96 Mich. 175.

*Minnesota*. — Kelly v. Baker, 10 Minn. 154. And see Jacoby v. Parkland Distilling Co., 41 Minn. 227.

*Mississippi*. — Parisot v. Tucker, 65 Miss. 439.

*Nebraska*. — Corey v. Schuster, 44 Neb. 269.

*Oklahoma*. — De Ford v. Painter, 3 Okla. 80.

*Tennessee*. — Flannegan v. Stifel, 3 Tenn. Ch. 465.

*Texas*. — Hancock v. Morgan, 17 Tex. 582.

*Wisconsin*. — Harriman v. Queen Ins. Co., 49 Wis. 71; Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244; Prince v. Hake, 75 Wis. 638; Palmer v. Hawes, 80 Wis. 474.

**4. Illustrations** — **Office, Shop, or Store**. — When property was used as a residence, the fact that the wife carried on a retail grocery business in a certain portion thereof was held not to deprive the premises of their homestead character. Rush v. Gordon, 38 Kan. 535. See also Matter of Ogburn, 105 Cal. 95. So where a part of the building was used by the debtor for a post office and other business purposes. Orr v. Shraft, 22 Mich. 260. So likewise where a part of a residence was used as a saloon by the debtor. Groneweg v. Beck, 93 Iowa 717.

**5. Use as Hotel**. — Kiesel v. Clemens, (Idaho 1899) 56 Pac. Rep. 84; Cass County Bank v. Weber, 83 Iowa 63, 32 Am. St. Rep. 288; Lazell v. Lazell, 8 Allen (Mass.) 575; King v. Welborn, 83 Mich. 195; Lamont v. Le Fevre, 96 Mich. 175; Harriman v. Queen Ins. Co., 49 Wis. 71. And see Schoffen v. Landauer, 60 Wis. 334; Binzel v. Grogan, 67 Wis. 147. But see decisions to the contrary in the note following.

A debtor who owns a building on land which he occupies under a lease providing that



**Primary and Chief Use.** — In some states the doctrine that premises used both as a residence and as a place of business are all exempt is not recognized to the full extent, but it is held that a place used primarily and chiefly as a place of business cannot be claimed as a homestead, though also used incidentally as the place of residence of the debtor and his family.<sup>1</sup>

**Premises Not Susceptible of Being a Dwelling House** cannot be exempt as a homestead. Thus a building constructed and intended solely as a store or business block cannot be held as a homestead merely because the owner moves into it and lives there with his family.<sup>2</sup>

(3) *Lease of Part.* — If a building is used by a debtor as his family residence it may be his homestead, and exempt as such, notwithstanding a part of it may be leased to others for residence or business purposes.<sup>3</sup> But in some states, though not in all, where there are two or more houses on land owned by a debtor, and he resides in one and leases the others, he can acquire a homestead in that part of the land only on which the house in which he resides is situated.<sup>4</sup> And generally where a debtor resides on one tract or lot of land, and owns another lot or tract which he has leased, he cannot claim the latter as a part of the homestead, even though it may adjoin.<sup>5</sup>

the land shall be used and occupied exclusively as a site for a hotel, and who resides in such building with his family under the tacit consent of his lessor, has no homestead therein. *Green v. Pierce*, 60 Wis. 372.

**Lodging House.** — In *Nevada* a house in which the owner and his family resided was held exempt though it was suitable for and used as a lodging house. *Goldman v. Clark*, 1 Nev. 607.

1. **Primary and Chief Use as Place of Business.** — *Garrett v. Jones*, 95 Ala. 96; *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110; *Bell v. Anniston Hardware Co.*, 114 Ala. 341; *Matter of Delaney*, 37 Cal. 179; *Matter of Noah*, 73 Cal. 592, 2 Am. St. Rep. 834; *Maloney v. Hefer*, 75 Cal. 424, 7 Am. St. Rep. 180; *McDowell v. His Creditors*, 103 Cal. 264, 42 Am. St. Rep. 114. Compare *Heathman v. Holmes*, 94 Cal. 291.

Where only part of a tract of land described in a declaration of homestead was used as a residence and for purposes connected with the residence, and the rest was used principally for the business of general blacksmithing and wagon making, it was held that the latter portion formed no part of the homestead. *Matter of Allen*, 78 Cal. 293.

**Use as Hotel.** — Both in *Alabama* and in *California* it has been held, contrary to the decisions referred to in the note preceding that a debtor cannot claim as his homestead premises used primarily and chiefly as a hotel, though he lives there with his family as an incident to his business. *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110; *Laughlin v. Wright*, 63 Cal. 113; *McDowell v. His Creditors*, 103 Cal. 264, 42 Am. St. Rep. 114. But see *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516.

**Pasturing Cattle** of others, where there is surplus pasturage, does not prevent a farm being selected as a homestead. *Kennedy v. Gloster*, 98 Cal. 143.

2. **Stores and Business Blocks.** — It was so held by Judge Hopkins in *In re Lammer*, 7 Biss. (U. S.) 269, under the *Wisconsin* statute exempting a lot in a village or city and the "dwelling house thereon." See also *Garrett*

*v. Jones*, 95 Ala. 96; *Bell v. Anniston Hardware Co.*, 114 Ala. 341.

3. **Lease of Part of Premises** — *Arkansas*. — *Klenk v. Knoble*, 37 Ark. 298.

*Illinois*. — *Conklin v. Foster*, 57 Ill. 104.

*Kansas*. — *Bebb v. Crowe*, 39 Kan. 342; *Layson v. Grange*, 48 Kan. 440; *Milford Sav. Bank v. Ayers*, 48 Kan. 602. See *Upton v. Coxen*, 60 Kan. 1.

*Massachusetts*. — *Mercier v. Chace*, 11 Allen (Mass.) 194; *Pratt v. Pratt*, 161 Mass. 276.

*Mississippi*. — *Colbert v. Henley*, 64 Miss. 374.

*Oklahoma*. — *De Ford v. Painter*, 3 Okla. 80.

*Tennessee*. — *Flannegan v. Stifel*, 3 Tenn. Ch. 465.

*Texas*. — *Forsgard v. Ford*, 87 Tex. 185; *Bailey v. Bauknight*, (Tex. Civ. App. 1894) 25 S. W. Rep. 56; *Tenney v. Wessell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 436. And see *Storrie v. Woessner*, (Tex. Civ. App. 1898) 47 S. W. Rep. 837.

*Wisconsin*. — *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *Hoffman v. Junk*, 51 Wis. 613.

See also *Heathman v. Holmes*, 94 Cal. 291.

**Decisions to the Contrary.** — In *Iowa* it is held that where the upper story or stories of a building in a city are used by the owner as a home, and the first story is rented for the purposes of a store, the latter portion may be sold on execution, while the former will be exempt. *Rhodes v. McCormack*, 4 Iowa 368, 68 Am. Dec. 663; *Mayfield v. Maasden*, 59 Iowa 517.

4. **Separate Buildings Leased to Others.** — See *infra*, this section, *Appurtenances and Improvements* — *Buildings Not Used for Homestead Purposes*.

A **Double House Intended for Two Families**, there being no connection between the parts and each having a separate entrance, cannot be set off to the owner, who occupies only one part, as his homestead. Homestead rights extend only to the part actually occupied. *Tiernan v. Creditors*, 62 Cal. 286.

5. **Adjoining Tracts or Lots Leased to Others.** — See *infra*, this section, *Adjoining Lots or Tracts*.

**5. Failure to Use Entire Tract.** — So long as an entire tract of land not exceeding the quantity exempted by the statute is claimed as a homestead, and is not devoted to a purpose inconsistent with its use as a homestead, the whole tract is exempt, whether every portion of it is used or not.<sup>1</sup>

**6. Adjoining Lots or Tracts** — *a. IN GENERAL.* — The homestead of a debtor is not necessarily limited to the land on which the dwelling house is situated. In the absence of express provision to the contrary, it embraces adjoining land used in connection with the dwelling house for homestead purposes, whether it be an entire farm in the country or a lot or several lots in a city, provided the whole does not exceed the quantity and value fixed by the statute.<sup>2</sup> But of course adjoining land cannot be claimed as a part of the homestead where, if it were included, the whole would exceed the statutory quantity or value.<sup>3</sup>

**Residence on Leased Land.** — A debtor who lives on leased land and owns adjoining land which he uses in connection with his home and for homestead purposes may claim such land as his homestead.<sup>4</sup>

**Husband and Wife.** — Where husband and wife reside upon land belonging to the wife, but the husband owns an adjoining tract, and the whole is used and cultivated as one farm, the husband is entitled to a homestead exemption in his land.<sup>5</sup>

**b. USE IN CONNECTION WITH HOMESTEAD.** — Generally, in order that a lot or tract of land adjoining that upon which the dwelling house is situated may be claimed as a part of the homestead, it must be used for homestead purposes.<sup>6</sup> In some states, however, the statute exempts a certain quantity

**1. Entire Tract Need Not Be Used.** — *Morrissey v. Donahue*, 32 Kan. 646.

The sale of a part of a tract does not affect homestead rights in the remainder, the dwelling being retained and the family residing there. *Creath v. Dale*, 84 Mo. 349.

**2. Homestead Embraces Adjoining Tracts or Lots** — *United States.* — *Greeley v. Scott*, 2 Woods (U. S.) 657; *Dakota Bldg., etc., Assoc. v. Logan*, 66 Fed. Rep. 827, 30 U. S. App. 163.

*Alabama.* — *Tyler v. Jewett*, 82 Ala. 93.

*Arkansas.* — *Clements v. Crawford County Bank*, 64 Ark. 7; *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *McCloy v. Arnett*, 47 Ark. 445.

*California.* — *McDonald v. Badger*, 23 Cal. 393, 83 Am. Dec. 123; *Gregg v. Bostwick*, 33 Cal. 227, 91 Am. Dec. 637; *Englebrecht v. Shade*, 47 Cal. 627; *Kennedy v. Gloster*, 93 Cal. 143; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207; *Skinner v. Hall*, 69 Cal. 195; *Matter of Allen*, 78 Cal. 293.

*Illinois.* — *Boyd v. Fullerton*, 125 Ill. 437; *Reinbach v. Walter*, 27 Ill. 393; *Sever v. Lyons*, 170 Ill. 395; *Raber v. Gund*, 110 Ill. 581; *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Darby v. Dixon*, 4 Ill. App. 187.

*Iowa.* — *Wright v. Ditzler*, 54 Iowa 620.

*Kansas.* — *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197.

*Kentucky.* — *Franks v. Lucas*, 14 Bush (Ky.) 395; *Slaughter v. Karn*, (Ky. 1893) 23 S. W. Rep. 791; *Mason v. Columbia Finance, etc., Co.*, 99 Ky. 117, 59 Am. St. Rep. 451.

*Michigan.* — *Geiges v. Greiner*, 68 Mich. 153.

*Mississippi.* — *Colbert v. Henley*, 64 Miss. 374; *Baldwin v. Tillery*, 62 Miss. 378; *King v. Sturges*, 56 Miss. 606; *Wiseman v. Parker*, 73 Miss. 378; *Hinds v. Morgan*, 75 Miss. 509.

*Missouri.* — *Grimes v. Portman*, 99 Mo. 229; *Perkins v. Quigley*, 62 Mo. 498.

*Nevada.* — *Clark v. Shannon*, 1 Nev. 568; *Smith v. Stewart*, 13 Nev. 65.

*New Hampshire.* — *Libbey v. Davis*, (N. H. 1895) 34 Atl. Rep. 744.

*South Carolina.* — *McClenaghan v. McEachern*, 47 S. Car. 446.

*Texas.* — *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341; *Ragland v. Rogers*, 34 Tex. 617; *Little v. Baker*, (Tex. Civ. App. 1894) 26 S. W. Rep. 305; *Bailey v. Baukright*, (Tex. Civ. App. 1894) 25 S. W. Rep. 56; *Blum v. Witworth*, 66 Tex. 350; *Luhn v. Stone*, 65 Tex. 439; *Effinger v. Cates*, 61 Tex. 590; *Medlenka v. Downing*, 59 Tex. 32; *Arto v. Maydole*, 54 Tex. 244; *Andrews v. Hagadon*, 54 Tex. 571. And see *Clements v. Lacy*, 51 Tex. 150; *Jenkins v. Volz*, 54 Tex. 639; *Brown v. McLennan*, 60 Tex. 43.

**That Several Lots in a City may be claimed as a homestead, under the limitations stated in the text, see** *Boyd v. Fullerton*, 125 Ill. 437; *Geiges v. Greiner*, 68 Mich. 153; *Blum v. Whitworth*, 66 Tex. 350; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212.

**3. Limitation as to Quantity or Value.** — *Raber v. Gund*, 110 Ill. 581; *Hay v. Baugh*, 77 Ill. 500; *Hirshfield v. Brown*, (Tex. Civ. App. 1895) 30 S. W. Rep. 962. See *infra*, this section, *Limitations as to Value and Extent*.

**4. Residence on Leased Premises by Owner of Adjoining Land.** — *Libbey v. Davis*, (N. H. 1895) 34 Atl. Rep. 744. See also *Hinds v. Morgan*, 75 Miss. 509; *King v. Sturges*, 56 Miss. 606.

In *Kansas* there is a decision to the contrary. *Hay v. Whitney*, 59 Kan. 771, 51 Pac. Rep. 896.

**5. Residence on Wife's Land.** — *Mason v. Columbia Finance, etc., Co.*, 99 Ky. 117, 59 Am. St. Rep. 451.

**6. Use for Homestead Purposes** — *California.* — *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec.

of land without regard to the use to which the part not occupied by the residence is put.<sup>1</sup>

**Particular Uses.** — A tract or lot is used for homestead purposes, so as to be exempt as a part of the homestead, where it is used for the purpose of a garden by the family,<sup>2</sup> for furnishing water for the use of the family,<sup>3</sup> for the purpose of drying clothes,<sup>4</sup> for access to the street,<sup>5</sup> or for a stable.<sup>6</sup> The use of a portion of an urban homestead for purposes of mere convenience and ornament,<sup>7</sup> or the purchase and holding of a tract to prevent its use for purposes detrimental to the homestead,<sup>8</sup> has been sanctioned.

**c. ADJOINING LAND LEASED TO OTHERS.** — A tract adjoining premises occupied as a homestead, but leased to others and used only as a source of revenue, is held in most states to form no part of the homestead, and not to be exempt.<sup>9</sup>

**7. Separate and Detached Parcels of Land** — *a. IN GENERAL.* — In some states it is held that the exemption laws allow a debtor to claim, in addition to the particular tract or lot of land upon which his dwelling house is situated, separate and detached parcels or lots, so long as the statutory limit in acreage and value is not exceeded, provided the separate and detached parcels or lots are used in connection with the home place.<sup>10</sup> In other states this is not

637; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207; *Englebrecht v. Shade*, 47 Cal. 627.

*Iowa.* — *Groneweg v. Beck*, 93 Iowa 717.

*New Hampshire.* — *Libbey v. Davis*, (N. H. 1895) 34 Atl. Rep. 744.

*Texas.* — *Methery v. Walker*, 17 Tex. 593; *Andrews v. Hagadon*, 54 Tex. 571; *Arto v. Maydole*, 54 Tex. 244; *Medlenka v. Downing*, 59 Tex. 32; *Effinger v. Cates*, 61 Tex. 590; *Blum v. Whitworth*, 66 Tex. 350; *Axer v. Bassett*, 63 Tex. 545; *Martin Clothing Co. v. Henry*, 83 Tex. 592; *Jones v. Lee*, (Tex. Civ. App. 1897) 41 S. W. Rep. 195; *Stevens v. Whitaker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1026; *Oppenheimer v. Fritter*, 79 Tex. 99. See also *Blum v. Rogers*, 78 Tex. 530.

**1. Statutes Containing No Restriction as to Use.** — See *McDougall v. Meginniss*, 21 Fla. 362; *Clark v. Shannon*, 1 Nev. 568; *Smith v. Stewart*, 13 Nev. 65; *Binzel v. Grogan*, 67 Wis. 147.

**2. Particular Uses — Garden.** — *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207, where it was held also that the homestead claim is not defeated by temporary failure to cultivate.

It has been held, however, that there must be proof that the garden products were for home use. *Stevens v. Whitaker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1026.

**3. Use for Furnishing Water.** — *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

**4. Use for Drying Clothes.** — *Englebrecht v. Shade*, 47 Cal. 627.

**5. Use for Access to Street.** — *Englebrecht v. Shade*, 47 Cal. 627. And see *Arto v. Maydole*, 54 Tex. 244.

**6. Use for Stable.** — *Blum v. Whitworth*, 66 Tex. 350.

**7. Convenience, Pleasure, and Ornament.** — *Medlenka v. Downing*, 59 Tex. 32; *Arto v. Maydole*, 54 Tex. 244.

**8. May Hold Adjoining Land to Prevent Detrimental Use.** — *Little v. Baker*, (Tex. 1889) 11 S. W. Rep. 549.

**9. Adjoining Tract Leased to Others Held Not Exempt** — *United States*. — *Greeley v. Scott*, 2 Woods (U. S.) 657.

*Alabama.* — *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110.

*Illinois.* — *Tourville v. Pierson*, 39 Ill. 446; *Sever v. Lyons*, 170 Ill. 395.

*Kansas.* — *Edwards v. Fry*, 9 Kan. 417; *Ash-ton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197.

*Kentucky.* — *Tohermes v. Bersir*, 93 Ky. 415.

*New Hampshire.* — *Hoitt v. Webb*, 36 N. H. 158.

*South Carolina.* — *Harrell v. Kea*, 37 S. Car. 369.

*Texas.* — *Charles v. Chaney*, (Tex. Civ. App. 1894) 26 S. W. Rep. 169; *Hendrick v. Hendrick*, 13 Tex. Civ. App. 49; *Waggenger v. Haskell*, 13 Tex. Civ. App. 630; *Jones v. Lee*, (Tex. Civ. App. 1897) 41 S. W. Rep. 195. Compare *Baldeschweiler v. Ship*, (Tex. Civ. App. 1899) 50 S. W. Rep. 644.

**A Lot Leased for Cultivation on Shares** has been held within this principle. *Waggenger v. Haskell*, 13 Tex. Civ. App. 630.

**10. States in Which Separate and Detached Parcels May Be Claimed** — *United States*. — *Thebo v. Cain*, 1 Tex. L. J. 92, 23 Fed. Cas. No. 13,875 (under the *Texas* statute). But see *Equitable Mortg. Co. v. Lowry*, 55 Fed. Rep. 165.

*Alabama.* — *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110; *Dicus v. Hall*, 83 Ala. 159; *Jaffrey v. McGough*, 88 Ala. 648; *Hodges v. Winston*, 95 Ala. 514, 36 Am. St. Rep. 241; *Shubert v. Winston*, (Ala. 1892) 11 So. Rep. 200. Compare *Garland v. Bostick*, 118 Ala. 209.

*Iowa.* — *Reynolds v. Hull*, 36 Iowa 394.

*Kentucky.* — *Nichols v. Sennitt*, 4 Ky. L. Rep. 889, 5 Ky. L. Rep. 199; *Slaughter v. Karn*, 15 Ky. L. Rep. 429, where the residence lot and the other lot allowed as part of the homestead were connected by a passway one hundred and fifty yards in length. See also *Ross v. Sweeney*, 12 Ky. L. Rep. 816.

*Mississippi.* — *Acker v. Trueland*, 56 Miss. 30.

*Missouri.* — *Perkins v. Quigley*, 62 Mo. 498.

*New Hampshire.* — *Buxton v. Dearborn*, 46 N. H. 43.

*North Carolina.* — *Martin v. Hughes*, 67 N. Car. 293; *Mayho v. Cotton*, 69 N. Car. 289; *Flora v. Robbins*, 93 N. Car. 38.

*Pennsylvania.* — *Hunsecker's Estate*, 19 Pa. Co. Ct. 14, 6 Pa. Dist. 202.



allowed, even though the detached parcel of land is used in connection with the home place, and though it may be convenient for the procurement of fuel and other articles essential to the use and enjoyment of the tract on which the dwelling is situated.<sup>1</sup> This difference in the law is due to a great extent to a difference in the language of the statutes, but not entirely so. Some of the courts have differed in construing statutes which are substantially the same.

**Parcels of Land Cornering on Each Other.** — Under a statute exempting a homestead "consisting of any quantity of land not exceeding eighty acres, and the dwelling house thereon and its appurtenances," it has been held that a tract of land cornering on the tract on which the dwelling house was situated, and which was cultivated by the debtor, could not be claimed as a part of the homestead.<sup>2</sup> In *Arkansas* there is a decision to the contrary.<sup>3</sup>

**b. WHAT CONSTITUTES SEPARATION OF TRACTS.** — The fact that a tract of land is divided into separate lots or parcels by a highway, street, or alley, which constitutes a mere easement in the land, leaving the title to the fee unaffected, does not divide the tract into separate and detached parcels, so as to prevent the whole from being claimed as exempt.<sup>4</sup>

**Railroads.** — The same is true where land occupied as a homestead is divided by a railroad running through it.<sup>5</sup>

**Separation by a Stream** does not so divide land as to make separate tracts and prevent the homestead from including the land on both sides.<sup>6</sup>

**Quarter-section Lines and Fences.** — The same is true of quarter-section lines<sup>7</sup> and of fences.<sup>8</sup>

*Tennessee.* — *First Nat. Bank v. Meachem*, (Tenn. Ch. 1896) 36 S. W. Rep. 724; *Moses v. Groner*, (Tenn. Ch. 1896) 37 S. W. Rep. 1031. *Compare Ex p. Brien*, 2 Tenn. Ch. 33.

*Texas.* — *Hancock v. Morgan*, 17 Tex. 583; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341; *George v. Watson*, 19 Tex. 354; *Williams v. Hall*, 33 Tex. 212; *Ragland v. Rogers*, 34 Tex. 617; *Brooks v. Chatham*, 57 Tex. 31; *Pridgen v. Warn*, 79 Tex. 588; *Axer v. Bassett*, 63 Tex. 545; *Jacobs v. Hawkins*, 63 Tex. 1; *Morgan v. Morgan*, 1 Tex. Unrep. Cas. 400; *Waggener v. Haskell*, 13 Tex. Civ. App. 630; *Little v. Baker*, (Tex. Civ. App. 1894) 26 S. W. Rep. 305, *reversing* (Tex. Civ. App. 1894) 25 S. W. Rep. 143. *Compare Cullum v. Price*, (Tex. Civ. App. 1893) 23 S. W. Rep. 711.

*Utah.* — *Kimball v. Salisbury*, 17 Utah 381.

*Vermont.* — *Hastie v. Kelley*, 57 Vt. 293; *West River Bank v. Gale*, 42 Vt. 27. *Compare True v. Morrill*, 27 Vt. 672; *Mills v. Grant*, 36 Vt. 269, decided under an earlier statute.

**1. States in Which Separate and Detached Parcels Cannot Be Claimed** — *Arkansas.* — *McCrosky v. Walker*, 55 Ark. 303. *Compare Clements v. Crawford County Bank*, 64 Ark. 7.

*California.* — See *Matter of Liggett*, 117 Cal. 352, 59 Am. St. Rep. 190. The statute in California expressly defines the homestead as consisting of "the dwelling house in which the claimant resides and the land on which the same is situated." Civ. Code, § 1237.

*Florida.* — *Brandies v. Perry*, 39 Fla. 172.

*Illinois.* — *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730. See *Hawley v. Simons*, (Ill. 1887) 14 N. E. Rep. 7.

*Kansas.* — *Randal v. Elder*, 12 Kan. 257; *Linn County Bank v. Hopkins*, 47 Kan. 580, 27 Am. St. Rep. 309; *Allen v. Dodson*, 39 Kan. 220. And see *Griswold v. Huffaker*, 47 Kan. 690, 48 Kan. 374; *Lenora State Bank v. Peak*, 3 Kan. App. 698, 58 Kan. 485.

*Massachusetts.* — *Adams v. Jenkins*, 16 Gray

(Mass.) 146. *Compare Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177.

*Minnesota.* — *Kresin v. Mau*, 15 Minn. 116. *Wisconsin.* — *Bunker v. Locke*, 15 Wis. 635; *Hornby v. Sikes*, 56 Wis. 382.

**2. Parcels of Land Cornering on Each Other.** — *Kresin v. Mau*, 15 Minn. 116. And see *Linn County Bank v. Hopkins*, 47 Kan. 580, 27 Am. St. Rep. 309.

**3. Clements v. Crawford County Bank**, 64 Ark. 7.

**4. Separation by Street, Alley, or Highway** — *California.* — *Matter of Delaney*, 37 Cal. 176.

*Kansas.* — *Griswold v. Huffaker*, 47 Kan. 690, 48 Kan. 374. There was a dictum to the contrary in *Randal v. Elder*, 12 Kan. 257.

*Mississippi.* — *Acker v. Trueland*, 56 Miss. 30.

*Vermont.* — *West River Bank v. Gale*, 42 Vt. 27.

*Wisconsin.* — *Hornby v. Sikes*, 56 Wis. 382; *Binzel v. Grogan*, 67 Wis. 147.

The platting of a rural homestead into lots, the streets shown on the plat not being dedicated to the public, does not affect the owner's homestead rights, nor does the sale of some of the lots affect such rights in the remainder, if the contiguity of the remainder is maintained. *Phelps v. Northern Trust Co.*, 70 Minn. 546.

**5. Separation by Railroad and Depot Grounds.** — *Pariset v. Tucker*, 65 Miss. 439. See also *Bunker v. Locke*, 15 Wis. 635.

This is true where the grant of a right of way to a railroad company is in part an absolute grant and in part the creation of an easement only. *Allen v. Dodson*, 39 Kan. 220. See also *Hornby v. Sikes*, 56 Wis. 382.

**6. Separation by Stream.** — See *Bunker v. Locke*, 15 Wis. 635.

**7. Quarter-section Lines.** — *Darby v. Dixon*, 4 Ill. App. 371.

**8. Fences.** — *Little v. Baker*, (Tex. Civ. App. 1894) 26 S. W. Rep. 305.

*c. USE IN CONNECTION WITH HOMESTEAD.* — In those states in which a debtor residing on one tract or lot of land as his home may claim as a part of his homestead a detached lot or tract, it is generally if not always required, expressly or impliedly, that he shall use such separate lot or tract in connection with the homestead.<sup>1</sup> It has also been held that it is necessary that some act shall be done evincing an intention to use the detached parcel in some way in connection with the home place for comfort, convenience, or support of the family. Mere ownership thereof, coupled with an intention at some future time to use the detached parcel, is not sufficient.<sup>2</sup>

*d. LOTS OR TRACTS LEASED TO OTHERS.* — Separate and detached lots or tracts of land which are not only not used in connection with the home place, but are leased to others, cannot be claimed as parts of the homestead.<sup>3</sup>

**8. Appurtenances and Improvements** — *a. IN GENERAL.* — Unless there is some express restriction to the contrary, the homestead embraces all the usual and customary appurtenances and improvements, including fences and out-buildings of every kind necessary or convenient for family use.<sup>4</sup>

**Buildings on Land of Another.** — The right to claim as exempt a dwelling house

**1. Detached Parcel Must Be Used as Part of Homestead** — *United States.* — *Grosholz v. Newman*, 21 Wall. (U. S.) 486; *Equitable Mortg. Co. v. Lowry*, 55 Fed. Rep. 165.

*Alabama.* — *Dicus v. Hall*, 83 Ala. 159; *Garland v. Bostick*, 118 Ala. 209; *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110; *Shubert v. Winston*, (Ala. 1892) 11 So. Rep. 200.

*California.* — *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180.

*Mississippi.* — *Rhyne v. Guevara*, 67 Miss. 139; *Semmes v. Wheatley*, (Miss. 1890) 7 So. Rep. 430. (Both these were cases wherein the lots were separated by a public road.)

*Texas.* — *Methery v. Walker*, 17 Tex. 593; *Iken v. Olenick*, 42 Tex. 195; *Brooks v. Chatham*, 57 Tex. 31; *Jacobs v. Hawkins*, 63 Tex. 1; *Stringer v. Swenson*, 63 Tex. 7; *Axer v. Bassett*, 63 Tex. 545; *Nix v. Mayer*, (Tex. 1886) 2 S. W. Rep. 819; *Houston, etc., R. Co. v. Winter*, 44 Tex. 612; *Stevens v. Whitaker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1026; *Achilles v. Willis*, 81 Tex. 169; *Pryor v. Stone*, 19 Tex. 371.

*Utah.* — *Kimball v. Salisbury*, 17 Utah 381.

*Vermont.* — *Hastie v. Kelley*, 57 Vt. 293.

In *Iowa* use of such detached lot as a part of the homestead must appear, and it is not sufficient to show that the owner "used, worked, and occupied" it. *Reynolds v. Hull*, 36 Iowa 394.

**Character of Use.** — In *Texas* the use of a detached lot as an inclosed pasture for the domestic animals of the family has been held to constitute such use for the purposes of a home as will invest it with homestead character. *Axer v. Bassett*, 63 Tex. 545.

But the fact that detached lots in a town contribute to the support of the family, through the products of cultivation or rental, does not render them a part of the homestead. *Evans v. Womack*, 48 Tex. 230. Even though there may be an occasional incidental use of part, as for the pasturage of a cow, which might give them that character. *Allen v. Whitaker*, (Tex. 1892) 18 S. W. Rep. 160.

**2. Manifestation of Intention.** — *Grosholz v.*

*Newman*, 21 Wall. (U. S.) 486; *Brooks v. Chatham*, 57 Tex. 31.

But, if a Detached Lot Is Actually Used for Homestead Purposes, an open claim to it as a part of the homestead is not necessary. *Jacobs v. Hawkins*, 63 Tex. 1.

**3. Separate Tracts or Lots Leased to Others.** — *Garland v. Bostick*, 118 Ala. 209; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180; *Edwards v. Fry*, 9 Kan. 417; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Rhyne v. Guevara*, 67 Miss. 139; *Semmes v. Wheatley*, (Miss. 1890) 7 So. Rep. 430; *Iken v. Olenick*, 42 Tex. 195. See also *supra*, this section, *Adjoining Land Leased to Others*.

**A Detached Lot Leased for Cultivation on Shares** cannot be claimed as a part of the homestead. *Waggener v. Haskell*, 13 Tex. Civ. App. 630. *Contra*, *Baldeschweiler v. Ship*, (Tex. Civ. App. 1899) 50 S. W. Rep. 644.

**4. Improvements and Appurtenances — Fences and Outbuildings** — *United States.* — *Greeley v. Scott*, 2 Woods (U. S.) 657.

*California.* — *Gregg v. Bostwick*, 33 Cal. 227, 91 Am. Dec. 637; *Matter of Delaney*, 37 Cal. 176; *Englebrecht v. Shade*, 47 Cal. 627; *Kennedy v. Gloster*, 98 Cal. 143; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

*Illinois.* — *Reinbach v. Walter*, 27 Ill. 393; *Conklin v. Foster*, 57 Ill. 104; *Hubbell v. Canady*, 58 Ill. 425; *Stevens v. Hollingsworth*, 74 Ill. 202.

*Iowa.* — *Wright v. Ditzler*, 54 Iowa 620.

*Kansas.* — *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197.

*Kentucky.* — *Hemphill v. Haas*, 88 Ky. 492. *Mississippi.* — *Baldwin v. Tillery*, 62 Miss. 378.

*Missouri.* — *Perkins v. Quigley*, 62 Mo. 498.

*Montana.* — *Watterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527.

*Texas.* — *New Orleans Ins. Assoc. v. Jameson*, 6 Tex. Civ. App. 282; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292. And see *Tenney v. Wessell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 436; *House v. Phelan*, 83 Tex. 595.

**A Part Interest in a Ditch and the water therein for which a right of way has been granted over a homestead has been held a part**

owned by the debtor, but which is on land of another, and is mere personal property, is elsewhere considered.<sup>1</sup>

**b. MACHINERY.** — Those things which are so attached to the homestead as to become a part of the realty, or acquire the character of permanent fixtures, are as much a part of the homestead as are the houses and the soil. Therefore machinery owned by the debtor and annexed to the land is exempt as a part of the homestead.<sup>2</sup>

**c. MATERIAL FOR IMPROVEMENTS.** — Lumber and other materials actually on the ground, and intended for use in the erection of a dwelling house or other improvements, are exempt as part of the homestead to the same extent as the improvements would be when completed.<sup>3</sup>

**d. IMPROVEMENTS BY INSOLVENT DEBTOR.** — In the absence of express provision to the contrary, the fact that the owner of a homestead knows that he is insolvent when he invests money in making improvements on the homestead, so to keep it from his creditors, will not deprive him of his right of exemption.<sup>4</sup>

**e. STATUTE SUBJECTING IMPROVEMENTS.** — In *Kentucky*, and perhaps in other states, the statute expressly declares improvements on a homestead to be subject to a debt contracted before their erection.<sup>5</sup>

**f. TITLE.** — Property to which the owner of a homestead has no title does not constitute a part of the homestead, though it may be annexed to the land, for under such circumstances it does not become a part of the realty.<sup>6</sup> Such is the case where machinery or other property is sold to the owner of a homestead, but the title is to remain in the seller until payment of the price.<sup>7</sup>

**g. BUILDINGS NOT USED FOR HOMESTEAD PURPOSES** — (1) *In General.* — In some states buildings have been held to be included in the homestead, and exempt as a part of it, though detached, and though used for an entirely foreign purpose, as for business purposes unconnected with the homestead,<sup>8</sup> the theory being that the object of the statute is not merely to give a shelter to the debtor and his family, but also to give him the means of supporting his family.<sup>9</sup> In other states the courts have taken a different view, and have held that a detached building, though located on the same lot or tract as the dwelling house, is no part of the homestead if it is used for the purposes of

of the homestead and exempt as such. *Fitzell v. Leaky*, 72 Cal. 477.

**1. Buildings on Land of Another.** — See *infra*, this section, *Exemption of Money and Other Personal Property—Buildings Disconnected from the Soil*.

**2. Machinery Permanently Annexed.** — *Gentry v. Bowser*, 2 Tex. Civ. App. 388; *New Orleans Ins. Assoc. v. Jameson*, 6 Tex. Civ. App. 282; *Willis v. Morris*, 66 Tex. 628; *House v. Phelan*, 83 Tex. 595.

**Machinery Not Annexed to the realty is not exempt.** It was so held in *Cullers v. James*, 66 Tex. 494, with respect to a mill and gin with their machinery, which was on the land occupied as a homestead, but was not attached thereto. See also *Taylor v. Prendergast*, (Tex. Civ. App. 1894) 29 S. W. Rep. 87.

**3. Material for Erection of Improvements.** — *Scofield v. Hopkins*, 61 Wis. 370; *Krueger v. Pierce*, 37 Wis. 269. And see *Anderson v. McKay*, 30 Tex. 186.

**4. Improvements on Homestead by Insolvent Debtor.** — *Chase v. Swayne*, 88 Tex. 218, 53 Am. St. Rep. 742. And see *Kelly v. Sparks*, 54 Fed. Rep. 70; *In re Parks*, 9 Nat. Bankr. Reg. 270.

**5. Statute Declaring Improvements Subject to**

**Debts Previously Contracted.** — Stat. Ky. (1894), § 1702; *Butler v. Davis*, (Ky. 1893) 23 S. W. Rep. 220; *Thomas v. Lucas*, (Ky. 1898) 45 S. W. Rep. 68.

Where the owner of a homestead pulls down the old dwelling house on the homestead and builds a new one in part with the material thereof, the new house is an improvement within the meaning of this statute, so as to be subject to debts contracted before its erection. *Butler v. Davis*, (Ky. 1893) 23 S. W. Rep. 220.

**6. Title Must Be in Owner of Homestead.** — *McNeil v. Moore*, 7 Tex. Civ. App. 536.

**7. Property Sold Conditionally.** — *Marshall v. Bachelord*, 47 Kan. 442; *McNeil v. Moore* 7 Tex. Civ. App. 536.

**8. Detached Buildings Not Used in Connection with Homestead — View that They Are Exempt** — *Illinois*, — *Stevens v. Hollingsworth*, 74 Ill. 203; *Bartholomae, etc., Brewing, etc., Co. v. Schroeder*, 67 Ill. App. 560.

*Missouri*, — *Perkins v. Quigley*, 62 Mo. 503. *Nebraska*, — *Clark v. Shannon*, 1 Nev. 568.

*New Hampshire*, — *Buxton v. Dearborn*, 46 N. H. 43.

*Texas*, — *Houston, etc., R. Co. v. Winter*, 44 Tex. 611; *Moore v. Whitis*, 30 Tex. 440.

**9. Clark v. Shannon**, 1 Nev. 568.



an independent business.<sup>1</sup>

(2) *Buildings Leased to Others.* — There is also a conflict in the decisions with respect to the right to claim as part of the homestead detached buildings leased to others. Some courts hold that they are exempt,<sup>2</sup> but most courts have held otherwise even when the building was on the same lot or tract as the homestead, on the ground that the statute does not contemplate the exemption of buildings used merely as a source of revenue.<sup>3</sup>

9. *Business Homestead.* — In *Texas*, since 1876, the constitution has con-

1. *View that Buildings Used for Independent Business Are Not Exempt.* — In *Greeley v. Scott*, 2 Woods (U. S.) 657, under a constitutional provision of Florida exempting a rural homestead of one hundred and sixty acres without limit as to value, it was held that a farmer's homestead would not embrace tenant houses, sawmills, gristmills, etc., situated on his farm, though his residence was also situated thereon and the farm did not exceed one hundred and sixty acres. It was further said that a mill-owner who had a farm attached to his mill and cultivated it as a secondary business could hold his residence and mill exempt, but not the farm also, and that the owner of a sawmill who followed the business of sawing lumber and whose mill was adjacent to his residence would be entitled to hold the mill as part of his homestead, but that he could not hold those portions of the one hundred and sixty acres which were not ancillary to his business as a lumberman. See also to the same effect *Mouriquand v. Hart*, 22 Kan. 594, 31 Am. Rep. 200.

In *California*, while a homestead cannot include two dwelling houses on the same lot at the time of filing the declaration of homestead, yet the subsequent erection of an additional dwelling house upon the lot will not vitiate or affect the homestead, unless the second house increases the value of the homestead beyond the statutory limit. *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108.

*Partial Use of Dwelling House for Business.* — See *supra*, this section, 4. *c.* (2) *Use in Part for Business.*

*Use of Adjoining Lot or Tract.* — See *supra*, this section, 6. *b.* *Use in Connection with Homestead.*

*Use of Detached Lot or Tract.* — See *supra*, this section, 7. *c.* *Use in Connection with Homestead.*

2. *View that Buildings Are Exempt Though Leased to Others* — *Illinois.* — *Conklin v. Foster*, 57 Ill. 104; *Bartholomae, etc., Brewing, etc., Co. v. Schroeder*, 67 Ill. App. 560.

*Kansas.* — *Layson v. Grange*, 48 Kan. 440; *Milford Sav. Bank v. Ayers*, 48 Kan. 602.

*Mississippi.* — *Colbert v. Henley*, 64 Miss. 374.

And see the *Texas* cases referred to in the note following.

*Illustration.* — Thus in *Mississippi*, where the head of a family owned a town lot upon which there were two houses, and usually resided in one of them with her family, but in the summer time, when visitors came to the town, rented out this house, and lived temporarily in the other, it was held that she might claim the whole as a homestead. *Colbert v. Henley*, 64 Miss. 374.

3. *View that Detached Buildings Leased to*

*Others Are Not Exempt* — *United States.* — *Greeley v. Scott*, 2 Woods (U. S.) 657.

*California.* — *Tiernan v. His Creditors*, 62 Cal. 286; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180.

*Iowa.* — *Kurz v. Brusck*, 13 Iowa 371, 81 Am. Dec. 435.

*Kansas.* — *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197. But see *Layson v. Grange*, 48 Kan. 440; *Milford Sav. Bank v. Ayers*, 48 Kan. 602.

*Michigan.* — *Dyson v. Sheley*, 11 Mich. 527; *Geney v. Maynard*, 44 Mich. 578.

*Wisconsin.* — *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710; *Schoffen v. Landauer*, 60 Wis. 334; *Hoffman v. Junk*, 51 Wis. 613.

*If There Is a Double House on a City Lot*, intended for two families, one half leased to tenants, the other occupied by the owner, the latter cannot claim as homestead that portion not occupied by him. *Tiernan v. His Creditors*, 62 Cal. 286. And see *Dyson v. Sheley*, 11 Mich. 527.

*Buildings Occupied by Servants.* — The rule does not apply to detached buildings occupied by servants employed in the family of the owner. *Schoffen v. Landauer*, 60 Wis. 334.

*Rule in Texas.* — In *Texas* the fact that some of the buildings on the homestead are leased to others does not necessarily prevent the whole from being exempt. See *Rollins v. O'Farrel*, 77 Tex. 90. And where a new residence is built and occupied upon the homestead premises, and a part of the old residence is rented to pay for the meals of the family, who reserve a room therein and eat with the lessee, the retention of control of a part of it for use by the family, taken in connection with the purpose of the renting, constitutes the whole property a homestead. *Bailey v. Bauknight*, (Tex. Civ. App. 1894) 25 S. W. Rep. 56. See also *Tenney v. Wessell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 436.

Yet when a city or town homestead is divided, and improvements are put upon the subdivisions for the purpose of being leased, an unimportant or subsidiary use of the subdivisions for household purposes will not protect the lots so improved from forced sale. *Blum v. Rogers*, 78 Tex. 530. And see *McDonald v. Clark*, (Tex. 1892) 19 S. W. Rep. 1023; *Hensley v. Shields*, 6 Tex. Civ. App. 136.

*As to Lease of Part of Dwelling House*, see *supra*, this section, 4. *c.* (3) *Lease of Part.*

*As to Lease of Adjoining Lots or Tracts*, see *supra*, this section, 6. *c.* *Adjoining Land Leased to Others.*

*As to Lease of Detached Lots or Tracts*, see *supra*, this section, 7. *d.* *Lots or Tracts Leased to Others.*

tained a provision extending the urban homestead exemption to a lot or lots where the head of a family exercises his "calling or business."<sup>1</sup> One is entitled to such a business homestead in addition to his residence homestead,<sup>2</sup> and his right to it is not affected by the fact that the property in which it is claimed is not adjacent to the residence homestead.<sup>3</sup> But he is not, it seems, entitled to such a homestead unless he is a resident of the town, and consequently he cannot claim both a rural homestead and an urban business homestead.<sup>4</sup> If a part of a lot or lots is occupied for business, the remaining portions thereof are exempt, unless put to some use not connected with such business;<sup>5</sup> and adjacent lots may be so exempt if utilized in connection with the business.<sup>6</sup> While a warehouse or other auxiliary building on the same lot as that on which the business is principally conducted is exempt,<sup>7</sup> a warehouse on another lot, not adjacent, is not exempt.<sup>8</sup> And if one is engaged in different lines of business in separate buildings, he can claim only one as his homestead.<sup>9</sup>

**Character of Business.** — To render the property exempt, it must be adapted and reasonably necessary to the "calling or business" of the head of the family.<sup>10</sup> But the fact that but little, if any, business is actually transacted is immaterial, if the premises are in good faith occupied for that purpose;<sup>11</sup> nor does the fact that the business is conducted in fraud of creditors affect the right to the exemption.<sup>12</sup> Though there is no right to an exemption if the building is devoted to an illegal business, such right is not lost by the fact that the property, though occupied for a legal business, is incidentally used for an illegal purpose, as gaming.<sup>13</sup>

**Loss and Abandonment.** — The right to the exemption is lost by the abandonment of the premises for purposes of business,<sup>14</sup> and if the building or a portion thereof is leased by the owner to other persons for purposes inconsistent with his continued use thereof, the portion leased ceases to be exempt;<sup>15</sup> but this is not the case if the renting is merely temporary.<sup>16</sup> And though the home-

**1. Business Homestead.** — See Const. Tex., art. 16, § 51; *Miller v. Menke*, 56 Tex. 539; *Wright v. Straub*, 64 Tex. 64; *Inge v. Cain*, 65 Tex. 75; *Exall v. Security Mortg., etc., Co.*, 15 Tex. Civ. App. 643; *Kahler v. Carruthers*, 18 Tex. Civ. App. 216; *Webb v. Hayner*, 49 Fed. Rep. 601.

**Partners** may, it seems, have such a homestead right in their undivided interests in the partnership realty. *Swearingen v. Bassett*, 65 Tex. 267.

**2. Miller v. Menke**, 56 Tex. 539; *McDonald v. Campbell*, 57 Tex. 614; *King v. Harter*, 70 Tex. 579; *Waggener v. Haskell*, 89 Tex. 435; *Atkinson v. Phares*, 20 Tex. Civ. App. 150.

**3. Miller v. Menke**, 56 Tex. 550; *McDonald v. Campbell*, 57 Tex. 614; *Shryock v. Latimer*, 57 Tex. 674; *Webb v. Hayner*, 49 Fed. Rep. 601.

**4. Posey v. Bass**, 77 Tex. 512.

**5. To What Exemption Extends.** — *Hargadene v. Whitfield*, 71 Tex. 489; *Lavell v. Lapowski*, 85 Tex. 168.

**6. Lavell v. Lapowski**, 85 Tex. 168; *Schneider v. Campbell*, 1 Tex. Civ. App. 314.

**7. Auxiliary Buildings.** — *Hargadene v. Whitfield*, 71 Tex. 489; *Maroney Hardware Co. v. Connellee*, (Tex. Civ. App. 1894) 25 S. W. Rep. 448.

**8. Hinz v. Moody**, 1 Tex. Civ. App. 26; *McDonald v. Campbell*, 57 Tex. 614. Compare *Low v. Tandy*, 70 Tex. 745.

**9. Separate Business Ventures.** — *Parrish v. Frey*, 18 Tex. Civ. App. 271.

**10. Character of Business.** — *Shryock v. Latimer*, 57 Tex. 674; *Wynne v. Hudson*, 66 Tex. 1; *Pfeiffer v. McNatt*, 74 Tex. 640; *Houston v. Newsome*, 82 Tex. 75; *Gassoway v. White*, 70 Tex. 475; *Van Slyke v. Barrett*, (Tex. 1891) 16 S. W. Rep. 902. See also *Hargadene v. Whitfield*, 71 Tex. 482; *Atkinson v. Phares*, 20 Tex. Civ. App. 150.

**11. Gassoway v. White**, 70 Tex. 475. In *May v. International L. & T. Co.*, 92 Fed. Rep. 445, it was held that one who leased a building under an agreement that he should receive as compensation one-half of the profit of the business did not have such an interest in the business as to be entitled to claim the building as his business homestead.

**12. Fraud as to Creditors.** — *Gassoway v. White*, 70 Tex. 475; *King v. Harter*, 70 Tex. 579.

**13. Illegal Business.** — *Tillman v. Brown*, 64 Tex. 181. In *Gassoway v. White*, 70 Tex. 475, it was decided that the failure to pay a license tax did not render the business illegal so as to deprive the owner of the exemption.

**14. Loss and Abandonment.** — *Miller v. Menke*, 56 Tex. 539; *Duncan v. Alexander*, 83 Tex. 441; *Shryock v. Latimer*, 57 Tex. 674.

**15. Lease by Owner.** — *Hargadene v. Whitfield*, 71 Tex. 482; *Pfeiffer v. McNatt*, 74 Tex. 640; *Foust v. Sanger*, 13 Tex. Civ. App. 410.

**16. Maroney Hardware Co. v. Connellee** (Tex. Civ. App. 1894) 25 S. W. Rep. 448; *Storrie v. Woessner*, (Tex. Civ. App. 1898) 47 S. W. Rep. 537.

In *Brennan v. Fuller*, 14 Tex. Civ. App. 111, it was held that a lease for a term of years did not constitute an abandonment of the homestead.

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stead right is not lost, the rents thereof are liable to garnishment.<sup>1</sup>

**10. Exemption of Money and Other Personal Property** — *a. IN GENERAL.* — In a few states the homestead laws not only exempt a homestead in real property, as a dwelling house and the land used in connection therewith, but also exempt certain personal property under the designation of homestead.<sup>2</sup>

*b. MATERIAL FOR USE ON HOMESTEAD.* — As was shown in another place, the exemption of a homestead covers lumber and other materials obtained by the debtor for the purpose of repairing the dwelling house occupied by him as a homestead and actually deposited upon land included in the homestead, and materials actually upon the ground and designed to be used in the construction of a dwelling house, well, or other appurtenances of a homestead which the owner intends to occupy as such.<sup>3</sup>

*c. BUILDINGS DISCONNECTED FROM THE SOIL.* — In some states it is held that the homestead exemption does not attach to the ownership of a tenement disconnected from the soil upon which it is erected. The homestead right can attach, in other words, only to the building occupied as a home through or by virtue of ownership of land upon which it is situated.<sup>4</sup> As was shown, however, in a previous section, the ownership of the soil need not be in fee, but may be for life or for a term of years, etc.<sup>5</sup> In other states a debtor may claim a house as his homestead whether he owns or does not own any interest or estate in the land on which it stands, if it is used as the home of his family.<sup>6</sup>

**11. Proceeds and Product of Exempt Homestead** — *a. PROCEEDS IN GENERAL.* — In some cases money or other personal property or land may be exempt because of its being the proceeds or product of an exempt homestead, but this is not always the case.<sup>7</sup>

In Georgia the statute expressly provides that "all produce, rents, or profits arising from homesteads" shall be exempt;<sup>8</sup> and a similar statute exists in Vermont.<sup>9</sup>

509, it was held that though one rented the main part of the building, retaining but a small corner thereof for his own business purposes, he did not lose his exemption as to the whole building, he having the right of ingress and of passage through the building for himself and his customers.

1. *Brennan v. Fuller*, 14 Tex. Civ. App. 509.

2. **Exemption of Money or Other Personal Property.** — Civ. Stat. S. Car. (1893), § 2131; *Gray v. Putnam*, 51 S. Car. 97; *Union Bank v. Northrop*, 19 S. Car. 473.

There was no exemption of money in *South Carolina* prior to the constitutional amendment of 1880. *Union Bank v. Northrop*, 19 S. Car. 473.

Under the exemption of "personal property" money may be claimed. *Gray v. Putnam*, 51 S. Car. 97. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 146 *et seq.*

3. **Exemption of Material for Use on Homestead.** — *Krueger v. Pierce*, 37 Wis. 269; *Zimmer v. Pauley*, 51 Wis. 285; *Scofield v. Hopkins*, 61 Wis. 370. See *supra*, this section, *Appurtenances and Improvements*.

4. **View that Buildings Disconnected with Land Are Not Exempt.** — *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258; *Kuttner v. Haines*, 35 Ill. App. 307, 135 Ill. 382, 25 Am. St. Rep. 370.

In *Michigan* it was held that no homestead right attached to a house erected on land held under contract to purchase and wrongfully removed by the vendee to a third person's land.

*Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49.

In *Arkansas* a building situated upon a homestead loses its exempt character as a part of the homestead when it is removed, and may then be seized and sold on execution. *Klenk v. Knobbe*, 37 Ark. 303; *Curtis v. Des Jardins*, 55 Ark. 126.

5. See *supra*, this title, *Title or Interest Necessary to Support Homestead Exemption*.

6. **View that Building Alone May Be Exempt.** — In *Texas* it is held that a house is embraced in the term "homestead," *Franklin v. Coffee*, 18 Tex. 417; and if the head of a family owns a house and occupies it with his family, it is the home of the family, and within the spirit and purpose of the constitution, though the head has no interest or estate whatever in the land on which it is situated. *Cullers v. James*, 66 Tex. 494. See also *Franklin v. Coffee*, 18 Tex. 417; *Luck v. Zapp*, 1 Tex. Civ. App. 528.

7. **Proceeds and Product of Exempt Homestead.** — As to the exemption of proceeds of exempt personal property, see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 150.

8. 2 Code Ga. (1895), § 2848; *Larey v. Baker*, 85 Ga. 687.

Fees due to a physician are not exempt as the "proceeds" of exempt property, because earned by him while living upon a homestead, and using in his practice a horse, medical books, etc., which had been set apart to him as exempt. *Staples v. Keister*, 81 Ga. 772.

9. Stat. Vt. (1894), § 2179. See *Jewett v. Guyer*, 38 Vt. 209.



**b. RENT OF PROPERTY.** — In most jurisdictions, as has been elsewhere explained, land which is not occupied as a homestead, but is leased to others, cannot be claimed as exempt; <sup>1</sup> nor can the rent of such property be claimed as exempt. <sup>2</sup> It has been held in some states that where a homestead is leased temporarily, and retains its character as a homestead, the rent accruing under the lease will be exempt. <sup>3</sup> This is not true, however, in all jurisdictions. <sup>4</sup> The rents due from a trespasser on the homestead are exempt. <sup>5</sup>

**c. CROPS RAISED ON HOMESTEAD.** — In most states, perhaps, the right of homestead exemption extends to crops while they are growing on the homestead. <sup>6</sup> In some states, though not in all, it extends to crops which have been grown on the homestead even after they have been gathered or harvested, <sup>7</sup> and to cattle or other property purchased with the proceeds of such crops. <sup>8</sup>

**d. MINING ROYALTIES AND FORFEITURES.** — In *Georgia* it has been held that where one leases part of the land set apart as a homestead, for mining purposes, under a contract by which the lessee is to pay a certain amount on the ore mined, or, in case the land is not worked, to pay a certain forfeiture, both the royalties and such forfeiture, when due, are profits within the meaning of the provision in that state exempting "all produce, rents, or profits arising from homesteads." <sup>9</sup> In *Texas*, however, it has been held that royalties due for coal mined on a homestead are not exempt. <sup>10</sup>

**e. PROPERTY PURCHASED WITH INCOME OF HOMESTEAD.** — In *Georgia* property that is purchased by the head of a family and paid for exclusively out of the income of the homestead is regarded and treated as an addition to the *corpus* of the homestead estate, and is exempt as a part thereof. <sup>11</sup>

**1. Leased Premises.** — See *supra*, this section, *Use for Other Purposes than as Residence — Premises Leased to Others.*

**2. Rent Not Exempt.** — *Hoitt v. Webb*, 36 N. H. 166; *Horn v. Tufts*, 39 N. H. 478.

**3. Rent Accruing from Temporary Lease.** — *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234; *Ailey v. Burnett*, 134 Mo. 313.

In *Georgia* the statute expressly provides that rents arising from homesteads shall be exempt. 2 Code Ga. (1895), § 2848; *Larey v. Baker*, 85 Ga. 687.

**4. Wing v. Hayden**, 10 Bush (Ky.) 280; *Citizens' Nat. Bank v. Green*, 78 N. Car. 247; *Hinzle v. Moody*, 13 Tex. Civ. App. 193.

**5. Rents Due from Trespasser.** — *Lamaster v. Dickson*, 17 Tex. Civ. App. 473. See *infra*, this section, *II. h. (2), Judgment, etc.*

**6. Exemption of Crops Growing on Homestead — Georgia.** — *Wade v. Weslow*, 62 Ga. 563.

*Iowa.* — *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234.

*Texas.* — *Alexander v. Holt*, 59 Tex. 205; *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725; *Bailey v. Oliver*, (Tex. 1888) 9 S. W. Rep. 606; *Phillips v. Warner*, (Tex. 1890) 16 S. W. Rep. 423. See *Cobbs v. Coleman*, 14 Tex. 75.

**7. Gathered Crops.** — In *Georgia* the statute expressly provides that all proceeds and profits arising from the homestead shall be exempt, and the exemption applies to gathered crops as well as to growing crops. *Cox v. Cook*, 46 Ga. 301; *Wade v. Weslow*, 62 Ga. 563; *Whitehead v. Mundy*, 91 Ga. 198; *Martin v. Davis*, 104 Ga. 633.

In *Iowa* there is no such provision as that in *Georgia*, but it has nevertheless been held that gathered crops are exempt because of the exemption of the homestead. *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234.

And in *Missouri* it is held that a debtor is not only entitled to possession of the homestead, but is also entitled to enjoy the profits thereof. *Ailey v. Burnett*, 134 Mo. 313.

In *Vermont* the yearly products of the homestead are exempt, and it makes no difference that the debtor has received an equal or greater amount from other portions of his possessions. *Jewett v. Guyer*, 38 Vt. 209.

In *California* it is held that grain is not exempt after being harvested, though grown upon the homestead. *Horgan v. Amick*, 62 Cal. 401.

In *Texas* crops grown on the homestead are not exempt after they have been gathered. *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725; *Bailey v. Oliver*, (Tex. 1888) 9 S. W. Rep. 606.

In *North Carolina* the income derived from crops grown on the homestead is not exempt. *Citizens' Nat. Bank v. Green*, 78 N. Car. 247.

**8. Sheep Purchased with Proceeds of Crop.** — In *Wade v. Weslow*, 62 Ga. 563, it was held not only that crops grown upon the homestead are exempt, but that sheep purchased with the proceeds of the crop and put on the homestead are also exempt. The correctness of this ruling was questioned in *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725.

**9. Royalties and Forfeitures under Mining Leases.** — *Larey v. Baker*, 85 Ga. 687.

**10. F. F. Collins Mfg. Co. v. Carr**, 11 Tex. Civ. App. 364.

**11. Property Paid For out of Income of Homestead.** — *Kilmer v. Dunder*, 102 Ga. 477; *Mitchell v. Prater*, 78 Ga. 767; *Murray v. Sells*, 53 Ga. 257; *Cheney v. Rodgers*, 54 Ga. 168, 50 Ga. 861; *Morris v. Tennent*, 56 Ga. 577; *Dodd v. Thompson*, 63 Ga. 393.

**If Property Is Purchased Partly with Such Income,** an exemption is available in such cases.

*f. PROCEEDS OF VOLUNTARY SALE OF HOMESTEAD — (1) In General.* — In the absence of some provision in the statute to the contrary, the voluntary sale of his homestead by a debtor will constitute a waiver or abandonment of his right of homestead exemption, and the right will not follow and attach to the proceeds, but creditors may reach and subject them by garnishment or otherwise.<sup>1</sup>

(2) *Statutes Protecting Proceeds.* — In many states, however, the statute expressly or impliedly allows a debtor to sell his homestead for the purpose of investing in another homestead, and protects the proceeds prior to such reinvestment.<sup>2</sup> In some states the proceeds are thus protected for a limited time only.<sup>3</sup>

**Sale for Reinvestment in Georgia.** — In Georgia the statute contains express provisions by which, when real or personal property has been set apart as a homestead exemption, the debtor and his wife, or the other beneficiaries, may apply to the judge of the Superior Court to have the property or any part thereof sold for reinvestment. The sale is made under the judge's order, and the proceeds are reinvested upon the same uses. The power of a chancellor to provide the means and mode of sale and reinvestment is given to the judge.<sup>4</sup>

equitable pleadings. *Kiser v. Dozier*, 102 Ga. 429. See also *Vining v. Officers of Ct.*, 82 Ga. 222, 86 Ga. 127, a case which seems to negative the necessity of equitable pleadings to prevent the sale of the property.

1. **Proceeds of Voluntary Sale of Homestead.** — *Giddens v. Williamson*, 65 Ala. 439; *Lane v. Richardson*, 104 N. Car. 642; *Whittenberg v. Lloyd*, 49 Tex. 633; *Moursund v. Priess*, 84 Tex. 554; *Kirby v. Giddings*, 75 Tex. 679; *Mann v. Kelsey*, 71 Tex. 609, 10 Am. St. Rep. 800; *Womack v. Stokes*, 12 Tex. Civ. App. 648.

**Personal Property Exemption.** — But in some states where the personal property exemption extends to money and choses in action, the proceeds of a voluntary sale of the homestead, while not exempt under the statute exempting a homestead, become subject to the personal property exemption. *Lane v. Richardson*, 104 N. Car. 642. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 150.

2. **Statutes Exempting Proceeds — Illinois.** — *Watson v. Saxer*, 102 Ill. 585.

*Iowa.* — *Peninsular Stove Co. v. Roark*, 94 Iowa 560; *Schutloffel v. Collins*, 98 Iowa 576, 60 Am. St. Rep. 216; *Robinson v. Charleton*, 104 Iowa 296.

*Kansas.* — *Brenneke v. Duigenan*, 6 Kan. App. 229.

*Kentucky.* — *Cooper v. Arnett*, 95 Ky. 603; *Allen v. Gravitt*, 3 Ky. L. Rep. 534; *Skinner v. Chadwell*, 8 Ky. L. Rep. 258; *King v. Tompkins*, 15 Ky. L. Rep. 29; *Sebastian v. Steel*, (Ky. 1892) 20 S. W. Rep. 269.

*Mississippi.* — *Airey v. Buchanan*, 64 Miss. 181; *Thoms v. Thoms*, 45 Miss. 263.

*Nebraska.* — *Schribar v. Platt*, 19 Neb. 625; *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414; *Corey v. Plummer*, 48 Neb. 481.

*South Carolina.* — *Ex p. Allison*, 45 S. Car. 338.

*Wisconsin.* — *Watkins v. Blatschinski*, 40 Wis. 347; *Hewett v. Allen*, 54 Wis. 583; *Binzel v. Grogan*, 67 Wis. 147; *Bailey v. Steve*, 70 Wis. 316; *Hoppe v. Goldberg*, 82 Wis. 660; *Clancey v. Alme*, 98 Wis. 229.

See also *Smith v. Enos*, 91 Mo. 579.

3. **Limited Time.** — In *Wisconsin* the proceeds of a sale of the homestead are exempt for two years, and for that time only. *Stat. Wis.* (1898), § 2983; *Hewett v. Allen*, 54 Wis. 583; *Bailey v. Steve*, 70 Wis. 316.

In *Nebraska* the proceeds of a sale of the homestead are exempt for six months. *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414.

**Residence in State During Period of Exemption.** — In *Wisconsin*, where the proceeds derived from the sale of the homestead are exempted for a period not exceeding two years, it has been held that it is not necessary, as a condition of such exemption, that the debtor shall continue to reside in the state during the two years. *Hewett v. Allen*, 54 Wis. 583.

**Where a Debtor Sells His Homestead Together with Personal Property for a Gross Sum**, the exemption extends to such portion of the proceeds, not exceeding the value of the homestead, as he holds with the intention of procuring another homestead. *Binzel v. Grogan*, 67 Wis. 147.

**Rights of Wife on Death of Husband.** — Where the homestead is sold with the intention of investing the proceeds in a new homestead, and the owner dies before the proceeds of the sale have been received, his wife is entitled to such proceeds exempt from the claims of creditors whose claims would not have attached to the new homestead if procured. *Schutloffel v. Collins*, 98 Iowa 576, 60 Am. St. Rep. 216.

4. **Sale under Order of Court for Reinvestment — Georgia Statute.** — 2 Code Ga. (1895), § 2847 *et seq.* See *Mitchell v. Prater*, 78 Ga. 767; *Skinner v. Moye*, 69 Ga. 476; *Barfield v. Barfield*, 72 Ga. 668; *City Bank v. Smisson*, 73 Ga. 422; *Sirmans v. Sirmans*, 74 Ga. 541; *Linch v. McIntyre*, 78 Ga. 209; *Stephenson v. Eberhart*, 79 Ga. 116; *Deyton v. Bell*, 81 Ga. 370; *Fleetwood v. Lord*, 87 Ga. 592.

**In the Application the head of a family must join his wife, if he has one; a widow need not join her children therein; but a trustee or guardian for minors must make the children parties.** *Deyton v. Bell*, 81 Ga. 370.

**Title of Purchaser.** — Where exempted property is sold for reinvestment under the order



(3) *Sale on Time*. — It is not necessary that the old homestead be sold for cash and the cash immediately invested. The sale may be on time, and if the intention is to invest the proceeds, when realized, in a new homestead, they will be exempt.<sup>1</sup>

(4) *Intention to Reinvest*. — Where this is the case the proceeds derived from a sale of the homestead are not exempt when they are not held with the intention of investing in another homestead, or if they are invested in property other than a homestead.<sup>2</sup>

(5) *Proceeds Given to Wife*. — It has been held in several cases that where a homestead is sold, and the proceeds, whether money or property, are given or conveyed directly to the wife as her separate property and in consideration of her consent to the sale of the homestead, such proceeds are not liable to be reached by the creditors of her husband.<sup>3</sup>

g. VOLUNTARY SURRENDER TO ASSIGNEE FOR CREDITORS. — Where a debtor makes an assignment for the benefit of creditors, reserving his home-

of the court the sale operates to pass to the purchaser the entire interest and title of the beneficiaries in the exempted property. 2 Code Ga. (1895), § 2847, subsec. 2; Van Horn v. McNeill, 79 Ga. 121.

**Liability of Purchasers — Set-off.** — Where a commissioner appointed by the chancellor to sell exempted property for the purpose of reinvestment makes a sale thereof, the purchasers are bound to pay the price, and they cannot set off in a suit therefor a debt due by the husband or either of the beneficiaries to them. *Sirmans v. Sirmans*, 74 Ga. 541.

**Review on Appeal — Adequacy of Price.** — On appeal the Supreme Court cannot inquire whether the price for which a homestead was sold for reinvestment was adequate or inadequate. *Deyton v. Bell*, 81 Ga. 370.

**Where a Homestead Was Sold for the Purpose of the Removal of the Family to Another State** and the making of a reinvestment there, the reversionary interest of the head of the family, in the hands of the purchaser, was held subject to levy and sale by a creditor. *City Bank v. Smisson*, 73 Ga. 422.

**Injunction.** — Where the head of a family has applied to the judge of the Superior Court for leave to sell all or a part of the homestead, equity will not, at the instance of the two minor children of the applicant, enjoin the sale on the ground that the applicant drinks to excess, has married a second wife, has had his affections alienated from the petitioners, is mismanaging the estate, and threatens to so manage it as to deprive the petitioners of all benefit therefrom. *Barfield v. Barfield*, 72 Ga. 668.

1. **Sale May Be on Credit.** — *State v. Geddis*, 44 Iowa 537; *Schuttloffel v. Collins*, 98 Iowa 576, 60 Am. St. Rep. 216; *Allen v. Gravitt*, 3 Ky. L. Rep. 534.

**Notes Executed by the purchaser of a homestead** cannot be subjected by a creditor of the seller unless he shows their conversion into other property not exempted by law. *Allen v. Gravitt*, 3 Ky. L. Rep. 534; *King v. Tompkins*, 15 Ky. L. Rep. 29.

**The Interest on Notes** taken in payment of a homestead and intended for investment in another homestead is exempt. *Bailey v. Steve*, 70 Wis. 316.

2. **Absence of Intention to Purchase Another**

**Homestead.** — *Huskins v. Hanlon*, 72 Iowa 37; *Peninsular Stove Co. v. Roark*, 94 Iowa 560; *Lear v. Totten*, 14 Bush (Ky.) 101. And see *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234; *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188.

**Proceeds Invested in Business.** — If the proceeds of the homestead are invested in business, the property in which such proceeds are invested does not continue exempt. *Peninsular Stove Co. v. Roark*, 94 Iowa 560.

**The Use by the Debtor of a Portion of the Proceeds** of the sale of his homestead to pay debts and maintain his family does not destroy his right to the exemption of the balance. *Binzel v. Grogan*, 67 Wis. 147.

**Intention to Reinvest in Another State.** — Where the proceeds are exempted, it is not necessary that the debtor shall intend to procure another homestead in the state. *Hewett v. Allen*, 54 Wis. 583. It is sufficient if he intends to invest the proceeds in a homestead in another state. *Schuttloffel v. Collins*, 98 Iowa 576, 60 Am. St. Rep. 216.

**Proceeds of Homestead in Another State.** — But it has been held in *Iowa* that where an Iowa homestead is sold and the proceeds are invested in a homestead in another state, such homestead is not within the statute of Iowa protecting the proceeds of a homestead; and where the homestead in the other state is sold no exemption attaches to land purchased therewith in Iowa. *Dalton v. Webb*, 83 Iowa 478, 32 Am. St. Rep. 314.

3. **Right of Wife to Proceeds of Homestead.** — In *Vermont* it has been held that the proceeds of a sale of the homestead belong to the wife, and cannot be attached for her husband's debts, where she refuses to join in a deed of the homestead unless the avails are given to her, and the husband consents to her having them. *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707. See also *Nance v. Nance*, 28 Ill. App. 587.

In *Texas*, also, it has been held that cattle or other personal property received in payment for sale of a homestead and transferred to the wife to be her separate property, in consideration of her consent to the sale of the homestead, cannot be reached and subjected by creditors of the husband. *Blum v. Light*, 81 Tex. 414; *Gatewood v. Scurlock*, 2 Tex. Civ. App. 98.



stead, and afterwards agrees with his assignee and creditors to surrender his homestead for sale with the other land, in consideration of the payment to him of money in lieu of the homestead, the money thus paid to him is exempt as against any of the creditors who have consented to its payment to him in lieu of his homestead, and they cannot reach and subject it even after he has loaned it out to another.<sup>1</sup>

*h. INVOLUNTARY CONVERSION* — (1) *In General*. — In most states, if an exempt homestead is converted into money or other personal property otherwise than by the voluntary act of the debtor, the money or other property may be claimed as exempt.<sup>2</sup>

(2) *Judgment for Unlawful Sale, Trespass, or Injury*. — If an exempt homestead is wrongfully sold or otherwise taken from the debtor by proceedings *in invitum*, as on execution or attachment, or is lost to him or impaired through any other wrongful act of another, a judgment recovered by him in an action for the wrong, or the money collected under such judgment, is exempt to the same extent as the homestead itself would have been.<sup>3</sup>

(3) *Damages in Condemnation Proceedings*. — Money derived as damages for a right of way taken across a homestead by a railroad company or a municipality is exempt, and this is true notwithstanding the character of the homestead is not destroyed as such by the easement.<sup>4</sup>

(4) *Proceeds of Insurance*. — It is also very generally held that when buildings or other property constituting a part of the debtor's homestead, and exempt as such, are destroyed by fire, the proceeds of a policy of insurance on the property are exempt, to enable him to purchase another homestead or replace the property lost.<sup>5</sup>

**1. Assignment for Benefit of Creditors — Money Paid in Lieu of Homestead.** — *Goodin v. First Nat. Bank*, 15 Ky. L. Rep. 208.

But where, at a sale of a homestead by an assignee for the benefit of creditors, the debtor announced that he relinquished his homestead, and purchased the land, and received a credit to the extent of the homestead exemption on his notes for the purchase money, it was held that he could not again claim a homestead when it was sought to collect the balance due on the notes. *Whitesides v. Cushenberry*, 8 Ky. L. Rep. 590.

**Ohio Statute — Allowance in Lieu of Homestead.** — In Ohio, under a statute allowing an exemption to the extent of five hundred dollars in lieu of homestead, a debtor made an assignment for the benefit of creditors of all his property, reserving all property to which he might be entitled under the homestead and exemption laws, and the appraisers set off to him nothing in lieu of homestead, and the assignee sold his lands in disregard of his selection of a part in lieu of homestead. It was held that the court had the power to order the sum of five hundred dollars to be paid to the assignor out of the proceeds of the sale of the lands in lieu of a homestead. *Kuhn v. Nieberg*, 40 Ohio St. 631.

**2. Involuntary Conversion of Homestead.** — *Houghton v. Lee*, 50 Cal. 101; *Mitchell v. Milhoan*, 11 Kan. 617; *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707; *Stebbins v. Peeler*, 29 Vt. 289.

**3. Judgment for Unlawful Sale of or Injury to Homestead.** — *Mudge v. Lanning*, 68 Iowa 641; *National Bank v. Kilgore*, 17 Tex. Civ. App. 462. And see *Harrell v. Harrell*, 77 Ga. 130.

**Damages Recovered from a Railroad Company for Causing a Fire upon the homestead and**

thereby injuring or destroying fences, buildings, trees, crops, etc., are exempt. *Mudge v. Lanning*, 68 Iowa 641. And see *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234.

**Damages or Rents Recovered Against a Trespasser on a homestead for unlawful seizure and detention thereof are exempt.** *National Bank v. Kilgore*, 17 Tex. Civ. App. 462; *La Master v. Dickson*, 17 Tex. Civ. App. 473.

**4. Money Derived as Damages for Right of Way.** — *Kaiser v. Seaton*, 62 Iowa 466. And see *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234; *Brooks v. Collins*, 11 Bush (Ky.) 622.

**5. Exemption of Proceeds of Insurance on Homestead — California.** — *Houghton v. Lee*, 50 Cal. 101.

*Kentucky.* — *Bernheim v. Davitt*, 9 Ky. L. Rep. 229, (Ky. 1887) 5 S. W. Rep. 193.

*Minnesota.* — *Culbertson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204.

*Texas.* — *Traders Ins. Co. v. Chase*, 11 Tex. Civ. App. 13; *New Orleans Ins. Assoc. v. Jameson*, 6 Tex. Civ. App. 282; *Chase v. Swayne*, 88 Tex. 218, reversing (Tex. Civ. App. 1895) 29 S. W. Rep. 418; *Cameron v. Fay*, 55 Tex. 58; *Whiteselle v. Jones*, (Tex. Civ. App. 1897) 39 S. W. Rep. 405.

To procure a policy of insurance on the homestead is not a fraud on creditors. *Bernheim v. Davitt*, 9 Ky. L. Rep. 229, (Ky. 1887) 5 S. W. Rep. 193.

In *Mississippi* it has been held, contrary to the cases above cited, that money due under a policy of insurance on a house occupied as a homestead represents a personal contract of indemnity with the owner, and is not exempt as representing the homestead; but in this case the court, contrary to the overwhelming weight of authority, also held that the home-

(5) *Judicial and Execution Sales of Homestead* — (a) **In General.** — In most states, perhaps, where a homestead is sold at a judicial sale for a debt as against which it is not exempt, and a surplus remains, the debtor may claim the amount of his exemption in such surplus, to enable him to purchase another homestead.<sup>1</sup>

(b) **Execution Sale.** — This is the case in some states where a homestead is sold under execution on a judgment which is superior to the homestead exemption right.<sup>2</sup>

(c) **After Setting Aside Conveyance as Fraudulent.** — Where creditors attack a conveyance of land as fraudulent and procure a judicial sale of the land, the amount of the homestead exemption may be claimed out of the proceeds in those jurisdictions in which it is held that a conveyance of the homestead cannot be made in fraud of creditors.<sup>3</sup>

(d) **Partition Sale.** — When a tenant in common is allowed to assert the right of exemption, as is the case in most jurisdictions,<sup>4</sup> and a partition in kind between him and his copartners is impracticable, the homestead right will attach to and protect the proceeds of a sale made for the purpose of partition to the extent of the homestead value.<sup>5</sup>

(e) **Foreclosure of Mortgage.** — Giving a mortgage on the homestead does not

stead exemption laws are strictly construed. *Smith v. Ratcliff*, 66 Miss. 683, 14 Am. St. Rep. 606. See also *Monniea v. German Ins. Co.*, 12 Ill. App. 240. See further the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 152.

1. **Judicial Sale of Homestead — Exemptions — United States.** — *In re Beckerford*, 1 Dill. (U. S.) 45, 3 Fed. Cas. No. 1,209 (under a Missouri statute of 1864).

*Arkansas.* — *Simpson v. Biffle*, 63 Ark. 289.

*Illinois.* — *Walsh v. Horine*, 36 Ill. 238.

*Kansas.* — *Mitchell v. Milhoan*, 11 Kan. 617; *Gilworth v. Cody*, 21 Kan. 702; *Brenneke v. Daigenan*, 6 Kan. App. 229.

*Kentucky.* — *Schmidt v. Oliges*, 6 Ky. L. Rep. 296; *Robinson v. Blackerby*, (Ky. 1887) 5 S. W. Rep. 312.

*Mississippi.* — *Edmonson v. Meacham*, 50 Miss. 34.

*Ohio.* — *Jackson v. Reid*, 32 Ohio St. 443; *Bills v. Bills*, 41 Ohio St. 206.

*South Carolina.* — *Swandale v. Swandale*, 25 S. Car. 389.

*Texas.* — *Jenkins v. Volz*, 54 Tex. 636.

*Vermont.* — *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707.

*Wisconsin.* — *Clancey v. Alme*, 98 Wis. 229.

In *Kansas* the proceeds arising from the forced sale of a homestead are exempt from any execution issued on any judgment which was not a lien on such homestead, so long as the judgment debtor desires and expects to use the money in purchasing another homestead, or in redeeming the former homestead from the sale. *Mitchell v. Milhoan*, 11 Kan. 617; *Gilworth v. Cody*, 21 Kan. 702.

In *Illinois*, where a homestead is sold under process, the statute exempts the proceeds to the extent of one thousand dollars, for one year after the receipt thereof. The exemption is for a year from the time when the money is actually paid over. And a tender of the money by the officer before the sale has had a reasonable time within the period of redemption to test the validity of the sale makes no difference. *Walsh v. Horine*, 36 Ill. 238.

**Garnishment.** — Where an execution creditor pays to the sheriff the value of the homestead and causes the premises to be sold for satisfaction of his debt, the officer holds the money for the use of the homesteader. It is not in the custody of the law, and is subject to garnishment. And if the sheriff is garnished at the suit of a creditor of the debtor, he cannot be required upon mere motion to pay the money over to the homesteader. The right to the money stands for determination in the garnishment proceeding, where the attaching creditors may be heard. *Self v. Schoenfeld*, 60 Ill. App. 65.

In *Texas*, where there was no law authorizing a sale or transfer of the homestead, it was held that where a homestead was sold to satisfy a vendor's lien, the surplus was not exempt. The sale, it was said, was a voluntary conversion of the homestead into money, and the money was not exempt. *Mann v. Kelsey*, 71 Tex. 609, 10 Am. St. Rep. 800.

2. **Execution Sale.** — *Robinson v. Blackerby*, (Ky. 1887) 5 S. W. Rep. 312.

Thus in *Arkansas*, where land is sold under execution on a judgment rendered before its occupancy as a homestead, and which is therefore a lien upon the land, the surplus remaining after satisfying the execution cannot be applied upon another execution on a judgment rendered after occupancy. *Simpson v. Biffle*, 63 Ark. 289.

In *South Carolina* a sale of the homestead under an execution is absolutely void, and a person who claims a right of homestead in land sold under execution cannot claim an exemption in the proceeds of the sale. *Ross v. Bradford*, 28 S. Car. 71.

3. **Sale After Setting Conveyance Aside as Fraudulent.** — *Edmonson v. Meacham*, 50 Miss. 34. See also *Bills v. Bills*, 41 Ohio St. 206.

4. **Exemption Attaches to Proceeds of Partition Sale.** — See *supra*, this title, *Title or Interest*.

5. *Swandale v. Swandale*, 25 S. Car. 389; *Jenkins v. Volz*, 54 Tex. 636.



waive the right of exemption except as against the mortgage debt; and in a number of states the mortgagor is entitled, on foreclosure of the mortgage, to have the amount of his homestead exemption set off to him out of the surplus, after satisfying the secured debt, before any part of the proceeds can be applied to the satisfaction of debts as against which the homestead exemption might be claimed.<sup>1</sup>

**2. CHANGE OF HOMESTEAD.**—It is clear that if no rights of creditors intervene, and there is no provision in the statute to prevent, a debtor may change his homestead by moving from one tract of land to another, and claim the new homestead as exempt; but in the absence of statutory provision he cannot, by moving from one tract of land to another, hold the latter as his homestead as against the lien of a judgment which attached thereto prior to the removal.<sup>2</sup> In some states it is otherwise by express provision of the statute. In *Iowa*, for example, the statute expressly provides that the owner may from time to time change his homestead, and hold the new homestead exempt from execution, to the extent in value of the old, in all cases where the former homestead would have been exempt, but that such change shall not prejudice conveyances or liens made or created previous to the change.<sup>3</sup>

**Consent of Wife.**—In the absence of statutory provision to the contrary, a husband may change his homestead without the consent of his wife.<sup>4</sup>

**1. Proceeds of Foreclosure of Mortgage on Homestead.**—*Kansas.*—*Brenneke v. Duigenan*, 6 Kan. App. 229.

*Nebraska.*—*Morrill v. Skinner*, 57 Neb. 164.

*Ohio.*—*McConville v. Lee*, 31 Ohio St. 447. And see *Niehaus v. Faul*, 43 Ohio St. 63.

*Tennessee.*—*White v. Fulghum*, 87 Tenn. 281.

*Wisconsin.*—*Clancey v. Alme*, 98 Wis. 229.

**"Proceeds of Sale of Homestead."**—The surplus proceeds of a foreclosure sale of the homestead are proceeds of a sale of the homestead within the meaning of a statute exempting such proceeds while held with intent to procure another homestead therewith. *Clancey v. Alme*, 98 Wis. 229.

**2. Change of Homestead.**—*Robinson v. Blackerby*, 9 Ky. L. Rep. 375; *Holliman v. Smith*, 39 Tex. 357; *Mabry v. Harrison*, 44 Tex. 286; *Houston, etc., R. Co. v. Winter*, 44 Tex. 597; *Willis v. Matthews*, 46 Tex. 478; *Freiberg v. Walzem*, 85 Tex. 264; *Rose v. Blankenship*, (Tex. 1891) 18 S. W. Rep. 101. See *Campbell v. Jones*, 52 Ark. 493.

**After Eviction under Judgment.**—If a party acquires a homestead right in a tract of land, and subsequently is evicted under a judgment from the part of the tract on which he lived, he may move on the other part and hold it under the homestead law. *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248.

**New Designation to Include Additional Land.**—A debtor who has made a designation of land as his homestead under the *Texas* statute may afterwards make another designation so as to include property acquired after the first designation, provided the statutory limitations are not exceeded. *Lake v. Boulware*, 12 Tex. Civ. App. 660.

**After Setting Apart Homestead on Levy of Execution.**—In *Mississippi* a sheriff levied an execution on land and set off a part thereof to the debtor as his homestead, in accordance with statutory provisions. Afterwards the debtor abandoned this land and moved to another tract, selling the land which had been

set off to him and claiming as his homestead the land to which he moved. It was held that when the land was set off to him by the sheriff, all the rest of the land which had been levied on was subject to sale, and that he could not prevent a sale by his change of homestead. *Richie v. Duke*, 70 Miss. 66.

**Sale and Removal to Other Land.**—In *Kentucky* a debtor who was occupying land as a homestead sold the part thereof on which he resided, after incurring a debt, but before judgment thereon against him, and moved to the unsold part, and was residing thereon when a creditor obtained judgment and levied an execution on the land. It was held that he was entitled to a homestead. *Robinson v. Blackerby*, 9 Ky. L. Rep. 375.

**Fraud as Against Creditors.**—In *In re Wright*, 3 Biss. (U. S.) 359, it was held by Judge Miller that though a debtor had a right under the *Wisconsin* statute to sell his homestead, he could not shift it to the prejudice of creditors, and where an insolvent merchant sold his homestead for cash, which he did not use for payment of debts, and moved into his store with his family, it was held that he could not hold the store as his homestead.

**3. Statutes Allowing Change of Homestead.**—*Iowa.*—Under the *Iowa* statute, where a debtor moved from one parcel of land to another after the docketing of a judgment against him, it was held that the occupancy of the new homestead displaced the lien of the judgment thereon and left it a lien on the old homestead only, where it was of greater value than the new, or of equal value therewith, and that the new homestead was not subject to execution on the judgment. *Furman v. Dewell*, 35 Iowa 170. This case in effect overruled *Elston v. Robinson*, 21 Iowa 531, and *Sargent v. Chubbuck*, 19 Iowa 37.

**4. Consent of Wife Not Necessary.**—*Williams v. Sweetland*, 10 Iowa 51; *Holliman v. Smith*, 39 Tex. 357. See *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel—Abandonment*.



**Claim of Abandoned Homestead.** — When a debtor has moved from a tract of land occupied as his homestead to another tract, with intention to change his homestead, he cannot afterwards assert a claim of homestead in the abandoned premises as against purchasers or creditors.<sup>1</sup>

**The Sale or Exchange of a homestead and the right of exemption in land purchased with the proceeds, or in the proceeds, or in the land taken in exchange, are elsewhere considered.**<sup>2</sup>

**j. EXCHANGE OF HOMESTEAD OR SALE AND PURCHASE OF NEW HOMESTEAD** — (1) *In General.* — In many states the statutes permit a debtor to exchange his homestead for other land, and to hold the land so acquired as his homestead and exempt from liability for any debt for which the old homestead would not be liable.<sup>3</sup> or to sell his homestead and invest the proceeds in a new homestead which shall be exempt to the same extent as the old homestead.<sup>4</sup> To come within the statute the proceeds must be invested

**1. Old Homestead Not Exempt.** — *Holliman v. Smith*, 39 Tex. 357, and other cases cited in the notes preceding. See also *infra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel — Abandonment.*

**2. Sale or Exchange of Homestead.** — See *infra*, this section, *Exchange of Homestead or Sale and Purchase of New Homestead.*

**3. Exchange of Homestead — California.** — *Eby v. Foster*, 61 Cal. 282.

*Illinois.* — *Crawford v. Richeson*, 101 Ill. 351.

*Iowa.* — *Windle v. Brandt*, 55 Iowa 221; *Jones v. Brandt*, 59 Iowa 332; *Cowgell v. Warrington*, 66 Iowa 666; *Mann v. Corrington*, 93 Iowa 108, 57 Am. St. Rep. 256; *Robinson v. Charleton*, 104 Iowa 296; *Blue v. Heilprin*, 105 Iowa 608.

*Kentucky.* — *Thompson v. Heffner*, 11 Bush (Ky.) 364; *Whitt v. Kendall*, 11 Ky. L. Rep. 116.

*Mississippi.* — *Thoms v. Thoms*, 45 Miss. 263; *Airey v. Buchanan*, 64 Miss. 181.

*Missouri.* — *Farra v. Quigley*, 57 Mo. 284; *Creath v. Dale*, 84 Mo. 349; *Smith v. Enos*, 91 Mo. 579; *Goode v. Lewis*, 118 Mo. 357.

*Texas.* — *Schneider v. Bray*, 59 Tex. 668, *distinguishing* *Whittenberg v. Lloyd*, 49 Tex. 633.

*Wisconsin.* — *Hoppe v. Goldberg*, 82 Wis. 660.

**Several Exchanges.** — The owner of a homestead acquired by successive exchanges has been held to be entitled to the same homestead rights in the one last acquired that he had in the original one. *Creath v. Dale*, 84 Mo. 349; *Goode v. Lewis*, 118 Mo. 357. See also *Crawford v. Richeson*, 101 Ill. 351.

**Exchange of Land Partly Mortgaged.** — Where a farm which was exchanged for a town lot with the intention to use the latter as a homestead consisted of a homestead only in part, and a mortgage on the balance was assumed by the grantee, it was held that the lot should be regarded as wholly acquired from the sale or exchange of the homestead, as the mortgaged part of the land exchanged therefor might be considered as absorbed in payment of the mortgage, and not as constituting part of the consideration for the lot. *Hoppe v. Goldberg*, 82 Wis. 660.

**Exchange for Property in Which Debtor Has Half Interest.** — When a debtor exchanged his homestead and also a half interest in other property subject to execution, and exchanged the homestead for the other half interest in such prop-

erty, it was held that the half interest originally owned remained liable to be sold under execution on a judgment for a debt existing at the time of the exchange. *Thompson v. Rogers*, 51 Iowa 333.

**4. Exemption of Land Purchased with Proceeds of Homestead** — *United States.* — *Green v. Root*, 62 Fed. Rep. 191.

*Idaho.* — *Wright v. Westheimer*, 2 Idaho 962.

*Illinois.* — *Watson v. Saker*, 102 Ill. 585; *Boyd v. Fullerton*, 125 Ill. 437; *Nance v. Nance*, 28 Ill. App. 587.

*Iowa.* — *Benham v. Chamberlain*, 39 Iowa 358; *Cowgell v. Warrington*, 66 Iowa 666; *Atkinson v. Hancock*, 67 Iowa 452; *Afton First Nat. Bank v. Thompson*, 72 Iowa 417; *White v. Kinley*, 92 Iowa 598; *Mann v. Corrington*, 93 Iowa 108, 57 Am. St. Rep. 256; *Robinson v. Charleton*, 104 Iowa 296; *Blue v. Heilprin*, 105 Iowa 608; *Johnson County Sav. Bank v. Carroll*, (Iowa 1899) 78 N. W. Rep. 247.

*Kentucky.* — *Cooper v. Arnett*, 95 Ky. 603; *Sebastian v. Steel*, (Ky. 1892) 20 S. W. Rep. 269; *McDonald v. Lowry*, (Ky. 1899) 50 S. W. Rep. 553; *Lear v. Totten*, 14 Bush (Ky.) 101; *Carter v. Liles*, 5 Ky. L. Rep. 690; *Musgrave v. Parish*, 10 Ky. L. Rep. 998.

*Missouri.* — *Farra v. Quigly*, 57 Mo. 284; *Smith v. Enos*, 91 Mo. 579; *Goode v. Lewis*, 118 Mo. 357; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Beckmann v. Meyer*, 7 Mo. App. 577, 75 Mo. 333. See *Stanley v. Baker*, 75 Mo. 60; *Stinde v. Behrens*, 81 Mo. 254.

*Nebraska.* — *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414.

*Texas.* — *Freiberg v. Walzem*, 85 Tex. 264.

*Wisconsin.* — *Hoppe v. Goldberg*, 82 Wis. 660.

**Use of Other Money in Addition to Proceeds of Homestead.** — Where a debtor sold the homestead occupied by him, and commenced the erection of a new one of greater value, using the proceeds of the sale together with other money in its construction, it was held that the homestead character attached to the excess of value in the new house only from the time of its occupancy. *Blue v. Heilprin*, 105 Iowa 608.

**Taking Title in Wife's Name.** — The title to the new homestead may be taken in the wife's name. *Green v. Root*, 62 Fed. Rep. 191; *Jones v. Brandt*, 59 Iowa 332; *White v. Kinley*, 92 Iowa 598. See *Broome v. Davis*, 87 Ga. 584.

**Deed Made to Wife by Mistake.** — *In re* — 77,

directly in another homestead. If they are invested in business, and a debt is then contracted, they cannot be withdrawn from the business and invested in land, so as to entitle the debtor to hold the land exempt as against such debt.<sup>1</sup> Land for which a homestead is exchanged will not be exempt except as a homestead, and only to the extent allowed by the constitution and statute.<sup>2</sup>

**Value.** — By express provision of the *Iowa* statute the property acquired for a new homestead by exchange or sale of a former homestead is not exempt as against debts contracted prior to its acquisition except to the value of the former homestead.<sup>3</sup>

(2) *Delay in Reinvesting.* — When a debtor sells his homestead with the intention of purchasing a new one, a reasonable time within which to exercise that right will be allowed to him, and if he does not gain credit on account of the transaction, debts contracted in the interim cannot be enforced against the new homestead.<sup>4</sup>

(3) *Homestead in Another State.* — The proceeds of the homestead, when invested in a new homestead in another state, have been held not to remain exempt. Therefore, where a debtor sold his homestead in Iowa and purchased one in Missouri, and afterwards sold his homestead in Missouri and invested the proceeds in a new homestead in Iowa, it was held that he could not hold the last homestead in Iowa exempt from debts existing at the time of its purchase, even though they did not antedate the first homestead.<sup>5</sup>

(4) *Declaration, Recording Deed, etc.* — Where a homestead is exchanged for a new homestead, or is sold and the proceeds are invested in a new homestead, questions may arise as to the necessity of complying, as regards the new homestead, with formalities which the statute requires generally in order to

a husband and his wife sold a homestead laid off to the husband as head of a family and invested the proceeds in land, intending it to take the place of the homestead, but by mistake the deed was made to the wife only, as a free trader. It was held that equity would treat the title to the wife as a trust for the same uses as was the homestead under the law, and would treat the purchaser with notice as holding for the same use as she did. *Murray v. Sells*, 53 Ga. 257. And see *Broome v. Davis*, 87 Ga. 584.

**Where a Wife Released Dower and Homestead** in a conveyance by the husband, in consideration of payment of a portion of the purchase money to her, and the money was used in the purchase of a new home, it was held that an intent to invest her with the same rights therein that she had in the old home would be presumed. *Nance v. Nance*, 28 Ill. App. 587.

**1. Investment of Proceeds in Business Before Purchase of New Homestead.** — *Peninsular Stove Co. v. Roark*, 94 Iowa 560.

**Burden of Proof.** — Where the defendant relies upon the fact that his homestead was procured with the proceeds of a previous homestead, in order to establish its exemption from a claim which antedates the acquisition of the last homestead, he has the burden of proving that fact. *Afton First Nat. Bank v. Thompson*, 72 Iowa 417; *Paine v. Means*, 65 Iowa 547; *Davenport First Nat. Bank v. Baker*, 57 Iowa 197.

And where a wife claims property as a homestead on the ground that it was paid for with the proceeds of the sale of a former homestead, she has the burden of clearly showing such fact. *Johnson County Sav. Bank v.*

*Carroll*, (Iowa 1899) 78 N. W. Rep. 247.

**2. Land Exempt Only as Homestead.** — *Campbell v. Jones*, 52 Ark. 493.

**3. Comparative Value of Former and New Homestead.** — *White v. Kinley*, 92 Iowa 598; *Blue v. Heilprin*, 105 Iowa 608.

**Purchase in Part Only with Proceeds of Homestead.** — The purchase of a second homestead partly with the proceeds of a former homestead and partly with other means entitles the owner to hold it exempt from debts contracted subsequently to the occupancy of the old homestead, where the value of the second homestead does not exceed that of the first. *Lay v. Templeton*, 59 Iowa 684; *Benham v. Chamberlain*, 39 Iowa 358.

**Exchange of Mortgaged Homestead.** — Where a farm exceeding in extent the amount which could be held exempt, and encumbered for a portion of its value, was exchanged for another tract of land no greater in value than was capable of exemption as a homestead, and the latter was occupied as such, it was held that since it was not practicable to establish what portion of the value of the original tract was exempt, no portion of the new homestead could be held exempt from a debt existing at the time of the exchange. *Paine v. Means*, 65 Iowa 547.

**4. Time Allowed for Reinvestment in New Homestead.** — *Benham v. Chamberlain*, 39 Iowa 358.

What is a reasonable time must depend upon the facts of each particular case. *Robinson v. Charleton*, 104 Iowa 296.

**5. Proceeds of Homestead in Another State.** — *Rogers v. Raisor*, 60 Iowa 355. But see *Stinde v. Behrens*, 81 Mo. 254.

acquire homestead rights, such as the filing of a declaration of homestead, or the recording of a deed, etc. The question will depend upon the language of the particular statute.<sup>1</sup>

(5) *Time of Forming Intention to Invest Proceeds.* — When a debtor sells his homestead and does not at the time have any intention of using the proceeds in purchasing another homestead, he cannot render such proceeds exempt by forming such an intention after an action has been brought against him to subject such proceeds to the payment of a debt.<sup>2</sup>

(6) *Debts for Which New Homestead Is Liable.* — The new homestead is generally liable for debts contracted prior to the acquisition of the old homestead,<sup>3</sup> but it is exempt as against debts contracted subsequently thereto, though prior to acquiring the new homestead.<sup>4</sup>

(7) *Application of Surplus Proceeds.* — Where a debtor who owns land of greater value than the homestead exemption limit fixed by the statute sells such land and invests in a new homestead a portion of the proceeds equal to the value of the homestead exemption allowed by the statute, he may claim the new homestead as exempt notwithstanding the fact that the surplus proceeds are applied by him to the payment of his debts.<sup>5</sup>

(8) *Intention in Selling Old Homestead.* — Where a debtor has sold his homestead and invested the proceeds in another homestead, it is not necessary, in order to entitle him to the exemption of the new homestead as against a debt created prior to the purchase of the new homestead, but subsequent to the purchase of the old homestead, that he show that the sale was made with the intention to reinvest the proceeds in another homestead. It is sufficient that the reinvestment has in fact been made.<sup>6</sup>

(9) *Occupancy of New Homestead.* — Land acquired by exchange of a homestead, or purchased with the proceeds of a former homestead, must be intended for a homestead and occupied as such, but it need not necessarily be occupied immediately. A reasonable time must be allowed for the debtor to make the change and to remove his family to the new home; and where there is no unreasonable delay, it will be exempt during the time intervening between its acquisition and its actual occupancy.<sup>7</sup>

1. *Necessity of New Declaration of Homestead.* — In *Idaho* land purchased with the proceeds of a homestead sold with the intention of purchasing a new homestead does not become a homestead until a declaration of homestead is filed, and is not exempt as against an attachment prior to the filing of the declaration. *Wright v. Westheimer*, 2 *Idaho* 962.

In *California* also a new declaration of homestead must be made and filed. *Eby v. Foster*, 61 *Cal.* 282.

The delivery of the deed to the new homestead and the filing thereof for record, together with the declaration of homestead, constitute one transaction, and the moment the title to the premises vests the homestead right attaches; and the premises are not subject to the lien of existing judgments. *Eby v. Foster*, 61 *Cal.* 282.

*Recording Deed — Missouri Statute.* — In *Missouri*, where the statute exempts a homestead as against debts existing at the time of acquisition, and declares that the date of recording the deed shall be considered the time of acquisition, but allows the new homestead to be acquired in place of a former homestead and declares that such new homestead shall not be liable for debts for which the former was not liable, it has been held that a new homestead taken in exchange for an old one is exempt as against debts contracted prior to

the recording of the deed of the new homestead. *Smith v. Enos*, 91 *Mo.* 579. See also *Farra v. Quigly*, 57 *Mo.* 284.

2. *Intention to Reinvest Formed After Commencement of Action.* — *Smith v. Gore*, 23 *Kan.* 488, 33 *Am. Rep.* 188.

3. *Debts for Which New Homestead Is Liable.* — *Bills v. Mason*, 42 *Iowa* 329.

4. *Pearson v. Minturn*, 18 *Iowa* 36; *Robb v. McBride*, 28 *Iowa* 386.

*Former Homestead Acquired by Descent.* — In *Kentucky*, where a homestead is acquired by descent and not by purchase, and is sold and the proceeds are invested in purchasing another homestead, the new homestead is exempt even as against a debt contracted before the acquisition of the former homestead. *McDonald v. Lowry*, (Ky. 1899) 50 *S. W. Rep.* 553.

5. *Payment of Debts with Surplus Proceeds.* — *Cooper v. Arnett*, 95 *Ky.* 605, 16 *Ky. L. Rep.* 145.

6. *Intention in Selling Former Homestead.* — *Cooper v. Arnett*, 95 *Ky.* 603, 16 *Ky. L. Rep.* 145.

7. *Necessity for Occupancy.* — *Cowgell v. Warrington*, 66 *Iowa* 666; *Mann v. Corrington*, 93 *Iowa* 108, 57 *Am. St. Rep.* 256; *Blue v. Heilprin*, 105 *Iowa* 608.

*Land Acquired in Exchange for a Homestead Being under a Lease*, it was held that it might have the character of a homestead, though on



(10) *Vacant Property*. — While the right of homestead will not attach to vacant land acquired by purchase independently of a change of homestead, it will attach to vacant land taken in exchange for a former homestead or bought with the proceeds of a former homestead when held in good faith for use as a homestead.<sup>1</sup>

12. *Separate Homesteads at Same Time*. — There cannot be two separate homesteads at one and the same time,<sup>2</sup> and the attempt to acquire a second homestead while one previously acquired is still in force is void.<sup>3</sup>

13. *Separate Homesteads in Same Tract*. — Two separate estates of homestead cannot exist in the same land at the same time.<sup>4</sup> Thus an heir entitled to the reversion cannot acquire a homestead interest in the land during the existence of the widow's homestead therein.<sup>5</sup>

14. *Limitations as to Value and Extent* — *a. IN GENERAL*. — In some states the homestead which a debtor may claim as exempt is limited in value, and in other states it is limited in extent. In these states the value or extent must of course be considered in determining what may be claimed,<sup>6</sup> but neither of

account of the lease actual occupancy could not be had for three years. *Hoppe v. Goldberg*, 82 Wis. 660.

*Death Before Occupancy*. — In *Missouri*, where the statute allows a new homestead to be acquired with the proceeds of an old one, and provides that it shall be exempt as against debts for which the old homestead would not have been liable, it was held that where a man exchanged his homestead for other land while he was ill, intending to occupy the land as a homestead when he should recover, and he died two months afterwards, the land so acquired was his homestead at the time of his death, notwithstanding it had never been occupied by him. *Goode v. Lewis*, 118 Mo. 357.

*Limitation of Time for Investment of Proceeds*. — In *Nebraska*, where the statute exempts the proceeds of a sale of the homestead for six months, it has been held that if the proceeds of a homestead are invested in a lot within six months after the sale of the homestead, the lot may be selected as a homestead notwithstanding the fact that it is not occupied as such within the six months. *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414.

1. *Exchange for Vacant Lot*. — *Mann v. Cornington*, 93 Iowa 108, 57 Am. St. Rep. 256; *Blue v. Heilprin*, 105 Iowa 608.

2. *Separate Homesteads at Same Time*. — *Beard v. Johnson*, 87 Ala. 729; *Herdman v. Cooper*, 39 Ill. App. 330, 138 Ill. 583; *Wright v. Dunning*, 46 Ill. 271; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *Horn v. Tufts*, 39 N. H. 478; *Achilles v. Willis*, 81 Tex. 169; *Schoffen v. Landauer*, 60 Wis. 337; *Cornish v. Frees*, 74 Wis. 490. See also *Taylor v. Hargous*, 4 Cal. 263, 60 Am. Dec. 606; *Hoitt v. Webb*, 36 N. H. 166.

In *Texas* a person occupying a rural homestead cannot claim an exemption for his urban place of business, *Pridgen v. Warn*, 79 Tex. 592; *Williams v. Willis*, 84 Tex. 398; or an urban homestead, *Iken v. Olenick*, 42 Tex. 195; *Keith v. Hyndman*, 57 Tex. 425; *Swearingen v. Bassett*, 65 Tex. 271; *Allen v. Whitaker*, (Tex. 1892) 18 S. W. Rep. 160; *Aransas Pass First Nat. Bank v. Walsh*, (Tex. Civ. App. 1894) 26 S. W. Rep. 1113; *Foust v. Sanger*, 13 Tex. Civ. App. 410; *Laucheimer v. Saunders*, 19 Tex. Civ. App. 392. See also *Sarahas v. Fenlon*, 5 Kan. 592.

*But a Homestead Partly Within and Partly Without a City* may be had in some states. *Orr v. Doughty*, 51 Ark. 527; *Fitzgerald v. Rees*, 67 Miss. 473.

If a husband has a homestead in his wife's land, he cannot have another homestead in his own land. *Herdman v. Cooper*, 29 Ill. App. 589, 39 Ill. App. 330, 138 Ill. 583. See also *Beard v. Johnson*, 87 Ala. 729. And see *supra*, this title, *Title or Interest Necessary to Support Homestead Exemption* — *Title in Husband or Wife or Both*.

*Under National and State Laws*. — A person who is residing on lands of the United States, to perfect a homestead claim thereto under the United States statutes, cannot at the same time hold a homestead under state laws in lands held under a pre-emption claim from the state. *Hesnard v. Plunkett*, 6 S. Dak. 73.

In *California* it has been held that a homestead may be exempted under state laws, though situated upon mineral lands of the United States and though the premises are used chiefly as a placer-mining claim, if it forms the actual residence of the person claiming it as a homestead. *Gaylord v. Place*, 98 Cal. 472.

3. *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440. See also *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207; *Archibald v. Jacobs*, 69 Tex. 248.

As to the effect of the wife's removal to another residence as affecting her right of homestead, see *infra*, this title, *Rights of Surviving Spouse and Children*.

*California* — *Miner's Exemption and Homestead Not in Conflict*. — The exemption from execution of a miner's dwelling and mining claim not exceeding a certain value, granted under the California statute (Code Civ. Pro., § 690, subdiv. 5), does not conflict with a homestead claim in the same property, though the property protected as a homestead exceeds in amount that exempt under the above provisions. *Gaylord v. Place*, 98 Cal. 472.

4. *Two Estates of Homestead Cannot Exist Together in Same Land*. — *Brokaw v. Ogle*, 170 Ill. 115; *Meguiar v. Burr*, 81 Ky. 32.

5. *Brokaw v. Ogle*, 170 Ill. 115; *Merrifield v. Merrifield*, 82 Ky. 526.

6. *Value and Extent*. — *Gregg v. Bostwick*, 33 Cal. 227, 91 Am. Dec. 637; *Matter of Delaney*,

these limitations is a test for determining what the homestead actually is. They do not come into operation until what the homestead actually is has been ascertained by the test of use.<sup>1</sup>

**Limitations as to Value.** — In those states in which the statute does not limit the quantity of land that may be claimed as a homestead, there is generally an express limitation as to value, and in such a case, of course, the statutory limit cannot be exceeded.<sup>2</sup>

**Limitations as to Quantity.** — In a number of states in which the statute does not limit the value of the premises which may be claimed as a homestead,<sup>3</sup> and in some states in which there is such a limitation,<sup>4</sup> there is an express limitation as to the quantity, and in such a case, of course, the statutory limit cannot be exceeded.<sup>5</sup>

**Right of Selection.** — When premises occupied as a homestead exceed the quantity allowed by the statute, the debtor has a right to select the part which he will hold as exempt.<sup>6</sup>

**Land Included in a Public Street or Alley** is not to be taken into consideration in

37 Cal. 180. And see the following subsections.

1. **Value Not Test.** — *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Hargadene v. Whitfield*, 71 Tex. 482. And see the definitions of homestead, *supra*, this title, II. 1. *Definition*.

Consequently a valid homestead may be acquired by residence and use under a declaration of homestead which states the value of the property at a sum greater than the limitation allowed by statute. The creditor can reach the excess, if any, in the manner provided by law, but he cannot subject the whole homestead on the ground that the declaration is invalid. *Mitchell v. McCormick*, 22 Mont. 249. See also *Hargadene v. Whitfield*, 71 Tex. 482.

**California — Homestead to Decedent's Family or to Insolvent.** — Under the California statute (Code Civ. Pro., §§ 1465, 1468), there is no limitation as to the value of a homestead which may be set aside to the family of a decedent, where none has been selected before his death; though there is such a limitation as to a homestead which was declared before his death (Code Civ. Pro., §§ 1474, 1475). In the first case the value of the homestead rests in the sound discretion of the court, having in view the amount and condition of the estate. *Matter of Walkerly*, 81 Cal. 579, *disapproving* dicta in previous cases.

An insolvent's homestead is to be dealt with in conformity with the procedure marked out for the homesteads of deceased persons (Code Civ. Pro. Cal., § 1474 *et seq.*), and the court has no power to set aside as the homestead of an insolvent premises which exceed five thousand dollars in value. The value must be rendered by division if practicable, or there must be a sale of the entire premises. *Matter of Herbert*, 122 Cal. 329. In this case the declaration of homestead had been made and recorded prior to the insolvency proceedings, so that the distinction stated in the previous case is not impaired.

2. **Valuation Limit.** — *Hill v. Bacon*, 43 Ill. 477; *Hubbell v. Canady*, 58 Ill. 425; *Blandy v. Asher*, 72 Mo. 27; *National Bank v. Bannholzer*, 69 Minn. 24; *Springer v. Colwell*, 116 N. Car. 520; *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634.

In *Alabama* the constitutional limitation on

value applies to both rural and urban homesteads. *Miller v. Marx*, 55 Ala. 322.

In *Texas* the amount of an urban homestead is determined by its value solely, not by its area. *Hensley v. Shields*, 6 Tex. Civ. App. 136; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341; *Ragland v. Rogers*, 34 Tex. 622.

3. Some statutes place no limit on the value of the homestead; its area alone is restricted. See *Layson v. Grange*, 48 Kan. 440; *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112; *Sumner v. Sawtelle*, 8 Minn. 321; *Cogel v. Mickow*, 11 Minn. 475; *Ward v. Huhn*, 16 Minn. 159; *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227; *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244.

A rural homestead in some states is limited as to the number of acres only. *Miller v. Marx*, 55 Ala. 322; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341; *Tex. Rev. Stat.* 1895, art. 2396.

**Undivided Interest in Land.** — Where a debtor has an undivided interest in a larger tract than the statute allows for a homestead, he is not entitled to claim as his homestead any more of a tract than the amount specified in the statute. *O'Brien v. Krenz*, 36 Minn. 136. See *supra*, this title, *Title or Interest Necessary to Support Homestead Exemption — Property Held in Common or in Joint Tenancy*.

4. **Limitation on Both Quantity and Value.** — See *Beecher v. Baldy*, 7 Mich. 488; *Fitzgerald v. Rees*, 67 Miss. 473; *Beach v. Reed*, 55 Neb. 605.

5. As to the different limitations in the case of rural and urban homesteads, see *infra*, this section, *Urban and Rural Homesteads*.

A *Georgia* statute exempts fifty acres for the head of a family and five acres additional for each child under sixteen. 2 Code Ga. (1895), § 2866. See also *Pinkerton v. Tumlin*, 22 Ga.

6. **Debtor's Right of Selection.** — *Mackey v. Wallace*, 26 Tex. 526; *Freeman v. Hamblin*, 1 Tex. Civ. App. 157. See also *De Graffenried v. Clark*, 75 Ala. 425.

Some statutes require such designation in the declaration claiming homestead, but a declaration not complying with such requirement is valid as to debts contracted before the enactment of the statute requiring such designation. *Clark v. Spencer*, 75 Ala. 40.



determining the extent of a debtor's homestead, where it is required that the land, to constitute a homestead, shall be occupied by the debtor; though the owner of a lot bounded by a street takes a fee to the centre of the street he has no right to occupy a portion of the street as a portion of his homestead.<sup>1</sup>

**b. URBAN AND RURAL HOMESTEADS.** — With respect to the quantity of land that may be claimed as exempt, the homestead laws make a distinction between homesteads within the limits of cities, towns, and villages, and homesteads in the country. In some states, if the homestead is within the corporate limits of a city, town, or village, its quantity is determined by the provisions as to urban homesteads, while a homestead outside of such limits is governed by the provisions in relation to rural homesteads.<sup>2</sup> In other states, by express provision of the statute, the land, to be governed by the provisions as to urban homesteads, must be within the laid-out or platted portion of the city, town, or village.<sup>3</sup>

**Urban Homestead.** — The courts have not agreed in construing the term "lot" in statutes allowing one lot as an urban homestead. Some have construed it as meaning one lot according to the survey or plat of the city, town, or village,<sup>4</sup> while others have given to it a broader meaning.<sup>5</sup> Under a statute

1. Weisbrod v. Daenicke, 36 Wis. 73.

2. Rural and Urban Homesteads. — See Clements v. Crawford County Bank, 64 Ark. 7.

Farm Lands do not come within the limitation of the Arkansas statute as to urban homesteads, merely because platted into lots, blocks, and streets, where there has been no incorporation. Clements v. Crawford County Bank, 64 Ark. 7.

Though Part of the Land in Which a Residence Is Situated Juts into an Incorporated Town, it may be claimed as a rural homestead together with a contiguous farm, where it is used for agricultural purposes and never has been platted into lots. Orr v. Doughty, 51 Ark. 527.

In Texas the fact that property is within an incorporated town is not decisive of its character upon the question under discussion. Wilder v. McConnell, 91 Tex. 600. Lots so situated, but marked on the plan of the city as farm lots, and not regarded as town or building lots, the streets through them, though reserved from sale, never having been opened, are not "town or city" lots in the sense of the Texas Constitution. Rogers v. Ragland, 42 Tex. 422. See also Taylor v. Boulware, 17 Tex. 79, 67 Am. Dec. 642.

Moreover, it is not necessary that a town be incorporated to bring lands within it under the law as to urban homesteads. Williams v. Willis, 84 Tex. 398.

3. Only Property Within Platted Portion Is Urban — Iowa. — Finley v. Dietrick, 12 Iowa 516; McDaniel v. Mace, 47 Iowa 509; Frost v. Rainbow, 85 Iowa 289; Beyer v. Thoeming, 81 Iowa 517.

In Iowa the plat must be that of a city or incorporated village, and the limitation does not apply to land in an unincorporated village, though platted. Truax v. Pool, 46 Iowa 256.

A part of a platted tract within an incorporated town left intact and designated as a park or outlot is not within the meaning of the Iowa statute. Frost v. Rainbow, 85 Iowa 289.

In Minnesota the statute (Stat. 1894, § 5521), applies to lots "within the laid-out or platted portion of any incorporated town, city, or village," etc. The earlier cases made the test to be whether the tract is itself included in and a part of that portion of the municipality which

is either laid out or platted. Baldwin v. Robinson, 39 Minn. 244; Mintzer v. St. Paul Trust Co., 45 Minn. 323.

In later cases it was found necessary to introduce an additional and more rigid test. The words "platted portion" of an incorporated town, etc., in the statute, are construed to refer to that platted portion of the municipality which is urban in its character. National Bank v. Banholzer, 69 Minn. 24.

Thus the fact that the land in question, itself unplatted, is surrounded by platted lands in an incorporated municipality, is not itself conclusive. If such surrounding portions are in fact strictly urban in character, the urban limitation applies. Heidel v. Benedict, 61 Minn. 170, 52 Am. St. Rep. 592; Ford v. Clement, 68 Minn. 484.

If the surrounding portion is in fact rural in character, the urban limitation does not apply. In re Smith, 51 Minn. 316; Kiewert v. Anderson, 65 Minn. 491, 60 Am. St. Rep. 487; National Bank v. Banholzer, 69 Minn. 24.

In Michigan the constitution allows as a homestead a "lot in any city, village, or recorded town plat," etc. This provision may operate in unincorporated villages, for "considerable villages are sometimes left unincorporated, though they are built upon lands regularly platted." But platting lands for partition, and not as village lots, does not bring them within the clause. Bouchard v. Bourassa, 57 Mich. 8.

4. Urban Homestead. — In Minnesota and Nebraska the word "lot" in a statute allowing a homestead in a city or town to the extent of one lot has been construed to mean a lot according to the survey and plat of the city or town, and not merely a "tract" or "parcel" of land. Wilson v. Proctor, 28 Minn. 13, followed in Norfolk State Bank v. Schwenk, 51 Neb. 146. See also Mead v. Marsh, 74 Minn. 268; Ford v. Clement, 68 Minn. 484.

Under a statute exempting as a homestead a quantity of land not exceeding in amount one lot, an undivided half of two city lots cannot be claimed as a homestead. Ward v. Huhn, 16 Minn. 159.

5. In Arkansas, contrary to the Minnesota decision above cited, the phrase "one town or



limiting an urban homestead to one lot, when situated within the laid-out or platted portion of an incorporated city, town, or village, it has been held that the size of the homestead is not determined by the size of the platted lots in other portions of the city, town, or village, but by the size of the lots according to the survey and plat upon which the land claimed is platted.<sup>1</sup> In *Arkansas* and *Kansas* an urban homestead is limited to one acre.<sup>2</sup>

*c. INDIVISIBLE HOMESTEADS.* — Where, after the homestead has been reduced as far as possible by division, it still exceeds in value the limit allowed by constitution or statute, it is held under some statutes not to be protected from liability.<sup>3</sup> And statutes generally provide that in such cases a sale may be had, the proceeds of which, to the statutory amount, become the property of the owner of the homestead and exempt while the excess is subjected to the debts of the owner.<sup>4</sup>

*d. EXCESSIVE HOMESTEADS* — (1) *Status.* — The fact that a homestead excessive in amount or value has been set apart does not prevent the property designated from having the status of a homestead.<sup>5</sup> But the excess is not protected as a part of the homestead, and by a proper procedure may be subjected to the payment of debts.<sup>6</sup>

city lot" has been held to mean the lot or piece of ground on which the head of a family has a house, with the appurtenances, which he uses as a home, no matter whether it contains more or less than one lot according to the plat or survey of the town or city. *Wassell v. Tunnah*, 25 Ark. 101.

The Term "Lot" in the *Illinois* homestead law, exempting a "lot of ground" occupied by the debtor as a residence, was held to mean no more than a quarter quarter-section, or a forty-acre tract of land, according to the government survey, on which a debtor's residence was situated. *Kerr v. South Park Com'rs*, 8 Biss. (U. S.) 276, 14 Fed. Cas. No. 7,733; *Aldrich v. Thurston*, 71 Ill. 324; *Gardner v. Eberhart*, 82 Ill. 316. See *Brock v. Leighton*, 11 Ill. App. 361.

In *Michigan*, where the statute (Comp. Laws Mich. 1897, § 10362) exempts a homestead "not exceeding in amount one lot, being within a recorded town plat or city or village, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of this state," it has been held that a homestead may be claimed in a hotel occupied as a residence and the land on which it is situated, although it is built upon two lots in a platted village. *King v. Welborn*, 83 Mich. 195. See also *Lamont v. Le Fevre*, 96 Mich. 175.

1. *Size of Platted Lot.* — *Lundberg v. Sharvey*, 46 Minn. 319.

Where a particular block is not platted, the size of a homestead thereon depends upon the size of the average platted lot in that part of the city. *Heidel v. Benedict*, 61 Minn. 170, 52 Am. St. Rep. 592.

2. *Restriction to One Acre* — *Property Not Divided into Lots.* — Under the *Illinois* statute exempting a homestead "not exceeding one acre" in any town, a homestead of more than an acre cannot be claimed, though it has not been divided into lots, and is used for farming purposes only. *Owatonna First Nat. Bank v. Wilson*, 62 Ark. 140.

In *Kansas* a homestead "within the limits of an incorporated town or city" is limited by the constitution to one acre. *In re Tertelling*, 2 Dill. (U. S.) 339; *Layson v. Grange*, 48 Kan.

440. See also *Hixon v. George*, 18 Kan. 258; *Sarahas v. Fenlow*, 5 Kan. 592.

The fact that the land is within an incorporated city must be proved, and where an island is entirely surrounded by a city, but it was never platted into lots and the owner's consent to its inclusion in the city is not shown, such consent being necessary by law, a city ordinance fixing the boundaries of the city is insufficient to bring the homestead within the limitation. *Topeka Water-Supply Co. v. Root*, 56 Kan. 187. See also *Armstrong v. Topeka*, 36 Kan. 432.

3. *Indivisible Excessive Homesteads Not Protected.* — *Miller v. Marx*, 55 Ala. 322; *Garner v. Bond*, 61 Ala. 84; *Farley v. Whitehead*, 63 Ala. 205; *Beecher v. Baldy*, 7 Mich. 488.

4. *Sale of Indivisible Homestead and Exemption in Proceeds.* — *Garner v. Bond*, 61 Ala. 84, explaining the effect of the Act of 1873; *Simonds v. Halthcock*, 26 S. Car. 595.

5. *Ham v. Santa Rosa Bank*, 62 Cal. 125, 45 Am. Rep. 654; *Hargadene v. Whitfield*, 71 Tex. 482.

*Separate Lots Included* — *Declaration Held in Part Void.* — But in *California* a debtor's declaration of homestead which includes separate lots, where the value of the residence lot alone exceeds the statutory limit, has been held void as to the other separate lots included, so that a sale under execution of the property covered by the declaration carries title to the separate lots improperly included free from the homestead. *McDonald v. Badger*, 23 Cal. 393, 83 Am. Dec. 123.

*A Conveyance Without a Release of the Homestead*, where the property is in excess of the statutory value, vests the grantee with a right which he may enforce against the surplus by partition or otherwise; and the same principles apply in case of a mortgage. *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112.

6. *Excess Reachable.* — *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Lubbock v. McManis*, 82 Cal. 246, 16 Am. St. Rep. 100; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Herdman v. Cooper*, 39 Ill. App. 330, 138 Ill. 583; *Louden v. Yager*, 91 Ky. 57; *Hargadene v. Whitfield*, 71 Tex. 482; *Paschal v.*

When Creditor Estopped to Question Valuation. — A creditor who participates in the proceeds of an execution sale of his debtor's estate has been held (in the absence of such fraud or mistake as will entitle him to relief in equity) estopped to attack the validity of the valuation of a tract set apart to the debtor as a homestead in the action in which the execution was issued.<sup>1</sup>

(2) *Subjecting Excess.* — It is usually provided that where practicable a division is to be made,<sup>2</sup> but if a division cannot be had the whole may be sold and the excess in the proceeds subjected to creditors,<sup>3</sup> or under some statutes the whole property may be adjudged to one party, who makes compensation to the conflicting interests.<sup>4</sup> In the absence of a special provision it has been held that a creditor may reach the overplus of an excessive homestead by a proceeding in equity.<sup>5</sup>

c. EFFECT OF IMPROVEMENTS. — If the homestead is within the statutory value when selected or laid off, it does not lose its homestead character by reason of the fact that the homesteader puts improvements thereupon which raise the value of the whole property beyond the statutory limit.<sup>6</sup> But though the excess so incorporated with the homestead is not reachable by a direct levy, it may be subjected to the payment of debts in equity<sup>7</sup> or by a proceeding in the manner marked out by the local statute.<sup>8</sup> In *Texas*, however, it is specially provided that there shall be no limitations to the value of improvements made on a city homestead.<sup>9</sup>

Cushman, 26 Tex. 74; *Gallagher v. Keller*, 4 Tex. Civ. App. 454.

Under the Former Mississippi Statute, where a debtor owned and occupied land in excess of the homestead, which had never been set apart, an execution creditor might levy upon and sell the whole subject to the homestead interest of the debtor. *Letchford v. Cary*, 52 Miss. 791. The present statute is different. See Annot. Code 1892, § 1976 *et seq.*

1. *Fenwick v. Wheatley*, 23 Mo. App. 641.

But a subsequent creditor who was no party to such proceeding will not be estopped. *Louden v. Yager*, 91 Ky. 57.

A Judgment Becomes a Lien on the Homestead on the excess above the statutory value. *Haworth v. Travis*, 67 Ill. 301. See also *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112.

But in other states it is held that the judgment does not become a lien, even on the excess, until the homestead has been duly ascertained and set apart from such excess. *Niacke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Mitchell v. McCormick*, 22 Mont. 249; *Fairbanks v. Devereaux*, 48 Vt. 552. See also *Lubbock v. McMann*, 82 Cal. 230, 16 Am. St. Rep. 108; *Vining v. Officers of Ct.*, 82 Ga. 222.

Administrator's Sale. — Under the *Missouri* statute, where an administrator sells homestead premises which are larger than the statute allows, the purchaser acquires the excess, and under Rev. Stat. 1889, § 5443, is entitled to have a commission appointed to set the same off to him. *Anthony v. Rice*, 110 Mo. 223.

But in *Michigan* a Homestead Right Does Not Attach to an undivided interest in lands excessive in acreage and value. See *supra*, this title, VIII. 17. b. (1) note, p. 568.

2. Division if Possible. — See the several statutes.

3. Sale of Whole Where Property Indivisible. — See the statutes. See also *Dearing v. Thomas*, 25 Ga. 223; *Marks's Appeal*, 34 Pa. St. 36, 75

Am. Dec. 631; *Paschal v. Cushman*, 26 Tex. 74.

4. Whole Adjudged to One, Who Must Make Compensation. — See *Straat v. Rinkle*, 16 Mo. App. 115; *Fenwick v. Wheatley*, 23 Mo. App. 641; Rev. Stat. Mo. 1889, § 5444.

Owner Allowed to Make Compensation for Excess. — In *South Carolina* the owner of such an excessive homestead may, according to the provisions of the statute, prevent the sale thereof by paying to the sheriff the amount by which his homestead exceeds the statutory value, and this provision is constitutional. *Carolina Sav. Bank v. Evans*, 28 S. Car. 521; *Simonds v. Haithcock*, 26 S. Car. 595. A similar provision exists in *Michigan*. Comp. Laws Mich. (1897), §§ 10369, 10370. See also *King v. Welborn*, 83 Mich. 195.

Where the Lot and the Improvements Thereon Have Separate Value Limits under the statute in the case of urban homesteads, and the improvements exceed in value the appropriate limit, an opportunity should be given to the owner to pay the excess in value and retain the whole. In default of such payment the lot and improvements should be separately sold, and of the proceeds the appraised value of the lot and the value of the improvements to the statutory limit given to the debtor, the rest of the proceeds being subjected to debts. *Wood v. Wheeler*, 7 Tex. 13.

5. Creditor's Remedy in Equity to Subject Excess. — *North v. Shearn*, 15 Tex. 174; *Mackey v. Wallace*, 26 Tex. 526. See also *Dearing v. Thomas*, 25 Ga. 223; and *infra*, this section, *Effect of Improvements*.

6. Effect of Improvements. — *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108.

7. *Vanstory v. Thornton*, 110 N. Car. 10. The question was not determined in *Hardy v. Lane*, 6 Lea (Tenn.) 379.

8. *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108. See also *Haworth v. Travis*, 67 Ill. 301.

9. *Chase v. Swayne*, 88 Tex. 218.



*f. RIGHT TO ADD TO HOMESTEAD.* — When a homestead has once been acquired, and is less than the statute allows, it may afterwards be enlarged or increased up to the maximum allowed, and the addition will become a part of the homestead.<sup>1</sup>

*g. REVALUATION OF HOMESTEAD.* — In the absence of express statutory provision, it is held that there can be no revaluation of a homestead upon the ground that it has appreciated in value beyond the statutory limit.<sup>2</sup> But there is authority to the contrary,<sup>3</sup> and some statutes provide expressly that the valuation may be attacked for fraud or other causes.<sup>4</sup>

*h. DETERMINING VALUE* — (1) *In General.* — The statutes usually provide a method for determining the value of premises claimed as homestead where the value is in dispute,<sup>5</sup> but in the absence of such provision, after a levy has been made, either party may, by a bill in equity, have the value ascertained and the practicability of a division determined.<sup>6</sup>

(2) *Incumbrances.* — In estimating the value of the homestead exemption, it has been held that the clear value of the premises over and above mortgages and other valid incumbrances is to be considered;<sup>7</sup> but a different doctrine obtains in some jurisdictions.<sup>8</sup>

(3) *Improvements.* — The value of improvements on the homestead lands is to be included in estimating the value of the homestead.<sup>9</sup> In *Texas*, however, the statute provides that the value of improvements is not to be included in determining the value of an urban homestead.<sup>10</sup>

But the maximum value cannot be increased by the addition of other lots or of other undivided interests in lots. *Richards v. Nelms*, 38 Tex. 445.

**1. Homestead May Be Enlarged to Maximum Allowed.** — *Campbell v. Macmanus*, 32 Tex. 442; *Macmanus v. Campbell*, 37 Tex. 267.

But if the value of the homestead as originally designated has increased to or beyond the statutory limit, there can be no second designation including additional property, for the value at the date of the second designation is the test. *Lake v. Boulware*, 12 Tex. Civ. App. 660.

As to the Georgia Statute allowing the supplementing of a homestead, see *Chattanooga First Nat. Bank v. Massengill*, 80 Ga. 333; *Johnson v. Redwine*, 105 Ga. 449. These cases are stated in note on p. 533, *supra*.

**2. Revaluation.** — *Gowdy v. Johnson*, (Ky. 1898) 47 S. W. Rep. 624; *Hardy v. Lane*, 6 Lea (Tenn.) 379. See also *Vanstory v. Thornton*, 110 N. Car. 10.

In such a case creditors have a remedy in equity. *Gully v. Cole*, 96 N. Car. 447. And see *Vanstory v. Thornton*, 110 N. Car. 10.

In *Texas* the increase in value of an urban homestead by natural appreciation becomes a part of the homestead, and such an increase does not give rise to a right of forced sale. *Richards v. Nelms*, 38 Tex. 445. See also *Chase v. Swayne*, 88 Tex. 218.

**3.** It is held in some states that if the homestead increases in value so as to exceed the statutory limit, it may be again assigned and the excess appropriated to the payment of debts. *Stubblefield v. Graves*, 50 Ill. 103; *Haworth v. Travis*, 67 Ill. 301; *Mooney v. Moriarty* 36 Ill. App. 175; *Beckner v. Rule*, 91 Mo. 62. See also *Matter of Delancy*, 37 Cal. 176, and compare *Kenley v. Bryan*, 110 Ill. 652.

**So upon a Depreciation**, it has been said, the homesteader may add to his homestead and

claim a revaluation himself. *Beckner v. Rule*, 91 Mo. 62.

**4.** See *Gully v. Cole*, 96 N. Car. 447, quoting Code N. Car. (1883), § 523, providing that the allotment "may be set aside for fraud, complicity, or other irregularity."

**5.** See the various statutes. See also *infra*, this title, *Enforcement and Protection of Right*.

**6.** *Beecher v. Baldy*, 7 Mich. 488.

**7. Incumbrances Deducted.** — *State v. Mason*, 88 Mo. 222, reversing 15 Mo. App. 141; *Meyer v. Nickerson*, 101 Mo. 184; *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591; *Mundt v. Hagedorn*, 49 Neb. 409.

**8.** "In fixing the valuation of the homestead premises, liens or incumbrances of any character are not an element entering into the question." *Matter of Herbert*, 122 Cal. 329.

**9.** So the value of a house on the homestead lands must be considered in determining the homestead exemption. *Ray v. Thornton*, 95 N. Car. 571.

**10.** Const. Tex., art. 16, § 51, provides that "the homestead in a city, town, or village shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon." The history of this clause is considered in *Chase v. Swayne*, 88 Tex. 218. See also *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634; *McLane v. Paschal*, 62 Tex. 102, 74 Tex. 20.

Under certain constitutions and statutes the value to which urban homesteads was limited, included improvements. *Wood v. Wheeler*, 7 Tex. 13; *North v. Shearn*, 15 Tex. 174; *Hancock v. Morgan*, 17 Tex. 582; *Williams v. Jenkins*, 25 Tex. 279; *Richards v. Nelms*, 38 Tex. 445.

A retroactive effect is not to be given to the statute excluding the value of improvements. *McLane v. Paschal*, 62 Tex. 102, 74 Tex. 20.



(4) *Fee Value the Basis of Valuation.* — The value of the fee-simple estate in lands is the basis for determining the value of a homestead estate therein, although the person claiming the homestead may have merely a life estate in the property.<sup>1</sup> But a different construction has been placed upon a statute exempting "a homestead in lands, whether held in fee or any lesser estate," to a certain value, and the value of the homesteader's life estate has been held to be the basis for determining the extent of his homestead rights.<sup>2</sup>

(5) *Time to Which Determination of Value Should Relate.* — When a judgment debtor claims a homestead as against the levy of an execution on the judgment, and this claim is contested, it has been held that the value of the property claimed is to be ascertained at the time of the trial of the contest, and not at the time when the exemption was claimed.<sup>3</sup> When a lien is filed against certain lands which are claimed to have the status of a homestead, the extent to which the lands are exempt is to be tested by their value at the time when the lien attached.<sup>4</sup> As between the heirs of the homesteader and creditors seeking to subject the estate to debts, it has been held that the value of the homestead at the time of the death is to control.<sup>5</sup>

(6) *Burden of Proof and Evidence.* — One who claims a homestead has the burden of establishing its value.<sup>6</sup> The evidence of value must relate to the time when the value is an issue,<sup>7</sup> for there is no presumption that the value remains unchanged during a series of years.<sup>8</sup>

## 2. EFFECT OF LAWS CHANGING VALUE AND EXTENT OF HOMESTEAD —

(1) *In General.* — A Statute Enlarging the Homestead does not apply as against the lien of a judgment docketed before it takes effect.<sup>9</sup> Indeed, as is elsewhere

1. *Fee Value Basis of Estimation.* — Brown v. Starr, 79 Cal. 608, 12 Am. St. Rep. 180; Yates v. McKibben, 66 Iowa 357.

A tract of land, with the improvements, the fee simple of which would equal the statutory value, is the true basis of the homestead, although the homesteader has merely a life estate. Arnold v. Jones, 9 Lea (Tenn.) 545.

But see dicta in Hoy v. Anderson, 39 Neb. 386, 42 Am. St. Rep. 591; Mundi v. Hagedorn, 49 Neb. 409. See also Higginson v. Wathen, (Ky. 1898) 46 S. W. Rep. 21.

2. Columbia Bank v. Gibbs, 54 S. Car. 579.

3. Moore v. Scharf, 110 Ala. 518.

4. Mills v. Hobbs, 76 Mich. 122.

5. Parisot v. Tucker, 65 Miss. 439. See further *infra*, this title, *Rights of Surviving Spouse and Children.*

6. *Burden of Proof of Value.* — Matter of Delaney, 37 Cal. 176; Boot v. Brewster, 75 Iowa 631, 9 Am. St. Rep. 515. See also McClelland v. Doe, (Ala. 1899) 25 So. Rep. 30.

As between an insolvent claiming a homestead and creditors, it has been held that the burden to show that the property claimed exceeds in value the amount allowed by statute, the debtor alleging the contrary, is on the creditors. Demartin v. Demartin, 85 Cal. 71.

7. *Time to Which Evidence of Value Must Relate.* — Matter of Delaney, 37 Cal. 176. See also McLane v. Paschal, 74 Tex. 20.

*Owner's Declaration of Homestead.* — In California the statement of the value of the homestead in the owner's declaration of homestead has been held to be no evidence of value. Matter of Delaney, 37 Cal. 176; Ham v. Santa Rosa Bank, 62 Cal. 125, 45 Am. Rep. 654.

*Owner's Testimony.* — In the absence of any other evidence of value, the owner's testimony

that he would take a certain sum for the homestead is evidence of its value. Boot v. Brewster, 75 Iowa 631, 9 Am. St. Rep. 515.

The homesteader's admission under oath that the homestead exceeded the value allowed by statute has been held conclusive against him. Cincinnati Leaf Tobacco Warehouse Co. v. Thompson, (Ky. 1899) 49 S. W. Rep. 446.

*Average of Witnesses' Valuation.* — Where the opinions of witnesses differed widely as to the value of the homestead, a valuation in accordance with the average value fixed by the witnesses has been sustained. Riley v. Smith, 9 Ky. L. Rep. 615, (Ky. 1887) 5 S. W. Rep. 869.

*Assessment Rolls* upon which the property was listed have been held incompetent. McLane v. Pascha, 74 Tex. 20.

8. *No Presumption that Value Continues Unchanged.* — Matter of Delaney, 37 Cal. 176.

When the question is the value of the homestead of a decedent at his death, and the evidence is conflicting as to the value at that time, it has been held no error to value the homestead as of the time when the heirs filed a bill to protect their rights therein. Parisot v. Tucker, 65 Miss. 439.

9. *Statute Enlarging Homestead.* — Ford v. Clement, 68 Minn. 484.

Statutes enlarging the value of the homestead will not be applied retroactively. Walker v. Darst, 31 Tex. 681; McLane v. Paschal, 62 Tex. 102; Linch v. Broad, 70 Tex. 92.

In Baylor v. San Antonio Nat. Bank, 38 Tex. 448, it was held that where a homestead dedicated under a former law had increased in value, but not so as to exceed the value allowed by a later constitution, it would be protected.

shown, the legislature cannot constitutionally enlarge the homestead exemption as against debts previously contracted, for this would impair the obligation of contracts.<sup>1</sup>

(2) *Extending Limits of City, Town, or Village.* — There is a direct conflict in the decisions as to whether the legislature has the power to abridge the homestead right of a debtor by extending the limits of a city, town, or village so as to include a previously acquired rural homestead and make the right of exemption, and the extent of the homestead, afterwards determinable by the provisions relating to urban homesteads.<sup>2</sup> Where this may be done, land will, in some states, become urban property, and subject to the provisions governing urban homesteads, if brought within the corporate limits of the city, town, or village.<sup>3</sup> In other states this is not the case unless the land is not only within the corporate limits, but also within the laid-out or platted portion of the city, town, or village.<sup>4</sup>

15. *Lands Fraudulently Acquired or Conveyed.* — Homestead rights in lands acquired by a debtor with nonexempt property,<sup>5</sup> as well as such rights in lands conveyed in fraud of his creditors by a debtor,<sup>6</sup> are considered elsewhere in this title.

**X. LIABILITIES AS AGAINST WHICH HOMESTEAD MAY BE CLAIMED** — 1. *In General.* — The right of a debtor to hold homestead property exempt from

1. See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed* — *General* — *Antedating Homestead Law*.

2. *Extension of Limits of City, Town, or Village.* — In *Wisconsin* it has been held that after land occupied as a rural homestead was brought within the limits of a city by a statute extending such limits, the extent of the homestead was determined by the law relating to homesteads within the city. *Bull v. Conroe*, 13 Wis. 233; *Parker v. King*, 16 Wis. 223.

In *Several States* the contrary has been decided. In *Nebraska* it was held that a person who acquires a right of homestead exemption has a vested right to such an exemption as is given by the then existing laws, and that this right cannot be diminished by a subsequently enacted law. And in accordance with this view it was held that where the owner of a tract of land near a city had acquired a homestead right therein, such right could not be diminished by the subsequent enactment of a law, without his consent or procurement, bringing the land within the corporate limits of the city. *Gallagher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319. See also *Finley v. Dietrick*, 12 Iowa 516; *Barber v. Rorabeck*, 36 Mich. 399.

In *Texas* it is well settled that the mere extension of the limits of an incorporated town so as to include a rural homestead, without the owner's consent, does not have the effect of diminishing such homestead in accordance with the law as to urban homesteads. *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642; *Bassett v. Messner*, 30 Tex. 604; *Nolan v. Reed*, 38 Tex. 425; *Neeley v. Case*, (Tex. Civ. App. 1895) 32 S. W. Rep. 785; *Wilder v. McConnell*, (Tex. Civ. App. 1897) 43 S. W. Rep. 807; *Atkinson v. Phares*, 20 Tex. Civ. App. 150; *In re Young*, 15 Nat. Bank. Reg. 205.

Nor will such extension coupled with the laying out of contiguous lands into blocks and lots reduce a rural homestead. *Posey v. Bass*, 77 Tex. 512.

When, however, the extension is platted and the owner acquiesces, and dedicates the streets

which subdivide his land, he cannot claim a rural homestead as against a judgment subsequently obtained. *Waggner v. Haskell*, 13 Tex. Civ. App. 630.

It has been declared that the legislature has the power without the owner's consent to extend the limits of the town so as to reduce a rural homestead in accordance with the provision for urban homesteads. *Wilder v. McConnell*, 91 Tex. 600.

Such an effect is certainly not produced until the rural residence is actually made a part of the city by being laid off into streets for town or city purposes. *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642; *J. B. Watkins Land, etc., Co. v. Abbott*, 14 Tex. Civ. App. 447; *Ayres v. Lamb*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1024. See also *Neeley v. Case*, (Tex. Civ. App. 1895) 32 S. W. Rep. 785.

Nor will the platting of a part of the land into blocks and lots by the owner after the extension and the acknowledging and recording of the plat change the status of the remainder of the land as a rural homestead. *Atkinson v. Phares*, 20 Tex. Civ. App. 150.

3. See *Bull v. Conroe*, 13 Wis. 233; *Parker v. King*, 16 Wis. 223.

4. *Property Not Within Laid-out or Platted Portion of City or Town.* — Where the statute limits urban homesteads to property which is within the platted portion of a town, and not merely within the limits of a town, as in *Iowa* and *Minnesota*, the limitation as to quantity covering urban homesteads does not apply to land which has been occupied as a homestead while outside of the limits of a town and which is brought within such limits by their extension, where such land has not been platted, but is still used as formerly. *Finley v. Dietrick*, 12 Iowa 516; *Kiewert v. Anderson*, 65 Minn. 491, 60 Am. Sr. Rep. 487; *Baldwin v. Robinson*, 39 Minn. 244. See *supra*, this subdivision, *Exemption of Rural Homesteads*.

5. See *infra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

6. See *infra*, this title, *Waiver, Forfeiture, Abandonment, and Lapse*.



seizure and sale to satisfy liabilities incurred by him exists only by virtue of statutory or constitutional provisions,<sup>1</sup> the terms and construction of which, in the various states of the Union, are by no means uniform. Under none of the state laws, however, is the exemption absolute. The provision in the Constitution of the United States prohibiting a state from impairing the obligation of contracts prevents their application to pre-existing contract debts; and the laws themselves, either in terms or by implication from the language employed, except various other liabilities from their operation.

## 2. Liabilities Antedating Homestead Law — a. CONTRACTUAL LIABILITIES

### — (1) *State Laws Creating or Increasing Exemption* — (a) *Retroactive Construction.*

— Many early cases held that a state law creating or enlarging a homestead right the terms of which were general enough to include pre-existing contracts might be applied to them, being merely a regulation of the remedy, and therefore not within the provision of the United States Constitution<sup>2</sup> prohibiting a state from enacting any law which will impair the obligation of contracts.<sup>3</sup>

**Pre-existing Liens.** — This construction was not generally carried so far as to support the homestead right against prior liens which had attached to the land, whether they resulted from the contract, as the lien of a mortgage or trust deed, or arose by operation of law, as in the case of attachment, judgment liens, and the like.<sup>4</sup>

(b) **Contrary View** — **Decisions of United States Supreme Court.** — Under the decisions of the Supreme Court of the United States, however, state laws creating or

1. **Homestead Exemption a Matter of Written Law.** — See *supra*, this title, *Definition, Origin, and Nature of Homestead Exemption.*

2. **Provision of Federal Constitution.** — Const. U. S., art. 1, § 10.

3. **Cases Construing Homestead Laws Retroactively** — *Alabama.* — *Sneider v. Heidelberger*, 45 Ala. 126, cited in *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727.

*Georgia.* — *Gunn v. Barry*, 44 Ga. 353, reversed in 15 Wall. (U. S.) 610; *Pulliam v. Sewell*, 40 Ga. 73; *Hardeman v. Downer*, 39 Ga. 425; *Warner, J., dissenting*; *Chambliss v. Phelps*, 39 Ga. 386. See also *Dooly v. Isbell*, 39 Ga. 342; *Kelly v. Stephens*, 39 Ga. 466.

*Kansas.* — *Cusic v. Douglass*, 3 Kan. 123, 87 Am. Dec. 458, doubted in *Deering v. Boyle*, 8 Kan. 526, cited in *Watkins v. Glenn*, 55 Kan. 439, per *Allen, J.*; *Root v. McGrew*, 3 Kan. 215.

*Louisiana.* — *Doughty v. Sheriff*, 27 La. Ann. 355; *Robert v. Coco*, 25 La. Ann. 199. See also *Taylor v. Saloy*, 38 La. Ann. 62.

*Mississippi.* — *Stephenson v. Osborne*, 41 Miss. 127, overruled in *Lessley v. Phipps*, 49 Miss. 798; *Morrison v. M'Daniel*, 30 Miss. 213.

*North Carolina.* — *Barrett v. Richardson*, 76 N. Car. 429; *Edwards v. Kearsey*, 74 N. Car. 241, 75 N. Car. 409, reversed in 96 U. S. 595; *Allen v. Shields*, 72 N. Car. 504; *Wilson v. Sparks*, 72 N. Car. 208; *Garrett v. Chesire*, 69 N. Car. 396, 12 Am. Rep. 647; *Poe v. Hardie*, 65 N. Car. 447; *McKeithan v. Terry*, 64 N. Car. 25; *Hill v. Kessler*, 63 N. Car. 437, cited in *Lowdermilk v. Corpening*, 92 N. Car. 333; *Jacobs v. Smallwood*, 63 N. Car. 112.

*South Carolina.* — *Bradley v. Rodelsperger*, 3 S. Car. 226; *In re Kennedy*, 2 S. Car. 216, overruled in *Cochran v. Darcy*, 5 S. Car. 125; *Howze v. Howze*, 2 S. Car. 229. See also *Allen v. Harley*, 3 S. Car. 412.

*Texas.* — *Baylor v. San Antonio Nat. Bank*, 38 Tex. 448.

*Wisconsin.* — *Borrman v. Schober*, 18 Wis. 438, distinguishing *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696.

**Constitutional Exemption.** — Where the homestead right was created by a state constitution which was submitted to and approved by Congress, this construction was upheld on the additional ground that it was no longer merely state legislation, but congressional legislation as well, and as against the latter the prohibition of the Federal Constitution has no application. *Hardeman v. Downer*, 39 Ga. 425; *Chambliss v. Phelps*, 39 Ga. 386; *Warner, J., dissenting* in both cases. This view was not adopted by the United States Supreme Court. See *infra*, this section, *Contrary View.*

4. **Homestead Laws Not Retroactive as Against Prior Liens** — **Mortgage Liens.** — *Cole v. La Chambre*, 31 La. Ann. 41; *Soulier v. Benker*, 37 La. Ann. 162; *Roupe v. Carradine*, 20 La. Ann. 244; *Lavillebeuvre v. Frederic*, 20 La. Ann. 374; *Martin v. Meredith*, 71 N. Car. 214; *Ladd v. Adams*, 66 N. Car. 164; *Sluder v. Rogers*, 64 N. Car. 289; *McKeithan v. Terry*, 64 N. Car. 25; *Shelor v. Manson*, 2 S. Car. 233; *Eylar v. Eylar*, 60 Tex. 315. *Contra*, *Chambliss v. Phelps*, 39 Ga. 386; *Warner, J., dissenting.*

**Liens by Operation of Law.** — *Townsend Sav. Bank v. Epping*, 3 Woods (U. S.) 390; *Taylor v. Saloy*, 38 La. Ann. 62; *Doughty v. Sheriff*, 27 La. Ann. 355; *Robert v. Coco*, 25 La. Ann. 199; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696, distinguished in *Borrman v. Schober*, 18 Wis. 437; *Simmons v. Johnson*, 14 Wis. 523; *Matter of Phelan*, 16 Wis. 77; *Dopp v. Albee*, 17 Wis. 591; *Baltimore Annual Conference v. Schell*, 17 Wis. 308. *Contra*, *Sneider v. Heidelberger*, 45 Ala. 126, doubted in *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Gunn v. Barry*, 44 Ga. 353, reversed in 15 Wall. (U. S.) 610; *Pulliam v. Sewell*, 40 Ga. 73; *Hardeman v. Downer*, 39 Ga. 425; *Warner, J., dissenting*;



enlarging the exemption, whether statutory merely or embodied in the constitution, impair the obligation of a pre-existing contract and are so far inoperative and void.<sup>1</sup>

**This Construction the Supreme Law of the Land.** — This construction of the Federal Constitution is binding on the state courts, whatever may have been their former holding, and renders those decisions which have upheld the retroactive construction of no value as precedents. It has been applied in numerous cases.<sup>2</sup>

*Cusic v. Douglass*, 3 Kan. 123, 87 Am. Dec. 458, *followed in* *Root v. McGrew*, 3 Kan. 215. See also *Kelly v. Stephens*, 39 Ga. 466; *Dooly v. Isbell*, 39 Ga. 342.

**1. Retroactive Homestead Exemption Laws Impair the Obligation of Contracts** — *United States*. — *Gunn v. Barry*, 15 Wall. (U. S.) 610 [*reversing* *Gunn v. Barry*, 44 Ga. 353, and in effect *overruling* dicta to the contrary in *Bronson v. Kinzie*, 1 How. (U. S.) 311, and *Planters' Bank v. Sharp*, 6 How. (U. S.) 330]; *Edwards v. Kearzey*, 96 U. S. 595, [*reversing* 74 N. Car. 241, 75 N. Car. 409], wherein it was said: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void." Further on this question, see the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 166; IMPAIRMENT OF OBLIGATION OF CONTRACTS, *post*.

**2. Retroactive Homestead Exemption Laws Impair Obligation of Contracts** — **Decisions of State Courts.** — Some of the decisions following are under homestead laws which by their own terms do not apply to pre-existing contracts. But such provisions are of little practical importance in view of this construction of the Federal Constitution.

*Alabama*. — *Cochran v. Miller*, 74 Ala. 50; *Peevey v. Cabaniss*, 70 Ala. 253; *Slaughter v. McBride*, 69 Ala. 510; *Corr v. Shackelford*, 68 Ala. 241; *Kelly v. Garrett*, 67 Ala. 304; *Smith v. Cockrell*, 66 Ala. 64; *Hardy v. Sulzbacher*, 62 Ala. 44; *Blum v. Carter*, 63 Ala. 235; *Love-lace v. Webb*, 62 Ala. 271; *Horn v. Wiatt*, 60 Ala. 297; *Johnson v. Murphy*, 60 Ala. 288; *Nelson v. McCrary*, 60 Ala. 301; *Preiss v. Campbell*, 59 Ala. 635; *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Watts v. Burnett*, 56 Ala. 340; *Miller v. Marx*, 55 Ala. 322; *Alabama Conference v. Vaughan*, 54 Ala. 443.

*Arkansas*. — *Cohn v. Hoffman*, 45 Ark. 376.

*Colorado*. — *Barnett v. Knight*, 7 Colo. 365.

*Georgia*. — *Jeffries v. Bartlett*, 75 Ga. 230; *McAfee v. Covington*, 71 Ga. 272, 51 Am. Rep. 263; *Shipp v. Smith*, 76 Ga. 1; *Dunagan v. Webster*, 93 Ga. 540; *Boroughs v. White*, 69 Ga. 841; *Douglass v. Boylston*, 69 Ga. 186; *Hawks v. Hawks*, 64 Ga. 239; *Hunnicutt v. Summey*, 63 Ga. 586; *Drinkwater v. Moreman*, 61 Ga. 395; *Hiley v. Bridges*, 60 Ga. 375; *Dar-sey v. Mumpford*, 58 Ga. 119; *Clarke v. Tra-wick*, 56 Ga. 359; *Bush v. Lester*, 55 Ga. 579, *cited in* *Dixon v. Lawson*, 65 Ga. 661; *Sparger v. Cumpton*, 54 Ga. 355; *Van Dyke v. Kilgo*, 54 Ga. 551; *Wofford v. Gaines*, 53 Ga. 485; *Cumming v. Clegg*, 52 Ga. 605; *Grant v. Cosby*, 51 Ga. 460; *Chambliss v. Jordan*, 50 Ga. 81; *Smith v. Whittle*, 50 Ga. 626; *Gunn*

*v. Thornton*, 49 Ga. 380; *Jones v. Brandon*, 48 Ga. 593.

*Kentucky*. — *Gardner v. Smith*, 10 Bush (Ky.) 245; *Kibbey v. Jones*, 7 Bush (Ky.) 244; *Knight v. Whitman*, 6 Bush (Ky.) 53, 99 Am. Dec. 652; *Pryor v. Smith*, 4 Bush (Ky.) 382; *Webster v. Bronston*, 5 Bush (Ky.) 521; *Miller v. Clemmons*, 6 Ky. L. Rep. 296; *Edmondson v. Green*, 3 Ky. L. Rep. 538.

*Louisiana*. — *Poole v. Cook*, 34 La. Ann. 331; *Martin v. Kirkpatrick*, 30 La. Ann. 1214; *Taylor's Succession*, 10 La. Ann. 509; *Sabatier v. Creditors*, 6 Mart. N. S. (La.) 589.

*Maine*. — *Lawton v. Bruce*, 39 Me. 484.

*Massachusetts*. — *Tucker v. Drake*, 11 Allen (Mass.) 145; *Howard v. Wilbur*, 5 Allen (Mass.) 219; *White v. Rice*, 5 Allen (Mass.) 73, *distinguishing* *Norton v. Norton*, 5 Cush. (Mass.) 530; *Rice v. Southgate*, 16 Gray (Mass.) 142; *Clark v. Potter*, 13 Gray (Mass.) 21; *Beals v. Clark*, 13 Gray (Mass.) 18; *Woods v. Sanford*, 9 Gray (Mass.) 16.

*Michigan*. — *Mertz v. Berry*, 101 Mich. 32, 45 Am. St. Rep. 379.

*Minnesota*. — *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112.

*Mississippi*. — *Acker v. Trueland*, 56 Miss. 30; *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Lessley v. Phipps*, 49 Miss. 790, *overruling* *Stephenson v. Osborne*, 41 Miss. 127; *Pennington v. Seal*, 49 Miss. 518; *Smith v. Brown*, 28 Miss. 810.

*Missouri*. — *Loring v. Groomer*, 142 Mo. 17; *Berry v. Ewing*, 91 Mo. 395; *Stivers v. Horne*, 62 Mo. 473; *Buck v. Ashbrook*, 59 Mo. 200.

*Nebraska*. — *Dorrington v. Myers*, 11 Neb. 388, *cited in* *De Witt v. Wheeler*, etc., *Sewing Mach. Co.*, 17 Neb. 533.

*New Hampshire*. — *Squire v. Mudgett*, 61 N. H. 149.

*North Carolina*. — *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483; *Long v. Walker*, 105 N. Car. 90; *Keener v. Goodson*, 89 N. Car. 273; *Grant v. Edwards*, 86 N. Car. 513, *citing* *Wyche v. Wyche*, 85 N. Car. 96; *Gamble v. Watterson*, 83 N. Car. 573; *Gheen v. Sum-mey*, 80 N. Car. 187; *Earle v. Hardie*, 80 N. Car. 177. See also *North Carolina* cases cited *infra*, this note.

*Ohio*. — *Curtis v. Selby*, 1 Ohio Cir. Dec. 25, 1 Ohio Cir. Ct. 40.

*Pennsylvania*. — *Weaver's Estate*, 25 Pa. St. 434.

*South Carolina*. — *McClenaghan v. McEachern*, 47 S. Car. 446; *Stewart v. Blalock*, 45 S. Car. 61; *Trimmier v. Winsmith*, 41 S. Car. 109; *Norton v. Bradham*, 21 S. Car. 378; *Choice v. Charles*, 7 S. Car. 171; *Ryan v. Pettigrew*, 7 S. Car. 147; *Ex p. Hewett*, 5 S. Car. 409; *De la Howe v. Harper*, 5 S. Car. 472; *Cochran v. Darcey*, 5 S. Car. 125, *overruling*; *In re Kennedy*, 2 S. Car. 216.

**Judgment and Other Liens.** — It is unimportant whether the contract has resulted in affixing a lien upon the land before the passage of the homestead law. The prohibition has reference to the contract, and is not dependent upon the existence of a lien.<sup>1</sup>

*South Dakota.* — *Sundback v. Griffith*, 7 S. Dak. 109.

*Tennessee.* — *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882; *Leonard v. Mason*, 1 Lea (Tenn.) 384; *Douglass v. Gregg*, 7 Baxt. (Tenn.) 384; *Hannum v. McInturf*, 6 Baxt. (Tenn.) 225, 11 Heisk. (Tenn.) 48, note; *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220; *Woodlie v. Towles*, 1 Memphis L. J. 68, 179, 1 Leg. Rep. 331; *Byrus v. James*, King's Tenn. Dig. 1232.

*Texas.* — *Wright v. Straub*, 64 Tex. 64; *McLane v. Paschal*, 62 Tex. 106, *citing* *Paschal v. Cushman*, 26 Tex. 74; *Gage v. Neblett*, 57 Tex. 374; *Wood v. Wheeler*, 7 Tex. 13.

*Virginia.* — *Huffman v. Leffell*, 32 Gratt. (Va.) 41; *Com. v. Ford*, 29 Gratt. (Va.) 683; *Russell v. Randolph*, 26 Gratt. (Va.) 705; *Homestead Cases*, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; *Taylor v. Stearns*, 18 Gratt. (Va.) 244, *cited in* *Antoni v. Wright*, 22 Gratt. (Va.) 858; *In re Wyllie*, 2 Hughes (U. S.) 449, 30 Fed. Cas. No. 18,112.

*West Virginia.* — *Speidel v. Schlosser*, 13 W. Va. 686.

The True Doctrine, said the *Virginia* court, "is that such property as was subject to execution at the time the debt was contracted must continue subject to execution until the debt is paid, so long as it remains in the hands of the debtor." *Homestead Cases*, 22 Gratt. (Va.) 295, 12 Am. Rep. 507.

**Constitutional Exemption.** — An exemption creating or enlarging the homestead right, contained in a state constitution which has been submitted to Congress and approved by it, impairs the obligation of pre-existing contracts as well as such exemptions which are merely statutory. *Homestead Cases*, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 8 Nat. Bankr. Reg. 1, *reversing* 44 Ga. 353.

**Debts Due to State.** — A homestead exemption law is inoperative and void as against pre-existing debts due to the state as well as against those due to citizens. The fact that the law was intended by the state to be retroactive does not estop the state from questioning its constitutionality. *Brooks v. State*, 54 Ga. 36.

**Contracts Entered Into Between Passage of Law and Time When It Takes Effect.** — A homestead law which excepts from its operation rights acquired "prior to the passage of this act" is valid as to rights acquired after it had become a law by the approval of the governor, although the time set for its going into operation had not yet arrived. *Johnson v. Fay*, 16 Gray (Mass.) 144. But see *contra*, *Charles v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457.

**Statutory Provision Excluding Pre-existing Contracts.** — Where the homestead law, by express provision, applies only to liabilities incurred "since" a certain day, no exemption can be claimed against contracts executed on that day. *Ladd v. Dudley*, 45 N. H. 61.

**Illustrations — Laws Which Affect Power of Owner to Encumber or Alienate Homestead.** — A

homestead law may increase the exemption and impair the obligation of pre-existing contracts without enlarging the amount of property which may be claimed as exempt. Thus a provision invalidating an incumbrance or other conveyance of homestead property by a married man unless his wife joins in the mortgage or deed is void as to pre-existing contracts not thus executed which were valid when made. *Ely v. Eastwood*, 26 Ill. 107; *Smith v. Marc*, 26 Ill. 150, *cited in* *Silsbe v. Lucas*, 36 Ill. 463; *Dawson v. Hayden*, 67 Ill. 52; *Olson v. Nelson*, 3 Minn. 53; *Schiels v. Horbach*, 49 Neb. 262; *Kincaid v. Burem*, 9 Lea (Tenn.) 553, *citing* *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220. See also *Spitley v. Frost*, 15 Fed. Rep. 299.

**Prohibiting Sale of Reversionary Interest.** — The *North Carolina* Act of 1870 which prohibited the sale of the debtor's reversionary interest in land charged with a homestead exemption could not be enforced against a pre-existing contract. *McDonald v. Dickson*, 85 N. Car. 248; *Cobb v. Halyburton*, 92 N. Car. 652.

**Right to Convey Homestead Free of Liens.** — A law which provides that the homestead may be conveyed free from the lien of judgments rendered subsequent to the time when the premises are impressed with the homestead character increases the exemption and is invalid as to pre-existing contracts. *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112.

**Compelling Creditor First to Exhaust Other Property.** — In *North Carolina* it was held in several cases that provisions in a law increasing the exemption which compel the creditor to subject to the payment of his debt property of the debtor not claimed as a homestead before coming on to the latter might be applied to pre-existing contracts without impairing their obligations. *Morrison v. Watson*, 101 N. Car. 332; *McCanless v. Flinchum*, 93 N. Car. 358; *Cobb v. Halyburton*, 92 N. Car. 652; *Arnold v. Estis*, 92 N. Car. 162; *Lowdermilk v. Corpening*, 92 N. Car. 333; *Mebane v. Layton*, 89 N. Car. 396; *Miller v. Miller*, 89 N. Car. 402; *Albright v. Albright*, 88 N. Car. 238; *Gamble v. Watterson*, 83 N. Car. 573. But these decisions were overruled on this point in *Long v. Walker*, 105 N. Car. 90, *Meirimon, C. J., dissenting*, which case was followed in *Shaffer v. Hahn*, 105 N. Car. 121, and *cited in* *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483.

**1. Lien Before Passage of Law Unnecessary.** — *Jones v. Brandon*, 48 Ga. 593.

**Liens on Property in Bankrupt Court.** — Where the exemption has been set apart in the federal bankrupt courts, liens on the premises antedating the exemption law are not debts which are discharged by the final discharge of the debtor unless they are proved and passed upon by those courts; but they may be still enforced against the homestead by proper proceedings in the courts of the state. *Phillips v. Bass*, 65 Ga. 427 [*citing In re Bass*, 15 Nat.



(c) **Continuing Early Laws in Force.** — Early homestead laws are frequently left unrepealed or are re-enacted when the exemption is increased, that the debtor may not be deprived of the right as against debts contracted thereunder.<sup>1</sup> In some states, indeed, homestead rights seem to have been perfected without question under prior laws no longer in force.<sup>2</sup> In some states, however, there are decisions which hold directly that this cannot be done.<sup>3</sup>

(2) **Acts of Congress Creating or Increasing Exemption.** — This inhibition against laws impairing the obligation of contracts is confined to the states respectively, and there is nothing in the Federal Constitution which precludes Congress from passing homestead laws applicable to all contracts, regardless of the time when they were entered into.<sup>4</sup>

Bankr. Reg. 453]; *Holland v. Withers*, 76 Ga. 667; *Darsey v. Mumpford*, 17 Nat. Bankr. Reg. 181; *Cumming v. Clegg*, 14 Nat. Bankr. Reg. 49; *Hatcher v. Jones*, 14 Nat. Bankr. Reg. 387. *Contra*, *Windley v. Tinkard*, 88 N. Car. 223, citing *Withers v. Stinson*, 79 N. Car. 341, and *Dixon v. Dixon*, 81 N. Car. 323; *Blum v. Ellis*, 73 N. Car. 293, distinguishing *Knabe v. Hayes*, 71 N. Car. 109.

1. **Early Laws Retained and Exemptions Allowed Thereunder** — *Alabama*. — *Powe v. McLeod*, 76 Ala. 418; *De Graffenried v. Clark*, 75 Ala. 425; *Clark v. Spencer*, 75 Ala. 49; *Keel v. Larkin*, 72 Ala. 493; *Peevey v. Cabaniss*, 70 Ala. 253; *Kelly v. Garrett*, 67 Ala. 304; *Smith v. Cockrell*, 66 Ala. 64; *Blum v. Carter*, 63 Ala. 235; *Hardy v. Sulzbacher*, 62 Ala. 44; *Watts v. Burnett*, 56 Ala. 340; *Miller v. Marx*, 55 Ala. 322; *Alabama Conference v. Vaughan*, 54 Ala. 443.

*Arkansas*. — *Cohn v. Hoffman*, 45 Ark. 376. *Georgia*. — Const. 1877, art. 9, §§ 7, 8; *Grant v. Cosby*, 51 Ga. 460; *Bush v. Lester*, 55 Ga. 579; *Darsey v. Mumpford*, 58 Ga. 119.

*Louisiana*. — *Hebert v. Mayer*, 47 La. Ann. 563; *Martin v. Walker*, 43 La. Ann. 1019; *Kinder v. Lyons*, 38 La. Ann. 713; *Taylor v. Saloy*, 38 La. Ann. 62; *Thomas v. Guilbeau*, 35 La. Ann. 927; *Poole v. Cook*, 34 La. Ann. 331; *Gerson v. Gayle*, 34 La. Ann. 337; *Gilmer v. O'Neal*, 32 La. Ann. 980; *Lavillebeuvre v. Frederic*, 20 La. Ann. 374.

*Maine*. — *Mills v. Spaulding*, 50 Me. 57.

*Massachusetts*. — *Clark v. Potter*, 13 Gray (Mass.) 21.

*New Hampshire*. — *Murray v. Trumbull*, 67 N. H. 281.

*North Carolina*. — *Earle v. Hardie*, 80 N. Car. 177.

*Ohio*. — *Curtis v. Selby*, 1 Ohio Cir. Dec. 25, 1 Ohio Cir. Ct. 40.

*Tennessee*. — *Deatherage v. Walker*, 11 Heisk. (Tenn.) 45; *Douglass v. Gregg*, 7 Baxt. (Tenn.) 384; *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220.

*West Virginia*. — *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

**Construction of Saving Clause.** — In a law repealing prior homestead acts, a clause which provides that such repeal shall not affect any right which may have been acquired thereunder has been held sufficient to permit the exemption to be perfected after the repeal. *Clark v. Potter*, 13 Gray (Mass.) 21; *Curtis v. Selby*, 1 Ohio Cir. Dec. 25, 1 Ohio Cir. Ct. 40; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

**Repeal and Re-enactment.** — The right to per-

fect a homestead under a prior law is not affected by the repeal of such law where it is re-enacted prior to the time when the claim is made. *Murray v. Trumbull*, 67 N. H. 281. See also the *Alabama* cases cited in the second note *infra*.

2. **Homestead Rights under Early Laws Not in Force.** — The authority under which these cases proceed is a statement contained in *Gunn v. Barry*, 15 Wall. (U. S.) 610, reversing 44 Ga. 353, and in *Edwards v. Kearzey*, 96 U. S. 595, reversing 74 N. Car. 241, 75 N. Car. 409, wherein, in deciding that certain homestead laws impaired the obligation of pre-existing contracts, it was held that the legal remedies for the enforcement of a contract that belong to such contract at the time and place when it is made are a part of its obligation. See *Trimmier v. Winsmith*, 41 S. Car. 109 (wherein it was held that the remedy in existence when the debt was created, being a part of the obligation, cannot be disturbed either by the constitution of the state or by an act of the legislature). *McClenaghan v. McEachern*, 47 S. Car. 446; *Stewart v. Blalock*, 45 S. Car. 61; *Norton v. Bradham*, 21 S. Car. 378. See also *Spitley v. Frost*, 15 Fed. Rep. 299; *Dorrington v. Myers*, 11 Neb. 388; *DeWitt v. Wheeler*, etc., *Sewing Mach. Co.*, 17 Neb. 533; *McHugh v. Smiley*, 17 Neb. 620; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675.

3. **Homesteads Not Allowed under Early Laws No Longer in Force.** — *Slaughter v. McBride*, 69 Ala. 510; *Carlisle v. Godwin*, 68 Ala. 137; *Clark v. Snodgrass*, 66 Ala. 233; *Giddens v. Williamson*, 65 Ala. 439; *Lovelace v. Webb*, 62 Ala. 271; *Horn v. Wiatt*, 60 Ala. 297; *Nelson v. McCrary*, 60 Ala. 301; *Charles v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457.

4. *Ross v. Worsham*, 65 Ga. 624; *In re Smith*, 8 Nat. Bankr. Reg. 401, 22 Fed. Cas. No. 12,986; *In re Owens*, 6 Biss. (U. S.) 432, 12 Nat. Bankr. Reg. 518, 18 Fed. Cas. No. 10,632; *In re Wyllie*, 2 Hughes (U. S.) 449, 30 Fed. Cas. No. 18,112.

**Illustrations** — **United States Bankrupt Act.** — Thus it has been held that amendments to a former bankrupt act, made by the Congress of 1872-1873, exempting homesteads and other property to the extent allowed by the various state constitutions and laws, against debts and judgment liens, whether the debts were contracted or the liens attached prior or subsequent to the passage of such constitutions and laws, were valid enactments. *In re Smith*, 2 Woods (U. S.) 458, 14 Nat. Bankr. Reg. 295, 22 Fed. Cas. No. 12,996; *In re Jordan*, 10 Nat. Bankr. Reg. 427, 13 Fed. Cas. No. 7,515, citing



(3) *Laws Decreasing Exemption.* — Laws which decrease the exemption are generally held applicable to pre-existing contracts determining both the rights of the promisee and those of the promisor. The remedies of the former are increased instead of being impaired, while the homestead right of the latter is not one which vests beyond the power of the state to recall it whenever it sees fit.<sup>1</sup>

b. **LIABILITIES ARISING OUT OF TORTS.** — A claim for damages arising out of a tort is not a contract within the meaning of this provision of the Federal Constitution, and a homestead law may be valid against such a right

*In re* Beckerford, 1 Dill. (U. S.) 45, 4 Nat. Bankr. Reg. 203, 3 Fed. Cas. No. 1,209; *In re* Jordan, 8 Nat. Bankr. Reg. 180; *In re* Kean, 2 Hughes (U. S.) 322, 8 Nat. Bankr. Reg. 367, 14 Fed. Cas. No. 7,630; *In re* Smith, 8 Nat. Bankr. Reg. 401, 22 Fed. Cas. No. 12,986; *Windley v. Tankard*, 88 N. Car. 223; *Lamb v. Chamness*, 84 N. Car. 379, cited in *Simpson v. Houston*, 97 N. Car. 344, 2 Am. St. Rep. 297. *Contra, In re* Deckert, 2 Hughes (U. S.) 183, 10 Nat. Bankr. Reg. 1, 7 Fed. Cas. No. 3,728, *per* Waite, C. J.; *In re* Dillard, 2 Hughes (U. S.) 190, 9 Nat. Bankr. Reg. 9, 7 Fed. Cas. No. 3,912; *In re* Duerson, 13 Nat. Bankr. Reg. 183, 7 Fed. Cas. No. 4,117; *In re* Shipman, 2 Hughes (U. S.) 227, 14 Nat. Bankr. Reg. 570, 21 Fed. Cas. No. 12,791; *Bush v. Lester*, 55 Ga. 579, *per* Bleckley, J.

*Federal Homestead Law.* — Perhaps another illustration of this authority is the Act of Congress providing for the acquirement of a homestead in public lands belonging to the United States, which exempts such property while in the hands of a settler from all debts contracted prior to the issue of the patent thereof. *Seymour v. Sanders*, 3 Dill. (U. S.) 437, cited in *Fink v. O'Neil*, 106 U. S. 272; *Miller v. Little*, 47 Cal. 348; *Lewton v. Hower*, 18 Fla. 872; *Adams v. White*, 23 Fla. 352; *Watson v. Voorhees*, 14 Kan. 328; *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389, cited in *Todd v. Johnson*, 56 Minn. 60; *Duell v. Cotter*, 51 Neb. 241; *Faulk v. Cooke*, 19 Oregon 455, 20 Am. St. Rep. 836; *Clark v. Bayley*, 5 Oregon 343; *Gile v. Hallock*, 33 Wis. 523.

Debts incurred prior to the issuance of the patent, by the grantee of the one entering public land as a homestead under this law, do not fall within its provisions, but the land may be seized and subjected to their payment. *Duell v. Potter*, 51 Neb. 241.

In *Watson v. Voorhees*, 14 Kan. 328, it was held that if a party entering public land as a homestead executes a mortgage upon it to secure a debt existing prior to the issuance of a patent, the mortgage will constitute a valid lien which may be enforced by foreclosure and sale. Citing *Nycum v. McAllister*, 33 Iowa 374. See also *Fuller v. Hunt*, 48 Iowa 165.

**Ontario.** — A law similar in character to the federal homestead law, relating to settlement upon public lands, exists in the province of Ontario, Canada. Rev. Stat. Ont., c. 25, § 20, subsec. 2, exempts a homestead acquired thereunder from attachment, levy under execution, or sale for payment of debts or liabilities contracted or incurred after the date of location for a period of twenty years, if it continues to be owned by the locatee or his widow. *Cann v. Knott*, 19 Ont. 422.

1. **Laws Decreasing Exemption Apply to Pre-existing Contracts** — *California.* — *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641.

*Georgia.* — *Harris v. Glenn*, 56 Ga. 94; *Sparger v. Cumpton*, 54 Ga. 355; *Whittington v. Colbert*, 50 Ga. 584; *Larence v. Evans*, 50 Ga. 216.

*North Carolina.* — *Leak v. Gay*, 107 N. Car. 468, 482, 483, *distinguishing* *Utley v. Jones*, 92 N. Car. 263; *Earle v. Hardie*, 80 N. Car. 177; *Gamble v. Rhyne*, 80 N. Car. 183. *Compare* *Rankin v. Shaw*, 94 N. Car. 405.

*Texas.* — *Moore v. Litchford*, 35 Tex. 185, 14 Am. Rep. 363, *Ogden, J., dissenting.*

*Wisconsin.* — *Bull v. Conroe*, 13 Wis. 233; *Parker v. King*, 16 Wis. 223.

*Contra.* — *Galligher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319; *Dorrington v. Myers*, 11 Neb. 388; *De Witt v. Wheeler, etc.*, *Sewing Mach. Co.*, 17 Neb. 533. See also *Dennis v. Omaha Nat. Bank*, 19 Neb. 675; *McHugh v. Smiley*, 17 Neb. 620; *Spitley v. Frost*, 15 Fed. Rep. 299, and other cases cited *infra*, this note.

**Illustration — Decreasing Exemption by Bringing Farm Land Within Corporate Limits of Town.** — *Bull v. Conroe*, 13 Wis. 233, was a case wherein farm land to which a homestead right had attached became town property in due course of law. It was held that the homestead exemption was thereby decreased in extent to conform to the laws regulating homesteads in urban property.

*Contra.* — *Bassett v. Messner*, 30 Tex. 604; *Arnold v. Adams*, 38 Tex. 425; *Kent v. Beatty*, 40 Tex. 440; *Galligher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319, which thus stated the doctrine of those cases opposed to the statement made in the text: "As appears by the section above quoted (the law in force at the time the indebtedness was incurred), the whole of the tract of land involved was exempt from forced sale on execution or other process. This remained the law of the contract (*Dorrington v. Myers*, 11 Neb. 389), and by the occupation of the property 'he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment,'".

As to whether the right to a homestead is a mere privilege or a vested interest in land see *supra*, this title, II. 4. c. *Whether Estate or Mere Privilege.*

In *Gunn v. Barry*, 15 Wall. (U. S.) 610, 8 Nat. Bankr. Reg. 1, *reversing* 44 Ga. 353, it was stated that a state may change laws regulating homestead exemptions, provided the change involves no impairment of a substantial right.

of action, although it existed prior thereto.<sup>1</sup>

**3. Liabilities Incurred After Enactment of Law**—*a. IN GENERAL.*—As a general rule the homestead exemption can be claimed as against all liabilities incurred subsequent to the passage of the law, which are not excepted, either expressly or by necessary implication, from its terms.

**Constitutionality of Exceptions.**—Statutory exceptions cannot be sustained if the homestead exemption is provided for by the state constitution and the exceptions are in conflict therewith.<sup>2</sup>

*b. DEBTS TO STATE.*—Neither a state nor the federal government has any greater rights against the homestead exemption than individual creditors, in the absence of an express exception in its favor.<sup>3</sup>

*c. LIABILITIES ARISING OUT OF TORTS AND PUBLIC WRONGS*—**In General.**—Under laws which exempt the homestead, without limitation as to the character of the liabilities against which it may be claimed, it cannot as a rule be subjected to the payment of any debts not specifically excepted, whether they are such as are incurred by contract or arise out of torts or public wrongs.<sup>4</sup>

1. *Parker v. Savage*, 6 Lea (Tenn.) 406; *Alley v. Holcomb*, 73 Ga. 109; *McAfee v. Covington*, 71 Ga. 272, 51 Am. Rep. 263, in which case, furthermore, the claim had been brought to judgment, and became a lien before the law was passed.

**Provision Against Impairing Suits in Court, Rights of Action, and the Like.**—A constitutional provision that nothing therein contained shall impair the validity of any debts or contracts, or affect any rights of property, "or any suits, actions, rights of action, or other proceedings in courts of justice," does not prevent the homestead given by the constitution from being claimed as against a judgment rendered after adoption of the constitution for a tort committed before its adoption, though the action for the tort may have been commenced before. *Parker v. Savage*, 6 Lea (Tenn.) 406.

**2. Constitutionality of Exceptions.**—*Meyer v. Berlandi*, 39 Minn. 438, 12 Am. St. Rep. 663; *Keller v. Struck*, 31 Minn. 446; *Coleman v. Bal-landi*, 22 Minn. 144; *Cogel v. Mickow*, 11 Minn. 475, cited in *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205; *Bergsma v. Dewey*, 46 Minn. 357; *Cumming v. Bloodworth*, 87 N. Car. 83; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66; *Donaldson v. Voltz*, 19 W. Va. 156, wherein it was said: "The constitution makes certain debts exceptions; but as to all other debts the exemption applies. If it was in the power of the legislature to except a debt due for rent from the benefit of the exemption, it could except all other debts and thus deprive the debtor of all the benefit intended by the constitution."

**South Dakota.**—Laws S. Dak. 1890, c. 86, declaring what should be the homestead, made no exceptions to the exemption; and in view of the fact that a proposition to subject homesteads to mechanic's liens, submitted to the people by the legislature, was rejected, section 2452 of the Compiled Laws, which excepted such liens, must be considered as repealed. *Fallihee v. Wittmayer*, 9 S. Dak. 479.

**3. State Has No Greater Remedies Against Homesteads than Other Creditors**—*United States*,—*Fink v. O'Neil*, 106 U. S. 272; *Salentine v. Fink*, 8 Biss. (U. S.) 503, 20 Alb. L. J. 335, 21 Fed. Cas. No. 12,250

*Arkansas.*—*Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28.

*Georgia.*—*Colquitt v. Brown*, 63 Ga. 440.

*Illinois.*—*Loomis v. Gerson*, 62 Ill. 11.

*Kentucky.*—*Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323; *Com. v. Lay*, 12 Bush (Ky.) 284, 23 Am. Rep. 718.

*Missouri.*—*State v. Pitts*, 51 Mo. 133.

*New Mexico.*—*U. S. v. Lesnet*, (N. Mex. 1897) 50 Pac. Rep. 321.

*Tennessee.*—*Ren v. Driskell*, 11 Lea (Tenn.) 642.

**United States.**—This doctrine is applicable against the United States under Rev. Stat. U. S., § 916, which provides that a party recovering a common-law judgment in a federal court shall have remedies thereon similar to those which are provided by the laws of the state in which the court is held. *Fink v. O'Neil*, 106 U. S. 272; *Salentine v. Fink*, 8 Biss. (U. S.) 503, 20 Alb. L. J. 335, 21 Fed. Cas. No. 12,250.

**Debts Due for Taxes and Local Assessments.**—It was held in *Com. v. Cook*, 8 Bush (Ky.) 220, 8 Am. Rep. 456, stress being laid, however, on the statute law of the commonwealth regulating the revenue, that an exception must be made in favor of the state, where the debt due to it is for taxes. The court said: "Public policy seems to require that this exceptional right shall continue to exist, in order that the public revenues may be speedily and certainly collected." See also *Nevin v. Allen*, (Ky. 1894) 26 S. W. Rep. 180, (Ky. 1897) 38 S. W. Rep. 888; *Perine v. Forbush*, 97 Cal. 305 (cases involving local assessments), and *Salentine v. Fink*, 8 Biss. (U. S.) 503, 20 Alb. L. J. 335, 21 Fed. Cas. No. 12,250. *Contra*, *Ren v. Driskell*, 11 Lea (Tenn.) 642; *Doe v. Deavors*, 11 Ga. 81 (exemption of personal property). See generally the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 179.

**Municipal Corporations.**—In *State v. Allen*, 71 Ala. 543, a case in which the state sued for the use of a county to recover a fine, it was held that even if the state would be entitled to an exception in its favor, none such existed in favor of municipal corporations.

**4. Exemption May Be Claimed Against All Debts Not Specifically Excepted.**—*Hollis v. State*, 59



"Debts Contracted." — The same doctrine is held in some states where the law exempts the homestead from "debts contracted" or "any debt contracted."<sup>1</sup> In other jurisdictions, however, no exemption can be claimed under such a law except as against a contract indebtedness.<sup>2</sup>

Other Statutory Provisions. — A statute exempting the homestead as against "any debt" allows the exemption as against liabilities generally;<sup>3</sup> while if the language used is "debts founded on contract," liabilities arising out of torts and public wrongs override the exemption.<sup>4</sup>

Waiver of Tort. — It has been held that where the tort is one which may be waived and suit brought upon an implied promise, it is a "debt contracted," against which the exemption may be claimed, regardless of the form of action in which it is sought to enforce the obligation.<sup>5</sup>

Ark. 211, 43 Am. St. Rep. 28; *Alley v. Holcomb*, 73 Ga. 109; *McAfee v. Covington*, 71 Ga. 272, 51 Am. Rep. 263; *Smith v. Omans*, 17 Wis. 395.

Judgments Obtained for Violation of Liquor Laws. — Under Code Iowa (1873), § 1558 (Code 1897, § 2422), which provides that premises and property occupied and used for the illegal manufacture or sale of intoxicating liquors with the consent and knowledge of the owner thereof or his agent shall be liable for fines and costs assessed and judgments rendered for a violation of the law regulating sales of intoxicants, a homestead which has been thus used is liable for all fines, costs, and judgments rendered for such violations. Such provision is a "special declaration" within the meaning of a section of the homestead law providing that "where there is no special declaration of the statute to the contrary" the homestead of every family, whether owned by the husband or the wife, is exempt from judicial sale. *Arnold v. Gotshall*, 71 Iowa 572; *McClure v. Braniff*, 75 Iowa 38.

1. "Debts Contracted" or "Any Debt Contracted." — *In re Radway*, 3 Hughes (U. S.) 609, 20 Fed. Cas. No. 11,523; *Loomis v. Gerson*, 62 Ill. 11; *Conroy v. Sullivan*, 44 Ill. 451; *Kruger v. Le Blanc*, 75 Mich. 424; *Mertz v. Berry*, 101 Mich. 32, 45 Am. St. Rep. 379.

2. "Debts Contracted" Refers Only to Contract Debts — *Alabama*. — *Wright v. Jones*, 103 Ala. 539; *Vincent v. State*, 74 Ala. 274; *Williams v. Bowden*, 69 Ala. 433 (judgment for statutory penalty); *Meredith v. Holmes*, 68 Ala. 190; *Schussler v. Dudley*, (Ala. 1887) 2 So. Rep. 526; *Thompson v. Hartline*, (Ala. 1894) 16 So. Rep. 711; *Randolph v. Brown*, 115 Ala. 677.

*New York*. — *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *Schouton v. Kilmer*, (Supm. Ct.) 8 How. Pr. (N. Y.) 527; *Cook v. Newman*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 523.

*Virginia*. — *Whiteacre v. Rector*, 29 Gratt. (Va.) 714, 26 Am. Rep. 420; *Burton v. Mill*, 78 Va. 468. *Contra, In re Radway*, 3 Hughes (U. S.) 609, 20 Fed. Cas. No. 11,523, in the District Court for the Eastern District of Virginia.

Sureties on Recognizance. — The indebtedness incurred by sureties of one against whom a fine has been assessed for a misdemeanor is not a liability arising out of a public wrong or tort, but is a mere civil liability, against which a homestead exemption may be claimed. *State v. Allen*, 71 Ala. 543.

Bonds of Public Officials. — In *Alabama* it has been held that the liability on their bonds in-

curred by officials having the custody of public moneys is in the nature of a liability *ex delicto* and not for a "debt contracted," and that the statutory lien upon their property which attaches on their giving the bond is superior to the homestead exemption. *Schussler v. Dudley*, (Ala. 1887) 2 So. Rep. 526, *Clopton, J., dissenting*; *Randolph v. Brown*, 115 Ala. 677.

Breach of Promise to Marry. — A homestead may not be claimed as against a demand for damages for breach of promise to marry, it being a *quasi* tort and not a "debt contracted." *Burton v. Mill*, 78 Va. 468.

In *Cook v. Newman*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 523, it was also held that such a cause of action was *ex delicto* and not *ex contractu*, but the court was construing a provision contained in the homestead law which excepted from the operations of its provisions "a debt contracted for the purchase thereof," and allowed the homestead exemption, overlooking the fact that the statute applied only to debts contracted, and was not applicable to liabilities generally. See this case discussed in *Lathrop v. Singer*, 39 Barb. (N. Y.) 396.

3. "Any Debt." — *Simpson v. Houston*, 97 N. Car. 344, 2 Am. St. Rep. 297; *Gill v. Edwards*, 87 N. Car. 76; *Dellinger v. Tweed*, 66 N. Car. 206; *Pearson, C. J., and Rodman, J., dissenting*; *Parker v. Savage*, 6 Lea (Tenn.) 406.

4. "Debts Founded on Contract." — So held under an early homestead law which obtained in *Georgia*. *Davis v. Henson*, 29 Ga. 345.

5. Waiver of Tort. — The debt involved in the litigation in which this ruling was made was a liability incurred for money obtained for false and fraudulent representations. The provision of the homestead law under which this case was decided allowed the homestead to be sold on execution for "debts contracted" prior to the passage of the law or prior to the purchase of the homestead. *Warner v. Cammack*, 37 Iowa 642.

In *New York* under a similar statute it has been held that an indebtedness incurred by false representations, which consisted in a statement that real estate belonging to the debtor was not encumbered, when as a matter of fact it had been impressed with the homestead character, could not be enforced against the premises, since such action would engraft upon the law an exception not contained therein. *Robinson v. Wiley*, 15 N. Y. 489, cited in *People v. Roper*, 35 N. Y. 637.

On the other hand, in *Matter of Haake*, 2 Sawy. (U. S.) 231, 7 Nat. Bankr. Rep. 61, 11



d. **INSOLVENT DEBTORS.** — It has been generally held that the exemption may be claimed although the property was purchased, or incumbrances thereon were removed, with the proceeds of nonexempt property, by one indebted, or even insolvent, at the time; that to hold otherwise would read into the homestead law, with reference to which it must be presumed that the debts were contracted, an exception which would go far towards nullifying the operation of the statute.<sup>1</sup>

e. **LIENS BY CONTRACT AND OPERATION OF LAW** — (1) *Prior to Homestead Right* — **General Rule.** — It is generally held that the exemption cannot be claimed as against valid liens which have attached to the premises before they are impressed with the homestead character, whether such liens are obtained

Fed. Cas. No. 5,883, it was held that a mortgagor who has declared a homestead and fraudulently obtained money thereafter on the strength of his ownership cannot claim the exemption against such indebtedness.

1. **Exemption May Be Claimed by One Indebted or Insolvent** — *United States.* — Humboldt First Nat. Bank v. Glass, 79 Fed. Rep. 706; Kelly v. Sparks, 54 Fed. Rep. 70; Matter of Henkel, 2 Sawy. (U. S.) 305, 11 Fed. Cas. No. 6,362, reversing 2 Nat. Bankr. Reg. 546, 11 Fed. Cas. No. 6,361, distinguishing Riddell v. Shirley, 5 Cal. 488. *Contra, In re Boothroyd*, 14 Nat. Bankr. Reg. 223, 3 Fed. Cas. No. 1,652; *In re Sauthoff*, 8 Biss. (U. S.) 35, 16 Nat. Bankr. Reg. 181, 5 Cent. L. J. 364; Pratt v. Burr, 5 Biss. (U. S.) 36, 19 Fed. Cas. No. 11,372; *In re Wright*, 3 Biss. (U. S.) 359, 8 Nat. Bankr. Reg. 430, 30 Fed. Cas. No. 18,067.

*Alabama.* — Wiggins v. Mertins, 111 Ala. 164; Smith v. Cockrell, 66 Ala. 64; Reeves v. Peterman, 109 Ala. 366.

*Arkansas.* — Flask v. Tindall, 39 Ark. 571.

*California.* — Simonson v. Burr, 121 Cal. 582; Fittell v. Leaky, 72 Cal. 477; King v. Gotz, 70 Cal. 236; Culver v. Rogers, 28 Cal. 526; Randall v. Buffington, 10 Cal. 493. *Contra, Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132.

*Colorado.* — McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579.

*Georgia.* — Blanchard v. Paschal, 68 Ga. 32, 45 Am. Rep. 474; Hunnicutt v. Summey, 63 Ga. 586; Newton v. Summey, 59 Ga. 397; Harris v. Visscher, 57 Ga. 229.

*Illinois.* — Cipperly v. Rhodes, 53 Ill. 346.

*Kansas.* — Munger v. Baldridge, 41 Kan. 236, 13 Am. St. Rep. 273; Sproul v. Atchison Nat. Bank, 22 Kan. 336; Hixon v. George, 18 Kan. 253; Monroe v. May, 9 Kan. 466. But see Long v. Murphy, 27 Kan. 375, distinguished in Tootle v. Stine, 31 Kan. 66.

*Massachusetts.* — Tucker v. Drake, 11 Allen (Mass.) 145.

*Michigan.* — Meigs v. Dibble, 73 Mich. 101; Orr v. Shraft, 22 Mich. 260.

*Minnesota.* — Jacoby v. Parkland Distilling Co., 41 Minn. 227.

*Mississippi.* — Edmonson v. Meacham, 50 Miss. 34.

*Nebraska.* — Paxton v. Sutton, 53 Neb. 81; Hanlon v. Pollard, 17 Neb. 368.

*New Hampshire.* — Gove v. Campbell, 62 N. H. 491.

*Texas.* — North v. Sharno, 1 Tex. 174; Chase v. Wayne, 88 Tex. 218; Bell v. Beazley,

18 Tex. Civ. App. 639; Finn v. Krut, 13 Tex. Civ. App. 36.

*Washington.* — Bradley v. Gotziam, 12 Wash. 71.

*Wisconsin.* — Kapernick v. Louk, 90 Wis. 232; Palmer v. Hawes, 80 Wis. 474; Comstock v. Bechtel, 63 Wis. 656.

**Reasons for This Holding.** — "If he [the debtor] disposes of his property subject to execution, for the very purpose of converting the proceeds into exempt property, this will not constitute legal fraud. This he may do at any time before the creditors acquire a lien upon the property. It is a right which the law gives him, subject to which every one gives him credit, and fraud can never be predicated on an act which the law permits." Jacoby v. Parkland Distilling Co., 41 Minn. 227.

"Equity, therefore, as guided and directed by the constitution and statutes of this state, favors the protection of the homestead from the claims of creditors. And, generally, whatever is done in good faith for the protection of the homestead from creditors is not looked upon as a fraud, or as illegal, but is looked upon as a proper and legitimate transaction." Sproul v. Atchison Nat. Bank, 22 Kan. 336.

**Taking Conveyance in Name of Third Party.** — It is generally held to make no difference in this respect whether the conveyance of the homestead property is taken by the husband in his own name or in that of his wife. Humboldt First Nat. Bank v. Glass, 79 Fed. Rep. 706; Hixon v. George, 18 Kan. 253. See also generally cases cited *supra*, this note. *Contra, Rogers v. McCauley*, 22 Minn. 384; Piper v. Johnston, 12 Minn. 60; Sumner v. Sawtelle, 8 Minn. 399, in which case the deed was taken in the name of a third party and not in that of the wife.

**Attacking Sale of Nonexempt Property.** — It is intimated in some cases that though the exemption was not fraudulently obtained as to creditors, a sale of nonexempt property by which the money for the purchase of the homestead was procured may be attacked as fraudulent. Comstock v. Bechtel, 63 Wis. 656, cited in Kapernick v. Louk, 90 Wis. 232; Riddell v. Shirley, 5 Cal. 488, cited in Matter of Henkel, 2 Sawy. (U. S.) 305, 11 Fed. Cas. No. 6,362, reversing 2 Nat. Bankr. Reg. 546, 11 Fed. Cas. No. 6,361. *Contra, Finn v. Krut*, 13 Tex. Civ. App. 36, wherein it was said: "There cannot be a fraudulent purchaser without a fraudulent vendor." Citing Sanger v. Colbert, 84 Tex. 673.

by contract<sup>1</sup> or by operation of law.<sup>2</sup>

**Other Views.** — In a few states the homestead exemption is declared to be superior to the right to enforce prior liens while the use continues; in some of

**1. Liens by Contract — Mortgage Liens —** *Alabama* — *Moses v. Home Bldg., etc., Assoc.*, 100 Ala. 465; *Scaife v. Argall*, 74 Ala. 473; *Hudson v. Kelly*, 70 Ala. 393; *Blum v. Carter*, 63 Ala. 235; *Boyle v. Shulman*, 59 Ala. 566.

*California*. — *Rix v. McHenry*, 7 Cal. 89; *Cohen v. Davis*, 20 Cal. 187; *Graham v. Oviatt*, 58 Cal. 428. But see *California* cases cited *infra*, the next note but one.

*Illinois*. — *Titman v. Moore*, 43 Ill. 169; *Tourville v. Pearson*, 39 Ill. 446; *McCormick v. Wilcox*, 25 Ill. 274; *People v. Stitt*, 7 Ill. App. 294.

*Iowa*. — *Chase v. Abbott*, 20 Iowa 154.

*Louisiana*. — *Martin v. Walker*, 43 La. Ann. 1019; *Taylor v. Saloy*, 38 La. Ann. 62; *Soulrier v. Benker*, 37 La. Ann. 162; *Gilmer v. O'Neal*, 32 La. Ann. 979; *Brannin v. Womble*, 32 La. Ann. 805.

*Nevada*. — *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 543, 6 Fed. Cas. No. 3,058; *Child v. Singleton*, 15 Nev. 461, *citing* *Smith v. Shrieves*, 13 Nev. 303.

*Tennessee*. — *Cottrell v. Rogers*, 99 Tenn. 488; *Enoch v. Wilson*, 11 Lea (Tenn.) 228; *Hildebrand v. Taylor*, 6 Lea (Tenn.) 659.

*Texas*. — *Hensel v. International Bldg., etc., Assoc.*, 85 Tex. 215; *Berry v. Boggess*, 62 Tex. 239; *Brooks v. Young*, 60 Tex. 32; *Wheatley v. Griffin*, 60 Tex. 209; *Morris v. Geisecke*, 60 Tex. 633; *Perego v. Kottwitz*, 54 Tex. 497; *Andrews v. Hagadon*, 54 Tex. 571; *Gillum v. Collier*, 53 Tex. 592; *Clements v. Lacy*, 51 Tex. 150; *Mabry v. Harrison*, 44 Tex. 286; *Batts v. Scott*, 37 Tex. 59; *McCreery v. Fortson*, 35 Tex. 641; *De Bruhl v. Maas*, 54 Tex. 464; *Potshuisky v. Krempan*, 26 Tex. 307; *White v. Shepperd*, 16 Tex. 163; *Shepherd v. White*, 11 Tex. 346; *Merchant v. Perez*, 11 Tex. 22; *Farmer v. Simpson*, 6 Tex. 303; *Baker v. Collins*, 4 Tex. Civ. App. 520; *McCandless v. Freeman*, (Tex. Civ. App. 1893) 23 S. W. Rep. 1112.

*Vermont*. — *Spaulding v. Crane*, 46 Vt. 292.

*United States*. — *Black v. Reno*, 59 Fed. Rep. 917.

**Other Contract Rights Superior to Exemption.** — No homestead can be claimed as against a bond to convey the premises made prior to the perfecting of the homestead right, *Yost v. Devault*, 3 Iowa 345, 66 Am. Dec. 92; as against the enforcement of trusts under which the debtor took the property, *Gilbert v. Sleeper*, 71 Cal. 290; or as against a party-wall contract whereby one-half the cost of the wall is made a lien, *Arnold v. Chamberlain*, 14 Tex. Civ. App. 634.

**2. Liens by Operation of Law — Judgment Liens —** *Alabama*. — *Preiss v. Campbell*, 59 Ala. 635; *Lyons v. Connor*, 57 Ala. 181. See also the *Alabama* cases cited in preceding notes.

*Arkansas*. — *Tillar v. Bass*, 57 Ark. 179; *Patrick v. Baxter*, 42 Ark. 175.

*Idaho*. — *Smith v. Richards*, 2 Idaho 464.

*Illinois*. — *Willard v. Masterson*, 160 Ill. 443; *Zander v. Scott*, 165 Ill. 51; *Rock v. Haas*, 110 Ill. 528; *Chappell v. Spire*, 106 Ill. 472; *Reinbach v. Walter*, 27 Ill. 393; *Tourville v. Pearson*, 39 Ill. 446.

*Iowa*. — *Peterson v. Little*, 74 Iowa 223; *Elston v. Robinson*, 21 Iowa 531.

*Kansas*. — *Aldrich v. Boice*, 56 Kan. 170; *Ingels v. Ingels*, 50 Kan. 755; *Osborne v. Schoonmaker*, 47 Kan. 667; *Edgerton v. Connelly*, 3 Kan. App. 618; *Dobson v. Shoup*, 3 Kan. App. 468.

*Kentucky*. — *Meador v. Meador*, 88 Ky. 217, 10 Ky. L. Rep. 783; *Creager v. Creager*, 87 Ky. 449, 10 Ky. L. Rep. 424.

*Louisiana*. — *Martin v. Walker*, 43 La. Ann. 1019; *Taylor v. Saloy*, 38 La. Ann. 62, *distinguishing* *Gerson v. Gayle*, 34 La. Ann. 337.

*Minnesota*. — *Kresin v. Mau*, 15 Minn. 116; *Kelly v. Dill*, 23 Minn. 435; *Liebetrau v. Goodsell*, 26 Minn. 417.

*Mississippi*. — *Trotter v. Dobbs*, 38 Miss. 198.

*Missouri*. — *Bunn v. Lindsay*, 95 Mo. 250; *Jackson v. Bowles*, 67 Mo. 609; *Shindler v. Givens*, 63 Mo. 394, *distinguishing* *Vogler v. Montgomery*, 54 Mo. 577.

*Nebraska*. — *Hanlon v. Pollard*, 17 Neb. 368; *Bowker v. Collins*, 4 Neb. 496.

*Nevada*. — *Lachman v. Walker*, 15 Nev. 422, *citing* *Hawthorne v. Smith*, 3 Nev. 189; *Walley's Estate*, 11 Nev. 264; *Smith v. Stewart*, 13 Nev. 65.

*New Hampshire*. — *Austin v. Stanley*, 46 N. H. 51.

*Tennessee*. — *Rayburn v. Norton*, 85 Tenn. 351. See also *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882.

*Texas*. — *Gaines v. National Exch. Bank*, 64 Tex. 18; *Wright v. Straub*, 64 Tex. 64; *Gage v. Neblett*, 57 Tex. 374; *Baird v. Trice*, 51 Tex. 555, *overruling* *Stone v. Darnell*, 20 Tex. 11, 25 Tex. Supp. 430; *Houston, etc., R. Co. v. Winter*, 44 Tex. 597. But see *Macmanus v. Campbell*, 37 Tex. 267; *Westbrooks v. Jeffers*, 33 Tex. 86.

*Virginia*. — *Kennerly v. Swartz*, 83 Va. 704.

*West Virginia*. — *Cabell v. Given*, 30 W. Va. 760. In this state any lien existing at the time when the homestead provision is declared is expressly excepted from the operation of the law. Acts 1864, c. 29.

*Wisconsin*. — *Upman v. Second Ward Bank*, 15 Wis. 449.

*United States*. — *Freeman v. Stewart*, 5 Biss. (U. S.) 19, 9 Fed. Cas. No. 5,088.

**Attachment Liens.** — *Bell v. Anniston Hardware Co.*, 114 Ala. 347; *Reynolds v. Tenant*, 51 Ark. 84; *Richardson v. Adler*, 46 Ark. 43; *Hiatt v. Bullene*, 20 Kan. 557; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Caldwell v. Truesdell*, (Ky. 1890) 13 S. W. Rep. 101; *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518; *Avery v. Stephens*, 48 Mich. 246; *Kelly v. Dill*, 23 Minn. 435; *Baird v. Trice*, 51 Tex. 555, *overruling* *Stone v. Darnell*, 20 Tex. 11, 25 Tex. Supp. 430. See also *Houston, etc., R. Co. v. Winter*, 44 Tex. 597. *Contra*, where judgment is rendered in the attachment proceedings after the declaration of homestead has been filed, under a statute prohibiting the forced sale of the homestead except on judgments which have become a lien prior to the filing of such declaration. *Wilson v. Madison*, 58 Cal. 1; *Sullivan v. Hendrickson*, 54

these jurisdictions, however, a distinction is made between mortgage liens and liens by operation of law.<sup>1</sup>

**When Homestead Right Is Perfected with Reference to Prior Liens.**—In those jurisdictions where the time when the homestead right shall be perfected is not fixed

Cal. 258; *McCracken v. Harris*, 54 Cal. 81, cited with approval in *Barrett v. Sims*, 59 Cal. 615, and *Fitzell v. Leaky*, 72 Cal. 477.

**Mechanic's Liens.**—*Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205, *distinguishing Cogel v. Mickow*, 11 Minn. 475; *Swope v. Stantzenberger*, 59 Tex. 387; *Pope v. Graham*, 44 Tex. 196; *Buntun v. Palm*, (Tex. 1888) 9 S. W. Rep. 182. See also *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579.

**1. Judgment Liens.**—In some states liens attaching by operation of law, as judgment liens, are suspended by a homestead exemption perfected at any time before the premises have actually been sold thereunder. *Woodward v. People's Nat. Bank*, 2 Colo. App. 369; *Weare v. Johnson*, 20 Colo. 363; *Jones v. Hart*, 62 Miss. 13; *Letchford v. Cary*, 52 Miss. 791; *Irwin v. Lewis*, 50 Miss. 363; *Trotter v. Dobbs*, 38 Miss. 108; *Markham v. Hicks*, 90 N. Car. 204 (decided under a law not now in force; for other cases decided thereunder, see *infra*, this section, *Liens by Operation of Law*); *Wiss v. Stewart*, 16 Wash. 376; *Anderson v. Stadlmann*, 17 Wash. 433; *McMillan v. Man*, 1 Wash. 26, cited in *Traders' Nat. Bank v. Schorr*, 20 Wash. 1.

**Georgia.**—In Georgia prior liens, whether obtained by contract or otherwise, are held off by the perfecting of the homestead exemption. *Barrett v. Durham*, 80 Ga. 336, wherein it was said that "this court has so held in numerous cases;" *McWilliams v. Bones*, 84 Ga. 203.

This holding has been made in many cases where property exempt under Georgia laws had been set apart by the courts of the United States sitting as courts of bankruptcy, the same effect being allowed to such adjudications as to adjudications made in the state courts. *Broach v. Powell*, 79 Ga. 79; *Collier v. Simpson*, 74 Ga. 697; *Holland v. Withers*, 76 Ga. 667; *Brady v. Brady*, 71 Ga. 71; *Ross v. Worsham*, 65 Ga. 624; *Benedict v. Webb*, 57 Ga. 348; *Bush v. Lester*, 55 Ga. 579; *Rushin v. Gause*, 41 Ga. 180.

**Ohio.**—In Ohio valid mortgage liens affixed to the premises prior to their being impressed with the homestead character are superior to the exemption; but as against judgment liens the homestead right may be perfected at any time before sale. *Wildermuth v. Koenig*, 41 Ohio St. 180; *Hill v. Myers*, 46 Ohio St. 183; *Schuler v. Miller*, 45 Ohio St. 325; *McComb v. Thompson*, 42 Ohio St. 139; *Roig v. Schults*, 42 Ohio St. 165; *Gibson v. Mundell*, 29 Ohio St. 523; *Wilson v. Scott*, 29 Ohio St. 636.

**Express Statutory Exception—Mortgage Liens.**—In California and Arizona, at least, somewhat narrow in its scope, is made by the homestead law itself as to mortgage liens existing at the time when the homestead right was perfected. The premises are subject to forced sale on debts secured by mortgage on the premises where such mortgage is both executed and recorded before the declaration of homestead is filed for record. *Glas v. Glas*, 114 Cal. 566, 55 Am. St. Rep. 90; *Lee v.*

*Murphy*, 119 Cal. 364; *San Luis Obispo First Nat. Bank v. Bruce*, 94 Cal. 77; *Ontario State Bank v. Gerry*, 91 Cal. 94; *Duncan v. Curry*, 124 Cal. 106, citing *Downing v. Le Du*, 82 Cal. 471; *Edwards v. Grand*, 121 Cal. 254; *Law v. Spence*, (Idaho 1897) 48 Pac. Rep. 282.

In California, construing this provision with Civ. Code, § 1241, subd. 3, which provides that a homestead cannot be claimed against a mortgage on the premises executed by both husband and wife, if the prior mortgage be thus executed it will have precedence although it has not been filed for record. *Duncan v. Curry*, 124 Cal. 106, citing *Downing v. Le Du*, 82 Cal. 471.

**Same—Judgment Liens.**—In California the homestead law also provides that the exemption may not be claimed as against judgments which were rendered and became liens on the premises, before the declaration of homestead was filed. *Beaton v. Reid*, 111 Cal. 484; *King v. Gotz*, 70 Cal. 236; *Wilson v. Madison*, 58 Cal. 1; *Sullivan v. Hendrickson*, 54 Cal. 258; *McCracken v. Harris*, 54 Cal. 81, cited with approval in *Barrett v. Sims*, 59 Cal. 615, and *Fitzell v. Leaky*, 72 Cal. 477; *Bartholomew v. Hook*, 23 Cal. 277.

A judgment obtained before a justice of the peace is not a lien under this provision until filed in the office of the recorder of the county in which the lands are situated, under the general laws regulating judgment liens, even though execution has been levied on the premises. *Beaton v. Reid*, 111 Cal. 484; *Wilson v. Madison*, 58 Cal. 1.

A judgment obtained in attachment proceedings, subsequent to the filing of the homestead declaration, is not excepted by this provision, although the attachment was levied prior to the time when it was filed. *Wilson v. Madison*, 58 Cal. 1; *Sullivan v. Hendrickson*, 54 Cal. 258; *McCracken v. Harris*, 54 Cal. 81, cited with approval in *Barrett v. Sims*, 59 Cal. 615, and *Fitzell v. Leaky*, 72 Cal. 477.

**"Forced Sale."**—Under homestead laws which provided that the premises should be exempt from "forced sale," it was held in *Illinois* and *Texas* that they might be sold in the exercise of a power of sale contained in a prior mortgage or trust deed, but not under process out of court, irrespective of the character of the lien or the time when it attached. *Smith v. Marc*, 26 Ill. 150; *Ely v. Eastwood*, 26 Ill. 107; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Boyd v. Cudderback*, 31 Ill. 113; *Wing v. Cropper*, 35 Ill. 256; *Dawson v. Hayden*, 67 Ill. 52; *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762; *Bomback v. Sykes*, 24 Tex. 217; *Jordan v. Peak*, 38 Tex. 429; *Inge v. Cain*, 65 Tex. 75; *Black v. Rockmore*, 50 Tex. 95, in which case it was doubted whether this doctrine as applied by early Texas cases should have been extended to foreclosure sales by a court, under prior mortgage contracts.

In *California* and *Arizona*, at least, somewhat narrow in its scope, is made by the homestead law itself as to mortgage liens existing at the time when the homestead right was perfected.



by law, as by the filing of a declaration of homestead or of the deed to the premises,<sup>1</sup> a present intention to occupy the premises formed at the time of their purchase or subsequent thereto, whatever may be their original condition, will generally prevent liens from having priority if the premises are prepared and occupied with reasonable despatch.<sup>2</sup>

**Status of Judgment Lien as Against After-acquired Title.** — Where premises not owned by the debtor, but in which he has sufficient title to support the homestead claim, are occupied as such, a judgment rendered during that period is subject to the exemption, although the debtor secures the interest in the property that is outstanding.<sup>3</sup>

decree of foreclosure or a trustee's sale, is not a "forced sale" within the meaning of such a provision. *Peterson v. Hornblower*, 33 Cal. 266; *Rosenberg v. Lewi*, 7 S. Car. 344; *Homestead Bldg., etc., Assoc. v. Enslow*, 7 S. Car. 1; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, wherein it was held that the sale is not forced, since a valid mortgage contract gives indirect consent to such a sale, just as a trust deed containing a power to sell involves direct consent.

**Deficiency Judgments.** — A judgment for a deficiency existing after a foreclosure and sale of property under a mortgage does not become a lien upon the homestead of the debtor until it is rendered and docketed, irrespective of the date when the mortgage was given. *Culver v. Rogers*, 28 Cal. 520; *Hershey v. Dennis*, 53 Cal. 77. See also *Martens v. Gilson*, 13 Nev. 489.

**On Abandonment of Homestead Lien May Be Enforced.** — In states which thus declare the homestead exemption superior to the lien of prior judgments, such liens are not affected in any other way than by being suspended while the exemption continues. On its abandonment by sale or otherwise the liens may be enforced. *McComb v. Thompson*, 42 Ohio St. 139; *Schuler v. Miller*, 45 Ohio St. 325; *Roig v. Schults*, 42 Ohio St. 165.

**1. How Exemption Claimed and Perfected.** — See *infra*, this section, *Debts Contracted Before Purchase*.

**2. When Homestead Right Perfected with Reference to Prior Liens — Liens by Operation of Law — Illinois.** — *Wike v. Garner*, 179 Ill. 257; *Boyd v. Fullerton*, 125 Ill. 437; *Crawford v. Richeson*, 101 Ill. 351, *sub nom.* *Hook v. Richeson*, 115 Ill. 431; *Webb v. Hollenbeck*, 48 Ill. App. 514.

**Kansas.** — *Emporia Mut. Loan, etc., Assoc. v. Watson*, 45 Kan. 132; *Gilworth v. Cody*, 21 Kan. 702; *Swenson v. Kiehl*, 21 Kan. 534; *Monroe v. May*, 9 Kan. 466; *Edwards v. Fry*, 9 Kan. 417; *Edgerton v. Connelly*, 3 Kan. App. 618; *Dobson v. Shoup*, 3 Kan. App. 468.

**Michigan.** — *Mills v. Hobbs*, 76 Mich. 122; *Bowles v. Hoard*, 71 Mich. 150; *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852; *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594; *Biggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554.

**Nebraska.** — *Hanlon v. Pollard*, 17 Neb. 368. **Texas.** — *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep. 832, *explaining* *Stone v. Darnell*, 20 Tex. 11, 25 Tex. Supp. 430, *distinguishing* *Pope v. Graham*, 44 Tex. 196; *Dobkins v. Kuykendall*, 81 Tex. 183; *Archibald v. Jacobs*, 69 Tex. 251; *Gardner v. Douglass*, 64 Tex. 76;

*Scott v. Dyer*, 60 Tex. 135; *Swope v. Stantzenberger*, 59 Tex. 390; *Brooks v. Chatham*, 57 Tex. 33; *Barnes v. White*, 53 Tex. 631; *Houston, etc., R. Co. v. Winter*, 44 Tex. 611; *Moreland v. Barnhart*, 44 Tex. 280; *Macmanus v. Campbell*, 37 Tex. 267; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Miles v. Kelley*, 16 Tex. Civ. App. 147; *Lone Star Brewing Co. v. Felder*, (Tex. Civ. App. 1895) 31 S. W. Rep. 524; *Heady v. Bexar Bldg., etc., Assoc.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 468.

**Wisconsin.** — *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927; *Hoppe v. Goldberg*, 82 Wis. 660; *Schofield v. Hopkins*, 61 Wis. 370.

**Where No Dwelling on Premises.** — In *Blue v. Heilprin*, 105 Iowa 608, it was held that where no dwelling was upon the premises, the intention to make them a homestead, followed by immediate preparation, would not prevent judgment liens from attaching. *Distinguishing* *Neal v. Coe*, 35 Iowa 407, in which case there was a dwelling, but occupancy did not begin for a period during which the premises were being repaired. See also *Elston v. Robinson*, 23 Iowa 208. This view, however, is opposed by numerous cases decided in other states. See generally the cases cited *supra*, this note.

**Mortgage Liens.** — A mortgage lien executed while the premises are in preparation for occupancy as a homestead, but not as required by law, for the alienation or incumbrance of homestead interests, is subject to the exemption. *Miles v. Kelley*, 16 Tex. Civ. App. 147; *Lone Star Brewing Co. v. Felder*, (Tex. Civ. App. 1895) 31 S. W. Rep. 524; *Heady v. Bexar Bldg., etc. Assoc.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 468.

**Homestead in Leasehold Estate.** — In *Wertz v. Merriitt*, 74 Iowa 683, a son had occupied a portion of his father's land as a tenant of the father, and had acquired a homestead right therein. After his father's death the land was allotted to him upon partition of the real estate. It was held that the homestead right acquired by him by virtue of occupancy during his father's life terminated, when his leasehold estate terminated on the death of his father, and that he could not claim the land as a homestead by virtue of his occupancy after his father's death as against a debt contracted during his father's life.

**3. Status of Judgment Lien as Against After-acquired Title.** — *Robson v. Hough*, 56 Ark. 621; *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248; *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158; *Fordyce v. Hicks*, 80 Iowa 272; *Kaser v. Haas*, 27 Minn. 406.

This rule has also been applied to land pur-

(2) *Subsequent to Homestead Right* — (a) **Liens by Contract.** — The validity of liens by mortgage and like contracts, other than those given to secure excepted debts, entered into after a homestead right in the property has been perfected, are treated in another connection in this title.<sup>1</sup>

(b) **Liens by Operation of Law — Laws Exempting from Levy and Sale.** — In most jurisdictions it is held that laws which merely exempt homestead property from sale under legal process do not prevent judgments from becoming liens upon it; but that the lien attaches subject to the homestead use, retains its priority over subsequent liens, and may be enforced when that use has terminated by a sale or other abandonment.<sup>2</sup> On the other hand, a few states have held, under laws of this character, that during the existence of the right the owner

chased for a homestead as against judgments entered and docketed against the debtor prior to his purchase, although he had never theretofore occupied them as a homestead. *Neumaier v. Vincent*, 41 Minn. 481. See also *Macmanus v. Campbell*, 37 Tex. 267. *Contra*, *Taylor v. Saloy*, 38 La. Ann. 62.

In *Gaines v. National Exch. Bank*, 64 Tex. 18, it was held that where one has conveyed in fraud of his creditors land not occupied or designated for homestead purposes, he cannot defeat the lien of a judgment thereafter rendered by procuring a reconveyance of the premises and occupying them as a homestead. See also *supra*, this title, *Title or Interest Necessary to Support Homestead Exemption*.

1. See *infra*, this title, *Sales, Conveyances, and Incumbrances*.

2. **Lien of Judgment Attaches to Homestead Property** — *Arkansas*. — *Brandon v. Moore*, 50 Ark. 247, 7 Am. St. Rep. 96; *McCloy v. Arnett*, 47 Ark. 445; *Cohn v. Hoffman*, 45 Ark. 376, cited in *Jackson v. Allen*, 30 Ark. 110; *Moore v. Granger*, 30 Ark. 574; *Chambers v. Sallie*, 29 Ark. 407; *Norris v. Kidd*, 28 Ark. 485.

*Louisiana*. — *Hebert v. Mayer* 42 La. Ann. 839; *Denis v. Gayle*, 40 La. Ann. 291 (holding that *Hardin v. Wolf*, 29 La. Ann. 333, and *Van Wickle v. Landry*, 29 La. Ann. 330, in effect *contra*, were overruled by *Allen v. Carruth*, 32 La. Ann. 444); *Todd, J., dissenting*; *Chaffe v. McGehee*, 38 La. Ann. 278.

*Minnesota*. — *Piper v. Johnston*, 12 Minn. 60; *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112; *Folsom v. Carli*, 5 Minn. 333.

*Mississippi*. — *Whitworth v. Lyons*, 39 Miss. 468.

*Nebraska*. — *Horbach v. Smiley*, 54 Neb. 217; *Galligher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319; *McHugh v. Smiley*, 17 Neb. 620; *De Witt v. Wheeler, etc., Sewing Mach. Co.*, 17 Neb. 533; *Eaton v. Ryan*, 5 Neb. 49; *State Bank v. Carson*, 4 Neb. 501.

*New York*. — *Smith v. Brackett*, 36 Barb. (N. Y.) 574; *Allen v. Cook*, 26 Barb. (N. Y.) 374; *Rice v. Davis*, 7 Lans. (N. Y.) 393.

*North Carolina*. — It seems that this has been the only rule possible under the laws of North Carolina, since the constitution, art. 10, § 2, only exempts a homestead "from sale under execution or other final process obtained on any debt;" and to exempt by statute from the lien of a judgment would be to increase the exemption contrary to that provision. *Jones v. Britton*, 102 N. Car. 166, *Davis and Avery, JJ., dissenting*. But such exemption was made by statute at one time and upheld

in several cases. *Utley v. Jones*, 92 N. Car. 261, distinguished in *Leak v. Gay*, 107 N. Car. 468; *Markham v. Hicks*, 90 N. Car. 204, cited in *Rankin v. Shaw*, 94 N. Car. 405, and *Simpson v. Houston*, 97 N. Car. 344, 2 Am. St. Rep. 297. The law has now been settled in accordance with the statement made in the text by the amendment to Code N. Car. § 501, made by Acts 1885, c. 359. *Leak v. Gay*, 107 N. Car. 468, 482, 483; *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483; *Jones v. Britton*, 102 N. Car. 166; *Rankin v. Shaw*, 94 N. Car. 405.

*Wisconsin*. — *Baltimore Annual Conference v. Schell*, 17 Wis. 308; *Simmons v. Johnson*, 14 Wis. 523; *Hoyt v. Howe*, 3 Wis. 752, 62 Am. Dec. 705.

**Reason for Different Constructions.** — "The rulings in the different states seem to have grown out of the different constructions placed upon the word 'homestead.' In the states just mentioned [*Illinois, California, and Iowa*] the idea seems to prevail that the law creating a homestead is an absolute investiture of the debtor with an estate the fee in which can never be sold on execution so long as claimed and occupied as a homestead." *Norris v. Kidd*, 28 Ark. 485, approved in *Chambers v. Sallie*, 29 Ark. 407.

**Effect of Homestead on Lien.** — In the states which thus hold, the homestead affects the lien of the judgment only by suspending a sale upon execution. Every other advantage secured by judgment liens generally accrues to the lienor. Thus the right of the judgment creditor to redeem the property from a lien having priority over his is not abrogated. *Rice v. Davis*, 7 Lans. (N. Y.) 393.

In *North Carolina*, however, although it is held that a judgment lien attaches, the homestead right is at the same time considered as so far a vested estate that it may be sold or assigned without there being an abandonment. The vendee takes it with the same quality annexed that has attached to it in the possession of the vendor, and it is exempt from seizure under the judgment lien, at least during the life of the vendor. *Gardner v. Batts*, 114 N. Car. 496 [quoting from *Littlejohn v. Egerton*, 77 N. Car. 379]. *Clark, J., dissenting*; *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483 [in which case the court reviewed and approved *Adrian v. Shaw*, 82 N. Car. 474; *Jones v. Britton*, 102 N. Car. 166; *Lane v. Richardson*, 104 N. Car. 642; *Long v. Walker*, 105 N. Car. 90, and other cases, and overruled a dictum in *Fleming v. Graham*, 110 N. Car. 374].



holds and may convey the homestead property free from any such liens whatsoever.<sup>1</sup>

**Laws Which Expressly or by Implication Refuse Liens.** — The laws which now obtain in many of the states above mentioned, and in others, exempt the homestead from the lien of judgments, as well as from levy and sale thereunder, in terms or by necessary implication from provisions which vest in the debtor an absolute right to use and convey the property.<sup>2</sup>

**1. No Lien Attaches to Homestead Property** — *Colorado*. — Woodward v. People's Nat. Bank, 2 Colo. App. 369, citing Barnett v. Knight, 7 Colo. 365, and cited in Weare v. Johnson 20 Colo. 363.

*Illinois*. — Brokaw v. Ogle, 170 Ill. 115; Bach v. May, 163 Ill. 547; Halliday v. Hess, 147 Ill. 588; Moore v. Flynn, 135 Ill. 74; Watson v. Doyle, 130 Ill. 415; Moriarty v. Galt, 112 Ill. 373; Nichols v. Spremont, 111 Ill. 631; Raber v. Gund, 110 Ill. 581; Hartman v. Schultz, 101 Ill. 437; Crawford v. Richeson, 101 Ill. 351; Kingman v. Higgins, 100 Ill. 319; Leupold v. Krause, 95 Ill. 440; Hotchkiss v. Brooks, 93 Ill. 386; Asher v. Mitchell, 92 Ill. 480; Eldridge v. Pierce, 90 Ill. 474; Hartwell v. McDonald, 69 Ill. 293; Haworth v. Travis, 67 Ill. 301; Wolf v. Ogden, 66 Ill. 224; Conklin v. Foster, 57 Ill. 104; Wiggins v. Chance, 54 Ill. 175; Bonnell v. Smith, 53 Ill. 375; McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Bliss v. Clark, 39 Ill. 590, 89 Am. Dec. 330; Fishback v. Lane, 36 Ill. 437; Green v. Marks, 25 Ill. 221; Lorimer v. Marshall, 44 Ill. App. 645; Lytle v. Scott, 2 Ill. App. 646.

*Iowa*. — Thomas v. McDonald, 102 Iowa 564; Roane v. Hamilton, 101 Iowa 250; Ayres v. Grill, 85 Iowa 720; Beyer v. Thoeming, 81 Iowa 517; Belden v. Younger, 76 Iowa 567; Cummings v. Long, 16 Iowa 41, 85 Am. Dec. 502; Lamb v. Shays, 14 Iowa 567.

*Kansas*. — Elwell v. Hitchcock, 41 Kan. 130; Morris v. Ward, 5 Kan. 239; Morris v. Brown, 5 Kan. App. 102.

**Laws Prohibiting Husband Alone from Alienating Homestead.** — In an early case in *Kansas* it was held that a judgment on a cause of action against the husband alone should not be allowed to become a lien upon the land, since that would in effect nullify in some measure an express provision making void an alienation of the homestead without the consent of the wife, the inference being that a judgment on a cause of action against both might become a lien. *Morris v. Ward*, 5 Kan. 239. Compare *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144, in which case it was held that a judgment against both husband and wife on a promissory note executed by them did not constitute a statutory alienation.

**Status of Judgment After Abandonment of Homestead.** — Where the owner does not convey away the homestead while the right continues to exist, but abandons it, retaining title, the property may then be subjected to judgments against him. In *Illinois* the lien will attach only as at common law, by levying execution, the first levy made after the abandonment having priority. *Bliss v. Clark*, 39 Ill. 590, 89 Am. Dec. 330. In other states the liens immediately attach under the general lien laws, and in the order in which the judgments were

rendered. *Lamb v. Shays*, 14 Iowa 567; *Morris v. Brown*, 5 Kan. App. 102.

**2. Arkansas.** — *Robson v. Hough*, 56 Ark. 621; *Davis v. Day*, 56 Ark. 156.

*California*. — *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26; *Lubbock v. McMann*, 82 Cal. 230, 16 Am. St. Rep. 108; *Barrett v. Sims*, 59 Cal. 615; *Bowman v. Norton*, 16 Cal. 213; *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *Dunn v. Tozer*, 10 Cal. 167.

*Minnesota*. — *Ferguson v. Kumler*, 27 Minn. 156; *Morrison v. Abbott*, 27 Minn. 116.

*Mississippi*. — *Edmonson v. Meacham*, 50 Miss. 34, citing *Smith v. Allen*, 39 Miss. 473.

*Missouri*. — *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Beckmann v. Meyer*, 75 Mo. 333; *Harrington v. Utterback*, 57 Mo. 519; *Mills v. McDaniels*, 59 Mo. App. 331.

*Nebraska*. — *Smith v. Neufeld*, 57 Neb. 660; *Horbach v. Smiley*, 54 Neb. 217; *Mundt v. Hagedorn*, 49 Neb. 409; *Corey v. Plummer*, 48 Neb. 481; *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414; *Corey v. Schuster*, 44 Neb. 269; *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591; *Baumann v. Franse*, 37 Neb. 807; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730; *Swartz v. McClelland*, 31 Neb. 646; *Schribar v. Platt*, 19 Neb. 625; *Stout v. Rapp*, 17 Neb. 462.

*South Carolina*. — *Ketchin v. McCarley*, 26 S. Car. 1, 4 Am. St. Rep. 674; *Cantrell v. Fowler*, 24 S. Car. 424, McGowan, J., dissenting; *Elliott v. Mackorell*, 19 S. Car. 238. See also *McKeown v. Carroll*, 5 S. Car. 75.

*Texas*. — The Constitution of 1876, art. 16, § 50, provides that "no mortgage, trust deed, or other lien on the homestead shall ever be valid" except for purchase money or improvements. *Inge v. Cain*, 65 Tex. 75; *Taylor v. Huck*, 65 Tex. 238; *Taylor v. Ferguson*, 87 Tex. 1; *Hargadene v. Whitfield*, 71 Tex. 488; *Willis v. Mike*, 76 Tex. 82 [citing *Wood v. Chambers*, 20 Tex. 247, 70 Am. Dec. 382; *Cox v. Shropshire*, 25 Tex. 113; *Martel v. Somers*, 26 Tex. 559, to the effect that the homestead may be voluntarily conveyed by the owner freed from all claims of creditors]; *Ellerman v. Wurz*, (Tex. 1890) 14 S. W. Rep. 333; *Lanahan v. Sears*, 102 U. S. 318.

In *Inge v. Cain*, 65 Tex. 75, it was said that the new features in the Constitution of 1876 not only aptly reverse the holding in *Iken v. Olenick*, 42 Tex. 200, but also seem intended to prevent the further application of the principles announced in *Sampson v. Williamson*, 6 Tex. 109, 55 Am. Dec. 762; *Bomback v. Sykes*, 24 Tex. 217; *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609, and *Jordan v. Peak*, 38 Tex. 429. See also the Texas cases cited *supra*, this section, *Prior to Homestead Right*.



**Judgment for Alimony.** — While a homestead owned by a married man may be allotted to his wife, in whole or in part, in a proceeding for alimony, a general judgment for alimony is within the laws which prevent liens attaching.<sup>1</sup>

**Valid Subsisting Liens.** — Liens which are held to attach to the premises, whether arising prior or subsequent to the time when the premises were impressed with the homestead character, must be perfected as provided by the general laws, with such qualifications as may be injected by the exemption law, and kept alive, in order to retain whatever rights they may possess against the homestead, and priority over other liens.<sup>2</sup>

**f. LIABILITIES EXPRESSLY EXCEPTED** — (1) *Debts Contracted Before Purchase* — (a) **In General.** — A homestead law is not invalid as impairing the obligation of contracts as against liabilities, not secured by liens, incurred after its enactment, irrespective of the time when the homestead privilege or estate is perfected.<sup>3</sup>

*Washington.* — *Traders' Nat. Bank v. Schorr*, 20 Wash. 1; *Asher v. Sekofsky*, 10 Wash. 379.

*Wisconsin.* — *Moore v. Smead*, 89 Wis. 558; *Carver v. Lassallete*, 57 Wis. 232; *Goodell v. Blumer*, 41 Wis. 436; *Dopp v. Albee*, 17 Wis. 590; *Baltimore Annual Conference v. Schell*, 17 Wis. 308; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *Simmons v. Johnson*, 14 Wis. 523; *Hoyt v. Fowe*, 3 Wis. 752, 62 Am. Dec. 705.

**Abandonment of Homestead while Retaining Title.** — If the homestead is abandoned without the property having been conveyed away, the lien of a judgment will then attach. *Marriner v. Smith*, 27 Cal. 649; *Glasscock v. Stringer*, (Tex. Civ. App. 1896) 33 S. W. Rep. 677, *reversing* (Tex. Civ. App. 1895) 32 S. W. Rep. 920; *Marks v. Bell*, 10 Tex. Civ. App. 587; *Inge v. Cain*, 65 Tex. 75; *Taylor v. Ferguson*, 87 Tex. 1; *Beard v. Blum*, 64 Tex. 62; *Baines v. Baker*, 60 Tex. 141; *Cox v. Shropshire*, 25 Tex. 113; *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609; *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546.

**1. No Lien Attaches on General Judgment for Alimony** — *Illinois.* — *Redfern v. Redfern*, 38 Ill. 509.

*Iowa.* — *Daniels v. Morris*, 54 Iowa 369; *Hemenway v. Wood*, 53 Iowa 21; *Whitcomb v. Whitcomb*, 52 Iowa 715; *Wilson v. Wilson*, 40 Iowa 230; *Byers v. Byers*, 21 Iowa 268.

*Kansas.* — *Blankenship v. Blankenship*, 19 Kan. 159; *Brandon v. Brandon*, 14 Kan. 342. *Massachusetts.* — *Doyle v. Coburn*, 6 Allen (Mass.) 71.

*Minnesota.* — *Mahoney v. Mahoney*, 59 Minn. 347.

*Missouri.* — *Biffle v. Pullam*, 114 Mo. 50.

*Ohio.* — *Cooper v. Cooper*, 24 Ohio St. 488.

*Texas.* — *Tiemann v. Tiemann*, 34 Tex. 522.

*Washington.* — *Philbrick v. Andrews*, 8 Wash. 7.

*Wisconsin.* — *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245; *Webster v. Webster*, 64 Wis. 438.

**New Hampshire.** — The rule is otherwise in New Hampshire, where the statute gives the homestead right to the wife, widow, or child, but not to the husband or father. After a divorce in favor of the wife and the assignment of the custody of the children to her the husband cannot claim premises occupied by him as a residence as his homestead, and therefore a judgment for alimony in favor of the wife

may be enforced against the land. *Wiggin v. Buzzell*, 58 N. H. 329.

**Judgment Directing Lien.** — It has been held in one case, under a divorce act providing that "judgments and decrees for alimony or maintenance shall be liens upon the property of the husband," that such general judgment is a lien on the homestead, where the court has so directed. *Best v. Zutavern*, 53 Neb. 604. See also as to the effect of a declaration in a judgment that it shall be a lien on the homestead, *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245. *Contra*, *Wilson v. Wilson*, 40 Iowa 230.

**2. Liens Must Be Kept Alive.** — *Brandon v. Moore*, 50 Ark. 247, 7 Am. St. Rep. 96; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26; *Wike v. Garner*, 179 Ill. 257; *Benbow v. Boyer*, 89 Iowa 494; *Gerson v. Gayle*, 34 La. Ann. 337, *distinguished* in *Taylor v. Saloy*, 38 La. Ann. 62; *Hebert v. Mayer*, 42 La. Ann. 839; *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518; *Horbach v. Smiley*, 54 Neb. 217. See also *California* and *Idaho* cases cited *supra*, this section, *Prior to Homestead Right*.

**Mortgage Not Covering Homestead Through Mistake.** — Where through an error in description, a prior mortgage given by the husband does not cover the homestead premises, it cannot be corrected as against the wife after she has impressed the premises with the homestead character. *Adams v. Baker*, (Nev. 1897) 51 Pac. Rep. 252.

**Judgment Which Has Been Satisfied.** — Where a judgment which was a prior lien upon the homestead has been satisfied by proceeds obtained from a wrongful sale of property, and is entered as satisfied, its priority is not revived by a money decree rendered on a bill to vacate the satisfaction after the homestead right has been perfected. *Wike v. Garner*, 179 Ill. 257.

**3. Laws Valid as to All Liabilities Incurred Subsequent to Their Passage.** — See *Bender v. Meyer*, 55 Ala. 576, *cited* in *Schnessler v. Wilson*, 56 Ala. 516; *Paxton v. Sutton*, 53 Neb. 81; *Hanlon v. Pollard*, 17 Neb. 368; *Walley's Estate*, 11 Nev. 260; *Webb v. Hayner*, 49 Fed. Rep. 601; *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882, wherein it was said: "The validity \* \* \* of such exemptions as to debts created after the law was never seriously challenged. The law which gives the creditor his remedy and the law which gives the debtor

**Liabilities Incurred Prior to Acquisition of Homestead.** — In several states, however, the exemption can be claimed only as against debts or liabilities incurred subsequent to the acquisition or purchase of the homestead. It cannot be claimed in *Iowa* as against debts contracted prior to the acquisition of the homestead where other property of the debtor has been exhausted, leaving a balance due; <sup>1</sup> in *Kentucky* as against a debt or liability existing prior to the purchase of the land or to the erection of improvements thereon; <sup>2</sup> in *Missouri* and

his exemption are as much parts of the contract as if they had been set forth in the stipulations of the agreement by which the debt was originated."

1. *Iowa*. — *Matter of Gardner*, 103 Iowa 738; *Hale v. Heaslip*, 16 Iowa 451; *Hyatt v. Spearman*, 20 Iowa 510; *Greeley v. Sample*, 22 Iowa 338; *Elston v. Robinson*, 23 Iowa 208; *Bills v. Mason*, 42 Iowa 329; *Paine v. Means*, 65 Iowa 547; and other cases cited *infra*, this note.

**Homestead Owned Jointly by Husband and Wife.** — Where the homestead was purchased with money part of which belonged to the husband and part to the wife, it may be subjected to the payment of debts against the husband, incurred prior to its acquisition, to the extent of his interest therein. *Croup v. Morton*, 49 Iowa 16, 53 Iowa 599; *Hamill v. Henry*, 69 Iowa 752.

The payment by the husband of repairs, taxes, incumbrances, and the like for which a homestead owned by his wife is liable will not give to him any interest in the property which can be taken to satisfy such debts. *Hamill v. Henry*, 69 Iowa 752; *Wells v. Anderson*, 97 Iowa 201, 59 Am. St. Rep. 409.

**Homestead Acquired from Proceeds of Prior Homestead.** — Under the Iowa law, where a new homestead is acquired with the proceeds of a prior homestead, debts incurred prior to its acquisition which could not have been enforced against the old homestead cannot be enforced against the new one, except to the extent in which it may exceed in value the prior homestead. *Blue v. Heilprin*, 105 Iowa 608; *Lamb v. McConkey*, 76 Iowa 47; *Lay v. Templeton*, 59 Iowa 684; *Jones v. Brandt*, 59 Iowa 332; *Benham v. Chamberlain*, 39 Iowa 358; *Sargent v. Chubbuck*, 19 Iowa 37.

**Conveyance and Reconveyance of Homestead.** — Where a voluntary conveyance of a homestead is made, such conveyance passes all the interest of the grantors in the property, under Code Iowa (1873), § 1930 (Code 1897, § 2914), and if the property is reconveyed to them it is subject to all debts incurred prior to such acquisition. *Butler v. Nelson*, 72 Iowa 732.

**Homestead in Public Lands.** — A homestead is acquired in public lands of the United States entered under the federal homestead laws, with reference to debts incurred prior to acquisition or purchase, at the time of such entry, and not at the date of the issuance of the patent. *Green v. Farrar*, 53 Iowa 426.

**Waiver.** — Although this provision requires the holder of a debt which may be enforced against the homestead first to exhaust the other property of the debtor, he is not estopped from asserting his claim by the fact that he has delayed enforcing it until other property which the debtor had is no longer available. *Denegre v. Haun*, 14 Iowa 240, 81 Am. Dec. 480.

2. *Kentucky*. — *Hensey v. Hensey*, 92 Ky. 164, 13 Ky. L. Rep. 426; *Meador v. Meador*, 88 Ky. 217, 10 Ky. L. Rep. 783; *Snapp v. Snapp*, 87 Ky. 554, 10 Ky. L. Rep. 598; *Creager v. Creager*, 87 Ky. 449, 10 Ky. L. Rep. 424; *Purcell v. Dittman*, 81 Ky. 148, 4 Ky. L. Rep. 954; *Nichols v. Sennitt*, 78 Ky. 630, 1 Ky. L. Rep. 397; *Thompson v. Heffner*, 11 Bush (Ky.) 353; *Gardner v. Smith*, 10 Bush (Ky.) 245; *Hester v. Linn*, (Ky. 1899) 49 S. W. Rep. 431; *Eaton v. Price*, (Ky. 1897) 42 S. W. Rep. 341; *Crouch v. Meguiar-Harris Co.*, (Ky. 1897) 42 S. W. Rep. 91; *Morehead v. Morehead*, (Ky. 1894) 25 S. W. Rep. 750, 16 Ky. L. Rep. 34; *In re Duerson*, 13 Nat. Bankr. Reg. 183, 7 Fed. Cas. No. 4,117; *Keeny v. Burke*, 12 Ky. L. Rep. 464; *Flowers v. Miller*, 13 Ky. L. Rep. 250; *Bell v. Wise*, 11 Ky. L. Rep. 295; *Thacker v. Booth*, 9 Ky. L. Rep. 745; *Ashley v. Terry*, 6 Ky. L. Rep. 140; *Colvin v. Stinnett*, 5 Ky. L. Rep. 175; *Krafft v. Schmidt*, 1 Ky. L. Rep. 419. See also other cases cited *infra*, this note.

**Purchase Money Must Be Paid.** — The land is not purchased within this provision until the purchase money has been paid. *Moseley v. Bevins*, 91 Ky. 260, 12 Ky. L. Rep. 825; *Morehead v. Morehead*, (Ky. 1894) 25 S. W. Rep. 750, 16 Ky. L. Rep. 34; *Moore v. Miller*, 1 Ky. L. Rep. 322; *Moss v. Hall*, 1 Ky. L. Rep. 314. But if only a portion of it remains unpaid at the time when a debt is incurred, the land may be subjected only to the extent represented by that portion. *Moseley v. Bevins*, 91 Ky. 260, 12 Ky. L. Rep. 825.

**Lands Acquired by Descent or Gift.** — A homestead is not purchased within this provision when it is acquired by descent or devise, and the exemption may be claimed therein as well against debts created prior to such acquisition as against debts created thereafter. *Meador v. Meador*, 88 Ky. 217, 10 Ky. L. Rep. 783; *Jewell v. Clark*, 78 Ky. 398; *Pendergest v. Heekin*, 94 Ky. 384, 15 Ky. L. Rep. 180; *Hester v. Linn*, (Ky. 1899) 49 S. W. Rep. 431; *Byers v. Prewitt*, 4 Ky. L. Rep. 991. See also *Miller v. Bennett*, 11 Ky. L. Rep. 391; *Dwelby v. Galbraith*, 5 Ky. L. Rep. 209, 4 Ky. L. Rep. 891.

Nor is land acquired by gift purchased, within this provision. *Halcomb v. Hood*, (Ky. 1886) 1 S. W. Rep. 401.

**Homestead Exchanged for Other Property.** — Where a homestead is exchanged for other premises to be used and occupied for the same purpose, the homestead right is retained, and debts, although incurred prior to such acquisition, cannot be enforced against the premises if they could not have been enforced against the prior homestead. *Thompson v. Heffner*, 11 Bush (Ky.) 353.

**Debts Existing Prior to Erection of Improvements.** — Under that part of the provision re-



*Vermont* as against causes of action existing at the time of acquiring the homestead, which time, it is provided, shall date from the filing of record of the deed of the homestead;<sup>1</sup> and in *Louisiana*, *Maine*, *Massachusetts*, and *West Virginia* as against debts contracted after the certificate or declaration of homestead is recorded.<sup>2</sup>

**Occupying Premises as Homestead.** — In some of the states which have these provisions, acquisition in the method pointed out is not alone sufficient to exempt the property, but it must also be occupied as a homestead before the liability was incurred.<sup>3</sup> In other states in a number of cases exactly the opposite

lating to debts incurred prior to the erection of improvements, a homestead exemption cannot be claimed as against a debt incurred before their erection, with the limitations mentioned in succeeding paragraphs. *Hemphill v. Haas*, 88 Ky. 492, 11 Ky. L. Rep. 62; *Fish v. Hunt*, 81 Ky. 584, 5 Ky. L. Rep. 653; *Butler v. Davis*, 15 Ky. L. Rep. 273; *Miller v. Bennett*, 11 Ky. L. Rep. 391; *Dwelby v. Galbraith*, 5 Ky. L. Rep. 209, 4 Ky. L. Rep. 891; *O'Gorman v. Madden*, (Ky. 1887) 5 S. W. Rep. 756; *Darnell v. Smith*, 98 Ky. 238.

The improvements referred to by this section are new and extensive improvements placed on the land whereby its value is increased in an amount exceeding the homestead exemption allowed by law, and not such as are caused by repairing or adding to those already made for the increased comfort of the family. *O'Gorman v. Madden*, (Ky. 1887) 5 S. W. Rep. 756.

Only the buildings or other improvements erected subsequent to the time when the debt was incurred, and not the homestead as it existed prior thereto, can be subjected to its payment. *Hemphill v. Haas*, 88 Ky. 492, 11 Ky. L. Rep. 62; *Darnell v. Smith*, 98 Ky. 238, *distinguishing* *Moseley v. Bevins*, 91 Ky. 260, 12 Ky. L. Rep. 825.

**Mechanics' and Materialmen's Debts.** — In *Sternberg v. Gowdy*, 93 Ky. 146, 14 Ky. L. Rep. 88, it was held that a debt for material incurred prior to the erection of improvements for which it was furnished cannot be enforced against the homestead unless a lien has been perfected under the general lien laws of the state.

1. *Missouri*. — *Anthony v. Rice*, 110 Mo. 223; *Murphy v. De France*, 105 Mo. 53; *Peake v. Cameron*, 102 Mo. 568; *Tennent v. Pruitt*, 94 Mo. 145; *Berry v. Ewing*, 91 Iowa 395; *Finnegan v. Prindeville*, 83 Mo. 517; *O'Shea v. Payne*, 81 Mo. 516; *Kelsay v. Frazier*, 78 Mo. 112; *Rogers v. Marsh*, 73 Mo. 64; *State v. Diveling*, 66 Mo. 375; *Shindler v. Givens*, 63 Mo. 394; *Farra v. Quigly*, 57 Mo. 284; *Griswold v. Johnson*, 22 Mo. App. 466. See also other cases cited *infra*, this note.

*Vermont*. — *Titus v. Warren*, 67 Vt. 242; *Spaulding v. Crane*, 46 Vt. 292; *Lamb v. Mason*, 45 Vt. 500; *West River Bank v. Gale*, 42 Vt. 27; *Perrin v. Sargeant*, 33 Vt. 84; *Simonds v. Powers*, 28 Vt. 354.

**Deed Filed of Record.** — Nothing short of a deed filed of record will stop indebtedness from being superior to the homestead right. Thus the filing of a contract for the purchase of land, a title bond, or the like is not a compliance with this provision. *Griswold v. Johnson*, 22 Mo. App. 466.

Under the early laws of *Missouri* a homestead acquired by descent or devise was not exempt from levy and sale under execution, whether the debt was incurred prior or subsequent to such acquisition, since in such a case there was no deed which might be filed for record. This was changed by Acts 1887, p. 197, which exempted homesteads acquired by descent and devise from attachment and levy under execution, as in the case of a homestead acquired by deed. *Loring v. Groomer*, 142 Mo. 1.

In *Vermont* by law the homestead passes to the widow and children without any liability for debts of the decedent except for those for the payment of which it might have been subjected during his lifetime, those made specially chargeable thereon, and debts due for taxes. *Simonds v. Powers*, 28 Vt. 354; *Perrin v. Sargeant*, 33 Vt. 84.

2. *Louisiana*. — *Kinder v. Lyons*, 38 La. Ann. 713; *Furniss's Succession*, 34 La. Ann. 1013.

*Maine*. — Under Act Me. 1850, c. 207, if the certificate claims in express terms the exemption given by section 1, it will be good from the time of filing the certificate; otherwise the date of the recording of the certificate is the limit of the indebtedness to which the estate is exposed. *Lawton v. Bruce*, 39 Me. 484; *Mills v. Spaulding*, 50 Me. 57.

*Massachusetts*. — *Stevens v. Stevens*, 10 Allen (Mass.) 146, 87 Am. Dec. 630; *Thurston v. Maddocks*, 6 Allen (Mass.) 427.

*West Virginia*. — *Reinhardt v. Reinhardt*, 21 W. Va. 76; *Speidel v. Schlosser*, 13 W. Va. 686; *Holt v. Williams*, 13 W. Va. 704. It is held under the *West Virginia* statute that it was intended to benefit in succession three classes: first, husbands; second, parents; and third, infant children of deceased parents; but that if the property has been obtained from or through the preceding class or classes, the homestead will be subject to such liens and equities as surrounded it in the hands of such preceding class or classes. See the *West Virginia* cases above cited.

3. **Prior Occupancy Required** — *Iowa*. — Under an early statutory provision somewhat more extensive than the present one, reading that the homestead might be sold "for debts contracted prior to the purchase of such homestead," it was held that debts contracted after the purchase of the property, but before it acquired the homestead character, might be enforced against it; and this construction has been since followed. *Hale v. Heaslip*, 16 Iowa 451 (Cole, J., dissenting on the ground that the words "prior to the purchase of such homestead" did not mean prior to its being impressed with the homestead character);



holding has been made.<sup>1</sup>

**Foreign Debts.** — The statutory exceptions apply whether the debt created prior to the acquisition of the homestead is a foreign or a domestic debt.<sup>2</sup>

**Judgment Liens.** — It is not necessary under such provisions that a judgment should have been rendered on the indebtedness prior to the time when the homestead is acquired, the liability attaching when the debt was incurred;<sup>3</sup> but until the lien of a judgment has been obtained, the premises cannot be seized in the hands of a purchaser without notice.<sup>4</sup>

(b) **Application of Payments.** — Where a part of the indebtedness accrued before the acquisition of the homestead, thus making it liable therefor, and a part accrued after such acquisition, partial payments made generally will be applied on the former.<sup>5</sup>

(2) **Obligations for Purchase Money** — **Liens Contemporary with Purchase Transaction.** — Purchase-money obligations, secured by liens contemporary with and a part of the purchase transaction, as the lien of a mortgage or a vendor's lien, are, irrespective of exceptions contained in homestead laws, enforceable against the premises. On principle, supported by authority, no homestead can be carved out of the property so as to impair the right of such lienors.<sup>6</sup>

*Page v. Ewbank*, 18 Iowa 580; *Greeley v. Sample*, 22 Iowa 335; *Hyatt v. Spearman*, 20 Iowa 510; *Elston v. Robinson*, 23 Iowa 208.

*Missouri.* — *Finnegan v. Prindeville*, 83 Mo. 517; *Tennent v. Pruitt*, 94 Mo. 145, wherein it was said: "If any question relating to the homestead law is settled, it is that before the owner of land can claim it as being exempt from sale for the payment of his debts, on the ground of its being his homestead, it must appear that he occupied it and used it as such, and that the acquisition of the homestead rights, as against creditors, dates from the time of his filing his deed for record."

**1. Prior Occupancy Not Required** — *Kentucky.* — *Hensey v. Hensey*, 92 Ky. 164, 13 Ky. L. Rep. 426; *Nichols v. Sennitt*, 78 Ky. 630, 1 Ky. L. Rep. 397; *Crouch v. Meguiar-Harris Co.*, (Ky. 1897) 42 S. W. Rep. 91; *Morehead v. Moorehead*, (Ky. 1894) 25 S. W. Rep. 750, 16 Ky. L. Rep. 34.

*Vermont.* — *West River Bank v. Gale*, 42 Vt. 27; *Lamb v. Mason*, 45 Vt. 500; *Spaulding v. Crane*, 46 Vt. 292.

**2. Applies to Foreign Debts.** — *Laing v. Cunningham*, 17 Iowa 510; *Brainard v. Van Kuran*, 22 Iowa 261; *O'Shea v. Payne*, 81 Mo. 516.

**3. No Judgment Lien Necessary.** — *Bills v. Mason*, 42 Iowa 329.

**4. Judgment Lien Necessary as Against Purchaser of Homestead.** — *Kimball v. Wilson*, 59 Iowa 638; *Higley v. Millard*, 45 Iowa 586; *Hale v. Heaslip*, 16 Iowa 451.

**General Judgments.** — The judgment is a lien as against purchasers of the homestead subsequent to its rendition, although it does not appear therefrom that the debt was one within the exception, and which for that reason became a lien upon the premises. *Hale v. Heaslip*, 16 Iowa 451.

That the judgment was obtained on such a debt may be shown by evidence *aliunde*. *Delavan v. Pratt*, 19 Iowa 429; *Phelps v. Finn*, 45 Iowa 447.

**5. Application of Payments.** — *Stewart First Nat. Bank v. Hollinsworth*, 78 Iowa 575; *Sternberger v. Gowdy*, 93 Ky. 146, 14 Ky. L.

Rep. 88; *Morehead v. Morehead*, (Ky. 1894) 25 S. W. Rep. 750, 16 Ky. L. Rep. 34.

**6. Prior Mortgage or Vendor's Liens for Purchase Money Superior to Homestead Exemption.** — See generally on this proposition cases cited throughout this subdivision. Wherever liens have thus attached, they have been held superior to the homestead exemption, with little regard to whether obligations or liens for the purchase price are or are not excepted from the operation of the homestead law. See especially the following cases:

*Alabama.* — *Newbold v. Smart*, 67 Ala. 326.

*Arkansas.* — *Tunstall v. Jones*, 25 Ark. 272; *Gainus v. Cannon*, 42 Ark. 503.

*California.* — *Van Sandt v. Alvis*, 109 Cal. 165, 50 Am. St. Rep. 25, citing among other cases *Birrell v. Schie*, 9 Cal. 105, and *Tolman v. Smith*, 85 Cal. 280; *Williams v. Young*, 17 Cal. 403; *Skinner v. Beatty*, 16 Cal. 157; *Montgomery v. Tutt*, 11 Cal. 307, *per* Field, C. J.; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Dillon v. Byrne*, 5 Cal. 455.

*Kansas.* — *Andrews v. Alcorn*, 13 Kan. 351.

*Kentucky.* — *Williams v. Samuels*, 90 Ky. 59, 11 Ky. L. Rep. 863; *Reynolds v. Williams*, (Ky. 1887) 4 S. W. Rep. 178, 9 Ky. L. Rep. 112; *Travis v. Davis*, 12 Ky. L. Rep. 825.

*Nebraska.* — *Jackson v. Phillips*, 57 Neb. 189.

*Nevada.* — *Hopper v. Parkinson*, 5 Nev. 233.

*Ohio.* — *Starkey v. Wainright*, 9 Ohio Dec. 436, 6 Ohio N. P. 32.

*South Carolina.* — *Edwards v. Edwards*, 14 S. Car. 11.

*Texas.* — *Farmer v. Simpson*, 6 Tex. 304; *Shepherd v. White*, 11 Tex. 346; *De Bruhl v. Maas*, 46 Tex. 464; *McCreery v. Fortson*, 35 Tex. 641; *Macmanus v. Campbell*, 37 Tex. 267; *Joplin v. Fleming*, 38 Tex. 526; *Woolfolk v. Ricketts*, 41 Tex. 359; *Gaylord v. Loughridge*, 50 Tex. 573; *Clements v. Lacy*, 51 Tex. 150; *Dillon v. Kauffmann*, 58 Tex. 696; *Morris v. Geisecke*, 60 Tex. 633.

*Wisconsin.* — *Cornish v. Frees*, 74 Wis. 490.

See generally cases cited *supra*, this section, *Prior to Homestead Right*.

**Statutory Exceptions — In General.** — Exemptions made by homestead statutes in favor of purchase-money debts are therefore of importance only in so far as they save the obligation when not secured by a prior lien. In *California*, and perhaps in other states, the homestead statute merely excepts a vendor's lien, which provision does not seem to add anything to the rights of a vendor under the law as above stated. Such lien is a right enforceable only in equity, and is subject to all the infirmities with which it is attended, generally.<sup>1</sup>

**Contra.** — In *Georgia*, under an early law which contained no exemption as to purchase-money debts, it was held that the setting apart of a homestead made the right to the exemption superior to prior liens. *Rushin v. Gause*, 41 Ga. 180; *Sparger v. Cumpton*, 54 Ga. 355.

**Applicability of Provisions in Homestead Law Relating to Alienation and Incumbrancing.** — Purchase-money obligations or liens contemporary and a part of the purchase transaction, because prior to the time when the premises have been impressed with the homestead character, are validly executed in the same manner as obligations relating to nonexempt property. Provisions contained in the law relating to alienating or encumbering the homestead have no application. *Skinner v. Beatty*, 16 Cal. 157; *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Kimble v. Esworthy*, 6 Ill. App. 517; *Christy v. Dyer*, 14 Iowa 438, 81 Am. Dec. 493; *Barnes v. Gay*, 7 Iowa 26; *Nichols v. Overacker*, 16 Kan. 54; *Andrews v. Alcorn*, 13 Kan. 351; *Pratt v. Topeka Bank*, 12 Kan. 570; *Jackson v. Phillips*, 57 Neb. 189; *Clitus v. Langford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 325; *Gaylord v. Loughridge*, 50 Tex. 573, wherein it was said that "this restriction [as to alienating or encumbering the homestead] has been relaxed in favor of vendor's liens, upon the principle that the title was not acquired until the purchase money had been paid." See also *infra*, this title, *Statutes, Conveyances, and Incumbrances*.

**1. Vendor's Lien Excepted by Statute.** — *Lee v. Murphy*, 119 Cal. 364, wherein the law of *California* as it existed at various periods is thus given: "The Homestead Act of April 21, 1851 (Stat. 1851, p. 296), described this lien as a 'vendor's lien.' The Act of March 13, 1860 (Stat. 1860, p. 87), described it as a 'lien for purchase money.' The Act of May 12, 1862 (Stat. 1862, p. 519), described it as a 'vendor's lien,' and it has continued to be described ever since as a 'vendor's lien.'" See also *Longmaid v. Coulter*, 123 Cal. 208; *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158; *Fitzell v. Leaky*, 72 Cal. 477; *Peterson v. Hornblower*, 33 Cal. 266; *Dillon v. Byrne*, 5 Cal. 455.

**Alabama.** — In *Alabama* any lien attaching to the homestead in favor of any vendor for unpaid purchase money is excepted. *Tyler v. Jewett*, 82 Ala. 93; *Moses v. Home Bldg., etc., Assoc.*, 100 Ala. 465.

**New Hampshire.** — Pub. Stat. N. H. (1891), c. 138, § 4, provides that "no deed shall convey or encumber the homestead right except a mortgage made at the time of purchase to secure payment of the purchase money, unless it is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land." See *Norris v. Moulton*, 34 N. H. 392.

**Reason for Rule.** — "The ultimate purpose of the homestead exemption is to protect the head of a family and the family from want and penury, and from being homeless by reason of misfortune. But it was never intended by these laws that a purchaser and his family should possess and enjoy property not paid for within the spirit of the contract of purchase, while the seller and his family were not compensated for it. There is no equity in allowing a purchaser and his family to obtain the homestead of another man and his family and keep it, by any subterfuge or overreaching by which the seller's family is turned out of doors, and get nothing for their home. A homestead obtained by fraud or the semblance of fraud is not contemplated by the law." *Porter v. Teate*, 17 Fla. 813.

**Under Statutes Excepting Debts Contracted Prior to Purchase of Premises.** — Under a homestead law which excepts from its operation debts contracted prior to the purchase of the premises, a debt due for the purchase money which was incurred as a part of the purchase transaction is superior to the exemption. *Williams v. Samuels*, 60 Ky. 59, 11 Ky. L. Rep. 863; *Reynolds v. Williams*, (Ky. 1887) 4 S. W. Rep. 178. *Contra*, *Thurston v. Maddocks*, 6 Allen (Mass.) 427, changed by the existing statute, which expressly excepts debts contracted for the purchase price. Pub. Stat. Mass., c. 123, § 4.

**Excess of Purchase Money Paid by Tenant in Common.** — Where persons become tenants in common by the purchase of land, one who pays more than his share of the purchase price has an equitable lien on the portion belonging to his cotenant, against which no homestead exemption can be claimed. *Newbold v. Smart*, 67 Ala. 326; *Edwards v. Edwards*, 14 S. Car. 11.

**Mortgage Executed and Recorded.** — Under the homestead law of *California*, which provides that the homestead shall be subject to forced sale under a mortgage only when it is properly executed and recorded before the declaration of homestead is filed for record, a mortgage thus given for the purchase price is included. *Lee v. Murphy*, 119 Cal. 364, distinguished in *Duncan v. Curry*, 124 Cal. 140.

**Agreement to Pay Indebtedness of Vendor to Third Person.** — Where a grantee of land orally agrees to pay the grantor's indebtedness to a third person as a part of the purchase price, a judgment for such indebtedness rendered after the premises have been occupied as a homestead cannot be enforced against it where the homestead debt is superior to the purchase money. If there is an equitable lien by virtue of the transaction it is wholly in favor of the grantor. *See also* *supra*, this title, *Statutes, Conveyances, and Incumbrances*.



"Debts" or "Obligations" for Purchase Money. — Most of the statutes, however, except "debts" or "obligations" for purchase money, generally. Under these it is immaterial, so far as the vendee is concerned, whether a contract or a vendor's lien exists, or the obligation is enforced by judgment, attachment, or the like; in either case it is superior to the exemption.<sup>1</sup>

**1. Exceptions of "Debts" or "Obligations" for Purchase Money —** *Arkansas*. — Boone County Bank v. Hensley, 62 Ark. 398.

*Florida*. — Porter v. Teate, 17 Fla. 813.

*Georgia*. — *Perdue v. Fraley*, 92 Ga. 780; *McElmurray v. Blue*, 91 Ga. 509; *Lane v. Collier*, 46 Ga. 580; *Patterson v. Wallace*, 47 Ga. 453; *Baker v. Bower*, 44 Ga. 16; *Chambliss v. Phelps*, 39 Ga. 386.

*Illinois*. — *Stafford v. Woods*, 144 Ill. 203; *Williams v. Jones*, 100 Ill. 362; *Asher v. Mitchell*, 92 Ill. 480; *Bush v. Scott*, 76 Ill. 524; *Hubbell v. Canady*, 58 Ill. 426; *Tourville v. Pierson*, 39 Ill. 446.

*Iowa*. — *Bills v. Mason*, 42 Iowa 329; *Hyatt v. Spearman*, 20 Iowa 510; *Burnap v. Cook*, 16 Iowa 149, 85 Am. Dec. 507; *Cole v. Gill*, 14 Iowa 527; *Christy v. Dyer*, 14 Iowa 438, 81 Am. Dec. 493; *Barnes v. Gay*, 7 Iowa 26.

*Kansas*. — *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336; *Shelden v. Motter*, (Kan. App. 1898) 53 Pac. Rep. 89; *Greeno v. Barnard*, 18 Kan. 518; *Nichols v. Overacker*, 16 Kan. 59; *Ayres v. Probasco*, 14 Kan. 177; *Andrews v. Alcorn*, 13 Kan. 351; *Pratt v. Topeka Bank*, 12 Kan. 571.

*Kentucky*. — *Bradley v. Curtis*, 79 Ky. 327, 2 Ky. L. Rep. 329; *Greer v. Oldham*, (Ky. 1889) 11 S. W. Rep. 73, 10 Ky. L. Rep. 889; *Reynolds v. Williams*, (Ky. 1887) 4 S. W. Rep. 178; *Travis v. Davis*, 12 Ky. L. Rep. 825; *Hopkins v. Noel*, 11 Ky. L. Rep. 37; *Reynolds v. Williams*, 9 Ky. L. Rep. 112; *Miller v. Jones*, 6 Ky. L. Rep. 364; *Edmondson v. Green*, 3 Ky. L. Rep. 538.

*Louisiana*. — *Soulier v. Benker*, 37 La. Ann. 162; *Ventress v. Collins*, 28 La. Ann. 783; *Simon v. Walker*, 28 La. Ann. 608.

*Mississippi*. — *Patrick v. Rembert*, 55 Miss. 87; *Bass v. Nelms*, 56 Miss. 502; *Buckingham v. Nelson*, 42 Miss. 417.

*North Carolina*. — *Smith v. High*, 85 N. Car. 93; *Lawson v. Pringle*, 98 N. Car. 450; *Fox v. Brooks*, 88 N. Car. 234; *Whitaker v. Elliott*, 73 N. Car. 186.

*Pennsylvania*. — *Wiley's Appeal*, 90 Pa. St. 173; *Hershey v. Metzgar*, 90 Pa. St. 217; *Ulrich's Appeal*, 48 Pa. St. 489; *Nottes's Appeal*, 45 Pa. St. 361.

*South Carolina*. — This was the character of the provision contained in the early South Carolina homestead law, *Calhoun v. Calhoun*, 2 S. Car. 283; *Calmes v. McCracken*, 8 S. Car. 87; and it remains unchanged except that process to enforce an obligation for the purchase money, as well as for other exceptions contained in the existing law, must have certified thereon by the court that it is issued for such purpose; but this certificate may be obtained by amendment where the pleadings lay proper foundation therefor. *Burnside v. Watkins*, 30 S. Car. 459, 32 S. Car. 247; *Green v. Spann*, 25 S. Car. 273; *Odom v. Burch*, 52 S. Car. 305; *Adams v. Agnew*, 15 S. Car. 36. Compare *Oliver v. White*, 18 S. Car. 235. The statute reads that the process must be certified as hav-

ing been issued for some one or more of the excepted obligations "and no other;" and it is held that if the obligation contracted for the purchase of the homestead also incurs other indebtedness the certificate cannot be made nor can the homestead be subjected. *Burnside v. Watkins*, 30 S. Car. 459.

*Tennessee*. — *Loftis v. Loftis*, 94 Tenn. 232, *distinguishing* *Guinn v. Spurgin*, 1 Lea (Tenn.) 228; *McWherter v. North*, (Tenn. Ch. 1898) 46 S. W. Rep. 478; *Fauver v. Fleenor*, 13 Lea (Tenn.) 622; *Christian v. Clark*, 10 Lea (Tenn.) 630; *Bentley v. Jordan*, 3 Lea (Tenn.) 353, *citing* *Woodlie v. Towles*, 1 Memphis L. J. 68, 179, 1 Leg. Rep. (Tenn.) 331.

*Texas*. — *Fossett v. McMahan*, 86 Tex. 652; *O'Shaughnessy v. Moore*, 76 Tex. 606; *De Bruhl v. Maas*, 54 Tex. 464; *Skaggs v. Mulkey*, 1 Tex. Unrep. Cas. 488; *Christoff v. Chesley*, 11 Tex. Civ. App. 122; *Brown v. Cawfield*, (Tex. Civ. App. 1895) 30 S. W. Rep. 454; *Fossett v. McMahan*, (Tex. Civ. App. 1894) 26 S. W. Rep. 998.

**Enforced as Ordinary Debts Against Nonexempt Property.** — "A lien for purchase money cannot be created on a homestead in any different manner than it can be created upon any other real estate. The homestead-exemption laws do not make any difference. \* \* \* Indeed there is no homestead-exemption law as against purchase money. As to purchase money, the homestead is just like any other real estate, and governed by the same rule as other real estate. A homestead may be sold on an execution for the purchase money; but the judgment rendered for the purchase money is no more a lien on the homestead than it is on any of the other real estate belonging to the judgment debtor. The debt for the purchase money would not be a lien on any of the real estate of the judgment debtor until the judgment was rendered, and then the judgment would be a lien on all the real estate of the judgment debtor, including the homestead." *Greeno v. Barnard*, 18 Kan. 518, *cited in* *Hurd v. Hixon*, 27 Kan. 722.

**Illustrations of What Constitutes Obligation for Purchase Money.** — An obligation for purchase money within such exceptions is a debt incurred in the purchase of an outstanding title to premises occupied as a homestead which is paramount to that already possessed by the purchaser, *Cassell v. Ross*, 33 Ill. 245, 85 Am. Dec. 270; a debt owed by the vendor which the vendee agrees to pay, *Lane v. Collier*, 46 Ga. 580; *Fox v. Brooks*, 88 N. Car. 234, *cited in* *Lawson v. Pringle*, 98 N. Car. 450; notes against a third person transferred by the vendee's indorsement in part payment of the purchase money, *Whitaker v. Elliott*, 73 N. Car. 186, *cited in* *Lawson v. Pringle*, 98 N. Car. 450; *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390.

Where the vendee exchanges his homestead against which there is a debt due for the purchase money, for other land which he claims as



**Vendors' Liens as Obligations.** — A vendor's lien for the purchase price is an obligation within these provisions, and although the lien has been waived under the law governing such liens, the debt or obligation remains and may be enforced.

**Money Borrowed to Pay Purchase Price.** — It has frequently been held that a debt for money borrowed to pay off purchase money due for land, incurred after the land has been impressed with the homestead character, is not an obligation for the purchase price within this exception.<sup>2</sup> In several states, however,

exempt, such debt is an obligation contracted for the purchase, and may be enforced against the land received by the vendee in exchange. *Porter v. Teate*, 17 Fla. 813; *Williams v. Samuels*, 90 Ky. 59, 11 Ky. L. Rep. 863; *Hopkins v. Noel*, 11 Ky. L. Rep. 37; *Creath v. Dale*, 69 Mo. 41; *Claybrooks v. Kelly*, 61 Tex. 634; *Skaggs v. Mulkey*, 1 Tex. Unrep. Cas. 488.

Where, on the division of the estate of a decedent, submitted to arbitrators, whose finding shall vest a fee-simple title to the lands assigned, they set apart certain land to one of the distributees and return as part of the assets of the estate a debt due by him, such debt is neither a legal nor an equitable one for purchase money, so as to take precedence over a homestead exemption. *Brady v. Brady*, 67 Ga. 368.

Where a wife is the owner of a stock of goods and merchandise, the husband carrying on the business in his own name, if the proceeds of sales are invested in real estate, the title to which is taken in the name of the wife, and which is immediately occupied by the family as a homestead, no purchase-money obligation accrues to business creditors of the husband, at least where it does not appear that the proceeds of the goods sold by the husband and wife constituted any part of the purchase price. *Tootle v. Stine*, 31 Kan. 66.

**After Partial Payments Have Been Made.** — If the debt is for any part of the purchase money for the entire homestead premises, the homestead is subject therefor as a whole; but if the debt is for the purchase money of only a part of the homestead, only that part is subject. *Cook v. Cook*, 67 Ga. 381. See also *Campbell v. Maginnis*, 70 Iowa 589, wherein it was held that an owner who has satisfied in part a judgment obtained for the purchase money of the homestead holds the premises subject to the lien for the balance due.

**Discharge in Bankruptcy.** — A discharge of the debtor in bankruptcy will not prevent the enforcement against the homestead of an obligation for the purchase price which is secured by a lien thereon. *Bass v. Nelms*, 56 Miss. 502; *Edmondson v. Green*, 3 Ky. L. Rep. 538.

**Loan of Money under Guise of Purchase-money Transaction.** — Under a provision of the *Texas* homestead law that no mortgage or other lien on the homestead shall ever be valid, with certain exceptions, among them debts owing for purchase money, if the real object of an apparent purchase-money transaction is the obtaining of a loan it will be invalid as against the exemption between parties having due notice, though not as against an assignee of the debt without notice. *Heidenheimer v. Stewart*, 65 Tex. 321; *O'Shaughnessy v. Moore*,

73 Tex. 108; *Hurt v. Cooper*, 63 Tex. 362; *Western Mortg., etc., Co. v. Ganzer*, 63 Fed. Rep. 647.

**Extinguishment of Debt.** — An obligation for money borrowed from a bank for the purchase of a homestead is extinguished, and rendered not enforceable against the premises, by the application on the debt of money deposited in the bank by the debtor, although such money constituted trust funds in the hands of the latter, and was known by the bank to be such. *Hale v. Richards*, 80 Iowa 164.

**1. Vendor's Lien for Purchase Price.** — *McWilliams v. Bones*, 84 Ga. 203; *Williams v. Jones*, 100 Ill. 362, citing *Eyster v. Hatheway*, 50 Ill. 522, 99 Am. Dec. 537; *Bush v. Scott*, 76 Ill. 524; *Kimble v. Esworthy*, 6 Ill. App. 517; *Bills v. Mason*, 42 Iowa 329; *Greer v. Oldham*, (Ky. 1889) 11 S. W. Rep. 73, 10 Ky. L. Rep. 889; *Reynolds v. Williams*, (Ky. 1887) 4 S. W. Rep. 178, 9 Ky. L. Rep. 112; *Carpenter v. Kearns*, 4 Ky. L. Rep. 825; *Bentley v. Jordan*, 3 Lea (Tenn.) 353, citing *Woodlie v. Towles*, 1 Memphis L. J. 68, 179, 1 Leg. Rep. (Tenn.) 331; *De Bruhl v. Maas*, 54 Tex. 464. Compare *Gruhn v. Richardson*, 128 Ill. 178; *Pridgen v. Warn*, 79 Tex. 588.

**2. Money Borrowed to Pay Purchase Price** — *Alabama*. — *Tyler v. Jewett*, 82 Ala. 93.

*California*. — *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66. Compare *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740.

*Illinois*. — *Gruhn v. Richardson*, 128 Ill. 178; *Winslow v. Noble*, 101 Ill. 194; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537, cited in *Parrott v. Kumpf*, 102 Ill. 423, and *Magee v. Magee*, 51 Ill. 500.

*North Carolina*. — *Brodie v. Batchelor*, 75 N. Car. 51, cited in *Lawson v. Pringle*, 98 N. Car. 450.

*Pennsylvania*. — *Notte's Appeal*, 45 Pa. St. 361.

*Tennessee*. — *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, wherein it was said: "A party who pays off purchase money is not thereby substituted or subrogated to the priority of liens in favor of the original creditor, and if he secure himself by mortgage his rights will depend on the mortgage and not on the original transaction;" *Loftis v. Loftis*, 94 Tenn. 232, overruling dictum in *Guinn v. Spurgin*, 1 Lea (Tenn.) 228; *Gray v. Baird*, 4 Lea (Tenn.) 212; *Durant v. Davis*, 10 Heisk. (Tenn.) 522. See also *Rogers v. Simpson*, 10 Heisk. (Tenn.) 655.

**Contra.** — See cases cited in the succeeding note.

**Such Debt One for Money Loaned and Not for Land Purchased.** — "The statute, in declaring that the homestead right should not be claimed against a debt due for the purchase money, obviously used the language in its ordinary

it is considered as such an obligation when the agreement between the parties is for a loan for that express purpose, and the money is thus applied;<sup>1</sup> and it seems to be uniformly held that where the loan is part of the purchase transaction, the lender being merely substituted for the vendor, as creditor of the vendee, no exemption can be claimed against the debt.<sup>2</sup>

**Land Purchased with Trust Funds.** — One who has purchased land with trust funds in his possession cannot claim a homestead in the property as against his indebtedness to the *cestui que trust*.<sup>3</sup>

**Transfer of Obligation or Lien.** — Obligations for purchase money which fall within the exception, whether liens or debts not thus secured, may be assigned or otherwise transferred to the same extent as liens or obligations for ordinary indebtedness, retaining their excepted character.<sup>4</sup>

and popular signification. All persons understand the term 'purchase money' to mean the price agreed to be paid for the land, or the debt created by the purchase. It is not understood to mean a debt due another person than the vendor. In this case the debt was created for money loaned, and not for land purchased. Appellee sold no land to appellant, but he loaned him money." *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537.

**1. Debt for Money Loaned Considered as Purchase-money Obligation** — *Kansas*. — *Ayres v. Probasco*, 14 Kan. 177; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, wherein the court said: "If the testimony shows that there was such an agreement and understanding between all the parties concerned as would subrogate Myers to the rights of Allen, the exemption might then be held inapplicable to that portion of the debt."

*Kentucky*. — *Coleman v. Parrott*, (Ky. 1895) 32 S. W. Rep. 679; *White v. Curd*, 86 Ky. 191, 9 Ky. L. Rep. 505; *Broomfield v. Broomfield*, 7 Ky. L. Rep. 221; *Riley v. Filmore*, 4 Ky. L. Rep. 347; *Dent v. McAtee*, 3 Ky. L. Rep. 36.

*Montana*. — *Mitchell v. McCormick*, 22 Mont. 249.

*Texas*. — *Pridgen v. Warn*, 79 Tex. 588; *Roy v. Clarke*, 75 Tex. 28; *Warhmund v. Merritt*, 60 Tex. 24; *Hicks v. Norris*, 57 Tex. 658, *overruling Malone v. Kaufman*, 38 Tex. 454; *Kallman v. Ludenecker*, 9 Tex. Civ. App. 182; *Dixon v. National Loan, etc., Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 541; *Pioneer Sav., etc., Co. v. Paschall*, 12 Tex. Civ. App. 513; *Western Mortg., etc., Co. v. Ganzer*, 63 Fed. Rep. 647.

In *Georgia* the homestead law contains a provision that the homestead shall be liable for debts incurred for the removal of incumbrances thereon. Money borrowed to pay off purchase money due for the premises is within this provision. *White v. Wheelan*, 71 Ga. 533; *McWilliams v. Bones*, 84 Ga. 203; *Midlebrooks v. Warren*, 59 Ga. 230; *Hawks v. Hawks*, 64 Ga. 239; *Chambliss v. Phelps*, 39 Ga. 386.

**2. Obligation Incurred for Money Borrowed when Contemporary with Purchase Transaction.** — *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Sale v. Wingfield*, 55 Ga. 622; *Magee v. Magee*, 51 Ill. 500; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336; *Nichols v. Overacker*, 16 Kan. 54; *Loftis v. Loftis*, 94 Tenn. 232, *explaining Guinn v. Spurgin*, 1 Lea

(Tenn.) 228; *Hensel v. International Bldg., etc., Assoc.*, 85 Tex. 215; *Denni v. Elliott*, 50 Tex. 337; *Wynn v. Flannegan*, 25 Tex. 778; *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170; *Clements v. Neal*, 1 Tex. Unrep. Cas. 41; *Carey v. Boyle*, 53 Wis. 574, 56 Wis. 145.

**3. Land Purchased with Trust Funds.** — *Thompson v. Hartline*, 135 Ala. 263; *Gordon v. English*, 3 Lea (Tenn.) 634; *Oury v. Saunders*, 77 Tex. 278. See also *Edwards v. Edwards*, 14 S. Car. 11; *Muir v. Bozarth*, 44 Iowa 499.

In *Pierce v. Holzer*, 65 Mich. 263, it was said: "A trustee cannot escape making reparation, nor discharge property from its trust character, by transferring it into a homestead. A homestead is not an asylum for fraud; and trust moneys invested in it do not exempt the property from the established doctrine of being subject to the trust."

**4. Transfer of Obligation or Lien.** — *Dillon v. Byrne*, 5 Cal. 455; *McElmurray v. Blue*, 51 Ga. 509; *Wofford v. Gaines*, 53 Ga. 485; *Stafford v. Woods*, 144 Ill. 203; *Williams v. Jones*, 100 Ill. 362; *Magee v. Magee*, 51 Ill. 500; *Bills v. Mason*, 42 Iowa 329; *Murray v. Davis*, (Ky. 1887) 5 S. W. Rep. 569; *Langevin v. Bloom*, 59 Minn. 22, *cited in Nickerson v. Crawford*, 74 Minn. 366; *Lawson v. Pringle*, 98 N. Car. 450; *Brooks v. Young*, 60 Tex. 32; *Malone v. Kaufman*, 38 Tex. 454; *Christoff v. Chesley*, 11 Tex. Civ. App. 122; *Skaggs v. Mulkey*, 1 Tex. Unrep. Cas. 488.

**Agreement of Third Party to Pay Purchase Price.**

— An agreement by an administrator to become personally responsible for the purchase price of land bought by his intestate, made for a valid consideration, makes him the owner of the debt by assignment, entitling him to enforce it against the homestead, and is not an extinguishment of the obligation. *Lawson v. Pringle*, 98 N. Car. 450. See also *Moore v. Reynolds*, 15 Ky. L. Rep. 47, wherein sureties of the vendee who had paid the purchase price were held entitled to enforce the debt against the premises.

**"Debt" of One Purchasing Premises from Vendor.** — Where the vendor of property retains the title pending the payment of the purchase money, one to whom he sells the land subject to the outstanding interest is entitled to enforce the vendor's lien against the premises. *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158; *Stafford v. Woods*, 144 Ill. 203; *Silsbe v. Lucas*, 36 Ill. 463; *Weider v. Clark*, 27 Ill. 251; *Clitus v. Langford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 325; *Harrison v. Oberthier*, 40 Tex. 385.



(3) *Obligations for Labor, Material, and the Like* — In General. — Another exception usually contained in the homestead laws prevents the exemption from being claimed as against debts for labor done and materials furnished in the improvement of the homestead premises.<sup>1</sup>

**Debts Secured by Liens.** — Under some of the provisions the exemption may not be claimed against mechanics', laborers', or like liens. Under these a lien that is within the terms of the exception must be perfected against the premises.<sup>2</sup>

**General Exceptions.** — Others except, without such limitations, obligations or debts due for labor and material in improving the homestead, and have in some respects a much more extended application, the manner in which they are secured or enforced being generally immaterial.<sup>3</sup>

**1. Illustrations of What Constitutes Such Indebtedness — Attorney's Fees.** — Attorney's fees in case of foreclosure, provided for in a contract given to secure the cost of improvements on the homestead, are not rightfully a part of the cost of such improvements, and cannot be enforced against the premises. *Walters v. Texas Bldg., etc., Assoc.*, 8 Tex. Civ. App. 500.

In *Strohecker v. Irvine*, 76 Ga. 639, 2 Am. St. Rep. 62, it was ruled that the lien of an attorney for services in successfully resisting a levy on a homestead and obtaining it to be set apart as an exemption is in the nature of labor done on the homestead and of purchase money thereof, and the homestead property is subject thereto. Compare *Collier v. Simpson*, 74 Ga. 697. The apparent conflict between these two cases was mentioned, but not reconciled, in *Haygood v. Dannenberg Co.*, 102 Ga. 24.

**Improvements on Land Made by One Not Having Title.** — A decision made by a lower court in *South Carolina* that one who has made improvements on premises claimed by him as a homestead, under the impression that he has a good title, has, on being ousted, an obligation for improvements under Civ. Stat. S. Car. (1893), § 1958, relating to betterments, was affirmed in the Supreme Court by virtue of the fact that the court was equally divided on the question. *Wilson v. Counts*, 52 S. Car. 218, McIver, C. J., delivering the dissenting opinion, in which it was said: "The claim of the plaintiff cannot be regarded as an obligation contracted for the payment of improvements on the homestead, for there is no pretense that any such contract was ever entered into by the defendant herein."

**Labor Debts.** — In *Fox v. McClay*, 48 Neb. 820, it was held that a person who contracted to, and himself manufactured, a pair of boots for the owner of the homestead, was an independent contractor and not a laborer having a claim which he might enforce against the homestead by virtue of Code Civ. Pro. Neb. § 531, which provides that no property shall be exempt from execution for clerks', laborers', or mechanics' wages.

On the other hand, it was held in *Virginia* that one who has contracted with the government to carry mail is a laboring person within such exception, where he himself performs the labor involved. *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953.

Services rendered by a physician are professional and do not constitute a claim for

labor. *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144.

**2. Debts Secured by Liens — Alabama.** — In this state the exception is in favor of any lien attaching to the homestead for work and labor done or for materials furnished. *Tyler v. Jewett*, 82 Ala. 93; *McAnally v. Hawkins Lumber Co.*, 109 Ala. 397.

*Arkansas.* — *Murray v. Rapley*, 30 Ark. 568; *Gulledge v. Preddy*, 32 Ark. 433; *Anderson v. Seamans*, 49 Ark. 475.

*California.* — *Lee v. Murphy*, 119 Cal. 364; *Palmer v. Lavigne*, 104 Cal. 30, *distinguishing* *Walsh v. McMenomy*, 74 Cal. 356; *Fitzell v. Leaky*, 72 Cal. 477.

*Iowa.* — *Delavan v. Pratt*, 19 Iowa 429.

*Michigan.* — In this state, under Act 1887, No. 270, a mechanics' lien on a homestead cannot be perfected unless the contract for the improvements is in writing and signed by both the husband and the wife. *Mills v. Hobbs*, 76 Mich. 122; *Lamont v. Le Fevre*, 96 Mich. 175. But see as to this statute *John Spry Lumber Co. v. Sault Sav. Bank, etc., Co.*, 77 Mich. 199, 18 Am. St. Rep. 396.

*Nebraska.* — *Phelps, etc., Windmill Co. v. Shay*, 32 Neb. 19. Code Civ. Pro., § 531, which provides that no property shall be exempt from execution for clerks', laborers', or mechanics' wages, if applicable to homesteads, is repealed in so far as it conflicts with the Homestead Act of 1879, § 1, which exempts homesteads from judgment liens and from execution and forced sale, with a few exceptions, among others debts secured by mechanics', laborers', and vendors' liens. *Fox v. McClay*, 48 Neb. 820.

*Wisconsin.* — *Chopin v. Runte*, 75 Wis. 361.

**Materialmen's Liens.** — The lien of a materialman is not included in a provision excepting mechanics' and laborers' liens. *Richards v. Shear*, 70 Cal. 187, *cited in* *Lee v. Murphy*, 119 Cal. 364. See also *Walsh v. McMenomy*, 74 Cal. 356. *Contra*, *Bonner v. Minnier*, 13 Mont. 269, 40 Am. St. Rep. 441, *citing* *Merrigan v. English*, 9 Mont. 113.

**3. Obligations or Debts Due for Labor, Etc.** — *Lewton v. Hower*, 18 Fla. 872; *Boyd v. Ernst*, 36 Ill. App. 583; *Tyler v. Johnson*, 47 Kan. 410; *Hurd v. Hixon*, 27 Kan. 722; *Ritch v. Oates*, 122 N. Car. 631; *Allen v. Harley*, 3 S. Car. 412; *Miller v. Brown*, 11 Lea (Tenn.) 155. See also *In re Boothroyd*, 15 Nat. Bankr. Reg. 368, and other cases cited *infra*, this note.

*Texas.* — Under an early law which obtained in Texas exception was made as to debts for



**Effect of Word "Thereon" in Statute.** — Under statutes which prevent the homestead from being claimed as against labor done or materials furnished in the erection of improvements, etc., "thereon," it may be claimed as against such obligations incurred for the improvement of the premises before they have been impressed with the homestead character.<sup>1</sup>

**Fixtures as Improvements.** — Obligations incurred for personal property purchased for the improvement of the homestead, and which has become a part

labor and materials expended thereon. Under this provision it was held that a lien must have been obtained under the mechanics' and laborers' lien law to bring the debt within the exception. *Merchant v. Perez*, 11 Tex. 20; *Campbell v. Fields*, 35 Tex. 751; *Pope v. Graham*, 44 Tex. 196; *Tinsley v. Boykin*, 46 Tex. 593; *Gaylord v. Loughridge*, 50 Tex. 573; *Miner v. Moore*, 53 Tex. 224; *Reese v. Corlew*, 60 Tex. 70.

The existing law also excepts such debts, but the work and material must have been contracted for in writing, and the consent of the wife, if there be one, must have been given in the same manner as is by law required in making a sale and conveyance of the homestead. Under this provision, if the debt is thus contracted the contract itself constitutes a lien, or it may be recorded as a deed is recorded, or otherwise secured by a mechanics' or laborers' lien or by a mortgage, trust deed, or the like, and enforced in the manner in which other liens of the kind obtained are enforced. *Lignoski v. Crooker*, 86 Tex. 324; *Lippencott v. York*, 86 Tex. 276; *Bosley v. Pease*, 86 Tex. 292; *Fullenwider v. Longmoor*, 73 Tex. 480; *Cameron v. Marshall*, 65 Tex. 7; *Taylor v. Huck*, 65 Tex. 238; *Huff v. Clark*, 59 Tex. 347; *Miner v. Moore*, 53 Tex. 224; *Muscogee First Nat. Bank v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 845; *Ellerman v. Wurz*, (Tex. 1890) 14 S. W. Rep. 333; *Blevins v. Cameron*, 2 Tex. Unrep. Cas. 461; *Kalamazoo Nat. Bank v. Johnson*, 5 Tex. Civ. App. 535; *Ricker v. Schadt*, 5 Tex. Civ. App. 460; *Crooker v. Grant*, 5 Tex. Civ. App. 182; *Banks v. House*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1022; *Heatherly v. Little*, (Tex. Civ. App. 1897) 41 S. W. Rep. 79; *Pioneer Sav., etc., Co. v. Paschall*, 12 Tex. Civ. App. 613; *Lone Star Brewing Co. v. Felder*, (Tex. Civ. App. 1895) 31 S. W. Rep. 524.

The labor must have been done or the materials furnished in pursuance of the contract and not prior thereto, or the debt is not one falling within the exception. *Lignoski v. Crooker*, 86 Tex. 324; *Taylor v. Huck*, 65 Tex. 238, citing *Reese v. Corlew*, 60 Tex. 71; *Lyon v. Ozee*, 66 Tex. 95; *Kainer v. Blank*, 6 Tex. Civ. App. 1; *Pioneer Bldg., etc., Co. v. Everheart*, 18 Tex. Civ. App. 192; *Walker v. House*, (Tex. Civ. App. 1893) 24 S. W. Rep. 82. Thus a mortgage, though executed in accordance with the requirements of the provision, will not be superior to the homestead right if executed after the work has been done or the materials furnished, unless there was a legally executed prior contract. *Dakota Bldg., etc., Assoc. v. Logan*, 66 Fed. Rep. 827.

**Judgments, Attachment Liens, and the Like.** —

The debts may be sued upon and liens obtained by attachment or general judgment, and enforced as ordinary debts are enforced against property in which no homestead right had ever been perfected. *Hurd v. Hixon*, 27 Kan. 722; *Tyler v. Johnson*, 47 Kan. 410; *Bagley v. Pepper*, (Minn. 1899) 78 N. W. Rep. 1113; *Nickerson v. Crawford*, 74 Minn. 366.

The judgment should be in common form, and not declaring a lien on the specific property. *Boyd v. Ernst*, 36 Ill. App. 583. And a purchaser of the homestead is bound at his peril to ascertain whether the judgment was obtained for such a debt, even in states where it is held that subsequent judgments do not become liens upon the premises. This may be shown by evidence *aliunde*. *Hurd v. Hixon*, 27 Kan. 722.

A general indebtedness cannot be united and commingled with claims which might otherwise be enforced, so that the judgment will become a lien upon the land for the whole. "To allow this would be practically a fraudulent evasion of the protective features of the constitution." *Lewton v. Hower*, 18 Fla. 872.

**Mechanics' Liens.** — A debt "contracted for improvements made thereon" may be enforced against the homestead although the creditor may have lost his mechanics' lien. *Miller v. Brown*, 11 Lea (Tenn.) 155.

In case a mechanics' lien is perfected under such provisions it is sufficiently done in the manner required by the general lien laws of the state, the joint consent of the husband and the wife not being necessary as it would be in attaching liens for debts not excepted. *U. S. Investment Co. v. Phelps, etc., Windmill Co.*, 54 Kan. 144.

**Judgment for Labor Performed.** — A claim allowed against a decedent's estate for labor is a "judgment for labor performed," within a provision which excepts such judgments from the operation of the homestead law. *Mitchener v. Robins*, 73 Miss. 383.

**1. Labor, etc., in Erection of Improvements "Thereon."** — *Stokes v. Hatcher*, 60 Ga. 617; *Connally v. Hardwick*, 61 Ga. 501; *Cahn v. Wright*, 66 Ga. 119; *Wilder v. Frederick*, 67 Ga. 669, wherein it was said: "The word 'thereon' in connection with 'labor' refers not to the soil or property out of which the homestead is afterwards carved, but to the land after it is made homestead."

**Labor in Cultivating Crops, Etc.** — The homestead is subject in *Georgia* to a debt for labor done thereon in the cultivation of the crops and other farm work after the homestead has been set apart, as well as in erecting buildings and other improvements of a substantial nature. *Dicken v. Thrasher*, 58 Ga. 360.

of it by being attached thereto, are debts which may be enforced against the premises.<sup>1</sup>

**Money Borrowed to Pay for Labor and Material.** — It is held in some cases that a debt incurred for money borrowed for the express purpose of settling obligations for labor and material, and actually used for that purpose, is entitled to the benefit of the exception.<sup>2</sup> Other decisions hold the contrary doctrine.<sup>3</sup>

**Transfer of Obligation or Lien.** — Obligations and liens coming within the terms of the exception may be transferred in the same manner as other obligations or liens of like character, without losing their superiority over the exemption.<sup>4</sup>

(4) **Taxes and Local Assessments — In General.** — Under many homestead laws debts due for taxes are expressly excepted from the exemption. Where the exception is general it usually applies to all such debts, whether for taxes assessed against the homestead or other property of a debtor, or where the exemption is claimed by tax collectors or sureties on their bonds.<sup>5</sup>

**Taxes Due "Thereon."** — It is otherwise of a provision that the homestead shall be liable for taxes due "thereon."<sup>6</sup>

1. **Fixtures as Improvements.** — *All v. Goodson*, 33 S. Car. 229.

Where the obligation is merely conditional, reserving in the vendor the right to retake possession at any time before payment has been made, such property remains personalty, and the debt cannot be enforced against the homestead. *Marshall v. Bachelder*, 47 Kan. 442. See also *Texas* cases which have held that where a mortgage on property sold has been taken to secure the purchase money or obligation after it had become attached as a fixture to the premises, the only remedy existing in the vendor is to enforce the lien which he has thus obtained. *Low v. Tandy*, 70 Tex. 745; *McNeil v. Moore*, 7 Tex. Civ. App. 536.

2. **Debt for Loan of Money Within Exception.** — *Beckenheuser v. Ferrell*, (Kan. App. 1898) 55 Pac. Rep. 499; *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 172, 543, 6 Fed. Cas. Nos. 3,057, 3,058; *Pioneer Bldg., etc., Assoc. v. Everheart*, 18 Tex. Civ. App. 192. But see *contra*, *Ellerman v. Wurz*, (Tex. 1890) 14 S. W. Rep. 333; *International Bldg., etc., Assoc. v. Fortassain*, (Tex. Civ. App. 1892) 23 S. W. Rep. 496.

It is not required that the person with whom the contract is made for such work or material shall be the very person who does the work or who owns the material. *Muscogee First Nat. Bank v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 845; *Heady v. Bexar Bldg., etc., Assoc.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 468; *Pioneer Sav., etc., Co. v. Edwards*, (Tex. Civ. App. 1896) 34 S. W. Rep. 193; *Walters v. Tex. Bldg., etc., Assoc.*, (Tex. Civ. App. 1894) 29 S. W. Rep. 51.

**Contracts for Improvements Supplemental to Land Contracts.** — Where a vendor agreed, by a contract supplemental to the land contract given by him, to advance to the vendee money to erect improvements, it was held that such money, being advanced for the purpose of establishing a homestead, was superior to the exemption. *Converse v. Barnard*, 114 Mich. 622, *citing* *Fournier v. Chisholm*, 45 Mich. 417.

3. **Debt for Loan of Money Not Within Exception.** — *Lepton v. Hower*, 18 Fla. 872; *Parrott v. Kumpf*, 102 Ill. 423; *citing* *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537. See also

*supra*, this section, *Obligations for Purchase Money*.

**Materials Furnished for Another Purpose, but in Fact Used in Improving Homestead.** — In *Boyd v. Ernst*, 36 Ill. App. 583, it was said to be "matter of serious doubt" whether, where materials have been furnished for entirely another purpose than for improving the homestead, but have been actually used for that purpose, the debt or obligation is one incurred for the improvement of the homestead within such provision.

**Georgia.** — Under Const. Ga. 1868 a homestead might be subjected to the payment of debts incurred for money borrowed and expended in improving it, but this provision was omitted in the Constitution of 1877, and such debts are now held to be subject to the exemption. *McWilliams v. Bones*, 84 Ga. 203.

**Law Excepting Mechanics' Liens.** — Under a provision which excepts merely mechanics' liens, an obligation for money borrowed to settle an indebtedness which might have resulted in such a lien is not a debt which can be enforced against the homestead. *Chopin v. Runte*, 75 Wis. 361.

4. **Transfer of Obligation or Lien.** — *Nickerson v. Crawford*, 74 Minn. 366, *citing* *Langevin v. Bloom*, 69 Minn. 22; *Reese v. Corlew*, 60 Tex. 70; *Luzenberg v. Bexar Bldg., etc., Assoc.*, 9 Tex. Civ. App. 261; *Muscogee First Nat. Bank v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 845.

5. **Debts Due for Taxes.** — *Lamar v. Sheppard*, 80 Ga. 25; *McWatty v. Jefferson County*, 76 Ga. 352; *Cahn v. Wright*, 66 Ga. 119.

6. **Taxes Due "Thereon."** — Where the exception subjects the homestead for taxes due "thereon," the exemption can be claimed as against all debts for taxes other than those for taxes assessed against it. *Penn v. Clemans*, 19 Iowa 372; *Wright v. Straub*, 64 Tex. 64; *Lufkin v. Galveston*, 58 Tex. 549, *overruled* on other grounds in *Higgins v. Bordages*, 88 Tex. 458; *Hayes v. Taylor*, 17 Tex. Civ. App. 449. See also *Stanley v. Hubbard*, 27 W. Va. 740.

**Exempt from Sale for Nonpayment of Taxes or Assessments — Illinois.** — The provision contained in the Illinois homestead law which declares the homestead not exempt from sale for nonpayment of taxes or assessments is appli-



**Local Assessments.** — It has been held that local assessments are not taxes within provisions in homestead laws which prevent the claim of an exemption as against taxes.<sup>1</sup>

(5) *Miscellaneous Exceptions.* — Exceptions of less importance than those above considered, contained in some of the statutes, will be found treated in the notes.<sup>2</sup>

**4. Time of Contracting Liability — Pre-existing Debts.** — The date of the execution of the contract, and not that of the breach of it, governs in respect to the priority of the creditor's claim over that of the homestead.<sup>3</sup>

cable only to proceedings *in rem* for delinquent taxes, under the general provisions regulating the revenue. *Douthett v. Winter*, 108 Ill. 330; *People v. Winter*, 116 Ill. 215; *Douthett v. Kettle*, 104 Ill. 356; *Crawford v. Richeson*, 101 Ill. 351; *Hume v. Gossett*, 43 Ill. 297.

In *Douthett v. Winter*, 108 Ill. 330, it was said: "A 'tax sale,' or, what is the same thing, a 'sale for the nonpayment of taxes,' has a distinct and well-defined meaning. It means a sale made in a proceeding *in rem*, and was so generally understood when the homestead law was enacted."

Under this provision, it being also held in Illinois that no lien created by operation of law subsequent to the perfection of the homestead right will attach to the premises, the statutory lien of a tax collector's bond which was thus executed as to time cannot be enforced against his homestead. *Hume v. Gossett*, 43 Ill. 297; *Crawford v. Richeson*, 101 Ill. 351.

**1. Local Assessments Not Taxes.** — *Higgins v. Bordages*, 88 Tex. 458, reversing 1 Tex. Civ. App. 43, overruling *Lufkin v. Galveston*, 58 Tex. 549, and quoting from *Taylor v. Boyd*, 63 Tex. 533, wherein it was said: "The words 'tax,' 'taxes,' and 'taxation,' as used in the constitution, without some qualifying word in reference to property, evidently mean an *ad valorem* tax, taxes, or taxation." Compare *Allen v. Nevin*, (Ky. 1897) 38 S. W. Rep. 888, (Ky. 1894) 26 S. W. Rep. 180; *Perine v. Forbush*, 97 Cal. 305, in which cases local assessments were enforced against the homestead under laws containing no exception whatever of debts due for taxes or assessments.

**2. Georgia.** — Judgments, executions, or decrees for debts incurred in the removal of incumbrances on the homestead are excepted from the operation of the Georgia law. Included in its application are debts for money borrowed to pay off mortgage or judgment liens superior to the homestead right, debts antedating the passage of the homestead law, and the like. *McWilliams v. Bones*, 84 Ga. 203; *White v. Wheelan*, 71 Ga. 533; *Cahn v. Wright*, 66 Ga. 119; *Hawks v. Hawks*, 46 Ga. 204; *Kelly v. Stephens*, 39 Ga. 466; *Chambliss v. Phelps*, 39 Ga. 386; *Green v. Jones*, 39 Ga. 521.

In *Collier v. Simpson*, 74 Ga. 697, the court held that a mortgage to secure an attorney's fee was not a debt which would subject the homestead, even if the services were rendered in a case involving the removal of an incumbrance on the land. But see *Strohecker v. Irvine*, 76 Ga. 639, 2 Am. St. Rep. 62. The apparent conflict between these two cases is noted in *Haygood v. Dannenberg Co.*, 102 Ga.

24, but it was held unnecessary, in settling the issues before the court, to reconcile them.

Under an early Georgia law not now in force, the homestead was not exempt as against debts owing for "stock, provisions and other articles used in making the crop, necessities for the family, medical services, and tuition for education." *Huff v. Bournell*, 48 Ga. 338.

**Provision Excepting Debt Due for Rent.** — Under a provision contained in the Virginia homestead law giving to a landlord having a claim for rent a lien on the premises superior to the tenant's right of homestead therein, an office judgment by confession for rent due is a waiver of the lien, and renders the judgment inferior to the right of homestead. *In re Lumpkin*, 2 Hughes (U. S.) 175, 15 Fed. Cas. No. 8,606.

**Fiduciary Debts.** — Provisions in some of the laws exempt debts due from persons who have failed to account for funds held by them in a fiduciary capacity. *Gilbert v. Neely*, 35 Ark. 24; *Sanders v. Sanders*, 56 Ark. 585; *Bridewell v. Halliday*, 37 La. Ann. 410; *Com. v. Ford*, 29 Gratt. (Va.) 683.

**Debt Incurred for Property Obtained under False Pretenses.** — The constitution of *South Dakota*, art. 21, § 4, which exempts homestead property from forced sale, did not repeal or supersede *Comp. Laws Dak.* (1887), § 5139, excepting from such exemption a debt incurred for property obtained under false pretenses. *Sundback v. Griffith*, 7 S. Dak. 109.

**3. Date of Execution of Contract Governs — United States.** — *In re Hook*, 2 Dill. (U. S.) 92, 12 Fed. Cas. No. 6,671.

*Alabama.* — *Keel v. Larkin*, 72 Ala. 493.

*Georgia.* — *Dunagan v. Webster*, 93 Ga. 540; *Willis v. Thornton*, 73 Ga. 128; *Douglass v. Boylston*, 69 Ga. 186; *Hunnicut v. Summey*, 63 Ga. 586; *Hunt v. Juhan*, 63 Ga. 162; *Drinkwater v. Moreman*, 61 Ga. 395; *Van Dyke v. Kilgo*, 54 Ga. 551.

*Massachusetts.* — *Rice v. Southgate*, 16 Gray (Mass.) 142.

*Missouri.* — *Berry v. Ewing*, 91 Mo. 395.

*North Carolina.* — *Leach v. Jones*, 86 N. Car. 404, citing *Earle v. Hardie*, 80 N. Car. 177.

*South Carolina.* — *De La Howe v. Harper*, 5 S. Car. 472, cited in *Adams v. Agnew*, 15 S. Car. 36.

*Tennessee.* — *Gross v. Washington*, (Tenn. Ch. 1896) 38 S. W. Rep. 442; *Douglass v. Gregg*, 7 Baxt. (Tenn.) 384.

*Texas.* — *Grayson v. Taylor*, 14 Tex. 672.

**Illustrations.** — The liability of an executor, administrator, or guardian dates from the time when he qualifies, or from the date of his bond, if he gives one, and not from the time when a breach of duty takes place. *In re*



**Renewal of Debts — Adjustment of Equities.** — When the obligation is superior to the homestead right, whether it is a contract antedating the enactment of the homestead law or one falling within the exceptions made by it, the debt may be renewed by the debtor, acting in good faith, secured by lien upon the premises, or the equities may be otherwise adjusted, as if no homestead right therein existed; and the obligation, unless extinguished by such changes, is entitled to its excepted character or original date, in determining its priority.<sup>1</sup>

Hook, 2 Dill. (U. S.) 92, 12 Fed. Cas. No. 6,671; Dunagan v. Webster, 93 Ga. 540; Willis v. Thornton, 73 Ga. 128; Hunt v. Juhan, 63 Ga. 162; Berry v. Ewing, 91 Mo. 395; Leach v. Jones, 86 N. Car. 404, *citing* Earle v. Hardie, 80 N. Car. 177; De La Howe v. Harper, 5 S. Car. 472, *cited* in Adams v. Agnew, 15 S. Car. 36.

The liability of a surety begins at the time of the execution of his contract, and not at the time when he pays the debt. Keel v. Larkin, 72 Ala. 493; Gross v. Washington, (Penn. Ch. 1896) 38 S. W. Rep. 442; Rice v. Southgate, 16 Gray (Mass.) 142.

An attorney's liability dates from the time when he takes a note for the obligation, and not from the time when the collection is made. Douglass v. Boylston, 69 Ga. 186, Crawford, J., *doubting*.

\* Indebtedness between partners arising from the partnership business will date from the time when the partnership was formed, and not from the time when an accounting is had. Hunnicutt v. Summey, 63 Ga. 586; Van Dyke v. Kilgo, 54 Ga. 551.

In the case of a warranty contained in a deed of real estate, or a contract for the sale of personality, the date of the deed or contract governs, and not the time when the breach of warranty took place. Corr v. Shackelford, 68 Ala. 241; Drinkwater v. Moreman, 61 Ga. 395; Douglass v. Gregg, 7 Baxt. (Tenn.) 384.

**Debts Contracted or Causes of Action Accruing Prior to Purchase of Homestead.** — The same rule obtains with respect to contracts considered with relation to a provision in homestead laws that the exemption may not be claimed as against debts contracted prior to the purchase of the homestead. Rice v. Southgate, 16 Gray (Mass.) 142.

Under a provision of this character contained in the *Missouri* homestead law which reads, instead of "debts contracted," "all causes of action existing," no cause of action accrues in favor of a succeeding covenantee by mesne conveyances until the breach of the covenant. Loring v. Groomer, 142 Mo. 1.

**Void Contract.** — Where a contract entered into is void, as where it is executed by a married woman, if a judgment thereon is afterwards obtained against her the liability, if it can be enforced at all, will date from the rendition of the judgment. Baker v. Hines, (Ky. 1897) 43 S. W. Rep. 452.

**Explaining Contract Debt.** — The fact that a contract is of date prior to the enactment of the homestead law will not estop a debtor against whom judgment thereon has been obtained from claiming the exemption upon the ground that it was antedated, and was, as a matter of fact, executed subsequent to the time when the homestead right accrued. Ingraham v. Dyer, 125 Mo. 491.

**Bond to Satisfy Judgment.** — A forthcoming bond entered into in satisfaction of the judgment rendered upon a contract executed prior to the passage of a homestead law is not a new contract, but is mere process to enforce the original judgment, and no exemption will be allowed as against it. Smith v. Brown, 28 Miss. 810.

**1. Pre-existing Contracts or Liens.** — Keel v. Larkin, 72 Ala. 493; Wofford v. Gaines, 53 Ga. 485, wherein it was said: "The renewal is simply a contract fixing a new day as to the same matter and with no new or different consideration;" Kibbey v. Jones, 7 Bush (Ky.) 244; Marsh v. Alford, 5 Bush (Ky.) 394; Pryor v. Smith, 4 Bush (Ky.) 382; Miller v. Clemmons, 6 Ky. L. Rep. 296; Burns v. Thayer, 101 Mass. 426; Wood v. Lord, 51 N. H. 448; Ladd v. Dudley, 45 N. H. 61; Strachn v. Foss, 42 N. H. 43; Weaver's Estate, 25 Pa. St. 434; Woodlie v. Towles, 9 Baxt. (Tenn.) 592, *cited* in Bentley v. Jordan, 3 Lea (Tenn.) 353; Robinson v. Leach, 67 Vt. 128, 48 Am. St. Rep. 807.

**Obligations for Purchase Money — California.** — Van Sandt v. Alvis, 109 Cal. 165, 50 Am. St. Rep. 25; McHendry v. Reilly, 13 Cal. 75; Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Dillon v. Byrne, 5 Cal. 455.

**Georgia.** — McElmurray v. Blue, 91 Ga. 509; Wofford v. Gaines, 53 Ga. 485; Hawks v. Hawks, 46 Ga. 204.

**Illinois.** — Williams v. Jones, 100 Ill. 362; Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571; Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Kimble v. Esworthy, 6 Ill. App. 517.

**Kentucky.** — Bradley v. Curtis, 79 Ky. 327, 2 Ky. L. Rep. 329; Murray v. Davis, (Ky. 1887) 5 S. W. Rep. 569; Miller v. Jones, 6 Ky. L. Rep. 364; Riley v. Filmore, 4 Ky. L. Rep. 347.

**Massachusetts.** — Stevens v. Stevens, 10 Allen (Mass.) 146, 87 Am. Dec. 630.

**Tennessee.** — Bentley v. Jordan, 3 Lea (Tenn.) 353, *citing* Woodlie v. Towles, 9 Baxt. (Tenn.) 592.

**Texas.** — Roy v. Clarke, 75 Tex. 28; Brooks v. Young, 60 Tex. 32; Morris v. Geisecke, 60 Tex. 633; Hicks v. Morris, 57 Tex. 664; De Bruhl v. Maas, 54 Tex. 464; Baker v. Collins, 4 Tex. Civ. App. 520; McCarty v. Brackenridge, 1 Tex. Civ. App. 176; Clements v. Neal, 1 Tex. Unrep. Cas. 41; Dickson v. Allen, (Tex. Civ. App. 1893) 24 S. W. Rep. 661; Clitus v. Langford, (Tex. Civ. App. 1893) 24 S. W. Rep. 325.

**Obligations for Labor and Material.** — Hurd v. Hixon, 27 Kan. 722; Keeny v. Burke, 12 Ky. L. Rep. 464; Thacker v. Booth, 9 Ky. L. Rep. 745; Nickerson v. Crawford, 74 Minn. 366; Weymouth v. Sanborn, 43 N. H. 171, 80 Am. Dec. 144; Lippencott v. York, 86 Tex. 276; Watkins v. Sproull, 8 Tex. Civ. App. 427; Heatherly v. Little, (Tex. Civ. App. 1897) 40

**Judgment Costs.** — The homestead is liable for costs accruing in an action upon a pre-existing indebtedness, as well as for the principal debt, although the judgment was rendered subsequent to the passage of the law.<sup>1</sup>

**5. Waiver and Estoppel of Creditor's Rights — Burden of Proof.** — That the premises have been impressed with the homestead character, whether by decree of court, occupancy, or whatever may be necessary, under the laws of the particular jurisdictions, will not generally preclude a creditor from proceeding against them on a pre-existing or other excepted indebtedness;<sup>2</sup> but it has been held that if such creditor puts his right in issue and contests the

S. W. Rep. 445; *McNeil v. Moore*, 7 Tex. Civ. App. 536, citing *Harkey v. Cain*, 69 Tex. 146.

**Debts Contracted Before Purchase of Homestead.** — *Higley v. Millard*, 45 Iowa 586; *Matter of Gardner*, 103 Iowa 738; *Travis v. Davis*, (Ky. 1891) 15 S. W. Rep. 525; *Colvin v. Stinnett*, 5 Ky. L. Rep. 175.

The fact that items of credit in an account current are of a date later than that of the acquisition of the homestead does not remove the debt from the "before purchase" class. *Thurston v. Maddocks*, 6 Allen (Mass.) 427.

**Liens Antedating Time when Exemption Is Perfected.** — *Wheatley v. Griffin*, 60 Tex. 209; *Morris v. Geisecke*, 60 Tex. 633; *Gillum v. Collier*, 53 Tex. 592; *Clements v. Lacy*, 51 Tex. 150; *De Bruhl v. Maas*, 54 Tex. 464; *White v. Shepperd*, 16 Tex. 163; *Baker v. Collins*, 4 Tex. Civ. App. 520.

**Obligation of Surety.** — Where a note is given in renewal of one executed before the passage of the homestead law, the debt is a subsequent one as to a surety who was not on the original note, and he is entitled to the exemption as against it. *Ladd v. Dudley*, 45 N. H. 61.

**Extinguishment of Pre-existing Obligation.** — If the new obligation creates a new liability by reason of new parties or otherwise, and involves full payment and satisfaction of the original debt, the date of the new obligation will govern. *Keel v. Larkin*, 72 Ala. 493; *Kirkland v. Burton*, 2 Ky. L. Rep. 319.

In *Massachusetts* and *North Carolina*, contrary to the general rule, a negotiable note given for a prior indebtedness extinguishes the old debt and creates a new one, the date of which will govern. *Tucker v. Drake*, 11 Allen (Mass.) 145; *Arnold v. Estis*, 92 N. Car. 162; *Wilson v. Patton*, 87 N. Car. 318. In *Massachusetts*, however, that the old debt is extinguished is merely a presumption which may be overcome by evidence showing that by treating the new note as payment the creditor would lose the advantage of some security, and did not intend it to have that effect. *Tucker v. Drake*, 11 Allen (Mass.) 145.

**Debts Barred by Limitation.** — It is held in some states that where a pre-existing contract or lien which had priority over the homestead exemption has become barred by the statute of limitations, a new promise made subsequent to the passage of the law or the time when the premises became impressed with the homestead character is not merely a renewal of the obligation, but a new and distinct debt, having no superiority over the homestead right. *Barber v. Babel*, 36 Cal. 11, cited in *Van Sandt v. Alvis*, 109 Cal. 165, 50 Am. St. Rep. 25; *Fraley v. Kelly*, 88 N. Car. 227, 43 Am. Rep. 743; *Grayson v. Taylor*, 14 Tex.

672. See also *Gillum v. Collier*, 53 Tex. 592. *Contra*, *Sloan v. Waugh*, 18 Iowa 224; *Woodlie v. Towles*, 9 Baxt. (Tenn.) 592.

**1. Judgment Costs.** — *Knight v. Whitman*, 6 Bush (Ky.) 53, 99 Am. Dec. 652, *distinguishing* *Slater v. Sherman*, 5 Bush (Ky.) 206; *Mills v. Spaulding*, 50 Me. 57, wherein it was said that execution may be issued on such judgment against the homestead even for costs, "which the defendant, by neglecting to pay what was justly due, has compelled the plaintiff to incur or lose his debt;" *Long v. Walker*, 105 N. Car. 90. *Contra*, *National Bank v. Goodman*, 33 S. Car. 601.

**2. Effect of Allotment on Excepted Obligations.** — *Alabama.* — *Peevey v. Cabaniss*, 70 Ala. 253; *Smith v. Cockrell*, 66 Ala. 64.

*California.* — *Rix v. McHenry*, 7 Cal. 89. *Georgia.* — *Smith v. Smith*, 101 Ga. 206; *Newton v. Summey*, 59 Ga. 397; *Thaxton v. Roberts*, 66 Ga. 704; *Broach v. Barfield*, 57 Ga. 601; *Clarke v. Trawick*, 56 Ga. 359; *Van Dyke v. Kilgo*, 54 Ga. 551; *Wofford v. Gaines*, 53 Ga. 485; *Grant v. Cosby*, 51 Ga. 460; *Chambliss v. Jordan*, 50 Ga. 81; *Patterson v. Wallace*, 47 Ga. 452; *Baker v. Bower*, 44 Ga. 14; *Harris v. Colquit*, 44 Ga. 663, cited in *Bush v. Lester*, 55 Ga. 579; *Chambliss v. Phelps*, 39 Ga. 386.

*South Carolina.* — *Bull v. Rowe*, 13 S. Car. 355; *Ryan v. Pettigrew*, 7 S. Car. 146; *Choice v. Charles*, 7 S. Car. 171.

*Contra.* — It was held in an early *Texas* case that the decree of a probate court, empowered by statute to set apart the decedent's homestead for the use of his widow or family, is a valid and binding adjudication as against creditors having liens within an excepted class. *Harrison v. Oberthier*, 40 Tex. 385. But the effect of this decision was nullified by Rev. Stat. Tex., art. 2000 (Rev. Stat. 1895, art. 2053), which declares that "No property upon which liens have been given by the husband and wife, acknowledged in a manner legally binding upon the wife to secure creditors, or upon which a vendor's lien exists, shall be set aside to the widow or children as exempted property, or appropriated to make up the allowances made in lieu of exempted property, until the debts secured by such liens are first discharged." *Fossett v. McMahan*, 86 Tex. 652.

"It Has Often Been Ruled by This Court, in Effect," said the *Georgia* court, "that in the assignment of a homestead there is no magic by which superior liens are thrown off, or deficient titles are made perfect. Those whose claims outrank the homestead may stay out of the ordinary's court, and nothing there done will be in their way." *Newton v. Summey*, 59 Ga. 397.



allotment of the homestead in a legal proceeding, he is bound by the decree rendered.<sup>1</sup>

**Joinder of Claims and Causes.** — An excepted indebtedness cannot be enforced against the homestead if intermingled with other claims not entitled to priority, unless the various amounts can be distinguished and separately adjudicated.<sup>2</sup>

**Burden of Proof.** — In proceedings in which it is sought to subject to the payment of debts premises in which a homestead is claimed, it is only necessary for the debtor to show that the right to the exemption has been perfected, when it devolves upon the creditor to bring his cause of action within the pre-existing or other excepted class.<sup>3</sup>

**1. Decree Allotting Homestead Adjudicates Right of Creditor Where He Contests.** — *Smith v. Smith*, 101 Ga. 296, the court saying: "No one interested in the property adversely to the estate of the deceased is compelled to go into the court of ordinary and interpose an objection of this character; but if they do they are bound by the adjudication of the ordinary on the question;" *Newton v. Summey*, 59 Ga. 397; *Broach v. Barfield*, 57 Ga. 601; *Van Dyke v. Kilgo*, 54 Ga. 551; *Wofford v. Gaines*, 53 Ga. 485; *Patterson v. Wallace*, 47 Ga. 452, wherein it is held to be the better practice for such creditors not to contest the homestead, but to endeavor to subject it to their claims notwithstanding the judgment setting it apart; *Harris v. Colquit*, 44 Ga. 663, cited in *Bush v. Lester*, 55 Ga. 579; *Bates v. Scobee*, 3 Ky. L. Rep. 758; *Barney v. Leeds*, 51 N. H. 253; *Probate Judge v. Simonds*, 46 N. H. 363; *Trimmier v. Winsmith*, 41 S. Car. 109; *Chalmers v. Turnipseed*, 21 S. Car. 136; *McKeown v. Carroll*, 5 S. Car. 79. See also *Bull v. Rowe*, 13 S. Car. 355.

**Contra.** — In *Gheen v. Summey*, 80 N. Car. 187, it was held that as to a debt antedating the homestead law a contest by such creditor of a homestead allotment made by the appraisers authorized by the act was not binding upon him, the law being void as to that class of debts, and the appraisers therefore having no jurisdiction as to them. See also *Bull v. Rowe*, 13 S. Car. 355, wherein a distinction was drawn between an estoppel, which, it is held, applies to constitutional as well as other rights and to proceedings absolutely void as well as those merely voidable, and proceedings had under a void act. But in *Chalmers v. Turnipseed*, 21 S. Car. 126, followed in *Trimmier v. Winsmith*, 41 S. Car. 109, it was held that the homestead being allotted by consent, the adjudication was valid as against such a debt although it passed under a mistake of law that the debtor was entitled to a homestead as against it, and under a belief that the court had jurisdiction.

**Adverse Possession.** — Property cannot be claimed against a debt antedating the homestead law under a statute giving title by adverse possession for a certain number of years, where in order to have been in possession for the requisite length of time a homestead allotment invalid as against such debt has to be tacked to subsequent possession. *Smith v. Ezell*, 51 Ga. 570.

**2. Joinder of Claims and Causes.** — *Lewton v. Hower*, 18 Fla. 372; *Stilbe v. Lister*, 76 Ill. 463; *Flowers v. Miller*, 13 Ky. L. Rep. 250;

*Arnold v. Estis*, 92 N. Car. 162, citing *Cable v. Hardin*, 67 N. Car. 472; *Burnside v. Watkins*, 30 S. Car. 459; *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163.

**3. Burden of Proof.** — *Georgia.* — *Wilder v. Frederick*, 67 Ga. 669. Compare *McWatty v. Jefferson County*, 76 Ga. 352.

*Illinois.* — *Bach v. May*, 163 Ill. 547; *White v. Clark*, 36 Ill. 285; *Stevenson v. Marony*, 29 Ill. 532.

*Iowa.* — *Matter of Gardner*, 103 Iowa 738; *Paine v. Means*, 65 Iowa 547.

*Kentucky.* — *Morehead v. Morehead*, (Ky. 1894) 25 S. W. Rep. 750, 16 Ky. L. Rep. 34; *Flowers v. Miller*, 13 Ky. L. Rep. 250; *Edmondson v. Green*, 3 Ky. L. Rep. 538; *Kraft v. Schmidt*, 1 Ky. L. Rep. 419; *In re Duerson*, 13 Nat. Bankr. Reg. 183; *Eaton v. Price*, (Ky. 1897) 42 S. W. Rep. 341.

*Missouri.* — *Anthony v. Rice*, 110 Mo. 223, overruling *Murphy v. De France*, 105 Mo. 53; *Kelsay v. Frazier*, 78 Mo. 112; *Rogers v. Marsh*, 73 Mo. 64.

*North Carolina.* — *McMillan v. Williams*, 109 N. Car. 252; *Toms v. Fite*, 93 N. Car. 274; *Mebane v. Layton*, 89 N. Car. 396, citing *Hill v. Oxendine*, 79 N. Car. 331; *Durham v. Bostick*, 72 N. Car. 353.

*Tennessee.* — *Christian v. Clark*, 10 Lea (Tenn.) 630; *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220.

Compare *Gillum v. Collier*, 53 Tex. 592; *Toole v. Dibrell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 387.

**Rules in Chancery and at Law Contrasted.** — "Where the debtor has shown that he is within the provisions of the enacting clause of the first section [of the homestead law] he is *prima facie* entitled to its benefits. And it must be rebutted by the creditor, to subject the property, under the provisions of the second section. Where the proceeding is in chancery, however, it may be different, as the practice allows the defendant by cross-bill to have discovery of the complainant to prove his defense. This was the rule regulating chancery practice, in such cases, intimated in case of *Kitchell v. Burgwin*, 21 Ill. 40." *Stevenson v. Marony*, 29 Ill. 532.

**Duty of Sheriff as to Levy of Execution.** — Where the sheriff has knowledge of the fact that the judgment upon which execution has been issued against a homestead was rendered upon an indebtedness to which the property may be subjected, it is his duty to sell under the execution notwithstanding the homestead has been allotted. *Smith v. Cockrell*, 66 Ala. 64.



**XI. WAIVER, FORFEITURE, ABANDONMENT, AND ESTOPPEL — 1. In General.** — The alienation of a homestead having been treated in another section of this article, this section will treat only of the various other modes in which the homestead exemption may be lost.

**2. Waiver — Express Waiver.** — The general rule is that, in the absence of constitutional or statutory prohibition, a debtor may sell or mortgage his property to him set apart as a homestead.<sup>1</sup> And while there is authority to the effect that an executory contract by which a debtor waives a homestead exemption is against public policy and void,<sup>2</sup> there is also respectable authority to the effect that the exemption may be waived by an express contractual stipulation, without executing a formal mortgage or trust deed upon the property.<sup>3</sup> But to constitute an effective waiver it must be explicit.<sup>4</sup> The homestead exemption cannot be waived by a mere parol declaration.<sup>5</sup>

**Implied Waiver — In General.** — It is quite generally held that there may be an implied waiver of the homestead exemption.<sup>6</sup>

**Failure to Assert Right — In General.** — As a general rule, if a person who owns a homestead and is under no disability to assert it fails to do so at the time and in the manner provided by law, in any action or proceeding involving the right, he will be deemed to have waived his exemption.<sup>7</sup>

**Surrender of Possession in Accordance with a Decree of Court** has been held not to be a waiver of a right of homestead in the premises surrendered.<sup>8</sup>

**Failure to Assert Homestead At or Before Judicial Sale.** — As to the rights of the owner of a homestead which has been levied upon and sold at a judicial sale, when he has not interposed his claim of homestead at or before the sale, there is a direct conflict of judicial authority. In some of the states the homestead exemption is deemed to be waived if it is not claimed by the judgment debtor at the time and in the manner prescribed by law.<sup>9</sup> But in other states it is

Where the judgment was rendered subsequent to the passage of the homestead law, the date of its rendition contained in the execution does not charge the sheriff with notice that the debt antedated the law. *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 277.

1. See *infra*, this title, *Sales, Conveyances, and Incumbrances*.

2. *Maguire v. Kennedy*, 91 Iowa 272. See *Rutt v. Howell*, 50 Iowa 535; *Moxley v. Ragan*, 10 Bush (Ky.) 158, 19 Am. Rep. 61; *Colvin v. Woodward*, 40 La. Ann. 627. But see *Allen v. Carruth*, 32 La. Ann. 444; *Gilmer v. O'Neal*, 32 La. Ann. 979; *Bunker v. Coons*, (Utah, 1900) 60 Pac. Rep. 549.

3. *Prather v. Smith*, 101 Ga. 283; *Davis v. Taylor*, 103 Ga. 366; *Williams v. Watkins*, 92 Va. 680; *Long v. Pence*, 93 Va. 584; *In re Solomon*, 2 Hughes (U. S.) 164, 22 Fed. Cas. No. 13,166; *In re McMurren*, 2 Hughes (U. S.) 207, 16 Fed. Cas. No. 8,904.

4. *Rutt v. Howell*, 50 Iowa 535.

**Release, by Wife, of Dower Interest.** — A deed by which a wife releases her dower interest does not waive her homestead exemption. *Kitchell v. Burgwin*, 21 Ill. 40; *Hayden v. Robinson*, 83 Ky. 615.

5. *Kingman v. Higgins*, 100 Ill. 319; *Rogers v. Day*, 115 Mich. 664; *Littlejohn v. Egerton*, 76 N. Car. 468.

6. **Implied Waiver of Homestead.** — *Snider v. Martin*, 55 Ark. 139; *Potter v. Northrup Banking Co.*, 59 Kan. 455; *Brown v. Clinton*, (N. H. 1898) 41 Atl. Rep. 286. But see *Roberts v. Riggs*, 84 Ky. 251.

7. *Alabama*. — *Martin v. Lile*, 63 Ala. 409; *Sherry v. Brown*, 66 Ala. 51; *Stanley v. Ehr-*

*man*, 83 Ala. 215; *Motley v. Jones*, 98 Ala. 443. See also *Mitchell v. Corbin*, 91 Ala. 599; *Schuer v. King*, 100 Ala. 241; *Block v. George*, 83 Ala. 178.

*Arkansas*. — *Turner v. Vaughan*, 33 Ark. 454; *Irwin v. Taylor*, 48 Ark. 224; *Chambers v. Perry*, 47 Ark. 400. But see *Bunch v. Keith*, 64 Ark. 654.

*California*. — *Matter of Reed*, 23 Cal. 410.

*Illinois*. — *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Maddox v. Epler*, 48 Ill. App. 265.

*Indiana*. — *Graves v. Hinkle*, 120 Ind. 159; *Boesker v. Pickett*, 81 Ind. 555.

*Iowa*. — *Collins v. Chantland*, 48 Iowa 241; *Hemenway v. Wood*, 53 Iowa 21; *Larson v. Reynolds*, 13 Iowa 579, 81 Am. Dec. 444.

*Kentucky*. — *Kirk v. Cassady*, (Ky. 1890) 12 S. W. Rep. 1039; *Snapp v. Snapp*, 87 Ky. 554, 10 Ky. L. Rep. 598; *Hill v. Lancaster*, 88 Ky. 338.

*Mississippi*. — *Henderson v. Still*, 61 Miss. 391.

*Nevada*. — *Hammersmith v. Avery*, 18 Nev. 225.

*South Carolina*. — *Sheriff v. Welborn*, 14 S. Car. 482; *Harmon v. Wagener*, 33 S. Car. 487.

*Wisconsin*. — *Scofield v. Hopkins*, 61 Wis. 370.

8. *Kuttner v. Haines*, 135 Ill. 382, 25 Am. St. Rep. 370.

9. **Failure to Assert Exemption Before Sale Deemed Waiver** — *Alabama*. — *Bell v. Davis*, 42 Ala. 460; *Sheffey v. Davis*, 60 Ala. 548; *Lackland v. Rogers*, 113 Ala. 529; *Rogers v. Lackland*, 117 Ala. 599.

*Arkansas*. — *Norris v. Kidd*, 28 Ark. 485;

held that a failure of the debtor to claim the exemption does not amount to a waiver.<sup>1</sup>

**Persons by Whom Waiver May Be Made — In General.** — As a general rule no waiver of a homestead exemption by one of the persons entitled to its enjoyment can affect the rights of the others.<sup>2</sup>

**Same — Power of Husband to Waive.** — Accordingly, no waiver by a husband can affect the rights of his wife and children.<sup>3</sup>

**Same — Power of Minors to Waive.** — It has been held that minors are incapable, by act or declaration, of waiving the homestead right.<sup>4</sup>

**Same — Power of Widow to Waive.** — After the death of her husband, the widow, being under no disability, may, it has been held, waive the homestead exemption precisely as could the husband.<sup>5</sup>

**3. Forfeiture.** — In some states it has been held that the right to the homestead exemption may be forfeited by fraud on the part of the debtor.<sup>6</sup>

**Death of Wife and Maturity of Children.** — Although the homestead statute may make the existence of a family necessary to the acquisition of a homestead, the decided weight of authority is to the effect that a homestead estate occupied by the owner is not defeated or lost by the death of his wife or the arrival of his children at years of maturity.<sup>7</sup>

*Healy v. Conner*, 40 Ark. 352; *Chambers v. Perry*, 47 Ark. 400. But compare *Bunch v. Keith*, 64 Ark. 654.

*Iowa.* — *Brumbaugh v. Zollinger*, 59 Iowa 384. *Louisiana.* — *Kuntz v. Baehr*, 28 La. Ann. 90; *Williston v. Schmidt*, 28 La. Ann. 416; *Gilmer v. O'Neal*, 32 La. Ann. 979.

*Missouri.* — *Paddock v. Lance*, 94 Mo. 283; *Finley v. Barker*, 110 Mo. 408; *Chance v. Norris*, 143 Mo. 235.

*Nebraska.* — *Jackson v. Creighton*, 29 Neb. 310.

See also *Ireland v. Pugh*, 4 Ky. L. Rep. 252.

**1. Failure to Assert Exemption Before Sale Not Waiver — Illinois.** — *Moore v. Titman*, 33 Ill. 368; *Pardee v. Lindley*, 31 Ill. 187; *Imhoff v. Lipe*, 162 Ill. 282; *Zander v. Scott*, 165 Ill. 51. *Mississippi.* — *Lessley v. Phipps*, 49 Miss. 799.

*New Hampshire.* — *Barney v. Leeds*, 51 N. H. 253; *Fletcher v. State Capital Bank*, 37 N. H. 369.

*Tennessee.* — *Gray v. Baird*, 4 Lea (Tenn.) 212; *Webb v. Cowley*, 5 Lea (Tenn.) 722.

*Wisconsin.* — *Scofield v. Hopkins*, 61 Wis. 370. And see *Hoppe v. Goldberg*, 82 Wis. 660. But see *Pratt v. Burr*, 5 Biss. (U. S.) 36.

**2. Griffin v. Johnson, 37 Mich. 87; *Showers v. Robinson*, 43 Mich. 513; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554; *Allen v. Shields*, 72 N. Car. 504.**

**3. Georgia.** — *Tanner v. Mutual Ben. Bldg. Assoc.*, 95 Ga. 528; *Sharp v. American Freehold Land Mortg. Co.*, 95 Ga. 415; *Kennedy v. Juhan*, 102 Ga. 148.

*Illinois.* — *Booker v. Anderson*, 35 Ill. 66; *Allen v. Hawley*, 66 Ill. 164; *Hubbell v. Canady*, 58 Ill. 425.

*Iowa.* — *Adams v. Booth*, 17 Iowa 111; *Pratt v. Scott*, 81 Iowa 319, 25 Am. St. Rep. 492.

*Kentucky.* — *Lindsay v. Sayre*, 8 Ky. L. Rep. 603; *Phillips v. Queen*, 8 Ky. L. Rep. 772.

*Michigan.* — *Beecher v. Baldy*, 7 Mich. 487; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Constantine First Nat. Bank v. Jacobs*, 50 Mich. 340; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554.

*Minnesota.* — *Ferguson v. Kumler*, 25 Minn. 183.

*Nevada.* — *Goldman v. Clark*, 1 Nev. 607.

*Texas.* — *House v. Phelan*, 83 Tex. 595.

*Utah.* — *Kimball v. Salisbury*, 17 Utah 381.

*Wisconsin.* — *Williams v. Starr*, 5 Wis. 534.

But it has been held that the exemption from garnishment of the proceeds of an insurance policy on the homestead may be waived by the husband alone, without the knowledge or consent of his wife. *Whiteselle v. Jones*, (Tex. Civ. App. 1897) 39 S. W. Rep. 405.

And, under the *Nebraska* homestead law of 1867, it has been held that the husband alone could waive the exemption and subject the property to a judgment. *Jackson v. Creighton*, 29 Neb. 310.

**4. Booth v. Goodwin**, 29 Ark. 633.

**5. Wright v. Dunning**, 46 Ill. 271, 92 Am. Dec. 257. But see *infra*, this section, *Abandonment*.

**6. Forfeiture by Fraud.** — In *Pratt v. Burr*, 5 Biss. (U. S.) 36, it was held that a debtor could not claim a homestead exemption in land taken by him in exchange for goods transferred in fraud of his creditors.

**7. Dissolution of Family — Effect on Homestead Exemption — Arkansas.** — *Stanley v. Snyder*, 43 Ark. 429; *Gray v. Patterson*, 65 Ark. 373.

*Georgia.* — *Nelson v. Commercial Bank*, 80 Ga. 328.

*Kentucky.* — *Stultz v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575.

*Massachusetts.* — *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Silloway v. Brown*, 12 Allen (Mass.) 30.

*Tennessee.* — *Webb v. Cooley*, 5 Lea (Tenn.) 722.

*Texas.* — *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642; *Kessler v. Draub*, 52 Tex. 575; *Blum v. Gaines*, 57 Tex. 119.

*Wyoming.* — *Towne v. Rumsev*, 5 Wyo. 11.

*Contra.* — *Hill v. Franklin*, 54 Miss. 632.

Where a homestead was taken by a man as head of a family, including himself, his wife, and also a minor female grandchild, who lived



4. **Abandonment** — *a.* IN GENERAL. — Except in one or two jurisdictions<sup>1</sup> the homestead exemption may be lost by a removal from the premises.<sup>2</sup> But whether a removal from the premises amounts to an abandonment of the homestead exemption depends upon the character of the removal. An actual removal from the homestead with no intention of returning to it and occupying it as a home is equivalent to a surrender of all claims to the premises as a homestead and constitutes an abandonment of the homestead exemption.<sup>3</sup>

with him and was dependent upon him, the death of the wife did not terminate the homestead estate, but it continued so long as the minor grandchild remained so dependent. A deed by the head of a family as an individual, purporting to convey land covered by a homestead, carried no title to the purchaser, nor could a recovery against the grantee as an individual be had thereon; pending the homestead estate, to eject the head of the family would destroy the full enjoyment of the homestead by the members thereof. *Hall v. Matthews*, 68 Ga. 490.

Where a homestead was set aside to the surviving husband, as the head of a family of minors, and he married again, it was held that the homestead was not terminated when the children became of age, but that it continued in favor of the wife. *Dismuke v. Eady*, 80 Ga. 289.

But where an unmarried person was not entitled to select or hold a homestead unless such person had the care and maintenance of his or her minor child, or of some other of the relatives mentioned in the statute, then residing on the homestead property with such person, it was held that where a widower with minor children, residing on a tract of land, declared a homestead thereon, the homestead ceased upon the children's arrival at maturity. *Santa Cruz Sav. Bank v. Cooper*, 56 Cal. 339.

1. **Abandonment by Removal Rejected.** — Under the *California* Civil Code a homestead when once created is not abandoned by the claimant ceasing to reside upon the premises. It can be abandoned only in the way pointed out in sections 1243 and 1244 of that code. *Holden v. Pinney*, 6 Cal. 234; *Porter v. Chapman*, 65 Cal. 365; *Tipton v. Martin*, 71 Cal. 325; *Lubbock v. McMann*, 82 Cal. 229, 16 Am. St. Rep. 108; *Simonson v. Burr*, 121 Cal. 582. And see *Faivre v. Daley*, 93 Cal. 664.

In *Massachusetts* the homestead estate may be conveyed away, in the manner prescribed by the statute, or terminated by acquiring another homestead elsewhere; but if any acts of abandonment, short of acquiring a new homestead, will defeat a homestead estate, they must be such as afford unequivocal evidence of an intent to abandon it. *Drury v. Bachelder*, 11 Gray (Mass.) 214; *Connor v. McMurray*, 2 Allen (Mass.) 204; *Dulanty v. Pyncheon*, 6 Allen (Mass.) 510; *Lazell v. Lazell*, 8 Allen (Mass.) 576; *Silloway v. Brown*, 12 Allen (Mass.) 30.

2. **Abandonment by Removal Recognized** — *Illinois*. — *Titman v. Moore*, 43 Ill. 169; *Vasey v. Township One, etc.*, 59 Ill. 188.

*Iowa*. — *Fyffe v. Beers*, 18 Iowa 4, 85 Am. Dec. 577.

*Kentucky*. — *Little v. Woodward*, 14 Bush (Ky.) 585.

*Michigan*. — *Wisner v. Farnham*, 2 Mich.

472; *Phillips v. Stauch*, 20 Mich. 369; *Bunker v. Paquette*, 37 Mich. 79; *Dei v. Habel*, 41 Mich. 88; *Bissell v. Taylor*, 41 Mich. 702; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554.

*Minnesota*. — *Donaldson v. Lamprey*, 29 Minn. 18; *Williams v. Moody*, 35 Minn. 280.

*Texas*. — *McMillan v. Warner*, 38 Tex. 410.

3. **Permanent Removal Constitutes Abandonment** — *Alabama*. — *Lehman v. Bryan*, 67 Ala. 558; *Beckett v. Whitlock*, 83 Ala. 123; *Sides v. Scharff*, 93 Ala. 106.

*Florida*. — *Murphy v. Farquhar*, 39 Fla. 350.

*Illinois*. — *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247; *Phillips v. Springfield*, 39 Ill. 83; *Titman v. Moore*, 43 Ill. 169; *Fergus v. Woodworth*, 44 Ill. 374; *Maher v. McConaga*, 47 Ill. 392; *Buck v. Conlogue*, 49 Ill. 392; *Vasey v. Township One, etc.*, 59 Ill. 188; *Cahill v. Wilson*, 62 Ill. 137; *Fisher v. Cornell*, 70 Ill. 216; *Cobb v. Smith*, 88 Ill. 199; *Hart v. Randolph*, 142 Ill. 521; *Jackson v. Sackett*, 146 Ill. 646.

*Iowa*. — *Fyffe v. Beers*, 18 Iowa 4, 85 Am. Dec. 577; *Duntun v. Woodbury*, 24 Iowa 74; *Leonard v. Ingraham*, 58 Iowa 406; *Cotton v. Hamil*, 58 Iowa 594; *Kimball v. Wilson*, 59 Iowa 638; *Newman v. Franklin*, 69 Iowa 244; *Baker v. Jamison*, 73 Iowa 698; *Wilson v. Daniels*, 79 Iowa 132; *Perry v. Dillrance*, 86 Iowa 424; *Maguire v. Hanson*, 105 Iowa 215; *Chambers v. Jackson*, 106 Iowa 6; *Conway v. Nichols*, 106 Iowa 358; *Ross v. Hellyer*, 26 Fed. Rep. 413, a case in the Circuit Court for the Southern District of Iowa.

*Kansas*. — *Atchison Sav. Bank v. Wheeler*, 20 Kan. 625.

*Kentucky*. — *Mattingly v. Berry*, 94 Ky. 544; *Carter v. Goodman*, 11 Bush (Ky.) 232; *Mudd v. Clement*, 5 Ky. L. Rep. 422; *Nethercutt v. Herron*, 10 Ky. L. Rep. 247, (Ky. 1888) 8 S. W. Rep. 13; *Marshall v. Applegate*, 10 Ky. L. Rep. 811, (Ky. 1889) 10 S. W. Rep. 805; *Crabb v. Potter*, 12 Ky. L. Rep. 430; *Smith v. Mattingly*, (Ky. 1890) 13 S. W. Rep. 719; *Curran v. Culp*, (Ky. 1891) 15 S. W. Rep. 657.

*Massachusetts*. — *Foster v. Leland*, 141 Mass. 187.

*Michigan*. — *Stanton v. Hitchcock*, 64 Mich. 317, 8 Am. St. Rep. 821; *Black v. Singley*, 91 Mich. 50; *Hoffman v. Buschman*, 95 Mich. 538.

*Minnesota*. — *Donaldson v. Lamprey*, 29 Minn. 18; *Williams v. Moody*, 35 Minn. 280.

*Missouri*. — *Smith v. Bunn*, 75 Mo. 559; *Kaes v. Gross*, 92 Mo. 648, 1 Am. St. Rep. 767.

*Ohio*. — *Niehaus v. Faul*, 43 Ohio St. 63.

*Tennessee*. — *Roach v. Hacker*, 2 Lea (Tenn.) 633; *Riddick v. Turpin*, 11 Lea (Tenn.) 478; *Levison v. Abrahams*, 14 Lea (Tenn.) 336; *Hicks v. Pepper*, 1 Baxt. (Tenn.) 42.

*Texas*. — *McMillan v. Warner*, 38 Tex. 410; *Woolfolk v. Ricketts*, 48 Tex. 28; *Cline v.*



If, on the other hand, the removal is for a temporary purpose and there is a present and continuing intention to return and occupy the premises as a home the homestead is not abandoned.<sup>1</sup>

Upton, 56 Tex. 320; Kutch v. Holley, 77 Tex. 220; Jamison v. Lewis, (Tex. Civ. App. 1896) 35 S. W. Rep. 954; Scottish-American Mortg. Co. v. Scripture, (Tex. Civ. App. 1897) 40 S. W. Rep. 210; Focke v. Sterling, 18 Tex. Civ. App. 8; Bell v. Greathouse, 20 Tex. Civ. App. 478.

*Vermont.* — Davis v. Andrews, 30 Vt. 679.  
*Wisconsin.* — Jarvais v. Moe, 38 Wis. 440; Moore v. Smead, 89 Wis. 558. See Matter of Phelan, 16 Wis. 79.

In the same manner the removal from a business homestead with no intention ever again to use the property as a place of business destroys the homestead exemption. Kaufman v. Fore, 73 Tex. 308.

**1. Temporary Absence Not Abandonment.** — *Alabama.* — McConaughy v. Baxter, 55 Ala. 379; Kelly v. Garrett, 67 Ala. 304; Murphy v. Hunt, 75 Ala. 438; Fuller v. Whitlock, 99 Ala. 411.

*Arkansas.* — Tumlinson v. Swinney, 22 Ark. 400, 76 Am. Dec. 432; Euper v. Alkire, 37 Ark. 283; Brown v. Watson, 41 Ark. 309; Robinson v. Swearingen, 55 Ark. 55; Robson v. Hough, 56 Ark. 621; Gray v. Patterson, 65 Ark. 373; Gates v. Steele, 48 Ark. 539.

*California.* — Guiod v. Guiod, 14 Cal. 506, 76 Am. Dec. 440.

*Colorado.* — Pierson v. Truax, 15 Colo. 223.

*Georgia.* — Willbanks v. Untriner, 98 Ga. 801.

*Illinois.* — Walters v. People, 18 Ill. 194, 21 Ill. 178; Titman v. Moore, 43 Ill. 169; Wright v. Dunning, 46 Ill. 271, 92 Am. Dec. 257; Cipperly v. Rhodes, 53 Ill. 346; Bonnell v. Smith, 53 Ill. 375; Hayes v. Hayes, 74 Ill. 312; Potts v. Davenport, 79 Ill. 455; Howard v. Logan, 81 Ill. 383; Kenley v. Hudelson, 99 Ill. 493, 39 Am. Rep. 31; Moline Plow Co. v. Vanderhoof, 36 Ill. App. 26; Reilly v. Reilly, (Ill. 1891) 26 N. E. Rep. 604.

*Iowa.* — Davis v. Kelley, 14 Iowa 523; Fyffe v. Beers, 18 Iowa 4, 85 Am. Dec. 577; Morris v. Sargent, 18 Iowa 90; Stewart v. Brand, 23 Iowa 477; Robb v. McBride, 28 Iowa 386; Bradshaw v. Hurst, 57 Iowa 745; Shirland v. Union Nat. Bank, 65 Iowa 96; Repenn v. Davis, 72 Iowa 548; Boot v. Brewster, 75 Iowa 631, 9 Am. St. Rep. 515; Jones v. Blumenstein, 77 Iowa 404; Basham v. Basham, 79 Iowa 494; Reeseman v. Davenport, 96 Iowa 330; Robinson v. Charleton, 104 Iowa 296; Coad v. Neal, 55 Iowa 528.

*Kansas.* — Hixon v. George, 18 Kan. 253; Osborne v. Schoonmaker, 47 Kan. 667; Kansas, etc., Coal Co. v. Judd, 6 Kan. App. 487; Moses v. White, 6 Kan. App. 558; Brury v. Smith, (Kan. App. 1898) 53 Pac. Rep. 74.

*Kentucky.* — Sansberry v. Simms, 79 Ky. 527; Phipps v. Acton, 12 Bush (Ky.) 377; Herferth v. Zimmerman, 7 Ky. L. Rep. 669; Davis v. Prichard, (Ky. 1888) 7 S. W. Rep. 549; Black v. Black, (Ky. 1889) 12 S. W. Rep. 147; McFarland v. Washington, (Ky. 1890) 14 S. W. Rep. 354; Gregory v. Oates, 92 Ky. 532; Campbell v. Potter, (Ky. 1895) 29 S. W. Rep. 139; Central Kentucky Lunatic Asylum v. Craven,

98 Ky. 105, 56 Am. St. Rep. 323; Derickson v. Gillespie, (Ky. 1895) 32 S. W. Rep. 1084; Cincinnati Leaf Tobacco Warehouse Co. v. Thompson, (Ky. 1899) 49 S. W. Rep. 446.

*Louisiana.* — Burch v. Mouton, 37 La. Ann. 725.

*Massachusetts.* — Drury v. Bachelder, 11 Gray (Mass.) 214; Dulanty v. Pynchon, 6 Allen (Mass.) 510; Lazell v. Lazell, 8 Allen (Mass.) 575.

*Michigan.* — Bunker v. Paquette, 37 Mich. 79; Karn v. Nielson, 59 Mich. 380; Earll v. Earll, 60 Mich. 30; Davis Sewing Mach. Co. v. Whitney, 61 Mich. 518; Kaeding v. Joachimsthal, 98 Mich. 78; Hitchcock v. Misner, 11 Mich. 180.

*Missouri.* — Leake v. King, 85 Mo. 413; Duffey v. Willis, 99 Mo. 132; Mills v. Mills, 141 Mo. 195; Bailey v. Comings, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

*Nebraska.* — Eckman v. Scott, 34 Neb. 817; Edwards v. Reid, 39 Neb. 645, 42 Am. St. Rep. 607; Mallard v. North Platte First Nat. Bank, 40 Neb. 784; Quigley v. McEvony, 41 Neb. 73; Corey v. Schuster, 44 Neb. 269.

*New Hampshire.* — Austin v. Stanley, 46 N. H. 51; Locke v. Rowell, 47 N. H. 46. See Currier v. Woodward, 62 N. H. 63.

*North Dakota.* — Edmonson v. White, 8 N. Dak. 72.

*Ohio.* — Wetz v. Beard, 12 Ohio St. 431; Kelly v. Duffy, 31 Ohio St. 437; Jackson v. Reid, 32 Ohio St. 443; William H. Holmes Co. v. Book, 1 Ohio N. P. 58, 1 Ohio Dec. 665.

*Tennessee.* — McInturf v. Woodruff, 9 Lea (Tenn.) 671.

*Texas.* — Taylor v. Boulware, 17 Tex. 74, 67 Am. Dec. 642; Franklin v. Coffee, 18 Tex. 413, 70 Am. Dec. 292; Shepherd v. Cassidy, 20 Tex. 24, 70 Am. Dec. 372; Gouhenant v. Cockrell, 20 Tex. 96; Thomas v. Williams, 50 Tex. 269; Kessler v. Draub, 52 Tex. 575; Parr v. Newby, 73 Tex. 468; Graves v. Campbell, 74 Tex. 576; Jones v. Robbins, 74 Tex. 615; Sanders v. Sheran, 66 Tex. 655; C. B. Carter Lumber Co. v. Clay, (Tex. 1888) 10 S. W. Rep. 293; Reinstein v. Daniels, 75 Tex. 640; Cooper v. Basham, (Tex. 1892) 19 S. W. Rep. 704; Hines v. Nelson, (Tex. Civ. App. 1893) 24 S. W. Rep. 541; Curtis v. Cockrell, 9 Tex. Civ. App. 51; Aultman v. Allen, 12 Tex. Civ. App. 227; Keller v. Beattie, (Tex. Civ. App. 1896) 34 S. W. Rep. 667; Farmer v. Hale, 14 Tex. Civ. App. 73; Locke v. Bonnell, 14 Tex. Civ. App. 354; Harbison v. Tenneson, (Tex. Civ. App. 1896) 38 S. W. Rep. 232; Scottish-American Mortg. Co. v. Scripture, (Tex. Civ. App. 1897) 40 S. W. Rep. 270; Building, etc., Assoc. v. Guillemet, 15 Tex. Civ. App. 649; Baum v. Williams, 16 Tex. Civ. App. 407; Gunn v. Wynne, (Tex. Civ. App. 1897) 43 S. W. Rep. 290; Cox v. Harvey, 1 Tex. Unrep. Cas. 268.

*Utah.* — Kimball v. Salisbury, 17 Utah 381; Anderson v. Davis, 18 Utah 200; Bunker v. Coons, (Utah 1900) 60 Pac. Rep. 549.

*Wisconsin.* — In the early case of Hoyt v. Howe, 3 Wis. 752, 62 Am. Dec. 705, it seems

**Application of Rule.** — Applying this rule it has been held that there is no abandonment of the homestead exemption if the owner, with a present and continuing intention to return, removes from the premises because of the disturbed conditions of the country,<sup>1</sup> the destruction of his dwelling by fire,<sup>2</sup> the ill health of some member of the family,<sup>3</sup> to secure better educational facilities for the children,<sup>4</sup> or for the purposes of business.<sup>5</sup> The rule that

to have been understood that the owner of a homestead could not, without forfeiture of the exemption, suspend his occupancy, unless upon casual necessity. But in 1858 a statute was passed which provided that the owner of a homestead might remove therefrom without thereby rendering the property liable to forced sale on execution. Rev. Stat. Wis. 1858, p. 798. This statute has been understood to change the rule of *Hoyt v. Howe*, 3 Wis. 752, 62 Am. Dec. 705, so as to permit the owner of a homestead to be absent not only on account of a casual necessity, but also on account of a temporary convenience, without losing his exemption. *Jarvais v. Moe*, 38 Wis. 440. See also *Herrick v. Graves*, 16 Wis. 157.

And it has been so held under the later Wisconsin statutes, which, however, are more explicit. *Phillips v. Root*, 68 Wis. 128; *McDermott v. Kernan*, 72 Wis. 268, 7 Am. St. Rep. 864; *Hughes v. Newton*, 89 Fed. Rep. 213.

In *McDermott v. Kernan*, 72 Wis. 268, 7 Am. St. Rep. 864, a widow who lived in the second story of a building, the first story of which was used as a saloon and dance hall, not wishing her children to live over a saloon, removed from the building to another place of residence. She left some furniture in the building, and always intended to return and live in it; at all events, when her children were grown and her daughters married. In the meantime she rented the building, and about seven years after her removal she executed an absolute deed of the premises as security for borrowed money. It was held that her right to claim the premises as her homestead was not impaired by her absence, and that she could hold them as exempt from sale on execution.

Where the owner of a homestead, shortly before his death, contracted to sell the premises and remove therefrom and to give possession to the purchaser, but the sale was not carried out in consequence of the purchaser failing to make the first payment, and the widow and her children thereupon moved back upon the premises, it was held that the removal was merely temporary and did not amount to an abandonment of the homestead rights. *Persifull v. Hind*, 88 Ky. 296.

**Mississippi Statute.** — By reason of the statutes in Mississippi the homestead exemption is lost "whenever the debtor shall cease to reside on his homestead, \* \* \* unless his removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the cause of his absence can be removed." Code Miss. 1880, § 1256; Code Miss. 1892, § 1981. Under this statute both the intent speedily to reoccupy and a sufficient cause for removal must exist to protect the homestead exemption. *Moore v. Bradford*, 70 Miss. 70; *Hand v. Winn*, 52 Miss. 784; *Thompson v. Tillotson*, 56 Miss. 36. Compare *Campbell v. Adair*, 45 Miss. 170.

**Minnesota Statutes.** — Under Gen. Stat. Minn. (1878), c. 68, § 9 (Stat. Minn. 1894, § 5529), the homestead exemption ceases on the expiration of six consecutive months' absence, unless a notice claiming the homestead has been filed with the register of deeds. *Russell v. Speedy*, 38 Minn. 303; *Quehl v. Peterson*, 47 Minn. 13.

**1. Removal Because of Disturbed Conditions of Country.** — *Leake v. King*, 85 Mo. 473.

A removal from homestead property under very just apprehensions for the safety of the family in consequence of the hostile attitude of the Indians in the vicinity, with a temporary residence elsewhere, has been held not to be evidence of the abandonment of the homestead. *Moss v. Warner*, 10 Cal. 296.

**2. Removal Because of Burning of Dwelling.** — *Howard v. Logan*, 81 Ill. 383; *Moses v. White*, 6 Kan. App. 558; *Stewart v. Rhoades*, 39 Minn. 193; *Kelly v. Duffy*, 31 Ohio St. 437.

**3. Removal Because of Ill Health** — *Illinois*. — *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730. *Kansas*. — *Kansas, etc., Coal Co. v. Judd*, 6 Kan. App. 487.

*Kentucky*. — *Davis v. Prichard*, (Ky. 1888) 7 S. W. Rep. 549.

*Louisiana*. — *Burch v. Mouton*, 37 La. Ann. 725.

*Michigan*. — *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518.

*Missouri*. — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

*Texas*. — *Graves v. Campbell*, 74 Tex. 576; *Jones v. Robbins*, 74 Tex. 615; *C. B. Carter Lumber Co. v. Clay*, (Tex. 1888) 10 S. W. Rep. 293; *Cooper v. Basham*, (Tex. 1892) 19 S. W. Rep. 704.

*Wisconsin*. — *Hughes v. Newton*, 89 Fed. Rep. 213.

**4. Removal to Educate Children** — *Illinois*. — *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31.

*Iowa*. — *Morris v. Sargent*, 18 Iowa 90; *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234; *Robinson v. Charleton*, 104 Iowa 296.

*Kansas*. — *Kansas, etc., Coal Co. v. Judd*, 6 Kan. App. 487.

*Kentucky*. — *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, (Ky. 1899) 49 S. W. Rep. 446.

*Nebraska*. — *Corey v. Schuster*, 44 Neb. 269.

*Texas*. — *Thomas v. Williams*, 50 Tex. 269; *Aultman v. Allen*, 12 Tex. Civ. App. 227; *Locke v. Bonnell*, 14 Tex. Civ. App. 354; *Gunn v. Wynne*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290.

Where a husband and his wife removed from the homestead to a city with the intention of remaining while their son should learn a trade, which would require two years, and then returning, and rented the farm in the meantime, it was held that there was no abandonment. *Herferth v. Zimmerman*, 7 Ky. L. Rep. 696.

**5. Removal for Purposes of Business** — *Arkansas*. — *Tumlinson v. Swinney*, 22 Ark. 400, 76



there need not be a continuous actual occupancy of the premises is applied with especial liberality in favor of the surviving minor children of a deceased owner of a homestead.<sup>1</sup>

**Abandonment Dependent upon Intention.**—The fact of abandonment is largely a question of intention to be determined from all the circumstances.<sup>2</sup>

**Intention to Return Must Be Formed at Time of Removal.**—The intention to return must be formed at the time of the removal from the premises in order to preserve and continue the homestead exemption.<sup>3</sup>

**Intention to Return Must Be Continuing.**—In order to preserve the homestead exemption during an absence from the property the intention to return and reoccupy the homestead must be continuing. If at the time when the removal

Am. Dec. 432; *Robinson v. Swearingen*, 55 Ark 55.

*Illinois*.—*Reilly v. Reilly*, (Ill. 1891) 26 N. E. Rep. 604.

*Kansas*.—*Brury v. Smith*, (Kan. App. 1898) 53 Pac. Rep. 74.

*Missouri*.—*Duffey v. Willis*, 99 Mo. 132; *Mills v. Mills*, 141 Mo. 195.

*Nebraska*.—*Eckman v. Scott*, 34 Neb. 817; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607; *Quigley v. McEvony*, 41 Neb. 73.

*New Hampshire*.—*Locke v. Rowell*, 47 N. H. 46.

*Tennessee*.—*McInturf v. Woodruff*, 9 Lea (Tenn.) 671.

*Texas*.—*Farmer v. Hale*, 14 Tex. Civ. App. 73; *Harbison v. Tennison*, (Tex. Civ. App. 1896) 38 S. W. Rep. 232.

*Utah*.—*Kimball v. Salisbury*, 17 Utah 381; *Bunker v. Coons*, (Utah 1900) 60 Pac. Rep. 549.

In *Wiggins v. Chance*, 54 Ill. 175, a judgment debtor, owning a homestead and residing thereon with his family, rented the premises for three years and removed therefrom to a town in the same county for the purpose of earning money to pay his debts, but with the intention of returning. In fact, he returned in about six months, and it was held that he had not lost his homestead by abandonment.

**1. Nonoccupancy by Surviving Minor Children.**—The courts of *Arkansas*, under a statute giving the homestead "during the time it shall be occupied by the widow, or child, or children," have held that actual occupancy by the minor children when both parents are dead is not necessary. It is declared to be a duty of the guardian to take possession of the homestead and lease or rent it for the benefit of the children. *Booth v. Goodwin*, 29 Ark. 633; *Johnston v. Turner*, 29 Ark. 280.

In *Farrow v. Farrow*, 13 Lea (Tenn.) 120, a majority of the court was of the opinion that the right of homestead of minor children is not dependent upon the actual and continuous occupation of the premises.

It has been said by the *Illinois* court that when both parents have died leaving minor children, to carry out the object of the homestead statute it may be necessary to hold that a residence by a tenant may be substituted for that of the children. *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247.

And in *Brinkerhoff v. Everett*, 38 Ill. 263, where both parents were dead the minor children were taken from the homestead by their

guardian and placed in the homes of their kindred, and the premises were leased by the guardian for the benefit of the children, they having no other means of support. It was held that the removal did not forfeit the homestead right of the minors and that the fact that the property was rented by the guardian for their benefit did not constitute an abandonment.

In *Mealy v. Lipp*, 16 Tex. Civ. App. 163, it was held that where the father, being ill, leaves the homestead and goes to the house of a neighbor to be cared for, and there dies, and the infant daughter from necessity removes from the homestead to make her own living, and the minor son is sent to a relative to be cared for, the homestead exemption of the children is not destroyed. And where a minor son of the deceased owner of a homestead, while he does not reside thereon, but lives with his mother until her marriage and then with her husband, continues to use and cultivate the property, the homestead exemption is not lost. *Deering v. Beard*, 48 Kan. 16.

Where the owner of a homestead died leaving a child eighteen months old, it was held that the removal of the child to the home of its guardian and the renting of the premises for a period of three years, the rents being used for the support of the child and for the payment of taxes, did not constitute an abandonment of the infant's homestead exemption, although the statute required continued occupancy after the father's death to preserve the homestead. *Shirack v. Shirack*, 44 Kan. 653.

**2. Importance of Intention with Which Removal Is Made.**—*Alabama*.—*Tchman v. Bryan*, 67 Ala. 558; *Murphy v. Hunt*, 75 Ala. 438.

*Arkansas*.—*Gates v. Steele*, 48 Ark. 539.

*Illinois*.—*Kitchell v. Burgwin*, 21 Ill. 40.

*Kansas*.—*Moses v. White*, 6 Kan. App. 558.

*Michigan*.—*Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821; *Hoffman v. Buschman*, 95 Mich. 538.

*Nebraska*.—*Corey v. Schuster*, 44 Neb. 269; *Mallard v. North Platte First Nat. Bank*, 40 Neb. 784.

*South Dakota*.—*Clark v. Evans*, 6 S. Dak. 244.

*Texas*.—*Austin v. Townes*, 10 Tex. 24; *Houston, etc., R. Co. v. Winter*, 44 Tex. 598; *Cox v. Harvey*, 1 Tex. Unrep. Cas. 268; *Reinstein v. Daniels*, 75 Tex. 640.

**3. Existence of Intention to Return at Time of Removal Necessary.**—*Smith v. Bunn*, 75 Mo. 559; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 747; *Duffey v. Willis*, 99 Mo. 132.



is made there is an intention to return, and this intention is subsequently abandoned, the original intention ceases to be effective and there is an abandonment of the homestead right in the land.<sup>1</sup>

**Intention to Return Formed Subsequent to Removal.** — Consequently an intention to return and reoccupy the premises formed after the removal does not restore the homestead rights until it is executed and possession of the premises resumed.<sup>2</sup> The homesteader who has removed from the premises with no intention to return may, however, change his intention to resume possession and thereby reinvest the property with the homestead character.<sup>3</sup> But such resumption of possession has only the effect of creating a new homestead right from the time of the new occupancy; it does not affect the rights of third persons acquired in the interim between the loss of the old and the acquisition of the new homestead.<sup>4</sup>

**Intention to Return Must Be Positive.** — By the weight of authority, to prevent a removal from working an abandonment the intention to return must be positive and certain, not conditional or indefinite.<sup>5</sup> Thus it has been held that there is an abandonment of the homestead if the owner removes from the premises with the intention of not returning except upon a contingency which may never happen,<sup>6</sup> and which he intends to avoid.<sup>7</sup> But according to another line of cases the homestead right is not lost by a temporary absence accompanied by an express intention to return if the purpose for leaving the homestead be not accomplished.<sup>8</sup>

**1. Effect of Abandonment of Intention to Return.** — *Maguire v. Hanson*, 105 Iowa 215; *Corey v. Schuster*, 44 Neb. 269; *Gunn v. Wynne*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290; *Schwartzman v. Cabell*, (Tex. Civ. App. 1898) 49 S. W. Rep. 113; *Bell v. Greathouse*, 20 Tex. Civ. App. 478.

**2. Effect of Subsequent Intention to Return.** — *Smith v. Bunn*, 75 Mo. 559; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767.

In *Smith v. Bunn*, 75 Mo. 559, Isaac Smith lived on the premises until the death of his first wife, when he broke up housekeeping, moved his household goods, and leased the premises for three or five years. He then married, and within a few weeks died, having made some preparations to move back to the premises. His widow claimed the property as her homestead, but it was held that these facts made out a *prima facie* case of abandonment. But compare *Ross v. Porter*, 72 Miss. 361.

**3.** *Campbell v. Adair*, 45 Miss. 170; *Zimmer v. Pauley*, 51 Wis. 282.

**4.** *Carter v. Goodman*, 11 Bush (Ky.) 232; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767.

In *Titman v. Moore*, 43 Ill. 169, a person left his farm and removed to a town six miles distant, where he voted at two local elections, first renting his farm for three years, and at the end of one year terminating that agreement and renting it anew for five years; and after eighteen months' absence from his farm, he executed a mortgage which did not release the benefit of the homestead act. It was held that the mortgagee took his lien free from the operation of the homestead and that the right to the homestead was not restored by a subsequent return to and residence on the farm.

**5. Qualified Intention to Return.** — *Wolf v. Hawkins*, 60 Ark. 262; *Cotton v. Hamil*, 58 Iowa 594; *Curran v. Culf*, 13 Ky. L. Rep. 84; *Donaldson v. Lamprey*, 29 Minn. 18; *Jarvais v. Moe*, 38 Wis. 440.

Thus it has been held that to remove from a homestead farm into town to become a merchant intending to return if he "should quit business" amounts to an abandonment of the exemption by the homesteader. *Wolf v. Hawkins*, 60 Ark. 262.

**6.** *Lehman v. Bryan*, 67 Ala. 558.

**7.** Where the owner of a homestead removed to a neighboring town for the purpose of practicing law, with the intention of remaining permanently if he should succeed in his profession, it was held that there was an abandonment. *Kimball v. Wilson*, 59 Iowa 638.

And it has been held that there was an abandonment when the owner of a homestead removed therefrom with the intention of returning in case he should not succeed in selling the property, which he was attempting to do. *Conway v. Nichols*, 106 Iowa 358; *Gregory v. Oates*, 92 Ky. 532, 13 Ky. L. Rep. 761; *Hall v. McGlothlin*, 6 Ky. L. Rep. 661.

But in *Painter v. Steffen*, 87 Iowa 171, an absence from the homestead, even for a number of years, while the homesteader engaged in attempting to establish in another place a business which was experimental and temporary in its character, was held not to constitute an abandonment of the homestead, it appearing that the homestead goods were allowed to remain in the house, which was occupied by relatives without rental.

**8.** *Potts v. Davenport*, 79 Ill. 455; *Imhoff v. Lipe*, 162 Ill. 282; *Carroll v. Dawson*, (Ky. 1898) 46 S. W. Rep. 222; *Sanders v. Sheran*, 66 Tex. 655.

In *Sanders v. Sheran*, 66 Tex. 655, a debtor who was employed as an agent for a person carrying on a nursery removed from his land to another place for the purpose of being in a better position to carry on his business, and for the further purpose of educating his children. He acquired no other homestead, but lived in rented property. Prior to removing

**b. ACTUAL ABANDONMENT NECESSARY.** — The abandonment of the homestead cannot be accomplished by a mere intention to remove; there must also be an actual removal from the premises.<sup>1</sup> Thus a person moving from his own homestead to a neighboring property owned by another does not lose his homestead exemption if he continues to use his own land as a part of his home place.<sup>2</sup> And the fact that a homesteader is about to remove from the state does not work an abandonment.<sup>3</sup> The absence of the head of the family from the homestead in pursuit of business or other purposes, the family remaining in the homestead, does not amount to an abandonment.<sup>4</sup>

**c. INTENTION A QUESTION OF FACT.** — The intention with which the owner of a homestead removes from the premises is ordinarily a question of fact for the determination of the jury.<sup>5</sup>

**d. DEGREE OF PROOF REQUIRED TO SHOW INTENTION.** — There is some conflict of judicial opinion as to how conclusively the question of intention to abandon must be established. According to some cases the abandonment of the homestead right by removal should be declared only upon clear and decisive proof of an intention to abandon the right.<sup>6</sup> But according to another line of cases, a removal from the homestead is to be taken as an abandonment, unless it clearly appears that there is an intention to return and occupy the premises as a home.<sup>7</sup> Stronger proof of abandonment is required when the debt to which it is sought to subject the land was contracted during actual occupancy than when it was contracted while the homesteader was not in actual possession of the premises.<sup>8</sup> And, conversely, if the debt was contracted while the homesteader was not in actual possession

from the premises he contracted to sell them, but the contract was never carried out, and he testified that his purpose in desiring to sell was to invest the proceeds in another homestead, and that his intention had always been to return to the land unless he could sell it, and with the proceeds acquire another home. It was held that the qualified intention not to return was no ground for holding the removal from the premises an abandonment.

In *Smith v. People*, 44 Ill. 16, the owner abandoned his residence in Illinois and took one in Tennessee, and there began the practice of the law. He left Illinois with the express intention of returning should his hopes be fruitless in Tennessee. He did return after an absence of some months, with his family, and it was held that he had not lost his residence in Illinois.

But in *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247, where the homesteader stated, before removing to another state, that if he liked the country and could do well in his business he expected to remain, it was held that there was an abandonment, although he found it to his interest to return.

**1. Effect of Mere Intention to Remove — Alabama.** — *Murphy v. Hunt*, 75 Ala. 438.

*Iowa.* — *Elder v. Reilly*, 58 Iowa 403; *Knorr v. Lohr*, (Iowa 1899) 78 N. W. Rep. 904; *Griffin v. Sheley*, 55 Iowa 513.

*Kentucky.* — *Summers v. Sprigg*, (Ky. 1896) 35 S. W. Rep. 1033.

*Minnesota.* — *Robertson v. Sullivan*, 31 Minn. 200.

*Missouri.* — *Davis v. Land*, 88 Mo. 436.

*Nebraska.* — *Eckman v. Scott*, 34 Neb. 817;

*Quigley v. McEvony*, 41 Neb. 73.

*New Hampshire.* — *Nichols v. Nichols*, 62 N. H. 621; *Chase v. Barnard*, 64 N. H. 61;

*Texas.* — *Archibald v. Jacobs*, 69 Tex. 248;

*Welborne v. Downing*, 73 Tex. 527; *Little v. Baker*, (Tex. 1889) 11 S. W. Rep. 549.

*Wisconsin.* — *Carter v. Sommermeyer*, 27 Wis. 665.

**2. Partial Removal by Husband to Adjoining Property Owned by His Wife.** — It has been so held where a husband removed from his own homestead to an adjoining property owned by his wife, he continuing to use the homestead from which he thus removed. *Summers v. Sprigg*, (Ky. 1896) 35 S. W. Rep. 1033; *Nichols v. Nichols*, 62 N. H. 621; *Chase v. Barnard*, 64 N. H. 615.

**3. Effect of Mere Intention to Remove from State.** — *Davis v. Land*, 88 Mo. 436.

**4. Bailey v. Comings, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733; *Griffin v. Sheley*, 55 Iowa 513.**

**5. Intention a Question of Fact.** — *Caldwell v. Pollak*, 91 Ala. 353; *Beckert v. Whitlock*, 83 Ala. 123; *Brennan v. Wallace*, 25 Cal. 108; *Cook v. McChristian*, 4 Cal. 23; *Potts v. Daventport*, 79 Ill. 459; *Feldes v. Duncan*, 30 Ill. App. 469; *Eyffe v. Beers*, 18 Iowa 7, 85 Am. Dec. 577; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *Duffey v. Willis*, 99 Mo. 132; *Wood v. Lord*, 51 N. H. 448; *Shepherd v. Cassiday*, 20 Tex. 26, 70 Am. Dec. 372.

**6. Sufficiency of Evidence of Intention.** — *Campbell v. Adair*, 45 Miss. 170; *Gouhenant v. Cockrell*, 20 Tex. 96; *Shepherd v. Cassiday*, 20 Tex. 29, 70 Am. Dec. 372; *Cross v. Everts*, 28 Tex. 523; *Cox v. Harvey*, 1 Tex. Unrep. Cas. 268; *Rollins v. O'Farrell*, 77 Tex. 90. But compare *Moore v. Dunn*, (Tex. Civ. App. 1897) 41 S. W. Rep. 530.

**7. Titman v. Moore, 43 Ill. 169; *Buck v. Conlogue*, 49 Ill. 391; *Shepard v. Brewer*, 65 Ill. 383; *Jackson v. Sackett*, 146 Ill. 646.**

**8. Duntun v. Woodbury, 24 Iowa 74; *Davis v. Kelley*, 14 Iowa 523; *Robinson v. Charleton*,**



of the premises, the court should incline the more strongly to the conclusion that there was a present intention on leaving to remain permanently away.<sup>1</sup>

**e. BURDEN OF PROOF TO SHOW INTENTION.**—While the authorities very generally hold that the homestead right, when once acquired, will be presumed to continue until it is shown to be terminated, and the burden of showing that it is at an end is upon the party who assails it,<sup>2</sup> it has, on the other hand, been held that an actual removal from the premises throws upon the claimant the burden to establish an intention to return and occupy the premises as a homestead.<sup>3</sup>

**f. EVIDENCE OF INTENTION TO ABANDON.**—While the intention of the owner who has removed from his homestead to return and occupy it as his home may be established by his own direct testimony,<sup>4</sup> the question of intent is usually to be inferred from his conduct.<sup>5</sup>

**Removal Without Acquiring New Home.**—While there is some authority for the proposition that a homestead is not abandoned by a removal of the claimant without acquiring a new homestead,<sup>6</sup> that is not the prevailing view. According to the preponderance of authority an actual removal with no intention to return amounts to an abandonment, even when a new homestead has not been acquired.<sup>7</sup> But the fact that the absent claimant has not acquired a home

104 Iowa 296; *Boot v. Brewster*, 75 Iowa 631, 9 Am. St. Rep. 515.

1. *Burch v. Atchison*, 82 Ky. 585, 6 Ky. L. Rep. 592, 636.

2. **Burden of Proof to Show Abandonment.**—*Bradshaw v. Hurst*, 57 Iowa 745; *Boot v. Brewster*, 75 Iowa 631, 9 Am. St. Rep. 515; *Robinson v. Charleton*, 104 Iowa 296; *Maguire v. Hanson*, 105 Iowa 215; *Balzer v. Pence*, (Iowa 1898) 76 N. W. Rep. 731; *Cooper v. Basham*, (Tex. 1892) 19 S. W. Rep. 704; *Welborne v. Downing*, 73 Tex. 527.

3. **Burden of Proof to Show Character of Removal.**—*Newman v. Franklin*, 69 Iowa 244; *Marshall v. Applegate*, (Ky. 1889) 10 S. W. Rep. 805; *Bell v. Greathouse*, 20 Tex. Civ. App. 478.

4. **Testimony of Claimant as to Intentions Admissible.**—The testimony of the person claiming a homestead is admissible and entitled to consideration, though it is not conclusive. *Boot v. Brewster*, 75 Iowa 631, 9 Am. St. Rep. 515; *Cline v. Upton*, 56 Tex. 320; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212.

**Statements of Third Persons.**—It has been held that statements made by third persons at the time of removal as to the claimant's intention to return are inadmissible. *Jones v. Blumenstein*, 77 Iowa 361.

**Opinion of Claimant.**—In *Jacobs v. Hawkins*, 63 Tex. 1, an action against a husband and wife to subject property claimed as a homestead to the lien of a mortgage, it was held that the declarations of the husband as to the character of the property secured by the mortgage were properly excluded on the ground that if, as a matter of fact, the property was a homestead, the mere declaration of the husband could not deprive it of that character. The case was distinguished from the cases in which the property has not been used as a homestead, or is not so being used, in which the declarations of the husband would seem to be admissible for the purpose of showing that there was no intention to claim the property as a homestead.

**Opinions of Third Persons.**—Upon an issue of

abandonment it is error to permit witnesses to give their opinions as to the intent of the claimant when leaving the homestead to return. *Graves v. Campbell*, 74 Tex. 576.

Thus, it was held in *Welborne v. Downing*, 73 Tex. 527, that testimony of a witness that "from conversations had" by him with the defendant upon the subject he had been "led to believe that it was not his [the defendant's] intention to remain permanently in Texas after his return from Montana" was properly excluded.

And in *Jones v. Blumenstein*, 77 Iowa 361, evidence of what the purchaser believed, when he purchased the property, as to the intention of the homesteader to return was held to be inadmissible to prove abandonment.

So it has been held that evidence of the general understanding of the claimant's neighbors as to his intention in removing is not admissible upon the question of intention. *Scottish-American Mortg. Co. v. Scripture*, (Tex. Civ. App. 1897) 40 S. W. Rep. 210.

5. *Ross v. Hellyer*, 26 Fed. Rep. 413; *Kimball v. Wilson*, 59 Iowa 638; *Cotton v. Hamil*, 58 Iowa 594.

6. **Acquiring New Home—Necessary to an Abandonment.**—The case of *Mills v. Von Buskirk*, 32 Tex. 360, in which it was held that there had been no abandonment although the claimants, being dissatisfied with the condition of the country, left it in 1865, declaring that they did not know that they would ever return, has been so understood. *Smith v. Bunn*, 75 Mo. 559.

In *Massachusetts* it has been held that under the statute of 1855, c. 238, no abandonment of the premises to which the homestead exemption has once attached will be sufficient to terminate it until a new homestead is acquired elsewhere. *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731.

7. **Same—Not Necessary to Abandonment.**—*Iowa*.—*Fyffe v. Beers*, 18 Iowa 4, 85 Am. Dec. 577; *Cotton v. Hamil*, 58 Iowa 594; *Newman v. Franklin*, 69 Iowa 244.

*Missouri*.—*Smith v. Bunn*, 75 Mo. 559.



elsewhere is a circumstance which tends to show an intention to return.<sup>1</sup> It has even been said that a homestead will not be considered abandoned before the acquisition of a new one except upon clear and conclusive proof of a removal with an intention not to return.<sup>2</sup>

**Removal and Acquisition of New Home.** — When the owner of a homestead removes therefrom to another house owned by him and resides there for a considerable time, the presumption is that the homestead has been abandoned.<sup>3</sup> But this presumption is not conclusive; if the attendant circumstances show that the new home was intended to be used only as a temporary residence there will be no abandonment.<sup>4</sup> Since, however, no one can have more than one homestead at the same time, an abandonment will be established by proof of the fact that the owner of a homestead has removed therefrom and acquired a new homestead elsewhere.<sup>5</sup>

**Removal to Another State.** — The removal of the owner of a homestead to another state for a temporary purpose and with the intention of returning and reoccupying the premises does not amount to an abandonment.<sup>6</sup> But the homestead laws of the several states are regarded as applying only to their citizens. If, therefore, the owner of a homestead in one state removes to another with no definite and fixed intention of returning, and establishes a home in and becomes a citizen of the state to which he removes, the homestead exemption is abandoned.<sup>7</sup>

*Texas.* — *Jordan v. Godman*, 19 Tex. 273; *Shepherd v. Cassiday*, 20 Tex. 24, 70 Am. Dec. 372; *Gouhenant v. Cockrell*, 20 Tex. 96; *McMillan v. Warner*, 38 Tex. 410; *Woolfolk v. Rickets*, 41 Tex. 359; *Cline v. Upton*, 56 Tex. 322; *Reece v. Renfro*, 68 Tex. 194; *Moore v. Johnson*, 12 Tex. Civ. App. 694; *Scottish-American Mortg. Co. v. Scripture*, (Tex. Civ. App. 1897) 40 S. W. Rep. 210.

1. **Failure to Acquire New Homestead Evidence of Intention to Return.** — *Hughes v. Newton*, 89 Fed. Rep. 213.

2. *Shepherd v. Cassiday*, 20 Tex. 24, 70 Am. Dec. 372; *Gouhenant v. Cockrell*, 20 Tex. 96; *Cross v. Everts*, 28 Tex. 533.

3. **Acquisition of New Home — Abandonment Presumed** — *Alabama*. — See *Sides v. Scharff*, 93 Ala. 106.

*Arkansas*. — *Wolf v. Hawkins*, 60 Ark. 262.

*Illinois*. — *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257.

*Iowa*. — *Davis v. Kelley*, 14 Iowa 523.

*Wisconsin*. — *Jarvais v. Moe*, 38 Wis. 440.

4. **Same — Presumption of Abandonment Not Conclusive** — *Arkansas*. — *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Robinson v. Swearingen*, 55 Ark. 55.

*Iowa*. — *Ayres v. Grill*, 85 Iowa 720.

*Texas*. — *Farmer v. Hale*, 14 Tex. Civ. App. 73; *Scottish-American Mortg. Co. v. Scripture*, (Tex. Civ. App. 1897) 40 S. W. Rep. 210; *Baum v. Williams*, 16 Tex. Civ. App. 407; *Gunn v. Wynne*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290; *Reinstein v. Daniels*, 75 Tex. 640.

5. **Acquisition of New Homestead Works Abandonment** — *Kansas*. — *Atchison v. Sedgwick*, 20 Kan. 625; *McAlpine v. Powell*, 44 Kan. 411.

*Michigan*. — *Wheeler v. Smith*, 62 Mich. 373.

*Minnesota*. — *Donaldson v. Lamprey*, 29 Minn. 180. Compare *Robertson v. Sullivan*, 31 Minn. 200.

*Mississippi*. — *Thoms v. Thoms*, 45 Miss. 263.

*Missouri*. — *Kaes v. Gross*, 92 Mo. 648, 1 Am. St. Rep. 767.

*New Hampshire*. — *Horn v. Tufts*, 39 N. H. 478; *Nims v. Bigelow*, 45 N. H. 347; *Mood v. Lord*, 51 N. H. 448.

*Texas*. — *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622; *Russell v. Nall*, 2 Tex. Civ. App. 60; *Davis v. Taylor*, (Tex. Civ. App. 1895) 33 S. W. Rep. 543; *Scottish-American Mortg. Co. v. Scripture*, (Tex. Civ. App. 1897) 40 S. W. Rep. 210; *Ghent v. Boyd*, 18 Tex. Civ. App. 88. See *Kutch v. Holley*, 77 Tex. 220; *Ogden v. Giddings*, 15 Tex. 486.

*Vermont*. — *Howe v. Adams*, 28 Vt. 541.

*Wisconsin*. — *Schoffen v. Landauer*, 60 Wis. 337; *Blackburn v. Lake Shore Traffic Co.*, 90 Wis. 362.

By the *Iowa Code* (Code 1873, § 1994; Code 1897, § 2977) it is provided that the homestead "must embrace the house used as a home by the owner, and if he has two or more houses thus used, he may select which he will retain." In a case where the owner of two tracts of land, who occupied one of the tracts as his home, selected as his homestead the tract which was not so used, it was held that the selection was void, and did not amount to an abandonment of his homestead right in the tract which he was occupying. *Knorr v. Lohr*, (Iowa 1899) 78 N. W. Rep. 904.

6. **Removal to Another State for Temporary Purpose Not Abandonment** — *Georgia*. — *Willbanks v. Untriner*, 98 Ga. 801.

*Illinois*. — *Kitchell v. Burgwin*, 21 Ill. 40; *Cipperly v. Rhodes*, 53 Ill. 346.

*Iowa*. — *Bradshaw v. Hurst*, 57 Iowa 745.

*New Hampshire*. — *Meador v. Place*, 43 N. H. 307.

*Ohio*. — *Wetz v. Beard*, 12 Ohio St. 431.

*Texas*. — *Graves v. Campbell*, 74 Tex. 576; *Jones v. Robbins*, 74 Tex. 615.

7. **Removal to Another State with No Intention to Return Constitutes Abandonment** — *Alabama*. — *Gist v. Lucas*, (Ala. 1899) 25 So. Rep. 41; *Land v. Boykin*, (Ala. 1899) 25 So. Rep. 172.

**Voting at Place of New Residence.** — When a debtor, after moving from his homestead to another place to live, exercises the right of suffrage at his new home, this is evidence from which it may be inferred that his removal was not merely temporary and with the intention to return.<sup>1</sup> But it is not conclusive, and may be overcome by circumstances showing an intention to return.<sup>2</sup>

**Duration of Absence.** — While the length of time during which the homesteader who has removed from the premises remains away is important as indicating his intention and must be taken into account in determining the question of abandonment,<sup>3</sup> it can be looked to only for the purpose of determining the intent with which the removal was made, and is not conclusive. Even a prolonged absence may, in the light of the attendant circumstances, be wholly consistent with an intention to return which will preclude the finding of an abandonment.<sup>4</sup> And, on the other hand, if there exists an intention not to

*California.* — *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

*Georgia.* — *City Bank v. Smisson*, 73 Ga. 422; *Jackson v. Du Bose*, 87 Ga. 761; *Knox v. Yow*, 91 Ga. 367.

*Illinois.* — *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247; *Maher v. McConaga*, 47 Ill. 392; *Carr v. Rising*, 62 Ill. 14; *Fisher v. Cornell*, 70 Ill. 216.

*Iowa.* — *Orman v. Orman*, 26 Iowa 361; *Leonard v. Ingraham*, 58 Iowa 406; *Perry v. Dillrance*, 86 Iowa 424.

*Kansas.* — *Fessler v. Haas*, 19 Kan. 216; *Atchison Sav. Bank v. Wheeler*, 20 Kan. 625; *Mosteller v. Readhead*, 6 Kan. App. 512.

*Kentucky.* — *Caldwell v. Seivers*, 85 Ky. 38, 8 Ky. L. Rep. 636; *Williams v. Rose*, 6 Ky. L. Rep. 517; *Crush v. Stewart*, 7 Ky. L. Rep. 825.

*Mississippi.* — *Salter v. Embrey*, (Miss. 1895) 18 So. Rep. 373.

*North Carolina.* — *Baker v. Legget*, 98 N. Car. 304; *Finley v. Saunders*, 98 N. Car. 462; *Munds v. Cassidey*, 98 N. Car. 558; *Lee v. Moseley*, 101 N. Car. 311. See *Adrian v. Shaw*, 82 N. Car. 474.

*North Dakota.* — *Kuhnert v. Conrad*, 6 N. Dak. 215.

*Ohio.* — *Stewart v. Boyd*, 9 Am. L. Rec. 364, 6 Ohio Dec. (Reprint) 973.

*South Carolina.* — *Trimmier v. Winsmith*, 41 S. Car. 109.

*Tennessee.* — *Hicks v. Pepper*, 1 Baxt. (Tenn.) 42; *Carrigan v. Rowell*, 96 Tenn. 185; *McClellan v. Carroll*, (Tenn. Ch. 1897) 42 S. W. Rep. 185.

*Texas.* — *Trawick v. Harris*, 8 Tex. 312; *Jordan v. Godman*, 19 Tex. 273; *McMillan v. Warner*, 38 Tex. 410; *McElroy v. McGoffin*, 68 Tex. 208; *Reece v. Renfro*, 68 Tex. 192, *Odum v. Menafee*, 11 Tex. Civ. App. 119; *Burcham v. Gann*, 1 Tex. Unrep. Cas. 338.

*Virginia.* — *Lindsay v. Murphy*, 76 Va. 428.

*Wisconsin.* — *Moore v. Smead*, 89 Wis. 558.

Where the owner of a homestead removed to another state and resided there fifteen months, and then returned to the state, but to a different county, it was held that the homestead had been abandoned. *Maher v. McConaga*, 47 Ill. 392.

**1. Effect of Voting at Place of New Residence** — *Florida.* — *Murphy v. Farquhar*, 39 Fla. 350.

*Illinois.* — *Titman v. Moore*, 43 Ill. 169; *Cobb v. Smith*, 88 Ill. 199; *Jackson v. Sackett*, 146 Ill. 646; *Hagerty v. Hagerty*, 149 Ill. 655.

*Iowa.* — *Cotton v. Hamil*, 58 Iowa 594; *Conway v. Nichols*, 106 Iowa 358; *Ross v. Hellyer*, 26 Fed. Rep. 413.

*Michigan.* — *Hoffman v. Buschman*, 95 Mich. 538.

In *Ross v. Hellyer*, 26 Fed. Rep. 413, it was held that evidence of the removal of a homesteader to another county and of his repeatedly voting at elections held there was sufficient to establish an abandonment of his homestead in the county from which he removed.

**2. Iowa.** — *Painter v. Steffen*, 87 Iowa 171; *Robinson v. Charleton*, 104 Iowa 296.

*Kentucky.* — *Campbell v. Potter*, (Ky. 1895) 29 S. W. Rep. 139; *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, (Ky. 1899) 49 S. W. Rep. 446.

*Nebraska.* — *Corey v. Schuster*, 44 Neb. 269; *Mallard v. North Platte First Nat. Bank*, 40 Neb. 784.

*Texas.* — *Graves v. Campbell*, 74 Tex. 576; *Sanders v. Sheran*, 66 Tex. 655.

**Effect of Registering as Voter.** — The fact that a homestead claimant registered as a voter at the place to which he had removed has been held not to be as strong evidence of intention to remain away as is the act of voting. It is, however, a fact to be considered as any other fact in the case and to be given such weight as it is entitled to under the rules governing the consideration of testimony. *Mallard v. North Platte First Nat. Bank*, 40 Neb. 784.

**3. Effect of Long-continued Absence** — *Iowa.* — *Dunton v. Woodbury*, 24 Iowa 74; *Newman v. Franklin*, 69 Iowa 244.

*Kentucky.* — *Burch v. Atchison*, 82 Ky. 585, 6 Ky. L. Rep. 592, 636.

*Texas.* — *Cline v. Upton*, 56 Tex. 320.

While length of absence from the homestead is not conclusive upon the question of abandonment, yet where there are no circumstances or acts of the party manifesting a purpose to return and occupy it as a homestead, the length of absence becomes an important fact in determining the question of intention to return. *Dunton v. Woodbury*, 24 Iowa 74. It may become a controlling circumstance. *Newman v. Franklin*, 69 Iowa 244.

**4. United States.** — *Hughes v. Newton*, 89 Fed. Rep. 213.

*Arkansas.* — *Brown v. Watson*, 41 Ark. 309; *Robinson v. Swearingen*, 55 Ark. 55.

*Iowa.* — *Fyffe v. Beers*, 18 Iowa 4, 85 Am. Dec. 577; *Boot v. Brewster*, 75 Iowa 631, 9 Am. St. Rep. 515; *Ayres v. Grill*, 85 Iowa 720;



return it is not necessary that the absence be continued for a great length of time in order to work an abandonment.<sup>1</sup>

**Removal of Dwelling from Land.** — It has been held that the removal by the homesteader of his dwelling house from the land, and his occupation of it in its new location as a home, are *prima facie* evidence of abandonment, and the burden is on him to rebut the presumption which arises from those facts.<sup>2</sup>

**Declarations of Owner.** — The declarations of the owner of homestead property may be given in evidence to establish the intent with which a removal was made.<sup>3</sup> They may be given in evidence to show either an intention to return<sup>4</sup> or an intention not to return.<sup>5</sup> But such declarations are not conclusive either to establish an abandonment<sup>6</sup> or to show that there existed an intention to return and occupy the premises.<sup>7</sup>

**Removal and Subsequent Conveyance.** — A removal from the homestead property and a residence elsewhere for a time, followed by a conveyance of the homestead, constitute evidence of an intention to abandon the exemption;<sup>8</sup> but such evidence is not conclusive, and may be overcome by other evidence tending to show an intention to return and occupy the premises as a homestead.<sup>9</sup>

**Homesteader Taking Advice of Counsel.** — The fact that the owner of a homestead, before removing, took the advice of counsel as to the effect of leaving upon his homestead exemption tends to show an intention to return and is admissible in evidence.<sup>10</sup>

**Offering Homestead for Sale.** — Since the owner of a homestead may sell and convey the property without thereby subjecting it to the claims of his creditors,

*Painter v. Steffen*, 87 Iowa 171; *Zwick v. Johns*, 89 Iowa 550; *Repenn v. Davis*, 72 Iowa 548; *Robinson v. Charleton*, 104 Iowa 296; *Maguire v. Hanson*, 105 Iowa 215.

*Kansas.* — *Osborne v. Schoonmaker*, 47 Kan. 667.

*Kentucky.* — *McFarland v. Washington*, (Ky. 1890) 14 S. W. Rep. 354.

*Michigan.* — *Bunker v. Paquette*, 37 Mich. 79; *Kaeding v. Joachimsthal*, 98 Mich. 78.

*Texas.* — *McMillan v. Warner*, 38 Tex. 410; *Cline v. Upton*, 56 Tex. 319; *Sanders v. Sheran*, 66 Tex. 655; *Farmer v. Hale*, 14 Tex. Civ. App. 73.

*Utah.* — *Kimball v. Salisbury*, 17 Utah 381.

1. *Cline v. Upton*, 56 Tex. 319.

2. **Effect of Removing Dwelling House from Land.** — *Fergus v. Woodworth*, 44 Ill. 374; *Maguire v. Hanson*, 105 Iowa 215. But in *Bunker v. Paquette*, 37 Mich. 79, it was held that a dwelling on the land occupied as a homestead is exempt from execution while being removed by the owner to another parcel of land, and the fact that he and his family had left the house, leaving a portion of the furniture therein, and had been living in a rented house at some distance therefrom for some two years prior to the levy would not render the house subject to execution unless he had abandoned it as a homestead.

3. *McMillan v. Warner*, 38 Tex. 410. And see *Mills v. Mills*, 141 Mo. 195.

But in *Hart v. Randolph*, 142 Ill. 521, it was held that declarations of a homesteader as to his abandonment of the homestead are not admissible in evidence as against his grantee.

4. *Benbow v. Boyer*, 89 Iowa 494; *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, (Ky. 1899) 49 S. W. Rep. 446; *Gouhenant v. Cockrell*, 20 Tex. 98; *Woolfolk v. Ricketts*, 48 Tex. 28.

5. *Brennan v. Wallace*, 25 Cal. 108; *Holli-*

*man v. Smith*, 39 Tex. 357; *Jones v. Robbins*, 3 Tex. Civ. App. 200; *Keller v. Beattie*, (Tex. Civ. App. 1896) 34 S. W. Rep. 667.

6. *Imhoff v. Liipe*, 162 Ill. 282; *Shepherd v. Cassiday*, 20 Tex. 24, 70 Am. Dec. 372; *Thomas v. Williams*, 50 Tex. 269.

7. *Benbow v. Boyer*, 89 Iowa 494; *Woolfolk v. Ricketts*, 48 Tex. 28; *Boehm v. Beutler*, 16 Tex. Civ. App. 380.

In *Jarvais v. Moe*, 38 Wis. 440, it was held that declarations made by the homestead claimant after intervening occurrences have made his return to the homestead advantageous will not alone be sufficient to establish the fact that he intended to return.

8. **Effect of Removal and Subsequent Conveyance.** — *Phillips v. Springfield*, 39 Ill. 83; *Conway v. Nichols*, (Iowa 1897) 71 N. W. Rep. 183; *Jones v. Robbins*, (Tex. Civ. App. 1893) 22 S. W. Rep. 69; *Focke v. Sterling*, 18 Tex. Civ. App. 8; *Kerr v. Oppenheimer*, 20 Tex. Civ. App. 140.

In *Murphy v. Farquhar*, 39 Fla. 350, it was held that a removal from the homestead and an attempt by the husband to transfer it to his wife constituted evidence of an intention not to return.

9. *Fuller v. Whitlock*, 99 Ala. 411.

It has been held that where there was no intention to abandon the homestead exemption, the lapse of eight days between the discontinuance of the business and a conveyance of premises held as a business homestead will not destroy the exemption. *Sheuber v. Ballow*, 64 Tex. 166.

10. **Taking Advice of Counsel.** — *Painter v. Steffen*, 87 Iowa 171; *Quigley v. McEvony*, 41 Neb. 73; *Shepherd v. Cassiday*, 20 Tex. 24, 70 Am. Dec. 372.

But in *Cahill v. Wilson*, 62 Ill. 137, evidence that a homesteader, before removing from the premises, inquired of an attorney as to the



the fact that he offers it for sale is not of itself sufficient to show an intention to abandon the exemption.<sup>1</sup>

**Use of Premises for Other than Homestead Purposes.** — In *Texas* it has been held that if the owner of a business homestead ceases to use the premises for business purposes with no intention to resume them or to pursue some other calling or business on the homestead property, there is an end to the exemption.<sup>2</sup> And while a temporary use of a part of the homestead property for other than homestead purposes does not amount to an abandonment of the homestead exemption in the part so used,<sup>3</sup> it has been held that when any part of a homestead is permanently appropriated to an inconsistent use, the part so appropriated loses its homestead character.<sup>4</sup> In other jurisdictions it has been held that where the land claimed as a homestead consists of only one tract and does not exceed in area the amount permitted to be held as a homestead, the use of a part of the homestead for other than homestead purposes does not amount to an abandonment of any part of the homestead property.<sup>5</sup> Nor does the fact that the owner of a homestead which is occupied by house leases part of it have that effect.<sup>6</sup>

mode of preserving his homestead rights was held insufficient to show an intention to return and occupy the homestead.

**1. Offering to Sell Homestead Not Abandonment.**

— *Gregory v. Oates*, 92 Ky. 532; *Harbison v. Tennison*, (Tex. Civ. App. 1896) 38 S. W. Rep. 232.

**2. Use of Business Homestead for Other than Business Purposes.** — *Kaufman v. Fore*, 73 Tex. 308; *Harle v. Richards*, 78 Tex. 80; *Hill v. Hill*, 85 Tex. 103; *Tackaberry v. City Nat. Bank*, 85 Tex. 488; *Willis v. Pounds*, 6 Tex. Civ. App. 512; *Duncan v. Alexander*, 83 Tex. 441; *Ford v. Fosgard*, (Tex. Civ. App. 1894) 25 S. W. Rep. 445; *Scott v. Parks*, (Tex. Civ. App. 1894) 29 S. W. Rep. 216.

A mere intention again to occupy the premises as a place of business at some indefinite time in the future, and dependent upon a contingency which may not happen, does not preserve the exemption. *Hull v. Naumberg*, 1 Tex. Civ. App. 132; *Hill v. Hill*, 85 Tex. 103; *Ford v. Fosgard*, (Tex. Civ. App. 1894) 25 S. W. Rep. 445.

But a partial and merely temporary discontinuance of the use of the homestead for business purposes, with an intention again to resume business upon the premises, does not amount to an abandonment. *Schoellkopf v. Cameron*, 19 Tex. Civ. App. 593.

The continuance of the business homestead does not depend upon the business success of the owner; if there is a *bona fide* attempt by him to conduct a business upon the property, that is sufficient. *Gassoway v. White*, 70 Tex. 475.

Where the owner of a house and lot occupied the premises both as a residence and as a place of business, and the place of business was necessarily closed in consequence of the levying of an attachment on his stock and fixtures, it was held that there was no abandonment. *King v. Harter*, 70 Tex. 579.

**3. Use of Part of Homestead for Other than Homestead Purposes.** — *Rollins v. O'Farrel*, 77 Tex. 90; *Harle v. Richards*, 78 Tex. 80; *Hensley v. Shields*, 6 Tex. Civ. App. 136; *Hinzle v. Moody*, 13 Tex. Civ. App. 193; *Shook v. Shook*, (Tex. Civ. App. 1899) 50 S. W. Rep. 731.

**4. Inconsistent Use of Part of Homestead.** —

*Medlenka v. Downing*, 59 Tex. 32; *Wynne v. Hudson*, 66 Tex. 1; *Hargadene v. Whitfield*, 71 Tex. 482; *Langston v. Maxey*, 74 Tex. 155; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212; *Ayers v. Shackey*, 2 Tex. Unrep. Cas. 274; *Williams v. Cleveland*, 18 Tex. Civ. App. 133.

**5. Groneweg v. Beck**, 93 Iowa 717; *Hoffman v. Hill*, 47 Kan. 611.

The fact that a widow residing on the homestead of her deceased husband takes her son-in-law and his family to live with her thereon does not constitute an abandonment of her homestead right. *Jones v. Blumenstein*, 77 Iowa 361.

**Use of Premises for Illegal Purposes.** — It has been held that the use of a homestead for illegal purposes does not amount to an abandonment. *Groneweg v. Beck*, 93 Iowa 717; *Prince v. Hake*, 75 Wis. 638.

But under a clause in the Constitution of *Texas* (art. 16, § 51) which provides that the homestead "shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family," it was held that if the real business or occupation in which the debtor was engaged in on the premises was the keeping and exhibiting of gaming tables and banks for the purpose of gaming in the house, that being an unlawful use, the premises were not protected from forced sale. *Tillman v. Brown*, 64 Tex. 181.

**6. Leasing Part of Premises — Alabama.** — *Metcalf v. Smith*, 106 Ala. 301; *Dowling v. Horne*, 117 Ala. 242.

*Arkansas.* — *Simpson v. Biffle*, 63 Ark. 289.  
*California.* — *Heathman v. Holmes*, 94 Cal. 291.

*Iowa.* — *Sibley v. Lawrence*, 46 Iowa 563.  
*Kansas.* — *Pitney v. Eldridge*, 58 Kan. 215.  
*Missouri.* — *Brown v. Brown*, 68 Mo. 388.  
*South Carolina.* — *McClenaghan v. McEachern*, 47 S. Car. 446.

*Texas.* — *Newton v. Calhoun*, 68 Tex. 451; *Oppenheimer v. Fritter*, 79 Tex. 99; *Blackburn v. Knight*, 81 Tex. 326; *Malone v. Kornrumpf*, 84 Tex. 454; *Hensley v. Shields*, 6 Tex. Civ. App. 136; *Bailey v. Bauknight*, (Tex. Civ. App. 1894) 25 S. W. Rep. 56; *Maroney Hardware Co. v. Connellee*, (Tex. Civ. App. 1894)

**Leasing Premises.** — Leasing the homestead premises during a temporary absence therefrom does not constitute an abandonment.<sup>1</sup> But leasing the

25 S. W. Rep. 448; Forsgard *v.* Ford, 87 Tex. 185; Prufrock *v.* Joseph, (Tex. Civ. App. 1894) 27 S. W. Rep. 264; Hayes *v.* Cavi, (Tex. Civ. App. 1895) 31 S. W. Rep. 313.

A husband occupying with his wife one room of his hotel as a residence does not lose his homestead right in the premises by renting out the balance for use as a hotel. Gainus *v.* Cannon, 42 Ark. 503.

**1. Temporary Leasing of Premises Not Abandonment** — *Arkansas.* — Gates *v.* Steele, 48 Ark. 539; White Sewing Mach. Co. *v.* Wooster, 66 Ark. 382.

*Colorado.* — Dallemand *v.* Mannon, 4 Colo. App. 262.

*Illinois.* — Bonnell *v.* Smith, 53 Ill. 375; Wiggins *v.* Chance, 54 Ill. 175; Moore *v.* Flynn, 135 Ill. 74; Brokaw *v.* Ogle, 170 Ill. 115; Moline Plow Co. *v.* Vanderhoof, 36 Ill. App. 26.

*Iowa.* — Stewart *v.* Brand, 23 Iowa 477; Robb *v.* McBride, 28 Iowa 386; Shirland *v.* Union Nat. Bank, 65 Iowa 96; Jones *v.* Blumenstein, 77 Iowa 361; Painter *v.* Steffen, 87 Iowa 171; Morgan *v.* Rountree, 88 Iowa 249, 45 Am. St. Rep. 234; Coad *v.* Neal, 55 Iowa 528.

*Kansas.* — Hixon *v.* George, 18 Kan. 253.

*Kentucky.* — Sansberry *v.* Simms, 79 Ky. 527, 3 Ky. L. Rep. 303; Phipps *v.* Acton, 12 Bush (Ky.) 377; Herferth *v.* Zimmerman, 7 Ky. L. Rep. 669; Davis *v.* Prichard, (Ky. 1888) 7 S. W. Rep. 549; Gregory *v.* Oates, 92 Ky. 532; Derickson *v.* Gilespe, (Ky. 1895) 32 S. W. Rep. 1084; Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, (Ky. 1899) 49 S. W. Rep. 446.

*Louisiana.* — Burch *v.* Mouton, 37 La. Ann. 725.

*Michigan.* — Earll *v.* Earll, 60 Mich. 30.

*Mississippi.* — Campbell *v.* Adair, 45 Miss. 170.

*Missouri.* — Duffey *v.* Willis, 99 Mo. 132.

*Nebraska.* — Corey *v.* Schuster, 44 Neb. 269.

*New Hampshire.* — Locke *v.* Rowell, 47 N. H. 46.

*Ohio.* — Wetz *v.* Beard, 12 Ohio St. 431.

*Tennessee.* — McInturf *v.* Woodruff, 9 Lea (Tenn.) 671.

*Texas.* — Hancock *v.* Morgan, 17 Tex. 582; Shepherd *v.* Cassiday, 20 Tex. 24, 70 Am. Dec. 372; Foreman *v.* Meroney, 62 Tex. 723; Jacobs *v.* Hawkins, 63 Tex. 1; Axer *v.* Bassett, 63 Tex. 545; Bowman *v.* Watson, 66 Tex. 296; Newton *v.* Calhoun, 68 Tex. 451; Kaufman *v.* Fore, 73 Tex. 308; Graves *v.* Campbell, 74 Tex. 576; Harle *v.* Richards, 78 Tex. 80; Malone *v.* Kornrumpf, 84 Tex. 454; Hensley *v.* Shields, 6 Tex. Civ. App. 136; Sanders *v.* Sheran, 66 Tex. 655; C. B. Carter Lumber Co. *v.* Clay, (Tex. 1888) 10 S. W. Rep. 293; Hines *v.* Nelson, (Tex. Civ. App. 1893) 24 S. W. Rep. 541; Prufrock *v.* Joseph, (Tex. Civ. App. 1894) 27 S. W. Rep. 264; Farmer *v.* Hale, 14 Tex. Civ. App. 73; Harbison *v.* Tonnison, (Tex. Civ. App. 1896) 38 S. W. Rep. 232.

*Wisconsin.* — Herrick *v.* Graves, 16 Wis. 163; Zimmer *v.* Pauley, 51 Wis. 282.

In California, since a homestead cannot, un-

der the Civil Code, be abandoned by the claimant ceasing to reside upon the premises, the fact that a homesteader leases his homestead property and purchases other property upon which he erects a home in which he resides does not show or tend to show the abandonment of the homestead. Simonson *v.* Burr, 121 Cal. 582.

**Alabama Statutory Provisions.** — In Alabama it was formerly held that actual occupancy and use of the homestead by the owner or his family were necessary to entitle him to its exemption under the homestead law, and that this right was lost when he abandoned its occupancy and rented it out to be occupied by a tenant. Kaster *v.* McWilliams, 41 Ala. 302; Boyle *v.* Shulman, 59 Ala. 566; Stow *v.* Lillie, 63 Ala. 257.

But by Code 1876, § 2843 (Code 1896, § 2065), it was declared that a temporary quitting or leasing of a homestead for a period of not more than twelve months at one time should not be deemed to be an abandonment of the right of homestead; but if the homesteader should make and file the declaration and claim as therein provided, it should remain subject to the same right of homestead as if he had continued in the actual occupancy thereof. Under this statute it has been held that a leasing of and absence from the homestead premises for a period of less than twelve months is not an abandonment so long as there exists an intention of returning and the required declaration and claim have been duly filed. Beckett *v.* Whitlock, 83 Ala. 123; Fuller *v.* Whitlock, 99 Ala. 411.

But it has been held that the homestead exemption is lost if the owner leases the premises, removes therefrom, and places a tenant in possession without having filed his written declaration and claim of exemption for record in the office of the judge of probate as required by the statute. Murphy *v.* Hunt, 75 Ala. 438; Pollak *v.* Caldwell, 94 Ala. 149.

And it has been held that leasing the premises for a longer term than twelve months is an abandonment of the homestead exemption. Boyle *v.* Shulman, 59 Ala. 566; Scaife *v.* Argall, 74 Ala. 473; Blackman *v.* Moore-Handley Hardware Co., 106 Ala. 458.

Where the owner of a homestead farm leased it to a tenant for a period of one year, and, while residing elsewhere, made a new contract with the tenant by which he was to resume possession of the land and residence in part, but in severalty, and not jointly with the tenant, and thereupon moved back upon the place and into the house and took up his permanent residence there, it was held that there was no abandonment of the homestead exemption. Dowling *v.* Horne, 117 Ala. 242.

**Lease for Life of Homesteader.** — Under ordinary circumstances a lease for the life of a homesteader will furnish conclusive evidence of abandonment; but it has been held that a lease of land for life made by an old man whose health made it necessary to go and live with his daughter was not an abandonment of his homestead right in the land where he re-



premises and giving possession to the tenant with no intention of again occupying the property as a homestead will amount to an abandonment of the exemption.<sup>1</sup>

**Devising Homestead.** — The fact that a homestead is devised by the owner does not work an abandonment of the exemption,<sup>2</sup> and it has been said that the fact that the owner of a homestead disposes of a part of it by will does not have the effect of destroying the homestead character of the part which is not devised.<sup>3</sup>

**Acceptance of Lease of Premises.** — The intention to abandon the homestead exemption may be inferred from the acceptance by the homesteader of a lease of the premises from a person who holds a mortgage thereon which has been irregularly foreclosed,<sup>4</sup> or from a grantee of the premises by an invalid conveyance.<sup>5</sup> And it has been held that a widow abandoned her rights in a homestead and exempt personalty by accepting a lease thereof from the decedent's heirs, and subsequently conveying the property to them, canceling the lease, and accepting other provisions for her support.<sup>6</sup>

**By Sale or Conveyance — In General.** — The general rule is believed to be that a sale or conveyance of the homestead is not, in a strict sense of the term, an abandonment of the right.<sup>7</sup>

served the right to return to the place and make it his home. *Gates v. Steele*, 48 Ark. 539.

**1. Leasing with No Intention of Again Occupying Homestead Constitutes Abandonment — Alabama.** — *Boyle v. Shulman*, 59 Ala. 566.

*Nebraska.* — *Warren v. Peterson*, 32 Neb. 727.

*New Hampshire.* — *Hoitt v. Webb*, 36 N. H. 158; *Horn v. Tufts*, 39 N. H. 478; *Austin v. Stanley*, 46 N. H. 51.

*Texas* — *Wynne v. Hudson*, 66 Tex. 1; *Kaufman v. Fore*, 73 Tex. 308; *Oppenheimer v. Fritter*, 79 Tex. 99; *Blackburn v. Knight*, 81 Tex. 326.

*Vermont.* — *Davis v. Andrews*, 30 Vt. 678.

**2. Norris v. Callahan**, 59 Miss. 140.

**3. Johnson v. Harrison**, 41 Wis. 381.

**4. Bradshaw v. Remick**, 90 Iowa 409.

**5. Anderson v. Cosman**, 103 Iowa 266.

**6. Ditson v. Ditson**, 85 Iowa 276.

**7. Sale or Mortgage Does Not Render Homestead Subject to Debts.** — The homestead of a debtor is not subject to the lien of a judgment and execution against him, and he may sell or mortgage it without its being thereby subjected to a levy or sale. *Green v. Marks*, 25 Ill. 221. See also *Moore v. Flynn*, 135 Ill. 74.

**Offering Land for Sale Not Abandonment.** — *Gregory v. Oates*, 92 Ky. 532.

**Conveyance of Part of Homestead.** — Where one owning a homestead worth less than the limit fixed by statute has conveyed a part thereof, such part cannot be held liable for his debts after his death. *Marshall v. Strange*, (Ky. 1888) 9 S. W. Rep. 250.

**A Widow to Whom a Homestead Has Been Assigned** may alienate her right in the property without working a forfeiture of the homestead. *Cowan v. Carson*, 101 Tenn. 523.

**Sale and Repurchase in Foreclosure.** — A widow sold her homestead by a deed expressly retaining a vendor's lien, and also secured the unpaid purchase money by a deed of trust. She intended to remove to another county when the purchase money should be paid, and

in the meantime lived on rented premises. The purchaser made default in payment, and the widow, having acquired no new homestead, foreclosed the trust deed and repurchased the property with the intention of resuming its occupancy as a homestead, which she did as soon as she was able to regain possession. It was held, as against a creditor obtaining and registering a judgment after her repurchase, that she had not been divested of her superior title to the property and her homestead right therein. *Smith v. Wright*, 13 Tex. Civ. App. 480.

**Conveyance — Removal — Reconveyance to Wife.** — But as the homestead statute does not exempt from execution the money or credits obtained from the sale of the homestead by the voluntary act of the exemptionist, it was held that where one, having sold his homestead and taken a note for the purchase money, removes therefrom, but afterwards procures the homestead to be conveyed to his wife in consideration of a surrender of the note, the property may be subjected in equity to a judgment which was a lien at the time of the sale. And the exemption, in such case, is lost notwithstanding the owner was advised by attorneys that the note for the purchase of his homestead was not subject to his debts, and although he intended to devote the proceeds of the sale of his homestead to the purchase of another, and believed that the conveyance to his wife would vest the title in her, as against his creditors, and though his object throughout was to keep within the protection of the exemption law. *Adams v. Dees*, 62 Miss. 354.

**Sale and Rescission — Effect of Prior Mortgage.** — A mortgagee of land in which there is a homestead right acquires no title to the homestead unless it is released in conformity with the statute. If the owner of the homestead rights sells a fee in the land to another, subject to the mortgage, and subsequently takes it back, the mortgagee acquires no right thereby to the homestead. *Ives v. Mills*, 37 Ill. 73, 87 Am. Dec. 238.

**Sale of Portion by Invalid Transfer.** — Where the



**Conveyances Operating as Such.** — The foregoing statement must not be confused with such acts of transfer or conveyance as operate to divest the right of homestead exemption in favor of a particular person and transmit it to such person, fully considered in another place. Acts so operating are frequently termed by the courts an abandonment of the right, and in such sense a conveyance in the form prescribed by statute does operate as an abandonment of the homestead, so far as the particular alienee is concerned, who, however, takes the land free of the claims of the creditors of the grantor.<sup>1</sup>

family did not cease to occupy the homestead, but another party took possession of a portion thereof under a transfer which was invalid, it was held that such facts did not constitute an abandonment. *Stinson v. Richardson*, 44 Iowa 373.

**A Conveyance of the Homestead by Parents to Their Son**, in consideration of his coming to live with, care for, and support them during life, was held not to extinguish their homestead right under the *Wisconsin* statute in force in 1869. *Murphy v. Crouch*, 24 Wis. 365. See also *Wilson v. Fields*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1024.

**Grant of Railroad Right of Way.** — A homestead right is not destroyed by the granting of a railroad right of way through the tract, a part of which is an absolute grant and part the creation of an easement. Nor does such conveyance of the right of way operate to divide the tract so as to limit the homestead right to the land lying only on one side of the right of way. *Allen v. Dodson*, 39 Kan. 220.

**When the Actual Homestead Has Been Mortgaged or Sold** the mortgagor is not entitled to a homestead in his other lots as against his creditors at the time of alienation. *Jarboe v. Colvin*, 4 Bush (Ky.) 70. See also *Enochs v. Wilson*, 11 Lea (Tenn.) 228.

**Conveyance of Homestead in Trust — Retention of Possession by Grantor.** — The homestead exemption is not lost by the conveyance thereof in trust, though the purpose be to defraud the creditors of the grantors, the true owners continuing to reside thereon, though transacting business in the name of the grantee. *Archenthal v. B. C. Evans Co.*, 11 Tex. Civ. App. 138.

**Contrary Doctrine — Conveyance Operating as Abandonment.** — In the case of *Garibaldi v. Jones*, 48 Ark. 230, it was held that where a widow and the heirs of a deceased husband and father conveyed lands which were the homestead of the latter, such sale would be construed as an abandonment of the homestead rights, the vendees taking the lands subject to the debts of the decedent, with the right, however, to have the assets of the estate marshaled so as to subject other lands and assets to the payment of the debts before a sale for such purpose of the homestead property. And in *Bowman v. Norton*, 16 Cal. 213, it was held that where, under the Act of 1851, both husband and wife united in a conveyance of the homestead, the homestead rights were relinquished, and persons to whom the husband alone had mortgaged the homestead previous to such conveyance might enforce their mortgages against the property in the hands of the grantee.

**Rule under Particular Statute.** — Where a husband and his wife sold their homestead, and, under the *Kentucky* statute known as the Act

of 1856, other creditors procured a judgment to sell the property on the ground that under the statute the sale above referred to operated as an assignment and transfer for the benefit of all creditors, it was held that as the first conveyance had divested the husband and wife of the right to exemption, and the judgment referred to did not reinvest them with that right, they were not entitled to homestead in the land conveyed. *Gideon v. Struve*, 78 Ky. 134.

**1. Alienee Takes Land Free from Claims of Other Creditors of Grantor — Alabama.** — *Pollak v. McNeil*, 100 Ala. 203.

*Georgia.* — *Stephenson v. Eberhart*, 79 Ga. 116; *Hart v. Evans*, 80 Ga. 330.

*Illinois.* — *Fishback v. Lane*, 36 Ill. 437; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Eldridge v. Pierce*, 90 Ill. 474; *Nichols v. Spremont*, 111 Ill. 631; *Moore v. Flynn*, 135 Ill. 74; *Halliday v. Hess*, 147 Ill. 588; *Bartholomae, etc., Brewing, etc., Co. v. Schroeder*, 67 Ill. App. 560.

*Indiana.* — *Rav v. Yarnell*, 118 Ind. 112.

*Iowa.* — *Bever v. Thoeiming*, 81 Iowa 517; *Roane v. Hamilton*, 101 Iowa 250; *Sibley v. Lawrence*, 46 Iowa 563.

*Kansas.* — *Manhattan First Nat. Bank v. Warner*, 22 Kan. 537; *Elwell v. Hitchcock*, 41 Kan. 130.

*Kentucky.* — *Marshall v. Strange*, (Ky. 1888) 9 S. W. Rep. 250; *Maynard v. May*, (Ky. 1889) 11 S. W. Rep. 806; *Brooks v. Collins*, 11 Bush (Ky.) 627; *Dowd v. Hurley*, 78 Ky. 260; *Tong v. Eifort*, 80 Ky. 152, 3 Ky. L. Rep. 647; *Baker v. Kinnaird*, 94 Ky. 5.

*Louisiana.* — *Denis v. Gayle*, 40 La. Ann. 286.

*Michigan.* — *Farrand v. Caton*, 69 Mich. 235. *Minnesota.* — *Barton v. Drake*, 21 Minn. 299; *James v. Wilder*, 25 Minn. 305.

*Mississippi.* — *Parker v. Dean*, 45 Miss. 408.

*Missouri.* — *Beckmann v. Meyer*, 75 Mo. 333; *Holland v. Kreider*, 86 Mo. 59; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Dickerson v. Cuthburth*, 56 Mo. App. 647; *Stewart v. Stewart*, 65 Mo. App. 663.

*Nebraska.* — *Schribar v. Platt*, 19 Neb. 625; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730.

*South Carolina.* — *Ketchin v. McCarley*, 26 S. Car. 1, 4 Am. St. Rep. 674.

*Texas.* — *Black v. Epperson*, 40 Tex. 162; *Kent v. Beaty*, 40 Tex. 440; *Mayers v. Paxton*, 78 Tex. 196; *Redlick v. Williams*, (Tex. 1887) 5 S. W. Rep. 375.

*Wisconsin.* — *Hoyt v. Howe*, 3 Wis. 752; *Carver v. Lassallete*, 27 Wis. 232.

**Illustration.** — When a homestead of less value than the amount exempted by statute is conveyed, a judgment recovered against the vendor after the filing of the contract of sale

So Also an Informal or Irregular Conveyance may, in connection with other facts, show an actual intent to abandon the homestead exemption.<sup>1</sup>

**Conveyance by Husband to Wife.** — A conveyance of the homestead property by a husband to his wife is not, in general, evidence of an abandonment of the homestead right by the former, though the conveyance was through a third person.<sup>2</sup> According to the doctrine of some cases, such a conveyance will be regarded as vesting the homestead estate, or the right to claim it, in the wife.<sup>3</sup>

**Conveyance as Security for Debt.** — The general rule is that the conveyance of the homestead with a formal waiver or release of the right is only for the benefit of the particular creditor, and is not for that of others whose debts are not

and before the payment of the remainder of the purchase price and the execution and delivery of the deed, upon a debt for the payment of which such homestead is not liable, is not a lien upon such land or the unpaid purchase money. *Corey v. Plummer*, 48 Neb. 481, following *Schribar v. Platt*, 19 Neb. 625.

**Rule of North Carolina Cases.** — In North Carolina there is much conflict of opinion, but the prevailing doctrine seems to be that this homestead right or estate, or exemption from execution, or "advantage," is salable or assignable, and the purchaser can hold the land in which he has acquired this right, estate, or exemption to the exclusion of the ordinary judgment creditor of his assignor or vendor until such right, estate, advantage, or exemption from execution terminates. By virtue of the assignment (usually made in the form of a deed to the land itself, the greater including the less) the grantee gets into the shoes of the homesteader, to use a homely expression. He has bought the privilege of so standing — the privilege of personating before the law and the judgment creditor the homesteader himself, *quoad* the homestead land — but when the right or advantage of the homesteader terminates the land is subject to the lien of the prior judgment. *Barrett v. Richardson*, 76 N. Car. 429; *Adrian v. Shaw*, 82 N. Car. 474, 84 N. Car. 832; *Wyche v. Wyche*, 85 N. Car. 96; *Hinson v. Adrian*, 86 N. Car. 61; *Wilson v. Patton*, 87 N. Car. 318; *Markham v. Hicks*, 90 N. Car. 204; *Lowdermilk v. Copenning*, 92 N. Car. 333; *Rankin v. Shaw*, 94 N. Car. 405; *Simpson v. Houston*, 97 N. Car. 344, 2 Am. St. Rep. 297; *Jones v. Britton*, 102 N. Car. 166; *Lane v. Richardson*, 104 N. Car. 642; *Long v. Walker*, 105 N. Car. 90; *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483. See also *Poe v. Hardie*, 65 N. Car. 447; *Littlejohn v. Egerton*, 77 N. Car. 384; *Jenkins v. Bobbitt*, 77 N. Car. 385; *Citizens' Nat. Bank v. Green*, 78 N. Car. 247; *Hill v. Oxendine*, 79 N. Car. 331.

**The Distinction Between a Conveyance and an Abandonment of the homestead right** is made clear in *Bartholomae*, etc., *Brewing*, etc., Co. v. *Schroeder*, 67 Ill. App. 560, wherein it was held that the owner of a homestead may sell or mortgage such estate, free from the lien of any judgment upon the premises, and in such a case the grantee takes the homestead estate which the grantor owned. Such sale is not an abandonment of the homestead, but a conveyance of an estate in and to the premises.

1. *Willis v. Pounds*, 6 Tex. Civ. App. 512.

**Sale of Homestead Dwelling.** — Upon sale of the portion of the homestead property on which the house is situated, without intention to build upon and occupy the residue as a homestead, the remaining portion loses its homestead character. *Givans v. Dewey*, 47 Iowa 414; *Windle v. Brandt*, 55 Iowa 221. The mere intention to place the remainder of the property in condition for occupancy at a future time will not continue the homestead character. *Givans v. Dewey*, 47 Iowa 414.

**A Parol Sale of Part of the Homestead** by the husband, with the knowledge and consent of the wife and payment of consideration by the vendee, followed by possession for sixteen years and the making of valuable improvements on the land purchased by the vendee, constitute an abandonment of homestead rights. *Roemer v. Meyer*, (Tex. 1891) 17 S. W. Rep. 597.

**Conveyance and Acceptance of Lease from Purchaser.** — The acceptance by the husband of a lease from the purchaser of the homestead has been held to be an abandonment which was binding on the wife as well as on the husband, in view of her knowledge of and acquiescence in the change of ownership. *Bradshaw v. Remick*, 90 Iowa 409. And see *Anderson v. Cosman*, 103 Iowa 266. See also *Ditson v. Ditson*, 85 Iowa 276. Compare *Booker v. Anderson*, 35 Ill. 66. And see *Buck v. Conlogue*, 49 Ill. 391.

**Lease of Part of Homestead to Another.** — Where the owner of a homestead leases a part of the homestead building to another, but reserves a part for actual occupancy as his home, with the right of ingress and egress through the part leased, the homestead character of the property is not changed, nor are the homesteader's rights abandoned. *Bebb v. Crowe*, 39 Kan. 342.

**2. Conveyance by Husband to Wife Not Abandonment.** — *Matter of Lamb*, 95 Cal. 397; *Murphy v. Farquhar*, 39 Fla. 350; *Green v. Farrar*, 53 Iowa 426; *White v. Kinley*, 92 Iowa 598; *Castle v. Palmer*, 6 Allen (Mass.) 401; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554; *Morrison v. Abbott*, 27 Minn. 116; *McMahon v. Spielman*, 15 Neb. 653. See also *Bouscher v. Smith*, 73 Iowa 610. Compare *Jones v. Currier*, 65 Iowa 533; *Nichol v. Davidson County*, 8 Lea (Tenn.) 389.

**3. A Wife Is Entitled to a Homestead out of lands fraudulently conveyed to her by the husband for the purpose of hindering and delaying his creditors.** *Ruohs v. Hooke*, 3 Lea (Tenn.) 305, 31 Am. Rep. 642; *Leupold v. Krause*, 95 Ill. 440.



secured by the instrument releasing the homestead right.<sup>1</sup>

**Conveyance Absolute in Form.** — The rule is the same though the conveyance is absolute in form,<sup>2</sup> except as to an innocent purchaser.<sup>3</sup>

**Conveyance in Fraud of Creditors — General Rule.** — The weight of authority favors the rule that the conveyance of property including the homestead is not as to the creditors of the grantor an abandonment of the homestead rights, although the transaction may be voidable as made with intent to hinder, delay, or defraud them.<sup>4</sup> Such a conveyance by the head of the family does not work

**1. Conveyance as Security with Release.** — *Arkansas.* — *Marr v. Lewis*, 31 Ark. 203, 25 Am. Rep. 553; *Flask v. Tindall*, 39 Ark. 571.

*California.* — *Bull v. Coe*, (Cal. 1887) 15 Pac. Rep. 123.

*Illinois.* — *Fishback v. Lane*, 36 Ill. 437; *Ives v. Mills*, 37 Ill. 73, 87 Am. Dec. 238; *Garlick v. Squires*, 45 Ill. App. 521; *Bartholomae, etc., Brewing, etc., Co. v. Schroeder*, 67 Ill. App. 560.

*Iowa.* — *Dickson v. Chorn*, 6 Iowa 19, 71 Am. Dec. 382; *Haggerty v. Brower*, 105 Iowa 395.

*Kentucky.* — *Jarboe v. Colvin*, 4 Bush (Ky.) 70; *McTaggart v. Smith*, 14 Bush (Ky.) 414. And see *Franks v. Lucas*, 14 Bush (Ky.) 395.

*Nebraska.* — *Morrill v. Skinner*, 57 Neb. 164.

*North Carolina.* — *Cheatham v. Jones*, 68 N. Car. 153.

*Tennessee.* — *Flannegan v. Stifel*, 3 Tenn. Ch. 465; *Hall v. Fulgham*, 86 Tenn. 451; *Jackson v. Shelton*, 89 Tenn. 82.

*Texas.* — *Sutherland v. Williams*, (Tex. 1889) 11 S. W. Rep. 1067; *Willis v. Kirbie*, 1 Tex. Unrep. Cas. 304. See also *Heidenheimer v. Stewart*, 65 Tex. 321.

*Vermont.* — *Morgan v. Stearns*, 41 Vt. 398; *Danforth v. Beattie*, 43 Vt. 138 (valid as other creditors); *Doane v. Doane*, 46 Vt. 485.

*Washington.* — *Wiss v. Stewart*, 16 Wis. 376.

But where the husband, without the wife uniting, conveyed certain property embracing the homestead by mortgage or trust deed to one creditor, and afterwards the husband and wife conveyed the same land, releasing the homestead, by mortgage or trust deed to another creditor, and it was necessary to sell the homestead right to satisfy the second mortgage or trust deed, it was held that the homestead right was in effect alienated as to both mortgages and trust deeds, as the homestead, being a mere exemption and not an estate, would be extinguished and the purchaser under the first deed would get the benefit of it. *Parr v. Fumbanks*, 11 Lea (Tenn.) 391. See also *Chamberlain v. Lyell*, 3 Mich. 443.

**Failure to Redeem.** — Where, upon foreclosure of a mortgage which releases the homestead, the mortgagor fails to redeem, he loses his homestead rights. *Herdman v. Cooper*, 138 Ill. 583. And the rule is the same against a purchaser from the mortgagor, where he does not redeem. *Schroeder v. Bauer*, 140 Ill. 135.

**Redemption by Creditor.** — But the homestead right is not extinguished where another creditor having no claim to the homestead redeems, and upon sale of the premises there remains a surplus. In such circumstances the surplus belongs to the homesteader, and cannot be taken in execution by a creditor who has not connected himself, by redemp-

tion, with the original sale, which alone is paramount to the right of homestead. *Garlick v. Squires*, 45 Ill. App. 521.

**No Abandonment by Subrogation.** — One may mortgage his homestead, but he does not thereby abandon it to other creditors, to be taken for their debts, either directly or by subrogation. *Flask v. Tindall*, 39 Ark. 571; *Marr v. Lewis*, 31 Ark. 203, 25 Am. Rep. 553.

**Conveyance and Reconveyance.** — Where there has been a conveyance of lands as security for a debt, and later a reconveyance to the original grantor, there is no abandonment of the homestead right. *Kennedy v. Gloster*, 98 Cal. 143.

**2. Conveyance Absolute in Form.** — *Mabury v. Ruiz*, 58 Cal. 11; *Kennedy v. Gloster*, 98 Cal. 143; *Merced Bank v. Rosenthal*, 99 Cal. 39; *Haggerty v. Brower*, 105 Iowa 395; *McClure v. Braniff*, 75 Iowa 38; *Wiss v. Stewart*, 16 Wash. 376. See also *Merced Bank v. Rosenthal*, 99 Cal. 39; *Ullman v. Jasper*, 70 Tex. 446.

**Contract to Reconvey.** — Where there was a conveyance of a homestead by deed absolute on its face, but in reality intended as security for a debt, and the grantor receives a letter from the grantee with an agreement to reconvey on payment of the debt, and the debt is paid, and the transaction is rescinded by an exchange of the papers, the owner is not divested of his homestead, though a formal reconveyance of the land is not made. *Colvin v. Woodward*, 40 La. Ann. 627.

**Rule by Statute.** — In *California* a homestead may be abandoned only as provided by section 1243 of the Civil Code. It is there declared that an abandonment may be a declaration thereof or a grant. It was held therefore that a deed absolute in form, but shown to be in reality a mortgage, would not have this effect. *Bull v. Coe*, (Cal. 1887) 15 Pac. Rep. 123.

**3. Mabury v. Ruiz**, 58 Cal. 11.

**4. United States.** — *Green v. Root* 62 Fed. Rep. 191; *Cox v. Wilder*, 2 Dill. (U. S.) 46.

*Alabama* — *Fellows v. Lewis*, 65 Ala. 343, 39 Am. Rep. 1; *Wright v. Smith*, 66 Ala. 514; *Lehman v. Bryan*, 67 Ala. 558; *Clark v. Spencer*, 75 Ala. 49; *Alley v. Daniel*, 75 Ala. 403; *Hines v. Duncan*, 79 Ala. 112, 58 Am. Rep. 580; *Fuller v. Whitlock*, 99 Ala. 411; *Tuscaloosa First Nat. Bank v. Kennedy*, 113 Ala. 279.

*Arkansas.* — *Turner v. Vaughan*, 33 Ark. 454; *Bogan v. Cleveland*, 52 Ark. 101, 20 Am. St. Rep. 158; *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241.

*California.* — *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

*Illinois.* — *Peoria First Nat. Bank v. Rhea*, 155 Ill. 434; *Redden v. Potter* 16 Ill. App. 265.



a forfeiture of the benefits of the homestead exemption; nor, where a fraudulent conveyance of property is subsequently annulled at the suit of creditors, is the grantor estopped to assert his homestead right.<sup>1</sup>

**The Reason of the Rule** is that general creditors have no rights as to the homestead property, and cannot, therefore, be heard to complain no matter what disposition the debtor makes of it, or what be the intent or motive of the transaction.<sup>2</sup>

**Right of Homesteader as Against Creditor.**—Most of the cases state the rule as being that the debtor is entitled to his homestead as against creditors having no specific right thereto.<sup>3</sup>

*Iowa.*—*Delashmut v. Trau*, 44 Iowa 613; *Officer v. Evans*, 48 Iowa 557; *Aultman v. Heiney*, 59 Iowa 654; *Butler v. Nelson*, 72 Iowa 732; *Payne v. Wilson*, 76 Iowa 377; *Beyer v. Thooming*, 81 Iowa 517; *Wells v. Anderson*, 97 Iowa 201, 59 Am. St. Rep. 409; *Wheeler, etc., Mfg. Co. v. Bjelland*, 97 Iowa 637.

*Kansas.*—*Hixon v. George*, 18 Kan. 253; *Wilson v. Taylor*, 49 Kan. 774.

*Kentucky.*—*Richart v. Utterback*, (Ky. 1888) 9 S. W. Rep. 422, 10 Ky. L. Rep. 548; *Kuevan v. Specker*, 11 Bush (Ky.) 1; *Trimble v. McGuire*, 4 Ky. L. Rep. 986; *Marshall v. Strange*, 10 Ky. L. Rep. 410; *Maynard v. May*, 11 Ky. L. Rep. 166; *Whayne v. Morgan*, 11 Ky. L. Rep. 254; *Dowd v. Hurley*, 78 Ky. 260; *Tong v. Eifort*, 80 Ky. 152; *Snapp v. Snapp*, 87 Ky. 554.

*Michigan.*—*Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Mich. 243; *Puelte v. Geller*, 47 Mich. 560; *Vermont Sav. Bank v. Elliott*, 53 Mich. 256; *Riggs v. Sterling*, 60 Mich. 653, 1 Am. St. Rep. 554; *Shay v. Wheeler*, 69 Mich. 254; *Dickey v. Converse*, 117 Mich. 449. See also *Dart v. Woodhouse*, 40 Mich. 400, 29 Am. Rep. 544; *Rosenthal v. Scott*, 41 Mich. 632; *Anderson v. Odell*, 51 Mich. 492; *Buckley v. Wheeler*, 52 Mich. 1; *Emerson v. Bacon*, 58 Mich. 526; *Freehling v. Bresnahan*, 61 Mich. 540, 1 Am. St. Rep. 617; *Fischer v. McIntyre*, 66 Mich. 681; *Farrand v. Caton*, 69 Mich. 235; *Dull v. Merrill*, 69 Mich. 49.

*Minnesota.*—*Morrison v. Abbott*, 27 Minn. 116; *Ferguson v. Kumler*, 27 Minn. 156; *Furman v. Tenny*, 28 Minn. 77; *Baldwin v. Rogers*, 28 Minn. 544, holding *Piper v. Johnston*, 12 Minn. 60, *contra*, as *overruled*.

*Mississippi.*—*Edmonson v. Meacham*, 50 Miss. 34; *Hodges v. Hickey*, 67 Miss. 716.

*Missouri.*—*Vogler v. Montgomery*, 54 Mo. 577; *Buck v. Ashbrook*, 59 Mo. 200; *State v. Diveling*, 66 Mo. 375; *Davis v. Land*, 88 Mo. 437; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Grimes v. Portman*, 99 Mo. 229; *Hart v. Leete*, 104 Mo. 315; *Hannah v. Hannah*, 109 Mo. 236.

*Nebraska.*—*Stubendorf v. Hoffman*, 23 Neb. 360.

*North Carolina.*—*Crummen v. Bennet*, 68 N. Car. 494; *Duvall v. Rollins*, 71 N. Car. 218; *Gaster v. Hardie*, 75 N. Car. 460; *Arnold v. Estis*, 92 N. Car. 162; *Rankin v. Shaw*, 94 N. Car. 405; *Dortch v. Benton*, 98 N. Car. 190, 2 Am. St. Rep. 331.

*Ohio.*—*Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378; *Tracy v. Cover*, 28 Ohio St. 61; *Roig v. Schults*, 42 Ohio St. 165; *Prosek v.*

*Kuchta*, 11 Cinc. L. Bul. 65, 9 Ohio Dec. (Reprint) 129.

*South Carolina.*—*Wood v. Timmerman*, 29 S. Car. 175; *Aultman v. Salinas*, 44 S. Car. 299.

*Texas.*—*Wood v. Chambers*, 20 Tex. 247, 70 Am. Dec. 382; *Cox v. Shropshire*, 25 Tex. 113; *Martel v. Somers*, 26 Tex. 551; *Freeman v. Hamblin*, 1 Tex. Civ. App. 157; *Willis v. Pounds*, 6 Tex. Civ. App. 512.

*Virginia.*—*Marshall v. Sears*, 79 Va. 49; *Hatcher v. Crews*, 83 Va. 371; *Shipe v. Repass*, 28 Gratt. (Va.) 734; *Boynton v. McNeal*, 316 Gratt. (Va.) 459.

*Wisconsin.*—*Shawano County Bank v. Koepen*, 78 Wis. 533.

See also the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 256.

**The Fraudulent Declarations or Acts of the husband to which the wife is in nowise privy** cannot involve the homestead in any way in which the husband could not involve it by deed. *Eckhardt v. Schlecht*, 29 Tex. 129.

**Homestead in Another State.**—Where a husband and his wife, having a homestead in the state of Kansas, conveyed it, and in part consideration therefor their grantee conveyed to the wife land in Missouri, and by the law of Kansas in force at the time of the conveyances the homestead was not subject to the debts of either the husband or wife, and could be disposed of only with their joint consent, the conveyance of the land in this state to the wife was not in fraud of creditors, and it could not therefore be subjected to the debts of the husband. *Stinde v. Behrens*, 81 Mo. 254.

**After-acquired Exemption.**—But a conveyance of property fraudulent as to creditors when made cannot subsequently be validated as to them by an after-acquired right of exemption. *Phenix Ins. Co. v. Fielder*, 133 Ind. 557. See also *Gibbs v. Patten*, 2 Lea (Tenn.) 180.

**1. Fraudulent Conveyance No Forfeiture.**—*Cox v. Wilder*, 2 Dill. (U. S.) 46; *Vogler v. Montgomery*, 54 Mo. 577; *State v. Diveling*, 66 Mo. 375.

**Estoppel.**—*Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207; *Hatcher v. Crews*, 83 Va. 371.

**2.** *Hixon v. George*, 18 Kan. 253; *Thomason v. Little*, 7 Ky. L. Rep. 749; *Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Mich. 243; *Rankin v. Shaw*, 94 Ky. 405.

**3. Right as Against Creditor.**—*Alabama*—*Tuscaloosa First Nat. Bank v. Kennedy*, 113 Ala. 279.

*California.*—*Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207.

As Between the Homesteader and the Grantee, the rights of the former, if the conveyance is on its face sufficient to pass the homestead, will depend on the circumstances of the particular transaction.<sup>1</sup>

**Contrary Doctrine.** — In some jurisdictions the rule is that the fraudulent conveyance of property, including the homestead, is a forfeiture of the right of exemption.<sup>2</sup>

**Conveyance of Undivided Interest.** — In those jurisdictions in which it is held that a homestead cannot be claimed in property held in common or by joint tenancy the conveyance of an undivided interest by the owner of a homestead operates as an abandonment of the homestead right.<sup>3</sup> It is otherwise in states in which a tenant in common or jointure may claim a homestead, which, as was shown in a preceding section, is the prevailing doctrine.<sup>4</sup>

**g. POWER OF HUSBAND AND WIFE RESPECTIVELY TO ABANDON HOMESTEAD — Power of Husband.** — Since a husband cannot make a valid conveyance of his homestead unless his wife joins in the conveyance,<sup>5</sup> it has sometimes been doubted whether a husband can abandon a homestead without the co-operation of his wife.<sup>6</sup> But the view that he cannot is not sound; the husband, being the head of the family, is entitled to fix the family residence, and may, even against the wishes and without the consent of his wife, abandon the homestead by a permanent removal of the family residence to another place, if he acts in good faith and without intending fraudulently to deprive her of her homestead rights.<sup>7</sup> Of course, if the wife voluntarily leaves the

*Kansas.* — *Roser v. Wichita Fourth Nat. Bank*, 56 Kan. 129.

*Illinois.* — *Peoria First Nat. Bank v. Rhea*, 155 Ill. 434.

*Michigan.* — *Smith v. Rumsey*, 33 Mich. 183.

*North Carolina.* — *Rankin v. Shaw*, 94 N. Car. 405.

*Ohio.* — *Tracy v. Gover*, 28 Ohio St. 61.

*Virginia.* — *Hatcher v. Crews*, 83 Va. 371.

**1. As Between Grantor and Grantee.** — A grantor who makes a conveyance of his land which is fraudulent as to his creditors does not thereby forfeit his right to a homestead as to such creditors. They can sell under an execution only the remaining part of his land, leaving the homestead to be contested between the alleged fraudulent grantor and the grantee. *Crummen v. Bennet*, 68 N. Car. 494.

**Title Vested in Grantee.** — In *Wilson v. Taylor*, 49 Kan. 774, it was held that a conveyance of a homestead or other exempt property, even though made with intent to defraud creditors, vests the title thereof in the grantee, and does not become subject to the lien of a judgment previously obtained by a creditor of the grantor.

**So Where the Owner of a Homestead and His Wife** conveyed the premises to a third person, who reconveyed to the wife, the purpose of the transaction being to hinder and delay creditors, the court, upon declaring the conveyances fraudulent as against creditors on bill filed, permitted the conveyance of the homestead to stand. *Bell v. Devore*, 96 Ill. 217.

**2. Held a Forfeiture** — *Georgia.* — *Minor v. Wilson*, 58 Fed. Rep. 616, decided under the law of *Georgia*.

*Louisiana.* — See *Denis v. Gayle*, 40 La. Ann. 286.

*New Hampshire.* — See *Currier v. Sutherland*, 54 N. H. 475, 20 Am. Rep. 143; *Babb v. Habb*, 61 N. H. 142.

*Tennessee.* — *Nichol v. Davidson County*, 8

*Lea* (Tenn.) 389. And see *McClung v. Johnson*, 2 Law & Eq. R. (Tenn.) 78; cited in *Gibbs v. Patten*, 2 *Lea* (Tenn.) 183.

*Wisconsin.* — *Barker v. Dayton*, 28 Wis. 367. See further *supra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

**3. Abandonment of Homestead.** — *Kellersberger v. Kopp*, 6 Cal. 563; *Carroll v. Ellis*, 63 Cal. 440. See also *Homes v. Burt*, 130 Mass. 368.

**4.** *Horn v. Tufts*, 39 N. H. 478; *Ferguson v. Reed*, 45 Tex. 574.

**Under the Colorado Homestead Act** (Gen. Stat. 1883, pp. 539, 540), the owner of a homestead may sell undivided portions thereof, and may still claim his homestead in the undivided residue, as against all persons except his cotenants. *Dallemand v. Mannon*, 4 Colo. App. 262.

**5.** See *infra*, this title, *Sales, Conveyances, and Incumbrances*.

**6. Husband's Right to Abandon Homestead.** — *Dunn v. Toyer*, 10 Cal. 167; *Robertson v. Sullivan*, 31 Minn. 200.

Under an *Illinois* statute providing that "neither the husband nor wife can remove the other from the homestead without the consent of the other, unless the owner of the property shall in good faith provide another homestead suitable to the condition in life of the family," it was doubted in *Panton v. Manley*, 4 Ill. App. 210, whether the husband could abandon or surrender the homestead as against his wife while she was an inmate of an insane asylum.

And in *Cox v. Harvey*, 1 Tex. Unrep. Cas. 268, the right of the husband to abandon a homestead, when once acquired, without the consent of his wife was unequivocally denied. See also *Evans v. Grand Rapids, etc., R. Co.*, 68 Mich. 602.

**7.** *Johnston v. Turner*, 29 Ark. 280, *Guido v. Guido*, 14 Cal. 506, 76 Am. Dec. 441; *Brennan v. Wallace*, 25 Cal. 108; *Titman v. Moore*, 43 Ill. 169; *Cabeen v. Mulligan*, 37 Ill. 230, 87



homestead to accompany her husband when he abandons it, there can then be no question that her homestead rights are lost.<sup>1</sup>

**Removal of Husband to Establish Home Elsewhere.** — The temporary absence of the husband while in search of a new home does not amount to an abandonment of his homestead, if being disappointed he returns and occupies it as his home.<sup>2</sup> And it has been held that where the head of a family leaves the state for the purpose of establishing a new home, but leaves his homestead in the possession of his family, which is to follow later, the homestead exemption is not lost until the time fixed for the removal of the family or the doing of some equivalent act, such as selling the land or acquiring a new homestead.<sup>3</sup>

**Desertion of Wife by Husband.** — A desertion of the wife by the husband, she continuing to occupy the homestead, does not have the effect of depriving her of her homestead rights.<sup>4</sup> If, however, she also removes from the premises, and there is no intention on the part of either the husband or the wife to return, there is an abandonment of the homestead exemption.<sup>5</sup>

**Power of Wife.** — It is not necessary to the continuance of a homestead exemption that the wife of the owner should live with him upon the homestead property continuously. Hence a merely temporary absence of the wife, the husband continuing to occupy the homestead, does not amount to an abandonment.<sup>6</sup> Nor is a married man's homestead exemption necessarily destroyed by his wife's desertion, if he continues to reside upon the homestead property.<sup>7</sup> But the desertion of the husband by the wife and the sub-

Am. Dec. 247; *Phillips v. Springfield*, 39 Ill. 83; *Buck v. Conlogue*, 49 Ill. 392; *Burson v. Fowler*, 65 Ill. 146; *Hart v. Randolph*, 142 Ill. 521. See also *Booker v. Anderson*, 35 Ill. 66; *Allen v. Hawley*, 66 Ill. 164; *Williams v. Moody*, 35 Minn. 280; *Thoms v. Thoms*, 45 Miss. 263; *Parker v. Dean*, 45 Miss. 408; *Slavin v. Wheeler*, 61 Tex. 654; *Wynne v. Hudson*, 66 Tex. 1; *Marler v. Handy*, 88 Tex. 421. Compare *Myers v. Evans*, 81 Tex. 317.

**Right of Husband to Use Property for Other than Homestead Purposes.** — If a husband, in good faith, with no intention to avoid the law which declares that he shall not sell the homestead without the consent of the wife, appropriates a part of it that will withdraw from it the homestead character, his act must be recognized as a power vested in him as the head of a family, and the part so appropriated will cease to be a part of the homestead. *Wynne v. Hudson*, 66 Tex. 1.

**1. Voluntary Removal of Wife with Husband.** — *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402; *Jordan v. Godman*, 19 Tex. 273; *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622; *Smith v. Uzzell*, 56 Tex. 315; *Reece v. Renfro*, 68 Tex. 192; *Portwood v. Newberry*, 79 Tex. 337; *Nash v. Herring*, 5 Tex. Civ. App. 95. But see *Collins v. Boyet*, 87 Tenn. 334, *overruling* *Levison v. Abraham*, 14 Lea (Tenn.) 336.

**2. Removal of Husband, Leaving Family in Possession of Homestead.** — *Kitchell v. Burgwin*, 21 Ill. 40; *Titman v. Moore*, 43 Ill. 169.

The absence of the husband upon business for the greater part of the time, the property being occupied by the family, does not constitute an abandonment. *Griffin v. Sheley*, 55 Iowa 513.

**3. Decorah Sav. Bank v. Kennedy**, 58 Iowa 454; *Lunt v. Neeley*, 67 Iowa 97; *McDannell v. Ragsdale*, 71 Tex. 23, 10 Am. St. Rep. 729; *Welborne v. Downing*, 73 Tex. 527. But see *Finley v. Saunders*, 98 N. Car. 462.

**4. Desertion by Husband, Family Continuing to**

**Occupy Homestead** — *Georgia*. — *Dearing v. Thomas*, 25 Ga. 223.

*Illinois*. — *Moore v. Dunning*, 29 Ill. 130; *White v. Clark*, 36 Ill. 285; *People v. Stitt*, 7 Ill. App. 294.

*Kentucky*. — *Warren v. Block*, 1 Ky. L. Rep. 121.

*Massachusetts*. — *Drury v. Bachelder*, 11 Gray (Mass.) 214.

*Michigan*. — *In re Pratt*, 1 Flipp (U. S.) 353, 1 Cent. L. J. 290. See *Gadsby v. Monroe*, 115 Mich. 282.

*Missouri*. — *Blandy v. Asher*, 72 Mo. 27.

*Nebraska*. — *Morrill v. Skinner*, 57 Neb. 164.

*Ohio*. — *Ditney v. Ellifritz*, 8 Ohio Cir. Ct. 278, 4 Ohio Cir. Dec. 465.

*Texas*. — *McMillan v. Warner*, 38 Tex. 410; *Cooper v. Basham*, (Tex. 1892) 19 S. W. Rep. 704.

But see *Finley v. Saunders*, 98 N. Car. 462.

**5. Desertion by Husband and Subsequent Removal of Family.** — *Henry v. Wilson*, 9 Lea (Tenn.) 176; *Thomas v. Smith*, (Kan. App. 1898) 54 Pac. Rep. 695.

**6. Temporary Removal of Wife.** — *Reinstein v. Daniels*, 75 Tex. 640.

**7. Desertion of Husband by Wife.** — *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Pardo v. Bittorf*, 48 Mich. 275; *Griffin v. Nichols*, 51 Mich. 575; *Earl v. Earl*, 60 Mich. 30; *Brown v. Brown*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415.

In *Pardo v. Bittorf*, 48 Mich. 275, it was held that a husband does not lose his homestead rights by his wife removing without his consent into another house, it appearing that on her refusal to return he took back his own bed, with the avowed purpose of keeping his residence in the old homestead, and continued to occupy it in whole or in part, and that, while renting a portion of the house and not invariably remaining in it, especially when not well, he never ceased to retain possession or to claim it as his homestead.

Even though the breaking up of the family



sequent removal of the husband from the premises, with no intention of returning, amount to an abandonment.<sup>1</sup>

**Abandonment by Wife After Husband's Death.** — Under homestead statutes which preserve the exemption to the surviving widow and minor children, it has been held that while the abandonment by the widow of a homestead derived through the deceased husband may constitute an abandonment of her own homestead rights,<sup>2</sup> it does not deprive the children of their homestead rights.<sup>3</sup> But in a few jurisdictions it is held that, after the death of the husband, the widow, being under no disability, may abandon the homestead precisely as could the husband, and will thereby deprive the children of the benefit of the exemption.<sup>4</sup> And the authorities very generally hold that a permanent removal by the widow will destroy her rights in the homestead.<sup>5</sup> However, the continuance of the homestead is not affected by a temporary absence of the widow.<sup>6</sup>

**5. Estoppel — Mere Acts or Declarations.** — When property in fact constitutes a homestead for the benefit of the family and can be waived only as provided by the statute it is held that mere acts, or false statements fraudulently made, will not create an estoppel to assert the homestead right.<sup>7</sup>

may be regarded as destroying the homestead character of the family residence, the permanent removal of the wife alone does not have that effect, if the husband and other members of the family continue to occupy the homestead property as a home. *New England Trust Co. v. Nash*, 5 Kan. App. 739.

**1. Desertion of Husband by Wife and Removal of Husband.** — *Riddick v. Turpin*, 11 Lea (Tenn.) 478.

**2. Power of Surviving Wife to Abandon Homestead.** — *Crabb v. Potter*, (Ky. 1890) 14 S. W. Rep. 501.

But it has been held in *Missouri* that the continuance of the homestead exemption in the widow and minor children of the owner does not depend upon a continued residence on the property, and that a widow does not forfeit her homestead by a second marriage and removal to the home of her second husband. *Hufschmidt v. Gross*, 112 Mo. 649, *overruling Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767.

**3. Little v. Woodward**, 14 Bush (Ky.) 555; *Showers v. Robinson*, 43 Mich. 502; *Hufschmidt v. Gross*, 112 Mo. 649.

**4. Illinois.** — *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Buck v. Conlogue*, 49 Ill. 392; *Shepard v. Brewer*, 65 Ill. 383. But see *Walters v. People*, 21 Ill. 178.

*Tennessee.* — *Hicks v. Pepper*, 1 Baxt. (Tenn.) 42.

**5. Illinois.** — *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Buck v. Conlogue*, 49 Ill. 392; *Shepard v. Brewer*, 65 Ill. 383; *Farnan v. Borders*, 119 Ill. 228.

*Iowa.* — *Peebles v. Bunting*, 103 Iowa 489.

*Kansas.* — *Barbe v. Hyatt*, 50 Kan. 86.

*Massachusetts.* — *Paul v. Paul*, 136 Mass. 286; *Pratt v. Pratt*, 161 Mass. 276.

*South Carolina.* — *Trimmer v. Winsmith*, 41 S. Car. 109.

*Texas.* — *Craddock v. Edwards*, 81 Tex. 609; *Sanburn v. Deal*, 3 Tex. Civ. App. 385.

It has been held that the widow's business-homestead exemption under the *Texas Constitution* is lost by her failure to conduct a business upon the premises. *Harle v. Richards*, 78 Tex. 80.

**6. Temporary Removal by Widow — Illinois.** — *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Reilly v. Reilly*, (Ill. 1891) 26 N. E. Rep. 604.

*Iowa.* — *Jones v. Blumenstein*, 77 Iowa 361; *Zwick v. Johns*, 89 Iowa 550.

*Kansas.* — *Deering v. Beard*, 48 Kan. 16; *Brury v. Smith*, (Kan. App. 1898) 53 Pac. Rep. 74.

*Kentucky.* — *Sansberry v. Simms*, 79 Ky. 527, 3 Ky. L. Rep. 303; *Phipps v. Acton*, 12 Bush (Ky.) 377.

*Massachusetts.* — *Brettun v. Fox*, 100 Mass. 234; *Pratt v. Pratt*, 161 Mass. 276.

*Mississippi.* — *Campbell v. Adair*, 45 Miss. 170.

*Texas.* — *Carter v. Randolph*, 47 Tex. 376; *Foreman v. Meroney*, 62 Tex. 723; *Lumpkin v. Nicholson*, 10 Tex. Civ. App. 108.

In *Brettun v. Fox*, 100 Mass. 234, it was held that a widow who continued to use for the purpose of storing furniture after her husband's death a room in a dwelling house occupied and owned by him at the time of his death as a homestead continued to occupy the homestead within the meaning of the statute. It was said by the court that the use of the room for the purpose of keeping her furniture was "continuing to occupy the homestead." And see *Pratt v. Pratt*, 161 Mass. 276.

The fact that a widow who continues to reside upon the homestead inherited from her husband takes her son-in-law and family to board with her does not amount to an abandonment. *Jones v. Blumenstein*, 77 Iowa 361.

**7. Mere Acts or Declarations.** — *Showers v. Robinson*, 43 Mich. 502; *Hinds v. Morgan*, 75 Miss. 509; *Hughes v. Hodges*, 102 N. Car. 236, *overruling Mayho v. Cotton*, 69 N. Car. 289; *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483; *Thomas v. Williams*, 50 Tex. 275.

Thus in *Arkansas*, under the constitutional provision prohibiting the head of the family from encumbering the homestead in any manner, it seems that a declaration by a mortgagor that the mortgaged property is not his homestead will not estop him to deny such declaration and to assert his homestead right against the mortgagee where the property does

**By Covenant.** — Where the homestead right is a mere inchoate personal right as to the parties in whom it exists, it is held that the grantor under a deed conveying the homestead is estopped by his covenants to assert the homestead claim against the grantee, his heirs or assigns.<sup>1</sup> But on the other hand it is held that although the homestead estate is not an estate in fee simple, but is simply a limited estate, which may or may not continue for the life of the husband and wife and for a term of years for their children, it is this homestead interest which cannot be conveyed by the sole deed of the husband, and such a deed is not an estoppel.<sup>2</sup> This statement must be taken with what is said in another portion of this article upon the power to convey or encumber the homestead.<sup>3</sup>

**As Against Parties Misled by Acts of Abandonment.** — It seems that the owner of a homestead, even though his removal therefrom may be only temporary, and with the intention to return and reoccupy the premises, will be estopped to claim that the premises are his homestead as against third persons who by his absence may have been led to believe that the property was not his homestead and to act upon this belief by purchasing it or otherwise altering its condition.<sup>4</sup>

**Change of Selection After Charging Other Lands.** — Where the owner of more than one tract of land out of which he may select his homestead makes his selection and thereafter encumbers the other tracts, he is estopped to assert homestead in the latter against persons who dealt with him upon the faith of his selection;<sup>5</sup> and where a debtor claims his exemption to prevent a sale under

in effect include the homestead. *Webb v. Davis*, 37 Ark. 551. But where property included in the mortgage might have been made a part of the homestead, such declaration is held to estop a mortgagor who, after the execution of the mortgage, was still left in the possession of a fair and reasonable homestead. *Klenk v. Knoble*, 37 Ark. 298.

**Absence of Wife—Denial of Marriage.** — In *Schwarz v. National Bank*, 67 Tex. 217, however, it was held that where a debtor conveyed to his creditor a lot upon which he resided with his children, having left his wife in Europe when he came to the United States, expecting her afterwards to join him, the debtor's representation at the time of conveyance that he had no wife would estop him, in an action of trespass to try title brought by the debtor, from asserting that he had a wife.

**Probate Sale.** — In *Showers v. Robinson*, 43 Mich. 502, it was held that a widow was not estopped from claiming homestead by reason of the fact that she desired a sale of the homestead for the payment of debts of the estate, and requested a party to buy the property and received the amount of the claim allowed in her favor from the proceeds.

Where the husband becomes insane after declaration of homestead has been filed, the probate court has no jurisdiction upon the petition of a guardian appointed by it over the wife's homestead; and if such court makes an order under which the homestead is sold for the support of the wife and children, the fact that the wife received a part of the money and consented that she be represented in the probate court proceedings will not estop her from recovering possession of the homestead. These matters do not amount to an estoppel *in pais*, nor do they constitute an estoppel by matter of record. *Flege v. Garvey*, 47 Cal. 371.

**1. Estoppel by Covenants.** — *Foss v. Strachn*, 42 N. H. 40.

And before the death of the husband and father (the grantor), neither the wife nor the minor children are entitled to convey the homestead against the covenants of the deed. *Strachn v. Foss*, 42 N. H. 43.

**2.** *Doyle v. Coburn*, 6 Allen (Mass.) 71.

**3.** See *infra*, this title, *Sales, Conveyances, and Incumbrances*.

**4. Persons Misled by Abandonment.** — *Fyffe v. Beers*, 18 Iowa 4, 85 Am. Dec. 577. See also *Davis v. Andrews*, 30 Vt. 678; *Thorn v. Dill*, 56 Tex. 145; *Reece v. Renfro*, 68 Tex. 192.

**5. Change of Selection after Charging Other Lands.** — *Rutherford v. Jamieson*, 65 Miss. 219. See also *Allbright v. Hannah*, 103 Iowa 98; *Lucas v. Pickel*, 20 Iowa 490; *Hayden v. Robinson*, 83 Ky. 615; *Tohermes v. Beiser*, 93 Ky. 415; *Western Mortg., etc., Co. v. Burford*, 71 Fed. Rep. 74, 30 U. S. App. 593. But see *Flora v. Robbins*, 93 N. Car. 38.

Thus the owner of forty acres of uncleared land on one side of which his residence was situated, close to the line bounding another forty acres of cleared land, agreed with his son-in-law to give the uncleared land to him at the death of the owner if the son-in-law should clear and improve it, and in reliance upon such promise the son-in-law cleared and improved the land. It was held that the right to claim the forty acres of uncleared land, at least as to all except that part upon which the dwelling house was situated, was abandoned. *Allbright v. Hannah*, 103 Iowa 98.

**Claim to Land Exchanged.** — Where the owner of land in one county, which was occupied by himself and family as a homestead, exchanged it for land in another county, and he and his family removed from the former to the latter and remained in possession and enjoyed the benefits thereof for years, and after the de-



a levy, and has his homestead set off to him pursuant to the statute, he cannot before sale abandon it, move upon another tract of land, sell that which had been set off, and successfully claim as his homestead the new selection.<sup>1</sup>

**Change of Selection After Representations Inducing Dealings.** — In *Texas*, when the family is in the actual occupancy of the homestead by residing thereon, representations that the property is not a homestead will not operate as an estoppel where such representations are made in the instrument giving the lien or otherwise; but if the members of the family have left the residence homestead and are residing upon other property, and the question of homestead rests on the intention of the parties, then it is held that their declarations may be acted upon and will operate as an estoppel without regard to whether they were made in the instrument of security or otherwise.<sup>2</sup>

**Void Conveyance.** — Where a wife's deed conveys no title, it will not estop her as to her interest in the homestead premises in an action to recover land on the homestead right.<sup>3</sup>

**Conveyance by Husband Without Joinder of Wife.** — Where the homestead cannot be allotted by the husband without the joinder of the wife and an attempted alienation is void by reason of such nonjoinder, the conveyance is no estoppel to the assertion of the right of homestead,<sup>4</sup> and neither the declarations of the wife nor her written recognition and ratification of the previous deed of her husband can estop her from asserting her homestead right.<sup>5</sup> But on the other hand it is held in *Tennessee* that as the husband may mortgage a part of the tract of land on which he resides with his family without the joinder of the wife in the mortgage, provided he retains enough land for the homestead, if, in such case, the wife subsequently joins the husband in a conveyance of

cease of the husband and the sale of the latter property by the wife the latter commenced an action of ejectment to recover possession to the first tract, it was held that the defendant might show any act or declaration of the plaintiff which would tend to prove an equitable estoppel. *McAlpine v. Powell*, 44 Kan.

111.  
1. **After Land Set Off under Levy of Execution.** — *Richie v. Duke*, 70 Miss. 69, in which case the court held as indicated in the text, although the statute provided for exemption from "seizure or sale;" for when the first homestead was set off to the execution debtor, the remainder of the land levied on was subject to sale. See also *Kent v. Beaty*, 40 Tex. 440; *Jarboe v. Colvin*, 4 Bush (Ky.) 70.

2. **Change of Selection After Representations Inducing Dealings.** — *Watkins v. Little*, 80 Fed. Rep. 321; *Ivory v. Kennedy*, 13 U. S. App. 279, 57 Fed. Rep. 340; *Haswell v. Fortes*, 8 Tex. Civ. App. 82; *Bowman v. Rutter*, (Tex. Civ. App. 1898) 47 S. W. Rep. 52; *Hawes v. Parrish*, 16 Tex. Civ. App. 497; *Texas Land, etc., Co. v. Blalock*, 76 Tex. 89; *White v. Dabney*, (Tex. Civ. App. 1898) 46 S. W. Rep. 653 [citing *Equitable Mortg. Co. v. Norton*, 71 Tex. 687; *Carden v. Short*, (Tex. Civ. App. 1895) 31 S. W. Rep. 246; *Harmsen v. Wesche*, (Tex. Civ. App. 1895) 32 S. W. Rep. 192; *Moerlein v. Scottish Mortg., etc., Co.*, 9 Tex. Civ. App. 415; *Scottish-American Mortg. Co. v. Scripture*, (Tex. Civ. App. 1897) 40 S. W. Rep. 210; *Kempner v. Comer*, 73 Tex. 196].

**Question for Jury.** — But whether such facts as constitute an estoppel do or do not exist is a question for the jury and should be submitted in appropriate instructions. *H. W.*

*v. Forbes*, 8 Tex. Civ. App. 82, citing *Equitable Mortg. Co. v. Norton*, 71 Tex. 683.

3. **Void Conveyance by Wife.** — *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163.

4. **Conveyance Without Joinder of Wife.** — *Marks v. Wilson*, 115 Ala. 561; *Flege v. Garvey*, 47 Cal. 371; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681; *Lambert v. Kinnery*, 74 N. Car. 348.

**Trust Deed to Secure Purchase of Outstanding Title.** — Where the husband, who, together with his wife, was in possession of land as a homestead, purchased an outstanding title and executed a trust deed upon the premises for the price of such outstanding title, containing no release of the homestead right, and without the joinder of the wife, the husband was held to be estopped to deny that the title so purchased was paramount, but the wife might show that she or her husband had the paramount title. *Cassell v. Ross*, 33 Ill. 245, 85 Am. Dec. 270.

5. **Subsequent Ratification.** — *Thomas v. Williams*, 50 Tex. 275.

But in *Tennessee* it was held that where the husband and wife joined in a conveyance of their lots, but a privy examination of the wife was never taken, and she afterwards joined with her husband in a bill to enforce the vendor's lien on such lots, under which bill she and her husband obtained a decree for the sale of these lots to satisfy the purchase money due from their vendee, neither the husband nor the wife would be heard in a court of equity to say that their sale was inoperative and that their decree, enforced by the collection and reception of its fruits, was ineffectual to divest their title. *Rawley v. Burris*, (Tenn. Ch. 1898) 47 S. W. Rep. 176.



the whole homestead she cannot thereafter claim the homestead in that part which had been previously conveyed by the husband alone;<sup>1</sup> and the same rule is held to apply where a creditor levies upon and sells a part of the homestead tract as where the husband himself sells it, and if after sale under the execution enough remains for a homestead and the husband and wife join in a conveyance thereof, the wife cannot claim homestead in that part which was sold under the execution.<sup>2</sup>

**Fraudulent Conveyance.** — A conveyance set aside as in fraud of creditors, though made to the wife, will not estop her to claim homestead in the land.<sup>3</sup>

**By Attorning.** — Where lands have been sold under an execution the defendant in the execution is not estopped to claim homestead by accepting a lease from the purchaser at the sale.<sup>4</sup>

**Matter of Record — Res Judicata.** — When the right to homestead is fairly within the issues presented in a cause, judgment therein is conclusive and will bar a subsequent assertion of the claim where the question has been decided adversely to the claimant or where there has been a failure on the part of the claimant to assert the right in the cause.<sup>5</sup> And when a debtor not only fails to set up his homestead right in a judicial proceeding to subject the property, but seeks to cover it from the pursuit of his creditor under a fictitious and simulated title which he had placed in the name of another, he is estopped from contradicting the judicial allegations of his answer after the judgment of the court has laid bare and annulled the simulation and subjected the property.<sup>6</sup>

**XII. SALES, CONVEYANCES, AND INCUMBRANCES — 1. Right to Alienate or Encumber Homesteads — a. RULE STATED.** — It is well settled that constitutional and statutory provisions establishing homestead exemptions do not necessarily deprive the owner of property of his right to alienate his home-

1. **Subsequent Release of Homestead.** — *Rayburn v. Norton*, 85 Tenn. 351, citing *Hildebrand v. Taylor*, 6 Lea (Tenn.) 659; *Enochs v. Wilson*, 11 Lea (Tenn.) 228.

2. *Rayburn v. Norton*, 85 Tenn. 351.

3. **Fraudulent Conveyance.** — *Howell v. Thompson*, 95 Tenn. 401, citing *Ruhs v. Hooke*, 3 Lea (Tenn.) 302, 31 Am. Rep. 642; *Powell v. Warren*, (Tenn.) 1 Leg. Rep. 47. See also *supra*, this section, *Abandonment*.

4. **By Attorning.** — *Abbott v. Cromartie*, 72 N. Car. 292, 21 Am. Rep. 457. To the same point see *Beckmann v. Meyer*, 75 Mo. 333; *Dotson v. Barnett*, 16 Tex. Civ. App. 258; *Dykes v. O'Connor*, 83 Tex. 160.

But in an action by the landlord to recover the premises from the tenant the homestead right is not a defense, and the tenant must wait until the expiration of his tenancy before he can assert such right. *Abbott v. Cromartie*, 72 N. Car. 292, 21 Am. Rep. 457.

5. **Matter of Record.** — *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Clubb v. Wise*, 64 Ill. 157; *Harpending v. Wylie*, 13 Bush (Ky.) 158.

**Illustrations — Party to Partition Suit.** — Thus a party to a partition suit is precluded as against the purchaser at the sale from asserting a claim of homestead. *Hoback v. Hoback*, 33 Ark. 399; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Rice v. Aiken*, 3 Tex. Civ. App. 143.

**Lien of Decree for Alimony.** — So in a suit for divorce by a wife against her husband in which alimony is awarded to the wife and the decree by its express terms is made a lien

upon the land, it is held that if the defendant does not set up his homestead when the court is asked to decree the judgment a lien thereon, such a decree, of necessity, will cut off the right of homestead. *Hemenway v. Wood*, 53 Iowa 21.

**Omitting to Claim in Action by Purchaser at Execution Sale.** — In an action by a purchaser of land at a sheriff's sale to recover land from the debtor, if the latter fails to interpose a claim of homestead he and others claiming under him are precluded from raising the question thereafter. *Sheriff v. Welborn*, 14 S. Car. 481; *Nichols v. Dibrell*, 61 Tex. 539.

**Having Dower Set Apart.** — The right to dower and the homestead right are held under the statutes in *Michigan* not to be so far inconsistent that the claim of the one is a denial of the existence of the other, and by having dower set apart in lands which are subject to homestead rights the widow is not estopped from claiming her homestead rights thereafter. *Showers v. Robinson*, 43 Mich. 502.

**Unauthorized Sale — Receipt of Proceeds.** — Where the probate court has no jurisdiction to sell a homestead, the facts that after the husband had become insane, upon a petition to sell the homestead to pay the expenses of the wife and children, preferred by a guardian appointed by the probate court, the wife consented to the appointment of an attorney to represent her and received a part of the proceeds of the sale, do not amount to an estoppel by matter of record. *Flege v. Garvey*, 47 Cal. 371.

6. **Denial of Title in Answer.** — *Gilmer v. O'Neal*, 32 La. Ann. 983.

stead<sup>1</sup> or any part thereof,<sup>2</sup> or to encumber it as he may see fit,<sup>3</sup> or even to give it away.<sup>4</sup>

**1. Homestead May Be Alienated**—*United States*.—*Green v. Root*, 62 Fed. Rep. 191; *Hannon v. Sommer*, 10 Fed. Rep. 601; *Connecticut Mut. L. Ins. Co. v. Jones*, 8 Fed. Rep. 303.

*California*.—*Peterson v. Hornblower*, 33 Cal. 266; *Bowman v. Norton*, 16 Cal. 213. See also *Kellersberger v. Kopp*, 6 Cal. 563; *Gee v. Moore*, 14 Cal. 472.

*Georgia*.—*Gunn v. Wades*, 65 Ga. 537. See also *City Bank v. Smisson*, 73 Ga. 422.

*Illinois*.—*McDonald v. Crandall*, 43 Ill. 231; *Eldridge v. Pierce*, 90 Ill. 474; *Fishback v. Lane*, 36 Ill. 437; *Halliday v. Hess*, 147 Ill. 588; *Bartholomae, etc., Brewing, etc., Co. v. Schroeder*, 67 Ill. App. 560; *Green v. Marks*, 25 Ill. 221. See also *Bliss v. Clark*, 39 Ill. 590.

*Indiana*.—*Ray v. Yarnell*, 118 Ind. 112.

*Iowa*.—*Wheeler, etc., Mfg. Co. v. Bjelland*, 97 Iowa 637; *Roane v. Hamilton*, 101 Iowa 250; *Yost v. Devault*, 9 Iowa 60; *Alley v. Bay*, 9 Iowa 510; *Larson v. Reynolds*, 13 Iowa 581, 81 Am. Dec. 444; *Davis v. Kelley*, 14 Iowa 525; *Lamb v. Shays*, 14 Iowa 570; *Eli v. Gridley*, 27 Iowa 378. See also *Drake v. Painter*, 77 Iowa 731; *Winkleman v. Winkleman*, 79 Iowa 319; *Quinn v. Brown*, 71 Iowa 376.

*Kansas*.—*Manhattan First Nat. Bank v. Warner*, 22 Kan. 537; *Wea Gas, etc., Co. v. Franklin Land Co.*, 54 Kan. 533, 45 Am. St. Rep. 297; *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 598.

*Kentucky*.—*Maynard v. May*, (Ky. 1889) 11 S. W. Rep. 806; *Marshall v. Strange*, (Ky. 1888) 9 S. W. Rep. 250; *Brame v. Craig*, 12 Bush (Ky.) 405; *Brooks v. Collins*, 11 Bush (Ky.) 627; *Pribble v. Hall*, 13 Bush (Ky.) 62. See also *Gideon v. Struve*, 78 Ky. 134; *Lisby v. Perry*, 6 Bush (Ky.) 515; *Cantrill v. Risk*, 7 Bush (Ky.) 159; *Wing v. Hayden*, 10 Bush (Ky.) 280; *Robbins v. Cookendorfer*, 10 Bush (Ky.) 631.

*Massachusetts*.—*Silloway v. Brown*, 12 Allen (Mass.) 30; *Connor v. McMurray*, 2 Allen (Mass.) 202; *McMurray v. Connor*, 2 Allen (Mass.) 205; *Dulanty v. Pyncheon*, 6 Allen (Mass.) 510; *Lazell v. Lazell*, 8 Allen (Mass.) 575; *Drury v. Bachelder*, 11 Gry (Mass.) 214; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Adams v. Jenkins*, 16 Gray (Mass.) 146. See also *Hlowes v. Burt*, 130 Mass. 368.

*Minnesota*.—*James v. Wilder*, 25 Minn. 305; *Barton v. Drake*, 21 Minn. 299.

*Mississippi*.—*Parker v. Dean*, 45 Miss. 408.

*Missouri*.—*Mack v. Heiss*, 90 Mo. 578; *Beckmann v. Meyer*, 75 Mo. 333; *Greer v. Major*, 114 Mo. 145.

*North Carolina*.—*Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483.

*South Carolina*.—See *Watson v. Neal*, 38 S. Car. 90.

*Tennessee*.—*Ren v. Driskell*, 11 Lea (Tenn.) 642.

*Texas*.—*Edmonson v. Blessing*, 42 Tex. 597; *Scaif v. Collin County*, 80 Tex. 514; *Sampson v. Williamson*, 6 Tex. 102; *Welch v. Rice*, 31 Tex. 688, 98 Am. Dec. 556.

*Virginia*.—*Williams v. Watkins*, 92 Va. 680.

*West Virginia*.—*Moran v. Clark*, 30 W. Va. 359, 8 Am. St. Rep. 66.

**Power of Alienation Exists Independent of Constitution or Statute.**—The power of alienation is not derived from the constitution or statute relating to alienation of homesteads. It is an incident of the ownership of the property independent of the homestead law, and the directions and prohibitions of the constitution or statutes as to the alienation are mere restrictions upon this antecedent power. *Hinson v. Booth*, 39 Fla. 333. See also *Hart v. Sanderson*, 18 Fla. 103.

**Conveyance to Children.**—A homestead may be conveyed to the children of the owner. *Brooks v. Collins*, 11 Bush (Ky.) 627.

**Deed Void for Usury.**—The homestead right cannot be defeated by a deed void for usury, nor by calling such instrument an equitable mortgage. *Anderson v. Tribble*, 66 Ga. 584.

**2. A Part of the Homestead May Be Sold**, as the power to sell the whole must necessarily include the power to sell a part. *Brooks v. Collins*, 11 Bush (Ky.) 627; *Parker v. Dean*, 45 Miss. 408. See also *Kellersberger v. Kopp*, 6 Cal. 563; *Ferguson v. Reed*, 45 Tex. 575.

**3. Homestead May Be Encumbered**—*United States*.—*Connecticut Mut. L. Ins. Co. v. Jones*, 8 Fed. Rep. 303; *In re Cross*, 2 Dill. (U. S.) 320, 6 Fed. Cas. No. 3,426.

*Arkansas*.—*Blevins v. Rogers*, 32 Ark. 258.

*California*.—*Peterson v. Hornblower*, 33 Cal. 266; *Van Reynegan v. Revalk*, 8 Cal. 75.

*Florida*.—*State First Nat. Bank v. Ashmead*, 23 Fla. 379.

*Illinois*.—*Fishback v. Lane*, 36 Ill. 437; *Bartholomae, etc., Brewing, etc., Co. v. Schroeder*, 67 Ill. App. 560; *Young v. Harris*, 74 Ill. App. 667; *Green v. Marks*, 25 Ill. 221.

*Iowa*.—*Low v. Anderson*, 41 Iowa 476; *Stevens v. Myers*, 11 Iowa 184; *Babcock v. Hoey*, 11 Iowa 375.

*Kansas*.—*Hill v. Alexander*, 2 Kan. App. 251.

*Massachusetts*.—*Greenough v. Turner*, 11 Gray (Mass.) 334; *Connor v. McMurray*, 2 Allen (Mass.) 202, 205; *Silloway v. Brown*, 12 Allen (Mass.) 32; *Adams v. Jenkins*, 16 Gray (Mass.) 146.

*Missouri*.—*Grimes v. Portman*, 99 Mo. 229; *Dickerson v. Cuthburth*, 56 Mo. App. 647; *Greer v. Major*, 114 Mo. 145.

*Tennessee*.—*Hildebrand v. Taylor*, 6 Lea (Tenn.) 659; *Daly v. Willis*, 5 Lea (Tenn.) 100; *Enochs v. Wilson*, 11 Lea (Tenn.) 228; *Parr v. Fumbanks*, 11 Lea (Tenn.) 391; *Edwards v. Boyd*, 9 Lea (Tenn.) 204; *Hall v. Fulgham*, 86 Tenn. 451.

*Texas*.—*Pioneer Sav., etc., Co. v. Paschall*, 12 Tex. Civ. App. 613; *Sampson v. Williamson*, 6 Tex. 102; *Jordan v. Peak*, 38 Tex. 429.

*Vermont*.—*Danforth v. Beattie*, 43 Vt. 138.

*Virginia*.—*Williams v. Watkins*, 92 Va. 680.

*West Virginia*.—*Moran v. Clark*, 30 W. Va. 359, 8 Am. St. Rep. 66.

*Wisconsin*.—See *German Bank v. Muth*, 96 Wis. 342.

**4. Homestead May Be Given Away.**—*Grimes v. Portman*, 99 Mo. 229.



*b. SALE UNDER FORECLOSURE OF MORTGAGE OR DEED OF TRUST NOT PROHIBITED "FORCED SALE."* — Thus it has been considered that a provision exempting the homestead from "forced sale" does not prohibit a sale thereof under foreclosure of a mortgage or deed of trust,<sup>1</sup> for an exemption in such terms should be restricted to sales involving no assent by contract referable to the special property to be sold.<sup>2</sup> But a contrary view has also been asserted.<sup>3</sup>

*c. ALIENATION OR INCUMBRANCE NOT FRAUD UPON CREDITORS.* — As general creditors have no claim or lien upon the homestead of the debtor, it follows naturally that a conveyance or incumbrance of such homestead cannot, as a rule, be fraudulent as against them.<sup>4</sup> And this has been held true though

**1. Sale under Foreclosure of Mortgage or Deed of Trust Not Prohibited "Forced Sale."** — *Hart v. Sanderson*, 18 Fla. 103; *Oregon Mortg. Co. v. Hersner*, 14 Wash. 515; *Moran v. Clark*, 30 W. Va. 359, 8 Am. St. Rep. 66. See also *Patterson v. Taylor*, 15 Fla. 337.

**Exemption from "Sale on any Mesne or Final Process."** — A judicial sale for the foreclosure of a mortgage on the homestead is not forbidden by a provision in the *South Carolina Constitution* of 1868 exempting the homestead from "attachment, levy, or sale on any mesne or final process issued from any court," for it is obvious that what is meant by the words quoted is process issued to enforce a judgment or decree for the payment of money and which may be enforced against the whole estate of the judgment debtor. Homestead Bldg., etc., *Assoc. v. Enslow*, 7 S. Car. 1.

**2. Term "Forced Sale" Restricted to Sales Involving No Assent by Contract.** — *Hart v. Sanderson*, 18 Fla. 103.

A foreclosure sale, whether under the power of sale contained in the mortgage or in pursuance of a decree, is not a forced sale within the meaning of a constitutional provision that "the legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families," and the statutes enacted pursuant thereto. It makes no difference in respect to the sale being forced or voluntary whether the owner consents directly to the sale or does the same indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. *Peterson v. Hornblower*, 33 Cal. 266.

**Execution Sale Not Necessarily "Forced Sale."** — "A 'forced sale' is not synonymous with a 'sale on execution,' etc. The latter may be and often is voluntary in every respect. When the owner consents to a sale under the execution or other legal process, the sale is not forced, but it is as voluntary, within the full import of the term, as it is when he directly effects the sale and executes the conveyance. Its quality, as being voluntary or forced, depends not upon the mode of its execution, but upon the presence or absence of the consent of the owner." *Peterson v. Hornblower*, 33 Cal. 266.

**3. Texas Doctrine.** — The Texas courts have asserted the doctrine that a sale by the mortgagee or trustee under a power contained in the mortgage or deed of trust would not be a forced sale, and therefore not within the constitutional prohibition; but they consider that a sale under judicial proceedings to foreclose a mortgage or deed of trust would be a forced

sale, and therefore a mortgage or trust deed without a power of sale is invalid. *Jordan v. Peak*, 38 Tex. 429; *Sampson v. Williamson*, 6 Tex. 102; *Stewart v. Mackey*, 16 Tex. 56.

**Illinois Rule.** — And the courts of Illinois have asserted that a foreclosure sale is a forced sale and therefore not permissible unless there is a formal release or waiver of the homestead right in the mortgage or deed of trust. *Ely v. Eastwood*, 26 Ill. 107; *Smith v. Marc*, 26 Ill. 150; *Wing v. Cropper*, 35 Ill. 256.

**4. Alienation or Incumbrance of Homestead Not Fraudulent as Against General Creditors** — *United States*. — *McFarland v. Goodman*, 6 Biss. (U. S.) 111; *Cox v. Wilder*, 2 Dill. (U. S.) 45; *Smith v. Kehr*, 2 Dill. (U. S.) 50; *Thomson v. Crane*, 73 Fed. Rep. 327; *Farwell v. Kerr*, 28 Fed. Rep. 345; *Green v. Root*, 62 Fed. Rep. 191.

*Alabama*. — *Hodges v. Winston*, 95 Ala. 514; *Fellows v. Lewis*, 65 Ala. 343; *Fuller v. Whitlock*, 99 Ala. 411; *Pollak v. McNeil*, 100 Ala. 203.

*Arkansas*. — *Pipkin v. Williams*, 57 Ark. 242; *Bogan v. Cleveland*, 52 Ark. 101; *Stanley v. Snyder*, 43 Ark. 429; *Gray v. Patterson*, 65 Ark. 373.

*California*. — *Wetherly v. Straus*, 93 Cal. 283.

*Colorado*. — *Barnett v. Knight*, 7 Colo. 365.

*Florida*. — *Murphy v. Farquhar*, 39 Fla. 350.

*Illinois*. — *Muller v. Inderreiden*, 79 Ill. 382; *Boyd v. Barnett*, 24 Ill. App. 199; *Moore v. Flynn*, 135 Ill. 74.

*Indiana*. — *Phenix Ins. Co. v. Fielder*, 133 Ind. 557.

*Iowa*. — *Delashmut v. Trau*, 44 Iowa 613; *Officer v. Evans*, 48 Iowa 557; *Payne v. Wilson*, 76 Iowa 377; *Clark v. Raymond*, 86 Iowa 661; *Butler v. Nelson*, 72 Iowa 732; *Wheeler*, etc., *Mfg. Co. v. Bjelland*, 97 Iowa 637; *Hugin v. Dewey*, 20 Iowa 368.

*Kansas*. — *Winter v. Ritchie*, 57 Kan. 212, 57 Am. St. Rep. 331; *Wilson v. Taylor*, 49 Kan. 774; *Manhattan First Nat. Bank v. Warner*, 22 Kan. 537; *Hixon v. George*, 18 Kan. 253; *Merchants Nat. Bank v. Kopplin*, 1 Kan. App. 599.

*Kentucky*. — *Wallace v. Mason*, 100 Ky. 560; *Dowd v. Hurley*, 78 Ky. 260; *Lishy v. Perry*, 6 Bush (Ky.) 515; *Anthony v. Wade*, 1 Bush (Ky.) 110; *Morton v. Ragan*, 5 Bush (Ky.) 334; *Kuevan v. Specker*, 11 Bush (Ky.) 1; *Baker v. Hines*, (Ky. 1897) 43 S. W. Rep. 452; *Whayne v. Morgan*, (Ky. 1889) 12 S. W. Rep. 128; *Carroll v. Dawson*, (Ky. 1898) 46 S. W. Rep. 222; *Feighan v. Jackson*, 7 Ky. L. Rep. 749; *Whitt v. Kendall*, (Ky. 1889) 11 S. W. Rep. 592; *McAdams v. Mitchell*, 10 Ky.



there was no consideration for the conveyance.<sup>1</sup>

**The Motive of the Vendor Is Immaterial**, for even if he intends to defraud his creditors by the conveyance they are not injured, as no property subject to their claims is disposed of.<sup>2</sup>

*d. RESTRICTIONS UPON ALIENATION AND ENCUMBERING.* — There are, however, in most if not all jurisdictions, certain constitutional or statutory restrictions upon the right of the owner of a homestead to alienate or encumber the same; and the major part of this section will be devoted to a discussion of these restrictions.<sup>3</sup>

**2 Prohibition of Alienation or Incumbrance by Husband Without Joinder or Consent of Wife** — *a. RULE STATED.* — The most usual restriction upon the right of alienating or encumbering the homestead is found in the very generally prevalent rule that the husband cannot, without the joinder or consent of his wife, execute any valid alienation of or fasten any binding incumbrance upon the homestead.<sup>4</sup>

L. Rep. 856; *Wilson v. Calvert*, 15 Ky. L. Rep. 489.

*Louisiana.* — *Cottingham's Succession*, 29 La. Ann. 669.

*Maine.* — *Legro v. Lord*, 10 Me. 161.

*Massachusetts.* — *Castle v. Palmer*, 6 Allen (Mass.) 401.

*Michigan.* — *Pulte v. Geller*, 47 Mich. 560; *Smith v. Rumsey*, 33 Mich. 183; *Patnode v. Darveau*, 112 Mich. 127; *Rhead v. Hounson*, 46 Mich. 243; *Shay v. Wheeler*, 69 Mich. 254.

*Minnesota.* — *Ferguson v. Kumler*, 27 Minn. 156; *Baldwin v. Rogers*, 28 Minn. 544.

*Mississippi.* — *Edmonson v. Meacham*, 50 Miss. 34; *Wilcher v. Thompson*, (Miss. 1893) 12 So. Rep. 828; *Hodges v. Hickey*, 67 Miss. 716.

*Missouri.* — *Muenks v. Bunch*, 90 Mo. 500; *Vogler v. Montgomery*, 54 Mo. 577; *Miller v. Leeper*, 120 Mo. 466; *Versailles Bank v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621, *overruling Schaffer v. Beldsmeier*, 107 Mo. 314.

*Nebraska.* — *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567; *Munson v. Carter*, 40 Neb. 417; *Mundt v. Hagedorn*, 49 Neb. 409; *Schribar v. Platt*, 19 Neb. 631.

*North Carolina.* — *Crummen v. Bennet*, 68 N. Car. 494.

*North Dakota.* — *Kvello v. Taylor*, 5 N. Dak. 76.

*Ohio.* — *Sears v. Hanks*, 14 Ohio St. 298.

*South Carolina.* — *Aultman v. Salinas*, 44 S. Car. 299.

*Texas.* — *Cox v. Shropshire*, 25 Tex. 113; *Willis v. Mike*, 76 Tex. 84; *Taylor v. Ferguson*, 87 Tex. 1; *Patterson v. Keller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 301; *Picton v. Sloan*, (Tex. Civ. App. 1894) 28 S. W. Rep. 251; *Wood v. Chambers*, 20 Tex. 254; *Martel v. Soiners*, 26 Tex. 560. See also *Beard v. Blum*, 64 Tex. 59.

*Vermont.* — *Foster v. McGregor*, 11 Vt. 595, 34 Am. Dec. 713; *Danforth v. Beattie*, 43 Vt. 15.

*Virginia.* — *Simon v. Ellison*, (Va. 1895) 22 S. E. Rep. 860.

*Wisconsin.* — *Shawano County Bank v. Koepfen*, 78 Wis. 533; *Dreutzer v. Bell*, 11 Wis. 119; *Pike v. Miles*, 23 Wis. 164; *Murphy v. Crouch*, 24 Wis. 365; *Bank of Commerce v. Fowler*, 93 Wis. 241.

**Conveyance by Husband to Wife.** — A deed of the homestead from the husband to the wife cannot be considered as in fraud of creditors

*Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554; *Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Mich. 244; *Pulte v. Geller*, 47 Mich. 560; *O'Connor v. Boylan*, 49 Mich. 210; *Brigham v. Fawcett*, 42 Mich. 542.

**The Fact that the Vendee Knew that Creditors of the Vendor Were About to Attach the Property** does not show that the transfer of a homestead was fraudulent, for the creditors could have no rights as against such property. *Scheuber v. Ballow*, 64 Tex. 166.

**1. Conveyance Without Consideration** — *Illinois.* — *Vaughan v. Thompson*, 17 Ill. 78.

*Iowa.* — *Fordyce v. Hicks*, 80 Iowa 272; *Butler v. Nelson*, 72 Iowa 732.

*Kentucky.* — *McAdams v. Mitchell*, 10 Ky. L. Rep. 856; *Wilson v. Calvert*, 15 Ky. L. Rep. 489.

*Michigan.* — *Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Mich. 244; *Pulte v. Geller*, 47 Mich. 560.

*Missouri.* — *Vogler v. Montgomery*, 54 Mo. 577.

*Nebraska.* — *Bladen Bank v. David*, 53 Neb. 608.

*Texas.* — *Cox v. Shropshire*, 25 Tex. 124; *Willis v. Mike*, 76 Tex. 84.

**2. Motive of Vendor Immaterial** — *United States.* — *Green v. Root*, 62 Fed. Rep. 191.

*Illinois.* — *Vaughan v. Thompson*, 17 Ill. 78. See also *Getzler v. Saroni*, 18 Ill. 511.

*Iowa.* — *Wheeler, etc., Mfg. Co. v. Bjelland*, 97 Iowa 637; *Butler v. Nelson*, 72 Iowa 732.

*Kentucky.* — *Feighan v. Jackson*, 7 Ky. L. Rep. 749; *Dowd v. Hurley*, 78 Ky. 260.

*Michigan.* — *Smith v. Rumsey*, 33 Mich. 183.

*Minnesota.* — See *Piper v. Johnston*, 12 Minn. 60.

*Mississippi.* — *Hodges v. Hickey*, 67 Miss. 716.

*Missouri.* — *Vogler v. Montgomery*, 54 Mo. 577.

*Nebraska.* — *Bladen Bank v. David*, 53 Neb. 608. See also *Munson v. Carter*, 40 Neb. 417.

*Texas.* — *Wood v. Chambers*, 20 Tex. 247.

**3. Effect of Constitutional Limitation.** — Where the constitution of the state has authorized the alienation or incumbrance of the homestead for certain enumerated purposes only, a statute authorizing its alienation or incumbrance for other purposes is void. *Roberts v. Trammell*, 55 Ga. 383.

**4. Requirement that Wife Shall Join in or Consent to Alienation or Incumbrance** — *United*

Rule Must Be Established by Constitution or Statute. — No such rule exists, however,

*States*. — Connecticut Mut. L. Ins. Co. v. Jones, 8 Fed. Rep. 303; Hannon v. Sommer, 3 McCrary (U. S.) 126, 10 Fed. Rep. 601; *In re* Cross, 2 Dill. (U. S.) 320, 6 Fed. Cas. No. 3,426; *In re* Smith, 2 Hughes (U. S.) 307, 22 Fed. Cas. No. 12,979; Hill v. Hite, 79 Fed. Rep. 826.

*Alabama*. — McGuire v. Van Pelt, 55 Ala. 344; Miller v. Marx, 55 Ala. 322; Balkum v. Wood, 58 Ala. 642; Halso v. Seawright, 65 Ala. 431; Long v. Mostyn, 65 Ala. 543; Jenkins v. Harrison, 66 Ala. 345; Slaughter v. McBride, 69 Ala. 510; Scott v. Simons, 70 Ala. 352; Snedecor v. Freeman, 71 Ala. 140; De Graffenried v. Clark, 75 Ala. 425; Alford v. Lehman, 76 Ala. 526; Watson v. Mancill, 76 Ala. 600; Crim v. Nelms, 78 Ala. 604; Strauss v. Harrison, 79 Ala. 324; Moses v. McClain, 82 Ala. 370; Hood v. Powell, 73 Ala. 171; McGhee v. Wilson, 111 Ala. 615; Garner v. Bond, 61 Ala. 84.

*Arizona*. — Hancock v. Herrick, (Ariz. 1891) 29 Pac. Rep. 13.

*Arkansas*. — Pipkin v. Williams, 57 Ark. 242; Harrison Bank v. Gibson, 60 Ark. 269; Shattuck v. Byford, 62 Ark. 431; Bluff City Lumber Co. v. Bloom, 64 Ark. 492.

*California*. — Taylor v. Hargous, 4 Cal. 273; Dorsey v. McFarland, 7 Cal. 342; Dunn v. Tozer, 10 Cal. 167; Matter of Tompkins, 12 Cal. 125; Lies v. De Diablar, 12 Cal. 327; Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603; McHendry v. Reilly, 13 Cal. 76; Gee v. Moore, 14 Cal. 472; Bowman v. Norton, 16 Cal. 218; Cohen v. Davis, 20 Cal. 187; Peterson v. Hornblower, 33 Cal. 266; Barber v. Babel, 36 Cal. 11; Brooks v. Hyde, 37 Cal. 366; Burkett v. Burkett, 78 Cal. 310, 12 Am. St. Rep. 58; Moss v. Warner, 10 Cal. 296; Powell v. Patison, 100 Cal. 236; Cook v. Klink, 8 Cal. 347; Gleason v. Spray, 81 Cal. 217, 15 Am. St. Rep. 47; Bunting v. Saltz, 84 Cal. 168; Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158; Faivre v. Daley, 93 Cal. 664; Flege v. Garvey, 47 Cal. 371; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Merced Bank v. Rosenthal, 99 Cal. 39. See also Sargent v. Wilson, 5 Cal. 506; Clarkin v. Lewis, 20 Cal. 634; Van Reyne-gan v. Revalk, 8 Cal. 75; Watts v. Gallagher, 97 Cal. 47.

*Colorado*. — Wright v. Whittick, 18 Colo. 54.

*Dakota*. — Myrick v. Bill, 5 Dak. 167.

*Illinois*. — Maxwell v. Maxwell, 145 Ill. 156; Milwaukee Mechanics' Mut. Ins. Co. v. Ketterlin, 24 Ill. App. 188; Kitterlin v. Milwaukee Mechanics' Mut. Ins. Co., 134 Ill. 647; Anderson v. Smith, 159 Ill. 93; Patterson v. Kreig, 29 Ill. 514; Best v. Allen, 30 Ill. 30; Smith v. Miller, 31 Ill. 161; Thornton v. Boyden, 31 Ill. 211; Connor v. Nichols, 31 Ill. 153; Pardee v. Lindley, 31 Ill. 174; Hoskins v. Litchfield, 31 Ill. 144; Marshall v. Barr, 35 Ill. 108; Gray v. Schofield, 175 Ill. 36; Donahoe v. Chicago Cricket Club, 177 Ill. 351; Hotchkiss v. Brooks, 93 Ill. 386, *affirming* 4 Ill. App. 175; McDonald v. Crandall, 43 Ill. 231; Eldridge v. Pierce, 90 Ill. 474; Browning v. Harris, 99 Ill. 456; McMahlill v. McMahlill, 105 Ill. 596; Laggar v. Mutual Union Loan, etc., Assoc., 146 Ill. 283; Stahl v. Stahl, 114 Ill. 375; Rich-

ards v. Greene, 73 Ill. 54. See also Stafford v. Woods, 144 Ill. 203.

*Iowa*. — Drake v. Painter, 77 Iowa 731; Harsh v. Griffin, 72 Iowa 608; Burnap v. Cook, 16 Iowa 153, 85 Am. Dec. 507; O'Brien v. Young, 15 Iowa 5; Seiffert v. Hartwell, 94 Iowa 576, 58 Am. St. Rep. 413; Larson v. Reynolds, 13 Iowa 579, 81 Am. Dec. 444; Goodrich v. Brown, 63 Iowa 247; Clay v. Richardson, 59 Iowa 483; Morris v. Sargent, 18 Iowa 90; Garlock v. Baker, 46 Iowa 334; Outumwa, etc., R. Co. v. McWilliams, 71 Iowa 164; Bolton v. Oberne, 79 Iowa 278; Lunt v. Neeley, 67 Iowa 97; Guion v. Giller, 101 Iowa 333; Spoon v. Van Fossen, 53 Iowa 494; Stinson v. Richardson, 44 Iowa 373; Bruner v. Bateman, 66 Iowa 488. See also Yost v. Devault, 9 Iowa 60; Alley v. Bay, 9 Iowa 510; Larson v. Reynolds, 13 Iowa 581, 81 Am. Dec. 444; Roane v. Hamilton, 101 Iowa 250; Lamb v. Shays, 14 Iowa 570; Eli v. Gridley, 27 Iowa 378; Babcock v. Hoey, 11 Iowa 375; Rogers v. McFarland, 89 Iowa 286; Stevens v. Myers, 11 Iowa 184; Lay v. Gibbons, 14 Iowa 377, 81 Am. Dec. 487; Blake v. McCosh, 91 Iowa 544.

*Kansas*. — Dudley v. Shaw, 44 Kan. 683; Ott v. Sprague, 27 Kan. 620; Morris v. Ward, 5 Kan. 239; Dollman v. Harris, 5 Kan. 598; Jenkins v. Simmons, 37 Kan. 496; Howell v. McCrie, 36 Kan. 636, 59 Am. Rep. 584; Wallace v. Travelers' Ins. Co., 54 Kan. 442, 45 Am. St. Rep. 288; Hill v. Alexander, 2 Kan. App. 251; Hoffman v. Hill, 47 Kan. 611; Hogan v. Manners, 23 Kan. 551, 33 Am. Rep. 199; Chambers v. Cox, 23 Kan. 393; Helm v. Helm, 11 Kan. 21; Schermerhorn v. Mahaffie, 34 Kan. 108; Hafer v. Hafer, 33 Kan. 464; Locke v. Redmond, 6 Kan. App. 76. See also Franklin Land Co. v. Wea Gas, etc., Co., 43 Kan. 518.

*Kentucky*. — Sup. Ct. of Kansas, 1 Ky. L. Rep. 200; Atkinson v. Gowdy, (Ky. 1888) 8 S. W. Rep. 698; Taylor v. Dismuke, 15 Ky. L. Rep. 703; Tong v. Eifort, 80 Ky. 152, 3 Ky. L. Rep. 647; Hemphill v. Haas, 88 Ky. 492, 11 Ky. L. Rep. 62. See also Davis v. Jenkins, 93 Ky. 353, 40 Am. St. Rep. 197; Lear v. Totten, 14 Bush (Ky.) 101.

*Massachusetts*. — Adams v. Jenkins, 16 Gray (Mass.) 146; Richards v. Chace, 2 Gray (Mass.) 383. See also Howes v. Burt, 130 Mass. 368; Connor v. McMurray, 2 Allen (Mass.) 202, 205; Silloway v. Brown, 12 Allen (Mass.) 32; Greenough v. Turner, 11 Gray (Mass.) 334.

*Michigan*. — Hall v. Loomis, 63 Mich. 709; Beecher v. Baldy, 7 Mich. 488; Phillips v. Stauch, 20 Mich. 369; Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200; Fisher v. Meister, 24 Mich. 447; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Comstock v. Comstock, 27 Mich. 97; Wallace v. Harris, 32 Mich. 380; Stevenson v. Jackson, 40 Mich. 702; Watertown F. Ins. Co. v. Grover, etc., Sewing Mach. Co., 41 Mich. 131, 32 Am. Rep. 146; Girzi v. Carey, 53 Mich. 447; Shoemaker v. Collins, 49 Mich. 597; Gadsby v. Monroe, 115 Mich. 282; Sammon v. Wood, 107 Mich. 506; Dye v. Mann, 10 Mich. 291; People v. Plumsted, 2 Mich. 465; Wisner v. Farnham, 2 Mich. 472;



in the absence of some constitutional or statutory provision establishing it.<sup>1</sup>  
**Existence of Wife Must Be Shown.** — In order to avoid a conveyance of a home-

*Hammond v. Rathbone*, 113 Mich. 499; *Sherrid v. Southwick*, 43 Mich. 515; *Amphlett v. Hibbard*, 29 Mich. 298; *Dikeman v. Arnold*, 71 Mich. 656. See also *Tharp v. Allen*, 46 Mich. 389; *Engle v. White*, 104 Mich. 15.

*Minnesota.* — *Law v. Butler*, 44 Minn. 482; *Barton v. Drake*, 21 Minn. 299; *Ferguson v. Kumler*, 25 Minn. 183; *Jelinek v. Stepan*, 41 Minn. 412; *Smith v. Lackor*, 23 Minn. 454; *Coles v. Yorks*, 28 Minn. 464; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681; *Conway v. Elgin*, 38 Minn. 469.

*Mississippi.* — *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654; *Howell v. Bush*, 54 Miss. 437; *Massey v. Womble*, 69 Miss. 347; *Cummings v. Busby*, 62 Miss. 195; *Scott v. Scott*, 73 Miss. 575; *Duncan v. Moore*, 67 Miss. 136; *Walton v. Walton*, 76 Miss. 662; *Pounds v. Clarke*, 70 Miss. 263; *Taylor v. Smith*, 54 Miss. 50. See also *Foote v. Hambrick*, 70 Miss. 157, 35 Am. St. Rep. 631; *Wilson v. Gray*, 59 Miss. 525.

*Missouri.* — *Parks v. Connecticut F. Ins. Co.*, 26 Mo. App. 511; *Greer v. Major*, 114 Mo. 145; *Riecke v. Westenhoff*, 85 Mo. 642.

*Montana.* — *American Sav., etc., Assoc. v. Burghardt*, 19 Mont. 323, 61 Am. St. Rep. 507; *Watterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527.

*Nebraska.* — *Betts v. Sims*, 25 Neb. 166; *Larson v. Butts*, 22 Neb. 370; *Prout v. Burke*, 51 Neb. 24; *Morrill v. Skinner*, 57 Neb. 164; *Interstate Sav., etc., Assoc. v. Strine*, (Neb. 1899) 78 N. W. Rep. 377; *France v. Bell*, 52 Neb. 57; *Bonorden v. Kriz*, 13 Neb. 122; *Phillips v. Bishop*, 31 Neb. 853; *McCreery v. Schaffer*, 26 Neb. 173. See also *Cobbey v. Knapp*, 23 Neb. 57.

*Nevada.* — *Clark v. Shannon*, 1 Nev. 568.

*New Hampshire.* — *Gunnison v. Twitchel*, 38 N. H. 62. See also *Smith v. Hall*, 67 N. H. 200.

*North Carolina.* — *Fleming v. Graham*, 110 N. Car. 374; *Hughes v. Hodges*, 102 N. Car. 236; *Lambert v. Kinnery*, 74 N. Car. 348; *Witkowsky v. Gidney*, 124 N. Car. 437; *Thomas v. Fulford*, 117 N. Car. 667; *Jenkins v. Bobbitt*, 77 N. Car. 385.

*Tennessee.* — *Collins v. Boyett*, 87 Tenn. 334; *Carter v. Hatton*, King's Tenn. Dig. 1231; *Williams v. Williams*, King's Tenn. Dig. 1231; *Mash v. Russell*, 1 Lea (Tenn.) 543; *Caruthers v. Caruthers*, 2 Lea (Tenn.) 71; *Caldwell v. Bowman*, King's Tenn. Dig. 1232; *Neam v. Campbell*, King's Tenn. Dig. 1235; *Cox v. Keathley*, 99 Tenn. 522; *Cookville Bank v. Brier*, (Tenn. Ch. 1897) 43 S. W. Rep. 140; *First Nat. Bank v. Mcachem*, (Tenn. Ch. 1896) 36 S. W. Rep. 724; *Nichol v. Davidson County*, 8 Lea (Tenn.) 389; *Christian v. Clark*, 10 Lea (Tenn.) 630; *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Fanver v. Fleenor*, 13 Lea (Tenn.) 622; *Rhea v. Rhea*, 15 Lea (Tenn.) 527.

*Texas.* — *Myers v. Evans*, 81 Tex. 317; *Wheatley v. Griffin*, 60 Tex. 209; *Sampson v. Williamson*, 6 Tex. 102; *Berlin v. Burns*, 17 Tex. 532; *Brewer v. Wall*, 23 Tex. 589; *Moore v. Wills*, 69 Tex. 109; *Stallings v. Hullum*, 89 Tex. 431; *Sherring v. Augustus*, 11 Tex. Civ.

App. 194; *Freeman v. Hamblin*, 1 Tex. Civ. App. 157; *Rogers v. Renshaw*, 37 Tex. 625; *Morrill v. Hopkins*, 36 Tex. 686; *Welch v. Rice*, 31 Tex. 688, 98 Am. Dec. 556; *Young v. Van Benthuyzen*, 30 Tex. 763; *Kirkland v. Little*, 41 Tex. 456; *Goff v. Jones*, 70 Tex. 572; *Allison v. Shilling*, 27 Tex. 454; *Cross v. Everts*, 28 Tex. 523; *Houghton v. Marshall*, 31 Tex. 198; *Paris, etc., R. Co. v. Greiner*, 84 Tex. 443; *Newman v. Farquhar*, 60 Tex. 640; *Coker v. Roberts*, 71 Tex. 597; *Gaylord v. Loughridge*, 50 Tex. 573. See also *Mabry v. Harrison*, 44 Tex. 287; *Barnes v. White*, 53 Tex. 628; *Cadwallader v. Campbell*, (Tex. Civ. App. 1895) 31 S. W. Rep. 829.

*Vermont.* — *Day v. Adams*, 42 Vt. 516; *Danforth v. Beattie*, 43 Vt. 138; *Spaulding v. Crane*, 46 Vt. 292; *Abell v. Lothrop*, 47 Vt. 375.

*Washington.* — *Anderson v. Sadlmann*, 17 Wash. 433.

*Wisconsin.* — *O'Malley v. Ruddy*, 79 Wis. 147; *Kent v. Lasley*, 48 Wis. 257; *Kent v. Agard*, 22 Wis. 150; *Godfrey v. Thornton*, 46 Wis. 677; *Ferguson v. Mason*, 60 Wis. 377; *McCabe v. Mazzuchelli*, 13 Wis. 478; *Hait v. Houle*, 19 Wis. 472; *Herron v. Knapp*, 72 Wis. 553; *Barker v. Dayton*, 28 Wis. 367; *Phelps v. Rooney*, 9 Wis. 70; *Williams v. Starr*, 5 Wis. 534; *Chopin v. Runte*, 75 Wis. 361; *Dunn v. Buckley*, 56 Wis. 190. See also *Green v. Pierce*, 60 Wis. 372; *Green v. Lyndes*, 12 Wis. 404; *Bunker v. Locke*, 15 Wis. 635.

**Necessity for Joinder or Consent of Husband in Alienation or Incumbrance of Homestead by Wife.** — *Clay v. Richardson*, 59 Iowa 483; *Matney v. Linn*, 59 Kan. 613; *Dollman v. Harris*, 5 Kan. 597.

**Full Consideration.** — The fact that a full consideration was paid cannot prevent the operation of the rule established by the statute that a conveyance by the husband without the joinder of the wife is invalid. *Carter v. Hatton*, King's Tenn. Dig. 1231; *Williams v. Williams*, King's Tenn. Dig. 1231; *Mash v. Russell*, 1 Lea (Tenn.) 543; *Caruthers v. Caruthers*, 2 Lea (Tenn.) 71.

**Pre-existing Debt.** — Nor can the fact that the conveyance is for a debt existing before the homestead right accrued affect the operation of the rule. *Parks v. Connecticut F. Ins. Co.*, 26 Mo. App. 511; *Higley v. Millard*, 45 Iowa 586; *Slaughter v. McBride*, 69 Ala. 510.

**Authority Given to Agent to Sell Before Marriage.** — The fact that a man has conferred upon an agent authority to sell his homestead before his marriage will not authorize him to sell it after his marriage, either in person or by his agent, without his wife's joining in the conveyance, and this though the authority to the agent to sell has never been revoked. *Henderson v. Ford*, 46 Tex. 628.

**1. Rule Must Be Established by Constitution or Statute.** — See the following cases:

*Arkansas.* — *Lindsay v. Merrill*, 36 Ark. 545; *Klenk v. Knoble*, 37 Ark. 208.

*Kentucky.* — *Whitesides v. Cushenberry*, 8 Ky. L. Rep. 590; *Pribble v. Hall*, 13 Bush (Ky.) 62.



stead on the ground that the wife of the grantor did not join therein it must be shown that he had a wife living at the time when the conveyance was made.<sup>1</sup>

*b. REASON OF RULE.* — The object, purpose, and intent of constitutional or statutory provisions that a married man shall not sell his homestead without the consent of the wife, given in such manner as may be prescribed by law, are to protect the wife in the homestead against the improvidence of the husband as well as against the rapacity of the creditor.<sup>2</sup>

*c. NATURE OF WIFE'S RIGHT.* — It has been considered that the establishment of the rule set out above vests in the wife no estate or property right in the homestead, but merely gives to her what has been aptly characterized as a "veto power" on its alienation or incumbrance.<sup>3</sup>

*d. CONSTITUTIONALITY OF STATUTES.* — Statutes prohibiting or making void any alienation or incumbrance of the homestead by a married man without the joinder or consent of his wife have been held constitutional.<sup>4</sup> But a statute forbidding any alienation or incumbrance of the homestead for the purpose of securing a loan or indebtedness has been held to be void as in conflict with a constitutional provision authorizing the creation of such liens by consent of both husband and wife.<sup>5</sup>

*e. APPLICATIONS OF RULE* — (1) *Homestead Held under Equitable Title.* — Where the homesteader has only the equitable title to the homestead lands he cannot transfer such title without the consent of his wife,<sup>6</sup> and her signature has also been held necessary to a valid conveyance of the legal title by the holder thereof.<sup>7</sup>

(2) *Homestead Held under Contract of Purchase.* — Where land occupied as a homestead is held under a contract for the purchase thereof, the husband cannot, without the joinder of his wife, extinguish the homestead right by an assignment of his contract or certificate of purchase, or title bond,<sup>8</sup> or even,

*Mississippi.* — *Massey v. Womble*, 69 Miss. 347.

*Missouri.* — *Lewis v. Curry*, 74 Mo. 49; *Riecke v. Westenhoff*, 85 Mo. 642.

*Nebraska.* — *Schields v. Horbach*, 49 Neb. 262.

*Tennessee.* — *Bilbrey v. Poston*, 4 Baxt. (Tenn.) 232; *Nichol v. Davidson County*, 8 Lea (Tenn.) 389; *Kincaid v. Buren*, 9 Lea (Tenn.) 553; *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220.

*Utah.* — *Cook v. Higley*, 10 Utah 228.

*Wisconsin.* — *Platto v. Cady*, 12 Wis. 461.

1. *Existence of Wife Must Be Shown.* — *McLean v. Ellis*, 79 Tex. 398.

2. *Reason of Rule.* — *Jones v. Goff*, 63 Tex. 248. See also *Allison v. Shilling*, 27 Tex. 450.

3. *Nature of Wife's Right.* — *Massey v. Womble*, 69 Miss. 347; *Billingsley v. Niblett*, 56 Miss. 537; *Pounds v. Clarke*, 70 Miss. 263; *Smith v. Scherck*, 60 Miss. 491; *Creath v. Creath*, 86 Tenn. 659; *Godfrey v. Thornton*, 46 Wis. 677.

In *Rogers v. McFarland*, 89 Iowa 286, it was said that the wife had a vested right in the homestead, the legal title to which was vested in the husband, which right she was entitled to protect by suitable measures.

4. *Not Interference with Vested Rights.* — *Massey v. Womble*, 69 Miss. 347.

*Not Impairment of Obligation of Contracts.* — *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220.

*Not Interference with Allodial Tenure of Lands.* — *Barker v. Dayton*, 28 Wis. 367.

5. *Statute Forbidding any Alienation or Incumbrance to Secure Loan.* — *Dunker v. Chedic*, 4 Nev. 378. Mr. Thompson, in his work on Homesteads and Exemptions (§ 466), has ex-

pressed his entire disapproval of this decision, but nevertheless the reasoning of the case appears sound.

6. *Wife Must Consent to Transfer of Equitable Title.* — *Moore v. Reeves*, 15 Kan. 150.

7. *Necessity for Joinder of Homesteader's Wife in Conveyance of Legal Title.* — *Jelinek v. Stepan*, 41 Minn. 412.

8. *Assignment by Husband Alone of Contract, etc., Does Not Extinguish Homestead Rights — California.* — *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158.

*Illinois.* — *Stafford v. Woods*, 144 Ill. 203.

*Iowa.* — *Drake v. Moore*, 66 Iowa 58. See also *Zelden v. Younger*, 76 Iowa 567, in which latter case the same principle was applied to an assignment by the wife alone. But compare *Dahl v. Thompson*, 98 Iowa 599.

*Michigan.* — *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Allen v. Cadwell*, 55 Mich. 8.

*Minnesota.* — *Law v. Butler*, 44 Minn. 482; *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107.

*Tennessee.* — *Fauver v. Fleenor*, 13 Lea (Tenn.) 622.

*Texas.* — *Wheatley v. Griffin*, 60 Tex. 209; *Morris v. Geisecke*, 60 Tex. 633.

The assignment of a bond for a deed of property by a husband, without the concurrence of his wife, conveys nothing, for Code Iowa (1873), § 1990 (Code 1897, § 2974), provides that a conveyance or incumbrance of the homestead by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument. And the wife neither relinquishes her homestead rights nor estops herself by

it has been held, by acknowledging the forfeiture of his rights thereunder.<sup>1</sup>

(3) *Homestead in Leased Premises*. — Similarly, when a homestead has been acquired in leased premises the lessee cannot assign his leasehold rights therein without the concurrence of his wife.<sup>2</sup>

(4) *Occupation of More Land than Can Be Held Exempt*. — It has been held in *Iowa* that where a husband and wife are occupying as a homestead more land than the law exempts as such, and the homestead has not been selected and platted as required by law, a mortgage executed by the husband alone on any part of the land so occupied is invalid.<sup>3</sup>

(5) *Ownership by Husband of Other Property Exceeding in Value Statutory Exemption*. — The invalidity of a conveyance by the husband, without the joinder of his wife, of so large a portion of the tract of land occupied by them as a homestead that the value of the part retained is less than the statutory exemption is not affected by the fact that the husband owns and retains other land worth more than the amount which can be held exempt as a homestead.<sup>4</sup>

(6) *Sale of Timber Growing on Homestead*. — Since growing trees constitute a part of the realty, a sale by the husband, without the joinder of his wife, of all the merchantable timber growing on the homestead is void.<sup>5</sup>

(7) *Chattel Mortgage on Improvements*. — The rule that a mortgage on the homestead by the husband without the joinder of his wife is invalid applies to a chattel mortgage on improvements on the land.<sup>6</sup>

(8) *Dedication to Public Use*. — It is not within the power of a husband to dedicate the homestead to public use without the consent of his wife.<sup>7</sup>

(9) *Relinquishment of Equity of Redemption*. — The relinquishment by a husband alone of the equity of redemption in a mortgaged homestead cannot prejudice the wife's rights.<sup>8</sup>

(10) *Changing Character of Lien, Renewing, Etc.* — It has been considered that a husband alone cannot, by his contract, change the character or priority of a mortgage lien on the homestead; neither can he alone restore it after loss, payment, or discharge, or recreate it, without the consent of his wife in the exact manner prescribed by law.<sup>9</sup>

verbally consenting to such an assignment. *Sinton v. Richardson*, 44 Iowa 373.

When the homestead right has attached, however feeble may be the estate to which it attaches, it can be divested, so long as it is not in some way abandoned, only by a conveyance made by the husband and the wife in the manner prescribed by law. *Wheatley v. Guthrie*, 60 Tex. 209, in which case this rule was applied to a homestead in county school lands, which the husband and wife had contracted to purchase, and upon which certain annual instalments of the purchase money had been paid. See also *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107.

**Surrender and Cancellation of Contract of Purchase Without Consent of Wife Does Not Defeat Her Rights.** — *McKee v. Wilcox*, 11 Mich. 359, 83 Am. Dec. 743.

**Mortgage Without Joinder of Wife on Land Held under Title Bond Does Not Defeat Homestead.** — *Griffin v. Proctor*, 14 Bush (Ky.) 571.

**1. Acknowledgment of Forfeiture of Contract of Sale Without Joinder of Wife Void.** — *Lessell v. Goodman*, 97 Iowa 681, 59 Am. St. Rep. 432.

**2. Homestead in Leased Premises.** — *Peterson v. De Bevard*, 13 Iowa 53. See also *Maatta v. Kippola*, 102 Mich. 116.

**Buildings Erected on the Leased Premises cannot be alienated without the concurrence of the wife of the tenant.** *Watts v. Gordon*, 65

Ala. 546; *Weber v. Short*, 55 Ala. 311. Compare *Pizzala v. Campbell*, 46 Ala. 35.

**3. Occupation of More Land Than Can Be Held Exempt.** — *Goodrich v. Brown*, 63 Iowa 247, distinguishing *Helfenstein v. Cave*, 3 Iowa 287, 6 Iowa 374, which was decided under a different statute. See also *Woolcut v. Lerdell*, 78 Iowa 668.

**4. Ownership by Husband of Other Property Exceeding in Value Statutory Exemption.** — *Cottrell v. Rogers*, 99 Tenn. 483.

**5. Sale of Timber Growing on Homestead.** — *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654. See also *Pritchett v. Davis*, 101 Ga. 236. But compare *Harkness v. Burton*, 39 Iowa 101, in which case the court said: "We have never heard that \* \* \* licenses to cut timber [on the homestead] \* \* \* may not be given by the husband without the assent of the wife."

**6. Chattel Mortgage on Improvements.** — *Waterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527. See also *Watts v. Gordon*, 65 Ala. 546; *Weber v. Short*, 55 Ala. 311.

**7. Dedication to Public Use.** — *San Francisco v. Grote*, 120 Cal. 59.

**8. Relinquishment of Equity of Redemption.** — *Haggerty v. Brower*, 105 Iowa 305.

**9. Changing Character of Lien, Renewing, Etc.** — *Barber v. Babel*, 36 Cal. 11; *Jenkins v. Simmons*, 37 Kan. 496; *Dunn v. Buckley*, 56 Wis. 190. See also *Blake v. McCosh*, 91 Iowa 544.



(11) *Contracts to Convey*. — It is very generally considered that a contract entered into by one spouse alone to convey the homestead cannot be specifically enforced,<sup>1</sup> nor can the purchaser recover damages for the nonperformance of such a contract.<sup>2</sup>

But compare *Mahon v. Cooley*, 36 Iowa 479; *Jenness v. Cutter*, 12 Kan. 500; *Smith v. Scherck*, 60 Miss. 491.

Where a wife joins with her husband in the execution of a deed, absolute in form, covering their homestead, which she executes for the purpose and with the intention and understanding that it is to secure a certain amount of indebtedness due from her husband, the husband and the mortgagee will not be permitted materially to change and alter the transaction to which the wife gave her consent in executing such deed, by executing between themselves, independently of her, and without her knowledge and consent, a separate instrument or defeasance, as part of such mortgage, by which materially new conditions and an increased amount are engrafted into the mortgage. In such case the deed absolute will be held to be a valid mortgage, only for the amount and upon the conditions understood and consented to by the wife. *State First Nat. Bank v. Ashmead*, 33 Fla. 416.

**Mortgage which Has Been Paid Cannot Without Joinder of Wife Be Made Security for Another Debt.** — *Spencer v. Fredendall*, 15 Wis. 666. But compare *Vaughn v. Powell*, 65 Miss. 401, in which case a contrary rule was asserted in the case of a deed of trust on crops to be grown on the homestead.

**Future Advances.** — A mortgage of a homestead will not cover future advances where there is no provision in the instrument therefor nor any consent of the wife thereto, and there is a part indebtedness to which it can apply. *Dunn v. Buckley*, 56 Wis. 190.

**An Agreement by Which the Mortgagee Is to Pay Insurance Premiums on the Homestead and be Secured Therefor by the Mortgage May be Made by the Husband Alone, since such an agreement will be considered as being for the preservation of the homestead.** *Blake v. McCosh*, 91 Iowa 544.

**1. Contract of One Spouse Alone to Convey Homestead Cannot Be Specifically Enforced — Alabama.** — *Moses v. McClain*, 82 Ala. 370.

*Dakota.* — *Myrick v. Bill*, 5 Dak. 167.

*Iowa.* — *Donner v. Redenbaugh*, 61 Iowa 271; *Yost v. Devault*, 9 Iowa 60; *Woolcut v. Lerdell*, 78 Iowa 668; *Cowgell v. Warrington*, 66 Iowa 666. See also *Wilson v. Riddick*, 100 Iowa 697; *Barnett v. Mendenhall*, 42 Iowa 296.

*Michigan.* — *Phillips v. Stauch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709. See also *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200.

*Minnesota.* — *Weitzner v. Thingstad*, 55 Minn. 244.

*Nebraska.* — *Clarke v. Koenig*, 36 Neb. 572; *Larson v. Butts*, 22 Neb. 370; *Aultman, etc., Co. v. Jenkins*, 19 Neb. 211; *Swift v. Dewey*, 20 Neb. 107.

*Texas.* — See *Brewer v. Wall*, 23 Tex. 585; *Allison v. Shilling*, 27 Tex. 450; *Nichols v. Gordon*, 25 Tex. Supp. 109; *Cross v. Everts*, 28 Tex. 523.

Compare *Blake v. Flatley*, 44 N. J. Eq. 228.

**Parol Agreement of Wife Alone to Execute Mortgage.** — In *Clay v. Richardson*, 59 Iowa 483, it was held that a lien against a homestead based upon a parol agreement of the wife, who held the legal title, to execute a mortgage on the property could not be enforced, because under the statute no incumbrance of the homestead was of any validity unless based upon a written instrument signed by both husband and wife.

**Oral Assent of Wife.** — A written contract made by the husband for the conveyance of the homestead, with only the oral concurrence of the wife, is void. *Donner v. Redenbaugh*, 61 Iowa 269. See also *Anderson v. Culbert*, 55 Iowa 233; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200.

**Right of Either Husband or Wife to Rescind Contract for Fraud of Purchaser.** — Where there is a verbal contract for the sale of a homestead made by the husband and wife with another person, with part performance and possession by the purchaser of such homestead, and upon investigation soon after it is discovered by the husband and wife that they have been greatly defrauded by the fraudulent representations of the purchaser and on account of such fraud have the right to avoid the contract, either or both may, upon the return of the property received under the contract, exercise the right to rescind, and any act of the husband in affirmation or recognition of such fraudulent contract, after the discovery of the fraud committed and without the consent or knowledge of the wife, is not binding on her. *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433.

**Adverse Possession under Contract of Sale.** — One who has taken possession of a homestead under a contract of sale with the owner alone, his wife not joining or consenting, may acquire perfect title as against the wife by continuing in possession for the statutory period. *Boling v. Clark*, 83 Iowa 481.

**2. Damages Not Recoverable for Nonperformance of Such Contract — Iowa.** — *Barnett v. Mendenhall*, 42 Iowa 296; *Clark v. Evarts*, 46 Iowa 248; *Cowgell v. Warrington*, 66 Iowa 666. See also *Donner v. Redenbaugh*, 61 Iowa 271.

*Kansas.* — *Thimes v. Stumpff*, 33 Kan. 53; *Hodges v. Farnham*, 49 Kan. 777.

*Minnesota.* — *Weitzner v. Thingstad*, 55 Minn. 244.

**The Rule Is Otherwise in Texas, where it has been held that during the life of the wife damages, or the amount expended by the purchaser in good faith under the contract of sale, may be recovered against the husband for nonperformance of his sole contract to convey the homestead.** *Wright v. Hays*, 34 Tex. 253; *Brewer v. Wall*, 23 Tex. 585; *Eberling v. Verein*, 72 Tex. 339; *Kempner v. Heidenheimer*, 65 Tex. 587; *Goff v. Jones*, 70 Tex. 572.

**Excess in Value of Land over Price Agreed on Not Recoverable.** — *Donner v. Redenbaugh*, 61 Iowa 269.



**Recovery of Purchase Money.** — In one case in *Kansas* the court even went so far as to deny the right of the purchaser to recover back a payment on account of purchase money which he had made under such contract, considering it to have been a voluntary payment with full knowledge of the invalidity of the contract.<sup>1</sup> But in *Iowa* the purchaser has been allowed to recover back his purchase money and interest.<sup>2</sup>

**Effect of Joinder of Wife in Contract to Convey.** — In *Alabama* and *Texas* it is considered that a contract to convey the homestead cannot be specifically enforced even though the wife of the homesteader has joined therein, for such a joinder is not the joinder in and consent to the alienation which is required by the constitution and statutes.<sup>3</sup>

**When Specific Performance May Be Enforced.** — It has been held in *Texas* that a suit for specific performance of a contract to convey a homestead may be maintained if at any time before the contract is barred the homestead is abandoned and a new homestead is acquired,<sup>4</sup> or, in the case of a contract by the husband alone, if the wife dies within such time.<sup>5</sup> And in an *Illinois* case, where a husband alone had entered into a contract to convey property greatly exceeding in value the homestead exemption allowed by statute, though he and his wife occupied it as a homestead, it was held that, though the contract was not signed by the wife, the court would decree specific performance where the purchaser agreed to accept a deed conveying the property subject to the homestead rights of the vendor. The court considered this a proper case for the application of the rule that the husband alone could convey the excess over the homestead.<sup>6</sup>

(12) **Effect of Disclaimer of Homestead.** — A conveyance by a husband, without the concurrence of his wife, of premises which he has selected and adopted as the appointed home of his family is invalid, although at the time of making such conveyance he disclaimed that the property was his homestead.<sup>7</sup>

(13) **Acts of Husband Sufficient to Create Lien by Estoppel.** — Though acts of a husband are sufficient to create a lien by estoppel as against him, they cannot result in a lien on the homestead where the wife did not participate in them.<sup>8</sup>

(14) **Conveyance by Wife of Homestead Previously Conveyed to Her by Husband.** — A deed of the homestead from the husband to the wife does not operate as a surrender of the husband's homestead rights in the property conveyed so as to enable the wife to convey the homestead to another without the joinder of the husband.<sup>9</sup>

(15) **Marriage Subsequent to Application for Loan.** — The wife's right in the homestead cannot be subordinated to a mortgage executed by her hus-

1. Purchase Money Cannot Be Recovered Back. — *Thimes v. Stumpff*, 33 Kan. 53. Compare *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 411.

2. Purchase Money Paid May Be Recovered Back with Interest in Iowa. — *Danner v. Reidenbaugh*, 61 Iowa 260; *De Kalb v. Hingston*, 104 Iowa 23.

3. Contract to Convey Homestead Cannot Be Specifically Enforced Though Wife Joined Therein. — *Alabama*. — *Blythe v. Dargin*, 68 Ala. 370. See also *Jenkins v. Harrison*, 66 Ala. 347; *Butts v. Broughton*, 72 Ala. 294.

*Texas*. — *Jones v. Goff*, 63 Tex. 248. See also *Eberling v. Verein*, 72 Tex. 339; *Brewer v. Wall*, 23 Tex. 589; *Cross v. Everts*, 28 Tex. 534; *Goff v. Jones*, 70 Tex. 572.

4. Effect of Abandonment of Homestead Before Contract to Convey Is Barred. — *Goff v. Jones*, 70 Tex. 572. See also *Brewer v. Wall*, 23 Tex. 589; *Eberling v. Verein*, 72 Tex. 339; *Cross v. Everts*, 28 Tex. 534.

5. Death of Wife. — *Wright v. Hays*, 34 Tex. 253. See also cases cited in the preceding note.

6. Homestead Largely Exceeding in Value Authorized Exemption. — Agreement of Purchaser to Hold Subject to Homestead Right. — *Watson v. Doyle*, 130 Ill. 415. In this case the property was worth fifty thousand dollars, while under the statute the exemption was allowed only to the extent of one thousand dollars.

7. Disclaimer of Homestead. — *Williams v. Swetland*, 10 Iowa 51.

8. Estoppel as Against Husband Cannot Affect Homestead. — *Kallman v. Ludenecker*, 9 Tex. Civ. App. 182.

Thus the recognition by the husband of a mortgagee's title as against him cannot prejudicially affect the wife's rights in the homestead. — *Morris v. Sargent*, 18 Iowa 90.

9. Joinder of Husband Necessary though He Had Previously Conveyed Homestead to Wife. — *Spoon v. Van Fossen*, 53 Iowa 494.

band alone after the marriage, though he applied for the loan previous to his marriage and at the time of the execution of the mortgage the mortgagee did not know of the marriage.<sup>1</sup>

(16) *Where Wife Is Insane*. — The prevailing doctrine is that the rule requiring the joinder or consent of the wife to a conveyance or incumbrance of the homestead remains the same although the wife is insane.<sup>2</sup> But the logical sequence of this doctrine is that in such case the homestead cannot be conveyed or mortgaged in any way, for the joinder or consent of an insane wife would be of no effect;<sup>3</sup> and it has been held that the consent of the guardian of the insane wife, under an order of the probate court regularly obtained, is not her consent so as to satisfy a constitutional requirement of the "joint consent" of the husband and wife.<sup>4</sup>

**Rule Otherwise in Texas.** — In a recent Texas case, however, the court has taken what would seem to be a better view, and has held that where the wife is hopelessly insane and in an asylum, the husband alone may convey the homestead, as the wife is incapable of giving the rational consent which the law requires, and the law does not require impossibilities; and furthermore the laws regulating the conveyance of property should not be construed so as unnecessarily and unreasonably to interfere with personal proprietorship therein.<sup>5</sup>

(17) *Where Wife is Living Apart from Husband*. — The rule requiring the joinder or consent of his wife in or to a conveyance or incumbrance of the homestead by the husband applies though the wife is living apart from her husband,<sup>6</sup> and even where the wife is living in a state other than that in which the husband holds the homestead.<sup>7</sup>

**Mississippi Rule.** — It is provided by statute in Mississippi that both the husband and the wife must join in a conveyance of the homestead if they are living together.<sup>8</sup> Under these provisions it has been held that a wife alone

1. **Marriage Subsequent to Application for Loan.** — *Tolman v. Leathers*, 1 McCrary (U. S.) 329.

2. **Husband Alone Cannot Alienate or Encumber Homestead though Wife Be Insane.** — *Thompson v. New England Mortgage Security Co.*, (Ala. 1895) 18 So. Rep. 315; *Security L. & T. Co. v. Kauffman*, 108 Cal. 214; *Whitlock v. Gosson*, 35 Neb. 829. See also cases cited in the next note.

3. **Joinder or Consent of Insane Wife of No Effect.** — *Thompson v. New England Mortgage Security Co.*, (Ala. 1895) 18 So. Rep. 315; *Alexander v. Vennum*, 61 Iowa 160. See also *Miners' Sav. Bank v. Sandy*, 71 Fed. Rep. 840. But compare *Abbott v. Creal*, 56 Iowa 175. See generally the title *INSANITY*.

4. **Consent of Guardian of Insane Wife Not Sufficient.** — *Locke v. Redmond*, 6 Kan. App. 76, 59 Kan. 773, (Kan. 1898) 52 Pac. Rep. 97.

5. **Texas Rule — Husband Alone May Convey where Wife Is Hopelessly Insane.** — *Shields v. Aultman*, 20 Tex. Civ. App. 345.

6. **Wife Living Apart from Husband — Alabama.** — *Thompson v. New England Mortgage Security Co.*, (Ala. 1895) 18 So. Rep. 315.

*Arkansas.* — *Johnston v. Turner*, 29 Ark. 280. *California.* — *Lies v. De Diablar*, 12 Cal. 327. *Iowa.* — *Williams v. Swetland*, 10 Iowa 51.

*Kansas.* — *Ott v. Sprague*, 27 Kan. 620; *Helm v. Helm*, 11 Kan. 21; *Bradford v. Central Kansas L. & T. Co.*, 47 Kan. 587.

*Michigan.* — *Rogers v. Day*, 115 Mich. 664; *Sherid v. Southwick*, 43 Mich. 515.

*Nebraska.* — *France v. Bell*, 52 Neb. 57.

*North Carolina.* — *Castlebury v. Maynard*, 95 N. Car. 281.

*Wisconsin.* — *Herron v. Knapp*, 72 Wis. 553; *Keyes v. Scanlan*, 63 Wis. 345. See also *Barker v. Dayton*, 28 Wis. 367.

**Contract of Wife to Convey Homestead.** — A contract to convey a homestead entered into by the wife alone in her own name cannot be specifically enforced though at the time when the contract was made the husband and wife were not living together. *Larson v. Butts*, 22 Neb. 370; *Aultman, etc., Co. v. Jenkins*, 19 Neb. 211; *Swift v. Dewey*, 20 Neb. 107.

**Signature of Woman Passing as Wife of Homesteader.** — A mortgage on the homestead without the signature of the wife of the homesteader is invalid though the wife be living apart from him; and the signature of another woman who is living with him and passing as his wife is ineffectual. *Sherid v. Southwick*, 43 Mich. 515. See also *Security L. & T. Co. v. Kauffman*, 108 Cal. 214.

7. **Wife Living in Another State.** — *Whitlock v. Gosson*, 35 Neb. 829. See also cases cited in the preceding note.

**Where Wife Has Never Resided Within State.** — In *Chambers v. Cox*, 23 Kan. 393, it was held that a husband could not convey the homestead without the consent of the wife although she had never been a resident of the state. But compare *Koons v. Rittenhouse*, 28 Kan. 359. See also *Meyer v. Claus*, 15 Tex. 516.

8. **Mississippi Statutes** — Annot. Code Miss. (1892), §§ 1983, 1985.



cannot convey the homestead where the husband has gone to another state in search of employment, but it is not shown that he intended to abandon his family, nor that he had any determination never to return.<sup>1</sup> And it has also been held that a husband who has driven his wife from his home and refused to permit her to return cannot alone convey the homestead, as the statute should not be so construed as to abrogate the maxim that no one can gain a right by his own wrong.<sup>2</sup>

(18) *Assignments for Benefit of Creditors*. — A deed of assignment for the benefit of creditors executed by an insolvent husband alone will not divest either him or his wife of the homestead.<sup>3</sup>

(19) *Conditional Sales*. — A husband cannot, without the consent of his wife, make even a conditional sale of his equitable interest in land occupied by him as a homestead.<sup>4</sup>

(20) *Business Homestead*. — It would seem that a conveyance of the business homestead which exists in *Texas* would be invalid unless the wife consented thereto.<sup>5</sup>

*f. EXCEPTIONS TO RULE* — (1) *Introductory*. — It is the purpose of this subsection to discuss all exceptions to the general rule stated above which have been suggested, although they may not be universally recognized or even supported by a preponderance of authority.

(2) *Incumbrance for Purchase Money*. — It is very generally considered that the owner of a homestead may, without the joinder or consent of his or her spouse, encumber the property for the purpose of securing the purchase money due thereon,<sup>6</sup> or even to alienate it satisfy the claim for purchase

1. *Husband Temporarily Absent in Search of Employment*. — *Walton v. Walton*, 76 Miss. 662.

2. *Wife Driven from Home*. — *Scott v. Scott*, 73 Miss. 575.

3. *Assignment for Benefit of Creditors by Husband Alone Does Not Pass Homestead*. — *Hemphill v. Haas*, 88 Ky. 492, 11 Ky. L. Rep. 62.

An Assignment in Bankruptcy of a husband does not pass the wife's homestead right in the equity of redemption in the homestead which has been mortgaged by the husband and wife, and if such equity of redemption does not exceed in value the value of the homestead right, a purchaser thereof from the assignee of the husband takes nothing by his deed. *Pollard v. Noyes*, 60 N. H. 184. See also *Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425.

And see generally the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 1; INSOLVENCY AND BANKRUPTCY.

4. *Conditional Sale*. — *Moore v. Reaves*, 15 Kan. 150.

5. *Effect of Deed of Husband Alone to Business Homestead*. — In *Willis v. Pounds*, 6 Tex. Civ. App. 512, *Williams, J.*, delivering the opinion of the court, said: "A deed to the business homestead in which the wife did not join, made while the exemption still existed, might not pass title to the land, yet the deed in question, conveying both land and goods, could have the effect to put an end to the business upon the continuation of which the exemption depended. With the discontinuance of that, the exemption fell. The wife could not claim the exemption after it was lost by the act of the husband in abandoning the use of it for his business."

6. *Exception in Case of Incumbrances to Secure Purchase Money*. — *Kimble v. Kimble*, 6 Ill. App. 517.

*Iowa*. — *Burnap v. Cook*, 16 Iowa 153, 85 Am. Dec. 507; *O'Brien v. Young*, 15 Iowa 5; *Morris v. Sargent*, 18 Iowa 90.

*Kansas*. — *Hoffman v. Hill*, 47 Kan. 611.

*Massachusetts*. — *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390.

*Michigan*. — *Girzi v. Carey*, 53 Mich. 447; *Amphlett v. Hibbard*, 29 Mich. 298. See also *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Fisher v. Meister*, 24 Mich. 447; *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302; *Comstock v. Comstock*, 27 Mich. 97; *Wallace v. Harris*, 32 Mich. 380; *Phillips v. Stauch*, 20 Mich. 369; *Stevenson v. Jackson*, 40 Mich. 702; *Watertown F. Ins. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 41 Mich. 131, 32 Am. Rep. 146.

*Minnesota*. — See *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681.

*Mississippi*. — *Billingsley v. Niblett*, 56 Miss. 557.

*Nebraska*. — *Prout v. Burke*, 51 Neb. 24.

*New Hampshire*. — *Gunnison v. Twitchel*, 38 N. H. 62.

*North Dakota*. — *Roby v. Bismarck Nat. Bank*, 4 N. Dak. 156, 50 Am. St. Rep. 633.

*Tennessee*. — *Hildebrand v. Taylor*, 6 Lea (Tenn.) 659.

*Texas*. — *Baker v. Collins*, 4 Tex. Civ. App. 520; *Investors' Mortg. Security Co. v. Loyd*, 11 Tex. Civ. App. 449; *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170.

*Vermont*. — *Danforth v. Beattie*, 43 Vt. 138; *Davenport v. Hicks*, 54 Vt. 23.

*Mortgage Assumed when Homestead Is Acquired*. — Where a husband and wife jointly convey a homestead in exchange for other real estate, to be occupied by them as a new homestead, upon which there is a prior mortgage, and the husband, with the consent of the wife,



money,<sup>1</sup> provided this be done in good faith.<sup>2</sup>

(3) *Incumbrance for Improvements.* — It has also been considered that a mortgage for the purpose of obtaining funds or materials to make improvements on the homestead is not within the rule requiring the joinder or consent of the wife of the homesteader.<sup>3</sup>

(4) *Leasing.* — The authorities are not uniform as to the right of a husband alone to lease the homestead premises, for this right has been both affirmed<sup>4</sup> and denied.<sup>5</sup> The most satisfactory rule would seem to be that the husband

takes the conveyance of such real estate in his own name and expressly assumes the payment of the mortgage thereon, the wife cannot in an action to foreclose the mortgage, defend against it upon the ground that the real estate so purchased is a homestead, and therefore that the prior mortgage thereon at the date of the exchange is null and void. *Sheldon v. Pruessner*, 52 Kan. 579.

**Exchange of Homesteads — Mortgage to Secure Loan to Pay Difference.** — Where a husband exchanges his homestead for other property to be occupied as a new homestead, he cannot, without the joinder of his wife, mortgage the new homestead to secure a loan from a third person to pay the difference in value which he had agreed to pay in money upon the exchange. *Dikeman v. Arnold*, 71 Mich. 656.

**Money Advanced to Pay Off Purchase-money Mortgages.** — In *Arkansas* it has been held that a mortgage given by the owner of the homestead to secure an advance made to him for the purpose of paying off other mortgages which he assumed as part of the purchase price was for "purchase money" within the provision of Sand. & H. Dig. Stat. Ark. (1894), § 3713, excepting purchase-money mortgages from those in which the wife of the homesteader was required to join. *Farnsworth v. Hoover*, 66 Ark. 367.

But in a *Mississippi* case where the owner of a homestead gave a trust deed thereon to a person who, at his request, paid a prior trust deed by which a part of the purchase money was secured, it was held that the latter trust deed was not for the purchase money, and, the wife of the homesteader not having joined therein, it was subordinate to the homestead exemption. *Howell v. Bush*, 54 Miss. 437.

**Change of Security.** — A deed of trust which is taken upon the release of a mortgage given for purchase money is but a change of security, and the deed of trust being thus for purchase money, a homestead right cannot, under the statute, be set up against it; and a sale under such deed of trust will pass title to the purchaser although other indebtedness beside the purchase money was secured thereby, if the debtor does not pay or offer to pay that portion which is purchase money. *Austin v. Underwood*, 37 Ill. 438.

**What Is Not Debt for Purchase Money.** — A debt incurred for lumber to build a dwelling house on a lot held under a contract of purchase and claimed and occupied as a homestead represents no part of the purchase money of the homestead, and therefore a husband alone cannot encumber the homestead to secure such debt. *Smith v. Lackor*, 23 Minn. 454.

**Mortgage of Crops for Supplies Used in Making**

**Them.** — Though, under some of the decisions of the *Georgia* court, advances of supplies furnished for the purpose of enabling the person receiving them to make crops are in the nature of "purchase money" of such crops, or to be regarded as "material furnished" therefor, so as to prevent a subsequent exemption thereof from becoming valid as against a judgment in favor of the party making the advances for the amount of the price of the supplies so furnished, it does not result that where a husband and father, after a homestead in land has been set apart to him, individually mortgages growing crops thereon, in order to obtain supplies to be used in making such crops, the holder of this mortgage can, by foreclosing it against the mortgagor as an individual, after the maturity of these crops, subject the crops to the satisfaction of the mortgage execution. Under such circumstances the crops are not subject to such execution. *Martin v. Davis*, 104 Ga. 633.

**1. Alienation to Pay Purchase Money.** — *Archend v. B. C. Evans Co.*, 11 Tex. Civ. App. 138; *Morrill v. Hopkins*, 36 Tex. 686; *Investors' Mortg. Security Co. v. Loyd*, 11 Tex. Civ. App. 449; *Dickson v. Allen*, (Tex. Civ. App. 1893) 24 S. W. Rep. 661. See also *Morris v. Geisecke*, 60 Tex. 633; *Sherring v. Augustus*, 11 Tex. Civ. App. 194.

**2. Necessity for Good Faith.** — *Morris v. Geisecke*, 60 Tex. 633; *Sherring v. Augustus*, 11 Tex. Civ. App. 194; *Investors' Mortg. Security Co. v. Loyd*, 11 Tex. Civ. App. 449; *Dickson v. Allen*, (Tex. Civ. App. 1893) 24 S. W. Rep. 661.

**3. Incumbrance for Improvements.** — *Hoffman v. Hill*, 47 Kan. 611; *Thacker v. Booth*, (Ky. 1888) 6 S. W. Rep. 460.

The wife has no equity to claim homestead rights as against a chattel mortgage on a house occupied as a homestead, given for money advanced for the purpose of enabling the husband to build the house, even though the mortgage was not signed by her. *Fournier v. Chisholm*, 45 Mich. 417.

**4. Husband Alone May Lease Homestead.** — A temporary renting of the homestead is not a sale thereof, and it is not necessary that the consent of the wife should be given thereto in the manner required by law when the homestead is sold. *Engelhardt v. Batla*, (Tex. Civ. App. 1895) 31 S. W. Rep. 324. See also *Randall v. Texas Cent. R. Co.*, 63 Tex. 588.

**5. Right of Husband to Lease Homestead Denied.** — *McHugh v. Smiley*, 17 Neb. 626.

In *Vermont* the court has denied without any qualification the right of a husband to execute any lease of the homestead without the joinder of his wife, but has considered that a covenant of quiet possession contained in

alone may lease the homestead lands for purposes not interfering with the use of the property as a homestead,<sup>1</sup> but cannot do so where the lease interferes with such possession and enjoyment of the premises by the wife.<sup>2</sup>

(5) *Grant of Right of Way to Railroad.* — Similarly, it has been held that the husband alone may grant to a railroad a right of way through the homestead where such grant does not materially interfere with the use of the property for the purpose for which it is set apart.<sup>3</sup> But the preponderance of authority is against the validity of such a grant by the husband alone.<sup>4</sup>

(6) *Sale by Abandoned Wife.* — In *Texas* it has been held that a wife whose husband had deserted her and left the state with the intention of permanently abandoning her might alone dispose of the community homestead in order to satisfy a judgment which was a lien upon the land.<sup>5</sup>

(7) *Prior Incumbrances.* — It has been held that the restriction on the power of the husband to dispose of his homestead without his wife's consent applies only where the husband has acquired full property in the land, and not as against preceding equities or incumbrances with which it is charged.<sup>6</sup>

(8) *License to Remove Minerals, Etc.* — That a husband may, without the joinder or assent of the wife, give a valid license to remove minerals, etc., from the homestead has been affirmed in *Iowa*,<sup>7</sup> but in *Kansas* a lease of the homestead for a period of twenty-one years with the privilege of prospecting for gas, coal, oil, and other minerals upon any or all portions of the homestead, at the pleasure of the lessee, and the right to erect derricks, engine houses, and buildings for storage purposes, if needed, has been held to require

such a lease was valid and binding on the husband, and that he was liable to his lessee for a breach thereof. *Welch v. Miller*, 70 Vt. 108.

1. *Lease for Purposes Not Interfering with Use as Homestead.* — *Harkness v. Burton*, 39 Iowa 101. See also *Coughlin v. Coughlin*, 26 Kan. 116; *Franklin Land Co. v. Wea Gas, etc., Co.*, 43 Kan. 518.

2. *Joinder of Wife Necessary where Lease Interferes with Possession and Enjoyment of Premises as Homestead.* — *Coughlin v. Coughlin*, 26 Kan. 116; *Wea Gas, etc., Co. v. Franklin Land Co.*, 54 Kan. 533, 45 Am. St. Rep. 297; *Franklin Land Co. v. Wea Gas, etc., Co.*, 43 Kan. 518.

3. *When Husband Alone May Grant to Railroad Right of Way through Homestead.* — *Id.* — *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164. See also *Chicago, etc., R. Co. v. Swinney*, 38 Iowa 182.

*Texas.* — *Randall v. Texas Cent. R. Co.*, 63 Tex. 586; *Chicago, etc., R. Co. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39. See also *Engelhardt v. Batla*, (Tex. Civ. App. 1895) 31 S. W. Rep. 324.

Even though the Construction of the Railroad Rendered the Homestead Less Desirable, the court of *Iowa* specifically enforced the sole contract of the husband to convey a right of way across the homestead, where it did not prevent the occupancy and enjoyment of the homestead as such. *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164.

4. *Husband Alone Cannot Grant Right of Way through Homestead* — *Alabama.* — *McGhee v. Wilson*, 111 Ala. 615; *Cowan v. Southern R. Co.*, 118 Ala. 354.

*Kansas.* — *Pilcher v. Atchison, etc., R. Co.*, 38 Kan. 516, 5 Am. St. Rep. 770.

*Michigan.* — *Evans v. Grand Rapids, etc., R. Co.*, 68 Mich. 602.

#### How Consent of Wife to Grant May Be Shown.

— The Constitution of *Kansas* does not in express terms require the alienation of the homestead by the joint consent of husband and wife, when that relation exists, to be evidenced by writing; and hence the consent of the wife to the grant or alienation of an easement in the homestead for the right of way of a railroad, when such consent has not been given in writing, may be shown by such evidence as is deemed necessary to establish any other material fact. *Pilcher v. Atchison, etc., R. Co.*, 38 Kan. 516, 5 Am. St. Rep. 770.

5. *Sale by Abandoned Wife.* — *Woodson v. Massenberg*, 3 Tex. Civ. App. 146.

6. *Prior Incumbrances must be discharged*, and they have precedence over the rights of the homestead privilege; and the right of a husband to make arrangements in relation to these incumbrances, or to renounce lands thus burdened or subject to conditions and contingencies, cannot be questioned by the wife, in virtue of her remote right which might arise if the incumbrances or conditions were ever discharged or removed, unless in cases where the husband is squandering the property with the fraudulent design of depriving his wife of a homestead. *White v. Shepperd*, 16 Tex. 163. See also *Spalti v. Blumer*, 63 Minn. 269.

*New Promise.* — Where, before marriage, a man has executed a deed of trust on land which after his marriage he occupies as a homestead, a new promise in writing by him alone to pay the debt is sufficient to continue the deed of trust in force so as to be paramount to the claim of a homestead and prevent its being barred by the statute of limitations. *Hambrick v. Jones*, 64 Miss. 240. *Citing Smith v. Scherck*, 60 Miss. 491.

7. *Husband Alone May Give Valid License to Remove Minerals or Quarry Stone, Etc.* — *Harkness v. Burton*, 39 Iowa 101.



the joint consent of husband and wife to give validity to it, as it might interfere with the use and occupancy of the homestead by the wife.<sup>1</sup>

(9) *Conveyance to Wife*. — It is not usually considered necessary to the validity of a conveyance of the homestead by a husband to his wife that she should join therein,<sup>2</sup> for in such case there is no necessity of applying the requirement of her joinder, which was intended merely for her protection,<sup>3</sup> and to require a deed from the wife to herself would, it has been said, be senseless.<sup>4</sup>

(10) *Express Reservation of Homestead Right*. — It is very generally considered that a conveyance of the homestead by the husband alone is valid when it contains an express reservation of the homestead right, or the use and occupation of the premises during the lives of the grantor and his wife, or a life estate to his wife, for the conveyance in such case amounts to nothing more than a sale of the reversion of the premises after the existing homestead rights have expired.<sup>5</sup>

(11) *Land Not Allotted as Homestead*. — Land owned by the husband can be conveyed by him without the joinder of the wife, free of all homestead claims, where such land has not before the conveyance been allotted to him as a homestead.<sup>6</sup>

(12) *Where Declaration of Homestead Has Not Been Filed*. — In those jurisdictions where the making and filing or recording of a declaration or claim of homestead is necessary to the perfection of the homestead right, the husband alone may convey his property before such requirements have been complied with.<sup>7</sup>

(13) *Husband Having Power of Attorney from Wife*. — It has been held in

1. **Joint Consent Necessary in Kansas**. — *Franklin Land Co. v. Wea Gas, etc., Co.*, 43 Kan. 518. See also *Wea Gas, etc., Co. v. Franklin Land Co.*, 54 Kan. 533, 45 Am. St. Rep. 297.

2. **Conveyance to Wife Valid Without Joinder of Wife** — *Alabama*. — *Turner v. Bernheimer*, 95 Ala. 241, 36 Am. St. Rep. 207.

*California*. — *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58.

*Iowa*. — *Harsh v. Griffin*, 72 Iowa 608. See also *Spoon v. Van Fossen*, 53 Iowa 494.

*Michigan*. — *Lynch v. Doran*, 95 Mich. 395. See also *Stevens v. Castel*, 63 Mich. 111.

*Nebraska*. — *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867. See also *Hicks, etc., Tea Co. v. Mack*, 19 Neb. 339.

**Conveyance by Husband to Trustee for Wife and Children**. — *Riehl v. Bingenheimer*, 28 Wis. 84.

**Conveyance to Divorced Wife**. — See *Grupe v. Byers*, 73 Cal. 271.

**A Conveyance to a Third Person Who at Once Conveys to His Wife** is not void for the want of the wife's signature, where the whole transaction is merely the carrying out of a purpose to transfer the title to the homestead to the wife. *Stevens v. Castel*, 63 Mich. 111.

**Rule Otherwise in Illinois**. — In Illinois the statutory rule requiring that both spouses shall join in the alienation of the homestead is held to apply to a conveyance from one spouse to the other. *Despain v. Wagner*, 163 Ill. 598; *Anderson v. Smith*, 159 Ill. 93; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647, reversing *Milwaukee Mechanic's Mut. Ins. Co. v. Ketterlin*, 24 Ill. App. 188.

3. **Reason of Rule**. — *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58.

4. *Lynch v. Doran*, 95 Mich. 395. See also *Stevens v. Castel*, 63 Mich. 111.

5. **Express Reservation of Homestead Rights, Etc.** — *Iowa*. — *Allbright v. Hannah*, 103 Iowa 98; *Stewart v. Brand*, 23 Iowa 481. See also *Williams v. Swetland*, 10 Iowa 51; *Christy v. Dyer*, 14 Iowa 438, 81 Am. Dec. 493.

*Massachusetts*. — *Silloway v. Brown*, 12 Allen (Mass.) 32; *McMurray v. Connor*, 2 Allen (Mass.) 205; *Smith v. Provin*, 4 Allen (Mass.) 516; *White v. Rice*, 5 Allen (Mass.) 76; *Doyle v. Coburn*, 6 Allen (Mass.) 71.

*New Hampshire*. — *Atkinson v. Atkinson*, 37 N. H. 434; *Cunnison v. Twitchel*, 38 N. H. 67; *Foss v. Strachn*, 42 N. H. 42.

*North Carolina*. — *Jenkins v. Bobbitt*, 77 N. Car. 385.

*Tennessee*. — *Moore v. Harvey*, King's Tenn. Dig. 1232.

*Wisconsin*. — *Town v. Gensch*, 101 Wis. 445; *Ferguson v. Mason*, 60 Wis. 377.

**The Rule Set Out in the Text Is Not Recognized in Michigan**. *Gadsby v. Monroe*, 115 Mich. 282.

6. **Land Not Allotted as Homestead**. — *Hughes v. Hodges*, 102 N. Car. 236. See also *Bruce v. Strickland*, 81 N. Car. 267; *Gilmore v. Bright*, 101 N. Car. 382.

7. **No Claim of Homestead Filed, Etc.** — *California*. — *McQuade v. Whaley*, 31 Cal. 526. See also *Watts v. Gallagher*, 97 Cal. 47; *Boreham v. Byrne*, 83 Cal. 23.

*Colorado*. — *Wells v. Caywood*, 3 Colo. 487.

*Missouri*. — *Kennedy v. Broyles*, 55 Mo. App. 257; *Tucker v. Wells*, 11 Mo. 399; *Greer v. Major*, 114 Mo. 145, overruling *Riecke v. Westenhoff*, 85 Mo. 642, and *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767. See also *Shores v. Shores*, 34 Mo. App. 208.

*Nevada*. — *Child v. Singleton*, 15 Nev. 461.



*Washington* that a husband, under a general power of attorney from his wife authorizing him to mortgage all their real estate, can make a valid mortgage of their homestead, which is community property, without being joined by the wife.<sup>1</sup> But it has been held otherwise in *Kansas*.<sup>2</sup>

(14) *Conveyance by Trustee or Guardian*. — It has been held that where a husband and wife have joined in a deed conveying the homestead to a trustee for the husband, with full power and authority in the trustee "to sell and convey the same in his own name as trustee and execute all necessary conveyances and contracts therefor without any intervention or signature of the grantors or either of them," it is not necessary to the validity of a subsequent mortgage of the property by the trustee that the wife should join therein.<sup>3</sup> But a guardian appointed by the court upon the insanity of the husband has no right, without the consent of the wife, to sell a homestead acquired by the husband before his lunacy, and a sale without such consent is void even though made by order of court and with the consent of an attorney whom the court has appointed to represent the wife.<sup>4</sup>

(15) *Conveyance or Incumbrance of Excess over Homestead*. — Where property owned by the husband and occupied as a homestead exceeds in value or extent the constitutional or statutory exemption, he may alone alienate or encumber the excess over what may be held exempt.<sup>5</sup>

(16) *Conveyance by Wife of Homestead Owned by Her*. — It has been said in *Michigan* that the constitution and laws of that state confer upon married women such absolute right to the disposition of their own separate property that a married woman who is the owner of the homestead may convey it by deed without the husband joining in the instrument.<sup>6</sup>

(17) *Where Both Acquisition of Homestead and Marriage Occurred Before Adoption of Restriction*. — In *North Carolina* it has been considered that one who owned land and was married before the adoption of the constitutional provision requiring the joinder of the wife in the alienation of the homestead might convey such land without the joinder of his wife.<sup>7</sup>

1. Husband Having Power of Attorney from Wife. — *Oregon Mortg. Co. v. Hersner*, 14 Wash. 515.

In this case the court said that any other view would render meaningless the law (Gen. Stat. Wash., § 1446; Ball. Annot. Codes & Stat. 1897, § 4542) empowering the wife to give to her husband a letter of attorney to alienate her estate.

2. Husband Cannot Execute Mortgage under General Power of Attorney from Wife to Sign Deeds, Mortgages, etc. — *Wallace v. Travelers Ins. Co.*, 54 Kan. 442, 45 Am. St. Rep. 288.

3. Conveyance by Trustee. — *Des Moines Ins. Co. v. McIntire*, 99 Iowa 50.

4. Guardian of Insane Husband Cannot Sell Without Consent of Wife. — *Hogg v. Gove*, 47 Cal. 371.

*Massachusetts Decisions* — *Guardian of Spendthrift Husband*. — In *Wilbur v. Hickey*, 8 Gray (Mass.) 432, a deed of conveyance executed by the guardian of the husband, under license of court, the husband being a spendthrift, was held sufficient to defeat the widow's right of homestead. But in the later case of *Brettun v. Fox*, 100 Mass. 234, the court criticised this decision, saying: "We feel bound to add that that decision was not much considered, and proceeded upon a narrower construction of the statute than has been usually adopted in later cases, and that we are not prepared to approve and are not in this case required to overrule it."

5. Conveyance or Incumbrance of Excess Over Homestead — *Alabama*. — *Goodloe v. Dean*, 81 Ala. 479.

*Arkansas*. — *Klenk v. Knoble*, 37 Ark. 298.

*Illinois*. — *Young v. Graff*, 28 Ill. 20; *Boyd v. Cuddeback*, 31 Ill. 120; *Watson v. Doyle*, 130 Ill. 415.

*New Hampshire*. — *Horn v. Tufts*, 39 N. H. 478.

*Tennessee*. — *Enochs v. Wilson*, 11 Lea (Tenn.) 228; *Rayburn v. Norton*, 85 Tenn. 351; *Cottrell v. Rogers*, 90 Tenn. 428; *Hildebrand v. Taylor*, 6 Lea (Tenn.) 659.

*Texas*. — *Neiman v. Schuster*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1075.

*Vermont*. — *Thorp v. Thorp*, 70 Vt. 46.

*Dedication of Street through Excess*. — *Little Rock v. Wright*, 58 Ark. 142.

6. Conveyance by Wife of Homestead Owned by Her. — *Buckingham v. Buckingham*, 81 Mich. 89. The statement set out in the text is merely a dictum in this case, for the real question in the case was whether a wife could maintain ejectment to recover from her husband the possession of land owned by her in fee while he continued in occupation of it as a homestead, after she had separated from him and removed from the land and taken up her residence elsewhere and abandoned the land as a homestead.

7. Where Both Acquisition of Homestead Property and Marriage Occurred Before Adoption of Restriction of Alienation. — See *Castlebury v.*

(18) *Agreement to Give Portion of Fruit Crop to Persons Furnishing Trees.* — In *Michigan* an agreement by the owner of a homestead to give a certain portion of the fruit crop raised thereon to the persons who furnished him with the trees to be set out has been held valid and binding though not joined in by the wife.<sup>1</sup>

(19) *Conveyance in Consideration of Support of Homesteader and Wife — Full Performance by Grantee.* — In a *Wisconsin* case where the husband conveyed the homestead, together with other land, to his son in consideration of the son's undertaking to support the father and his wife during their life, besides paying a money consideration, it was held that the deed was enforceable where the son had fully performed his covenants, although the wife of the father had not joined therein.<sup>2</sup>

(20) *Conveyance in Order to Effect Change of Residence.* — In *Mississippi* it has been held that if a husband has resolved to change his residence and has made a sale of his homestead in order to effect such change, and not as a device to avoid the legal requirement of his wife's joinder, the fact that the sale was made before his actual removal from the land will not invalidate the conveyance, which would have been valid if made after the abandonment occurred, although his wife did not join therein.<sup>3</sup>

(21) *Taxes and Mechanics' Liens.* — In *Arkansas* conveyances or mortgages for taxes or laborers' or mechanics' liens may be valid without the joinder of the wife.<sup>4</sup>

g. WHEN RULE HAS NO APPLICATION — (1) *Homestead Right Not Accrued.* — It is axiomatic that the rule requiring the joinder of the wife in conveyances of the homestead by the husband cannot apply until the homestead right has accrued.<sup>5</sup>

(2) *Homestead Abandoned.* — It is also very obvious that the husband alone may convey property which has been used as a homestead where such use has been discontinued and the property abandoned as a homestead before the conveyance.<sup>6</sup>

Maynard, 95 N. Car. 281; *Fortune v. Watkins*, 94 N. Car. 304; *Reeves v. Haynes*, 88 N. Car. 310; *Sutton v. Askew*, 66 N. Car. 172, 80 Am. Rep. 500; *Bruce v. Strickland*, 81 N. Car. 267; *Jenkins v. Jenkins*, 82 N. Car. 208; *O'Kelly v. Williams*, 84 N. Car. 281; *Williams v. Teachey*, 85 N. Car. 402; *Wittkowski v. Watkins*, 84 N. Car. 456; *Isler v. Koonce*, 81 N. Car. 378; *Davis v. Evans*, 5 Ired. L. (27 N. Car.) 525; *Gilmore v. Bright*, 101 N. Car. 382.

1. *Agreement to Give Portion of Fruit Crop to Persons Furnishing Trees.* — *Dickey v. Waldo*, 97 Mich. 255. In this case the court said that the trees were planted upon only a portion of the homestead, and the occupation and possession of the buildings and land were not interfered with, as, during the growth of the trees, the land could be cultivated and crops raised; and that if the trees proved valueless neither the homesteader nor his wife had suffered, while if they proved valuable, which was the fact, then the homestead itself was increased in value; and under the circumstances there was no reason to hold that either the homesteader or his wife had parted with any homestead right or that their possession was in any manner interrupted.

2. *Conveyance in Consideration of Support of Homesteader and Wife — Full Performance by Grantee.* — *Whitmore v. Hay*, 85 Wis. 240.

3. *Conveyance in Order to Effect Change of Residence.* — *Wilson v. Gray*, 59 Miss. 525.

4. *Taxes and Mechanics' Liens.* — *Frits v.*

*Frits*, 32 Ark. 327. See also *Brown v. Watson*, 41 Ark. 309; *Sims v. Thompson*, 39 Ark. 301.

5. *Homestead Right Not Accrued.* — See *Meyer v. Claus*, 15 Tex. 519. And see generally *supra*, this section, *Land Not Allotted as Homestead; Where Declaration of Homestead Has Not Been Filed.*

6. *Homestead Abandoned.* — *Russell v. Rumsey*, 35 Ill. 375; *Phillips v. Springfield*, 39 Ill. 83; *Davis v. Kelley*, 14 Iowa 523; *Anderson v. Kent*, 14 Kan. 207. See also *Bradford v. Central Kansas L. & T. Co.*, 47 Kan. 587; *Stewart v. Mackey*, 16 Tex. 58; *Berlin v. Burns*, 17 Tex. 537; *Jordan v. Godman*, 19 Tex. 273. See also *Nash v. Herring*, 5 Tex. Civ. App. 95. And see *Dickson v. Allen*, (Tex. Civ. App. 1893) 24 S. W. Rep. 661, in which case the same principle was asserted in reference to a business homestead.

*Abandonment of Homestead Before Delivery of Imperfect Deed.* — In an *Alabama* case, where a conveyance of the homestead by the husband and wife was not acknowledged by the wife as required by law, but before the delivery of the deed the husband removed from the homestead and occupied another place as his homestead, and it was shown that the husband retained the deed in his own possession and under his control until he had acquired a new homestead, it was held that, as the deed took effect only upon delivery, the purchaser received a good title, for at the time of delivery



(3) *Unmarried Head of Family*. — An unmarried man, though the head of a family, may alone alienate or encumber his homestead.<sup>1</sup>

(4) *Proceeds of Condemnation of Homestead under Right of Eminent Domain*. — In *Minnesota* it has been held that a husband part of whose homestead is taken under the right of eminent domain may dispose of the compensation awarded him therefor without the consent of his wife.<sup>2</sup>

4. REQUIREMENT OF JOINDER OF WIFE IN INCUMBRANCE DOES NOT PROHIBIT ALIENATION BY HUSBAND ALONE. — It has been held that a statute requiring the joinder of the wife in a mortgage of the homestead by the husband does not, where he is the owner in fee of the homestead premises, restrict his right to sell and convey them by deed absolute, without his wife's joining in such conveyance.<sup>3</sup>

5. FORMAL REQUISITES OF ALIENATION — (1) *In General*. — In order to divest the homestead estate there must be a literal compliance with the mode of alienation prescribed by the statute.<sup>4</sup>

2) *Character of Instrument or Contract*. — It has been held that a quitclaim deed is a "grant" within a statutory requirement of a grant in order to effect a release of the homestead,<sup>5</sup> and a written assignment of the title bond under which the homestead is held is a sufficient conveyance.<sup>6</sup>

*Separate Conveyances*. — It is generally held that statutes requiring a joint instrument or a joint consent are mandatory, and that the homestead can be conveyed only by a joint deed by husband and wife, separate deeds being insufficient for the purpose;<sup>7</sup> and a like effect was given to a statute requiring a "deed executed by the husband and wife."<sup>8</sup>

*The Verbal Assent* of the wife is not sufficient to divest her homestead rights under statutes requiring the joint consent of husband and wife, or a joint conveyance by them;<sup>9</sup> but where the statute contains no such requirement, her oral consent is sufficient, and may be established by any legal form of evidence.<sup>10</sup>

(3) *Express Release or Waiver of Right*. — It has been decided, under an *Illinois* statute providing that no release or waiver of homestead shall be valid

the property was not the homestead of the grantor. *Woodstock Iron Co. v. Richardson*, 94 Ala. 629.

1. *Unmarried Head of Family May Alienate or Encumber Homestead*. — *Greenwood v. Maddox*, 27 Ark. 648; *Benson v. Aitken*, 17 Cal. 163; *Caldwell v. Bowman*, King's Tenn. Dig. 1232; *McLean v. Ellis*, 79 Tex. 398. See also *Moore v. Poole*, (Tex. Civ. App. 1874) 25 S. W. Rep. 802; *Bateman v. Pool*, 84 Tex. 405; *Davis v. Converse*, (Tex. Civ. App. 1898) 46 S. W. Rep. 910; *Lacy v. Rollins*, 74 Tex. 566; *Smith v. Von Hutton*, 75 Tex. 626; *Kiolbassa v. Raley*, 1 Tex. Civ. App. 165. And see *infra*, this section, *Texas Rule Against Incumbrances*.

2. *Proceeds of Condemnation of Homestead under Right of Eminent Domain*. — *Canty v. Latterner*, 31 Minn. 239.

3. *Requirement of Joinder of Wife in Incumbrance Does Not Prohibit Alienation by Husband Alone*. — *Wright v. Whittick*, 18 Colo. 54. See also *Barton v. Drake*, 21 Minn. 299, *distinguishing* *Folsom v. Carli*, 5 Minn. 333.

4. *Statutory Requirements to Be Complied With*. — *Lies v. De Diablar*, 12 Cal. 327; *Eldridge v. Pierce*, 90 Ill. 474; *Ketterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Hume v. Gossett*, 43 Ill. 297; *Board of Trustees v. Beale*, 98 Ill. 248; *Wheeler v. Gage*, 28 Ill. App. 427, *affirmed* 129 Ill. 197; *Boyd v. Cudderback*, 31 Ill. 113; *Smith v. Miller*, 31 Ill. 157; *Ives v. Mills*, 37 Ill. 73, 87 Am. Dec. 238;

*Black v. Lusk*, 69 Ill. 70; *Kingman v. Higgins*, 100 Ill. 319; *McMahill v. McMahon*, 105 Ill. 596, 44 Am. Rep. 819; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Browning v. Harris*, 99 Ill. 456; *Stodalka v. Novotny*, 144 Ill. 125; *Howell v. McCrie*, 36 Kan. 644, 59 Am. Rep. 584; *Fisher v. Meister*, 24 Mich. 447; *Showers v. Robinson*, 43 Mich. 502.

5. *Character of Instrument*. — *Faivre v. Daley*, 93 Cal. 664.

6. *Rubelman v. Rummel*, 72 Iowa 40.

7. *Separate Conveyances*. — *Poole v. Gerrard*, 6 Cal. 71, 65 Am. Dec. 481; *Ott v. Sprague*, 27 Kan. 620; *Christian v. Clark*, 10 Lea (Tenn.) 630; *Cox v. Keathley*, 99 Tenn. 522. See also *Luther v. Drake*, 21 Iowa 92; *Duncan v. Moore*, 67 Miss. 136.

8. *Dickinson v. McLane*, 57 N. H. 31.

9. *Verbal Assent of Wife*. — *Stinson v. Richards*, 44 Iowa 573; *Danner v. Redenbaugh*, 61 Iowa 269; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Collins v. Boyett*, 27 Tenn. 334. See also *Merced Bank v. Rosenthal*, 99 Cal. 39, 64 Am. Dec. 147; *Ruddy v. Wis.* 147, 24 Am. St. Rep. 702.

10. *Pilcher v. Atchison, etc.*, R. Co., 38 Kan. 516, 5 Am. St. Rep. 770; *Dudley v. Shaw*, 44 Kan. 683; *Matney v. Linn*, 59 Kan. 613.

*Assent of Husband*. — And in such case the verbal assent of the husband is sufficient if the title is in the wife. *Matney v. Linn*, 59 Kan. 613.



unless in writing subscribed by the householder and his wife, that there must be an express release of the homestead right; <sup>1</sup> and the same construction was given to a *Massachusetts* statute requiring the wife to join in a conveyance of the homestead. <sup>2</sup> In other states, under statutes not in terms requiring an express waiver of the homestead right, it has been decided that such a waiver is not necessary. <sup>3</sup> And to the same effect are decisions that the conveyance or incumbrance need not specifically state that the property which it is sought to convey or encumber is a homestead. <sup>4</sup>

(4) *Wife as Actual Party to Instrument.* — It has been held that the wife must join in the granting part of the instrument as an actual party thereto, and that her mere signature is insufficient, under statutes requiring her to "join in the deed of conveyance" <sup>5</sup> or to join in the execution of the instrument, <sup>6</sup> or requiring the release of a homestead to be subscribed by the owner and his wife, <sup>7</sup> or requiring the "joint consent" of the husband and wife "evidenced by conveyance duly executed." <sup>8</sup> But in *Alabama* a requirement of the wife's "voluntary signature and assent" is decided not to necessitate her joinder in the conveyance as a grantor, <sup>9</sup> and elsewhere it has been held that the wife's name is not required to appear in the body of the instrument when the statute merely in terms requires her signature or subscription thereto. <sup>10</sup>

**Release of Dower Insufficient.** — It has been decided in a number of cases that a

1. **Illinois Rule.** — *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Board of Trustees v. Beale*, 98 Ill. 248; *Patterson v. Kreig*, 29 Ill. 514; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Connor v. Nichols*, 31 Ill. 148; *Ely v. Eastwood*, 26 Ill. 114; *Smith v. Marc*, 26 Ill. 150; *Vanzant v. Vanzant*, 23 Ill. 540; *Miller v. Marckle*, 27 Ill. 405; *Moore v. Titman*, 33 Ill. 368; *Redfern v. Redfern*, 38 Ill. 512; *Cipperly v. Rhodes*, 53 Ill. 346; *Hutchings v. Huggins*, 59 Ill. 29; *Boyd v. Cudderback*, 31 Ill. 113; *Smith v. Miller*, 31 Ill. 157; *Kitchell v. Burgwin*, 21 Ill. 40.

And it is said that if the homestead is not specifically named as conveyed, no general language in the deed, though it comprehend every claim, interest, and estate, of whatever description, at law or in equity, in express terms, will pass the right or estop the householder from asserting it as against any one claiming under the deed. *Redfern v. Redfern*, 38 Ill. 509.

**A Contract to Convey the homestead property** is governed by the same rule, and is valid only if there is an express waiver. *Stodalka v. Novotny*, 144 Ill. 125.

**A Recital in the Certificate of Acknowledgment** that the wife acknowledged her release of her homestead rights will not supply the absence of the express release or waiver in the instrument itself. *Hutchings v. Huggins*, 59 Ill. 29. But see *Young v. Harris*, 74 Ill. App. 667.

2. **Massachusetts Rule — Express Waiver Required.** — *Greenough v. Turner*, 11 Gray (Mass.) 334; *Adams v. Jenkins*, 16 Gray (Mass.) 146; *Connor v. McMurray*, 2 Allen (Mass.) 202, 205.

3. **Express Waiver Unnecessary — United States.** — *In re Cross*, 2 Dill. (U. S.) 320, under the *Nebraska* statute.

*Alabama.* — *Lyons v. Conner*, 57 Ala. 181; *Preiss v. Campbell*, 59 Ala. 635; *Cahall v. Citizens Mut. Bldg. Assoc.*, 61 Ala. 232; *For-*

*syth v. Preer*, 62 Ala. 443; *Rogers v. Adams*, 66 Ala. 600; *Scott v. Simons*, 70 Ala. 352.

*Colorado.* — *Drake v. Root*, 2 Colo. 685.

*Kentucky.* — *Hays v. Froman*, (Ky. 1898) 45 S. W. Rep. 87; *Wing v. Hayden*, 10 Bush (Ky.) 280; *McGrath v. Berry*, 13 Bush (Ky.) 395; *Mullins v. Clark*, (Ky. 1891) 15 S. W. Rep. 784; *Owens v. Spratt*, 1 Ky. L. Rep. 265; *Gaddie v. Hodges*, 5 Ky. L. Rep. 241; *Vaughn v. Owsley*, 3 Ky. L. Rep. 249; *Sutton v. Puckett*, 2 Ky. L. Rep. 316, 319.

4. **No Reference to Homestead Character Necessary — California.** — *Pfeiffer v. Riehn*, 13 Cal. 643.

*Iowa.* — *Babcock v. Hoey*, 11 Iowa 375; *O'Brien v. Young*, 15 Iowa 5; *Reynolds v. Morse*, 52 Iowa 155; *Van Sickle v. Town*, 53 Iowa 259; *Waterman v. Baldwin*, 68 Iowa 255.

*South Carolina.* — *Reid v. McGowan*, 28 S. Car. 74.

*Tennessee.* — *Lover v. Bessenger*, 9 Baxt. (Tenn.) 393.

*Washington.* — *Brown v. Elwell*, 17 Wash. 442.

5. **Wife Must Be Party to Instrument.** — *Greenough v. Turner*, 11 Gray (Mass.) 332.

6. *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 441; *Bluff City Lumber Co. v. Bloom*, 64 Ark. 492.

7. *McGrath v. Berry*, 13 Bush (Ky.) 391; *Withers v. Pugh*, 91 Ky. 522.

But the wife need not join in the granting clause where the express waiver of her homestead rights is recited in the body of the mortgage. *Davis v. Jenkins*, 93 Ky. 353, 40 Am. St. Rep. 197.

8. *Hoge v. Hollister*, 2 Tenn. Ch. 606.

9. **Contrary Decisions.** — *Dooley v. Villalonga*, 61 Ala. 129; *Long v. Mostyn*, 65 Ala. 543; *Hood v. Powell*, 73 Ala. 171; *Shelton v. Aultman, etc.*, Co., 82 Ala. 315.

10. *Yocum v. Lovell*, 111 Ill. 212; *Barrett v. Cox*, 112 Mich. 220. But see *Fisher v. Meister*, 24 Mich. 447.

joinder by the wife in the conveyance or incumbrance merely for the sake of releasing her dower is not sufficient to release her homestead rights in the property.<sup>1</sup>

(5) *Description*. — The conveyance of a homestead must, as in the case of other property, sufficiently describe the homestead.<sup>2</sup> but, as in other cases, a description is sufficient if the property can be identified therefrom.<sup>3</sup> A conveyance may, it has been held, be reformed in this respect without affecting the waiver therein of the homestead,<sup>4</sup> but a defect in this respect cannot be cured by the subsequent act of the husband alone so long as the property is occupied as a homestead.<sup>5</sup>

(6) *Acknowledgment*. — A statutory requirement that the instrument shall be acknowledged by the husband and the wife is mandatory, and if the acknowledgment by either spouse is absent or substantially defective the instrument is void.<sup>6</sup> But a statute requiring the wife's signature has been held not to necessitate an acknowledgment by her.<sup>7</sup> If the statute provides for a private examination of the wife or for other formalities in connection with her acknowledgment, and requires the certificate to state a compliance with the requirements, such provisions must be complied with.<sup>8</sup> And accordingly, where the statute required the certificate to state that the wife was examined separately and apart from her husband, and that she acknowledged that she signed the conveyance "of her own free will and accord, and without fear, constraint, or persuasion of her husband," the mere statement that her act was voluntary was held to be insufficient.<sup>9</sup> But a private examination is not necessary unless expressly required by statute.<sup>10</sup> If the conveyance is invalid by reason of the want of a proper acknowledgment at the time of its execution, a subsequent acknowledgment in conformity with the statute will render the instrument sufficient except as against the rights of intervening third persons.<sup>11</sup>

1. *Release of Dower Insufficient*. — *Alabama*. — Long v. Mostyn, 65 Ala. 543; Thompson v. Sheppard, 85 Ala. 611.

*Arkansas*. — Shattuck v. Byford, 62 Ark. 431; Harrison Bank v. Gibson, 60 Ark. 269; Pipkin v. Williams, 57 Ark. 242, 38 Am. St. Rep. 241.

*Iowa*. — Sharp v. Bailey, 14 Iowa 387, 81 Am. Dec. 489; Fuller v. Hunt, 48 Iowa 163; Wilson v. Christopherson, 53 Iowa 481; Eisenstadt v. Cramer, 55 Iowa 753. Compare Reynolds v. Morse, 52 Iowa 155.

*Kentucky*. — Moss v. Hall, 1 Ky. L. Rep. 314, 3 Ky. L. Rep. 89; Hayden v. Robinson, 83 Ky. 615, 7 Ky. L. Rep. 707; Wing v. Hayden, 10 Bush (Ky.) 280.

*Massachusetts*. — Adams v. Jenkins, 16 Gray (Mass.) 146.

2. *Description*. — Hammond v. Wells, 45 Mich. 11; Coker v. Roberts, 71 Tex. 597; O'Malley v. Ruddy, 79 Wis. 147, 24 Am. St. Rep. 702.

3. *Casler v. Byers*, 129 Ill. 657, affirming 28 Ill. App. 128; Shoemaker v. Smith, 80 Iowa 655. And see Beyschlag v. Van Wagoner, 46 Mich. 91.

4. *Reformation*. — Snell v. Snell, 123 Ill. 403, 5 Am. St. Rep. 526.

5. *Cure by Husband*. — Coker v. Roberts, 71 Tex. 597.

6. *Necessity of Acknowledgment*. — Smith v. Pearce, 85 Ala. 264, 7 Am. St. Rep. 44; Harrison Bank v. Gibson, 60 Ark. 269; Tabler v. Sullivan, 97 Ky. 79, 16 Ky. L. Rep. 817; American Sav., etc., Assoc. v. Burghardt, 19 Mont. 323, 61 Am. St. Rep. 507; Phillips v.

Bishop, 31 Neb. 853; Interstate Sav., etc., Assoc. v. Strine, (Neb. 1899) 78 N. W. Rep. 377; Shelton v. Hurst, 16 Lea (Tenn.) 470.

7. *Lawyer v. Slingerland*, 11 Minn. 447.

8. *Private Examination*. — Vanzant v. Vanzant, 23 Ill. 536; Boyd v. Cudderback 31 Ill. 113; Fisher v. Meister, 24 Mich. 447; Lambert v. Kinnery, 74 N. Car. 348; Cross v. Everts, 28 Tex. 532. Compare Norton v. Nichols, 35 Mich. 148.

So a provision that the deed shall be fully explained to the wife by the officer taking the acknowledgment must be complied with, and the certificate must so state. Langton v. Marshall, 59 Tex. 296.

9. *Scott v. Simons*, 70 Ala. 352.

So, under a later statute requiring a certificate to state that the wife did not act under "threats" from her husband, the omission of the word "threats" from the certificate was held to be fatal. Daniels v. Lowery, 92 Ala. 519; Motes v. Carter, 73 Ala. 553. Compare Gates v. Hester, 81 Ala. 357.

The requirement of the *Alabama* statute does not apply where the homestead is the property of the wife, and not of the husband. Weiner a Sterling, 61 Ala. 98; Dawson v. Burrus, 73 Ala. 111.

10. *Private Examination Unnecessary*. — Miller v. Marx, 55 Ala. 322; Forsyth v. Preer, 62 Ala. 443; Jones v. Roper, 86 Ala. 210; Wynn v. Ficklen, 54 Ga. 529; Christopher v. Williams, 59 Ga. 779.

11. *Time of Acknowledgment*. — Cahall v. Citizens Mut. Bldg. Assoc., 61 Ala. 232; Hood v.

The Certificate must likewise conform to the statutory requirements as to stating that the grantor is known to the officer,<sup>1</sup> and if it contains a statement that one of the signers is known to him to be the wife of the other, the fact that in signing her name she used the wrong initials is immaterial.<sup>2</sup> The certificate has been held to be sufficient though it recites merely that the wife relinquishes dower, if the instrument itself clearly relinquishes the homestead rights,<sup>3</sup> but under a statute requiring an acknowledgment by the wife as a condition to the alienation of a homestead, it was held that the certificate must show that she released her homestead rights.<sup>4</sup>

(7) *Record*. — A statutory provision that a deed or mortgage of a homestead shall be recorded or lodged for record must be complied with.<sup>5</sup>

*j. REALITY OF CONSENT* — (1) *In General*. — All transactions in which the joinder or assent of the wife is obtained in or to any disposition of the homestead, by either lease, mortgage, or absolute sale, will doubtless be scrutinized by the courts with jealous vigilance, and the wife's rights will be protected against the influences of force, fraud, or mistake.<sup>6</sup> But this will not be carried to the extent of relieving her from the consequences of her own acts which she clearly did understand or should have understood.<sup>7</sup>

(2) *Duress*. — Where a wife signs a conveyance or incumbrance of the homestead under the duress of her husband, the instrument is not effectual as against the homestead, for she has not given that consent which is intended by the constitutional and statutory provisions requiring her joinder and consent.<sup>8</sup>

(3) *Fraud*. — For similar reasons the joinder or consent of the wife is not binding upon her where it was procured through fraud,<sup>9</sup> unless the grantee or

Powell, 73 Ala. 171; Vancleave v. Wilson, 73 Ala. 387; Smith v. Pearce, 85 Ala. 264.

In Richardson v. Woodstock Iron Co., 90 Ala. 266, it was held that if the wife failed to acknowledge the instrument during the life of her husband she could not after his death acknowledge it so as to affect the rights of his heirs. To the same effect see Parks v. Barnett, 104 Ala. 438.

1. Identification of Grantor. — Gage v. Wheeler, 129 Ill. 197, affirming 28 Ill. App. 427.

2. Shelton v. Aultman, etc., Co., 82 Ala. 315.

3. Statement as to Purpose of Instrument. — Razor v. Dowan, (Ky. 1890) 13 S. W. Rep. 914.

4. Vanzant v. Vanzant, 23 Ill. 536; Clubb v. Wise, 64 Ill. 157; Boyd v. Cuddeback, 31 Ill. 113; Smith v. Miller, 31 Ill. 157; Leonard v. Crane, 147 Ill. 52.

As to the Conclusiveness of the certificate of acknowledgment of the facts therein stated, see the title ACKNOWLEDGMENTS, vol. 1, p. 483.

5. Record. — Hensey v. Hensey, 92 Ky. 164, 13 Ky. L. Rep. 426.

6. Rigid Scrutiny of Transactions Resulting in Joinder or Consent of Wife. — See Sampson v. Williamson, 6 Tex. 102, 55 Am. Dec. 762; Bird v. Logan, 35 Kan. 228.

7. Wife Held to Consequences of Her Acts. — See Peake v. Thomas, 39 Mich. 584.

There Is No Necessity for an Interpreter to explain to the wife the contents of a note and mortgage on the homestead when it appears to the satisfaction of the court and the jury that at the time of the execution and acknowledgment thereof the wife understood the English language. Pfeiffer v. Riehn, 13 Cal. 644.

8. Effect of Duress — United States. — Hill v. Hite, 79 Fed. Rep. 826.

Illinois. — Leonard v. Crane, 147 Ill. 52.

Iowa. — Nevada First Nat. Bank v. Bryan, 62 Iowa 42.

Kansas. — Helm v. Helm, 11 Kan. 19; Anderson v. Anderson, 9 Kan. 112.

Texas. — Kocourek v. Marak, 54 Tex. 201, 38 Am. Rep. 623.

See generally the title DURESS, vol. 10, p. 320.

**Threat of Abandonment by Husband Constitutes Duress.** — A conveyance by husband and wife of the homestead is invalid where the wife signed and acknowledged the deed by reason of a threat on the part of the husband to abandon her if she refused to do so and of her reasonable apprehension that he would carry out such threat, and the wife never gave her voluntary and free consent to the deed. Kocourek v. Marak, 54 Tex. 201, 38 Am. Rep. 623.

**Command to Sign Mortgage Not Duress.** — An angry command by the husband to the wife to "dry up that crying, and go write your name," unaccompanied by threats of personal violence or any attempt to exercise violence, is not duress which will avoid a mortgage on the homestead of the wife. Gabbey v. Forgeus, 38 Kan. 62.

**Purchaser Ignorant of Duress.** — A deed conveying the homestead signed by the wife under duress is void though the purchaser be ignorant of the duress. Anderson v. Anderson, 9 Kan. 112.

9. Joinder or Consent Procured through Fraud. — Warden v. Reser, 38 Kan. 86; Spiegel v. Spiegel, 64 Mich. 345, 8 Am. St. Rep. 826; Griswold v. Hazels, 52 Neb. 64; Stallings v. Hullum, 79 Tex. 421. See also Westbrooks v. Jeffers, 33 Tex. 86.



mortgagee was innocent of any participation in or knowledge of the fraud.<sup>1</sup>

k. EFFECT OF ALIENATION OR INCUMBRANCE WITHOUT JOINDER OR CONSENT OF WIFE — (1) *Validity Subject to Homestead Privilege.* — The question whether the failure to comply with the statutory requirements of the joinder or consent of the wife renders the conveyance absolutely void as to the land subject to the homestead exemption has given rise to conflicting decisions, the conflict arising to some extent, of course, from the varying provisions of the statutes. In some states it has been decided that a conveyance by the husband alone is void only as regards the homestead exemption, and that upon the termination of such exemption by abandonment or death, or in any other manner, the conveyance is entitled to full force and effect; or, as it may be otherwise expressed, the husband may alone convey the property subject to the homestead privilege of the wife or other members of his family entitled thereto.<sup>2</sup> In other states the statutes have been construed as rendering the conveyance totally void so far as the property in which the homestead exemption exists is concerned, it not being rendered in any way effective by the subsequent termination of the homestead privilege, however this may occur.<sup>3</sup>

**The Husband's Title After the Expiration of the Wife's Homestead Rights May Pass** by a deed to which he fraudulently procured his wife's signature. *Stallings v. Hullum*, 79 Tex. 421. See generally *infra*, this section, *Effect of Alienation or Incumbrance Without Joinder or Consent of Wife.*

**Consent and Joinder of Husband Procured by Fraud.** — *Farr v. Dunsmoor*, 36 Minn. 437.

1. **Where Grantee or Mortgagee Is Innocent and Ignorant of Fraud** — *Arkansas.* — *Hill v. Yarbrough*, 62 Ark. 320.

*Iowa.* — *Miller v. Wolbert*, 71 Iowa 539; *Edgell v. Hagens*, 53 Iowa 223; *Van Sickles v. Town*, 53 Iowa 259; *Ætna L. Ins. Co. v. Franks*, 53 Iowa 618; *Rubelman v. Rummel*, 72 Iowa 40.

*Texas.* — *Webb v. Burney*, 70 Tex. 322.

**When Grantee Is Liable for Fraudulent Acts of Husband.** — Where a husband agreed with a creditor to procure the wife's signature to a deed of trust to secure a pre-existing debt of the husband, and it was shown that the husband concealed or did not reveal to the wife the character of the deed she was signing, and that she was procured to sign it without knowing its contents, it was held that, the husband being the agent of the grantee in the deed of trust so far as procuring the signature and assent of the wife was concerned, the creditor must be held to be bound by the act and conduct of the husband, which constituted a fraud on the wife and rendered the deed invalid. *Edwards v. Boyd*, 9 Lea (Tenn.) 204.

2. **Conveyance Valid Subject to Homestead Interest** — *Georgia.* — *Towns v. Mathews*, 91 Ga. 54.

*Louisiana.* — *Chaffe v. McGehee*, 38 La. Ann. 278.

*Massachusetts.* — *Sillway v. Brown*, 12 Allen (Mass.) 32; *McMurray v. Connor*, 2 Allen (Mass.) 205; *Smith v. Provin*, 4 Allen (Mass.) 516; *White v. Rice*, 5 Allen (Mass.) 76; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Castle v. Palmer*, 6 Allen (Mass.) 401.

*Missouri.* — *Anthony v. Rice*, 110 Mo. 223; *Bunn v. Lindsay*, 95 Mo. 250; *Crisp v. Crisp*, 86 Mo. 630; *Poland v. Vesper*, 67 Mo. 727; *Blandy v. Asher*, 72 Mo. 27.

*New Hampshire.* — *Atkinson v. Atkinson*, 37 N. H. 434; *Gunnison v. Twitchel*, 38 N. H. 62; *Nims v. Bigelow*, 45 N. H. 343; *Hoitt v. Webb*, 36 N. H. 166; *Horn v. Tufts*, 39 N. H. 478; *Wood v. Lord*, 51 N. H. 448.

*Tennessee.* — *Moore v. Hervey*, 1 Tenn. Leg. Rep. 22; *First Nat. Bank v. Meachem*, (Tenn. Ch. 1896) 36 S. W. Rep. 724; *Rhea v. Rhea*, 15 Lea (Tenn.) 527.

*Vermont.* — *Jewett v. Brock*, 32 Vt. 65; *Howe v. Adams*, 28 Vt. 544; *Davis v. Andrews*, 30 Vt. 678; *Whiteman v. Field*, 53 Vt. 554, *disapproving* *Abell v. Lothrop*, 47 Vt. 375.

3. **Conveyance Invalid though Homestead Privilege Terminated** — *Alabama.* — *Lehman v. Bryan*, 67 Ala. 558; *Scaife v. Argall*, 74 Ala. 473; *Vanceleave v. Wilson*, 73 Ala. 387; *Seaman v. Nolen*, 68 Ala. 463; *Hood v. Powell*, 73 Ala. 171; *Alford v. Lehman*, 76 Ala. 526; *Crim v. Nelms*, 78 Ala. 604.

*Arkansas.* — *Pipkins v. Williams*, 57 Ark. 242, 38 Am. Dec. 241.

*California.* — *Gagliardo v. Dumont*, 54 Cal. 496; *Powell v. Patison*, 100 Cal. 236; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47; *Barber v. Babel*, 36 Cal. 16. In some of the earlier cases a different view was taken. *Brooks v. Hyde*, 37 Cal. 366; *McQuade v. Whaley*, 31 Cal. 526; *Gee v. Moore*, 14 Cal. 472; *Bowman v. Norton*, 16 Cal. 213; *Himmelman v. Schmidt*, 23 Cal. 117. See also *Graves v. Baker*, 68 Cal. 133.

*Dakota.* — *Myrick v. Bill*, 5 Dak. 167.

*Illinois.* — *Eldridge v. Pierce*, 90 Ill. 474; *Browning v. Harris*, 99 Ill. 456; *McMahill v. McMahon*, 105 Ill. 596, 44 Am. Rep. 819; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Maxwell v. Maxwell*, 145 Ill. 156; *Gray v. Schofield*, 175 Ill. 36. These decisions were rendered under the Act of 1873, which made the homestead an actual estate in the land, while previously it was a mere exception. Under the previous statute the grantee in the conveyance took the property clear of any homestead claim on the part of the wife, the exemption right. *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402; *Coe v. Smith*, 47 Ill. 225; *Hessell v. McDonald*, 61 Ill. 207; *Thibault v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112;

(2) *Validity as to Excess over Homestead Exemption.* — The various provisions of the statutes to the effect that a conveyance or alienation of the homestead without the joinder or consent of the husband shall be void or ineffectual have been held not to render it ineffective so far as concerns property covered thereby which is not included within the homestead, the conveyance being regarded as valid so far as concerns any excess, either in quantity or value, over the statutory exemption. This is either expressly or impliedly stated in a number of cases.<sup>1</sup> In other cases it is broadly stated that the conveyance is absolutely void, without any reference to the question whether it would be valid as to any excess over the statutory exemption; but these are generally cases in which there was no such excess, and consequently a

*Hewitt v. Templeton*, 48 Ill. 367; *Finley v. McConnell*, 60 Ill. 259; *Hall v. Fullerton*, 69 Ill. 448; *Cobb v. Smith*, 88 Ill. 199.

*Iowa.* — *Alley v. Bay*, 9 Iowa 509; *Williams v. Swetland*, 10 Iowa 51; *Larson v. Reynolds*, 13 Iowa 579, 81 Am. Dec. 444; *Burnap v. Cook*, 16 Iowa 149, 85 Am. Dec. 507; *Goodrich v. Brown*, (Iowa 1882) 13 N. W. Rep. 309; *Higley v. Millard*, 45 Iowa 586; *Bruner v. Bateman*, 66 Iowa 488; *Lunt v. Neeley*, 67 Iowa 97; *Cowgell v. Warrington*, 66 Iowa 666; *Belden v. Younger*, 76 Iowa 567; *Bolton v. Oberne*, 79 Iowa 278.

*Kansas.* — *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 597; *Ayres v. Probasco*, 14 Kan. 175; *Moore v. Reaves*, 15 Kan. 150; *Chambers v. Cox*, 23 Kan. 393; *Ott v. Sprague*, 27 Kan. 620; *Thimes v. Stumpff*, 33 Kan. 53; *Schermerhorn v. Mahaffie*, 34 Kan. 108; *Jenkins v. Simmons*, 37 Kan. 496.

In *Miners Sav. Bank v. Sandy*, 71 Fed. Rep. 840, it was decided that after the death of the wife a mortgage of the homestead in which she joined could be enforced as against the husband though the wife was insane when she joined in its execution. This decision seems, to some extent at least, contrary to the above-cited state decisions, though the fact that the husband was the moving cause of the wife's joinder, notwithstanding he knew of her condition, and that he received the proceeds, seems to have been considered in deciding against his claim of the invalidity of the mortgage.

*Kentucky.* — *Wing v. Hayden*, 10 Bush (Ky.) 276.

*Michigan.* — *Amphlett v. Hibbard*, 29 Mich. 298; *Phillips v. Stauch*, 20 Mich. 369; *Watertown F. Ins. Co. v. Grover*, etc., *Sewing Mach. Co.*, 41 Mich. 131, 32 Am. Rep. 146; *Sherid v. Southwick*, 43 Mich. 515; *Shoemaker v. Collins*, 49 Mich. 595; *Rogers v. Day*, 115 Mich. 664.

*Minnesota.* — *Barton v. Drake*, 21 Minn. 299; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681; *Conway v. Elgin*, 38 Minn. 469; *Law v. Butler*, 44 Minn. 482.

*Mississippi.* — *Cummings v. Busby*, 62 Miss. 195; *McKenzie v. Shows*, 70 Miss. 388.

*Montana.* — *American Sav., etc., Assoc. v. Burghardt*, 19 Mont. 323.

*Nebraska.* — *Bonorden v. Kriz*, 13 Neb. 121; *McCreery v. Schaffer*, 26 Neb. 173.

*Texas.* — *Stallings v. Hullum*, 89 Tex. 431, reversing (Tex. Civ. App. 1895) 33 S. W. Rep. 1033; *Caywood v. Henderson*, (Tex. Civ. App. 1895) 44 S. W. Rep. 927; *Rogers v. Renshaw*, 37 Tex. 625; *Campbell v. Elliott*, 52 Tex. 151.

*Compare Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Jordan v. Godman*, 19 Tex. 273; *Stewart v. Mackey*, 16 Tex. 57, 67 Am. Dec. 609; *Marler v. Handy*, 88 Tex. 421.

*Wisconsin.* — *Hait v. Houle*, 19 Wis. 472; *Kent v. Lasley*, 48 Wis. 257.

1. *Alienation Valid as to Excess over Statutory Exemption* — *Alabama.* — *McGuire v. Van Pelt*, 55 Ala. 344; *Watts v. Burnett*, 56 Ala. 340; *Garner v. Bond*, 61 Ala. 84; *Jenkins v. Harrison*, 66 Ala. 345; *Snedecor v. Freeman*, 71 Ala. 140; *De Graffenried v. Clark*, 75 Ala. 425; *Strauss v. Harrison*, 79 Ala. 324; *Moses v. McClain*, 82 Ala. 370; *Thompson v. Sheppard*, 85 Ala. 611.

*California.* — *Sargent v. Wilson*, 5 Cal. 504; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Moss v. Warner*, 10 Cal. 296; *Kennedy v. Gloster*, 98 Cal. 143.

*Illinois.* — *Young v. Graff*, 28 Ill. 20; *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Eldridge v. Pierce*, 90 Ill. 474; *Browning v. Harris*, 99 Ill. 456; *Hartman v. Schultz*, 101 Ill. 437; *Gage v. Wheeler*, 129 Ill. 197; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Barrows v. Barrows*, 138 Ill. 649; *Anderson v. Smith*, 159 Ill. 93; *Despain v. Wagner*, 163 Ill. 598; *Wilson v. Illinois Trust, etc., Bank*, 166 Ill. 9; *Donahoe v. Chicago Cricket Club*, 177 Ill. 351.

*Kentucky.* — *Tong v. Eifort*, 80 Ky. 152; *Thorn v. Darlington*, 6 Bush (Ky.) 448; *Lear v. Totten*, 14 Bush (Ky.) 101; *Atkinson v. Gowdy*, (Ky. 1888) 8 S. W. Rep. 698.

*Massachusetts.* — *McMurray v. Connor*, 2 Allen (Mass.) 205; *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 139; *Johnson v. Fay*, 16 Gray (Mass.) 144.

*Michigan.* — *Dye v. Mann*, 10 Mich. 291; *Wallace v. Harris*, 32 Mich. 380; *Shoemaker v. Collins*, 49 Mich. 595; *Hammond v. Rathbone*, 113 Mich. 499.

*Mississippi.* — *State Nat. Bank v. Lyons*, 52 Miss. 181; *Howell v. Bush*, 54 Miss. 437. See also *Collins v. Collins*, 51 Miss. 311.

*Nebraska.* — *Swift v. Dewey*, 20 Neb. 107.

*Nevada.* — *Clark v. Shannon*, 1 Nev. 568.

*New Hampshire.* — *Atkinson v. Atkinson*, 37 N. H. 434; *Gunnison v. Twitchel*, 38 N. H. 62.

*New York.* — *Peck v. Ormsby*, 55 Hun (N. Y.) 265.

*Tennessee.* — *Hildebrand v. Taylor*, 6 Lea (Tenn.) 659; *Parr v. Fumbanks*, 11 Lea (Tenn.) 391; *First Nat. Bank v. Meachem*, (Tenn. Ch. 1896) 36 S. W. Rep. 724.

*Texas.* — *Henkel v. Bohnke*, 7 Tex. Civ. App. 16; *Whetstone v. Coffey*, 48 Tex. 269.



consideration of the question of the effect of the conveyance upon the excess was not called for.<sup>1</sup> Apparently the only case in which a different view from that above stated has been taken was decided in *Massachusetts*, the conveyance being there held to be void as to all the land covered thereby, though greatly exceeding the value of the exemption.<sup>2</sup> Since then the prevailing rule has been adopted in that state by statute.<sup>3</sup>

**Proceedings to Set Off Excess.** — It has been held that where the premises exceed in value the amount fixed by the statute, the grantee may have partition by setting off to the debtor so much of the premises as is within the statutory amount, and that if this cannot be done he may have a sale of the property and pay to the debtor the amount of the exemption from the proceeds of the sale;<sup>4</sup> or the grantee may pay such amount without any sale.<sup>5</sup> It has been decided to be proper for one claiming under a mortgage by the husband, to bring suit in equity to secure the admeasurement of the homestead and to subject the excess to his claim,<sup>6</sup> and in a foreclosure suit it was held proper to refer the matter to a commissioner to set off the homestead.<sup>7</sup> It is for the party desiring to subject the plaintiff's excess to his claim to take the initiative to obtain an inquiry as to the value of the land.<sup>8</sup> It is stated that if it is impossible to locate the homestead the grantee's title to the entire property will fail.<sup>9</sup> And in *Iowa* it was held that where a statute allowed only a certain area of land to be exempt there could be no foreclosure on any of the property covered by the mortgage, before the homestead was marked off as provided by the statute.<sup>10</sup> In *Alabama* it was held that unless the amount of the homestead could be actually separated from the residue of the land, there was no method by which its value could be carved out of the property,<sup>11</sup> but subsequently by statute it was provided that in such a case the equivalent in value of the homestead should be secured to the owner upon his filing a bill to have the land sold;<sup>12</sup> and there is a similar statute in *Mississippi*.<sup>13</sup> The wife may,

*Wisconsin.* — *Hait v. Houle*, 19 Wis. 472; *Kent v. Lasley*, 48 Wis. 257.

So it was decided that where a lease covered both a homestead and personal property, it was, though not signed by the wife, valid as to the personal property, and that the husband was liable on covenants for quiet enjoyment contained therein. *Welch v. Miller*, 70 Vt. 108.

**1. Cases Stating that Conveyance Is Absolutely Void** — *Alabama*. — *Balkum v. Wood*, 58 Ala. 642; *Garner v. Bond*, 61 Ala. 84; *Cahall v. Citizens Mut. Bldg. Assoc.*, 61 Ala. 232; *Vancleave v. Wilson*, 73 Ala. 387; *Halso v. Seawright*, 65 Ala. 431; *Seaman v. Nolen*, 68 Ala. 463; *Slaughter v. McBride*, 69 Ala. 510; *Scott v. Simons*, 70 Ala. 352; *Hood v. Powell*, 73 Ala. 171; *Alford v. Lehman*, 76 Ala. 526; *Crim v. Nelms*, 78 Ala. 604.

*Arkansas.* — *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241.

*Dakota.* — *Myrick v. Bill*, 5 Dak. 167.

*Iowa.* — *Alley v. Bay*, 9 Iowa 509; *Williams v. Swetland*, 10 Iowa 51; *Larson v. Reynolds*, 13 Iowa 579, 81 Am. Dec. 444; *Burnap v. Cook*, 16 Iowa 149, 85 Am. Dec. 507; *Higley v. Millard*, 45 Iowa 586; *Cowgell v. Warrington*, 66 Iowa 666; *Bolton v. Oberne*, 79 Iowa 278; *Goodrich v. Brown*, (Iowa 1882) 13 N. W. Rep.

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*Kansas.* — *Morris v. Ward*, 5 Kan. 239; *Doliman v. Harris*, 5 Kan. 597; *Ayres v. Probasco*, 14 Kan. 175; *Moore v. Reaves*, 15 Kan. 150; *Chambers v. Cox*, 23 Kan. 393; *Ott v. Sprague*, 27 Kan. 620; *Thimes v. Stumpff*, 33 Kan. 53; *Schermerhorn v. Mahabie*, 31 Kan. 108.

*Michigan.* — *Phillips v. Stauch*, 20 Mich. 369.  
*Minnesota.* — *Conway v. Elgin*, 38 Minn.

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*Nebraska.* — *Bonorden v. Kruz*, 13 Neb. 121; *McCreery v. Schaffer*, 26 Neb. 173. See *Hicks*, etc., *Tea Co. v. Mack*, 19 Neb. 339.

*Vermont.* — *Abell v. Lothrop*, 47 Vt. 375.

*Wisconsin.* — *Hait v. Houle*, 19 Wis. 472; *Kent v. Lasley*, 48 Wis. 257.

**2. Massachusetts Decisions.** — *Richards v. Chace*, 2 Gray (Mass.) 383.

**3.** *Smith v. Provin*, 4 Allen (Mass.) 516; *Johnson v. Fay*, 16 Gray (Mass.) 144; *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 139. See Pub. Stat. Mass., c. 123, § 7.

**4. Proceedings to Set Off Excess.** — *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Mix v. King*, 55 Ill. 434; *Eldridge v. Pierce*, 90 Ill. 474; *Hotchkiss v. Brooks*, 93 Ill. 386.

**5.** *Hotchkiss v. Brooks*, 93 Ill. 386; *Wilson v. Illinois Trust, etc., Bank*, 166 Ill. 9.

**6.** *State Nat. Bank v. Lyons*, 52 Miss. 184.

**7.** *Dye v. Mann*, 10 Mich. 291.

**8.** *Black v. Lusk*, 69 Ill. 70. Compare *Amphlett v. Hibbard*, 20 Mich. 298.

**9.** *Sammon v. Wood*, 107 Mich. 506.

**10.** *Goodrich v. Brown*, 63 Iowa 247.

**11. Alabama Cases.** — *Miller v. Marx*, 55 Ala. 323; *McGuire v. Van Pelt*, 55 Ala. 344; *Watts v. Burnett*, 56 Ala. 340; *Farley v. Whitehead*, 63 Ala. 27.

**12.** *Moses v. McClain*, 82 Ala. 370; *Thompson v. Sheppard*, 85 Ala. 611.

**13. Mississippi Statute.** — *State Nat. Bank v. Lyons*, 52 Miss. 181.



it has been held, bring a suit in equity to have her homestead set off as against the grantee.<sup>1</sup> Ejectment will not lie at the suit of the claimant under the husband's deed until the homestead has in some manner been set apart.<sup>2</sup>

(3) *Transfer of Possession.* — In *Illinois* the statute expressly provides that the joint deed of husband and wife containing a clause of release shall not be necessary if possession is given pursuant to the conveyance.<sup>3</sup> Previous to the enactment of such statute, such a transfer of possession was there regarded as rendering the conveyance effective as being an abandonment in favor of the grantee,<sup>4</sup> and it would seem that such must be the case in any state in which the rule prevails that a conveyance not joined in by the wife is valid as to the reversion after the expiration of the exemption right.<sup>5</sup>

(4) *Contracts to Convey.* — It has been decided that where the husband executes a contract to convey the homestead property without the joinder or consent of the wife, the husband may, after the termination of the homestead by abandonment, death of the wife, or otherwise, be compelled specifically to perform such contract.<sup>6</sup> In *Iowa*, it seems, a verbal contract for the transfer of the homestead, assented to by both husband and wife, and followed by a change of possession and a performance of the agreement, operates to transfer the equitable title.<sup>7</sup>

(5) *Divorce or Separation.* — It has been held that a conveyance which was originally invalid because executed by the husband alone does not become valid upon his divorce from his wife.<sup>8</sup> But a contrary view has been taken, on the ground that the statutory provision for a homestead was regarded as intended for the benefit of the family, and after a decree of divorce giving the custody of the children to the wife they cease to be a part of the husband's family.<sup>9</sup> The mere separation of the husband and wife, caused by the husband's misconduct, has been held not to deprive the wife of the homestead right as against a previous mortgagee of the property.<sup>10</sup>

(6) *Estoppel.* — It has been decided that where the rule prevails that a conveyance by the husband alone is void, there is no room for the contention that he is, by such deed, estopped to question the rights of the grantee therein,<sup>11</sup> and so there is no estoppel to claim the homestead right where the conveyance does not contain a waiver of the right as required by statute.<sup>12</sup> But it has been decided in *Texas* that a deed by the husband alone will pass the title to the grantee by estoppel upon the acquisition by the grantor of a new home-

1. *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200.

2. *Ejectment* — *California.* — *Cook v. McChristian*, 4 Cal. 23.

*Illinois.* — *Patterson v. Kreig*, 29 Ill. 514; *Smith v. Miller*, 31 Ill. 159; *Pardee v. Lindley*, 31 Ill. 174. 83 Am. Dec. 219; *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402.

3. *Transfer of Possession.* — *Moore v. Flynn*, 135 Ill. 74; *Maxwell v. Maxwell*, 145 Ill. 156; *McMahill v. McMahon*, 105 Ill. 596, 44 Am. Rep. 819; *Eldridge v. Pierce*, 90 Ill. 474; *Browning v. Harris*, 99 Ill. 456.

4. *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402. See also *Vasey v. Township One, etc.*, 59 Ill. 188.

5. See *supra*, this subsection, *Validity Subject to Homestead Privilege.*

6. *Contracts to Convey.* — *Brewer v. Wall*, 23 Tex. 589, 76 Am. Dec. 76; *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622; *Cross v. Everts*, 28 Tex. 534; *Goff v. Jones*, 70 Tex. 572; *Walker v. Kelly*, 91 Mich. 212, *distinguishing Phillips v. Stauch*, 20 Mich. 369, where the premises continued to be a homestead. See also *supra*, this section, *Prohibition of Alienation or Incumbrance by Husband Without Joinder*

*or Consent of Wife* — *Contracts to Convey.*

7. *Drake v. Painter*, 77 Iowa 731; *Winkleman v. Winkleman*, 79 Iowa 319.

8. *Effect of Divorce.* — *Rogers v. Day*, 115 Mich. 664; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681. And the fact that the decree of divorce assigns the homestead property to the husband is immaterial. *Powell v. Patison*, 100 Cal. 236.

9. *Heaton v. Sawyer*, 60 Vt. 495. See also *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption* — *Effect of Divorce.*

10. *Effect of Separation.* — *Atkinson v. Atkinson*, 40 N. H. 249; *Wood v. Lord*, 51 N. H. 448. See also *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption* — *Rights of Married Women* — *Husband's Property* — *Wife Who Has Left Her Husband.*

11. *Estoppel.* — *Crim v. Nelms*, 78 Ala. 604; *Powell v. Patison*, 100 Cal. 236; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Connor v. McMurray*, 2 Allen (Mass.) 202; *Hoge v. Hollister*, 2 Tenn. Ch. 606; *First Nat. Bank v. Meachem*, (Tenn. Ch. 1896) 36 S. W. Rep. 724; *Abell v. Lothrop*, 47 Vt. 375.

12. *Hartwell v. McDonald*, 69 Ill. 293.

stead, provided such change of homestead was not with intent to defraud the wife.<sup>1</sup> It seems that the wife, though she brings about the sale, and herself receives the purchase money, is not by such or similar acts *in pais* estopped from attacking the conveyance.<sup>2</sup>

(7) *Ratification or Acquiescence.* — Where the law requires the joint consent of the husband and wife to an alienation of the homestead, or a joint conveyance, it seems that a conveyance by the husband alone cannot subsequently be ratified by the wife.<sup>3</sup> If, however, the defect is in the acknowledgment by the wife, a new acknowledgment may, it seems, be made by her, except as against others whose rights have intervened.<sup>4</sup> A mortgage by the husband alone is not rendered valid by its recognition as an existing lien in a subsequent conveyance by the husband and wife.<sup>5</sup> Mere acceptance by a widow of the benefits of a parol contract by the husband to convey was held not to involve a ratification,<sup>6</sup> nor will knowledge by the wife of improvements made by the purchaser have this effect.<sup>7</sup>

(8) *Curative Acts.* — The legislature may, by express enactment, validate conveyances executed by the husband without the proper joinder of the wife, except as against persons who have acquired vested interests in the land previous to such enactment.<sup>8</sup>

(9) *Purchasers With and Without Notice.* — Where the wife does not properly join in or consent to the conveyance of the homestead property, it is not rendered valid by the fact that the grantee is an innocent purchaser for value.<sup>9</sup> If, after the making of such an invalid conveyance, the husband and wife convey to another person, the title of such second grantee will not be affected by the fact that he has knowledge of the previous conveyance.<sup>10</sup> Purchasers, however, of the property from the original grantee in the invalid conveyance, who purchased after the homestead was abandoned, without notice of the former homestead character of the property, have been held to be entitled to protection as against the original grantor and his wife, or either of them.<sup>11</sup>

§ WHO MAY ATTACK CONVEYANCE OR INCUMBRANCE. — The wife of the owner of a homestead may attack a conveyance or an incumbrance thereof on the ground that she did not join therein.<sup>12</sup> It has also been considered that the nonjoinder of the wife may be made a ground of attack by a grantee or mortgagee whose deed is subsequent to the one alleged to be invalid,<sup>13</sup> or

1. *Marler v. Handy*, 88 Tex. 421, citing *Irion v. Mills*, 41 Tex. 310, and *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76.

2. *Acts in Pais.* — *Huss v. Wells*, 17 Tex. Civ. App. 195. Compare *Spafford v. Warren*, 47 Iowa 47.

3. *Ratification and Acquiescence.* — *Howell v. McCrie*, 36 Kan. 605, 20 Am. Rep. 334; *Out v. Sprague*, 27 Kan. 620; *Duncan v. Moore*, 67 Miss. 136; *Dickinson v. McLane*, 57 N. H. 31. Compare *Spafford v. Warren*, 47 Iowa 47; *Dudley v. Shaw*, 44 Kan. 683.

4. See *supra*, this section, *Formal Requisites of Alienation — Acknowledgment*.

5. *Seiffert, etc.*, *Lumber Co. v. Hartwell*, 94 Iowa 576, 58 Am. St. Rep. 413.

6. *Clark v. Evarts*, 46 Iowa 248.

7. *Eckhardt v. Schlecht*, 29 Tex. 129.

8. *Curative Acts.* — *British, etc., Mtg. Co. v. Winchell*, 62 Ark. 160; *Shattuck v. Lyons*, 62 Ark. 338; *Shattuck v. Byford*, 62 Ark. 431; *Sidway v. Lawson*, 58 Ark. 117; *Hill v. Yarbrough*, 62 Ark. 320; *Bluff City Lumber Co. v. Bloom*, 64 Ark. 492; *Harrison Bank v. Gibson*, 60 Ark. 269.

9. *Purchasers With and Without Notice.* —

*Bunting v. Saltz*, 84 Cal. 169. See also *supra*, this section, *Reality of Consent — Fraud*.

10. *Higley v. Millard*, 45 Iowa 586; *Garlock v. Baker*, 46 Iowa 334.

11. *Lunt v. Neeley*, 67 Iowa 97; *Coker v. Roberts*, 71 Tex. 597. See also *Love v. Breedlove*, 75 Tex. 649.

12. *Wife May Attack Conveyance or Incumbrance.* — *Anderson v. Stadlmann*, 17 Wash. 433. But compare *Scott v. Scott*, 73 Miss. 575, in which it was considered that a wife could not maintain a bill merely to obtain cancellation of a conveyance of the homestead by the husband, as the statute gave the wife no property right in the home, but only a veto power upon the right of the husband to convey.

13. *Subsequent Grantee or Mortgagee May Attack Prior Conveyance or Mortgage.* — *Dorsey v. McFarland*, 7 Cal. 342; *Alley v. Bay*, 9 Iowa 509; *Dye v. Mann*, 10 Mich. 291.

*Junior Lienholders.* — Creditors of the owner of a homestead who claim liens on the homestead premises for improvements thereon, and are made parties to an action to foreclose a mortgage and enforce a first lien on the homestead premises, may properly raise the ques-



by any one interested in the homestead property.<sup>1</sup>

**General Creditors Cannot Attack.** — But general creditors of the grantor or mortgagor cannot attack such conveyance or mortgage.<sup>2</sup>

**3. Texas Rule Against Incumbrances** — *a.* **RULE STATED.** — The Constitution of Texas provides that "no mortgage, trust deed, or other lien on the homestead shall ever be valid," with certain specified exceptions, "whether such mortgage or trust deed or other lien shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."<sup>3</sup>

*b.* **APPLICATIONS OF RULE.** — The constitutional rule which has been stated above has been held to invalidate even a mortgage from the husband to the wife;<sup>4</sup> and under it any mortgage of the homestead is void, even although the instrument contains a covenant on the part of the mortgagor that the property covered is not his homestead.<sup>5</sup> But it has been held that notwithstanding the constitutional prohibition against incumbrances, the husband and wife may show that a person to whom they have conveyed their homestead agreed to reconvey it, and they may recover damages for a breach of such agreement.<sup>6</sup>

**Crops and Fixtures.** — It has been held that crops growing on the homestead may be mortgaged,<sup>7</sup> but that fixtures are not subject to mortgage.<sup>8</sup>

**Property Not Homestead.** — Property as to which the homestead right has not yet attached may, of course, be mortgaged,<sup>9</sup> and in the same manner an

tion of the validity of such mortgage, on the ground that it was not joined in by the wife of the homesteader. *Howell v. McCrie*, 36 Kan. 636, 59 Am. Rep. 584.

**1. Any One Interested in Property May Attack Conveyance or Mortgage.** — *Bolton v. Oberne*, 79 Iowa 278.

**2. General Creditors of Grantor or Mortgagor Cannot Attack Conveyance or Mortgage.** — *Taylor v. Dismuke*, 15 Ky. L. Rep. 703; *Cobbey v. Knapp*, 23 Neb. 579.

**A Stranger to the Homestead Right** cannot successfully impeach a transaction relative to the homestead, upon the ground that it amounts in effect to affixing a mortgage charge to the homestead, and as such should be regarded as illegal and void under the constitution and laws of the state where the transaction took place, when under such constitution and laws the transaction would be at the worst merely voidable and not void. *Parks v. Hartford Ins. Co.*, 100 Mo. 373.

**3. Homestead Cannot Be Mortgaged.** — Const. Tex., art. 16, § 50; *Brewster v. Davis*, 56 Tex. 478; *Jones v. Goff*, 63 Tex. 248; *Odum v. Menafee*, 11 Tex. Civ. App. 119; *Inge v. Cain*, 65 Tex. 75; *Campbell v. Elliott*, 52 Tex. 151; *Hays v. Hays*, 66 Tex. 606; *Texas Land, etc., Co. v. Blalock*, 76 Tex. 85; *Equitable Mortg. Co. v. Norton*, 71 Tex. 683. See also *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762; *Stewart v. Mackey*, 16 Tex. 58, 67 Am. Dec. 609; *Lee v. Kingsbury*, 13 Tex. 71, 62 Am. Dec. 546; *Light v. Brown*, (Tex. Civ. App. 1894) 26 S. W. Rep. 886; *Reinstein v. Daniels*, 75 Tex. 640; *Cervenka v. Dyckes*, (Tex. Civ. App. 1895) 32 S. W. Rep. 316.

The husband and wife cannot impose an ordinary lien upon the homestead by contract, nor can they make a conveyance of the homestead with conditions of defeasance. These are limitations and restrictions imposed by the constitution, and are not subject to legislative control. *Jones v. Goff*, 63 Tex. 248.

**Transaction Held Void as Attempted Evasion of Prohibition Against Mortgaging.** — *Stephenson v. Yeargan*, 17 Tex. Civ. App. 111.

**An Absolute Conveyance May Amount to a Mortgage.** *Kainer v. Blank*, 6 Tex. Civ. App. 1; *O'Shaughnessy v. Moore*, 73 Tex. 108; *Gray v. Shelby*, 83 Tex. 405. And compare *Brewster v. Davis*, 56 Tex. 478, where under the circumstances such a deed was held not a mortgage.

**Circumstances Not Constituting Mortgage on Homestead.** — G., the owner of a homestead, conveyed the same to C., and subsequently under a power of attorney from C., conveyed it to one of his (G.'s) creditors, taking an agreement for a reconveyance. It was held that since at the time of this transaction G. was not the owner of the property, the transaction was not void as a mortgage of the homestead. *Gay v. Halton*, 75 Tex. 203.

**"Pretended Sales of the homestead involving any condition of defeasance"** are void under the Texas Constitution. See *Astugueville v. Loustaunau*, 61 Tex. 233; *Hardie v. Campbell*, 63 Tex. 292.

**4. Mortgage from Husband to Wife.** — *Madden v. Madden*, 79 Tex. 595.

**5. Covenant that Property Mortgaged Is Not Homestead.** — *Hines v. Nelson*, (Tex. Civ. App. 1893) 24 S. W. Rep. 541. See also *Building, etc., Assoc. v. Guillemet*, 15 Tex. Civ. App. 649; *Texas Land, etc., Co. v. Blalock*, 76 Tex., 85; *Armstrong v. Moore*, 59 Tex. 646; *Kempner v. Comer*, 73 Tex. 196.

**6. Agreement by Grantee to Reconvey.** — *Hexter v. Urwitz*, 6 Tex. Civ. App. 580.

**7. Crops Growing on the Homestead** may, it has been held, be mortgaged, but they cannot be seized by the mortgagee until gathered and prepared for market. *Silberberg v. Trilling*, 82 Tex. 523.

**8. Fixtures.** — *Gentry v. Bowser*, 2 Tex. Civ. App. 388.

**9. Property as to Which Homestead Right**



abandoned homestead may be mortgaged.<sup>1</sup> But a subsequent abandonment of the homestead does not validate a deed of trust executed at a time when the land was impressed with the homestead character.<sup>2</sup>

**Mortgage Partly for Authorized Purposes.** — A mortgage of the homestead to secure a loan is void, even though part of the money be used for purposes for which, under the constitution, a mortgage of the property would be authorized.<sup>3</sup>

**Unmarried Head of Family.** — The constitutional restriction against mortgaging the homestead does not apply to an unmarried head of a family.<sup>4</sup>

**c. EXCEPTIONS TO RULE—(1) Purchase Money.** — The Constitution of Texas makes two exceptions to the rule under discussion, the first of which is in the case of incumbrances for purchase money.<sup>5</sup>

(2) *Improvements.* — The second exception is in the case of incumbrances for improvements on the homestead.<sup>6</sup> But it has been considered that this exception must be strictly construed,<sup>7</sup> and that it does not authorize the creation of an incumbrance for money loaned to pay for improvements.<sup>8</sup>

**4. California Rule Against Incumbrances.** — There was at one time a statute in California providing that no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness (except for purchase money)

**Has Not Yet Attached.** — *Perego v. Kottwitz*, 54 Tex. 497.

And this although at the time of the mortgage the mortgagor intends and is preparing to use the property as a homestead, and does actually so use it afterwards. *Kempner v. Comer*, 73 Tex. 196.

**1. Abandoned Homestead.** — *White v. Dabney*, (Tex. Civ. App. 1898) 46 S. W. Rep. 653.

**2. Abandonment of Homestead After Mortgage.** — *Rose v. Blankenship*, (Tex. 1891) 18 S. W. Rep. 101.

**A Subsequent Acquisition of Another Homestead** cannot validate a mortgage on property which was a homestead when the incumbrance was created. *Hays v. Hays*, 66 Tex. 606.

**3. Mortgage Partly for Authorized Purposes.** — *Building, etc., Assoc. v. Logan*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1088.

**4. Unmarried Man May Mortgage His Homestead.** — *Lacy v. Rollins*, 74 Tex. 566; *Smith v. Von Hutton*, 75 Tex. 625; *Bateman v. Pool*, 84 Tex. 405; *Moore v. Poole*, (Tex. Civ. App. 1894) 25 S. W. Rep. 802; *Hensel v. International Bldg., etc., Assoc.*, 85 Tex. 215; *Kiobassa v. Paley*, 1 Tex. Civ. App. 165; *Kidwell v. Carson*, 3 Tex. Civ. App. 327; *Hicks v. Hicks*, (Tex. Civ. App. 1894) 26 S. W. Rep. 227; *Astugueville v. Loustaunau*, 61 Tex. 233; *Davis v. Converse*, (Tex. Civ. App. 1898) 46 S. W. Rep. 910. See also *Stoker v. Patton*, (Tex. Civ. App. 1896) 35 S. W. Rep. 64.

**Unmarried Woman May Mortgage Homestead.** — *Dwyer v. Foley*, (Tex. Civ. App. 1896) 35 S. W. Rep. 820.

A widow with children, having the right to encumber her homestead by a deed of trust executed directly by herself, can do so indirectly by conveying the land to another person in order that he may use it as security for a loan to him, such other person giving a deed of trust to secure the loan. *Dwyer v. Foley*, (Tex. Civ. App. 1896) 35 S. W. Rep. 820.

**5. Homestead May Be Encumbered for Purchase Money.** — Const. Tex., art. 16, § 50; *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170; *Cameron v. Marshall*, 65 Tex. 7.

**Trust Deed Executed to Pay Off Existing Vendor's Lien.** — *Hensel v. International Bldg., etc., Assoc.*, 85 Tex. 215; *Wingate v. People's Bldg., etc., Assoc.*, 15 Tex. Civ. App. 416, the latter case concerning a business homestead.

**When Mortgagee May Be Subrogated to Rights of Holder of Vendor's Lien.** — *Texas Land, etc., Co. v. Blalock*, 76 Tex. 85. See also *Hicks v. Morris*, 57 Tex. 658.

**6. Homestead May Be Encumbered for Improvements.** — Const. Tex., art. 16, § 50; *Pioneer Sav., etc., Co. v. Paschall*, 12 Tex. Civ. App. 613; *Cameron v. Marshall*, 65 Tex. 7; *Lippencott v. York*, 86 Tex. 276.

**7. Strict Construction.** — To obtain and fix the materialman's or mechanic's lien authorized by the provision referred to in the text, the prescribed requirements must be strictly followed and complied with. *Cameron v. Marshall*, 65 Tex. 7.

**8. Incumbrance for Money Loaned to Pay for Improvements Not Authorized.** — The lien must be for labor performed or for material furnished, and not for money loaned to pay for labor or material. *Gaylord v. Loughbridge*, 50 Tex. 573. See also *Campbell v. McCampbell*, (Tex. Civ. App. 1896) 34 S. W. Rep. 970.

Therefore a trust deed to secure the payment of a lien obtained "for the purpose of building a homestead on the lot" is invalid, for if the lien could be contracted to secure the payment of money loaned, the purpose of the prohibition would be defeated and the wife and children deprived of their homestead by the husband securing the co-operation of the wife through the pretense that the money would be used to pay for the labor and material used in making the improvements. *Ellerman v. Wurz*, (Tex. 1890) 14 S. W. Rep. 333.

**Lien Created After Improvements Were Finished.** — A contract purporting to give a lien on a homestead for money loaned to pay for improvements thereon is without effect on the property as a lien, where it was entered into after the improvements were finished. *Pioneer Sav., etc., Co. v. Dougherty*, (Tex. Civ. App. 1896) 35 S. W. Rep. 698.

upon the homestead property, should be valid for any purpose whatsoever.<sup>1</sup> This statute, however, did not operate successfully, and was repealed in a very short time.<sup>2</sup>

**5. Louisiana Rule Against Incumbrances.** — Under a former Constitution of Louisiana the homestead was not susceptible of mortgage except for certain specified liabilities,<sup>3</sup> but there is no provision against mortgaging the homestead in the present Constitution.<sup>4</sup>

**6. Georgia Rule Requiring Leave of Court.** — The Constitution of Georgia provides that a debtor shall not, after his homestead is set apart, alienate or encumber the property so exempt, but that it may be sold by the debtor and his wife, if any, jointly, with the sanction of the judge of the Superior Court of the county where the debtor resides or the land is situated, the proceeds to be reinvested upon the same uses.<sup>5</sup>

**7. Conveyance of Homestead under Power of Attorney.** — In *Texas* it is considered that a valid conveyance of a homestead may be executed by a third person holding a power of attorney from the owner of the homestead and his wife;<sup>6</sup> but in *California* a conveyance executed by one holding a power of

**1. California Statute Prohibiting Mortgaging.** — Act of April 28, 1860; *Gluckauf v. Bliven*, 23 Cal. 312; *Sears v. Dixon*, 33 Cal. 326; *Bowman v. Norton*, 16 Cal. 213.

**Strict Construction of Act.** — The provision of the California Act of 1860 that "no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid for any purpose whatsoever," being restrictive upon the right of a citizen to make a contract, should be strictly construed, and could be applied only to those cases which came clearly within its letter and spirit. Therefore, where a mortgage was given partly in renewal of a former mortgage and partly for a new loan, a court of equity would treat it, to the extent of the old mortgage included in it, as a substitute for the former mortgage, and to that extent as a valid incumbrance upon the property. *Himmelmänn v. Schmidt*, 23 Cal. 117. See also *Dillon v. Byrne*, 5 Cal. 455.

The provision quoted above applied only to those cases where parties had duly established their homestead right according to the provisions of the Act of 1860; and where the declaration of the homestead was not made, filed, or recorded in accordance with the provisions of the Act of 1860, at the time of the execution of a mortgage, it would be a valid incumbrance upon the homestead, for in such case the homestead claim would be under the Act of 1851, which did not prohibit such mortgaging. *Gluckauf v. Bliven*, 23 Cal. 312; *Cohen v. Davis*, 26 Cal. 187.

**2. Repeal of Statute.** — See *Peterson v. Hornblower*, 33 Cal. 266.

**Power to Mortgage under Act of 1862.** — Under the Act of 1862 the husband and wife may, by complying with the statutory requirements, place any character of mortgage or lien upon the homestead, and they are therefore not restrained by the act from mortgaging the homestead to secure the payment of a loan. *Peterson v. Hornblower*, 33 Cal. 266.

**3. Constitutional Prohibition of Mortgaging.** — Const. La. 1879, art. 222.

**Transaction Amounting to Mortgage.** — When a person sells the homestead for an existing debt as the price, and immediately the pur-

chaser transfers it back to the vendor and takes a mortgage and vendor's lien on the property, the transaction will be viewed as one of mortgage to secure the debt, and in violation of the constitutional provision referred to in the text. *Stewart v. Sutton*, 48 La. Ann. 1073.

**4. No Prohibition in Present Constitution.** — See Const. La. 1898, title Homestead Exemptions, arts. 244-247.

**5. Georgia Rule Requiring Leave of Court.** — Const. Ga., art. 9, § 3, par. 1 (Code 1882, § 5212); *Pritchett v. Davis*, 101 Ga. 236; *Hart v. Evans*, 80 Ga. 330; *Linch v. McIntyre*, 78 Ga. 209. See also *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163.

Alienation of the homestead is permissible in Georgia, under the ordinary's sanction, by the joint act of the husband and wife. *Burnside v. Terry*, 45 Ga. 629. But it can be neither alienated nor abandoned by the husband alone. *Dearing v. Thomas*, 25 Ga. 224.

A purchaser of the homestead from the husband or from the husband and wife without the approval of the ordinary gets no title as against the homestead interest. *Cheney v. Rodgers*, 54 Ga. 168.

**A Conveyance by the Husband to the Wife** cannot be made without an order of the judge of the Superior Court. *Love v. Anderson*, 89 Ga. 612.

**The Homestead of a Debtor Cannot Be Mortgaged** even with the consent of the wife and an order of the court. *Planters' Loan, etc., Bank v. Dickinson*, 83 Ga. 711.

**6. Homestead May Be Conveyed under Power of Attorney.** — A conveyance of the homestead made under a power of attorney executed and properly acknowledged by the husband and wife may be sustained, for in the case of such a power she has the privilege of retracting before the deed is made as required by statute, and may withdraw her consent at any time before the deed is made by her attorney. *Patton v. King*, 26 Tex. 686, 84 Am. Dec. 596; *Canon v. Boutwell*, 53 Tex. 626; *Warren v. Jones*, 69 Tex. 462; *Jones v. Robbins*, 74 Tex. 615.

**But the Power of Attorney Must Be Acknowledged by the Wife** in the manner prescribed by statute, in order for a conveyance thereunder



attorney from the owner of the homestead has been held invalid even although the wife of the homesteader joined in the deed.<sup>1</sup>

**8. Consideration.** — It has been held that under the laws of *California* the wife has such an interest in the homestead that a consideration is required for her agreement to convey or encumber it.<sup>2</sup> But the Supreme Court of *Texas* has considered that a precedent debt of the husband to the grantees was a valuable consideration between the parties for a conveyance of the homestead, and no additional consideration need be shown to have passed to the wife to give validity to the deed.<sup>3</sup>

**A Nominal Consideration** has been held sufficient to support a conveyance of a homestead to the children of the owner.<sup>4</sup>

**9. Equities on Rescission of Conveyance.** — In *Texas* it has been held that when the statute regulating the privy examination of the wife in conveyances of the homestead has not been substantially complied with, and she has been guilty of no fraud, she may sue for and recover the homestead, or invoke any other judicial remedy for its protection, without refunding the purchase money, unless the same has been applied to her use and benefit.<sup>5</sup>

**10. Rights Between Holder of Incumbrance Covering Homestead and Owner.** — It has been asserted in some jurisdictions that the holder of an incumbrance covering the homestead and other property should exhaust the other property before resorting to the homestead for the satisfaction of his debt;<sup>6</sup> but in *Massachusetts* no such rule is recognized.<sup>7</sup>

**11. Rights Between Holder of Incumbrance Covering Homestead and Other Creditors.** — The holder of a mortgage covering a homestead cannot be compelled by other creditors of the mortgagor to exhaust the homestead property before resorting to the other property covered by his mortgage.<sup>8</sup>

to be valid. *Jones v. Robbins*, 74 Tex. 615. See also *Johnson v. Bryan*, 62 Tex. 624; *Langton v. Marshall*, 59 Tex. 296; *Ruleman v. Pritchett*, 56 Tex. 483.

**Abandonment of Homestead Before Conveyance under Power of Attorney Void as to Wife.** — Where a power of attorney to convey the homestead is void as to the wife, but valid as to the husband, a conveyance under such power, made after the abandonment of the homestead by the husband and wife, will be valid. *Jones v. Robbins*, 74 Tex. 615.

**1. Homestead Cannot Be Conveyed under Power of Attorney.** — *Gagliardo v. Dumont*, 54 Cal. 496.

**2. Necessity for Consideration to Wife.** — *California Fruit Transp. Co. v. Anderson*, 79 Fed. Rep. 404.

Consequently, where the wife executed the mortgage for the prior debts of her husband, and it did not appear that she received any consideration, it was held that she was not bound.

**3. Precedent Debt of Husband Sufficient Consideration.** — *Webb v. Burney*, 70 Tex. 322.

**4. Nominal Consideration.** — *Brooks v. Collins*, 11 Bush (Ky.) 627. See generally the title CONSIDERATION, vol. 6, p. 667.

**5. Wife Need Not Refund Purchase Money unless Applied to Her Use or Benefit.** — *McFalls v. Brown*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1110 [citing *Berry v. Donley*, 26 Tex. 737; *Eckhardt v. Schlecht*, 29 Tex. 130; *Fitzgerald v. Turner*, 43 Tex. 79; *Williams v. Ellingsworth*, 75 Tex. 480; *Stone v. Sledge*, (Tex. Civ. App. 1894) 24 S. W. Rep. 697; *Looney v. Adamson*, 48 Tex. 619; *Stallings v. Hullum*, 57 Tex. 411].

**Deed Rescinded Because of Insanity of Husband.**

— Where a deed for a homestead executed by a husband and wife is rescinded because of the insanity of the husband, which was unknown to the vendee, who acted in perfect good faith, and it appears that the wife and children have received the benefits of the sale, they must be required to return to the vendee the purchase money paid. *Pearson v. Cox*, 71 Tex. 246, 10 Am. St. Rep. 740.

**6. Property Other than Homestead Should Be First Resorted To.** — *Iowa*. — *Lay v. Gibbons*, 14 Iowa 377, 81 Am. Dec. 487; *Blake v. McCosh*, 91 Iowa 544. See also *Bockholt v. Kraft*, 78 Iowa 661.

*Kansas*. — *Frick Co. v. Ketels*, 42 Kan. 527, 16 Am. St. Rep. 507. But compare *Chapman v. Lester*, 12 Kan. 592.

*Michigan*. — *Armitage v. Toll*, 64 Mich. 412. *Tennessee*. — *Parr v. Fumbanks*, 11 Lea (Tenn.) 201.

*Texas*. — See *Hunter v. Wooldert*, 55 Tex. 433.

*Wisconsin*. — *Dunn v. Buckley*, 56 Wis. 190; *Rozek v. Redzinski*, 87 Wis. 525.

**Purchase Subject to Incumbrance.** — A purchaser of a homestead which is subject to an incumbrance, such as a mortgage, is not entitled to have the other property of his grantor exhausted before such mortgage can be enforced against the property so purchased. *Barker v. Rollins*, 30 Iowa 412.

**7. Homestead Need Not Be First Resorted To.** —

*California*. — *Chapman v. Lester*, 12 Kan. 592. *Michigan*. — *Armitage v. Toll*, 64 Mich. 412. *Missouri*. — *Smith*, 28 Neb. 583, 26 Am. St. Rep. 3573.



**12. Rights Between Owner and Creditors Other Than Holder of Incumbrance Covering Homestead.**—It has been considered that a creditor of the homesteader has no right, as against the latter, to insist that an incumbrance covering the homestead and other property shall be enforced primarily against the homestead, but on the other hand the homesteader may insist that the other property be first sold;<sup>1</sup> and that if, when the entire property is sold under such an incumbrance, there is a surplus after paying the amount due, the homesteader may receive out of such surplus the amount of the homestead exemption free from the claims of other creditors.<sup>2</sup>

**13. Disposition of Homestead by Will.**—The right of the owner of a homestead to dispose of the same by will to a person other than his or her spouse, and without the consent of the latter, has been recognized,<sup>3</sup> though in *Iowa* such testamentary disposition can be made only subject to the homestead rights of the surviving spouse.<sup>4</sup> But in some states the right of the owner of a homestead to devise it away from his wife and minor children has been denied.<sup>5</sup> And in *Nebraska* the written assent of the husband or wife of the testator or testatrix is necessary to a valid devise of the homestead.<sup>6</sup>

As Against Creditors the owner of the homestead may devise the same to his widow and children.<sup>7</sup>

*Harris v. Alden*, 104 N. Car. 86; *Rozek v. Redzinski*, 87 Wis. 525. See also *Bernsee v. Hamilton*, 6 Ohio Cir. Ct. 487, 3 Ohio Cir. Dec. 550, wherein it was held that a subsequent judgment creditor could not compel the mortgagee of a homestead to sell the premises for the payment of the mortgage and thus defeat the homestead right.

**1. Property Other than Homestead Must Be First Exhausted.**—*Frick Co. v. Ketels*, 42 Kan. 327, 16 Am. St. Rep. 507; *La Rue v. Gilbert*, 18 Kan. 220; *Hanson v. Edgar*, 34 Wis. 653.

The Rule Was Otherwise in Wisconsin prior to the enactment of chapter 133 of the Laws of 1870. *Jones v. Dow*, 18 Wis. 241; *White v. Polleys*, 20 Wis. 503, 91 Am. Dec. 432.

**2. Homesteader May Receive Amount of Exemption Out of Surplus.**—*Belvidere First Nat. Bank v. Briggs*, 22 Ill. App. 228.

**3. Homestead May Be Devised.**—In *Mississippi* the right of the owner of a homestead to devise the same is recognized. *Norris v. Callahan*, 59 Miss. 140; *Osburn v. Sims*, 62 Miss. 429. See also *Turner v. Turner*, 30 Miss. 428; *Nash v. Young*, 31 Miss. 134.

And it is considered that the right of a married woman who is the owner of a homestead to dispose of it by will is not affected by the provision of section 1260 of the Code of 1880, that "no conveyance of the homestead interest, when this interest is the separate property of the wife, shall be valid and binding unless signed and acknowledged by the husband living with his wife." *Kelly v. Alfred*, 65 Miss. 495.

In *Washington* the husband has the right to devise his separate estate to whomsoever he may see fit, and the wife cannot claim a homestead in such property. *Matter of Eyres*, 7 Wash. 291.

**Devise of One-half Interest Where Owner Without Children.**—Where a husband and wife occupy a piece of land as their homestead, she owning the same, and the legal title thereto being in her name, and she has no children, she can, by will, and without the consent of her husband, devise a one-half interest in the

land, or any less interest therein, to a third person, so that after her death such third person can take the interest attempted to be devised. *Vining v. Willis*, 40 Kan. 609.

**Devise to Son.**—Under the statutes of *Wisconsin* and the decisions of that state, a father has power, without the consent of his wife, lawfully to devise his homestead to a son. *Ferguson v. Mason*, 60 Wis. 377; *Albright v. Albright*, 70 Wis. 535; *Whitmore v. Hay*, 85 Wis. 240, 39 Am. St. Rep. 838.

**Where Owner Is Without Children.**—Under section 4 of article 10 of the *Florida* constitution of 1885, where the owner of the homestead is without children, he or she, as the case may be, can legally dispose of the homestead by last will and testament without the consent of his or her spouse, subject, however, where such disposition is made by the husband, to the widow's right to dower therein as provided by statute. *Burnell v. Reed*, 32 Fla. 329.

But under such provision only those who are without children can dispose of their homesteads by will. *Walker v. Redding*, 40 Fla. 124.

**4. Devise Subject to Rights of Surviving Spouse.**—*Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432; *Stewart v. Brand*, 23 Iowa 477.

**5. Homestead Cannot Be Devised Away from Wife and Children.**—*Meech v. Meech*, 37 Vt. 414. See also *Brettun v. Fox*, 100 Mass. 234.

**6. Necessity for Written Assent to Devise.**—*Gen. Stat. Neb.*, 1894, § 4470. See *Eckstein v. Radl*, 72 Minn. 95.

**Time of Giving Assent.**—This assent need not be executed or given until after the decease of the testator or testatrix. *Radl v. Radl*, 72 Minn. 81. See also *Eckstein v. Radl*, 72 Minn. 95.

**7. Devise to Widow and Children.**—The owner of a homestead not exceeding one thousand dollars in value can pass title to the property to his widow and children by will. Under the homestead law the homestead may be conveyed, and it is no more an injury to creditors nor in contravention of the purpose and rea-

**XIII. RIGHTS OF SURVIVING SPOUSE AND CHILDREN — 1. Of Widower.** — In some jurisdictions, by express statutory provisions, a homestead, whether the title to the fee is in the husband<sup>1</sup> or in the wife,<sup>2</sup> continues after her death for the benefit of the surviving husband, and this without regard to whether he has or has not a family living with him, or whether there is or is not issue out of the marriage.<sup>3</sup> But in some jurisdictions no provision is made for the

son of the homestead law for the debtor to pass title by will than by deed. *Myers v. Myers*, 89 Ky. 442.

**1. Continuation of Husband's Homestead After Wife's Death.** — *Gray v. Patterson*, 65 Ark. 373; *Blum v. Gaines*, 57 Tex. 119.

As to the effect of the death of the wife as determining the husband's homestead, see *supra*, this title, *Waiver, Forfeiture, Abandonment and Release*.

Under Statute in California it has been held that when the homestead is selected from the separate property of the husband who joined in its selection as a homestead, upon the death of the wife it goes absolutely to the surviving husband. *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321.

**Homestead Declared upon Community Property.** — Under statute in California it has been held that where a homestead is declared upon community property, upon the death of the wife it vests absolutely in the surviving husband. *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321; *Robinson v. Dougherty*, 118 Cal. 299. Compare *Burnett v. Walker*, 23 La. Ann. 335.

And under statute in Texas the surviving husband is, as against creditors, entitled to two hundred acres of land as a homestead for himself and the children, where such homestead has been declared on community property. *Beall v. Hollingsworth*, (Tex. Civ. App. 1893) 46 S. W. Rep. 831. See also *Schwartzhoff v. Necker*, 1 Tex. Unrep. Cas. 328. And in such case the homestead cannot be partitioned so long as the father alone or with his minor children may use and occupy it as such, or so long as the probate court, in the event of his death, may permit the guardian of the minor children to use it as a homestead for them. *Adair v. Hare*, 73 Tex. 275.

As to the respective rights of surviving husband and the children in a homestead declared a community property, see *infra*, this section, *Of Children*.

**2. Right of Surviving Husband in Homestead of Deceased Wife.** — *Henson v. Moore*, 104 Ill. 403; *Green v. Root*, 62 Fed. Rep. 191, declaring the law in Iowa; *Burns v. Keas*, 21 Iowa 257; *Little v. Woodward*, 14 Bush (Ky.) 585; *Gavin v. Sanders*, 5 Ky. L. Rep. 321; *Crigler v. Connor*, (Ky. 1839) 11 S. W. Rep. 202; *Tillet v. Gurd*, (Ky. 1896) 35 S. W. Rep. 920; *Ritter v. Huffman*, (Ky. 1899) 50 S. W. Rep. 1101.

By the California Code of Civil Procedure, § 1474, it is provided that "if the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected \* \* \* from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor." See *Matter of Lamb*, 95 Cal. 397; *Watson v. His Creditors*, 58 Cal. 556.

But if the homestead was selected from the separate property of the wife without her consent it vests on her death in her heirs, subject to the power of the Superior Court to assign it for a limited period to the family of the decedent; and a surviving husband without children will come within the description of "family of the decedent." *Matter of Lamb*, 95 Cal. 397. See also *Beck v. Soward*, 76 Cal. 527.

And upon the death of the wife the court will, under certain circumstances, order the separate property of the wife to be set apart for a limited period as a homestead for her surviving husband where none had been selected by the decedent or her husband. *Matter of Matheny*, 121 Cal. 267.

**Change of Homestead.** — It has been held that a surviving husband who has acquired the benefit of the wife's homestead on her death is an "owner" under statute in Iowa permitting an owner to change the homestead. *Green v. Root*, 62 Fed. Rep. 191.

**By What Law Governed.** — A husband's homestead rights in the lands of his wife, it has been held, are determined by the law in force at the death of the wife, and not by a different law in force at any time prior thereto. *Henson v. Moore*, 104 Ill. 403.

**Election to Take Homestead Instead of Distributive Share.** — Under a code provision in Iowa (Code 1897, § 2985) that "upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law" it has been held that the continued occupancy of the property by the husband as a homestead after the death of the wife, who is the owner, will be regarded as an election to hold it as such instead of the distributive share allowed by statute. *Stevens v. Stevens*, 50 Iowa 491; *Butterfield v. Wicks*, 44 Iowa 310; *Holbrook v. Perry*, 66 Iowa 286. See also *Burdick v. Kent*, 52 Iowa 583; *Darrah v. Cunningham*, 72 Iowa 125; *Bradshaw v. Hurst*, 57 Iowa 745.

But it has been held that where the surviving husband is a nonresident of the state, and has abandoned the homestead as a place of residence for himself, and is not shown to have any intention of returning to it, the homestead exemption is at an end and the husband's interest in the premises may be subjected for his debts. *Hornbeck v. Brown*, 61 Iowa 316.

**3. Existence of Children Unnecessary to Enable Surviving Husband to Claim Homestead.** — *Ellis v. Davis*, 90 Ky. 183; *Reed v. Talley*, 13 Tex. Civ. App. 286; *Brown v. Reed*, 20 Tex. Civ. App. 74.

And this right exists, it has been held, against the heirs of the wife as well as against the creditors. *Ellis v. Davis*, 90 Ky. 183.



continuation of the wife's homestead for the husband's benefit after her death.<sup>1</sup>

**Whether Right May Be Defeated by Will of Wife.** — In some jurisdictions it has been held that a wife cannot by will dispose of the homestead declared on her separate property so as to defeat the husband's right during his lifetime to occupy the property after her death, so long as he elects to do so.<sup>2</sup> But in *Mississippi* a different rule has been declared.<sup>3</sup>

**Effect of Abandonment.** — It has been held that where the homestead is the separate property of the wife, a husband who has abandoned his wife without reasonable cause cannot claim any part of the homestead as survivor.<sup>4</sup>

**Mere Temporary Absence.** — But it has been held that a mere temporary absence will not amount to an abandonment of the homestead so as to defeat the right of the husband by survivorship.<sup>5</sup>

**Whether Surviving Husband's Interest Is Assignable.** — Under statute in *Iowa* it has been held that the right of occupancy and possession on the part of the surviving husband does not confer any title which can be conveyed or mortgaged.<sup>6</sup> And under statute in *Illinois* it has been held that a surviving husband cannot convey by deed to a third person his estate of homestead in premises the fee of which is in the heirs of his wife, before the homestead has been assigned or set off, so as to vest the grantee of the deed with the right to have the homestead set off and assigned to him.<sup>7</sup> But in other jurisdictions the husband has the right and power to alienate or mortgage his interest.<sup>8</sup>

**2. Of Widow** — *a. IN GENERAL.* — In most jurisdictions the statutes provide for the continuance of the homestead after the death of the homesteader for the benefit of his widow,<sup>9</sup> and this though she be without

**Homestead Declared on Community Property.** — This rule has been laid down in the case of a homestead declared on community property. *Robinson v. Dougherty*, 118 Cal. 299; *Roberts v. Greer*, 22 Nev. 318, 58 Am. St. Rep. 755.

**1. Jurisdictions in Which No Provision Is Made for Surviving Husband.** — *Thompson v. King*, 54 Ark. 9; *Keyte v. Peery*, 25 Mo. App. 394.

**2. View that Interest of Surviving Husband May Not Be Defeated by Will of Wife.** — *Henson v. Moore*, 104 Ill. 403; *Stewart v. Brand*, 23 Iowa 477; *Reed v. Talley*, 13 Tex. Civ. App. 286.

**3. Interest of Surviving Husband Defeated by Wife's Will in Mississippi.** — *Kelly v. Alred*, 65 Miss. 495.

**4. Abandonment of Wife as Defeating Surviving Husband's Interest.** — *Hector v. Knox*, 63 Tex. 613.

**Husband's Conveyance as Abandonment.** — Under statute in *Illinois* it has been held that where a surviving husband conveyed all of his rights and interest as one of the heirs in the land of his deceased wife, which had been occupied by him and her as a homestead, he thereby released all of his rights under the homestead laws, which rights became merged in the fee and could not be asserted against the other heirs. *Best v. Jenks*, 123 Ill. 447.

**Surviving Husband Selling Homestead in Community Property Not Entitled to Second Homestead in Wife's Separate Property.** — Upon the death of either spouse a homestead declared upon community property vests absolutely in the survivor, still retaining its homestead characteristics; and if the surviving husband afterwards sells the property it has been held that he is not entitled to have another homestead set apart to him out of the separate property of the deceased. *Matter of Ackerman*, 80 Cal. 208, 13 Am. St. Rep. 116.

**5. Henson v. Moore**, 104 Ill. 403.

Thus the absence of the husband from residence on the premises of the wife for a short time, in consequence of some difficulty with the wife, is not such an abandonment of the homestead as deprives him of his right under the statute, where he returns during the wife's last illness and lives with her on the premises until her death. *Henson v. Moore*, 104 Ill. 403.

**6. Butterfield v. Wicks**, 44 Iowa 310. See also *Smith v. Eaton*, 50 Iowa 488.

**7. Best v. Jenks**, 123 Ill. 447.

**8. Surviving Husband's Interest Held to Be Assignable.** — *Hannon v. Sommer*, 10 Fed. Rep. 601, declaring the law in *Kansas*; *Himmelman v. Schmidt*, 23 Cal. 117; *Revalk v. Kraemer*, 8 Cal. 73; *Benson v. Aitken*, 17 Cal. 163; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *Morrill v. Hopkins*, 36 Tex. 686; *Dawson v. Holt*, 44 Tex. 174; *Rice v. Scottish-American Mortg. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 75; *Watts v. Miller*, 76 Tex. 13; *Kidwell v. Carson*, 3 Tex. Civ. App. 327. See also *Jordan v. Imthurn*, 51 Tex. 276.

**9. Continuance of Husband's Homestead for Benefit of Widow** — *Alabama.* — *Weber v. Short*, 55 Ala. 311; *Miller v. Marx*, 55 Ala. 322; *Leslie v. Tucker*, 57 Ala. 483; *Smith v. Cockrell*, 66 Ala. 64; *Bolling v. Jones*, 67 Ala. 508; *Hunter v. Law*, 68 Ala. 365; *Munchus v. Harris*, 69 Ala. 506; *Keel v. Larkin*, 72 Ala. 493; *Garland v. Bostick*, 118 Ala. 209.

*California.* — *Matter of Buchanan*, 8 Cal. 507; *Gee v. Moore*, 14 Cal. 472; *Matter of James*, 23 Cal. 415; *McQuade v. Whaley*, 31 Cal. 526; *Matter of Wixom*, 35 Cal. 320; *Matter of Delaney*, 37 Cal. 181; *Kingsley v. Kingsley*, 39 Cal. 665; *Rich v. Tubbs*, 41 Cal. 34; *Schadt v. Heppe*, 45 Cal. 433; *Herrold v. Reen*, 58 Cal.



children.<sup>1</sup> And she is as much entitled to control the rents and profits of

443; *Watson v. His Creditors*, 58 Cal. 556; *Graham v. Stewart*, 68 Cal. 374; *Tyrrell v. Baldwin*, 78 Cal. 470; *Mechanics' Bldg., etc., Assoc. v. King*, 83 Cal. 440; *Baker v. Brickell*, 87 Cal. 329; *Matter of Schmidt*, 94 Cal. 334; *Matter of Croghan*, 92 Cal. 370.

*Illinois*. — *Merritt v. Merritt*, 97 Ill. 243; *Browning v. Harris*, 99 Ill. 456; *Kitterlin v. Milwaukee Mechanic's Mut. Ins. Co.*, 134 Ill. 647; *Jones v. Gilbert*, 135 Ill. 27; *Brokaw v. Ogle*, 170 Ill. 115.

*Iowa*. — *Burns v. Keas*, 21 Iowa 257; *Cotton v. Wood*, 25 Iowa 43; *Byers v. Johnson*, 89 Iowa 278; *Collins v. Collins*, 72 Iowa 104; *Strong v. Garrett*, 90 Iowa 100.

*Kansas*. — *Dayton v. Donart*, 22 Kan. 256; *Hafer v. Hafer*, 33 Kan. 464; *Hoffman v. Hill*, 47 Kan. 611.

*Kentucky*. — *Phipps v. Acton*, 12 Bush (Ky. 377; *Evans v. Evans*, 13 Bush (Ky.) 587; *McTaggart v. Smith*, 14 Bush (Ky.) 414; *Funk v. Walters*, 6 Ky. L. Rep. 297; *Wilson v. Campbell*, 14 Ky. L. Rep. 512; *Myers v. Myers*, 89 Ky. 442; *Allensworth v. Kimbrough*, 79 Ky. 332; *Robinson v. Smithey*, 80 Ky. 636; *Merrifield v. Merrifield*, 82 Ky. 526; *Derr v. Wilson*, 84 Ky. 14.

*Minnesota*. — *Wilson v. Proctor*, 28 Minn. 13.

*Mississippi*. — *Morrison v. M'Daniel*, 30 Miss. 213; *Hardin v. Osborne*, 43 Miss. 532; *Thoms v. Thoms*, 45 Miss. 263; *Birmingham v. Birmingham*, 53 Miss. 610; *Hickman v. Ruff*, 55 Miss. 549.

*Missouri*. — *Huffschtmidt v. Gross*, 112 Mo. 649; *Kirksville Sav. Bank v. Spangler*, 59 Mo. App. 172.

*New Hampshire*. — *Batchelder v. Fottler*, 62 N. H. 445.

*North Dakota*. — *Fore v. Fore*, 2 N. Dak. 260.

*South Carolina*. — *Hosford v. Wynn*, 26 S. Car. 130; *Glover v. Glover*, 45 S. Car. 51; *Ex p. Worley*, 49 S. Car. 41.

*Tennessee*. — *Farrow v. Farrow*, 13 Lea (Tenn.) 120; *Shelton v. Hurst*, 16 Lea (Tenn.) 470.

*Texas*. — *Wood v. Wheeler*, 7 Tex. 13; *James v. Thompson*, 14 Tex. 463; *Hubbard v. Horne*, 24 Tex. 270; *Runnels v. Runnels*, 27 Tex. 515; *Blair v. Thorp*, 33 Tex. 38; *Lacey v. Clements*, 36 Tex. 661; *McLane v. Paschal*, 62 Tex. 102. See also *Oldham v. McIver*, 49 Tex. 556; *Wortham v. Anderson*, 6 Tex. Civ. App. 18.

*Vermont*. — *White v. White*, 63 Vt. 577.

*Virginia*. — *Barker v. Jenkins*, 84 Va. 895; *Hanby v. Henritze*, 85 Va. 177.

*Wisconsin*. — *Johnson v. Harrison*, 41 Wis. 381. See also *Hove v. McGivern*, 25 Wis. 525.

*Compare* *Clemons v. St. Andrews*, 11 Manitoba 111.

*In Texas* the interest of the surviving husband exists in both separate and community property. *Carter v. Randolph*, 47 Tex. 376; *Hudgins v. Sansom*, 72 Tex. 229; *Zwernemann v. Von Rosenberg*, 76 Tex. 522; *Childers v. Henderson*, 76 Tex. 664; *Hooper v. Caruthers*, 78 Tex. 432; *Lacy v. Lockett*, 82 Tex. 190; *Thompson v. Jones*, (Tex. 1889) 12 S. W. Rep. 77; *Cameron v. Morris*, 83 Tex. 14. See also *King v. Harter*, 70 Tex. 579; *Sanburn v. Deal*, 3 Tex. Civ. App. 385; *Clemons v. Clemons*, 92 Tex. 66.

*In Louisiana* it has been held that the statute in that state giving to every head of a family the right to hold exempt from seizure by his creditors 160 acres of land, etc., as homesteads does not apply to succession property, and therefore if such property has passed into the succession it may be sold for the payment of the debts thereof. *Burnett v. Walker*, 23 La. Ann. 335.

But under statute in this state it has been held that a widow is entitled to an allowance of one thousand dollars out of the husband's succession where there is satisfactory proof of her necessitous circumstances. *Lerude's Succession*, 11 La. Ann. 386; *Aaron's Succession*, 11 La. Ann. 671; *Foulkes's Succession*, 12 La. Ann. 537; *Hunter's Succession*, 13 La. Ann. 257; *Gimble v. Goode*, 13 La. Ann. 352; *Pendarvis v. Wall*, 1, La. Ann. 452; *Yarborough's Succession*, 13 La. Ann. 378; *Sabalot v. Populus*, 31 La. Ann. 854; *De Boisblanc's Succession*, 32 La. Ann. 17; *Dougherty's Succession*, 32 La. Ann. 412. See also *Elliott's Succession*, 31 La. Ann. 31.

*In Florida* the wife has no interest in the homestead of her deceased husband except dower. *Wilson v. Fridenburg*, 19 Fla. 461; *Brokaw v. McDougall*, 20 Fla. 212; *Miller v. Finegan*, 26 Fla. 29.

**By What Law Governed.** — The law governing the homestead rights of the widow and minor children is that in force at the time of the husband's death. *Tyrrell v. Baldwin*, 78 Cal. 470; *Gruwell v. Seybolt*, 82 Cal. 7; *Davidson v. Davis*, 86 Mo. 440; *Burgess v. Bowles*, 99 Mo. 543; *Ailey v. Burnett*, 134 Mo. 313.

**When the Marriage Is Void**, no right under it exists for the benefit of the alleged widow. *Owen v. Bracket*, 7 Lea (Tenn.) 448; *Chapman v. Chapman*, 16 Tex. Civ. App. 382.

In a suit for land purchased at an administrator's sale, brought by parties claiming as the widow and legitimate children, it was held competent for the defendant to allege and prove that they were not the widow and legitimate children, but that there were others who stood in that relation, and to whom the homestead right belonged, if any existed. *Robinson v. Crump*, 35 Tex. 426.

**Widow of Second Marriage.** — A homestead vested in the husband during his first marriage will inure upon his death to the benefit of the widow and child of a second marriage as against his creditors securing levy thereon while he was a widower without family. *National Bank v. Shelton*, 87 Tenn. 393.

**1. Widow Entitled Apart from Existence of Children.** — *Brokaw v. Ogle*, 170 Ill. 115; *Gasaway v. Woods*, 9 Bush (Ky.) 72; *Eustache v. Rodaquest*, 11 Bush (Ky.) 42; *Riley v. Smith*, (Ky. 1887) 5 S. W. Rep. 869; *Gray v. Hanks*, 81 Ky. 552; *Moore v. Parker*, 13 S. Car. 486; *Yoe v. Hanvey*, 25 S. Car. 94; *Watkins v. Davis*, 61 Tex. 414. See also *Elston v. Robinson*, 23 Iowa 208; *Dei v. Habel*, 41 Mich. 88.

*In North Carolina* a widow is not entitled to homestead in lands of her husband if he dies leaving children, whether minors or adults. *Hager v. Nixon*, 69 N. Car. 108; *Wharton v. Leggett*, 80 N. Car. 169; *Saylor v. Powell*, 90 N. Car. 202.

the homestead as the husband was when living.<sup>1</sup>

**Homestead Created After Husband's Death.**—In several jurisdictions provision is made for the setting apart by the probate court, under certain circumstances, of a homestead to the widow where no homestead was set apart in the husband's lifetime.<sup>2</sup> And it has been held that a childless widow is entitled to the provision.<sup>3</sup> But in other jurisdictions it is held that the widow cannot create a homestead right in the land of the husband after his death, and that the husband must have impressed the homestead character upon the land

**1. Right to Rents and Profits.**—*Stull v. Graham*, 60 Ark. 461; *Floyd v. Mosier*, 1 Iowa 512; *Dickson v. Chorn*, 6 Iowa 30.

**Right to Growing Crops.**—When homestead is assigned to a widow while the crops growing at her husband's death still remain upon the land, she takes the crops as against the decedent's creditors and next of kin. *Vaughn v. Vaughn*, 88 Tenn. 742.

**Right to Sue for Breach of Covenant Running with Land.**—A widow in possession of her husband's homestead may sue for breach of covenant running with the land. *St. Louis, etc., R. Co. v. O'Baugh*, 49 Ark. 418.

**Right to Sue for Trespass.**—The widow is entitled to the possession of the whole homestead of the deceased husband, and is the proper person to sue for trespass. The heirs may sue separately for a permanent injury to the freehold resulting from the trespass. *Little Rock, etc., R. Co. v. Dyer*, 35 Ark. 360. See also *Funk v. Walter*, 87 Ky. 182.

A widow continuing to occupy the homestead belonging to her former husband has such right to occupancy as to entitle her to sue for injuries to her enjoyment of the property by a wrongdoer, although it may not appear but that her right to the property is subject to be divested at any time. *Cain v. Chicago, etc., R. Co.*, 54 Iowa 255.

**2. Widow's Right to Probate Homestead Where No Homestead Has Been Declared in Husband's Lifetime.**—*Brooks v. Johns*, 119 Ala. 412; *Matter of Schmidt*, 94 Cal. 334; *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296; *Matter of Noah*, 73 Cal. 590, 2 Am. St. Rep. 834; *Kearney v. Kearney*, 72 Cal. 591; *Matter of Cariger*, 107 Cal. 618; *Fountain v. Hendley*, 82 Ga. 616; *Coughanour v. Hoffman*, 2 Idaho 267; *Walley's Estate*, 11 Nev. 260; *Helm v. Helm*, 30 Gratt. (Va.) 404. See also *Englehardt v. Yung*, 76 Ala. 534. Compare *Chambers v. McPhaul*, 55 Ala. 367; *David v. David*, 56 Ala. 49.

**Under Statute in Washington** providing that a decedent's widow or children may remain in possession of the homestead, and if the decedent has not in his lifetime complied with the law for acquiring a homestead they may have the property set aside for their use exempt from the decedent's debts, it has been held that the obtaining of a general judgment lien against the husband's real estate before he and his family had begun to reside on the premises will not cut off the subsequent selection of a homestead by the widow at any time before sale. *McMillan v. Marr*, 1 Wash. 26.

**In North Carolina** a widow who has no homestead of her own and no living children by the marriage is entitled to have a homestead allotted out of the estate of her deceased hus-

band, although no homestead was allotted to him during his life. *Smith v. McDonald*, 95 N. Car. 163.

**Homestead Set Apart Out of Devised Property.**—In *Bridwell v. Bridwell*, 76 Ga. 627, it was held that a widow may have set apart an exemption for herself and minor children from the property which belonged to her deceased husband at the time of his death, where by the will of the husband the property has been devised to her for life and in trust for such minor children, and such exemption will be granted in spite of the objections of a judgment creditor of the husband.

**Allowance in Lieu of Homestead.**—In Texas, where one dies leaving no homestead the surviving widow is entitled to an allowance in lieu of a homestead. *Terry v. Terry*, 39 Tex. 310; *Burt v. Box*, 36 Tex. 114; *Mayman v. Reviere*, 47 Tex. 357; *Hoffman v. Hoffman*, 79 Tex. 189. See also *Ragland v. Rogers*, 34 Tex. 617; *Newcomb v. Newcomb*, 38 Tex. 561; *Mabry v. Harrison*, 44 Tex. 287.

**Substituted Homestead.**—Under statute in Alabama it has been held that when the decedent's homestead, reduced to the lowest possible area, still exceeds two thousand dollars in value, the widow has a right to select other lands in lieu thereof, and she may select lands of less value than two thousand dollars. *Jackson v. Rowell*, 87 Ala. 686.

**Claiming a Second Homestead.**—It has been held that a widow to whom a probate court has set apart a homestead out of the estate of her deceased husband may, if she afterwards marries, claim a second homestead under the general homestead act on the estate of her second husband. *Higgins v. Higgins*, 46 Cal. 259.

**3. Widow Entitled to Probate Homestead Apart from Existence of Children.**—*Matter of Armstrong*, 80 Cal. 71; *Matter of Lamb*, 95 Cal. 397; *Walley's Estate*, 11 Nev. 260. See also *Wentzel v. Hayes*, 16 Ohio Cir. Ct. 110, 8 Ohio Cir. Dec. 756. Compare *Taylor v. Thorn*, 29 Ohio St. 569; *Kidd v. Lester*, 46 Ga. 231.

**In Georgia** it was held that a widow who had no children living with her dependent on her for support was not entitled to a homestead out of the property of her deceased husband, as the head of a family, according to the true intent and meaning of the Constitution of 1868. *Kidd v. Lester*, 46 Ga. 231.

**But the Testator's Widow and the Stepmother of His Minor Children**, undertaking after his death to keep the children together and to care for and support them, became the head of his family, and as such was entitled to a homestead in his realty for the benefit of herself and the minors. *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484.



during his life, and she must succeed him in that right.<sup>1</sup>

**In What Property Widow Is Entitled to Homestead.** — It has been held that the exemption in favor of the widow attaches only to land of which the husband died seized.<sup>2</sup>

**Lands Held by Trustee.** — She cannot assert a claim to homestead in lands held by her husband merely as a trustee.<sup>3</sup>

**Equitable Estate.** — But she is entitled to a homestead in lands of her deceased husband held by an equitable title only, as where he held under an agreement to purchase, the purchase money or part thereof having been paid.<sup>4</sup>

**Lands Held for Life or for Term of Years.** — Lands held for life<sup>5</sup> or for a term of years<sup>6</sup> by the husband in which a homestead right is enjoyed have been held not to continue as a homestead to the widow.

**Reversionary Interest.** — Nor, it has been held, has the widow a right of homestead in a reversionary interest belonging to her deceased husband, since the right of present occupancy is deemed essential to the existence of the homestead.<sup>7</sup>

**Lands Held in Common.** — But it has been held that a widow is entitled to a homestead in lands of which her husband died seized in common with another.<sup>8</sup>

**b. CHARACTER AND EXTENT OF WIDOW'S INTEREST.** — Under statute in most jurisdictions the widow is entitled to a conditional estate for life in the homestead of her deceased husband.<sup>9</sup> But in other jurisdictions she is, under

**1. View that Widow Is Not Entitled to Homestead Where None Was Declared in Husband's Lifetime.** — *Trotter v. Trotter*, 31 Ark. 145; *Johnston v. Turner*, 29 Ark. 280; *Hoback v. Hoback*, 33 Ark. 404; *Elston v. Robinson*, 23 Iowa 208; *Peebles v. Bunting*, 103 Iowa 489; *Dehoney v. Bell*, (Ky. 1895) 30 S. W. Rep. 400; *King v. McCarthy*, 54 Minn. 190.

**Necessity of Occupancy by Widow.** — In *Johnston v. Turner*, 29 Ark. 280, it was held that the domicile of the wife and minor children follows that of the husband, and their actual personal residence at the homestead place is not necessary to perfect the right in him, or to entitle them to the benefit of it after his death; and that where the head of a family has in good faith selected a place of residence, owns the land, and has entered and resides upon it, the absence of the wife and children might require stronger proof of his intention, but nothing more.

**2. Homestead Attaches Only to Lands of Which Husband Died Seized.** — *Bolling v. Jones*, 67 Ala. 508; *Stockton Bldg., etc., Assoc. v. Chalmers*, 65 Cal. 93; *Berry v. Dobson*, 68 Miss. 483; *Horn v. Tufts*, 39 N. H. 478.

**Undivided Interest of Children.** — The homestead right of a widow does not attach to the undivided interest of the children of the deceased husband inherited from his wife by a former marriage. *Gilliam v. Null*, 58 Tex. 293. See also *King v. Gilleland*, 60 Tex. 271.

**3. No Homestead in Lands Held in Trust.** — *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151; *Osborn v. Strachan*, 32 Kan. 52.

**4. Equitable Interest Sufficient.** — *Munchus v. Harris*, 69 Ala. 506; *Persifull v. Hind*, 88 Ky. 274.

Thus where a party held land under an agreement to purchase, and after his death the purchase money was paid in full by the sale of a portion of the land, but no title deed was ever executed, the widow and children are entitled to their homestead out of the unsold

remainder. *Munro v. Jeter*, 24 S. Car. 29. See also *Garaty v. DuBose*, 5 S. Car. 493.

But in *McCreery v. Fortson*, 35 Tex. 641, it was held that a purchaser by title bond to convey land who dies before paying the purchase money has not such an interest in the land as will create a homestead exemption in favor of his family.

**5. No Homestead in Lands Held for Life.** — *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151.

**6. No Homestead in Term for Years.** — *Pizzala v. Campbell*, 46 Ala. 40.

In *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258, it was held that a widow has no right of homestead in property held by her husband for a term which expired before his death.

**Lands Held as Tenant at Will.** — In the same way it has been held that the widow is not entitled to a homestead in lands held by the husband as a tenant at will. *Berry v. Dobson*, 68 Miss. 483.

**7. No Homestead in Reversionary Interest.** — *Howell v. Jones*, 91 Tenn. 402.

**8. Homestead Right in Lands Held by Husband in Common with Another.** — *Ward v. Mayfield*, 41 Ark. 94; *Stull v. Graham*, 60 Ark. 461; *McClary v. Bixby*, 36 Vt. 254; *Danforth v. Beattie*, 43 Vt. 138. Compare *Matter of Carriger*, 107 Cal. 615.

**9. Widow Entitled to Conditional Life Estate in Homestead.** — *Merritt v. Merritt*, 97 Ill. 243; *Brokaw v. Ogle*, 170 Ill. 115; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526; *Stevens v. Stevens*, 50 Iowa 491; *Dayton v. Donart*, 22 Kan. 256; *McCarthy v. Van Der Mey*, 42 Minn. 189; *Lake v. Page*, 63 N. H. 318; *Zwernemann v. Von Rosenberg*, 76 Tex. 522; *Dooley v. Stringham*, 4 Utah 107; *Howe v. McGivern*, 25 Wis. 532; *Ferguson v. Mason*, 60 Wis. 377. Compare *Green v. Crow*, 17 Tex. 150; *Reeves v. Petty*, 11 Tex. 250; *Horn v. Arnold*, 52 Tex. 161; *Watson v. Rainey*, 69 Tex. 319.



certain circumstances, entitled to a fee-simple interest.<sup>1</sup>

**Whether Interest Assignable.** — Under the law in some of the states it has been held that the right conferred upon the widow surviving is the right to remain in the occupancy of the premises or homestead, and hence an attempted alienation of her interest works an abandonment as against the heirs, who may bring an action for recovery against the alienee.<sup>2</sup> And in *Arkansas* it has been held that in such case it becomes assets in the hands of the administrator for the payment of debts against the estate.<sup>3</sup>

**Effect of Allotment of Homestead Prior to Conveyance.** — In some jurisdictions a distinction has been made in this respect between a conveyance made prior to

In *Missouri*, prior to March 18, 1875, the homestead, upon the death of the husband, passed to and vested in the widow absolutely, subject only to the possessory rights of the minor children during their minority. *Skouten v. Wood*, 57 Mo. 380; *Gragg v. Gragg*, 65 Mo. 343; *Brown v. Brown*, 68 Mo. 388; *Register v. Hensley*, 70 Mo. 189; *Rogers v. Marsh*, 73 Mo. 64; *French v. Stratton*, 79 Mo. 560; *Rockhey v. Rockhey*, 97 Mo. 76; *Burgess v. Bowles*, 99 Mo. 543; *Case v. Mitzenburg*, 109 Mo. 311; *Van Syckel v. Beam*, 110 Mo. 589; *Goode v. Lewis*, 118 Mo. 357; *Linville v. Hartley*, 130 Mo. 252; *Albrecht v. Imbs*, 3 Mo. App. 587; *Keyte v. Peery*, 25 Mo. App. 394; *Richards v. Smith*, 47 Mo. App. 619.

Under Rev. Stat. Mo. 1889, § 5439, however, on the death of the husband the wife takes a life estate in the homestead property, and the minor children take an estate therein during their minority. See *Huschmidt v. Gross*, 112 Mo. 649; *Kirksville Sav. Bank v. Spangler*, 59 Mo. App. 172.

1. Under Statute in *Nevada* it has been held that when a declaration of homestead is filed, the property is held by the husband and the wife as joint tenants, and that upon the death of the husband the homestead property vests absolutely in the surviving wife. *Smith v. Shrieves*, 13 Nev. 303.

Under Statute in *California* it has been held that if a homestead is selected from community property, upon the death of the husband it vests absolutely in the widow. *Matter of Wixom*, 35 Cal. 320; *Bollinger v. Manning*, 79 Cal. 7; *Mechanics' Bldg., etc., Assoc. v. King*, 83 Cal. 440; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26; *Sheehy v. Miles*, 93 Cal. 288; *Collins v. Scott*, 100 Cal. 446; *Matter of Burdick*, 76 Cal. 639.

Also it has been held that if the husband selects a homestead from his separate estate, it will, upon his death, vest absolutely in the wife. *Matter of Croghan*, 92 Cal. 370.

But it has been held that if the homestead is selected from the separate property of the husband without his assent, it will vest in his heirs on his death, subject to the power of the Superior Court to assign it for a limited period to the family of the decedent. *Mawson v. Mawson*, 50 Cal. 539; *Harris v. Harris*, 71 Cal. 314; *Gruwell v. Seybolt*, 82 Cal. 7; *Matter of Lamb*, 95 Cal. 397; *Weinreich v. Hensley*, 121 Cal. 647.

In *Alabama* it has been held that an exemption of homestead set apart to the widow vests a life estate in the widow in any event and the fee in her and her children if the estate is insolvent. But a judicial ascertainment and dec-

laration of insolvency are required before the fee passes. *Munchus v. Harris*, 69 Ala. 506; *Smith v. Boutwell*, 101 Ala. 375; *Kilgore v. Kilgore*, 103 Ala. 617. See also *Thornton v. Thornton*, 45 Ala. 274; *McCuan v. Turrentine*, 48 Ala. 68; *Hudson v. Stewart*, 48 Ala. 204; *Corr v. Shackelford*, 68 Ala. 241.

2. **Widow's Interest Held Not to Be Assignable.** — *Barber v. Williams*, 74 Ala. 331; *Sanson v. Harrell*, 55 Ark. 572; *Freeman v. Mills*, (Ky. 1897) 39 S. W. Rep. 826. See also *Norton v. Norton*, (Ala. 1892) 10 So. Rep. 436.

In *California* it has been held that the right to have a probate homestead admeasured does not constitute an interest in land such as will pass by a conveyance purporting to pass all of the widow's right, title, claims, and interest in the estate of the deceased husband. *Matter of Vance*, 100 Cal. 425. To the same effect see *Matter of Moore*, 57 Cal. 446; *Phelan v. Smith*, 100 Cal. 158; *In re King*, (Cal. 1894) 36 Pac. Rep. 806. See also *Hoppe v. Hoppe*, (Cal. 1894) 36 Pac. Rep. 389. Compare *McHarry v. Stewart*, (Cal. 1893) 35 Pac. Rep. 141.

*Contra.* — But a different rule prevails in other jurisdictions. *Nebraska L. & T. Co. v. Smassall*, 38 Neb. 516; *Kiobassa v. Raley*, 1 Tex. Civ. App. 165; *Grothaus v. De Lopez*, 57 Tex. 670. See also *Abbott v. Abbott*, 97 Mass. 136; *McCarthy v. Van Der Mey*, 42 Minn. 189.

In *Kansas* it has been held that if an interest in the homestead is sold and conveyed by the widow while the property is still occupied as a homestead by her and any one or more of the minor children, the title to such interest passes to the purchaser free from all debts except prior incumbrances given by the intestate and his wife, or the grantor and his wife, and taxes and debts for purchase money and improvements, although the property may afterwards be abandoned as a homestead by the widow and children. *Dayton v. Donart*, 22 Kan. 256. See also *Harclerode v. Green*, (Kan. App. 1898) 54 Pac. Rep. 505.

Under a Provision of the *Georgia Code* that "parties who have taken a homestead of realty under the Constitution of 1868 shall have the right to sell said homestead and reinvest the same by order of the judge of the Superior Courts of this state," it has been held that the surviving widow may, in behalf of herself and minor son, sell the homestead by order of the judge of the Superior Court, and the purchaser acquires the title divested of any claims which any of the heirs at law might have upon the property. *Linch v. McIntyre*, 78 Ga. 209. See also *Fleetwood v. Lord*, 87 Ga. 592. Compare *Whittle v. Samuels*, 54 Ga. 548.

3. *Garibaldi v. Jones*, 48 Ark. 230.

an assignment of homestead and a conveyance subsequent to such assignment.

**After Assignment.** — Thus it has been held that where the homestead is assigned and set off to the widow her inchoate and imperfect right becomes a vested estate in the premises set off which she may convey to a third person if she chooses.<sup>1</sup>

**Conveyance Before Assignment of Homestead.** — But it has been held that the widow's homestead right is merely inchoate until it is assigned and set out in specific property, and the surviving wife cannot by deed convey to a third person her estate of homestead in the premises, the fee of which is in the heirs, before the homestead has been assigned or set off, so as to vest such third person with the right to have the homestead set off and assigned to him.<sup>2</sup> On the other hand, it has been held that the widow may convey her unallotted homestead notwithstanding it existed in a tract of land which was in excess of the quantity and value to which the homestead was limited under the law.<sup>3</sup>

**Whether Subject to Partition at Suit of Heirs.** — It is the prevailing rule that the widow is entitled to homestead as well against heirs as against creditors of her deceased husband, and that during the continuance of her right of occupancy there can be no partition of the homestead at the suit of the heirs,<sup>4</sup> and this though there are no creditors of the decedent.<sup>5</sup> But where the widow is a party to a suit for partition among the heirs and fails to claim her homestead right, it is barred by the decree.<sup>6</sup> In *Michigan* it has been held that where the homestead can be partitioned by metes and bounds there is no difficulty in partitioning it among the heirs entitled, subject to the homestead right of the widow until its termination; but where land is subject to a homestead interest of the widow and minor children, and is within the constitutional limitations as to quantity and value, and cannot be divided in proceedings for partition, it is not subject to sale under such proceedings.<sup>7</sup> And in *Missouri* it has been held that if the land exceeds in area or value the statutory limit of a homestead the heirs have a right to a partition of the estate in excess of the

1. Allotted Homestead Held to Be Assignable. — *White v. Plummer*, 96 Ill. 394; *Plummer v. White*, 101 Ill. 474; *Lake v. Page*, 63 N. H. 318. See also *Shepard v. Brewer*, 65 Ill. 383. Compare *Norris v. Moulton*, 34 N. H. 392; *Probate Judge v. Simonds*, 46 N. H. 363.

2. Unallotted Homestead Held Not to Be Assignable. — *Anderson v. Smith*, 159 Ill. 93; *Slominger v. Slominger*, 161 Ill. 270. See also *Lake v. Page*, 63 N. H. 318.

3. Unallotted Homestead Held to Be Assignable. — *Weatherford v. King*, 119 Mo. 51, *disapproving* *Miller v. Schnebly*, 103 Mo. 368. See also *Colvin v. Hauenstein*, 110 Mo. 579; *Richards v. Smith*, 47 Mo. App. 619.

**Suit for Partition by Heirs.** — And in such a case partition is a proper proceeding in which to obtain the setting apart of the homestead to the alienee. *Colvin v. Hauenstein*, 110 Mo. 575; *Weatherford v. King*, 119 Mo. 51.

4. Homestead Held Not Subject to Partition During Widow's Occupancy. — *Smally v. Chisenhall*, 103 Ala. 683; *Trotter v. Trotter*, 31 Ark. 148; *Hoback v. Hoback*, 33 Ark. 399; *Nicholas v. Purzell*, 21 Iowa 265, 89 Am. Dec. 572; *Gasaway v. Woods*, 9 Bush (Ky.) 72; *Lancaster v. Redding*, (Ky. 1894) 26 S. W. Rep. 1013; *Batchelder v. Fottler*, 62 N. H. 445, *overruling* *Spaulding's Appeal*, 32 N. H. 336; *Hinson v. Poe*, 1 Lea (Tenn.) 701; *Childers v. Henderson*, 76 Tex. 664; *Keyes v. Hill*, 30 Vt. 759; *Voelz v. Voelz*, 88 Wis. 461. See also *Eustache v. Rodaquest*, 11 Bush (Ky.) 42.

In *Kansas* it has been held that so long as the homestead is occupied by the family of the deceased, and until the widow again marries, or the children arrive at the age of majority, no partition of the homestead at the suit of the heirs can be made, although the minor child also appeared in court and asked for the partition. *Hafer v. Hafer*, 33 Kan. 449. See also *Dayton v. Donart*, 22 Kan. 256.

**After Abandonment by the Widow** the property ceases to have the homestead character and she becomes a tenant in common with other heirs. *Orman v. Orman*, 26 Iowa 361. And partition among such heirs may then be had. *Size v. Size*, 24 Iowa 580.

5. *Trotter v. Trotter*, 31 Ark. 148; *Hoback v. Hoback*, 33 Ark. 399.

6. **Widow's Right Barred by Partition Suit in Which She Is a Party and Does Not Claim Homestead.** — *Hoback v. Hoback*, 33 Ark. 399; *Wright v. Danneberg*, 35 Mo. 271; *Roll v. Zimmermeister*, 15 Mo. App. 249; *Moore v. Moore*, (T. Civ. App. 1895) 32 S. W. Rep. 161. Compare *Wheelock v. Overshiner*, 110 Mo. 100; *Case v. Mitzenburg*, 109 Mo. 311; *Yeates v. Briggs*, 5 Ill. 79.

7. *Robinson v. Baker*, 47 Mich. 619. See also *Zoellner v. Zoellner*, 53 Mich. 625.

**Indivisible Homestead Exceeding Constitutional Limitations as to Value.** — In *Zoellner v. Zoellner*, 53 Mich. 620, it was held that where the premises occupied by the debtor as a homestead exceed in value the statutory limit and



homestead, and if the interest of all who are interested would be promoted thereby there may be a sale under the partition proceedings.<sup>1</sup>

**1. NECESSITY OF OUTSTANDING INDEBTEDNESS AGAINST DECEDENT'S ESTATE.** — In some jurisdictions it is held that a widow cannot hold, as against the heirs at law, a homestead set apart by her husband in his lifetime where there is no outstanding indebtedness against the estate of the decedent,<sup>2</sup> and the fact that the homestead was claimed by the husband in his lifetime is not, as against the heir, presumptive proof that there are subsisting debts of the estate outstanding,<sup>3</sup> but if there is an indebtedness the smallness thereof will be no reason for disallowing the claim of homestead.<sup>4</sup> But in other jurisdictions the homestead estate of the wife after the husband's death does not depend upon the existence of outstanding debts against the estate.<sup>5</sup>

**d. AGAINST WHAT DEBTS EXEMPTION EXISTS — Debts of Decedent.** — The general rule is that the widow's homestead is not subject to administration, that is, is not subject to claims of general creditors of the decedent's estate.<sup>6</sup> But the homestead is not, according to the prevailing decisions, discharged from all the debts of the decedent. Thus, in some jurisdictions it is subject to specific liens, such as mortgage and vendor's liens properly executed, and even to general indebtedness for purchase money, improvements, and taxes.<sup>7</sup> And in some jurisdictions the rule is broadly laid down that the homestead remains liable for the payment of the same debts after it descends to the widow and children for which it was liable when the title stood in the husband.<sup>8</sup>

cannot be divided so as to carve out a homestead within that limit, no homestead exists in favor of the widow or family.

1. Beckner v. McLinn, 107 Mo. 277. See also Colvin v. Hauenstein, 110 Mo. 582; Weatherford v. King, 119 Mo. 51.

2. **Widow's Homestead Held Dependent on Existence of Outstanding Indebtedness Against Estate.** — Zoellner v. Zoellner, 53 Mich. 625; *Ex p.* Worley, 49 S. Car. 41; Barker v. Jenkins, 84 Va. 895. See also Green v. Crow, 17 Tex. 180; Jergens v. Schiele, 61 Tex. 255; Zwernemann v. Von Rosenberg, 76 Tex. 522; Knudsen v. Hannberg, 8 Utah 203. Compare Carter v. Randolph, 47 Tex. 376.

In *North Carolina* it has been held that a widow cannot have a homestead laid off for herself after the death of the husband when he died without leaving debts. Hager v. Nixon, 69 N. Car. 108.

But in *Tucker v. Tucker*, 103, N. Car. 170, it was held that where the homestead is laid off to the husband in his lifetime, or when he leaves no children to his widow after his death, it cannot be divested in favor of the heir by the release or extinguishment of the debts of the deceased husband by reason of payment made by the heir. And the same has been held to be true of a payment made by the administrator. *Ex p.* Worley, 49 S. Car. 41.

3. Barker v. Jenkins, 84 Va. 895.

**Where No Claim to Homestead Was Made by Husband in His Lifetime.** — In *Helm v. Helm*, 30 Gratt. (Va.) 404, it was held that a widow whose husband has died leaving no children and no debts and has not claimed the homestead in his lifetime is not entitled to a homestead in his estate as against his heirs.

4. *Ex p.* Worley, 49 S. Car. 41.

5. **Widow's Homestead Held Not Dependent on Outstanding Indebtedness.** — Cox v. Bridges, 84 Ala. 553; Hoback v. Hoback, 33 Ark. 399;

Lancaster v. Redding, (Ky. 1894) 26 S. W. Rep. 1013; Silloway v. Brown, 12 Allen (Mass.) 30; Freund v. McCall, 73 Mo. 343; Rhorer v. Brockhage, 86 Mo. 544.

6. **Widow's Homestead Not Subject to General Claims of Decedent's Creditors.** — Matter of Tompkins 12 Cal. 114; Matter of Busse, 35 Cal. 310; Shadt v. Heppe, 45 Cal. 433; Matter of Gilmore, 81 Cal. 240; Keyes v. Cyrus, 100 Cal. 322, 38 Am. St. Rep. 206; Cummins v. Denton, 1 Tex. Unrep. Cas. 181; Blair v. Thorp, 33 Tex. 38; White v. White, 63 Vt. 577; Childers v. Henderson, 76 Tex. 664. See also Smith v. Wells, 46 Miss. 64.

7. **Widow's Homestead Subject to Specific Liens.** — Dayton v. Donart, 22 Kan. 256; Fudge v. Fudge, 23 Kan. 417; Jones v. Tainter, 15 Minn. 512; Blair v. Thorp, 33 Tex. 38; Black v. Rockmore, 50 Tex. 88; Hensel v. International Bldg., etc., Assoc., 85 Tex. 215; Fossett v. McMahan, 86 Tex. 652. See also Johnson v. Cain, 15 Kan. 532; Cohen v. Ripy, (Ky. 1896) 33 S. W. Rep. 625; Mullins v. Yarrowborough, 44 Tex. 14. Compare Cason's Succession, 32 La. Ann. 790.

A mortgage given to secure payment for a land warrant, with which pre-empted land is entered, is for purchase money, and takes precedence of the widow's right of dower or homestead right, under statutes providing that a claim of homestead shall not be valid as against a mortgage for the purchase money of the subject of the claim. Jones v. Tainter, 15 Minn. 512.

**A Widow Who Pays Off Her Husband's Note** given for the homestead may enforce the vendor's lien against the homestead or collect the note out of the general estate before any distribution to his heirs or distributees. Gainus v. Cannon, 42 Ark. 503.

8. Matter of Orr, 29 Cal. 101; White v. White, 63 Vt. 577. See also Matter of McCauley, 70 Cal. 544; Matter of Chalmers, 64 Cal. 75;



**Sale of Homestead for Payment of Debts.** — Under statute in some jurisdictions the probate court has no authority to order, or the administrator to make, a sale of the homestead of a deceased homesteader for the payment of his debts, until the exemption in favor of the widow and children has been in some mode terminated,<sup>1</sup> this rule being restricted in some jurisdictions to the case where the land to be sold is within the constitutional or statutory limitations as to quantity and value.<sup>2</sup> But in other jurisdictions in which the fee of the homestead is regarded as assets for the payment of debts the homestead may be sold subject to the occupancy of the widow and children, if the sale is necessary to pay the debts of the husband.<sup>3</sup>

**Debts of Survivor.** — In some jurisdictions the rule is laid down that a homestead set apart under the Probate Act simply becomes not subject to administration — that is, not subject to claims of general creditors of the estate — but it remains subject in the hands of the widow to the payment of her debts, whether contracted before or after it was so set apart.<sup>4</sup> But in other states a different rule has been laid down.<sup>5</sup>

*e. HOW INTEREST MAY BE BARRED* — (1) *In General.* — The interest of

*Simonds v. Powers*, 28 Vt. 354; *Perrin v. Sargeant*, 33 Vt. 84.

**1. Homestead Held Not Subject to Sale by Administrator During Widow's Occupancy.** — *McCloy v. Arnett*, 47 Ark. 445; *Stayton v. Halpern*, 50 Ark. 329. See also *Rogers v. Marsh*, 73 Mo. 64; *Seek v. Haynes*, 68 Mo. 13; *Kelsay v. Frazier*, 78 Mo. 111; *Murphy v. De France*, 105 Mo. 54; *Anthony v. Rice*, 110 Mo. 223; *Daud v. Harmon*, 16 Mo. App. 203.

**Sale of Homestead by Administrator a Nullity.** — Under the *Arkansas* Constitutions of 1868 and 1874 the probate court has no jurisdiction to order the sale of a homestead of a deceased person for the payment of his debts during the minority of his children, or so long as his widow remains unmarried or does not abandon the homestead, or shall not be the owner of a homestead in her own right; and an order of sale so made is an absolute nullity. *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119.

But the purchaser at such sale is entitled to be subrogated to the rights against the estate which were held by the creditors whose claims his money has paid. *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119; *Harris v. Watson*, 56 Ark. 574.

**Sale of Homestead by Administrator a Misdemeanor.** — Under statute in *Arkansas* it has been held to be a misdemeanor punishable by fine and imprisonment for an administrator to attempt to sell the homestead after it has been reserved for the benefit of the widow and children. *McCloy v. Arnett*, 47 Ark. 454; *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119; *Harris v. Watson*, 56 Ark. 574; *Horton v. Hilliard*, 58 Ark. 300.

But the statute does not make criminal the buying or offering to buy the homestead of a deceased person at an administrator's or executor's sale after it has been selected by the widow or minor children and reserved for sale. *Bond v. Montgomery*, 56 Ark. 572, 35 Am. St. Rep. 119; *Harris v. Watson*, 56 Ark. 574.

**2. Hartman v. Schultz**, 101 Ill. 437; *Oettinger v. Specht*, 162 Ill. 179; *Mueller v. Conrad*, 178 Ill. 276. See also *Rottenberry v. Pipes*, 53 Ala. 447; *Showers v. Robinson*, 43

Mich. 502; *Zoellner v. Zoellner*, 53 Mich. 626.

In *Hartman v. Schultz*, 101 Ill. 437, it was held that no sale of the homestead by the administrator of the deceased householder to pay his debts can rightfully be made when the property does not exceed in value one thousand dollars, until the exemption in favor of the widow and minor children has been in some mode terminated; and that the homestead, when not exceeding one thousand dollars in value, cannot even be sold subject to the homestead right.

**Consent of Widow Immaterial.** — And the consent of the widow to the sale will not validate it, as the fee in the premises cannot be so severed from the right of occupancy as the homestead. *Mueller v. Conrad*, 178 Ill. 276.

**Sale to Satisfy Judgment Creditor of Heir.** — But in *Brokaw v. Ogle*, 170 Ill. 115, it was held that the interest of an heir may be levied upon and sold subject to the homestead right of the widow under a judgment against the heir.

**3. Sale by Administrator Subject to Widow's Occupancy Held Valid.** — *Phipps v. Acton*, 12 Bush (Ky.) 377; *Evans v. Evans*, 13 Bush (Ky.) 587; *Lear v. Totten*, 14 Bush (Ky.) 101; *McTaggart v. Smith*, 14 Bush (Ky.) 414; *Taylor v. Loller*, 8 Ky. L. Rep. 773; *Derr v. Wilson*, 84 Ky. 14. See also *McCarthy v. Van Der Mey*, 42 Minn. 189; *McGowan v. Baldwin*, 46 Minn. 477.

**4. Widow's Right Held Liable to Her Own Debts.** — *Walley's Estate*, 11 Nev. 260. See also *Givens v. Hudson*, 64 Tex. 471; *Lacy v. Lockett*, 82 Tex. 190; *Cameron v. Morris*, 83 Tex. 44.

**5. Widow's Right Held Not Liable for Her Debts.** — *Tyrell v. Baldwin*, 78 Cal. 470; *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296; *Briggs v. Briggs*, 45 Iowa 318; *Nye v. Walliker*, 46 Iowa 306. See also *McTaggart v. Smith*, 14 Bush (Ky.) 414.

**Widow as Devisee.** — The widow, as devisee of her husband, holds an independent right to a homestead in the land devised, which cannot be subjected to debts incurred by her after his death. *Allensworth v. Kimbrough*, 79 Ky. 332, 2 Ky. L. Rep. 352.

the surviving widow is, like the interest of the original homesteader, subject to be defeated.<sup>1</sup>

(2) *Waiver or Abandonment* — During Lifetime of Husband. — Where the homestead has been abandoned by the husband and the wife, with no intention of returning, the right of the wife as survivor is forfeited.<sup>2</sup>

*Abandonment of Husband by Wife.* — Under statute in some jurisdictions it has been held that a wife who without cause abandons her husband and lives apart from him until his death thereby forfeits her right as survivor to the homestead of the deceased husband.<sup>3</sup> But in other jurisdictions a different rule has been declared.<sup>4</sup>

*Voluntary Separation.* — It has been held that a voluntary separation of husband and wife will not deprive the widow of her homestead rights after the husband's decease.<sup>5</sup> But in *California* it has been held that under an agreement of separation, whereby the common property of the husband and wife is fairly divided to the satisfaction of both parties, and each relinquishes all right to the share allotted and assigned to the other, the wife can claim no homestead rights as survivor upon the death of the husband.<sup>6</sup>

*After Husband's Death.* — The right of the surviving widow may be lost by her abandonment of the homestead, as where she takes up her abode elsewhere with no intention of returning to the homestead estate.<sup>7</sup> And the rule is not affected by the fact that she was ignorant of her homestead rights.<sup>8</sup> But in some states the widow's rights remain whether she continues to reside upon the homestead or not.<sup>9</sup>

**1. Merger of Homestead in Absolute Estate.** — Under statute in *Georgia* it has been held that where a widow, having a life estate in property of her deceased husband by reason of the homestead, afterwards acquires an absolute estate in the same property by reason of its being set apart to her as a year's support, the life estate, being the lesser, is merged in the absolute estate, and the homestead estate being thus destroyed, the absolute estate becomes subject to the debts of the owner. *Lowe v. Webb*, 85 Ga. 731.

**2. Widow's Right Defeated by Abandonment by Husband and Wife.** — *Foster v. Leland*, 141 Mass. 187; *Matter of Phelan*, 16 Wis. 79. See also *Horn v. Tufts*, 39 N. H. 478.

*Under Statute in Minnesota* it has been held that where husband and wife removed from and leased their homestead and remained away for a period longer than six months without filing the notice prescribed by statute, the homestead does not survive to the wife after the husband's death. *Baillif v. Gerhard*, 40 Minn. 172.

**3. Wife's Abandoning Husband as Barring Homestead.** — *Trawick v. Harris*, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 630; *Sears v. Sears*, 45 Tex. 557; *Newland v. Holland*, 45 Tex. 588; *Duke v. Reed*, 64 Tex. 705. See also *Farwell Brick, etc., Co. v. McKenna*, 86 Mich. 285; *Dickman v. Birkhauser*, 16 Neb. 686; *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623; *Curtis v. Cockrell*, 9 Tex. Civ. App. 51.

*Abandonment for Cause.* — But it has been held that if the wife abandons the husband for good cause, she will be entitled to a life estate in the homestead of the husband upon his death. *Lamb v. Wogan*, 27 Neb. 236; *Bradley v. Deroche*, 70 Tex. 465.

**4. Widow's Right Held Not Barred by Abandonment of Husband.** — *Duffy v. Harris*, 65 Ark. 251; *Brown v. Brown*, 68 Mo. 388; *Atkinson v.*

*Atkinson*, 40 N. H. 249; *Lindsey v. Brewer*, 60 Vt. 627.

**5. Widow's Right Not Barred by Voluntary Separation of Husband and Wife.** — *Meador v. Place*, 43 N. H. 307. See also *Culberson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204.

**6. Wickersham v. Comerford**, 96 Cal. 433. See also *Matter of Winslow*, 121 Cal. 92. *Compare Eproson v. Wheat*, 53 Cal. 715.

**7. Effect of Widow's Abandonment of Homestead.** — *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Shepard v. Brewer*, 65 Ill. 383; *Farnan v. Borders*, 119 Ill. 228; *Butterfield v. Wicks*, 44 Iowa 310; *Hornbeck v. Brown*, 91 Iowa 316; *Paul v. Paul*, 136 Mass. 286; *Gaines v. Gaines*, 4 Tex. Civ. App. 408; *McAllister v. Godbold*, (Tex. Civ. App. 1894) 29 S. W. Rep. 417. See also *Barber v. Williams*, 74 Ala. 334; *Size v. Size*, 24 Iowa 580; *Orman v. Orman*, 26 Iowa 361; *Dayton v. Donart*, 22 Kan. 256.

*The Unexecuted Intention* of a widow to occupy and claim land of her deceased husband as a homestead does not exempt it from the payment of his debts. *Hicks v. Soaper*, 6 Ky. L. Rep. 364.

*But the Mere Temporary Absence* of the widow from the homestead from sickness or other necessary cause, if she intends to return, does not divest her of her rights thereto. *Zwick v. Johns*, 89 Iowa 550; *Derring v. Beard*, 48 Kan. 16; *Pratt v. Pratt*, 161 Mass. 276.

*An absence* by the widow from the homestead by reason of ill health for a year after the death of her husband will not deprive her of her right of homestead under the *Illinois* statute of 1851, where there is no intention to abandon. *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730.

**8. Paul v. Paul**, 136 Mass. 286.

**9. Widow's Right Held Not to Be Affected by Ceasing to Occupy Premises.** — *Gainus v. Can-*



**Alienation as Abandonment — Conveyance During Coverture.** — If the wife unites with her husband in the conveyance or mortgage of their homestead, she cannot, upon the husband's death, have the homestead as against the alienee or against the mortgagee until the mortgage debt is paid.<sup>1</sup> But a mortgage, lease, or other conveyance not signed by the wife, or otherwise executed in violation of the prescribed statutory mode, will not bar her right in the homestead as survivor.<sup>2</sup> It has been held, however, that if the husband conveys his homestead without the concurrence of his wife, and subsequently acquires a new homestead, though of less value, the right in the former homestead is thereby terminated, and upon the husband's death the widow cannot claim the old homestead.<sup>3</sup>

**Alienation After Husband's Death.** — In those jurisdictions in which the right of the widow to convey her interest as survivor in the homestead is recognized her right thereto will of course be barred by its alienation.<sup>4</sup> This effect has

non, 42 Ark. 503; *Hufschmidt v. Gross*, 112 Mo. 656; *Durland v. Seiler*, 27 Neb. 33.

**1. Widow's Right Defeated by Conveyance by Husband and Wife.** — *Fudge v. Fudge*, 23 Kan. 417; *Harpending v. Wylie*, 13 Bush (Ky.) 158; *Norris v. Morrison*, 45 N. H. 490. See also *Hufschmidt v. Gross*, 112 Mo. 656; *Woodall v. Rudd*, 41 Tex. 375; *Clements v. Lacy*, 51 Tex. 150. Compare *McLane v. Paschal*, 47 Tex. 366, 74 Tex. 20; *Black v. Rockmore*, 50 Tex. 88.

**Liability of Widow's Interest to Contribution to Pay Off Incumbrance.** — In *McGowan v. Baldwin*, 46 Minn. 477, it was held that where a homestead is mortgaged by an instrument in which the wife joins, the life estate of the surviving widow is subject to and must bear its proportion of the incumbrance in case of a deficiency in personal assets, and in an order of sale of the remainder in fee in the homestead property it is error to charge the same with the entire incumbrance of a subsisting mortgage for which the entire estate is liable. See also *Jones v. Gilbert*, 135 Ill. 32.

**Where a Purchaser at an Administrator's Sale redeemed from a mortgage on the property, it was held that the widow was entitled to her homestead only upon payment of her ratable share of the mortgage debt.** *Selb v. Montague*, 102 Ill. 446. See also *Jones v. Gilbert*, 135 Ill. 32. And this whether the mortgage was executed by the husband alone before marriage, or was executed after marriage, with a release of dower and homestead. *Selb v. Montague*, 102 Ill. 446.

**Right of Widow to Compel Heir to Contribute.** — Where a homesteader and his wife executed a deed of trust in the nature of a mortgage on the homestead, and after the death of the homesteader the wife remained in possession as survivor and purchased the property at the trustee's sale, it was held that before an heir at law could assert any claim to the homestead property as against the surviving widow he must discharge or tender his due proportion of the mortgage obligation, since the wife is entitled to be subrogated to the rights of the holder of the mortgage and to remain as mortgagee in possession until satisfaction of the debt secured is made. *Ailey v. Burnett*, 134 Mo. 111.

**Judgment Foreclosing Mortgage a Bar.** — A judgment against a husband and wife foreclosing a mortgage executed by them and ordering a sale of the homestead embraced therein pre-

cludes the wife and infant children of the husband after his death from asserting claim to a homestead, and the court has no power, on a motion to revive, to go behind the judgment to inquire into the validity of the mortgage. *Harpending v. Wylie*, 13 Bush (Ky.) 158.

**Right of Occupancy Until Enforcement of Mortgage Lien.** — Although the wife of a debtor joins with him in a mortgage on his land, waiving homestead and dower, she has the right after her husband's death to the use and occupancy of so much of the land as represents the homestead until it is sold under the judgment enforcing the mortgage lien. *Hersperger v. Smith*, 16 Ky. L. Rep. 61.

**2. Effect of Conveyance in Which Wife Is Not Joined.** — *Scott v. Simons*, 70 Ala. 352; *White v. Curd*, 86 Ky. 191; *Norris v. Moulton*, 34 N. H. 394; *Meador v. Place*, 43 N. H. 307; *Bates v. Bates*, 97 Mass. 392; *Hair v. Wood*, 58 Tex. 77. See also *Browning v. Harris*, 99 Ill. 456; *Hicks v. Pepper*, 1 Baxt. (Tenn.) 44.

**Failure of Wife to File Claim of Homestead During Husband's Lifetime.** — In *Shores v. Shores*, 34 Mo. App. 208, it was held that where a husband in his lifetime leases part of his homestead land for a term of years, and afterwards dies, his widow, never having filed in the recorder's office her claim of homestead during the life of the husband, cannot claim possession of the land against the rights of the lessee, but she may nevertheless enjoy her right, subject to the rights of the lessee, by receiving the rents reserved in the lease, and may enforce a forfeiture of the lease, where forfeiture is authorized by its terms, and resume possession.

**3. Horn v. Tufts**, 39 N. H. 478. See also *Foster v. Leland*, 141 Mass. 187; *Curtis v. Cockrell*, 9 Tex. Civ. App. 51.

In *Horn v. Tufts*, 39 N. H. 478, it was held that if a husband conveys to a third person an undivided half of the homestead on which he and his family have lived, and his wife does not join in the deed, but the grantee enters into possession of his part, and the husband continues to occupy the residue in common as his homestead, the homestead right becomes limited to the half so occupied, and upon the death of the husband the judge of probate has no authority to assign to the widow a homestead in the lands conveyed.

**4. Widow's Right Barred by Alienation After Husband's Death.** — *Mack v. Heiss*, 90 Mo.



been given to a conveyance of her homestead before it was assigned.<sup>1</sup> And the doctrine has been advanced that an attempted alienation of the homestead by the widow will amount to abandonment by her, although no title passed to the grantee by the conveyance.<sup>2</sup>

**Lease of Homestead.** — A mere temporary absence after having rented out the homestead and placed it in possession of the tenant has been held not to be such an abandonment as will forfeit the widow's claim to the homestead, and the occupancy of her tenant will be considered as her occupancy.<sup>3</sup> But where a widow rents the premises, and leaves them with no intention of returning and occupying them as a homestead, but with the intention of remaining away permanently, there is an abandonment.<sup>4</sup>

(3) *Nonresidence in State.* — The wife or children of a person owning land in a state, but who dies without having resided there, cannot claim a homestead therein, or the statutory allowance in lieu of homestead, though he may have intended to move into the state and make the land his homestead.<sup>5</sup> And it has been held that where an alien husband, after desertion of his wife in one jurisdiction, settles in another state or jurisdiction, and the wife never comes to his later place of residence, she cannot upon his death claim any rights as survivor in the homestead acquired by the husband.<sup>6</sup> But in *Texas* it is held that there is no forfeiture if the deceased husband was a resident of the state, though the wife and children may have lived elsewhere, provided they did so with his consent.<sup>7</sup> Such a claim cannot be made by a wife who had abandoned her husband and gone to another state.<sup>8</sup> Nor can the claim be asserted by a wife if she and her husband had ceased to reside in the state before his death.<sup>9</sup> And it has been held that the widow's rights in the homestead of the deceased husband are forfeited in favor of the husband's creditors

578; *Weatherford v. King*, 119 Mo. 51; *Richards v. Smith*, 47 Mo. App. 619; *Nebraska L. & T. Co. v. Smassall*, 38 Neb. 516; *Grothaus v. De Lopez*, 57 Tex. 670; *Kiobassa v. Raley*, 1 Tex. Civ. App. 165. See also *Hoppe v. Hoppe*, 104 Cal. 94; *O'Connor v. Barre*, 3 Mart. (La.) 460.

1. *Weatherford v. King*, 119 Mo. 51; *Tucker v. Tucker*, (Tenn. 1898) 45 S. W. Rep. 344. See also *Shepard v. Brewer*, 65 Ill. 383.

2. *Freeman v. Mills*, (Ky. 1897) 39 S. W. Rep. 826. See also *Sansom v. Harrell*, 55 Ark. 572.

**Conveyance of Dower Interest as Abandonment of Homestead.** — In *Bates v. Bates*, 97 Mass. 392, it was held that if a widow, entitled under the statute of 1855, c. 238, to an estate of homestead, which had not been set off to her, procured an assignment to herself of dower, under Gen. Stat. Mass., c. 90, § 5, of one-third of the rents, issues, and profits of the same land as tenant in common with the other owners, and then conveyed her interest so procured, she waived and relinquished her right of homestead.

3. **Effect of Widow's Lease of Homestead.** — *Garland v. Bostick*, 118 Ala. 209; *Garibaldi v. Jones*, 48 Ark. 230; *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Brokaw v. Ogle*, 170 Ill. 115; *Phipps v. Acton*, 12 Bush (Ky.) 375. See also *White v. Plummer*, 96 Ill. 396.

4. *Farnan v. Borders*, 119 Ill. 228, holding that an abandonment might be inferred where, having retained a room in the house for a time and left her furniture there, the widow afterwards sold the furniture, gave up the room, ceased housekeeping, and remained away for

seven years at various places where her children had obtained situations.

5. **Widow Not Entitled to Homestead if She and Her Husband Remain Aliens.** — *Talmadge v. Talmadge*, 66 Ala. 199; *Murphy v. Hunt*, 75 Ala. 438; *Alston v. Uiman*, 39 Tex. 157.

6. *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821; *Emmett v. Emmett*, 14 Lea. (Tenn.) 369.

7. *Lacey v. Clements*, 36 Tex. 661. See also *Henderson v. Ford*, 46 Tex. 628.

8. **Effect of Abandonment of Husband and Going to Another State.** — *Trawick v. Harris*, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 634; *Meyer v. Claus*, 15 Tex. 516; *Lacey v. Clements*, 36 Tex. 661, 51 Tex. 150.

**Living in Adultery in Another State.** — A woman who, without cause, voluntarily and permanently deserts her husband and home, and elopes with another man, and lives with him in another state in adultery for a long period of years, and until her deserted husband's death, forfeits all rights which she may ever have had, as widow, to homestead in lands owned by the husband at his death. *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623. Compare *Duffy v. Harris*, 65 Ark. 251.

9. **Effect of Acquisition of Residence in Another State by Husband and Wife.** — *Farris v. Sipes*, 99 Tenn. 298; *Jordan v. Godman*, 19 Tex. 275. See also *Auerbach v. Pritchett*, 58 Ala. 451; *Norton's Succession*, 18 La. Ann. 36.

**Temporary Absence of Husband in Another State.** — In *Meador v. Place*, 43 N. H. 307, it was held that the temporary residence of the husband in a foreign jurisdiction and the purchase of a doubtful or contingent estate there will

by her removal to another state subsequently to the husband's death.<sup>1</sup>

(4) *Remarriage*. — Under statute in some jurisdictions the widow loses all claim to the homestead of her deceased husband by her subsequent remarriage, the statutes sometimes expressly providing that the homestead given to the widow shall continue during her widowhood.<sup>2</sup>

**Homestead of Widow Held Not to Be Barred by Remarriage.** — But the prevailing rule seems to be that the widow has a life estate in the homestead of her deceased husband, and her rights therein are not affected by her remarriage, so long as she continues to occupy the homestead as her home.<sup>3</sup> And this rule has been applied whether the homestead was assigned to her before such marriage or afterwards.<sup>4</sup> And indeed it has been held that the widow does not forfeit her homestead by a second marriage and removal to the home of her second husband.<sup>5</sup>

(5) *Divorce* — **Divorce a Mensa**. — In *Tennessee* it has been held that a widow is entitled to a homestead out of the lands of which her former husband died seized and possessed, although she had obtained a divorce *a mensa et thoro* from him.<sup>6</sup>

**Divorce a Vinculo**. — But it seems to be the prevailing rule that after a divorce *a vinculo* the wife can claim no rights as survivor in the homestead of the deceased husband where no such right is given to her by express statutory enactment or by the decree in which the divorce was granted.<sup>7</sup>

(6) *Acceptance of Dower*. — The effect of the statutes in many jurisdictions is to give to the widow an estate in addition to her other rights in the property of her deceased husband, and the fact that a widow has received an assignment of dower does not preclude her from claiming the additional benefit of an estate of homestead.<sup>8</sup> But in some jurisdictions recognizing the rights of

not deprive the wife of her homestead rights upon his death.

1. **Removal of Widow to Another State.** — *Hicks v. Pepper*, 1 Baxt. (Tenn.) 42. But see *Munchus v. Harris*, 69 Ala. 506; *Brown v. Brown*, 33 Miss. 39.

2. **Homestead Held to Be Barred by Remarriage.** — *Matter of Boland*, 43 Cal. 640; *Matter of Still*, 117 Cal. 509; *People v. Plumsted*, 2 Mich. 465; *Dei v. Habel*, 41 Mich. 88; *Carpenter v. Brownlee*, 38 Miss. 200; *Anderson v. Coburn*, 27 Wis. 558; *Ferguson v. Mason*, 60 Wis. 377.

3. **Homestead Held Not to Be Barred by Second Marriage.** — *Yeates v. Briggs*, 95 Ill. 79; *Nicholas v. Purcell*, 21 Iowa 265, 89 Am. Dec. 572; *Brady v. Banta*, 46 Kan. 131; *Ailey v. Burnett*, 134 Mo. 313; *Fore v. Fore*, 2 N. Dak. 260. See also *Morrissey v. Stephenson*, 86 Ill. 346; *Stewart v. Brand*, 23 Iowa 481; *Dodds v. Dodds*, 26 Iowa 311; *Gimble v. Goode*, 13 La. Ann. 352; *Yarborough's Succession*, 13 La. Ann. 378; *Threat v. Moody*, 87 Tenn. 143.

**Partition After Remarriage.** — Where real estate is occupied by a man and his family as a homestead at the time of his death, and afterwards by his widow and children, and the widow marries again, the homestead may be partitioned between her and the children. *Brady v. Banta*, 46 Kan. 131.

4. *Miles v. Miles*, 46 N. H. 261, 88 Am. Dec. 203.

5. **Effect of Remarriage and Removal to Home of Second Husband.** — *West v. McMullen*, 112 Mo. 405, *overruling Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *Hufschmidt v. Gross*, 112 Mo. 649.

But it has been held that by remarrying and removing with her children to a residence owned by her second husband, the widow acquires a new home, and so loses her right of homestead derived through the first husband. *Buck v. Conlogue*, 49 Ill. 391. And this though she continues in possession of the homestead of her first husband by a tenant. *Home Ins. Co. v. Field*, 42 Ill. App. 392.

But it has been held that the remarriage of a widow and the removal to the homestead of her second husband will not be conclusive evidence of an abandonment of the old homestead. *Loveless v. Thomas*, 152 Ill. 479.

6. **Homestead Held Not Barred by Divorce a Mensa.** — *Howell v. Thompson*, 95 Tenn. 396.

7. **Homestead Held to Be Barred by Divorce a Vinculo.** — *Stahl v. Stahl*, 114 Ill. 375. See also *Hall v. Fields*, 81 Tex. 557.

8. **Homestead Held Not to Be Barred by Acceptance of Dower** — *Alabama*. — *Chisolm v. Chisolm*, 41 Ala. 327.

*Arkansas*. — *Horton v. Hilliard*, 58 Ark. 300. *Massachusetts*. — *Monk v. Capen*, 5 Allen (Mass.) 146; *Mercier v. Chace*, 11 Allen (Mass.) 194; *Silloway v. Brown*, 12 Allen (Mass.) 30; *Bates v. Bates*, 97 Mass. 392; *Cowdrey v. Cowdrey*, 131 Mass. 186; *Weller v. Weller*, 131 Mass. 446.

*Michigan*. — *Showers v. Robinson*, 43 Mich. 502; *Patterson v. Patterson*, 49 Mich. 176.

*Missouri*. — *Gragg v. Gragg*, 65 Mo. 343; *Seek v. Haynes*, 68 Mo. 13; *Murdock v. Dalby*, 13 Mo. App. 41.

*New Hampshire*. — *Norris v. Morrison*, 45 N. H. 490.

*Ohio*. — *Wanzer v. Widow*, 2 West. L. Month. 426, 2 Ohio Dec. (Reprint) 323.



the widow to have both dower and homestead, it has been held that the widow's share in the homestead shall be deducted in allotting dower.<sup>1</sup> In other jurisdictions the double rights of dower and homestead do not attach, and the widow is put to her election as to which she shall take.<sup>2</sup>

(7) *Antenuptial Contract*. — It has been held that an antenuptial contract by which the wife of a homesteader agreed to release her dower does not affect her right as widow to the homestead.<sup>3</sup> And the same rule has been applied to an antenuptial agreement to release rights of dower and inheritance.<sup>4</sup> And indeed in some jurisdictions it has been held that the homestead right of the widow as survivor of her husband cannot be barred under any circumstances by an antenuptial contract, since the policy of the law is to preserve the homestead privilege for the benefit of the family as well as for the owner.<sup>5</sup>

(8) *Husband's Devise*. — It seems to be the prevailing rule that the widow's right to homestead is not subject to be divested by the will of the husband devising the homestead to a third person.<sup>6</sup> But in other states a different rule has been applied.<sup>7</sup>

**Devise to Wife — Election.** — In many jurisdictions it has been held that in case of a testamentary provision for the widow in lieu of homestead the widow will be put to her election as to whether she will take under the will or renounce it and claim her homestead rights, and her acceptance of the provision under the will bars her right to the homestead.<sup>8</sup> But it has been held that when

*Tennessee*. — *Simpson v. Poe*, 1 Lea (Tenn.) 701; *Vaughn v. Vaughn*, 88 Tenn. 742.

See also *Watts v. Leggett*, 66 N. Car. 197; *Gregory v. Ellis*, 86 N. Car. 579.

1. **View that Dower Is to Be Estimated in Allotting Homestead.** — *Seek v. Haynes*, 68 Mo. 13; *Bryan v. Rhoades*, 96 Mo. 485; *Murdock v. Dalby*, 13 Mo. App. 47; *Doane v. Doane*, 33 Vt. 649; *Chaplin v. Sawyer*, 35 Vt. 286.

2. **View that Widow Must Elect as Between Dower and Homestead.** — *Hickson v. Bryan*, 41 Ga. 620; *Lee v. Hale*, 77 Ga. 1; *Funk v. Walters*, 6 Ky. L. Rep. 297; *Burch v. Atchison*, 82 Ky. 585. See also *Gasaway v. Woods*, 9 Bush (Ky.) 72.

In *Illinois* it has been held that where dower is allowed out of lands other than the homestead, the acceptance of such allowance is a waiver of the estate of homestead, unless otherwise provided by the court. *Walker v. Doane*, 108 Ill. 236. See also *Turner v. Bennett*, 70 Ill. 263; *Eggleston v. Eggleston*, 72 Ill. 24; *Sontag v. Schmisser*, 76 Ill. 541.

But both homestead and dower may be claimed by the widow where the entire estate is within the homestead and of less than the statutory limit of value, but the dower right is subservient to the homestead estate while it continues. *Jones v. Gilbert*, 135 Ill. 27.

**Distributive Share in Lieu of Dower.** — Under statute in *Iowa* the widow has the right to elect between the distributive share conferred by statute in lieu of dower and the right to occupy the family homestead. *Nicholas v. Purcell*, 21 Iowa 265, 89 Am. Dec. 572; *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432; *Butterfield v. Wicks*, 44 Iowa 310; *Briggs v. Briggs*, 45 Iowa 318; *Knox v. Hanlon*, 48 Iowa 252; *Wilson v. Hardesty*, 48 Iowa 515; *Stevens v. Stevens*, 50 Iowa 491; *Burdick v. Kent*, 52 Iowa 583; *Smith v. Zuckmeyer*, 53 Iowa 14; *Cunningham v. Gamble*, 57 Iowa 46; *Blair v. Wilson*, 57 Iowa 177; *Darrah v. Cunningham*, 72 Iowa 123; *Mobley v. Mobley*, 73 Iowa 654; *Kite v. Kite*, 79 Iowa 491; *Schlarb v. Holder-*

*baum*, 80 Iowa 394; *Zwick v. Johns*, 89 Iowa 550; *Hornbeck v. Brown*, 91 Iowa 316; *Wold v. Berkholz*, 105 Iowa 370; *Benjamin v. Doerschler*, 105 Iowa 391. See also the title *EQUITABLE ELECTION*, vol. II, p. 93.

**Homestead in Dower Estate.** — In *Burch v. Atchison*, 82 Ky. 585, 6 Ky. L. Rep. 592, 636, it was held that by having dower assigned the widow waived any homestead right and thereafter held a life estate in the property assigned as dower, and in this she was entitled to a homestead, not as a widow, but in her own right, and this right she could forfeit by abandonment, but not to the prejudice of infant children. Compare *Ladham v. Glover*, 46 S. Car. 65.

3. *Mack v. Heiss*, 90 Mo. 578.

4. *Mahaffy v. Mahaffy*, 63 Iowa 55. See also *Collins v. Collins*, 72 Iowa 104.

5. **Widow's Homestead Held Not Defeasible by Antenuptial Contract.** — *McMahill v. McMahon*, 105 Ill. 596, 44 Am. Rep. 819; *Achilles v. Achilles*, 137 Ill. 589; *Hafer v. Hafer*, 33 Kan. 464. See also *McGee v. McGee*, 91 Ill. 548.

6. **View that Widow's Right Is Not to Be Defeated by Husband's Will.** — *Bell v. Bell*, 84 Ala. 64; *Hunter's Succession*, 13 La. Ann. 257; *Pratt v. Pratt*, 161 Mass. 276; *Eaton v. Robbins*, 29 Minn. 327; *Holbrook v. Wightman*, 31 Minn. 168; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *Rockhey v. Rockhey*, 97 Mo. 76; *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761; *Schneider v. Hoffmann*, 9 Mo. App. 280; *Runnels v. Runnels*, 27 Tex. 515; *Meech v. Meech*, 37 Vt. 414. See also *Depas v. Riez*, 2 La. Ann. 30; *Hendrix v. Seaborn*, 25 S. Car. 481, 60 Am. Rep. 520.

7. **View that Husband May Defeat Widow's Right by Will.** — *Osburn v. Sims*, 62 Miss. 429; *Matter of Eyres*, 7 Wash. 291; *Turner v. Scheiber*, 89 Wis. 1.

8. **View that Widow Must Elect as Between Homestead and Provision under Will.** — *McCormick v. McNeel*, 53 Tex. 15; *Rogers v. Treva-*



a will does not express that its provisions for the widow are in lieu of homestead, electing to take under the will does not deprive her of homestead, unless it clearly appears from the will that such was the intention of the testator.<sup>1</sup> And in *Tennessee* it has been held that the widow has a right to the homestead though she did not dissent from the will and though the claim was antagonistic thereto.<sup>2</sup>

**f. ALLOTMENT OR SETTING APART OF HOMESTEAD.** — In those jurisdictions where the widow's right of homestead is simply a transmission or continuance of the same right which was vested in the decedent and his family at the time of his death, the homestead right of the widow vests in her at the instant of the death of the husband, and is not dependent or contingent upon any formal act of selection on her part, or upon any order or decree of court assigning it to her, and no such formalities will be required if the land occupied by the decedent and his family as a homestead does not exceed in quantity or value the limit allowed by law to the widow; but if such excess exists, a formal assignment may be necessary to determine the precise boundaries of the homestead.<sup>3</sup> In other jurisdictions, however, the setting apart of the homestead to the widow by the probate or other court is expressly provided for by statute.<sup>4</sup>

*Melms v. Pabst Brewing Co.*, 93 Wis. 140. See also *Trotter v. Trotter*, 31 Ark. 145; *Eproson v. Wheat*, 53 Cal. 715; *Van Syckel v. Beam*, 110 Mo. 589.

**Where Interest under Will Is Less than Homestead Right.** — It has been held that no formal renunciation of the will by the widow is necessary to confirm her title to the property given to her by the homestead law where the interest which the widow is to receive under the will is not greater than her right of homestead. *Burgess v. Bowles*, 99 Mo. 546.

In *Brettun v. Fox*, 100 Mass. 234, where it appeared that the husband, who died possessed of a homestead estate consisting of a dwelling house and lands, by his will gave to his wife, the petitioner, an estate for life in one undivided third of the same, and the remainder in fee to his son, from whom the respondent derived his title, and the petitioner did not within six months waive the provisions of the will, she was notwithstanding entitled to have an estate of homestead set off to her. See also *Haby v. Fuos*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1121.

In *Kentucky* it has been held that the owner of a homestead not exceeding the statutory limit may pass title thereto to a widow and children by will, and his creditors cannot complain. *Myers v. Myers*, 89 Ky. 442. See also *Pendergest v. Heckin*, 94 Ky. 384.

And in such case it has been held that if the widow, who is devisee, has a family, her homestead is not subject to her debts contracted prior or subsequent to the acquisition of the homestead. *Pendergest v. Heckin*, 94 Ky. 384. See also *Allensworth v. Kimbrough*, 79 Ky. 332.

But if the devise is of such a character as to impose a condition upon the devisee, such as the payment of the testator's debts, she cannot take it as devisee free from his debts. *Nichols v. Lancaster*, (Ky. 1895) 32 S. W. Rep. 676; *Ochsner v. German Bldg., etc., Assoc.*, 5 Ky. L. Rep. 177. See also *Carpenter v. Kearns*, 4 Ky. L. Rep. 825.

For a full discussion of this question, see the title **EQUITABLE ELECTION**, vol. 11, p. 95.

1. *Sulzenberger v. Sulzenberger*, 50 Cal. 387; *Haby v. Fuos*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1121; *Re Blackmer*, 66 Vt. 46. Compare *Matter of Franke*, 97 Iowa 704; *Schlarb v. Holderbaum*, 80 Iowa 394.

2. **View that Homestead Is Not Barred by Acceptance of Provision under Will.** — *Wooten v. House*, (Tenn. Ch. 1895) 36 S. W. Rep. 932. See also *Jarman v. Jarman*, 4 Lea (Tenn.) 671.

3. **Jurisdictions Holding Formal Assignment of Homestead by Court to Widow Unnecessary.** — *Munchus v. Harris*, 69 Ala. 506; *Jarrell v. Payne*, 75 Ala. 577; *Jackson v. Wilson*, 117 Ala. 432; *Garland v. Bostick*, 118 Ala. 209; *Parks v. Reilly*, 5 Allen (Mass.) 77; *Woodward v. Lincoln*, 9 Allen (Mass.) 239; *Wilson v. Proctor*, 28 Minn. 16; *Rogers v. Marsh*, 73 Mo. 64. See also *Pollak v. McNeil*, 100 Ala. 203; *Brooks v. Johns*, 119 Ala. 412.

In *Parks v. Reilly*, 5 Allen (Mass.) 77, it was held that a widow who has acquired a right of homestead in premises which are worth less than the statutory limit, and is in the occupation thereof at the time of her husband's death, may continue such occupation, and avail herself of her right of homestead as a defense against one who claims title under her husband, although her homestead has not been set out to her by the Court of Probate and Insolvency.

**Proceeding for Partition.** — In *New Hampshire* it has been held that the proceeding by petition for partition is the appropriate remedy for a widow to obtain an assignment of her homestead right, and this whether she is or is not in possession of all or part of the estate in which she is entitled to a homestead. *Norris v. Moulton*, 34 N. H. 394; *Horn v. Tufts*, 39 N. H. 478; *Atkinson v. Atkinson*, 40 N. H. 249. And no demand of the homestead is necessary to enable her to maintain her petition for the assignment of her homestead interest. *Atkinson v. Atkinson*, 40 N. H. 249.

4. **Statutory Provision for Setting Apart Homestead to Widow by Probate Court.** — *Matter of Busse*, 35 Cal. 310; *Matter of Lahiff*, 86 Cal. 151; *Matter of Ballentine*, 45 Cal. 606; *Mawson v. Mawson*, 50 Cal. 539; *Matter of Mc-*

**Quantum of Interest to Be Allowed.** — In many jurisdictions statutory limitations as to the quantity or value of the property to be allotted to the widow as her homestead are imposed, and these limitations are to be complied with in setting apart the homestead.<sup>1</sup> But in some instances the quantum of interest to be allotted is left to the discretion of the court.<sup>2</sup> The amount or value of the homestead to be set apart is, it has been held, to be determined by the valuation of the property at the time of the husband's death.<sup>3</sup> But it has been held that as against creditors the law in force at the time when their debts were created is to determine the quantum of interest to be set apart.<sup>4</sup>

**Where Wife Has Separate Property.** — The fact that the widow has a separate estate does not lessen her right to the homestead, and cannot be estimated in fixing the value or quantity of her interest.<sup>5</sup>

**Whether Adverse Claims May Be Adjudicated in Proceedings for Allotment.** — In some jurisdictions it has been held that the setting apart of a homestead in the course of homestead proceedings does not affect or adjudicate the question of title to the property set apart, and hence the existence of adverse claims superior to the homestead right of the widow furnishes no reason why the land should not be allotted as a homestead.<sup>6</sup> And even in a jurisdiction where the power of the probate court to set aside the homestead is limited to such property as is not subject to certain specified liens, the order of the court making an allotment will not be held absolutely void, but will be merely void as to the lienholder, who may avoid it by establishing his claim and procuring an order to sell the property for its satisfaction.<sup>7</sup>

**3. Of Children and Heirs** — *a.* **IN GENERAL** — **Homestead Continued for Minor Children.** — The homestead laws usually provide for the continuation of the homestead estate not only to the widow of the homesteader, but to his minor children as well,<sup>8</sup> and where there is no widow the homestead is continued

Cauley, 50 Cal. 544. See also *supra*, this section, *Of Widow* — *In General*.

1. **Statutory Limitations as to Quantity and Value of Premises to Be Set Apart.** — Smith v. Cockrell, 66 Ala. 64; Turnipseed v. Fitzpatrick, 75 Ala. 297; James v. Clark, 89 Ala. 606; Merritt v. Merritt, 97 Ill. 243; Wilson v. Illinois Trust, etc., Bank, 166 Ill. 9; Miller v. Schnebly, 103 Mo. 368; Squire v. Mudgett, 63 N. H. 71; Terry v. Terry, 39 Tex. 310; White v. Mitchell, 60 Tex. 164; McLane v. Paschal, 62 Tex. 102; Hough v. Shippey, 16 Tex. Civ. App. 88.

2. Matter of Walkerly, 81 Cal. 579; Matter of Smith, 99 Cal. 449. See also Matter of Delaney, 37 Cal. 176; Kearney v. Kearney, 72 Cal. 591. Compare Matter of Burdick, 76 Cal. 639.

3. **Valuation of Property at Time of Husband's Death Controls.** — Matter of Delaney, 37 Cal. 176; McLane v. Paschal, 74 Tex. 20; Lynch v. Broad, 70 Tex. 92. Compare *In re Fowler*, (Cal. 1889) 20 Pac. Rep. 81.

4. Smith v. Cockrell, 66 Ala. 64. See also Slaughter v. McBride, 69 Ala. 510.

5. **Wife's Separate Property Not to Be Estimated in Allotting Homestead.** — Johnston v. Davenport, 42 Ala. 317; Thompson v. Thompson, 51 Ala. 493; Darden v. Reese, 62 Ala. 311; Sansberry v. Simms, 79 Ky. 527; Buckler v. Brown, (Ky. 1897) 39 S. W. Rep. 825; *Ex p.* Brown, 37 S. Car. 181. But see Davenport v. Devnaux, 45 Ark. 341.

And it has been held that when husband and wife own contiguous tracts, and occupy the two tracts as a homestead with the dwelling on the land of the wife, she is, on the hus-

band's death, entitled to a homestead in the adjoining land of the husband. Lowell v. Shannon, 60 Iowa 713; Buckler v. Brown, (Ky. 1897) 39 S. W. Rep. 509; Nichols v. Nichols, 62 N. H. 621; Chase v. Barnard, 64 N. H. 615.

6. **Adverse Claims Not to Be Adjudicated in Allotting Homestead.** — Coffey v. Joseph, 74 Ala. 271; Cox v. Bridges, 84 Ala. 553; Jackson v. Sheffield, 107 Ala. 358; Rich v. Tubbs, 41 Cal. 34; Watson v. His Creditors, 58 Cal. 556; Matter of Burton, 63 Cal. 36; Matter of Chalmers, 64 Cal. 77; Matter of Groome, 94 Cal. 69; Matter of Kimberly, 97 Cal. 281. Compare Lazell v. Lazell, 8 Allen (Mass.) 575; Woodward v. Lincoln, 9 Allen (Mass.) 239; Mercier v. Chace, 9 Allen (Mass.) 242.

7. Hensel v. International Bldg., etc., Assoc. 85 Tex. 215; Fossett v. McMahan, 86 Tex. 652.

8. **Homestead Continued for Widow and Minors** — *Arkansas.* — Sparkman v. Roberts, 61 Ark. 26. *Georgia.* — Hall v. Matthews, 68 Ga. 490. *Illinois.* — Capek v. Kropik, 129 Ill. 509; Kyle v. Wills, 166 Ill. 501; Brokaw v. Ogle, 170 Ill. 115; Stunz v. Stunz, 131 Ill. 210; Wolf v. Ogden, 66 Ill. 224.

*Kansas.* — White v. White, 41 Kan. 556. *Kentucky.* — Myers v. Myers, 89 Ky. 442; McTaggart v. Smith, 14 Bush (Ky.) 414; Funk v. Walters, 6 Ky. L. Rep. 297. The statute limits the homestead benefit to "unmarried infant children."

*Massachusetts.* — Abbott v. Abbott, 97 Mass. 136.

*Mississippi.* — McCaleb v. Burnett, 55 Miss. 83; Peeler v. Peeler, 68 Miss. 141; Parisot v.



solely for the benefit of minor children.<sup>1</sup> In some states the rights of the children are the same where the surviving parent is the father as where the mother survives.<sup>2</sup>

**Homestead Descending to Heirs.** — In several states, upon the death of a person in whom is the legal title to a homestead, the title descends, subject to the rights of the surviving spouse, to the heirs of the decedent, impressed with an exemption from the debts of the decedent,<sup>3</sup> and in some cases with an additional

Tucker, 65 Miss. 439; Acker v. Trueland, 56 Miss. 30.

*Missouri.* — Keyte v. Peery, 25 Mo. App. 394; Plate v. Koehler, 8 Mo. App. 396.

*New Hampshire.* — Miles v. Miles, 46 N. H. 265; Squire v. Mudgett, 61 N. H. 149.

*Ohio.* — Wehrle v. Wehrle, 39 Ohio St. 365. The statute is only for the benefit of minors "unmarried and composing part of the decedent's family at the time of his death."

*Tennessee.* — Farrow v. Farrow, 13 Lea (Tenn.) 120; Shelton v. Hurst, 16 Lea (Tenn.) 470. But "during the life of the parent the infant's right of homestead is contingent upon the parent's right." Farris v. Sipes, 99 Tenn. 301; Carrigan v. Rowell, 96 Tenn. 190.

See also the following subsections and generally the statutes of the several states.

**Adopted Child.** — In *Alabama* an adopted child is within the benefit of the provision. Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54. So in *Texas*. Wolfe v. Buckley, 52 Tex. 641.

**Infants Not Natural or Adopted Children.** — But children living with a deceased person who are not his, either in fact or by adoption, are not entitled to the benefit of such a statute. Matter of Romero, 75 Cal. 379. See also *McMillan v. Hendricks*, (Tex. Civ. App. 1898) 46 S. W. Rep. 859.

**Married Children Having Homes and Families of Their Own** are not within the provision of the *Illinois* statute. Kyle v. Wills, 166 Ill. 501. And the same rule applies in *Texas*. Trammel v. Neal, 1 Tex. Unrep. Cas. 51.

**Adult.** — A child who has attained majority at the time of the father's death is not within the benefit of the statute. Thompson v. Thompson, 51 Ala. 493. See also Heard v. Downer, 47 Ga. 629; Jackson v. Bowles, 67 Mo. 609; Saylor v. Powell, 90 N. Car. 202; Simpson v. Wallace, 83 N. Car. 477.

**Grandchildren** — *Mississippi* Statute. — A *Mississippi* statute provides that where the surviving spouse owns a residence equal in value to the homestead, the homestead shall go to children of the decedent by a first marriage, but the term "children" in this statute does not include grandchildren. Peeler v. Peeler, 68 Miss. 141.

**Rights in Fund Derived from Sale of Homestead.** — A fund in the hands of the administrator of the estate, derived from the sale of lands for distribution, stands in the place of the land, and the widow and minor children are entitled to their homestead therein, and are not compelled to account therefor to the other heirs upon a distribution of personal assets. Hunter v. Law, 68 Ala. 365. See also Meacham v. Edmonson, 54 Miss. 746; Hardin v. Osborne, 43 Miss. 532.

In *Anderson v. Thomas*, 54 Ala. 104, the equities of infant children in a fund derived

from the sale of the whole estate of a decedent were, to the extent of the exemption allowed to them by law, preferred to those of a creditor of the estate. See also *McDougall v. Brokaw*, 22 Fla. 98, involving the right of the heirs to be subrogated, as to their homestead rights, to another fund, that derived from the homestead having been disposed of.

**1. Children Only** — *Alabama.* — Baker v. Keith, 72 Ala. 121; Hudson v. Stewart, 48 Ala. 204.

*Arkansas.* — Sparkman v. Roberts, 61 Ark. 26, quoting Const. Ark., art. 9, § 6; Thompson v. King, 54 Ark. 9; Kirksey v. Cole, 47 Ark. 504.

*Illinois.* — Bonnell v. Smith, 53 Ill. 375.

*Kentucky.* — Turner v. Turner, 89 Ky. 583; Higginbotham v. Meadows, 6 Ky. L. Rep. 660; Loyd v. Loyd, 82 Ky. 521.

*Mississippi.* — Peeler v. Peeler, 68 Miss. 141; Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579.

*Missouri.* — Quinn v. Kinyon, 100 Mo. 551.

*Tennessee.* — Farrow v. Farrow, 13 Lea (Tenn.) 120.

And see the several statutes.

**The Death of the Mother**, who was the surviving parent, does not affect the homestead right of a minor child under the *Missouri* Act of 1865. Canole v. Hurt, 78 Mo. 649.

**2. Capek v. Kropik**, 129 Ill. 509. See also the several statutes.

**In Arkansas, Where the Surviving Spouse Is the Husband** a homestead set apart to the deceased wife has been held to survive to the minor children.

**Children and Step-parent.** — Where a husband and wife were tenants in common of a tract of land, and the wife died leaving minor children by a former marriage, the husband is entitled to a homestead interest in the entire tract (in one moiety as owner, in the other moiety as surviving spouse), and the children are entitled to a homestead interest in the moiety owned by the mother. The right of occupancy, however, being indivisible, must necessarily continue for the children's benefit in the whole of the land constituting the homestead, including the land of the husband, so long as the homestead continues. Capek v. Kropik, 129 Ill. 509.

**3. Homestead Descends with Exemption.** — In *Florida* the homestead of a deceased head of a family inures to his widow and heirs. Const. Fla., art. 10, § 2. The title of the heirs is derived from the laws of inheritance, but the constitution annexes the incident that the homestead inherited is free from liabilities for the debts of the ancestor. Hinson v. Booth, 39 Fla. 333; Godwin v. King, 31 Fla. 525; Miller v. Finegan, 26 Fla. 29; McDougall v. Brokaw, 22 Fla. 98; Wilson v. Fridenburg, 19 Fla. 461.



exemption from the antecedent debts of the heir.<sup>1</sup> Under some of these statutes the exemption operates in favor of adult and minor heirs equally.<sup>2</sup>

In California there has been much legislation regulating the homestead rights of the minor children and the wife. Some idea of the effect of the statutes is given in the note.<sup>3</sup>

In Michigan it is only when the estate is insolvent that the rights of the surviving spouse and minor children attach.<sup>4</sup>

In Minnesota the homestead descends absolutely to the surviving spouse, if there be one, with remainder to the decedent's children, free from the ancestors' debts. If there is no surviving spouse, the homestead descends upon the same conditions absolutely to the children.<sup>5</sup>

In Nebraska the law seems to be similar. *Schuyler v. Hanna*, 31 Neb. 307.

The homestead does not pass to the administrator as assets. *Hedick v. Hedick*, 38 Fla. 252; *Baker v. State*, 17 Fla. 406.

1. In Iowa the homestead descends to the heir relieved not only from his ancestor's antecedent debts, but from his own (*Merchants Nat. Bank v. Eyre*, 107 Iowa 13; *Knox v. Hanlon*, 48 Iowa 252; *Cotton v. Wood*, 25 Iowa 48; *Burns v. Keas*, 21 Iowa 257), and this though he is an adult and before title passed to him by descent he waived such exemption. *Maguire v. Kennedy*, 91 Iowa 272.

The exemption of the heirs is not because of any homestead right of their own, but is founded on the ancestor's homestead right. *Kite v. Kite*, 79 Iowa 491.

If an heir dies, the estate of the surviving spouse is not increased — there is nothing corresponding to the *jus accrescendi* which exists under some statutes — and if the survivor inherits the portion of the dead child as heir, it is subject to execution against such survivor. *Strong v. Garrett*, 90 Iowa 100.

The abandonment of the homestead by the surviving spouse ends the exemption in favor of the heirs as to their own debts, *Baker v. Jamison*, 73 Iowa 698, but not that as to their ancestor's debts, *Matter of Boulson*, 95 Iowa 700, citing *Johnson v. Gaylord*, 41 Iowa 362.

The exemption as to the ancestor's debts does not include debts which might have been enforced against the homestead in the hands of the ancestor. *Moninger v. Ramsey*, 48 Iowa 368.

If the surviving spouse elects to take his distributive share instead of his homestead (see the title *EQUITABLE ELECTION*, vol. II, p. 93) he may take it from the part of the land which is not homestead, and the homestead will descend to the heirs free from the deceased parent's debts. *Matter of Coulson*, 95 Iowa 696.

2. **Adults May Share.** — *Miller v. Finegan*, 26 Fla. 29; *Maguire v. Kennedy*, 91 Iowa 272.

3. **California Statutes.** — It appears that, if there is no surviving spouse, the probate court must set apart to the minor children a homestead duly selected during the lifetime of the parents, whether it was selected from the community or from separate property. Code Civ. Pro., § 1465.

If there is a surviving spouse, the rights of the minor children depend upon whether a homestead was or was not properly set apart during the life of the deceased parent. If no homestead was so set apart, or if a homestead was

set apart from the separate property of the deceased spouse without his or her concurrence, the probate court must set apart a homestead for the use of the surviving spouse "and" the minor children. Code Civ. Pro., § 1465; *Matter of Still*, 117 Cal. 509; *Hoppe v. Hoppe*, 104 Cal. 94.

A setting apart to the "family" of the deceased is valid. *Phelan v. Smith*, 100 Cal. 158; *Mawson v. Mawson*, 50 Cal. 539.

If a homestead was duly set apart during the life of the parents from the community property or from the separate property of the survivor, or from the separate property of the deceased, with his or her concurrence, it seems that it vests absolutely in the surviving spouse. Code Civ. Pro., §§ 1465, 1474. But see Code Civ. Pro., § 1468, and Civ. Code, § 1265.

The effect of the various statutes here referred to is somewhat considered in *Weinreich v. Hensley*, 121 Cal. 647; *Matter of Crogan*, 92 Cal. 370. Section 1474 of the Code of Civil Procedure is later than and controls, so far as there is any inconsistency, Civ. Code, § 1265. *Weinreich v. Hensley*, 121 Cal. 647.

Absolute survivorship in favor of the surviving spouse was created by the Act of 1862, previous to which the homestead of a deceased head of a family vested in the surviving wife and his own legitimate children. *Levins v. Rovegno*, 71 Cal. 273; *Matter of Wixom*, 35 Cal. 320. See also *Johnston v. Bush*, 49 Cal. 198; *Rich v. Tubbs*, 41 Cal. 34.

Under the Act of 1862, the homestead vested absolutely in the surviving spouse, even if there were surviving children. *Matter of Wixom*, 35 Cal. 320. See also *Beck v. Soward*, 76 Cal. 527; *Rich v. Tubbs*, 41 Cal. 34; *Herrold v. Reed*, 58 Cal. 443.

4. *Michigan.* — *Zoellner v. Zoellner*, 53 Mich. 620.

5. *Minnesota.* — Stat. Minn. (1894), § 4470; *Dunn v. Stevens*, 62 Minn. 380; *McCarthy v. Van Der Mey*, 42 Minn. 189.

Under the Act of 1875, also, the surviving spouse took an absolute unconditional life estate, unqualified by any right in minor children. *Holbrook v. Wightman*, 31 Minn. 168 [*modifying* *Eaton v. Robbins*, 29 Minn. 327]; *McCarthy v. Van Der Mey*, 42 Minn. 189. But the remainder in favor of the latter was not accompanied by an exemption. After the survivor's estate terminated, the homestead became assets, and it might be sold during the survivor's life, subject to his or her life estate. *McCarthy v. Van Der Mey*, 42 Minn. 189; *McGowan v. Baldwin*, 46 Minn. 477.

In Mississippi the homestead exemption is continued for the widow and children only in case of intestacy.<sup>1</sup>

In North Carolina the homestead is prolonged after the debtor's death only in favor of his minor children, if there are any such, to the exclusion of the widow,<sup>2</sup> but the dower right of the widow is superior to the homestead right of the children, and they take their homestead subject thereto, whether the homestead was or was not assigned during the debtor's life.<sup>3</sup>

In South Carolina the homestead is "forever discharged from all debts" of the decedent, and the exemption does not cease when the children become of age.<sup>4</sup>

In Texas, after the death of the head of the family, if a constituent of the family — spouse, minor child, or unmarried daughter — survives, the homestead is secured to the use of such surviving constituent as fully as it had been during the lifetime of the decedent,<sup>5</sup> and before the present constitution the title in the beneficiaries was absolute if the estate was insolvent;<sup>6</sup> but now it appears that, subject to the rights of surviving constituents, it descends to the heirs.<sup>7</sup> If no constituent member of the family survives, the homestead

Where there is no surviving parent, perhaps the children's right of occupancy during minority is protected, but this is not decided. *McCarthy v. Van Der Mey*, 42 Minn. 189.

1. Mississippi. — *Johnson v. Cooper*, 56 Miss. 608.

2. Homestead Continued for Children Only — North Carolina. — *Formeyduval v. Rockwell*, 117 N. Car. 320; *Williams v. Whitaker*, 110 N. Car. 393; *Simpson v. Wallace*, 83 N. Car. 477; *Wharton v. Leggett*, 80 N. Car. 169; *Hager v. Nixon*, 69 N. Car. 108.

3. Widow's Dower Right Has Priority. — *Graves v. Hines*, 108 N. Car. 262; *Gregory v. Ellis*, 86 N. Car. 579; *McAfee v. Bettis*, 72 N. Car. 28; *Watts v. Leggett*, 66 N. Car. 197. See also *Roff v. Johnson*, 40 Ga. 555.

4. South Carolina. — *Stewart v. Blalock*, 45 S. Car. 61; *Ex p. Worley*, 49 S. Car. 41.

The children are entitled collectively only to a single homestead. *Carolina Nat. Bank v. Senn*, 25 S. Car. 572.

5. Texas — Homestead Goes to Survivor. — *Childers v. Henderson*, 76 Tex. 664. See also *Lacy v. Lockett*, 82 Tex. 190; *Zwernemann v. Von Rosenberg*, 76 Tex. 522; *Moore v. Owsley*, 37 Tex. 603; *Bell v. Schwarz*, 37 Tex. 572.

A Community Homestead (and in most of the cases the homestead seems to have been in such property), on the death of a spouse, descends to his heirs, but remains subject to the rights of the survivor. *Bell v. Schwarz*, 37 Tex. 572; *Wright v. Doherty*, 50 Tex. 34. See as to the descent of community property generally the title COMMUNITY PROPERTY, vol. 6, p. 293.

Under the Act of August 15, 1870, if the minor children had a homestead in the community property of the deceased parent fixed and determined in his lifetime, they are not entitled to a homestead in his separate property. *McAllister v. Farley*, 39 Tex. 552.

Who Considered Surviving Constituents — Adult Descendants Other than Unmarried Daughters cannot be considered as constituting the decedent's family. *Givens v. Hudson*, 64 Tex. 471.

"When Children Arrive at the Age of Majority, and especially when they leave the family of their father and mother and become

a separate family, they are not any longer a part of the old family." *Morrill, C. J.*, in *Hoffman v. Neuhaus*, 30 Tex. 636, 98 Am. Dec. 492. In this case it was held that the word "children" in Act 1848, § 45, is to be construed as meaning minor children.

*The Marriage and Removal of a Daughter* severs her connection with the family, and it is not revived so as to give homestead rights to her by the fact that as a widow she returns with her children to live with a surviving parent. *Trammell v. Neal*, 1 Tex. Unrep. Cas. 51; *Roco v. Green*, 50 Tex. 483.

*A Mother Who Lived with Her Son on His Homestead* is not entitled to a continuation of his homestead after his death. *Munzenberger v. Boehme*, 2 Tex. Unrep. Cas. 389.

*Grandchildren*. — A granddaughter living with her grandmother under an arrangement terminable at the will of either has been held not entitled to homestead rights as a surviving member of the family. *Phillips v. Price*, 12 Tex. Civ. App. 408.

So the children of a son who has ceased to be a member of the parent's family. *Glasscock v. Stringer*, (Tex. Civ. App. 1896) 33 S. W. Rep. 677. See also *Schwarzhoff v. Necker*, 1 Tex. Unrep. Cas. 325.

Otherwise of a granddaughter who is a constituent member of the grandparents' family. *Clark v. Goins*, (Tex. Civ. App. 1893) 23 S. W. Rep. 703.

6. Insolvent Estate — Title Was Absolute. — *McDougal v. Bradford*, 80 Tex. 567 [citing *Childers v. Henderson*, 76 Tex. 664; *Scott v. Cunningham*, 60 Tex. 566; *Sossaman v. Powell*, 21 Tex. 665; *Green v. Crow*, 17 Tex. 189]; *Lacy v. Lockett*, 82 Tex. 190; *Trammell v. Neal*, 1 Tex. Unrep. Cas. 51; *Horn v. Arnold*, 52 Tex. 161; *Reeves v. Petty*, 44 Tex. 249; *Watson v. Rainey*, 69 Tex. 319; *Gaines v. Gaines*, 4 Tex. Civ. App. 408; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162. See also *Abney v. Pope*, 52 Tex. 288; *Krueger v. Wolf*, 12 Tex. Civ. App. 167 (property assigned in lieu of homestead).

7. *McDougal v. Bradford*, 80 Tex. 567.

The Administrator Has No Rights in the Homestead where a constituent of the family survives. *Lacy v. Lockett*, 82 Tex. 190. See also *Zwernemann v. Von Rosenberg*, 76 Tex.



becomes subject to the decedent's debts, although he may have left children not constituent of the family.<sup>1</sup> In case there is no surviving parent, the court may make an order allowing the minor children, through a guardian, to occupy the homestead, but the minor children cannot claim this right absolutely;<sup>2</sup> its allowance and the length of the occupancy depend on the judgment of the proper court, having regard to the necessity or propriety of protecting the minors in a home.<sup>3</sup> But the homestead is not assets for the payment of the decedent's debts so long as there are surviving members of the family entitled to occupy the homestead.<sup>4</sup>

**Setting Apart Homestead to Children.** — Provision is also made for setting apart a homestead to the widow or children, out of the decedent's estate, though no homestead was assigned to the decedent during his life.<sup>5</sup>

**Occupancy** is not, under some statutes, a condition of the enjoyment by the children or heirs of their homestead estates.<sup>6</sup> In other states occupancy is a requisite.<sup>7</sup>

**b. EXTENT AND CHARACTER OF INTEREST.** — As the preceding paragraphs show, the extent and character of the interest which surviving children take in the homestead of a deceased parent vary greatly in the different states, in accordance with the various statutes.

**Duration.** — The general rule is that such children take only a right of occupancy during minority,<sup>8</sup> but under some statutes, or under particular

522; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162; *Hanks v. Crosby*, 64 Tex. 483.

1. *Burns v. Jones*, 37 Tex. 50.

2. **Minor's Right to Occupy.** — Const. Tex., art. 16, § 52; *Ashe v. Yungst*, 65 Tex. 631. See also *Gaines v. Gaines*, 4 Tex. Civ. App. 408.

The court will see that the minors' rights are protected, and for that purpose will not allow the case to proceed when their rights have not been regarded and no guardian has been appointed; and the purchaser at an executor's sale before the children's homestead was set apart gains no title and must account for rents and profits from the date of the order setting apart the homestead. *Fields v. Austin*, (Tex. Civ. App. 1895) 30 S. W. Rep. 386; *Hall v. Fields*, 81 Tex. 553.

3. *Osborn v. Osborn*, 76 Tex. 494; *Hudgins v. Sansom*, 72 Tex. 229; *Ashe v. Yungst*, 65 Tex. 631.

4. *Childers v. Henderson*, 76 Tex. 664.

**Court Cannot Order Sale.** — No court has jurisdiction to order the sale of the homestead of a decedent to pay debts so long as there are surviving constituents of the family who have a right to occupy it. *Yarboro v. Brewster*, 38 Tex. 397. See also *Sossaman v. Powell*, 21 Tex. 664; *Connell v. Chandler*, 11 Tex. 249; *Harris v. Seinsheimer*, 67 Tex. 356; *Griffie v. Maxey*, 58 Tex. 213.

5. See *Baker v. State*, 17 Fla. 406; *Roff v. Johnson*, 40 Ga. 555. See also the various statutes.

**The Fact that an Order of Sale Has Been Procured by the Administrator** of the homestead property does not prevent its being set apart to the children. *Matter of Still*, 117 Cal. 509; *Matter of Lahiff*, 86 Cal. 151.

**The Allowance for the Temporary Support of the Family** which is authorized by statute (see the title **ALLOWANCES**, vol. 2, p. 156), cannot impair the right of the children to a homestead. *Matter of Still*, 117 Cal. 509.

In *Georgia* minor children take the homestead laid off to them subject to the right of

dower and to the year's support. *Roff v. Johnson*, 40 Ga. 555.

6. **Occupancy.** — *Sparkman v. Roberts*, 61 Ark. 26, quoting Const. Ark., art. 9, § 6; *Miller v. Finegan*, 26 Fla. 29; *Maguire v. Kennedy*, 91 Iowa 272; *Johnson v. Gaylord*, 41 Iowa 362; *Phipps v. Acton*, 12 Bush (Ky.) 377; *Little v. Woodward*, 14 Bush (Ky.) 585; *Rhorer v. Brockhage*, 86 Mo. 544, affirming 13 Mo. App. 397.

7. **The Illinois Statute** of 1851 continued the homestead for the benefit of the wife and family, "some or one of them continuing to occupy such homestead." Under this act occupancy by a tenant for the benefit of the widow and minor children, or for the benefit of the minor children alone, there being no widow, was held sufficient. *Walters v. People*, 21 Ill. 178; *Brinkerhoff v. Everett*, 38 Ill. 263; *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247. This clause does not appear in the present statute, but abandonment by the widow and children is held to forfeit all rights. See *infra*, this section, *Control and Conflicting Rights*. And occupancy is still required. See *Hagerty v. Hagerty*, 149 Ill. 655.

In *Kansas* the same rule appears to obtain. *Shirack v. Shirack*, 44 Kan. 653; *Dayton v. Donart*, 22 Kan. 256. But see *Deering v. Beard*, 48 Kan. 16.

It seems that a lease for the benefit of the minor child does not forfeit his rights. *Shirack v. Shirack*, 44 Kan. 653.

**Massachusetts.** — See *Abbott v. Abbott*, 97 Mass. 136.

**Michigan.** — *Louden v. Martindale*, 109 Mich. 235; *Drake v. Kinsell*, 38 Mich. 232.

In *Mississippi* occupancy by "some member of the family" is required. *Acker v. Trueland*, 56 Miss. 30.

**Texas — Residence at the Time of His Death with the Father** to whose homestead minors assert a claim is not essential. *Hall v. Fields*, 81 Tex. 553.

8. See *supra*, this section and subdivision,



circumstances, the homestead may vest absolutely in the beneficiaries pointed out in the act.<sup>1</sup>

**To What Extent Exemption Continued.** — The exemption in favor of a surviving spouse and children in the decedent's homestead may be limited merely to an exemption from forced sale to answer certain particular claims<sup>2</sup> or may extend also to protect the homestead from partition and keep it together as one estate until its termination in regular course.<sup>3</sup>

**Nature of Interest.** — When the homestead is merely continued in favor of surviving minor children the interest is a mere exemption from levy and sale and vests no title in them beyond the right to occupy. They cannot convey or encumber the homestead,<sup>4</sup> but may protect their rights as against one who does not hold by a superior title.<sup>5</sup>

**C. CONTROL AND CONFLICTING RIGHTS** — So Long as Both Parents Live the rights of the children are necessarily under the control of the parents, and

*In General, and infra, Termination of Interest.*

In California the probate court has power to set aside a homestead selected from the separate property of a deceased parent only "for a limited period." Code Civ. Pro., § 1468; Weinreich v. Hensley, 121 Cal. 647.

**1. Homestead Vesting Absolutely.** — Under former Alabama statutes (and under Code Ala., § 2069), the homestead vested absolutely in the widow and minor children of a decedent, where the estate was insolvent and such insolvency was judicially established. Smith v. Boutwell, 101 Ala. 373; Smally v. Chisenhall, 108 Ala. 683.

Where the estate was not declared insolvent, a child's interest ceases at his majority and is not revived by a subsequently established insolvency. Baker v. Keith, 72 Ala. 121.

By statutes of 1885 and 1887 the probate court was empowered, when the estate of a decedent did not exceed the amount exempted by law to widows and minors, and no administration on the estate was granted, after sixty days, to cause to be appraised and set apart the property absolutely to the widow and children. Code 1886, § 2562 and note; De Armond v. Whitaker, 99 Ala. 252; Smith v. Boutwell, 101 Ala. 373; Louisville, etc., R. Co. v. Hill, 115 Ala. 347.

Such an allotment is void for want of jurisdiction where the estate exceeds in value or amount the statutory limits. James v. Clark, 89 Ala. 606; Brooks v. Johns, 119 Ala. 417.

By the statute of 1892 (Code 1896, § 2071), in case the estate falls within the limits above indicated, the homestead vests absolutely in the widow and children whether there is or is not an administrator. See Jackson v. Wilson, 117 Ala. 432; Garland v. Bostick, 118 Ala. 209; Brooks v. Johns, 119 Ala. 412.

In Kansas the homestead becomes the absolute property of the widow and children, not subject to the ancestors' debts or the statute of distributions until the majority of the children. Hafer v. Hafer, 36 Kan. 524. But see *infra*, this section and subdivision, *Termination of Interest*. See also *supra*, this section and subdivision, *In General*, the paragraph *Homestead Descending to Heirs*.

**2. Extent of Exemption.** — In Illinois the only exemption of the homestead previous to the Act of 1872 was from forced sale for debts, and therefore the heirs of a deceased home-

stead could have partition and sell the homestead and neither the widow nor minor children could withhold possession from the purchaser at such sale. Turner v. Bennett, 70 Ill. 264. And under the former law the husband's curtesy in his wife's estate would defeat the homestead right of minor children. Wolf v. Wolf, 67 Ill. 55.

As to Michigan, see Robinson v. Baker, 47 Mich. 619.

See also *supra*, this section and subdivision, *In General*, the paragraph *Homestead Descending to Heirs*.

**3.** See *infra*, this section and subdivision, *Control and Conflicting Rights*, the paragraph *Partition*.

**4.** Miller v. Marx, 55 Ala. 341.

**5. Where the Widow's Rights Have Terminated, Ejectment Will Lie** by the children against any one in possession who does not claim by a title superior to that of the father. McCloy v. Arnett, 47 Ark. 445.

In Florida, if a constitutional homestead was declared in the ancestor's life the heirs may maintain ejectment against the administrator; otherwise if no homestead was so declared, and the home tract exceeded the extent allowed by the constitution, and some of the heirs are minors. Barco v. Fennell, 24 Fla. 378.

In Missouri ejectment lies by the minors against a grantee of the surviving mother after her death. Rogers v. Mayes, 84 Mo. 520. See also Kochling v. Daniel, 82 Mo. 54; Roberts v. Ware, 80 Mo. 363.

**A Purchaser at a Probate Sale Must Take Notice of the Minors' Homestead Rights** and is accountable to them for the rents. McCloy v. Arnett, 47 Ark. 445; Altheimer v. Davis, 37 Ark. 416.

**Improvements by Occupant.** — Where the occupant of a homestead set apart to minors improves the premises, the occupants cannot be charged with an increased rent; nor, on the other hand, can the minors be made liable for the value of such improvements, and so be "improved out of their homestead." The reasonable value of necessary repairs is to be allowed to the occupant, and he is chargeable with such rents as the property would have yielded without improvements. McCloy v. Arnett, 47 Ark. 456; Reynolds v. Reynolds, 55 Ark. 369; Sparkman v. Roberts, 61 Ark. 26.

may be lost by abandonment or conveyance.<sup>1</sup>

**Not Affected by Acts of Children.** — The minors in whom the homestead right of a deceased parent vests cannot waive their rights of homestead during their minority.<sup>2</sup>

In Arkansas the **Minor's Right of Homestead and Right of Inheritance Are Distinct** and cannot be merged; the first accrues at the death of the parent, the latter at majority.<sup>3</sup>

**Rights of Surviving Spouse and Children During Their Lives.** — Under the *Arkansas* statute the widow and children have been held to occupy the relation of joint tenants towards each other.<sup>4</sup> In *Mississippi* they are tenants in common.<sup>5</sup> Neither the widow nor the children can lessen or impair the rights of the others during the minority of the children.<sup>6</sup> In *Illinois*, however, the widow

1. **Both Parents Living.** — *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402; *Clubb v. Wise*, 64 Ill. 157; *Milwaukee Mechanics' Mut. Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Shelton v. Hurst*, 16 Lea (Tenn.) 470. See also *Collins v. Chantland*, 48 Iowa 241.

But the homestead rights of the widow and minor children cannot be defeated by an antenuptial agreement. *McGee v. McGee*, 91 Ill. 548. But see *Hafer v. Hafer*, 36 Kan. 524.

2. **No Waiver by Minors.** — *Alzheimer v. Davis*, 37 Ark. 316; *Johnston v. Turner*, 29 Ark. 280; *Deering v. Beard*, 48 Kan. 16; *Farrow v. Farrow*, 13 Lea (Tenn.) 120. But see *supra*, this section and subdivision, *In General*, the paragraph *Occupancy*.

A minor child's right is not affected by delay in applying for a homestead. *Matter of Still*, 117 Cal. 509.

When during minority minors entitled to a continuation of the father's homestead fail to claim their rights in a proceeding wherein such rights are involved, they cannot, after coming of age, have a title acquired at a sale in pursuance of a decree in such proceeding set aside as void. *Dickens v. Long*, 112 N. Car. 311.

3. **Minor's Right of Homestead and Right as Heir Distinct.** — *Kessinger v. Wilson*, 53 Ark. 400, 22 Am. St. Rep. 220.

4. *Sparkman v. Roberts*, 61 Ark. 26.

The *Arkansas* statute provides that during the widow's life the rents and profits of the homestead vest in her, "provided that if the owner leaves children, one or more, said child or children shall share with the said widow and be entitled to half the rents and profits" during minority. Under this provision, if the homestead is rented, the rent is payable half to the minor children and half to the widow; if the widow occupies the estate she is accountable to the minors for one-half its rental value; the widow is not entitled to receive the rents for the children or to the care and custody of their estate until she has qualified as their guardian. *Sparkman v. Roberts*, 61 Ark. 26.

The widow cannot defeat an action by the infant children to recover their share of the rents and profits by showing that no dower has been assigned to her. *Winters v. Davis*, 51 Ark. 335.

5. *Falkner v. Thurmond*, (Miss. 1898) 23 So. Rep. 584; *Hardin v. Osborne*, 43 Miss. 532; *Morton v. McCaness*, 68 Miss. 810.

6. **Widow Cannot Impair Children's Rights** — *Arkansas*. — *Johnston v. Turner*, 29 Ark. 292.

*California*. — *Matter of Still*, 117 Cal. 514; *Hoppe v. Hoppe*, 104 Cal. 94; *Phelan v. Smith*, 100 Cal. 158.

*Kentucky*. — *Myers v. Myers*, 89 Ky. 442; *Little v. Woodward*, 14 Bush (Ky.) 585; *Moss v. Hall*, 3 Ky. L. Rep. 89. See also *Paducah, etc., R. Co. v. Dipple*, 16 Ky. L. Rep. 62.

*Minnesota*. — See *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323.

*Mississippi*. — *Falkner v. Thurmond*, (Miss. 1898) 23 So. Rep. 584.

*Michigan*. — See *Showers v. Robinson*, 43 Mich. 502.

*Missouri*. — *Hufschmidt v. Gross*, 112 Mo. 649; *Rogers v. Mayes*, 84 Mo. 520; *Rhorer v. Brockhage*, 86 Mo. 544, *affirming* 13 Mo. App. 397; *Kochling v. Daniel*, 82 Mo. 54; *Plate v. Koehler*, 8 Mo. App. 396; *Roberts v. Ware*, 80 Mo. 363.

*Tennessee*. — *Shelton v. Hurst*, 16 Lea (Tenn.) 470; *Farrow v. Farrow*, 13 Lea (Tenn.) 120. But see *Carrigan v. Rowell*, 96 Tenn. 185, and *infra*, this note.

**Florida** — *Mortgage by Widow*. — A mortgage of the homestead executed under an order of court in virtue of a power in the will by a widow who was executrix does not bind the heirs not made parties to the proceeding. *Wilson v. Fridenburg*, 19 Fla. 461.

**Arkansas**. — The estate does not vest in the widow subject to the minor's homestead, and she cannot prejudice their rights by a sale. *Garibaldi v. Jones*, 48 Ark. 230.

A statute allowing the probate court to make an order vesting the whole estate, when under a certain value, in the widow applies only in case there are no minor children. *Sansom v. Harrell*, 51 Ark. 429.

But a sale is as to the widow an abandonment of her rights, and in case of the death of the sole minor child the statute of limitations begins to run in the widow's favor and against the minor's heirs from the time of the death of the minor, though the widow may have obtained a reconveyance. *Sansom v. Harrell*, 55 Ark. 572, 51 Ark. 429.

**In Kentucky** the acceptance by the widow of an interest devised in lieu of homestead or of dower destroys the homestead rights of herself and her children; *aliter* of her death or abandonment. *Ellmore v. Ellmore*, 4 Ky. L. Rep. 622, 5 Ky. L. Rep. 580.

*If a Homestead Is Derived from a Deceased Mother* the father may by abandonment or conveyance terminate the rights of the minor children therein. *Little v. Woodward*, 14 Bush (Ky.) 585.



may abandon the homestead, and when she does so, and takes her children with her, their homestead right is gone;<sup>1</sup> but a release or waiver when the children occupy with or without the widow does not extinguish the children's rights, without an order of court directing the release.<sup>2</sup>

In Texas, if there is a surviving parent, the homestead right vests entirely in him or her.<sup>3</sup> The right to occupy the homestead as such belongs to the surviving parent for life.<sup>4</sup> If the surviving parent declines to exercise this right of occupancy, the land becomes subject to partition, if children of the deceased parent take any part of it by inheritance, and the right is the same without distinction between adult and minor heirs.<sup>5</sup> The minors' right of occupancy in the homestead where there is no surviving parent can be asserted only through a guardian, to whom the occupancy for the minor is assigned.<sup>6</sup>

**Curtsey and Dower.** — The surviving father's curtesy has been held to be post-

In Minnesota the widow's election to take under a will in lieu of homestead defeats the children's remainder. *In re Jones*, (Minn. 1898) 77 N. W. Rep. 551.

In Mississippi, when the homestead has been sold for claims against the surviving father, there is no such interest in the children as enables them to vindicate their homestead right as a right of property by suit. *Taylor v. Smith*, 54 Miss. 50. Compare *Hufschmidt v. Gross*, 112 Mo. 649.

In South Carolina, when there are a widow and children, the homestead exemption is for the benefit of both, not for the widow only. *Ex p. Worley*, 49 S. Car. 41.

**Tennessee — Widow Forfeiting Children's Rights by Nonresidence.** — Under the Tennessee statute the homestead right is dependent on residence in the state, and if the widow removes with her minor children to another state, her homestead right and theirs is forfeited. *Carrigan v. Rowell*, 96 Tenn. 185. This case proceeds apparently on the ground that the children's right does not become vested until the widow's death, a view not easily reconcilable with the words of the constitution and statute, quoted in *Farrow v. Farrow*, 13 Lea (Tenn.) 120, or with the reasoning in *Shelton v. Hurst*, 16 Lea (Tenn.) 470, which seems to recognize that the interest of the children at the father's death is the same in quality as that of the widow. *Carrigan v. Rowell*, 96 Tenn. 185, is followed in *Farris v. Sipes*, 99 Tenn. 298.

1. Illinois. — *Kingman v. Higgins*, 100 Ill. 319; *Shepard v. Brewer*, 65 Ill. 383; *Buck v. Conlogue*, 49 Ill. 391; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 271; *McCormack v. Kimmel*, 4 Ill. App. 121.

Apparently the abandonment of the mother will not affect the right of minor children who continue to occupy the homestead. *Kingman v. Higgins*, 100 Ill. 319.

In *Walters v. People*, 21 Ill. 178, there are strong dicta to the effect that minor children's rights are not forfeited by the widow's abandonment, but, as cases cited above show, this is no longer the law.

2. *Lager v. Mutual Union Loan, etc., Assoc.*, 146 Ill. 283. See also *Miller v. Marckle*, 27 Ill. 402; *Anderson v. Smith*, 159 Ill. 93.

An assent of the widow to a sale by order of court binds the children. *Hayack v. Will*, 169 Ill. 111.

A Step-parent cannot waive release, or aban-

don the homestead right of his minor step-children in one-half of a tract of land owned by such step-parent and his deceased spouse as tenants in common. *Capek v. Kropik*, 129 Ill. 509; *Kingman v. Higgins*, 100 Ill. 319.

3. Texas — **Vests in Surviving Parent.** — *Ashe v. Yungst*, 65 Tex. 631. See also *Watts v. Miller*, 76 Tex. 13.

Where lands are improperly included in the widow's homestead, she is liable to the minor heirs for rents and profits therefrom. *Linch v. Broad*, 70 Tex. 92.

"The Children Have No Interest in the Homestead, as Such, as against the surviving parent, by virtue of the homestead rights of the deceased parent." *Ashe v. Yungst*, 65 Tex. 631 [citing *Johnson v. Taylor*, 43 Tex. 122; *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Brewer v. Wall*, 23 Tex. 586, 76 Am. Dec. 76]. See also *Grothaus v. De Lopez*, 57 Tex. 670; *Shannon v. Gray*, 59 Tex. 252; *Kilgore v. Graves*, 2 Tex. App. Civ. Cas., § 412.

4. *Ashe v. Yungst*, 65 Tex. 631.

**Where Debts Exist Against the Community Estate the Surviving Parent May Sell the community homestead to pay them, as the surviving parent may sell a homestead set apart out of his or her separate property.** *Ashe v. Yungst*, 65 Tex. 631. See also *Schwarzhoff v. Necker*, 1 Tex. Unrep. Cas. 325; *Kilgore v. Graves*, 2 Tex. App. Civ. Cas., § 412.

The surviving parent cannot deprive the children of their homestead rights, however, by a sale, where there are no community debts. *Bell v. Schwartz*, 56 Tex. 353.

5. **Survivor Declining to Exercise Right.** — *Ashe v. Yungst*, 65 Tex. 631. See also *Bell v. Schwarz*, 37 Tex. 572.

6. **Necessity of Guardian.** — *Hall v. Fields*, 81 Tex. 553; *Gaines v. Gaines*, 4 Tex. Civ. App. 408.

Both parties being dead, a minor child can resist a partition at the suit of adult heirs only through a duly appointed guardian. *Osborn v. Osborn*, 76 Tex. 494.

The right of the minors in a parent's homestead cannot be taken away so long as the court permits the guardian to occupy with them as a homestead. *Hall v. Fields*, 81 Tex.

The guardian of a minor's estate cannot so deal therewith as to deprive the guardian of the minor's person of his right of occupancy of the homestead with the ward. *Hudgins v. Sanson*, 72 Tex. 229.



poned to the children's homestead,<sup>1</sup> but the widow's dower estate is superior in one state at least.<sup>2</sup>

**Effect of Testamentary Disposition.** — In some states the minor children's rights cannot be defeated by will.<sup>3</sup>

**Sale of Homestead.** — The fee to the homestead cannot generally be sold subject to the minor's right of homestead to satisfy the claims of the decedent's creditors.<sup>4</sup> But a sale of the homestead is valid in some states, though the purchaser's rights do not accrue until the termination of the homestead.<sup>5</sup> Under the *Georgia* statutes a sale and reinvestment are authorized,<sup>6</sup> and in *Arkansas* the probate court may order a sale of the minor's homestead left to him by his last surviving parent.<sup>7</sup>

**Partition.** — In some states there can be no partition for the benefit of the widow or any of the children until all of the children have attained majority.<sup>8</sup> In other jurisdictions a partition subject to the homestead of the widow and children may be had.<sup>9</sup> Again, under other statutes, it seems that the debtor's homestead may be partitioned on the widow's death among the children of

1. *Thompson v. King*, 54 Ark. 9; *Loeb v. McMahon*, 89 Ill. 487. *Contra*, under an earlier statute, *Wolf v. Wolf*, 67 Ill. 55.

But the curtesy of the husband is still an interest which may be sold on execution, though the purchaser's enjoyment is postponed to the minor children's homestead. *Littell v. Jones*, 56 Ark. 139.

2. So in *North Carolina*. See *supra*, this section and subdivision, *In General*, the paragraph beginning *In North Carolina*.

3. **Devise Does Not Defeat Children's Rights.** — *Bell v. Bell*, 84 Ala. 64; *Scull v. Beatty*, 27 Fla. 426; *Wilson v. Fridenberg*, 21 Fla. 386; *Brokaw v. McDougall*, 20 Fla. 212; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *Rockhey v. Rockhey*, 97 Mo. 76; *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761; *Hall v. Fields*, 81 Tex. 553. See also *Lewis v. Lichty*, 3 Wash. 213. And compare *Schuyler v. Hanna*, 31 Neb. 307.

4. **Sale.** — *McCloy v. Arnett*, 47 Ark. 445; *Nichols v. Shearon*, 49 Ark. 76; *Stayton v. Halpern*, 50 Ark. 329; *Hinsdale v. Williams*, 75 N. Car. 439; *Wehrle v. Wehrle*, 39 Ohio St. 365. See also *Harris v. Watson*, 56 Ark. 574; *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119.

Under the *Arkansas* statute the administrator or executor who sells the homestead of a decedent after its selection by the widow or minor children is guilty of a misdemeanor, but the purchaser at such sale is not involved in the wrong, and is entitled to be subrogated to the claims of the creditors which were satisfied by the purchase money. *Harris v. Watson*, 56 Ark. 574. And see *Nichols v. Shearon*, 49 Ark. 75.

**When the Homestead Is Mingled with Other Lands Which the Court Has Jurisdiction to Sell**, the sale of the whole has been held not void for want of jurisdiction. *Burgett v. Apperson*, 52 Ark. 213.

The failure of the administrator to lay off the minor's homestead before sale does not affect the homestead rights of the minors. *Allen v. Shields*, 72 N. Car. 504.

5. *Gatton v. Tolley*, 22 Kan. 678; *McCaleb v. Burnett*, 55 Miss. 83; *Morton v. McCannless*, 68 Miss. 810; *Poland v. Vesper*, 67 Mo. 727; *Hannah v. Hannah*, 109 Mo. 236.

In *Michigan* a sale subject to the homestead right of the widow and minor children is not void, but is at most voidable. *Louden v. Martindale*, 109 Mich. 235. See also *Showers v. Robinson*, 43 Mich. 502; *Drake v. Kinsell*, 38 Mich. 232.

6. **Georgia Rule.** — *Fleetwood v. Lord*, 87 Ga. 592. See *supra*, this title, IX. 11. j. *Exchange of Homestead or Sale and Purchase of New Homestead*.

In *Sloan v. Nance*, 45 Ga. 310, it was held that there could be no sale of land, set apart to a minor as a homestead, by the executor at a private sale under a power in the will, even with the consent of the ordinary.

7. *Merrill v. Harris*, 65 Ark. 355. Compare *Plate v. Koehler*, 8 Mo. App. 396; *Daudt v. Harmon*, 16 Mo. App. 203.

8. **No Partition.** — *Miller v. Marx*, 55 Ala. 342; *Smally v. Chisenhall*, 108 Ala. 683; *Hoppe v. Hoppe*, 104 Cal. 94.

In *Kansas* when the children attain majority they are entitled to a partition of the homestead, though the widow remains unmarried and occupies the homestead. *Hafer v. Hafer*, 36 Kan. 524, 33 Kan. 449. See also *Vandiver v. Vandiver*, 20 Kan. 501; *Barbe v. Hyatt*, 50 Kan. 86.

In *Missouri* one who has purchased from the mother is not entitled to partition as against the children. *Rhorer v. Brockhage*, 13 Mo. App. 397, affirmed 86 Mo. 544.

In *Iowa* the heirs cannot have partition against the surviving spouse. *Dodds v. Dodds*, 26 Iowa 311; *Nicholas v. Purcell*, 21 Iowa 265, 89 Am. Dec. 572.

9. **Partition Subject to Homestead Rights of Women and Children.** — *Brokaw v. Ogle*, 170 Ill. 115; *Merritt v. Merritt*, 97 Ill. 243; *Stunz v. Stunz*, 131 Ill. 210.

In *Michigan* the widow and minor children are not entitled to hold land as a homestead to the exclusion of children claiming rights therein as heirs at law, and the latter are entitled to partition (*Robinson v. Baker*, 47 Mich. 619; *Patterson v. Patterson*, 49 Mich. 176) unless the homestead is within the constitutional limitation as to value and quantity and cannot be divided, and perhaps though the homestead exceeds these limits, if it is indivisible. *Zoellner v. Zoellner*, 53 Mich. 620.

the decedent.<sup>1</sup> The Constitution of *Texas* forbids partition of the homestead so long as it is occupied as such by a surviving parent, or by a guardian for minor children under an order of court.<sup>2</sup>

*d. TERMINATION OF INTEREST.* — When the estate of the children in the homestead is limited to minority, the interest of each child in the homestead ceases upon his majority, and the whole homestead interest vests, as to the children, in the child or children who are still under age; and when all attain majority, the exemption ceases and the property reverts to the estate.<sup>3</sup>

*Termination — Burden of Proof.* — When a homestead right is shown to have existed, one who seeks to enforce rights inconsistent therewith must show not only the death of the homesteader, but the arrival at full age of his children.<sup>4</sup>

**4. Continuance of Homestead After Death of Survivor.** — In some jurisdictions provision is made for the continuance of the exemption of the homestead in

1. In *South Carolina* the homestead may be partitioned "in like manner as if no debt existed" among the decedent's children, on the death of the widow. *Stewart v. Blalock*, 45 S. Car. 61.

2. *Texas*. — *Constitutional Provision as to Partition.* — *Hall v. Fields*, 81 Tex. 553; *Osborn v. Osborn*, 76 Tex. 494; *Hudgins v. Sansom*, 72 Tex. 229. See also *Hoffman v. Neuhaus*, 30 Tex. 633, 98 Am. Dec. 492; *Pressley v. Robinson*, 57 Tex. 453.

When the mother dies, the surviving husband may occupy the community homestead for life; but if he remains and dies, leaving his second wife surviving, the children of the first wife may, as against the surviving widow, have partition of their mother's interest in the homestead, but the surviving widow's homestead in the share of a deceased husband is protected. *Pressley v. Robinson*, 57 Tex. 453. See also *Gilliam v. Mull*, 58 Tex. 298; *Cradock v. Edwards*, 81 Tex. 609; *West v. West*, 9 Tex. Civ. App. 475.

Where the homestead in such a case was the separate property of the first wife, the rule is the same, except that the second surviving wife has no homestead rights. *King v. Gilleland*, 60 Tex. 271.

But the constitutional provision does not, it has been said, forbid a partition of the estate which preserves entire the homestead right of the surviving constituents of the family, which it is the purpose of that provision to protect; for instance, when the homestead is set apart to the minors, or set apart subject to the right of occupancy of the minors and their guardian. *Hudgins v. Sansom*, 72 Tex. 229.

The prohibition against partition is against those who claim as heirs of the decedent, and does not apply to those claiming an interest in the land through other titles. *Gilliam v. Null*, 58 Tex. 298.

3. *Termination at Majority* — *Alabama*. — *Miller v. Marx*, 55 Ala. 322; *Hunter v. Law*, 68 Ala. 365; *Smalley v. Chisenhall*, (Ala. 1895) 18 So. Rep. 739, mem. 108 Ala. 683.

*Arkansas*. — *Thomas v. Sybert*, 61 Ark. 579; *Sparkman v. Roberts*, 61 Ark. 26, quoting Const. Ark., art. 9, § 6; *Kessinger v. Wilson*, 53 Ark. 400, 22 Am. St. Rep. 220; *Kirksey v. Cole*, 47 Ark. 504; *McCloy v. Arnett*, 47 Ark. 445; *Cohn v. Hoffman*, 45 Ark. 376; *Johnston v. Turner*, 29 Ark. 280.

*Georgia*. — *Evans v. Hart*, 99 Ga. 302; *Towns v. Mathews*, 91 Ga. 546; *Tate v. Goff*,

89 Iowa 184; *Vornberg v. Owens*, 88 Ga. 237; *Neal v. Brockhan*, 87 Ga. 130; *Haynes v. Schaefer*, 96 Ga. 743.

*Illinois*. — *Capej v. Kropik*, 129 Ill. 509; *Stunz v. Stunz*, 131 Ill. 210; *Loeb v. McMahon*, 89 Ill. 487; *Wolf v. Ogden*, 66 Ill. 224; *Lewis v. McGraw*, 19 Ill. App. 313.

*Kansas*. — *White v. White*, 41 Kan. 556; *Vining v. Willis*, 40 Kan. 609; *Hafer v. Hafer*, 36 Kan. 524, 33 Kan. 449; *Stratton v. McCandliss*, 32 Kan. 512; *Gatton v. Tolley*, 22 Kan. 678; *Dayton v. Donart*, 22 Kan. 256.

*Kentucky*. — *Myers v. Myers*, 89 Ky. 442; *Turner v. Turner*, 89 Ky. 583. Whether there is a *jus accrescendi* in favor of minors seems undetermined.

*Michigan*. — *Louden v. Martindale*, 109 Mich. 235; *Drake v. Kinsell*, 38 Mich. 232. See also *Griffin v. Johnson*, 37 Mich. 87.

*Mississippi*. — *McCaleb v. Burnett*, 55 Miss. 83; *Acker v. Trueland*, 56 Miss. 30.

*Missouri*. — *Ailey v. Burnett*, 134 Mo. 313; *Hannah v. Hannah*, 109 Mo. 236; *Quinn v. Kinyon*, 100 Mo. 551; *Poland v. Vesper*, 67 Mo. 727; *Rhorer v. Brockhage*, 13 Mo. App. 397, affirmed 86 Mo. 544; *Richards v. Smith*, 47 Mo. App. 619.

*New Hampshire*. — *Squire v. Mudgett*, 61 N. H. 149.

*North Carolina*. — *Wharton v. Leggett*, 80 N. Car. 169; *Simpson v. Wallace*, 83 N. Car. 477.

*Tennessee*. — *Farrow v. Farrow*, 13 Lea (Tenn.) 120; *Leonard v. Mason*, 1 Lea (Tenn.) 1.

4. **When the Youngest Child Attains His Majority**, the interest of all the children as heirs attaches, subject to the rights of creditors. *Kessinger v. Wilson*, 53 Ark. 400, 22 Am. St. Rep. 220.

**Children Who Reach Majority Without an Application for a Homestead** lose their right thereto. *Matter of Still*, 117 Cal. 509.

After reaching majority a minor cannot maintain an action against one who wrongfully deprived him of rents and profits accruing on the homestead during minority. *Moore v. Peacock*, 94 Ga. 523. But compare *Hufschmidt v. Gross*, 112 Mo. 649.

After the minor children have attained their majority, the homestead continues during the life and widowhood of the mother, and the children are not entitled to recover their parts of the land against her. *Holloway v. Holloway*, 92 Ga. 340.

4. *Ladd v. Byrd*, 113 N. Car. 466.



the hands of the heirs after the expiration of the rights of the surviving spouse and family, and their interest does not become a part of the assets of the estate for the payment of the debts of the decedent.<sup>1</sup> But in other jurisdictions a different rule obtains.<sup>2</sup>

**XIV. ENFORCEMENT AND PROTECTION OF RIGHT — 1. Jurisdiction of Courts —**  
*a. IN GENERAL.* — Jurisdiction to adjudicate the right to homestead, or to set off and assign it to one entitled thereto, depends upon the statutes of the particular states, and no general rule can be stated in this regard.<sup>3</sup>

**Infringement or Loss of Right.** — Where the homestead right has been lost or infringed through no fault or neglect of the party entitled thereto, he may seek relief in equity or at law to protect or recover it;<sup>4</sup> and when a cause is properly before the court, it may have the power to determine the right to the exemption when such question is involved in the determination of the cause, even though it may not have original jurisdiction to set apart the homestead.<sup>5</sup>

**1. Exemption Held to Continue to Heirs.** — *McCarthy v. Van Der Mey*, 42 Minn. 189; *McGowan v. Baldwin*, 46 Minn. 477. See also *Johnson v. Gaylord*, 41 Iowa 362; *Matter of Coulson*, 95 Iowa 696; *Coleman v. McCormick*, 37 Minn. 179.

In Florida it has been held that upon the death of the homesteader the exemption accrues without limitation to the heirs of the homesteader and is not subject to testamentary disposition. *Scull v. Beatty*, 27 Fla. 426. See also *Miller v. Finegan*, 26 Fla. 29; *Baker v. State*, 17 Fla. 406.

In Wisconsin it has been held that the proceeds of the homestead, when it becomes necessary to sell it to satisfy any mortgage or lien upon it, shall, after the discharge of such mortgage or lien, be distributed to the heirs according to law and will not be subject to the general debts of the estate if the deceased dies intestate without a family; and where the homestead consisted of forty acres of land, the exemption as to thirty-five acres which constituted a part of the homestead was not lost in consequence of the devise of the five acres, including the dwelling, by the testator. *Johnson v. Harrison*, 41 Wis. 381.

**2. Exemption Held Not to Continue to Heirs.** — *Hanby v. Henritze*, 85 Va. 177.

In *Weber v. Short*, 55 Ala. 311, it was held that if there be no widow or minor children, the homestead, though during the life of the owner not subject to the payment of debts, at his death descends to his heirs or passes to his devisee, and is liable as are his other lands to the payment of his debts.

In Texas it has been held that when upon the death of the owner of the homestead no constituent of the family survives, and as a consequence there remains no family, the exemption ceases, and the homestead becomes subject, like other real estate, to be sold for the payment of debts. *Givens v. Hudson*, 64 Tex. 471; *Childers v. Henderson*, 76 Tex. 664.

But if upon the death of the owner any constituent of the family survives, so that the family continues to be represented, then the homestead in insolvent estates, subject to the prior right of occupancy of such as are protected in remaining, and subject to certain specified claims, descends and passes to the heirs of the owner. *Zwernemann v. Von*

*Rosenberg*, 76 Tex. 522; *Childers v. Henderson*, 76 Tex. 664; *Cameron v. Morris*, 83 Tex. 14; *Lacy v. Lockett*, 82 Tex. 194.

**3. Jurisdiction Depends upon Statute.** — See *Cox v. Bridges*, 84 Ala. 553; *Coffey v. Joseph*, 74 Ala. 271; *Sherry v. Brown*, 66 Ala. 52; *Myers v. Ham*, 20 S. Car. 527; *Scruggs v. Foot*, 19 S. Car. 279; *Ex p. Lewie*, 17 S. Car. 153; *Munro v. Jeter*, 24 S. Car. 29; *Bradley v. Rodelsperger*, 17 S. Car. 9.

In *South Carolina*, under the statute which provided for an application to the clerk of the court for the appraisement of a homestead, and fixed a certain number of days within which exceptions could be taken to the appraisement, after which the appraisement should be confirmed by the Circuit Court, and if such exceptions were taken a reappraisement might be ordered by the court, it was held that there was no original jurisdiction in the Circuit Court upon an application for an appraisement. *Ex p. Brown*, 37 S. Car. 181.

In *Massachusetts*, under Gen. Stat., c. 104, § 9, full authority was given to one entitled to a homestead to have the same set off upon petition for partition filed in the common-law courts, as in the case of tenants in common. *Woodward v. Lincoln*, 9 Allen (Mass.) 241; *Silloway v. Brown*, 12 Allen (Mass.) 35.

**New Hampshire Supreme Court.** — In *Gunnison v. Twitchel*, 38 N. H. 62, the jurisdiction of the Supreme Court to set off the homestead of a widow was distinctly asserted.

**Trial of Title to Land.** — Under the Constitution and laws of Texas it was held that a County Court could not try title to land, and that a homestead right was a title to land within the meaning of this inhibition. *Cross v. Peterson*, 1 Tex. App. Civ. Cas., § 1061; *C. B. Carter Lumber Co. v. De Grazier*, 3 Tex. App. Civ. Cas., § 177.

*A Justice of the Peace* has no jurisdiction to determine the right of homestead. *Irwin v. Taylor*, 48 Ark. 224.

**4. See *infra*, this section, *Relief Against Infringement of Right*.**

**5. Determination of Right Without Allotting.** — In *South Carolina* the Court of Common Pleas has no original jurisdiction to set off a homestead, but it has jurisdiction, in a proceeding otherwise properly before it, to adjudicate simply the right to a homestead. *Munro v.*



**Allotment when Jurisdiction Is Acquired on Other Grounds.** — In some cases it is held that where a court has jurisdiction of a cause upon other grounds, it has power to allot homestead when such allotment is a necessary incident to the proper exercise of the jurisdiction already acquired on other grounds;<sup>1</sup> but it is held that where the court has jurisdiction to set apart the homestead as such necessary incident, it cannot exercise the power to allot homestead unless it has acquired jurisdiction on other grounds.<sup>2</sup>

**Allotment in Chancery.** — Where a court of equity is resorted to for the purpose of protecting the homestead right, the court may not only adjudicate the right, but it may effectuate its decree by having the homestead itself set apart to the party entitled thereto.<sup>3</sup>

**In Ejectment.** — This power to set apart is also exercised at law in some states where the right to the homestead is adjudicated, as where the defendant in an action of ejectment claims homestead rights in the property.<sup>4</sup> But it has been held that homestead cannot be allotted in an action of ejectment brought by a purchaser, but it must be set apart in accordance with the statute by commissioners in the first instance, and not by a jury acting upon evidence alone.<sup>5</sup>

**Effect of Judgment — Waiver.** — When the right is fairly within the issue pre-

Jeter, 24 S. Car. 29; *Bridgers v. Howell*, 27 S. Car. 425; *People's Bank v. Brice*, 47 S. Car. 136; *Ex p. Worley*, 49 S. Car. 57; *Gray v. Putnam*, 51 S. Car. 97; *National Bank v. Kinard*, 28 S. Car. 101.

**1. Incidental Power to Allot.** — *Galyon v. Gilmore*, 93 Tenn. 676; *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Burnett v. Austin*, 10 Lea (Tenn.) 566.

**North Carolina Superior Court.** — In *Formey-duval v. Rockwell*, 117 N. Car. 325, it was held that the homestead right is a vested right, and cannot be destroyed by any irregularity in the proceeding or want of procedure in the manner prescribed in the code; that therefore, when a failure in those methods occurs, it can, "in order to enforce the right," be accomplished by other methods by the proper tribunal. This has been done by the Superior Court under the direction of the Supreme Court, in a case where the conditions were such that neither a sheriff nor a justice of the peace could have the allotment made. *Littlejohn v. Egerton*, 77 N. Car. 379.

**2. Necessity for Jurisdiction upon Other Grounds.** — *Galyon v. Gilmore*, 93 Tenn. 676; *Rhea v. Meredith*, 6 Lea (Tenn.) 605.

**3. Allotment in Chancery.** — *Brokaw v. Ogle*, 170 Ill. 115; *Leupold v. Krause*, 95 Ill. 440; *Jaffrey v. McGough*, 88 Ala. 643; 83 Ala. 208; *Clark v. Allen*, 87 Ala. 198; *McMichael v. Grady*, 34 Fla. 219; *Dillman v. Will County Nat. Bank*, 36 Ill. App. 272; *Hotchkiss v. Brooks*, 93 Ill. 386; *Clark v. Crosby*, 6 Ill. App. 102; *Pittsfield Bank v. Howk*, 4 Allen (Mass.) 347; *Silloway v. Brown*, 12 Allen (Mass.) 30; *Comstock v. Comstock*, 27 Mich. 97; *Parr v. Fumbanks*, 11 Lea (Tenn.) 391; *Lindsey v. Brewer*, 60 Vt. 627.

In a suit in chancery, the court, in the exercise of its equitable powers, may adjust the rights of the parties and compel a division of the portion of the estate in excess of the homestead, or a payment of the judgment. *Brokaw v. Ogle*, 170 Ill. 115; *Leupold v. Krause*, 95 Ill. 440; *Hotchkiss v. Brooks*, 93 Ill. 386;

*Mix v. King*, 55 Ill. 434; *Loomis v. Gerson*, 62 Ill. 11; *Lindsey v. Brewer*, 60 Vt. 627.

When the homestead, after being reduced to the lowest practicable area, exceeds two thousand dollars in value, and the husband has conveyed it by deed without the voluntary signature and assent of the wife, his grantee acquires no title whatever to the homestead interest, but the husband (or his wife or child or children) may, by bill in equity, have the land sold, and the homestead interest set apart (code, § 2538); and if he files a bill to enforce a vendor's lien on the land, the purchaser claiming an abatement of the purchase money on account of the defect of title to the homestead interest, the court will decree a sale of the whole land, separating the value of the homestead interest from the proceeds of sale, and allotting it to the complainant. *Thompson v. Sheppard*, 85 Ala. 611.

In *Georgia* it was held that courts of equity alone had jurisdiction of suits for the recovery of property which had been set apart under the homestead and exemption laws, and which were sold previous to February 15, 1876, or for the recovery of any interest therein. *Zellers v. Beckman*, 64 Ga. 747.

But it was held that it was not necessary to resort to equity to secure the exemption allowed by the section of the code in the case of an insolvent estate, as, by another section, where a party failed while a wife to assert her right in a proper manner, she can establish it as a widow by simply returning a schedule to the ordinary and having the same recorded. *Mapp v. Long*, 62 Ga. 568.

**4. In Ejectment.** — *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Crisp v. Crisp*, 86 Mo. 630; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 49.

**Setting Apart After Judgment.** — The setting apart of homestead should precede the judgment for possession in favor of the plaintiff, but doing it after judgment and before execution for possession will not be reversible error. *Arnold v. Jones*, 9 Lea (Tenn.) 545.

**5. Allotment by Commissioners in First Instance.** — *1880 & 1881* (Tenn.) 11.

sented in the cause, the judgment is conclusive, and will bar a subsequent assertion of the right.<sup>1</sup>

*b. PROBATE COURTS.* — Upon the death of either head of the family, it is the duty of the probate court to set aside homestead for the benefit of the surviving husband or wife and the legitimate children,<sup>2</sup> as in cases of dower;<sup>3</sup> or jurisdiction to set aside homestead might reside in courts of like character, as where the statute confers jurisdiction upon ordinaries,<sup>4</sup> or in the County Courts where such court has general jurisdiction of matters of probate and settlement of estates.<sup>5</sup>

*c. INSOLVENCY COURTS.* — Under the statutes of various states, the court having jurisdiction of insolvency proceedings has jurisdiction to set apart to the insolvent his homestead exemption;<sup>6</sup> and in *California*, under a statute making it the duty of the court to set apart the homestead for the use and benefit of the insolvent, such court was held to have no discretion where the application for the exemption was properly made, and it could not refuse to set apart the homestead, nor decide that the property was not a homestead.<sup>7</sup>

**1. Effect of Judgment.** — See *supra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel — Estoppel*.

**2. Probate Courts — California.** — Matter of Tompkins, 12 Cal. 125; Levins *v.* Rovegno, 71 Cal. 273; Rich *v.* Tubbs, 41 Cal. 36; Matter of Headen, 52 Cal. 294; Gee *v.* Moore, 14 Cal. 472; Matter of McCauley, 50 Cal. 544; Matter of Ballentine, 45 Cal. 696; Mawson *v.* Mawson, 50 Cal. 539; Matter of Burton, 63 Cal. 37; Schadt *v.* Heppe, 45 Cal. 433; Matter of Schmidt, 94 Cal. 334; Matter of Wixom, 35 Cal. 320; Herrold *v.* Reen, 58 Cal. 443; Hardwick's Estate, 59 Cal. 292; Matter of Gilmore, 81 Cal. 240; Watson *v.* His Creditors, 58 Cal. 556; Matter of Busse, 35 Cal. 310.

*Nevada* — Walley's Estate, 11 Nev. 260; Smith *v.* Shrieves, 13 Nev. 308.

*New Hampshire.* — Horn *v.* Tufts, 39 N. H. 485; Norris *v.* Moulton, 34 N. H. 392.

*Texas.* — Harrison *v.* Oberthier, 40 Tex. 385.

*Vermont.* — Howe *v.* Adams, 28 Vt. 544.

In *Texas* the probate court has power to set aside a homestead out of a large tract, even before the purchase money has been paid, and such order will protect the family, even against the vendor's lien, until it has been set aside in a direct proceeding for that purpose, with all parties interested before the court. Harrison *v.* Oberthier, 40 Tex. 385.

**3. Jurisdiction as in Dower.** — In *Tennessee*, under the Act of 1873, it is held that homestead is set apart by the same courts as is dower. Rhea *v.* Meridith, 6 Lea (Tenn.) 608.

In *New Hampshire* it was held that a widow who continues after the decease of her husband to occupy the dwelling which constituted the family home at the time of his death may have the homestead assigned to her by the judge of probate, under the authority given by statute to cause the dower and share of the widow in the real estate of any person deceased to be assigned to her. Norris *v.* Moulton, 34 N. H. 392.

*Writ of Homestead.* — In Woodward *v.* Lincoln, 9 Allen (Mass.) 241, it was suggested by Mr. Justice Dewey that a homestead might be recovered by writ of homestead, in analogy to a writ of dower. See also Silloway *v.* Brown, 12 Allen (Mass.) 33.

**4. Ordinary.** — The *Georgia* Act of 1868 confers jurisdiction upon the ordinaries of the several counties to set out homestead and exemption to the heads of families. Blivins *v.* Johnson, 40 Ga. 297. See Deyton *v.* Bell, 81 Ga. 376; Hardin *v.* McCord, 72 Ga. 240; Harris *v.* Colquit, 44 Ga. 663.

**5. County Court.** — Guthman *v.* Guthman, 18 Neb. 98.

**6. Insolvency Courts.** — Matter of Ligget, 117 Cal. 352, 59 Am. St. Rep. 190; Matter of Bowman, 69 Cal. 244; Silloway *v.* Brown, 12 Allen (Mass.) 30; Rhea *v.* Meridith, 6 Lea (Tenn.) 605. See also Anderson *v.* Brown, 72 Ga. 713; Ross *v.* Worsham, 65 Ga. 624.

In *Georgia* it was held that the only effect of the legislation of Congress upon the title to property reserved as a homestead was to prevent its passing to the assignee in bankruptcy, and thus to withdraw it from the jurisdiction of the bankruptcy court, leaving it where it was before the proceedings in bankruptcy were commenced, depriving that court of the power of administering it as a part of the estate of the bankrupt; that the title did not vest for the use of the family until the state law had been complied with, and that therefore an exemption in bankruptcy was subject to a debt contracted by the debtor after his discharge. Felker *v.* Crane, 70 Ga. 484; Brady *v.* Brady, 67 Ga. 368. See also Ross *v.* Worsham, 65 Ga. 624; Collier *v.* Simpson, 74 Ga. 697; Barrett *v.* Durham, 80 Ga. 336.

**Limited Jurisdiction.** — The Court of Insolvency, being a court of peculiar and limited jurisdiction, has no authority to set apart the homestead except by express statute; and where an assignee in insolvency conveyed all the debtor's right in the premises, subject to his right of homestead, it was held that the Court of Insolvency had no jurisdiction to set apart the homestead, but that the owner of the homestead and the owner of the residue of the estate were tenants in common, and the proper mode of setting off the homestead was by proceedings for partition upon the petition of either party. Silloway *v.* Brown, 12 Allen (Mass.) 30.

**7. No Discretion.** — Demartin *v.* Demartin, 85 Cal. 74; Gaylord *v.* Place, 98 Cal. 480; Dascey *v.* Harris, 65 Cal. 361.



*d. JURISDICTION LIMITED TO ALLOTMENT.* — Where the court has power merely to set apart or assign homestead, its jurisdiction is limited to this extent, in the absence of a broader grant of power;<sup>1</sup> and if an allotment of a homestead is made to a surviving child of a decedent, by commissioners appointed by the probate court, and such allotment is contested by a creditor of the decedent, the issues cannot be tried by that court.<sup>2</sup>

**2. Claiming, Selecting, and Setting Apart** — *a. RIGHT TO PRESCRIBE METHOD.* — Where the constitution of the state secures a homestead exemption, the legislature cannot impair the right, though it may prescribe the method of claiming and setting apart.<sup>3</sup>

*b. OCCUPANCY AS SUFFICIENT SELECTION.* — In the absence of express statutory provision, no ceremonies are required to designate a homestead and communicate notice to the public, but when a debtor occupies such a status as entitles him to a homestead, his mere ownership of the land and occupancy of the same are sufficient to impress it with the character of a homestead,<sup>4</sup> especially when the property is within the extent and value limited by law for a homestead<sup>5</sup> and even though the premises are used for unlawful purposes.<sup>6</sup>

*c. CLAIM AND SELECTION* — (1) *In General.* — In some states, under various statutory provisions, the claiming and setting apart of homestead before the property is subjected are required, and the mode in which these shall

**1. Jurisdiction Limited to Allotment** — *Alabama.* — Baker v. Keith, 72 Ala. 121; Keel v. Larkin, 72 Ala. 493; Kelly v. Garrett, 67 Ala. 304; Cochran v. Sorrell, 74 Ala. 310; Cox v. Bridges, 84 Ala. 554.

*California.* — Schadt v. Heppe, 45 Cal. 433; Matter of Tompkins, 12 Cal. 114; Matter of James, 23 Cal. 417; Matter of Gilmore, 81 Cal. 240; Hardwick's Estate, 59 Cal. 292; Rich v. Tubbs, 41 Cal. 34; Watson v. His Creditors, 58 Cal. 556; Matter of Burton, 63 Cal. 36; Matter of Moore, 57 Cal. 437.

*Massachusetts.* — Lazell v. Lazell, 8 Allen (Mass.) 575; Woodward v. Lincoln, 9 Allen (Mass.) 239; Mercier v. Chace, 9 Allen (Mass.) 242.

**Adjudication of Title.** — The probate court, in setting apart property which has been dedicated as a homestead under the Homestead Act, does not change or transmit the title; nor, indeed, does it adjudicate the question of title as between the parties who assert a claim to it. The purpose and effect of the order are merely that the property be relieved from administration. The question of title, as between the claimants, is to be determined in another forum. Rich v. Tubbs, 41 Cal. 34. See also Watson v. His Creditors, 58 Cal. 556; Matter of Burton, 63 Cal. 36; Matter of Moore, 57 Cal. 437; Smith v. Smith, 101 Ga. 296; Home Bldg., etc., Assoc. v. Cherry, 62 Ga. 269; Bush v. Lester, 55 Ga. 581.

In *Alabama*, where the widow selects the homestead and petitions the probate court to have it allotted to her, and upon the report of the commissioners appointed to allot the homestead and appraise its value creditors of the decedent except, the issue made by the exception is certified to the Circuit Court for trial, but neither court has authority to try the title to the land. The statutory jurisdiction is limited to the inquiry whether the lands in which the homestead is claimed were, at the death of the husband and father, impressed by his occupancy with the character of a

homestead, and whether the assignment made by the commissioners is excessive in value. Coffey v. Joseph, 74 Ala. 271; Cox v. Bridges, 84 Ala. 553.

**Prejudicial Order Set Aside.** — Although an order made by a probate court, relating to property previously set apart as a homestead for the benefit of a surviving wife, can in no way affect her rights in said property, yet it was held that such an order would be set aside as erroneous where it might operate to the prejudice of the widow by raising a doubt as to her title. Hardwick's Estate, 59 Cal. 292.

**2. Issues upon Contest.** — Baker v. Keith, 72 Ala. 121, holding that under the code provisions in that state, such issues could not be tried by the probate court, but should be certified to the Circuit Court for trial.

**3. Right to Prescribe Method.** — Wray v. Davenport, 79 Va. 19.

**4. Occupancy Sufficient Designation** — *Arkansas.* — Lindsay v. Merrill, 36 Ark. 545.

*California.* — Cook v. McChristian, 4 Cal. 24; Taylor v. Hargous, 4 Cal. 272, 60 Am. Dec. 606.

*Illinois.* — Bach v. May, 163 Ill. 547; Zander v. Scott, 165 Ill. 51; Imhoff v. Lipe, 162 Ill. 285.

*Iowa.* — Yost v. Devault, 9 Iowa 60.

*Minnesota.* — Ferguson v. Kumler, 25 Minn. 188.

*Mississippi.* — Hand v. Winn, 52 Miss. 784.

*Missouri.* — Peake v. Cameron, 102 Mo. 568.

*Tennessee.* — First Nat. Bank v. Meachem, (Tenn. Ch. 1896) 36 S. W. Rep. 724.

*Texas.* — Coates v. Caldwell, 71 Tex. 19, 10 Am. St. Rep. 725.

*Washington.* — Philbrick v. Andrews, 8 Wash. 7.

**5. Property Within Statutory Limit.** — Peake v. Cameron, 102 Mo. 568. See also *infra*, this section, *Where Property Not in Excess of Exemption.*

**6. Unlawful Use of Premises.** — Prince v. Hake, 75 Wis. 638.



be done is prescribed.<sup>1</sup> The claim and selection of homestead constitute the initiative step in proceedings designed to avoid evils consequent upon a sale under process imposed by or subject to claim of homestead.<sup>2</sup>

**Homestead "to Be Selected by the Owner" — Occupancy Not Sufficient.** — Where the statute, as is the case in some states, exempts a homestead of a certain number of acres, or of a certain value, "to be selected by the owner," a selection of the premises by the owner for the homestead is necessary to render the same exempt, when the premises are of a greater quantity or value than he is entitled to hold as exempt. In such a case the mere ownership and occupancy of the premises are not sufficient to render them exempt. The party has a right to select and must select.<sup>3</sup>

**Design of Statutes.** — Such statutes are sometimes designed to preclude the right of homestead where the claim is not made, as where the statute does not confer a homestead, but the mere right to it is dependent upon such claim.<sup>4</sup> In other cases, however, the statutes seem designed to afford the debtor the privilege of selecting what lands shall not be subject to execution, and if he fails to make his selection he is merely deprived of his right to select, and not of his homestead, which is fixed in value and extent by law,<sup>5</sup> as where, upon the failure to claim and select a homestead, the sheriff is required to proceed to set it off,<sup>6</sup> or the debtor is confined to the legal subdivision embracing the dwelling house.<sup>7</sup>

**1. Claim and Selection Required.** — See *Sherry v. Brown*, 66 Ala. 51; *Schuer v. King*, 100 Ala. 239; *Davenport v. Alston*, 14 Ga. 271; *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163.

In *Arkansas*, before the Act of 1887, the debtor lost his right of homestead if he failed to claim it before sale, the claim being made by filing with the clerk a schedule of the debtor's property and procuring a supersedeas staying the same. *Healy v. Conner*, 40 Ark. 352. But after the Act of 1887 the failure so to claim did not waive the right. *Brown v. Peters*, 53 Ark. 182.

In *Alabama*, under the statute, there were two methods by which the claim for exemption could be made, namely, by making and filing for record a declaration claiming exemption, before the levy of process, in which case no execution could be levied upon the property claimed to be exempt until a contesting affidavit had been made and filed with the clerk, and the fact of such contesting affidavit having been so made and filed must be indorsed on the process to authorize a levy by the sheriff; and second, where no such declaration of claim had been made and filed for record, the defendant under the process, at any time after the levy and prior to the sale, might claim his exemption by filing with the officer a claim in writing, describing the property, and verified by oath. *Schuer v. King*, 100 Ala. 238; *Mitchell v. Corbin*, 91 Ala. 599; *Block v. George*, 83 Ala. 178; *Kennedy v. Tuscaloosa First Nat. Bank*, 107 Ala. 170.

**2.** *Clancy v. Stephens*, 92 Ala. 577; *Block v. Bragg*, 68 Ala. 293.

**3. Selection Necessary — Occupancy Not Sufficient.** — *Hardy v. Sulzbacher*, 62 Ala. 44; *Peak v. Lenora State Bank*, 58 Kan. 485; *Constantine First Nat. Bank v. Jacobs*, 50 Mich. 340; *Herschfeldt v. George*, 6 Mich. 468; *People v. Plumsted*, 2 Mich. 465; *Meyer v. Nickerson*, 100 Mo. 599; *Martin v. Aultman*, 80 Wis. 150; *Kent v. Lasley*, 48 Wis. 257.

**4. Right Dependent upon Claim.** — *Line's Appeal*, 2 Grant Cas. (Pa.) 198; *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738; *Miller's Appeal*, 16 Pa. St. 300; *Dodson's Appeal*, 25 Pa. St. 234.

**5. Waiver of Right to Select Only.** — *Myers v. Ham*, 20 S. Car. 522; *Fischer v. Schultz*, 98 Wis. 462.

**6. Sheriff Required to Set Off upon Failure to Claim.** — *Meyer v. Nickerson*, 100 Mo. 599. See also *infra*, this section, *Appraisal, Allotment and Sale — Duty of Officer to Appraise and Set Apart*.

**7. Confined to Dwelling.** — *Martin v. Aultman*, 80 Wis. 150.

Where the question what particular eighty acres were occupied by one who had failed to select his homestead from two sections of eighty acres is fairly submitted to the jury, the homesteader cannot object to a verdict which allows him eighty acres embracing his dwelling house and appurtenances. *DeGraf-fenried v. Clark*, 75 Ala. 425.

**Presumption of Selection.** — Under the *Wisconsin* statute exempting a homestead not exceeding forty acres in the country, or a quarter of an acre in a city or village, "to be selected by the owner thereof," it was held in *Kent v. Agard*, 22 Wis. 150, that where one lives on more than forty acres of land in the country, or more than a quarter of an acre in a city or village, the limits of his homestead remain undetermined until fixed by his selection, although his dwelling house may be upon a legal subdivision of land exactly commensurate with the right of homestead given by the statute. This decision, however, was overruled in *Kent v. Lasley*, 48 Wis. 257, holding that in such a case the owner, if he has made no different selection, will be presumed and held to have selected such subdivision for his homestead.

So it is held that want of notice of sale of the debtor's land, whereby the debtor had no opportunity to make his selection, will not be

**As Against Successive Executions.** — Where the claim, selection, and allotment have been made against executions, it is not necessary again to assert a claim or have a new allotment against alias executions coming into the officer's hands.<sup>1</sup>

(2) *Where Property Not in Excess of Exemption.* — Where the statute exempts a homestead of a certain number of acres or of a certain value, to be selected by the owner, when the premises are of a greater quantity or value than the statutory limit, no selection is necessary if the area and value of the homestead do not exceed such statutory limit, and if it is no part or parcel of a larger portion of land. In such a case the law intervenes, and attaches the right of exemption without any act on the part of the owner, as if the particular property were especially claimed and designated as exempt.<sup>2</sup>

**d. FORMAL DEDICATION AND SETTING APART.** — Under some statutes it is necessary that the property claimed as homestead exemption shall be described and its selection stated in the written instrument to be recorded, in order that such property shall become impressed with the character of a homestead,<sup>3</sup> or that the party claiming the right shall cause the word "home-

sufficient to set aside the sale, where the debtor was not injured. *Schoffen v. Landauer*, 60 Wis. 334.

1. **As Against Successive Executions.** — *Jones v. DeGraffenried*, 60 Ala. 145; *Bender v. Meyer*, 55 Ala. 576; *Weiner v. Sterling*, 61 Ala. 98; *Euper v. Alkire*, 37 Ark. 283; *Caldwell v. Taylor*, (Ky. 1895) 32 S. W. Rep. 678.

2. **Property Not in Excess of Exemption** — *Alabama*. — *Pollak v. McNeil*, 100 Ala. 206 [citing *Alley v. Daniel*, 75 Ala. 406; *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378; *Jarrell v. Payne*, 75 Ala. 579, 51 Am. Rep. 483; *Hardin v. Pulley*, 79 Ala. 387; *Chandler v. Chandler*, 87 Ala. 303].

*Georgia*. — *Pinkerton v. Tumlin*, 22 Ga. 165.

*Illinois*. — *Green v. Marks*, 25 Ill. 221.

*Iowa*. — *Rhodes v. McCormack*, 4 Iowa 368, 68 Am. Dec. 663; *Kurz v. Brusch*, 13 Iowa 371, 81 Am. Dec. 435.

*Michigan*. — *Evans v. Grand Rapids, etc., R. Co.*, 68 Mich. 602; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554; *Beecher v. Baldy*, 7 Mich. 488; *Thomas v. Dodge*, 8 Mich. 51; *Coolidge v. Wells*, 20 Mich. 79; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743.

*Missouri*. — *Peake v. Cameron*, 102 Mo. 568.

*Texas*. — *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725.

*Utah*. — *Kimball v. Salisbury*, 17 Utah 381.

In such a case the homestead estate conferred by the statute will vest in his wife and children immediately upon his death, without being set apart by commissioners. *Rogers v. Marsh*, 73 Mo. 64.

In *Tennessee*, under the act exempting an estate of a certain value belonging to the head of a family, whether living upon it or not, and giving to the head of the family the privilege of designating its location, it was held that these provisions applied only to a case where the interposition of the court or of judicial commissioners was necessary to set apart homestead; that there was no occasion to set apart homestead unless the head of the family had been levied on by execution or attachment, or was sought in some way to be subjected to sale by judicial process, or, upon the death of the husband, to designate what the widow and children should take as homestead;

that under this construction, where the head of the family owns several tracts of land, and resides with his family upon one of them worth as much as the statutory limit, this is, between him (both as to himself and as trustee for his family) and those who take conveyances from him, an adoption of the residence place as the homestead, and satisfies the law, and he may convey the other tracts free of the homestead right. *First Nat. Bank v. Meachem*, (Tenn. Ch. 1896) 36 S. W. Rep. 724.

In *Texas* it was held that the statutory provision permitting the head of a family to designate a homestead to an amount not exceeding two hundred acres, when the homestead is part of a larger tract or tracts of land exempt from forced sale, did not prescribe this as a means of cutting down the homestead to less than what the uses of the family had embraced in it, but as a means of marking the lines of the homestead uses which extended to homestead limits; and that if the husband and wife make a formal declaration that their homestead consists of a less number of acres than are exempted from forced sale, such declaration has no force for that purpose, as the statute does not authorize the head of the family to contract, but simply to define the homestead. *Radford v. Lyon*, 65 Tex. 471.

3. **Formal Dedication — Recording Claim.** — *Riley v. Pehl*, 23 Cal. 70; *McQuade v. Whaley*, 31 Cal. 526; *Matzen v. Shaeffer*, 65 Cal. 81; *Matter of Reed*, 23 Cal. 410; *Boreham v. Byrne*, 83 Cal. 23; *Loring v. Groomer*, 142 Mo. 1, under the homestead law of 1865; *Mutual L. Ins. Co. v. Newton*, (N. J. 1888) 15 Atl. Rep. 542; *Lachman v. Walker*, 15 Nev. 422; *Nevada Bank v. Treadway*, 17 Fed. Rep. 887. See also *Threat v. Moody*, 87 Tenn. 143; *Pella v. Decker*, 72 Tex. 578.

In *California* it was held that where the homestead was acquired under the Act of 1851, and was occupied as such up to the time of the passage of the Act of April 28, 1860, it would lose its character as such unless the declaration of homestead provided for in the latter act was made and filed. *Noble v. Hook*, 24 Cal. 628; *McQuade v. Whaley*, 31 Cal. 526.

But where an act repealing former homestead acts provided that the repeal should not



stead " to be entered of record on the margin of his recorded title.<sup>1</sup>

**Condition to Right of Selection.** — Some of these statutes, however, seem not to be intended to make a formal dedication a condition precedent to the right to claim homestead, but merely to the right of selection as against claims which intervene before such selection is made,<sup>2</sup> and in others, in order to protect property as a homestead, the selection and recording are held to be in time if made at any time before sale.<sup>3</sup>

**Effect of Declaration.** — When the declaration of homestead is made and recorded, as provided by the statute, the property is immediately withdrawn from liability for claims from which the homestead is exempt under the law;<sup>4</sup> and if in time, it is not material that it was made to hinder or defraud creditors.<sup>5</sup>

**Unauthorized Dedication.** — Where, however, no manner of formal dedication is required or prescribed by statute, the filing for record of a selection of homestead will have no legal effect, and is not conclusive as against creditors or purchasers.<sup>6</sup> Dedication in cases not covered by the statute will not be effective for any purpose. Thus a statute covering rural property has no application to urban property,<sup>7</sup> and property which is not subject to homestead cannot be made so by a declaration of homestead.<sup>8</sup>

**Proceedings Before Ordinary.** — In *Georgia* the statute provides a proceeding before the ordinary for the setting apart of the homestead and the recording of the plat.<sup>9</sup>

affect any rights acquired under said former acts, rights of homestead so acquired were protected without being recorded under the repealing act. *Clark v. Potter*, 13 Gray (Mass.) 21.

Declaration of homestead prescribed by the statute is not a conveyance under the doctrine that any recorded deeds and mortgages are good as against subsequent purchasers for value. *Ontario State Bank v. Gerry*, 91 Cal. 94.

**Land Partly in Two Counties.** — Where one wishes to declare a homestead partly in two counties, it is held in *California* that the same paper need not be filed in both counties, but that it is sufficient if the declaration is made in duplicate and one copy filed in each county, and it does not matter that one of the copies is filed several days after the filing of the other. *Kennedy v. Gloster*, 98 Cal. 143.

**1. Entry of "Homestead" on Recorded Title.** — *Goodwin v. Colorado Mortg. Invest. Co.*, 110 U. S. 1, under the statutes in *Colorado*; *Barnett v. Knight*, 7 Colo. 365; *Dallemand v. Mannon*, 4 Colo. App. 262.

**Sufficient Record of Title — Receiver's Receipt — Quitclaim Deed.** — A receiver's certificate which was in effect an agreement on the part of the United States to issue to the purchaser a patent for the land purchased, in consideration of the purchase price, was entitled to record by the terms of the statute, which made provision for the record of "all deeds, conveyances, and agreements in writing of, or affecting title to, real estate or any interest therein;" and the record of such certificate would be the recorded title, upon the margin of which the word "homestead" might be entered, so as to give the owner the benefit of the Homestead Act. Where, however, one who has acquired title to land conveys it in such manner that his title is extinguished, and it subsequently returns to him by independent convey-

ance, if he then desires to avail himself of the benefits of the homestead law, it is questionable whether he should not use the record of the later conveyance for that purpose; but where the homesteader executes a mortgage, and thereafter takes a quitclaim deed, releasing the mortgage, the latter is not a recorded title upon the margin of which the statute requires "Homestead" to be entered. *Dallemand v. Mannon*, 4 Colo. App. 262.

**2. Condition to Right of Selection.** — See *White v. Rowley*, 46 Iowa 680; *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725; *Brooks v. Chatham*, 57 Tex. 31.

And the failure to plat has been held not to deprive the parties to claim a right of not more than forty acres, by reason of the value not reaching the statutory limit. *Green v. Farrer*, 53 Iowa 426.

**3. Hawthorne v. Smith**, 3 Nev. 182.

**4. Effect — Withdrawal of Property from Liability.** — *Dascey v. Harris*, 65 Cal. 361; *Security L. & T. Co. v. Kauffmann*, 108 Cal. 214; *Nevada Bank v. Treadway*, 17 Fed. Rep. 887.

A judgment obtained after a declaration of homestead, unless secured by a mortgage, or a mechanic's, laborer's, or vendor's lien, cannot be enforced against the homestead, even although an attachment was levied upon the premises before the filing of the declaration. *Fitzell v. Leaky*, 72 Cal. 477 [citing *McCracken v. Harris*, 54 Cal. 81; *Sullivan v. Hendrickson*, 54 Cal. 258]; *Simonson v. Burr*, 121 Cal. 582.

**5. Simonson v. Burr**, 121 Cal. 582.

**6. Unauthorized Dedication.** — *Cook v. McChristian*, 4 Cal. 24.

**7. Equitable Mortg. Co. v. Norton**, 71 Tex. 683; *Pellat v. Decker*, 72 Tex. 578.

**8. Matter of Ligget**, 117 Cal. 352, 59 Am. St. Rep. 190.

**9. Proceedings Before Ordinary.** — *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163; *Mabry v. Johnson*, 85 Ga. 340; *Sharp v. Ameri-*



*c. COMPLIANCE WITH STATUTE* — (1) *In General*. — As the right to homestead exemption depends entirely upon the statutes, where the statute prescribes a particular method to be adopted with respect to the claiming, selecting, and setting apart of the same, such as a designation in writing of the property claimed, survey, appraisement, and the like, these provisions must be complied with.<sup>1</sup>

*Notice in Writing*. — Sometimes the notice to the officer is not required to be in writing, but it is sufficient if in any form it is indicated to the officer with reasonable certainty what land is claimed.<sup>2</sup> When so required by statute, however, the claim filed with the officer must be in writing and verified by affidavit.<sup>3</sup>

*Execution of Declaration as Required by Statute*. — When a recorded declaration of homestead is required, it must be executed as required by law. Thus a declaration by a married woman must be properly acknowledged under the statute, or the property will not become impressed with the character of a homestead.<sup>4</sup>

(2) *Sufficiency of Claim or Declaration* — *Statutes Mandatory*. — The provisions of the statute prescribing what shall be contained in a declaration or claim of homestead are held to be mandatory, and a compliance therewith is essential to the validity of the homestead.<sup>5</sup> The claim of exemption must contain

can Freehold Land Mortg. Co., 95 Ga. 415; Felker v. Crane, 70 Ga. 484; Branch v. Ford, 99 Ga. 761.

*The Time of Recording* is not material as against one who dealt with the party claiming the homestead after the record was made, notwithstanding the record was lost after the homestead was recorded. Sharp v. American Freehold Land Mortg. Co., 95 Ga. 415.

*Where Plat Recorded*. — But the plat need not be recorded in the county in which the land lies; it is sufficient if record is made in the county in which the homestead is secured. Timothy v. Chambers, 85 Ga. 267, 21 Am. St. Rep. 163.

1. *Compliance with Statute in General* — *Alabama*. — Block v. Bragg, 68 Ala. 293; Sherry v. Brown, 66 Ala. 51.

*Arkansas*. — Healy v. Conner, 40 Ark. 352; Brown v. Peters, 53 Ark. 182, holding that although under the statute then in force the right to the homestead was not lost by failing to claim it before sale, yet to prevent a sale the debtor must file a schedule of his property as required by statute.

*California*. — Matzen v. Shaeffer, 65 Cal. 83.

*Colorado*. — Dallemand v. Mannon, 4 Colo. 262.

*Georgia*. — Branch v. Ford, 99 Ga. 761; Davenport v. Alston, 14 Ga. 271; Weekes v. Edwards, 109 Ga. 314.

*Idaho*. — Burbank v. Kirby, (Idaho 1898) 55 Pac. Rep. 295.

*Iowa*. — Henderson v. Rainbow, 76 Iowa 320; White v. Rowley, 46 Iowa 681.

*South Carolina*. — People's Bank v. Brice, 47 S. Car. 134; Myers v. Ham, 20 S. Car. 522.

*Virginia*. — Wray v. Davenport, 79 Va. 19.

*Declaration Not Such as Required*. — Where a declaration of homestead was not such as the law required in order to constitute a homestead, an order of court in insolvency proceedings setting aside the homestead was held to be a nullity. Matzen v. Shaeffer, 65 Cal. 83.

*Failure to Note Recordation*. — Where a declaration was recorded, failure to note the re-

cord to note the recordation in his index does not affect the validity of the homestead. Southwick v. Davis, 78 Cal. 504.

2. *Notice in Writing Not Required*. — Beecher v. Baldy, 7 Mich. 488.

3. *Notice in Writing Required*. — Kennedy v. Tuscaloosa First Nat. Bank, 107 Ala. 170.

When under such statutory provisions a claim is made with a levy of execution, it is not sufficiently filed with the officer when it is merely handed to him after the levy and then withdrawn from him before sale and filed for registration under the statute providing for the latter step to prevent a levy. It must be filed with the officer and left with him. Schuer v. King, 100 Ala. 238.

4. *Properly Acknowledged*. — Kennedy v. Gloster, 98 Cal. 143; Beck v. Soward, 76 Cal. 527; Burbank v. Kirby, (Idaho 1898) 55 Pac. Rep. 295.

Omission by the recorder to copy a part of the acknowledgment to the declaration will not affect the validity of the homestead. When the homesteader files for record a proper declaration properly acknowledged, and this is all that the statute requires, it is sufficient. Quackenbush v. Reed, 102 Cal. 493.

In Clements v. Stanton, 47 Cal. 60, it was held that where a wife made a declaration of homestead selected by her alone, she might acknowledge it according to the provisions of the law for the acknowledgment of conveyances by persons other than married women.

5. *Statutes Mandatory*. — Ashley v. Olmstead, 54 Cal. 616; Knock v. Bunnell, (Cal. 1889) 21 Pac. Rep. 961; Booth v. Galt, 58 Cal. 254; Wilcox v. Deere, (Idaho 1897) 51 Pac. Rep. 98.

Thus under the statute in *California*, which requires that the declaration by a married woman should state that her husband had not made such declaration, but that she made it for their joint benefit, an omission of these averments will make the declaration bad. Booth v. Galt, 58 Cal. 254; Cunha v. Hughes, 122 Cal. 111. See also in *Georgia*, where the wife's right to have the homestead set apart

avermments from which can be ascertained the law regulating the exemption,<sup>1</sup> and must show that the claimant is entitled to the exemption under the law;<sup>2</sup> as, that the claimant is the head of the family,<sup>3</sup> residence upon the premises,<sup>4</sup> and the value of the property.<sup>5</sup>

**Declaration Good in Part.** — But though a declaration of homestead does not sufficiently describe some of the property claimed, it is not for that reason void if other property is sufficiently described; as to the latter it will be good.<sup>6</sup>

**Substantial Compliance.** — A substantial compliance with the statute, however, is all that is required, for, as has been shown in another section of this article, the homestead-exemption laws are to be liberally construed, and technical objections should not be allowed to defeat the right;<sup>7</sup> and where the debtor states with reasonable certainty what he claims as his homestead, it is held that this is a sufficient selection,<sup>8</sup> and the declaration need not be more certain than the language of the provision under which it is filed.<sup>9</sup>

**General Description of Land.** — A general description of the land under a claim set up by affidavit or by recorded declaration is sufficient, and a description by metes and bounds or by the number of the government surveys is not necessary;<sup>10</sup> such declaration need not be more particular in a description of land than is required in the case of a deed,<sup>11</sup> and a particular reference to a

out of her husband's property depended upon his refusal to do so, and in which case the schedule filed by the wife was required to show unequivocally a refusal on the part of the husband, *Davis v. Lumpkin*, 106 Ga. 582.

But where the declaration shows that it was filed for the husband and wife jointly, and that the husband had not made it, it is sufficient without showing expressly why the wife made it. *Farley v. Hopkins*, 79 Cal. 203.

**1. Showing Law Regulating Exemption.** — Thus a claim of exemption to lands upon which execution had been levied was held insufficient without averments as to when the debt upon which the judgment was rendered was contracted, so that the law governing the exemption could be ascertained. *Block v. Bragg*, 68 Ala. 291.

**2. Right of Claimant.** — *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Blum v. Carter*, 63 Ala. 235; *Boreham v. Byrne*, 83 Cal. 23.

**3. Head of Family.** — *Jones v. Waddy*, 66 Cal. 457, where it was held that a statement of the legal conclusion that the claimant was the head of the family was sufficient without facts showing him to be such.

**4. Residence upon Premises.** — *Boreham v. Byrne*, 83 Cal. 23; *Wilcox v. Deere*, (Idaho 1897) 51 Pac. Rep. 98.

Want of such statement cannot be supplied in a declaration of homestead by proof *aliunde*. *Boreham v. Byrne*, 83 Cal. 23.

**Schedule Filed with Clerk.** — *Patrick v. Baxter*, 42 Ark. 175.

**5. Value of Property.** — Thus it is sometimes required by statute that the declaration of homestead shall contain an estimate of the actual cash value of the property. *Read v. Rahm*, 65 Cal. 343; *Jones v. Waddy*, 66 Cal. 457; *Knock v. Bunnell*, (Cal. 1889) 21 Pac. Rep. 961; *Ames v. Eldred*, 55 Cal. 136; *Ashley v. Olmstead*, 54 Cal. 616; *Mitchell v. McCormick*, 22 Mont. 249. See also *Williams v. Watkins*, 92 Va. 680.

But where one claiming property as a homestead filed a bill to remove a cloud upon his title, and the defendant answered and admitted that the property was a homestead and had

been legally selected, it was held to be no objection that the declaration of homestead did not contain such estimate. *Mitchell v. McCormick*, 22 Mont. 249.

**6. Declaration Good in Part.** — *Williams v. Watkins*, 92 Va. 680.

**7. Technical Objections Disregarded.** — *Southwick v. Davis*, 78 Cal. 504; *Simonson v. Burr*, 121 Cal. 582; *Schuyler v. Broughton*, 76 Cal. 524; *Heathman v. Holmes*, 94 Cal. 291. See *supra*, this title, *Rules for Construction of Homestead Laws*.

**Illustration—Statement of Value.** — Under a statute requiring that a declaration of homestead shall state an estimate of the cash value of the property, a statement that it "does not exceed in value the sum of five thousand dollars" is sufficient. *Southwick v. Davis*, 78 Cal. 504.

So a statement which placed the value of the land at a sum "not to exceed sixteen hundred dollars" was held sufficient. *Schuyler v. Broughton*, 76 Cal. 524.

"The cash value of said homestead is about four thousand dollars" was likewise held sufficient. *Graves v. Baker*, 68 Cal. 134.

**8. Reasonable Certainty.** — He will not lose his exemption because by the literal meaning of the language used by him to the officer the tract named does not include his dwelling house, if it is evident that he intended to claim the tract on which the dwelling house is situated. *Herrick v. Graves*, 16 Wis. 157.

**9. Language of Provision under Which Filed.** — The registry of homestead exemption of a farm, including "the necessary quantity of corn and fodder for the current year," without specifying the quantity, was held sufficient, because the constitution required no specifications, and the court could not enlarge the requirements of the constitution. *Ducote v. Rachal*, 44 La. Ann. 580.

**10. General Description of Land.** — *Andrews v. Melton*, 51 Ala. 400; *Matter of Ogburn*, 105 Cal. 95; *Schuyler v. Broughton*, 76 Cal. 524.

**11. Need Not Be More Certain than Deed.** — *Schuyler v. Broughton*, 76 Cal. 524; *Ornbaum v. His Creditors*, 61 Cal. 455.



description in a deed is held to be sufficient.<sup>1</sup>

*f. SELECTION.* — The selection of the homestead is governed by the particular statute in force. The debtor may have a right to select from several tracts<sup>2</sup> or houses which he may own,<sup>3</sup> or the privilege of selection may not exist when several separate tracts are owned by the debtor.<sup>4</sup> The right to the selection in this regard is subject, of course, to the rules which have been stated in relation to the property which may be claimed as a homestead.<sup>5</sup>

*Effect of Selection Once Made.* — When a debtor has once made his selection he cannot change it to the prejudice of obligations which he has cast upon his other lands.<sup>6</sup>

*Excessive Claim and Selection.* — The debtor will not be permitted to claim and select as a homestead more than the law entitles him to;<sup>7</sup> though if the claim is excessive this will not defeat the right to the part to which the debtor is entitled under the law, and the claim will not for this reason be invalid,<sup>8</sup> as where the statute makes property exempt from levy and sale where the claimant files a declaration of homestead pursuant to the statute and provides a remedy for the creditor in case he should wish to contest the claim.<sup>9</sup>

*Capricious Selection.* — While the power of selection necessarily involves some latitude and discretion, it is also *ex vi termini* limited by the nature of the thing to be selected and by those broad principles of justice and reason which must control and regulate the exercise of every legal right, and the power of selection cannot be permitted to be entirely arbitrary and capricious,<sup>10</sup> especially where other rights have intervened and attach to the property, and an irregular selection would operate injuriously thereto.<sup>11</sup>

*g. TIME TO ASSERT CLAIM* — *Where Property Absolutely Exempt.* — Where the

1. *Reference to Description in Deed.* — Quackenbush v. Reed, 102 Cal. 499, in which case the premises were described in the declaration of homestead by a reference to a map made by a named civil engineer and surveyor, and to a deed, giving the names of the parties to it, and the date and page of the record in the recorder's office.

2. Tumlinson v. Swinney, 22 Ark. 400, 76 Am. Dec. 432; Flora v. Robbins, 93 N. Car. 41.

3. Palmer v. Hawes, 80 Wis. 474.

4. Partee v. Stewart, 50 Miss. 717.

5. See *supra*, this title, *Property in Which Exemption May be Claimed*.

6. *Effect of Selection Once Made.* — See *supra*, this title, *Waiver, Forfeiture, Abandonment, and Estoppel* — *Estoppel*.

7. *Excessive Claim and Selection.* — Hardy v. Sulzbacher, 62 Ala. 44, holding that if such selection is made the court will compel a proper selection in accordance with the amount which the party is entitled to claim.

8. *Excessive Claim Not Invalid.* — Demartin v. Demartin, 85 Cal. 71; Ham v. Santa Rosa Bank, 62 Cal. 125, 45 Am. Rep. 654; Tiernan v. His Creditors, 62 Cal. 286; King v. Gotz, 70 Cal. 236; Peak v. Lenora State Bank, 58 Kan. 485.

9. *Contest.* — See *infra*, this section, *Contest of Claim and Selection*.

But where the code contains no provision by which after the homestead has once been selected there can be a readjustment of the area and the surplus taken by the creditor, the premises described in the declaration must fall within the statutory limit; otherwise the declaration is ineffective to exempt the property claimed. Yerrick v. Higgins, 22 Mont. 502; citing Mitchell v. McCormick, 22 Mont. 249,

wherein it was held that it did not follow that if the property selected for the homestead was of greater value than twenty-five hundred dollars the law would not protect the claimant to the extent of his right as the head of a family, and *distinguishing* it in that it was one of excessive value rather than excess in area, and the code provisions were applicable to cases of this kind.

10. *Capricious Selection.* — Jaffrey v. McGough, 88 Ala. 649, in which case it was held that where one is authorized by statute to select the homestead owned by him, embracing "land most contiguous to the dwelling and including such dwelling and appurtenances," the selection should be made with reference to the lines of subdivisions of the government surveys, taking a forty-acre subdivision as a unit of measure and embracing one solid body of land, except where there may be intervening highways or watercourses, and a selection which makes a tract of irregular and fanciful shape will not be allowed; notwithstanding if the limits of the homestead are already fixed, whatever the shape or form of the tract by actual occupancy and use, and the area is within the amount exempted, there is no room for any exercise of discretion. See also Sparks v. Day, 61 Ark. 570, 54 Am. St. Rep. 279; Shakopee First Nat. Bank v. How, 61 Minn. 238.

But the homesteader is not confined in his selection of forty acres allowed by law to the government subdivision of forty acres, but he may select any reasonable shape, so as to include his dwelling. Schlarb v. Holderbaum, 80 Iowa 394; Kent v. Agard, 22 Wis. 150.

11. *Selection Prejudicial to Rights of Others.* — Hanchett v. McQueen, 32 Mich. 22.



property is absolutely exempt from levy and sale, and no action on the part of an execution debtor is necessary to perfect the right, a claim of homestead may be made at any time, even after sale.<sup>1</sup>

**Under Statutes Requiring Claim and Selection.** — Homestead exemptions, as well as exemptions of personal property, are held to be waived unless claimed at the time prescribed by law;<sup>2</sup> and when a claim and selection are necessary under the statute, though there may be no provision as to the precise time for making them, they should be made before a sale of the property under execution, and if delayed beyond the sale without sufficient excuse for the delay all rights dependent upon such sale and selection will be deemed to have been waived.<sup>3</sup> And when the statute expressly provides that exemptions shall be claimed within a certain time, such provisions must be complied with, as where a declaration and record of claim are required.<sup>4</sup>

**Waiver Good Defense.** — If the claim to homestead exemption is not made in proper time, so that a waiver of the right can be imputed to the party, such waiver will be a good defense to an action at law brought to recover the homestead after sale under execution.<sup>5</sup>

**Time of Making Claim Before Sale.** — It has been held that to entitle the debtor to the exemption, the claim must be interposed before or at the time of the levy, and that the debtor waives his right if he does not claim it at that time.<sup>6</sup> On the other hand, it is held that the claim may be asserted before or at the time of the levy, or within a reasonable time thereafter, in order to protect the right to the exemption<sup>7</sup> or the right to select.<sup>8</sup> In other cases it is held that the claim may be asserted and the selection made at any time before sale.<sup>9</sup>

**1. Where Property Absolutely Exempt.** — *Brown v. Peters*, 53 Ark. 182; *White v. Rowley*, 46 Iowa 680; *Meyer v. Nickerson*, 100 Mo. 599; *Myers v. Ham*, 20 S. Car. 522; *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725; *Hoppe v. Goldberg*, 82 Wis. 660; *Scofield v. Hopkins*, 61 Wis. 370; *Fischer v. Schultz*, 98 Wis. 462. See also *infra*, this section, *Relief Against Infringement of Right*.

**2. Time Prescribed.** — *Sherry v. Brown*, 66 Ala. 51; *Martin v. Lile*, 63 Ala. 406.

**3. Before Sale.** — *Steele v. Moody*, 53 Ala. 423; *Martin v. Lile*, 63 Ala. 406; *Norris v. Kidd*, 28 Ark. 486.

In *Louisiana* it was held that the sale of property by the sheriff divested all rights, including that under the homestead law; that if the party had any right to a homestead he should have asserted it prior to the sale, and that personal notice to the sheriff and the plaintiff in the seizure and sale did not amount to a legal assertion of the right. *Kuntz v. Baehr*, 28 La. Ann. 90.

In *Alabama* it was held that though there was no express provision in the statute for selecting the homestead by or for the widow or minor children of a decedent, when the family lived on the land at the time of the decedent's death, such selection must be made when the tract is of greater extent or value than can be claimed as exempt; but that when the whole tract does not exceed the quantity and value exempted by law in favor of the widow or minor children, no selection is necessary, but all that is required in such a case is that the claim should be asserted or made before the personal representative acquires dominion over it for the purposes of administration, or some creditor procures its sale for the payment of debts. *Jarrell v. Payne*, 75 Ala. 577.

**Excuse — Want of Notice.** — But the homestead right is not forfeited by the omission of the execution debtor to select his homestead, where being within reach he was not notified of the levy or proceedings thereunder, and did not know that there was any occasion to make a selection. *Griffin v. Nichols*, 51 Mich. 575.

**4. Provision as to Declaration or Claim.** — *Mutual L. Ins. Co. v. Newton*, (N. J. 1888) 15 Atl. Rep. 542. See also *supra*, this section, *Formal Dedication and Setting Apart*.

Declaration of homestead need not be filed on the day of its execution. *Farley v. Hopkins*, 79 Cal. 203.

**5. Defense to Action for Recovery of Homestead.** — *Shaw v. Lindsey*, 60 Ala. 346, holding that the court of equity will not enjoin an action brought for the recovery of a homestead upon the ground that the claim to the homestead has been abandoned by failure to make it seasonably, because if the claim is not seasonably made this can be set up in defense to the action at law.

**6. Before or at Time of Levy.** — *Freeman v. Stewart*, 5 Biss. (U. S.) 19, 9 Fed. Cas. No. 5,088.

**7. Within Reasonable Time After Levy.** — *Beecher v. Baldy*, 7 Mich. 488.

**8.** *Meyer v. Nickerson*, 100 Mo. 599.

**9. At Any Time Before Sale.** — *Nevada Bank v. Treadway*, 17 Fed. Rep. 887; *Melton v. Andrews*, 45 Ala. 454; *Mitchell v. Corbin*, 91 Ala. 599; *Kennedy v. Tuscaloosa First Nat. Bank*, 107 Ala. 170; *Robinson v. Swearingen*, 55 Ark. 55; *Hawthorne v. Smith*, 3 Nev. 182; *U. S. v. Lesnet*, (N. Mex. 1897) 50 Pac. Rep. 323; *Seibert's Appeal*, 73 Pa. St. 361; *Anderson v. Stadlmann*, 17 Wash. 433; *Wiss v. Stewart*, 16 Wash. 376.

In *Arkansas*, as the law stood prior to the Act of 1887, a debtor lost his right of home-

*h. APPRAISAL, ALLOTMENT, AND SALE* — (1) *Right to Sell in General.* — Where the homestead is absolutely exempt from levy and sale it cannot be seized and sold under execution or otherwise,<sup>1</sup> that is, when the homestead right is not involved in the issues tried.<sup>2</sup> And after the homestead has been set apart to a widow, an order to sell such homestead under a proceeding by an executor to sell lands to pay debts is invalid;<sup>3</sup> the homestead is no longer the subject of administration after it has been set apart to the family.<sup>4</sup>

*Sale After Formal Dedication or Selection.* — Where under the statute a debtor may file a declaration of homestead and thereby impress the property designated with the homestead character, or may select his exemption and claim it before the officer before sale, so as to withdraw it from liability to execution and sale, property which has been so dedicated or selected cannot be sold under execution, notwithstanding it may be of greater value than the statutory limit, until the value has been ascertained and the proper exemption therein defined as provided by the statute.<sup>5</sup>

(2) *Sale and Payment of Money in Lieu of Homestead.* — The court has no

stead if he failed to procure a supersedeas staying its sale. That act provided that in certain enumerated cases the right should not be lost by such failure, but it did not provide that any supersedeas should issue to stay the sale, and left the debtor's right to a supersedeas as it existed before the act. In *Brown v. Peters*, 53 Ark. 184, it was held that if, in any of the cases enumerated in the act, the homestead was sold, the debtor could subsequently claim it and set up his right of homestead in a suit brought against him for its possession; but if he permitted it to go to sale, he took the chances of a defeat in a trial upon that issue; that if he would avoid these chances and protect the homestead from a sale, he could procure a supersedeas to stay it by following the law, which gave that right.

*After Decree Ordering Sale.* — After a decree setting aside a conveyance and ordering a sale, a petition to the court for homestead exemption or for an equivalent amount of the proceeds of the sale is in time. *Kennedy v. Tuscaloosa First Nat. Bank*, 107 Ala. 171, 113 Ala. 280.

*Execution from Justice of the Peace.* — When a levy is made under an execution from a justice's court the claim must be asserted before the order of sale in the Circuit Court. *Sherry v. Brown*, 66 Ala. 51; *Rogers v. Lackland*, 117 Ala. 599.

*On Appeal Where Justice Had No Jurisdiction.* — But where a homestead was attached in a suit before a justice of the peace and upon a final judgment of the justice an appeal was taken to the Circuit Court, it was held that the failure of the defendant to claim his exemption before the final judgment of the Circuit Court condemning the land for sale would not estop him to assert his claim by filing his schedule and obtaining a supersedeas after judgment and before sale, because he could not assert it before the judgment in the Circuit Court, for the reason that the justice had no jurisdiction of the question and the Circuit Court acquired none by appeal. *Irwin v. Taylor*, 48 Ark. 224.

1. *Cannot Be Sold.* — *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440; *De Doffelz v. Pico*, 46 Cal. 289; *Barrett v. Wilson*, 102 Ill. 302; *Mayers v. Paxton*, 78 Tex. 196; *Tobar v.*

*Losano*, 6 Tex. Civ. App. 698. See also *infra*, this section, *Failure of Officer to Set Apart — Effect of Sale*; and *supra*, this title, X, *Liabilities as Against Which Homestead May Be Claimed*.

*Judicial Sale.* — The homestead is exempt from judicial sale. *Seligson v. Collins*, 64 Tex. 314; *Hamblin v. Warnecke*, 31 Tex. 91; *Campbell v. Elliott*, 52 Tex. 151; *Thompson v. Jones*, 77 Tex. 626.

2. *Seligson v. Collins*, 64 Tex. 314.

3. *Homestead Set Apart — Sale to Pay Debts of Estate.* — *Wehrle v. Wehrle*, 39 Ohio St. 365, in which case the order directing and confirming such sale, subject to the homestead, was held to be void.

The homestead, when not exceeding a statutory limit of value, cannot be sold subject to homestead rights. *Hartman v. Schultz*, 101 Ill. 437.

So in *Arkansas* it was held that a decedent's homestead could not be sold subject to the homestead right for the payment of debts of the estate. *Stayton v. Halpern*, 50 Ark. 329; *McCloy v. Arnett*, 47 Ark. 445; *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119; *Harris v. Watson*, 56 Ark. 574; *Burgett v. Apperson*, 52 Ark. 213.

4. *Not Subject to Administration — Sale for Support of Family.* — In *Cummins v. Denton*, 1 Tex. Unrep. Cas. 184, it was held that the homestead, having been set apart to the family, was no longer the subject of administration, and a sale thereof made under order of the probate court for the support of the family was declared a nullity.

5. See *infra*, this section, *Contest of Claim and Selection*.

*Order of Sale under Justice's Execution.* — Where, after a levy of an execution from a justice's court and motion for an order of sale in the Circuit Court, the defendant appeared and filed his claim to the land as exempt, the court ordered the whole tract sold except as to the homestead of the defendant, not exceeding eighty acres, without designating what should constitute the homestead, it was held that the order was erroneous. The defendant should have been put to his election and the order of sale should have been made to specify what lands the sheriff was to sell. *Hardy v. Sulzbacher*, 62 Ala. 44.



power to order a sale of the homestead and the payment of money in lieu thereof, unless such authority can be exercised under an express statutory grant.<sup>1</sup>

(3) *Duty of Officer to Appraise and Set Apart*—*Ascertainment of Extent and Value*.—Where a homestead of certain value or extent is absolutely exempt from sale, it is the duty of the officer to ascertain in the manner prescribed by statute the extent and value of the land upon which he is about to levy, before he proceeds,<sup>2</sup> for in such a case it is only the excess over the limit prescribed which is subject to levy and sale,<sup>3</sup> unless the property is incapable of division, which emergency is often provided for by statute.<sup>4</sup>

*Homestead Should Be Set Apart*.—Before the excess over the homestead exemption allowed by law can be sold under an execution, the officer levying the execution should see that the homestead is set apart;<sup>5</sup> and where a statute gives to the debtor the right to select his homestead, and in the event of his failure to make his selection requires the sheriff to set off the homestead, it is the duty of the sheriff to have the homestead set apart before attempting to execute the process by sale.<sup>6</sup>

*Appointment of Commissioners or Appraisers*.—And under various statutory provisions it is his duty to appoint commissioners or appraisers for the purpose of ascertaining and setting aside the debtor's homestead exemption of the value and extent as prescribed by law.<sup>7</sup>

1. *Right to Allotment in Kind*.—*Campbell v. White*, 95 N. Car. 491; *Oakley v. Van Noppen*, 96 N. Car. 247; *Matter of Noah*, 73 Cal. 590, 2 Am. St. Rep. 834; *Matter of Walkerly*, 81 Cal. 580. See *infra*, this section, *Sale of Indivisible Property; Contest of Claim and Selection*.

In *California* the provisions of the code authorizing a homestead to be set apart to the family of the decedent, where none has been selected before his death, contained no limitation as to the value of the homestead. Code Civ. Pro., §§ 1465, 1468. There was such a limitation where a homestead was declared before his death. Code Civ. Pro., §§ 1474, 1475. And in that case, where it was sought to have the same set apart to the family after his death, provision was made for the sale of the property and payment of five thousand dollars to the family as or in lieu of the homestead, if the property exceeded that amount in value and could not be divided. Code Civ. Pro., § 1476. There was no provision for the payment of money in lieu of the property where no homestead had been declared, and the Supreme Court has held that it could not be done in this class of cases. *Matter of Walkerly*, 81 Cal. 579, citing *Matter of Noah*, 73 Cal. 590, 2 Am. St. Rep. 834.

*Property Incapable of Division*.—In *North Carolina* it has been held that the court had no power to order such a sale, and the rule was sustained where the property was incapable of division and it would have been for the advantage of the creditors to have it sold. *Oakley v. Van Noppen*, 96 N. Car. 247; *Campbell v. White*, 95 N. Car. 491. Compare *Hinson v. Adrian*, 92 N. Car. 121, holding that where an action was brought by mortgagees and judgment creditors to have the property sold for the payment of mortgages and judgments, and a sale was made without objection on the part of the debtor, it was too late for him to ask for a homestead by metes and bounds, after such sale had been made,

and that in such cases it was competent and proper, certainly by the consent of the parties, to set apart the value of the homestead in money.

2. *Ascertainment of Extent and Value*.—*Vogler v. Montgomery*, 54 Mo. 577; *Mays v. Frieberg*, (Indian Ter. 1899) 49 S. W. Rep. 52.

3. *Excess Only to Be Sold*.—*Newman v. Willits*, 78 Ill. 397; *Waters v. Stubbs*, 75 N. Car. 28; *Jones v. Wagoner*, 70 N. Car. 322.

4. *Property Incapable of Division*.—See *infra*, this section, *Sale of Indivisible Property*.

5. *Homestead Should Be Set Apart*.—*Hartwell v. McDonald*, 69 Ill. 293; *Nichols v. Spremont*, 111 Ill. 631; *Newman v. Willits*, 78 Ill. 397; *Webb v. Cowley*, 5 Lea (Tenn.) 724; *Gray v. Baird*, 4 Lea (Tenn.) 215; *Fairbanks v. Devereaux*, 48 Vt. 550.

6. *White v. Rowley*, 46 Iowa 680; *Linscott v. Lamart*, 46 Iowa 312; *Goodrich v. Brown*, 63 Iowa 247; *Visek v. Doolittle*, 69 Iowa 602; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 49; *Crisp v. Crisp*, 86 Mo. 630; *Meyer v. Nickerson*, 100 Mo. 599; *Macke v. Byrd*, 131 Mo. 689, 52 Am. St. Rep. 649; *Martin v. Hughes*, 67 N. Car. 293.

7. *Appointment of Appraisers or Commissioners*.—*Dillman v. Will County Nat. Bank*, 138 Ill. 284; *Rhodes v. McCormack*, 4 Iowa 368, 68 Am. Dec. 663; *Rhyne v. Guevara*, 67 Miss. 139; *Richie v. Duke*, 70 Miss. 66; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Swift v. Dewey*, 20 Neb. 110; *U. S. v. Lesnet*, (N. Mex. 1897) 50 Pac. Rep. 321; *Waters v. Stubbs*, 75 N. Car. 28; *Littlejohn v. Egerton*, 77 N. Car. 379; *Manning v. Dove*, 10 Rich. L. (S. Car.) 395; *Nance v. Hill*, 26 S. Car. 227; *Myers v. Ham*, 20 S. Car. 522; *Carolina Sav. Bank v. Evans*, 28 S. Car. 521.

In *Nebraska* section 14 of the Act of 1877 provides as follows: "When a disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the home-



**Sale of Undivided Interest.** — Under some statutes the land may be sold subject to the homestead right, or after an appraisalment and ascertainment of the value of the land an undivided interest representing the excess over the homestead exemption may be sold.<sup>1</sup>

**Ascertainment of Value — Sale of Undivided Interest.** — Where under the statute an undivided interest may be sold, it is the duty of the officer to ascertain the

stead, the sheriff shall, at the request of either party, summon nine disinterested persons having the qualifications of jurors; the parties then, commencing with the owner of the homestead, shall in turn strike off one juror each, and shall continue to do so until only three of the number remain. These shall then proceed as referees to examine and ascertain all of the facts of the case, and shall report the same, with their opinion thereon, to the next term of the court from which the execution or other process may have issued." See *Swift v. Dewey*, 20 Neb. 110.

**A Levy Is Not a Condition Precedent to the right for the debtor to apply to the officer to have his homestead set apart.** *Nance v. Hill*, 26 S. Car. 227.

**Payment of Officer's Fees.** — Where the statute makes it the duty of the officer to have the homestead laid off at the expense of the creditor, the officer's fees must be paid or tendered by the creditor, or he may refuse to execute the process. *Lute v. Reilly*, 65 N. Car. 20; *Taylor v. Rhyne*, 65 N. Car. 530; *Vannoy v. Haynore*, 71 N. Car. 128.

On the other hand, even where the statute provided that before setting off the homestead the sheriff should be entitled to demand and receive from the debtor the costs of the proceeding, where the value of the property was below the limit of the exemption allowed to the debtor and the debtor refused to advance the costs, the sheriff was nevertheless justified in refusing to levy and sell. *King v. McCarley*, 32 S. Car. 264.

1. In *Massachusetts*, as a sale of property including the homestead is necessarily subject to the homestead right, whether so declared or not, the omission to make the sale expressly subject to the homestead right does not operate to invalidate the sale. Upon a writ of entry the demandant is the general owner entitled to possession except so far as the tenant's special title may exclude him; until the homestead has been set out to the debtor, he and the owner of the residue are in relation to each other tenants in common, and if the tenant seeks to establish an exclusive right to any part of the premises as a homestead it is for him to show that that limited right is sufficient to cover the entire parcel so claimed. *Swan v. Stephens*, 99 Mass. 9, citing *Wolcott v. Knight*, 6 Mass. 418.

Before the enactment of the General Statutes, and after the repeal of the statute of 1855, the levy of an execution upon land which was subject to the homestead right acquired under the latter statute was held to be properly made up by deducting from the appraised value of the land the value of the homestead right and applying the balance to the satisfaction of the execution. Under the statute which repealed the Act of 1855, all rights of homestead acquired under the latter were pro-

ected, but the particular method there prescribed as the course to be pursued when the creditor should desire to seize the excess in value of the land beyond the homestead was abrogated; and it was held that since there was no special provision as to the mode in which the right was to be exercised the creditor could only cause execution to be levied in the manner in which the statute required all levies to be made upon that portion of the land which was not exempt from attachment and seizure thereon; that after the levy and appraisalment as above indicated, each of the parties ought to be in the full enjoyment of the use and occupation of the estate in proportion to the interest therein respectively belonging to them, and that this can be accomplished only by a proper division assigning to each the portion to which he is justly entitled; and that as the statute made no provision in relation to a partition between the parties when the right of homestead had been acquired by one of them, it was a necessary implication from the existence of the rights that such decrees must be made by the court as will effect the purposes of the laws and secure to each of the parties the possession of such portion of the estate as he is entitled to hold. *Pittsfield Bank v. Howk*, 4 Allen (Mass.) 347. See also *Castle v. Palmer*, 6 Allen (Mass.) 401.

In *New Hampshire*, while under the statute the sheriff had no power to extend an execution upon the homestead, and if the premises exceeded in value the statutory limit of the homestead exemption he could only proceed in the manner pointed out by the statute, which was by first setting out the homestead, yet it was held that the right to require the sheriff so to proceed depended upon the debtor's application; the creditor is not forbidden to extend his execution upon premises "subject to a family homestead." And in such a case the creditor and debtor, before any proceeding by either for the separation and assignment of their respective interests, are tenants in common of the estate, and upon petition by the creditor for a partition the committee appointed to make such partition should assign to the debtor by metes and bounds so much of the estate as they might find to have been of the value of five hundred dollars, the homestead exemption allowed by law, on the date of the completion of the levy. *Barney v. Leeds*, 51 N. H. 253; *Fletcher v. State Capital Bank*, 37 N. H. 369. See also *Tidd v. Quinn*, 52 N. H. 341.

Where the homestead exemption was five hundred dollars, and the appraisers on the execution to set off the land subject to the homestead appraised the value of the land at six hundred dollars, the parties became tenants in common in the proportions of five-sixths to the debtor and one-sixth to the creditor. *Barney v. Leeds*, 54 N. H. 128.

value of the property, so that the exact interest which is levied upon and sold may be made certain.<sup>1</sup>

(4) *Qualification of Commissioners.* — Commissioners appointed for the purpose of setting apart homestead must be qualified to act in this behalf according to the law. Thus they must be freeholders<sup>2</sup> or householders;<sup>3</sup> they must be disinterested,<sup>4</sup> and they must be duly sworn.<sup>5</sup>

(5) *Allotment or Appraisal.* — The duties of commissioners or appraisers are confined to the appraising of the value of the property and the setting apart of the homestead, and it is not within their province to attempt to determine the rights of the respective parties who may be interested in the property or proceeds thereof.<sup>6</sup> The allotment is sufficient if it conforms to the absolute requirements of the statute.<sup>7</sup>

**1. Ascertainment of Value — Sale of Undivided Interest.** — Where upon a claim made the land is appraised and a defined and certain portion of the undivided tract is sold, it is held that a sale should not be made until the appraisement of the value is obtained, so that the sheriff may convey a definite fractional undivided interest, otherwise the sale will convey no interest which can be enforced. *Gary v. Eastabrook*, 6 Cal. 457.

**2. Freeholders.** — *Wilson v. Lowe*, 7 Coldw. (Tenn.) 153; *Wiseman v. Parker*, 73 Miss. 378.

Where the statute does not so require, they need not be freeholders. *Hale v. Whitehead*, 115 N. Car. 28.

**3. Householders.** — *Mooney v. Moriarty*, 36 Ill. App. 175.

**4. Disinterested.** — *Wilson v. Lowe*, 7 Coldw. (Tenn.) 153.

The law contemplates the selection of fair-minded and competent men to act as commissioners, and where the sheriff, in his zeal to return an execution fully satisfied, selected one man as a commissioner who was dependent upon the sheriff for his position, and another who had been frequently associated with the judgment creditor as an employee, and another whose statements impeached his fairness in the particular transaction, and these men placed an excessive valuation upon the property, it was held that these were facts from which a purpose on the part of the sheriff, judgment creditor, and commissioners to make the judgment debtor pay the execution, regardless of his homestead rights, might be legitimately inferred. *Buck v. Mitchell*, 69 Ill. App. 222.

**5. Sworn.** — *Coble v. Thom*, 72 N. Car. 121; *Smith v. Hunt*, 68 N. Car. 482.

**Return Evidence of Qualification.** — The return of the sheriff is *prima facie* sufficient evidence of the due qualification of the commissioners. *Nance v. Hill*, 26 S. Car. 227; *Mooney v. Moriarty*, 36 Ill. App. 175.

**6. Commissioners Confined to Allotment and Appraisal.** — *Ray v. Thornton*, 95 N. Car. 571; *Aiken v. Gardner*, 107 N. Car. 236.

**Sufficiency of Appraisement.** — The appraisers should not hold to a fractional nicety in estimating the value of the property. *Pomroy v. Bunting*, 42 Ala. 254.

In appraising the value of the property for the purpose of exempting the homestead, the appraisers must take into consideration the value of the buildings erected upon the land, as the homesteader is not entitled to the thousand

dollars exemption in the land only, but the amount must be carved out of the land and the buildings thereon. *Ray v. Thornton*, 95 N. Car. 571.

Where a creditor causes the estate of his debtor, of greater value than the homestead right of the latter therein, to be set off on execution subject to the homestead right, and the debtor fails to have his homestead set off to him, upon petition by the creditor for partition the committee appointed to make the partition should assign to the debtor by metes and bounds so much of the estate as they find to have been the statutory value of the homestead exemption on the date of the completion of the levy, and not at the time when the partition is made. *Barney v. Leeds*, 51 N. H. 253.

**Concurrence of Majority of Appraisers.** — In *South Carolina* it was held that the return of a majority of the appraisers appointed to lay off homestead was valid, especially where, as in the particular case, the appraisers were appointed by the court to perform a duty provided by law. *Carolina Sav. Bank v. Evans*, 28 S. Car. 521.

**7. Conformity to Absolute Requirements.** — Thus where under the statute the allotment is to consist of "a tract of land in the form of (1) a square or (2) a parallelogram, if practicable, and composed, if practicable, of contiguous parcels, and including the dwelling house, and, if practicable, the other principal buildings, and not to exceed one hundred and sixty acres in area nor two thousand dollars in value," the only absolute requirements were that the land should include the dwelling, and should not exceed one hundred and sixty acres in area or two thousand dollars in value, and it was not required to conform to legal subdivisions, although in form a square. *Wiseman v. Parker*, 73 Miss. 378.

**Sufficiency of Allotment.** — In *Meyer v. Nickerson*, 100 Mo. 599, it was held that the action of appraisers in setting off homestead without including timberland in the allotment, where the debtor had failed to make his election and had made no claim or given any notice either to the sheriff or appraisers, would not be disturbed.

The commissioners may set apart the number of acres which coincide with the average value of the land as fixed by witnesses. *Riley v. Smith*, (Ky. 1887) 5 S. W. Rep. 869.

An allotment of homestead may be effected so as to prevent a sale of the homestead, by a setting apart of the homestead and subjecting



**General Description of Land.** — A homestead need not be laid off by course and distance, but any description which will locate it with sufficient certainty will be good.<sup>1</sup>

(6) *Failure of Officer to Set Apart — Effect of Sale.* — The failure of the officer to set apart the homestead will not prejudice the right thereto where the title to the property is vested in the owner by the constitution and the allotment thereof by the officer is merely for the purpose of ascertaining what excess, if any, above the statutory limit may be applied in satisfaction of the judgment.<sup>2</sup>

**Sale Conveys no Title.** — Where land is in fact a homestead of the extent and value allowed by law, and not in excess thereof, it cannot be sold, and an attempted sale is void and conveys no title to the purchaser;<sup>3</sup> and without reference to the extent or value of the property, it is held that a sale of the premises without an appraisal and allotment of the homestead by the officer levying the execution is invalid, and conveys no title, as the debtor is entitled to the whole of the property in which he claims his homestead, until the statutory limit is ascertained and defined as required by the statute.<sup>4</sup> At least such a sale conveys no right which can be enforced by action, or title which can be made available at law.<sup>5</sup> In other cases, however, it seems that such a sale is not regarded as absolutely void when the estate is of greater value

it to an easement of way, where this would not reduce the defendant's homestead below the proper value or substantially interfere with its enjoyment. *Schaeffer v. Beldsmeier*, 9 Mo. App. 438.

**1. General Description of Land.** — *Ray v. Thornton*, 95 N. Car. 571.

**Description Must Identify Land.** — But an assignment by the sheriff is void for uncertainty if it does not describe the homestead by metes and bounds or give any description by which it can be identified. *Littlejohn v. Egerton*, 77 N. Car. 380.

**2. Failure of Officer to Set Apart Not Prejudicial to Right.** — *Lambert v. Kinnery*, 74 N. Car. 348; *Gheen v. Summey*, 80 N. Car. 187; *Littlejohn v. Egerton*, 77 N. Car. 379; *King v. McCriley*, 32 S. Car. 264; *Gray v. Baird*, 4 Lea (Tenn.) 212; *Burnett v. Austin*, 10 Lea (Tenn.) 564; *Webb v. Cowley*, 5 Lea (Tenn.) 724. See also *McCracken v. Weitzell*, 70 Iowa 724.

In *South Carolina* it was held that where the property was clearly of a value less than the exemption allowed by law, the sheriff was justified in refusing to levy and sell without setting off the homestead, where the debtor was unable to advance or refused to advance the costs of the proceeding. *King v. McCriley*, 32 S. Car. 264.

**3. Sale Conveys No Title — California.** — *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440; *Kenall v. Clark*, 10 Cal. 17, 70 Am. Dec. 601; *De Deffeliz v. Pico*, 46 Cal. 289.

*Iowa.* — *Jones v. Blumenstein*, 77 Iowa 361.  
*Illinois.* — *Barrett v. Wilson*, 102 Ill. 302; *Hartman v. Schultz*, 101 Ill. 437; *Conklin v. Foster*, 57 Ill. 104.

*Kentucky.* — *Buckner v. Fleming*, 5 Ky. L. Rep. 607; *Hope v. Hollis*, 5 Ky. L. Rep. 319; *Queen v. Phillips*, 3 Ky. L. Rep. 470; *Caldwell v. Taylor*, (Ky. 1895) 32 S. W. Rep. 678.

*Missouri.* — *Ratliff v. Graves*, 132 Mo. 76.  
*Nebraska.* — *Baumann v. Franse*, 37 Neb. 807.

*South Carolina.* — *Cantrell v. Fowler*, 24 S.

Car. 424; *Ketchin v. McCriley*, 26 S. Car. 1, 4 Am. St. Rep. 674; *Bradford v. Buchanan*, 39 S. Car. 237; *Wagener v. Parrott*, 51 S. Car. 479.

*Texas.* — *Mayers v. Paxton*, 78 Tex. 196; *Tobar v. Losano*, 6 Tex. Civ. App. 698; *Thompson v. Jones*, 77 Tex. 626.

*Washington.* — *Asher v. Sekofsky*, 10 Wash. 379; *Philbrick v. Andrews*, 8 Wash. 7.

**4. Without Reference to Extent or Value.** — *Andrews v. Melton*, 51 Ala. 400; *Mays v. Frierberg*, (Indian Ter. 1899) 49 S. W. Rep. 52; *Kerr v. South Park Com'rs*, 8 Biss. (U. S.) 276, 14 Fed. Cas. No. 7,733; *Goodrich v. Brown*, 63 Iowa 247; *White v. Rowley*, 46 Iowa 681; *Linscott v. Lamart*, 46 Iowa 312; *Visek v. Doolittle*, 69 Iowa 602; *Riggs v. Sterling*, 60 Mich. 643; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *McCracken v. Adler*, 98 N. Car. 400, 2 Am. St. Rep. 340; *Bailey v. Barron*, 112 N. Car. 54; *Mebane v. Layton*, 89 N. Car. 396; *Ferguson v. Wright*, 113 N. Car. 537; *Fairbanks v. Devereaux*, 48 Vt. 552; *Phillips v. Root*, 68 Wis. 128.

**Upon Demand to Have Homestead Set Apart.** — The extent of an execution upon land in which homestead is claimed, and exists, cannot be made upon the whole of the land, in disregard of a demand by the party entitled to the homestead to have it set off, and such an extent is void. *Kensall v. Cobleigh*, 62 N. H. 298; *Barney v. Leeds*, 51 N. H. 268; *Fogg v. Fogg*, 40 N. H. 288, 77 Am. Dec. 715; *Tucker v. Keniston*, 47 N. H. 268, 93 Am. Dec. 425.

**Failure to Claim and Select.** — Though the right may not be lost by failure to claim and select, yet upon such failure it is sometimes held that, the homestead being a mere privilege, the purchaser at a sale takes a good title subject to the homestead. *Snider v. Martin*, 55 Ark. 139. See also *Barney v. Leeds*, 51 N. H. 253.

**5. Hartwell v. McDonald**, 69 Ill. 293; *Nichols v. Spremont*, 111 Ill. 631; *Brokaw v. Ogile*, 170 Ill. 115; *Stevens v. Hollingsworth*, 74 Ill. 202.



or extent than the statutory limit of exemption, but the debtor will be protected in his exemption rights.<sup>1</sup>

**Sale Subject to Homestead.** — Such an estate being exempted absolutely from seizure or sale, it is held that the reversionary interest cannot be seized and sold, and that a sale of the estate subject to homestead is invalid.<sup>2</sup> In some cases, from the nature of the homestead right, it is held that the reversionary interest may be sold on execution,<sup>3</sup> or, as is sometimes held, the judgment is a lien upon the land; but no sale can be had until the determination of the homestead,<sup>4</sup> even though the land is incapable of division so that the excess can be separated from the lawful exemption and sold.<sup>5</sup>

**Sale Before Allotment in Proceeding Before Ordinary.** — In *Georgia*, where a claimant is required to have his homestead set apart to him in a regular proceeding, it is held that if his land is sold in an execution pending an application to set aside the homestead, the purchaser takes a good title subject to the right of homestead,<sup>6</sup> but if the homestead has been actually set apart before sale a different result follows, and the purchaser acquires no title.<sup>7</sup>

(7) **Sale of Indivisible Property.** — While, as has been stated, under a proceeding to set apart a homestead the court cannot order a sale and payment of money in lieu of the homestead,<sup>8</sup> yet, where the homestead cannot be set apart in kind without great injury to the property, a sale may be ordered,<sup>9</sup> or in such a case it may order a transfer of money or property as

1. **Not Void.** — *Bradford v. Buchanan*, 39 S. Car. 237; *Martin v. Bowie*, 37 S. Car. 102; *Littlejohn v. Edgerton*, 77 N. Car. 379. See also *Bottineau v. Atna L. Ins. Co.*, 31 Minn. 125.

So in *Illinois* it is held that the court of equity, in the exercise of its equitable powers, may adjust the rights of the parties and compel a division of the premises, so as to set apart the homestead, if the property is divisible, or if not it can require the debtor to accept the value of his homestead exemption. *Leupold v. Krause*, 95 Ill. 440; *Brokaw v. Ogle*, 170 Ill. 115; *Hotchkiss v. Brooks*, 93 Ill. 386; *Loomis v. Gerson*, 62 Ill. 11.

**Sale in Lump.** — But where the homestead is sold together with other lots, so that it is impossible to tell what was bid on each, the entire sale should be set aside. *Phillips v. Root*, 68 Wis. 132. See also *Kipp v. Bullard*, 30 Minn. 84.

2. **Cannot Be Sold Subject to Homestead.** — *Hartwell v. McDonald*, 69 Ill. 293; *Versailles Bank v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621; *Jones v. Wagoner*, 70 N. Car. 322; *Cobb v. Halyburton*, 92 N. Car. 652; *Markham v. Hicks*, 99 N. Car. 204; *Mebane v. Layton*, 89 N. Car. 396; *Poe v. Hardie*, 65 N. Car. 447.

After a void execution and sale of a homestead, a sale by the judgment debtor to a third person and a removal from the property will not relate back to and cure the invalidity of the sheriff's deed. *Asher v. Sekofsky*, 10 Wash. 379.

3. **Reversionary Interest May Be Sold.** — *Carigan v. Rowell*, 96 Tenn. 185; *Gilbert v. Cowan*, 3 Lea (Tenn.) 203; *Fauver v. Fleenor*, 13 Lea (Tenn.) 622; *Bentley v. Jordan*, 3 Lea (Tenn.) 353; *Flannegan v. Stifel*, 3 Tenn. Ch. 465. See also *Murdock v. Welch*, 8 Am. L. Rec. 411, 6 Ohio Dec. (Reprint) 835.

**New Hampshire.** — Under the Act of 1868, the homestead right was a life estate, and a reversion was subject to be taken in execution, though formerly it was otherwise. *Cross v. Weare*, 62 N. H. 125.

**Sale under U. S. Bankruptcy Act.** — In *Murray v. Hazell*, 99 N. Car. 168, it was held that the bankruptcy law required the assignee to sell all the bankrupt's estate and interest in his lands, subject to homestead; that the homestead was allowed by the bankrupt law, not by the laws of the state; that the sale of the bankrupt's real property conveyed by him to the assignee in bankruptcy, subject to the homestead in the measure allowed by the state, was made by virtue of and in pursuance of the bankrupt law, and not by the laws of the state; and that the constitution, statutes, and judicial decisions of the state had no application to such sale, save in respect to the measure of the allotment which had been adopted by the statute of the United States.

4. See *supra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

In *North Carolina*, where a judgment is a lien upon land including the homestead, after sale of the homestead to satisfy a debt created before the exemption law, and a residue is left after sale, the mortgagor may, as against judgment creditors, secure the ultimate payment to them, as the court may direct, of the interest in the residue set apart as homestead to be paid to the mortgagor until his estate determines; or he may take the present value of the homestead out of the residue absolutely, and the balance will be left to the immediate satisfaction of the creditors, according to priority. *Leak v. Gay*, 107 N. Car. 468. See also *Vanstory v. Thornton*, 112 N. Car. 197; *Wilson v. Patton*, 87 N. Car. 318.

5. *Campbell v. White*, 95 N. Car. 491.

6. *Grace v. Kezar*, 86 Ga. 697; *Jackson v. Du Bose*, 87 Ga. 761; *Crine v. Johns*, 96 Ga. 220.

7. *Crine v. Johns*, 96 Ga. 220; *Rodgers v. Baker*, 96 Ga. 800.

8. See *supra*, this section, *Sale and Payment of Money in Lieu of Homestead*.

9. **Sale Where Homestead Cannot Be Set Apart.** — *Garner v. Bond*, 61 Ala. 84; *Palmer v. Palmer*, 50 Vt. 310; *Lindsey v. Brewer*, 60 Vt.

between the owner of the homestead and the owner of the residue.<sup>1</sup>

**In Connection with Statutes as to Setting Apart Before Sale.** — What has been said as to the necessity of setting apart the homestead before sale under execution is subject to the statutory provisions permitting a sale for partition where the property is not divisible in kind and exceeds the full homestead exemption. In other words, the officer must proceed to have the homestead set apart where the property exceeds the limit of the statutory exemption if the property is divisible; but if it is indivisible it may, under various statutory provisions, be sold by the sheriff upon the appraisement and ascertainment of this fact and of the value of the property, and the statutory value of the homestead may be set apart to the debtor and the excess applied to the satisfaction of the execution;<sup>2</sup> if it can be sold for more than the statutory limit of the exemption;<sup>3</sup> and it is held that such statutes provide the only means of subjecting the estate to sale.<sup>4</sup>

**Payment of Excess by Debtor.** — Under some statutes, where the property is not divisible it may be sold, and the value of the homestead paid to the debtor in money, or the debtor may pay the excess over the statutory limit of the exemption and up to the appraised value of the property, or, upon his failure to make such payment, the property may be sold for division, as above indicated.<sup>5</sup>

**i. EXCEPTIONS TO ALLOTMENT — REASSIGNMENT — In General.** — Upon the report of commissioners, exceptions must be made to the court from which the process issues, and to which an assignment of the homestead is returned.<sup>6</sup>

627; *Chaplin v. Sawyer*, 35 Vt. 286; *Matter of McCauley*, 50 Cal. 544; *Schaeffer v. Beldsmeier*, 9 Mo. App. 441; *Hinson v. Adrian*, 92 N. Car. 121; *Singleton v. Hill*, 43 Tex. 588.

**In Vermont** a probate court may order a sale of the homestead belonging to the widow and children, whenever its severance would greatly depreciate the value of the residue of the premises; and this remedy is available to either the owner of the homestead or the owner of the residue. Rev. Laws, § 1914; *Lindsey v. Brewer*, 60 Vt. 627. And this statutory provision was held to apply where the land in connection with the homestead exceeded half an acre. *Palmer v. Palmer*, 50 Vt. 310.

**In California**, when no homestead has been selected during the lifetime of a deceased husband, it must be set apart by the probate court. If the homestead thus set apart is encumbered by mortgages, liens, etc., so that it cannot be conveniently partitioned, the court may direct it to be sold, subject to such liens, and the homestead to be set apart out of the proceeds. *Matter of McCauley*, 50 Cal. 544.

**1. Transfer of Money or Property.** — *Lindsey v. Brewer*, 60 Vt. 627.

**2. In Connection with Statutes as to Setting Apart Before Sale.** — *Gregg v. Bostwick*, 33 Cal. 222, 91 Am. Dec. 637; *Mann v. Rogers*, 35 Cal. 319; *Sterling v. Riggs*, 60 Mich. 463; *Hall v. Johnson*, 64 N. H. 481; *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738; *Miller's Appeal*, 16 Pa. St. 300; *Dodson's Appeal*, 25 Pa. St. 234.

**Question for Commissioners.** — Whether the property is susceptible of division has to be determined by the commissioners appointed by the sheriff pursuant to the statute, and not by the court. *Muller v. Inderreiden*, 79 Ill. 382;

**3. Buckner v. Fleming** 5 Ky. L. Rep. 607.

**4. See *infra***, this section, *Contest of Claim and Selection*.

**Resort to Equity.** — But where no mode has been provided to determine the value of the premises, when the value is disputed, and the creditor has proceeded so far as to make a levy, either party may resort to a court of equity and procure a selection if the property is divisible, and the ascertainment of the value of the property whether it is divisible or not. *Beecher v. Baldy*, 7 Mich. 488.

**5. Payment of Excess by Debtor.** — *Carolina Sav. Bank v. Evans*, 28 S. Car. 521; *Simonds v. Haithcock*, 24 S. Car. 209; *Manning v. Dove*, 10 Rich. L. (S. Car.) 403; *Green v. Marks*, 25 Ill. 221; *Muller v. Inderreiden*, 79 Ill. 382; *Riggs v. Sterling*, 60 Mich. 651.

**In New Hampshire**, where an execution may be extended upon the real estate embracing a right of homestead when the debtor does not apply to have his homestead set apart to him in severalty, and upon appraisement of the whole the parties become tenants in common, upon petition for partition by the creditor, if the property is not divisible the creditor may take the estate and pay the excess over the statutory exemption, according to the appraisement, or the creditor may pay the debtor the value of the homestead interest, and if neither party will become the purchaser, then the whole estate may be sold and the proceeds divided according to their interests. *Barney v. Leeds*, 54 N. H. 128.

The debtor may waive the time in which to make his election, and notify the officer and creditor at the time of sale that he will not pay the surplus, in which event he becomes entitled to the value of the exemption. *Hall v. Johnson*, 64 N. H. 481.

**6. Exceptions — In General.** — See article



**Reallotment.** — A reallotment of homestead may be ordered by the court for good cause.<sup>1</sup> But the court will not ordinarily disturb the sworn report of commissioners in the absence of some element of fraud<sup>2</sup> or some substantial defect in the proceedings.<sup>3</sup>

**Reassignment upon Increase or Decrease in Value.** — In some cases the debtor takes his homestead subject to fluctuations in value, and upon an increase in value after allotment beyond the limit of the exemption allowed by law it may be reassigned and any excess subjected to the payment of debts.<sup>4</sup> In other cases, however, it is held that an assignment once properly made cannot be disturbed merely on account of an increase or decrease in value of the property.<sup>5</sup>

**j. PRESUMPTIONS — COLLATERAL ATTACK — Liberal Presumptions in Favor of Regularity** — Where proceedings for acquiring homestead by having it set apart

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A party excepting to the report of commissioners upon the ground that the land does not exceed the statutory limit of exemption has a right to introduce evidence of value. *Hogan v. Hogan*, (Ky. 1898) 44 S. W. Rep. 953.

The report of appraisers is not conclusive as to the value of the property, but may be set aside in a direct proceeding. *Schaeffer v. Eeldsmeier*, 9 Mo. App. 438.

**1. Reallotment.** — *Chambers v. Penland*, 74 N. Car. 341; *Carolina Sav. Bank v. Evans*, 28 S. Car. 521; *Bull v. Rowe*, 13 S. Car. 364; *Kerchner v. Singletary*, 15 S. Car. 539.

Reallotment may be ordered any number of times, in analogy to the right to grant a new trial. *Kerchner v. Singletary*, 15 S. Car. 539.

**Before Sale under Execution.** — In *North Carolina*, under the statute, it was held that an application for reassessment and allotment of homestead should be made before the sale of the excess by the sheriff. *Heptinstall v. Perry*, 76 N. Car. 190; *Hartman v. Spiers*, 94 N. Car. 156; *Welch v. Welch*, 101 N. Car. 565.

**Duty to Order Reallotment.** — Where the homestead was restricted to eighty acres, and the commissioners selected to allot the homestead made an allotment of one hundred and sixty acres, comprising two eighty-acre tracts, and upon a motion to subject one of the tracts to execution the court ordered that the exemption should be restricted to one eighty-acre tract, it was held that this was error, as the court should have directed a new allotment, there being nothing in the record to indicate that the homesteader would have selected or the commissioners have allotted the tract of land set aside by the court. *Ferguson v. Ferguson*, (Miss. 1889) 5 So. Rep. 514.

So where, on an execution issued upon a judgment, the sheriff caused the homestead exemption of the defendant to be valued and laid off as prescribed by law, and upon return thereof objections were filed to the report of the appraisers, upon the ground that the value exceeded the statutory limits, it was held that the court could not direct the sale of the entire lot and the payment into the clerk's office of the proceeds of the sale, whereof the value of the exemption should be retained, but there should have been a reallotment within the constitutional limits. *Oakley v. Van Noppen*, 96 N. Car. 247.

**2. Allotment Not Disturbed Except for Good Cause.** — *Doughty v. Little*, 61 N. H. 365; *Gul-*

*ly v. Cole*, 96 N. Car. 447; *Gulley v. Cole*, 102 N. Car. 333; *Chambers v. Penland*, 74 N. Car. 341; *Simonds v. Haithcock*, 24 S. Car. 209.

Where it is sought to set aside an order of a court allotting homestead to a widow, the plaintiff has the burden to establish by clear proof that the order setting apart the homestead was obtained through fraud, and it is not sufficient to show that the application was made under an erroneous view of the applicant's rights, or that upon the facts presented in the petition the court mistook the law applicable thereto. *Wickersham v. Comerford*, 104 Cal. 495.

Whenever it is made to appear that appraisers, whether selected for the purpose by a sheriff having in his hands an execution levied on land, or whether appointed by the court, have by either fraud or mistake undervalued the land set apart to the debtor as a homestead, a subsequent creditor, no party to the former proceeding, has the right to have such undervaluation corrected, and, by judgment of a court of equity, so much of the land as exceeds the limit of the exemption in value subjected to his debt. *Louden v. Yager*, 91 Ky. 57; *Buck v. Mitchell*, 69 Ill. App. 219, upon the question of fraud, holding, however, that a mere error in the judgment of the commissioners is not sufficient to warrant a court of chancery in setting aside the proceedings. See also *Gowdy v. Johnson*, (Ky. 1898) 47 S. W. Rep. 624; *Wood v. Corley*, (Ky. 1897) 43 S. W. Rep. 235.

**Limitation as to Time.** — Where the statute fixes a limit of time within which relief against fraud shall be sought in the allotment of the homestead, such relief will not be available after the expiration of that period. *Gowdy v. Johnson*, (Ky. 1898) 47 S. W. Rep. 624.

**3. Substantial Defect in Proceedings.** — *Smith v. Hunt*, 68 N. Car. 482.

**4. Subject to Fluctuations.** — *Mooney v. Moriarty*, 36 Ill. App. 175; *Stubblefield v. Graves*, 50 Ill. 103; *Beckner v. Rule*, 91 Mo. 62. But see *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649.

And if the homestead decreases in value he may in like manner add to it on a revaluation. *Beckner v. Rule*, 91 Mo. 62.

**5. Not Subject to Fluctuations.** — *Gulley v. Cole*, 102 N. Car. 333; *Gully v. Cole*, 96 N. Car. 447; *Thornton v. Vanstorty*, 107 N. Car. 331; *Shoaf v. Frost*, 123 N. Car. 343; *Hardy v. Lane*, 6 Lea (Tenn.) 379.



are required to be pursued, liberal presumptions will be indulged in favor of the regularity of such proceedings,<sup>1</sup> and when the allotment of the homestead is not excepted to, it becomes conclusive and cannot be collaterally impeached.<sup>2</sup>

**Void Proceedings.** — But where there is absolutely no right to a homestead as a matter of law, proceedings for the setting apart of a homestead are void and of no effect,<sup>3</sup> and it is held that the record of an application for a homestead must affirmatively disclose the facts entitling the applicant to the exemption.<sup>4</sup>

**3. Contest of Claim and Selection.** — Where the statute permits the exemptioner to claim and select his exemption, and restrains the officer from the further execution of process upon proper notice of such selection, or permits the claimant to file his selection of record and renders the property so selected exempt from sale, the officer cannot sell the property so claimed and selected except in the manner provided by statute, and provision is usually made for contesting such claim and selection and reaching property improperly included therein.<sup>5</sup>

**1. Liberal Presumptions.** — *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163; *Dunagan v. Stadler*, 101 Ga. 474.

**2. Collateral Attack.** — *Wickersham v. Comerford*, 104 Cal. 496; *Hutchinson v. McNally*, (Cal. 1890) 23 Pac. Rep. 132; *Lallement v. Detert*, 96 Mo. 182; *Meyer v. Nickerson*, 101 Mo. 184; *Barney v. Leeds*, 54 N. H. 128; *Whitehead v. Spivey*, 103 N. Car. 66; *Marshburn v. Lashlie*, 122 N. Car. 237; *Burton v. Spiers*, 87 N. Car. 87; *Formeyduval v. Rockwell*, 117 N. Car. 325; *Culler v. Crim*, 52 S. Car. 574; *Globe Phosphate Co. v. Pinson*, 52 S. Car. 185.

**3. Proceedings Void.** — *Williams v. Webb*, 99 Ga. 301; *Langford v. Driver*, 70 Ga. 588.

**Proceedings by Wife for Homestead in Separate Property.** — In *Georgia* a married woman not living separate from her husband was not entitled to have a homestead set apart to her out of her separate property, by the Constitution of 1878, and it was therefore held that proceedings instituted in her behalf for the setting apart of such a homestead were absolutely void, though carried to final approval by the ordinary, and that they constituted no obstacle to a sale, under an execution against her, of the property sought to be exempted. *Williams v. Webb*, 99 Ga. 301.

See *supra*, this title, *Persons Entitled to Benefit of Homestead Exemption — Rights of Married Women*.

In *North Carolina* it was held that an allotment of homestead to one not entitled thereto could not be collaterally attacked by the debtor or one claiming under him, the remedy being under the code provision that objections to the allotment shall be filed with the clerk, etc. *Formeyduval v. Rockwell*, 117 N. Car. 320.

**4. Record Must Show Facts Entitling Party to Homestead.** — *Davis v. Lumpkin*, 106 Ga. 582; *Coffee v. Adams*, 65 Ga. 317; *Jones v. Crumley*, 61 Ga. 105; *Langford v. Driver*, 70 Ga. 588; *Pegram v. Hancock*, 105 Ga. 185.

But in *Torrance v. Boyd*, 63 Ga. 22, it was held that causing the homestead to be set apart by the ordinary was in the nature of a recovery by the applicant for the benefit of his family, and that after the homestead had been enjoyed for a number of years the allowance would not be held void, at the instance of the applicant or those in privity with him, because of a defect in the application, in that it did not

disclose that the applicant was the head of a family or a resident of the county. See also *M'Donald v. Williams*, 94 Ga. 515.

In *Georgia*, where, in homestead proceedings before the ordinary, the homestead has been set apart without giving the notice required by law to a certain creditor, the proceeding is void as to that creditor, because as to him, in legal contemplation, no homestead has been set apart. *Weekes v. Edwards*, 101 Ga. 314; *Wheeler, etc., Mfg. Co. v. Christopher*, 68 Ga. 635.

Where a bill was brought to recover property as a homestead, and the proceedings exhibited did not show a setting apart by the ordinary as required by law, it appearing that the ordinary had set apart the lands before the surveyor had made his return and before he had sworn to the same, it was held that the bill was properly dismissed. *Falls v. Crawford*, 76 Ga. 35.

Where the right of the widow under the code to have a homestead set apart to her out of her husband's property depended upon his refusal to do so, it was held that a schedule filed by her for this purpose merely alleging that the husband neglected or refused to file the same did not show neglect or refusal on his part, and therefore a homestead purporting to be thus set apart was not valid as against one to whom the husband subsequently conveyed the land embraced therein. *Davis v. Lumpkin*, 106 Ga. 582.

**5. In Alabama**, after claim in writing by the party asserting the exemption, and upon notice to the opposite party, the latter is required within ten days to contest the claim in writing under oath, or the levy will be discharged. *Block v. Bragg*, 68 Ala. 293.

Where the claim of exemption is made and filed for record before levy, no execution can be levied upon the property so claimed to be exempt, until a contest affidavit has been made and filed with the clerk. *Schuer v. King*, 100 Ala. 238.

It is not the province of the officer to pass upon the sufficiency of the claim of exemption or of the affidavit of contest, but their sufficiency must be referred to the tribunal from which the process issued. *Block v. Bragg*, 68 Ala. 293.

Where the widow selects her homestead and petitions the probate court to have it allotted

**4. Relief Against Infringement of Right — a. AT LAW — Sale Set Aside — Recovery of Property.** — Where the homestead is sold on execution or other forced sale in violation of the rights of the exemptioner, the sale will be set aside,<sup>1</sup> and the homestead may be recovered in an action by the exemptioner.<sup>2</sup>

to her, and, upon the report of the commissioners appointed to allot the homestead and appraise its value creditors of the decedent except to the report, the issue made by the exception is certified to the Circuit Court for trial, its inquiry is confined to the question whether the property was a homestead at the time of the death of the husband, and whether the assignment of the commissioners is excessive in value. *Coffey v. Joseph*, 74 Ala. 271; *Cox v. Bridges*, 84 Ala. 553.

*Notice of Contest.* — *Mead v. Larkin*, 66 Ala. 87, holding that the claimant is entitled to such notice as a matter of constitutional right, as well as by force of the code provision, which was held to apply to all contests as to claims of exemption, whether of real or of personal property.

The sheriff must notify the execution creditor of the claim of exemption, and a sale without such notice will be void. *Allen v. Towns* 90 Ala. 479.

In *California*, upon petition by the creditor, and service of copy thereof, with notice of the time and place of hearing, upon the claimant of the homestead, the court, upon proof of the facts stated in the petition, appoints appraisers. An answer to the petition is not permitted, because the code does not contemplate any formal trial of issues. After the report of the appraisers, a time is fixed for the final hearing upon the evidence as to whether the homestead exceeds five thousand dollars in value, and whether it can be divided without injury. *Stone v. McCann*, 79 Cal. 460. See also *Mitchell v. McCormick*, 22 Mont. 249.

Where a homestead selected by the debtor is of greater value than the statutory limit, the excess does not invalidate the selection, but the creditor must proceed to subject the excess in the manner provided by statute for its admeasurement and application. *Demartin v. Demartin*, 85 Cal. 71; *Waggle v. Worthy*, 74 Cal. 268, 5 Am. St. Rep. 440; *Barrett v. Sims*, 59 Cal. 615.

In *Michigan*, where the homestead in amount within the constitutional limit is once established by location, selection, and occupancy, the constitution is a positive prohibition against levy and sale by the owner's creditors, unless it exceeds one thousand five hundred dollars in value. If the creditor thinks the homestead thus selected exceeds in value the sum of one thousand five hundred dollars, and it is capable of division so as to leave the debtor a homestead worth that amount, he may apply to a court of equity and have the division made; but if the homestead is not capable of division the sheriff may proceed under the statute, and under proper notice to the defendant, and, under proper proceedings taken, have the homestead appraised; and if found incapable of division, and worth over one thousand five hundred dollars, the whole property may be sold unless the debtor shall pay the judgment, and in case of sale one thousand five hundred dollars shall be reserved

for the debtor, and, with any excess after satisfying the execution, shall be paid over to him. But in no case where the debtor occupies the homestead, and it is within the constitutional limit and is capable of division, whatever may be its value, is the debtor required to take any steps to preserve or protect his homestead against the invasion of the creditor under his levy and sale on his execution, before he seeks to have the division made or to obtain possession under levy and sale. *Riggs v. Sterling*, 60 Mich. 651.

In *Nebraska*, where the property selected is within the limit as to quantity allowed by the terms of the statute, any excess in value does not make other proceedings necessary on the part of the debtor. It then devolves upon the creditor as a duty to ascertain the value of the premises selected, in the manner pointed out in the law, by making application for an appraisal and having its value assessed; and until a creditor does so no valid sale can be made by the sheriff of the lots selected as a homestead. *Quigley v. McEvony*, 41 Neb. 73.

In *Washington*, under the code provisions, a creditor could have a homestead, claimed under the provisions of the statute, sold under execution upon making and filing an affidavit that it exceeded in value the statutory limit of the exemption, and a purchaser under an execution sale was chargeable with notice of the fact that no such affidavit had been filed. *Philbrick v. Andrews*, 8 Wash. 7.

In *Wisconsin* a creditor who was dissatisfied with the quantity of land claimed by a debtor was required to cause a survey to be made and have the excess sold, and a sale of the whole without a survey was not permissible. *Myers v. Ford*, 22 Wis. 139; *Herrick v. Graves*, 16 Wis. 157.

**1. On Petition by Wife as Intervener.** — *U. S. v. Lesnet*, (N. Mex. 1897) 50 Pac. Rep. 321.

**On Motion.** — *White-Crow v. White-Wing*, 3 Kan. 276; *Hope v. Hollis*, 5 Ky. L. R. 319; *Caldwell v. Taylor*, (Ky. 1895) 32 S. W. Rep. 678; *Riggs v. Sterling*, 51 Mich. 157; *Bailey v. Barron*, 112 N. Car. 54.

In *Nebraska* it is held that the right to homestead cannot be considered upon proceedings for the confirmation of the sale of the alleged homestead on execution. The only things settled or adjudicated in the proceedings or order of confirmation are as to the proceedings of the sheriff and those acting under him in the levy, appraisement, and advertisement, and the making and return of sale. *Best v. Zutavern*, 53 Neb. 619, citing *Schriber v. Platt*, 19 Neb. 625. In these cases, *Berkley v. Lamb*, 8 Neb. 392, is in effect overruled to this extent.

In *California* it was held that the homestead right need not be tried on motion to set aside a sale under a mortgage, but that the husband and wife should join in a cross-bill in a foreclosure suit, or bring an action of ejectment. *Cook v. Klink*, 8 Cal. 347.

**2. Jones v. De Graffenreid**, 60 Ala. 145;



**Defense in Action by Purchaser.** — And in such a case, the purchaser acquiring no title which can be enforced against the exemptioner in an action by the former to recover the land, the homestead right of the defendant in the property may be shown in the defense; <sup>1</sup> and if the property is of greater extent or value than the exemption allowed by law, in some states the court may have the homestead set apart.<sup>2</sup>

**Effect of Recovery Back of Homestead.** — When the homestead has been unlawfully sold, and the exemptioner recovers it back from the purchaser, the latter is entitled to recover from the exemptioner the purchase money which was applied in satisfaction of the judgment against the exemptioner.<sup>3</sup>

**Damages.** — It has been held that one whose homestead has been unlawfully seized and sold may sue the officer and purchaser for damages, and need not pursue the property; <sup>4</sup> or he may recover damages resulting from the unlawful detention of the property, as by the superseding of a judgment setting aside a sale.<sup>5</sup>

**b. IN EQUITY — Power to Protect in General.** — Where the homestead right has been infringed or lost though no fault of the party entitled thereto, a court of equity will afford him relief for its protection or recovery.<sup>6</sup>

**Injunction — Removal of Cloud.** — Where there is a sale or a threatened sale of the homestead, the party entitled thereto may resort to a court of equity, which has inherent jurisdiction in this regard, and enjoin the threatened sale to prevent a cloud upon the title<sup>7</sup> or interference with the right to

Townsend v. Smith, 20 Tex. 465, 70 Am. Dec. 400.

1. Jones v. De Graffenreid, 60 Ala. 145; Riggs v. Sterling, 51 Mich. 157; Crisp v. Crisp, 86 Mo. 630; McCracken v. Adler, 98 N. Car. 400; Tobar v. Losano, 6 Tex. Civ. App. 698; Campbell v. Elliott, 52 Tex. 151. See also Hoffman v. Buschman, 95 Mich. 538; Amplett v. Hibbard, 29 Mich. 298.

2. See *supra*, this section, *Jurisdiction of Courts — In General*.

3. Stone v. Darnell, 25 Tex. Supp. 430; Cline v. Upton, 59 Tex. 27.

**No Satisfaction of Judgment.** — Where the plaintiff in execution becomes the purchaser at an execution sale, and the property is afterwards recovered back from him because it was the debtor's homestead, it is held that there was no satisfaction, and the plaintiff in the execution may sue the defendant on the judgment. Townsend v. Smith, 20 Tex. 470, 70 Am. Dec. 400.

**4. Damages Instead of Pursuing Property.** — House v. Phelan, 83 Tex. 595; Funk v. Walter, 87 Ky. 182.

Upon intervention by the wife of a defendant in an attachment, claiming the property as a part of her homestead, and also damages for the attachment, she may recover the damages notwithstanding the release of the attachment, and therefore it is error to dismiss the intervention upon release of the attachment. Stoddard v. McMahan, 35 Tex. 267.

But where an execution sale is void because the sheriff neglected to lay off the homestead, it is held that the debtor can recover, in a suit upon the sheriff's bond, only the costs and damages sustained, and not the value of the homestead, for the reason that the sale is void. McCracken v. Adler, 98 N. Car. 400.

In Funk v. Walter, 87 Ky. 182, it is held that in a suit by a widow against a purchaser of land, who has wrongfully ejected her, for

the recovery of the value of the homestead, the purchaser cannot set off taxes paid since the unlawful seizure of the property, as it will be presumed that the rent equaled the interest on the value and the taxes.

**5. Damages Resulting from Detention.** — The measure of damages is the rental value of the property during the time the homesteader is kept out of possession. Mitchell v. Stephens, 14 Ky. L. Rep. 861.

**6. Power to Protect.** — Andrews v. Melton, 51 Ala. 400; Imhoff v. Lipe, 162 Ill. 284; Hubbell v. Canady, 58 Ill. 425; Mix v. King, 55 Ill. 434; Riggs v. Sterling, 51 Mich. 157; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Miles v. Miles, 46 N. H. 261, 88 Am. Dec. 208; Littlejohn v. Egerton, 77 N. Car. 379; Webb v. Cowley, 5 Lea (Tenn.) 724; Williams v. Williams, 7 Baxt. (Tenn.) 116.

**7. Enjoining Sale.** — Roth v. Insley, 86 Cal. 134; McMichael v. Grady, 34 Fla. 219; Irwin v. Lewis, 50 Miss. 363; Koen v. Brill, 75 Miss. 870; Seligson v. Collins, 64 Tex. 314; Best v. Ray, (Tex. Civ. App. 1895) 33 S. W. Rep. 292; Goodell v. Blumer, 41 Wis. 436; Webb v. Hayner, 49 Fed. Rep. 601.

**Bill by Wife.** — Where a failure of the wife to join in the conveyance of the homestead is void as to her right to the homestead, she may file a bill to have the cloud removed and her homestead rights declared. Williams v. Williams, 7 Baxt. (Tenn.) 116. See also Comstock v. Comstock, 27 Mich. 97.

So where the wife had an unreleased right of homestead, it was held that such right could not be affected by a judgment in ejectment against the husband by a purchaser at a sale under a mortgage executed by the husband and wife without release of homestead, she not being a party to the action of ejectment; but that the judgment in ejectment was a bar to a recovery of possession at law, and that the wife might resort to equity for the protection



possession,<sup>1</sup> or may have the sale set aside where the value of the property is not in excess of the statutory exemption, as a cloud upon the title,<sup>2</sup> notwithstanding the sale is void.<sup>3</sup> Such relief, however, is subject to the requirements of particular statutes as to claiming and setting apart the homestead before the property can become impressed with the homestead character.<sup>4</sup>

**4. Evidence — Burden of Proof.** — One claiming a homestead in proceedings by him to protect the property,<sup>5</sup> or upon assertion of the right as a defense, has the burden of proving the homestead right,<sup>6</sup> notwithstanding the plaintiff holds the affirmative in the pleadings, as where the petition alleges that the land is not exempt from execution and is not occupied by the defendant as a homestead.<sup>7</sup>

In an Action Against the Sheriff and the sureties on an official bond for failure

of her rights, in which event she was entitled to have the homestead set off in kind, if it could be so set off, or to a payment of the value of the homestead with rents and profits, less taxes and repairs, to be enforced by sale if necessary. *Mix v. King*, 66 Ill. 145.

**1. Interference with Right of Possession.** — *Pritchett v. Davis*, 101 Ga. 236.

**2. Setting Aside Sale.** — *Riley v. Pehl*, 23 Cal. 70; *Pinkerton v. Tumlin*, 22 Ga. 165; *Barrett v. Wilson*, 102 Ill. 302; *Green v. Marks*, 25 Ill. 221; *Conklin v. Foster*, 57 Ill. 104; *Gallagher v. Keller*, 4 Tex. Civ. App. 454; *Scofield v. Hopkins*, 61 Wis. 370; *Smith v. Zimmerman*, 85 Wis. 542; *Hoppe v. Goldberg*, 82 Wis. 660.

Where the execution was satisfied by the sale of the homestead and three other lots, and it was impossible to tell whether the lots were sold separately or what was bid for each, it was held that the court should set aside the entire sale and cancel the certificate and sheriff's deed, and also set aside the satisfaction of the execution, so that there could be an alias execution issued to collect the judgment. *Phillips v. Root*, 68 Wis. 128.

**Sale After Homestead Regularly Claimed.** — When the sheriff sells the whole tract subject to homestead exemption, instead of valuing and setting apart the homestead as required by statute, when the debtor regularly claims such exemption, a court of equity will protect the homestead estate so claimed, and will set aside the sheriff's deed as to that part. *Andrews v. Melton*, 51 Ala. 400.

**3. Removal of Cloud though Sale Void.** — *Roth v. Insley*, 86 Cal. 134; *Webb v. Hayner*, 49 Fed. Rep. 601; *Conklin v. Foster*, 57 Ill. 104; *Gallagher v. Keller*, 4 Tex. Civ. App. 454. But see *Murray v. Hazell*, 99 N. Car. 168.

**Qualification of Rule.** — In *Jones v. De Graffenreid*, 60 Ala. 145, it was held that a court of equity would not entertain jurisdiction to remove a cloud from the title to a homestead when the homestead had been legally claimed and allotted and might be asserted or defended successfully in a court of law; that such jurisdiction would be exercised where the owner of the homestead was in possession and could not test his title by an action, but that this principle had no application where the purchaser had brought an action at law and had recovered a judgment in ejectment for the land.

**4. Claim and Selection.** — See *supra*, this section, *Claiming, Selecting, and Setting Apart* —

*Claim and Selection; Formal Dedication and Setting Apart.*

And so in an action to enjoin an execution sale of a forty-acre tract of land, where the plaintiff's dwelling house was partly on said tract and partly on an adjoining tract owned by his wife, it was held that the whole of the forty-acre tract was in the exemption, and that the provisions of the statute relating to the marking out, platting, and record of homestead gave the plaintiff ample protection without the interference of the court of equity. *Henderson v. Rainbow*, 76 Iowa 320.

**Setting Apart by Ordinary.** — Where a bill was brought to recover property as a homestead, and the proceedings exhibited did not show a setting apart by the ordinary as required by law, it appearing that the ordinary had set apart the lands before the surveyor had made his return and before he had sworn to the same, it was held that the bill was properly dismissed. *Falls v. Crawford*, 76 Ga. 35.

**5. Burden on Party Claiming Right.** — *Mullins v. Looke*, 8 Tex. Civ. App. 138.

**6. Apprate v. Faure**, 121 Cal. 466; *Robertson v. Robertson*, (Ky. 1892) 20 S. W. Rep. 543; *Mullins v. Clark*, (Ky. 1891) 15 S. W. Rep. 784; *Swan v. Stephens*, 99 Mass. 77; *Amphlett v. Hibbard*, 29 Mich. 298; *Doran v. O'Neal*, (Tenn. Ch. 1896) 37 S. W. Rep. 563.

**That No Homestead Has Been Allotted.** — In *North Carolina* it was held that in an action to recover possession of land sold under an execution against the defendant, if the defendant claims a homestead in the land, the burden is upon him to show that no homestead had been allotted, whereupon the presumption of the regularity of the judicial proceedings and sale is rebutted. *Fulton v. Roberts*, 113 N. Car. 421.

**Upon Contest of Recorded Declaration.** — But where, after the filing of a properly executed declaration of homestead and an application by the insolvent debtor for the setting apart of homestead, an execution creditor claims that the value of the homestead exceeds the statutory limit, and seeks to subject the excess to the payment of his debt without denying that a properly executed declaration has been filed, or that the debtor is residing on the premises, it is held that the creditor has the burden of proving that there is an excess. *Demartin v. Demartin*, 85 Cal. 71, citing *Stone v. McCann*, 79 Cal. 460.

**7. Robertson v. Robertson**, (Ky. 1892) 20 S. W. Rep. 543.

to make money on an execution, the burden is upon the sheriff to show a legal excuse for such failure, whether he has failed to levy or has discharged the levy without selling.<sup>1</sup>

**Prima Facie Case Sufficient.** — But it is only necessary for one claiming the benefit of the homestead to bring himself *prima facie* within the law,<sup>2</sup> and if the debtor seeks to subject the property upon the ground that his debt is of an excepted class, or one against which the homestead exemption cannot be claimed, he has the burden of proving this fact.<sup>3</sup>

**Admissibility of Evidence.** — Upon the issue whether property constitutes a homestead, testimony is admissible which bears directly upon the existence of facts which are pertinent under the particular homestead law,<sup>4</sup> as evidence of conduct showing the intention of the parties,<sup>5</sup> and such intention may be shown by the acts and declarations of the parties in connection with the subject-matter.<sup>6</sup>

**5. Exhaustion of Property Before Sale of Homestead — Adjustment of Equities Between Creditors** — **Equitable Rule as Between Creditors.** — For the protection of the equities of different creditors or incumbrancers, in the absence of statute the equitable rule is adopted whereby the court will compel one creditor or

1. **Burden on Sheriff.** — *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727.

2. **Prima Facie Case Sufficient.** — *Bach v. May*, 163 Ill. 547; *White v. Clark*, 36 Ill. 285; *Stevenson v. Marony*, 29 Ill. 532; *McMillan v. Williams*, 109 N. Car. 252; *White v. Dabney*, (Tex. Civ. App. 1898) 46 S. W. Rep. 653.

In a suit to restrain a sale the form of a charge which makes it necessary that an abandonment should be proven by the defendant is sufficient, and in such a case it is not error to refuse to charge in express terms that the burden is upon the defendants upon this particular phase of the case. *White v. Dabney*, (Tex. Civ. App. 1898) 46 S. W. Rep. 653.

3. See *supra*, this title, *Liabilities as Against Which Homestead May Be Claimed*.

4. **Testimony Pertinent under Homestead Law.** — In a contest upon a claim and selection questions asked of the claimant as to the character of the improvements on the land in controversy are held to be proper as tending to show the value of the property; and so the question whether or not the claimant was a resident of the county at the time the action was commenced by the contestant is legal and pertinent, as only residents are entitled to exemptions; but a question whether the claimant at that time intended to remain a resident of the county is not legal and pertinent. But where the two questions were asked together, and there was merely a general objection to the evidence, one of the questions being proper and the other improper, the objection was properly overruled. *Cofer v. Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54.

**Claim as Evidence.** — In *California* it is held that the recital of facts stated by the homestead claimant in her declaration is no evidence of the truth of such recital, but the introduction of such declaration serves only the purpose of showing a compliance with the law, which demands the filing for record of a declaration containing certain recitals. The proof of the truth of these recitals must be *aliunde* whenever the validity of the homestead exemption claimed is attacked. *Apprate v. Faure*, 121 Cal. 472.

In *Alabama*, in a contest of a claim and selection, a certified copy of the claim of exemptions which had been filed in the probate judge's office, in accordance with the statute, is relevant in support of the claim, since the statute makes it *prima facie* correct and operative as notice of its contents. *Cofer v. Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54.

5. **Evidence Showing Intention.** — *Gallagher v. Keller*, 87 Tex. 472; *Furner v. Edgewood Distilling Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 184; *Amphlett v. Hibbard*, 29 Mich. 298.

**Intention of Wife as Showing That of Husband.** — Where the husband and wife were shown to be in perfect agreement, the intention and expressions of the wife as to their common purpose and intention are pertinent and material testimony in support of a claim of homestead. *Gunn v. Wynne*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290.

**Opinion of Husband as Against Wife.** — But it is held that a declaration of opinion by the husband is not competent evidence against the wife, for if in fact the property was a homestead, the mere declaration of the husband to the contrary could not make it that which it was not in fact. *Jacobs v. Hawkins*, 63 Tex. 1; *Rose v. Blankenship*, (Tex. 1891) 18 S. W. Rep. 101.

6. **Acts and Declarations of the Parties.** — *Furner v. Edgewood Distilling Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 184; *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep. 832; *Gunn v. Wynne*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290.

**Testimony of Intent as Against Overt Acts.** — Testimony as to the purpose and intent should not prevail against insistent overt acts, but it is not for that reason incompetent, and should be considered for what it is worth in connection with other facts and circumstances. *Clark v. Evans*, 6 S. Dak. 244.

**Declarations of Claimant Against Existence of Homestead.** — Declarations made in disparagement of the existence of a homestead are competent in favor of one claiming adversely. *Anderson v. Kent*, 14 Kan. 207.



incumbrancer who has a lien upon property of the debtor, including the homestead, as against another who has no lien upon the homestead and whose debt cannot be enforced against it, to resort in the first instance to the homestead.<sup>1</sup> In other cases the rule is held to be inapplicable, and the homestead right comes next to the contract lien.<sup>2</sup>

**As Between Debtor and Creditor.** — The rule first stated as between different creditors has been adopted in some cases as between the debtor and a creditor having a lien superior to the right of homestead, it being held in such cases that a debtor may compel a mortgagee, for example, of property embracing the homestead to resort first to that part which does not include the homestead;<sup>3</sup> though it has also been held otherwise, upon the ground that the equity rule under which a mortgagee may be compelled to resort in the first instance to one of several assets embraced in the mortgage is applied only for the protection of the different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagee.<sup>4</sup>

**1. Equitable Rule as Between Creditors.** — *Searle v. Chapman*, 121 Mass. 19; *Worth v. Hill*, 14 Wis. 559; *Jones v. Dow*, 18 Wis. 241. See also *Pittman's Appeal*, 48 Pa. St. 315; *Shelly's Appeal*, 36 Pa. St. 373; *Johnston's Appeal*, 25 Pa. St. 116; *Hallman v. Hallman*, 124 Pa. St. 347.

In *Virginia*, where a judgment creditor had a lien on his debtor's real estate, it was held that the real estate might be subject to the payment of the judgment, notwithstanding the debt contained no waiver of the homestead and there were subsequent liens paramount to the homestead in excess of the whole value of the land; that if the debtor claimed the homestead it could be set apart to him, and the judgment paid out of the residue, but if necessary to pay the subsequent liens which were paramount, the homestead itself should be subjected. *Strayer v. Long*, 93 Va. 695.

**As Between Mortgagee and Judgment Creditor.** — As between the mortgagee in a mortgage embracing the homestead and other land, and a judgment creditor, the latter may compel the mortgagee to resort to the homestead which is subject to the lien of the mortgage and is not subject to the lien of the judgment; this equity depending upon the fact that the mortgage creditor, without injury or delay to himself, can make his debt out of the property voluntarily pledged by the debtor for that purpose, which property the judgment creditor cannot reach. *People's Bank v. Brice*, 47 S. Car. 134 [*citing* *State Sav. Bank v. Harbin*, 18 S. Car. 431; *Bowen v. Barksdale*, 33 S. Car. 151; *Craig v. Miller*, 41 S. Car. 48; *People's Bldg., etc., Assoc. v. Mayfield*, 42 S. Car. 426]; *White v. Polleys*, 20 Wis. 503, 91 Am. Dec. 432.

**2. Rule Not Applicable.** — *Ray v. Adams*, 45 Ala. 168; *McLaughlin v. Hart*, 46 Cal. 638; *Brown v. Cozard*, 68 Ill. 180; *Belvidere First Nat. Bank v. Briggs*, 22 Ill. App. 228; *Equitable L. Ins. Co. v. Gleason*, 62 Iowa 277; *Colby v. Crocker*, 17 Kan. 527; *Flowers v. Miller*, (Ky. 1891) 16 S. W. Rep. 705; *Buckner v. Samuels*, 6 Ky. L. Rep. 660; *McArthur v. Martin*, 23 Minn. 80.

A junior mortgagee in a mortgage not covering the homestead cannot pay off a senior mortgage covering the homestead and the premises covered by the junior mortgage, and

have the senior mortgage satisfied first out of the homestead. *Grant v. Parsons*, 67 Iowa 31.

In *North Carolina* it was held that where a debtor owed several judgments, some of the debts prior to the exemption law and others subsequent to it, the court would not allow the creditor who had purchased all the judgments to sell the real estate in excess of judgments on executions issued on the junior judgments, and the homestead on executions issued on the elder judgments. *Albright v. Albright*, 88 N. Car. 238.

**3. Between Debtor and Creditor.** — *Morrison v. Watson*, 101 N. Car. 332; *Horton v. Kelly*, 40 Minn. 193; *McArthur v. Martin*, 23 Minn. 74.

In *California* it was held that a wife could enjoin an execution and compel the exhaustion of other property of the estate before touching the homestead, even though the homestead had not been declared and recorded as such. *Bartholomew v. Hook*, 23 Cal. 278. But see *Kemerer v. Bournes*, 53 Iowa 172, wherein it was held that a wife had no right which she could assert as against the mortgagee to compel the exhaustion of other property, where the occupancy of the property claimed as a homestead did not begin until after the commencement of the action to foreclose the mortgage.

**4. Rule Applied for Creditor Only.** — As against the debtor the mortgagee has the right to enforce the contract between them, according to its terms, and is not obliged to elect between the different remedies or securities. *Searle v. Chapman*, 121 Mass. 19. See also *State Sav. Bank v. Harbin*, 18 S. Car. 431; *Chapman v. Lester*, 12 Kan. 592.

In *Illinois* the rule is that where a mortgage waiving homestead covers both homestead and other lands, a court of chancery will not either marshal assets at the instance of a judgment creditor, or, at the instance of the mortgagee and in the absence of a contract therefor, compel the mortgagee first to sell the lands in which there is no homestead right. The reason for the first branch of the rule is that such marshaling would be an injustice and injury to the common debtor; and the reasons for the other branch of the rule are, first, that the rule in equity for the marshaling of assets has no application as between debtor and creditor, and second, that the mortgagee has a right,



**Exhaustion of Other Property Required by Statute.**—The right of the debtor to compel a resort to other property before exhausting his homestead is conferred by statute in some states, under which it is required that when the homestead is subject to a lien other property of the debtor shall be exhausted before the sale of the homestead.<sup>1</sup>

**HOMICIDE.**—[While engaged upon this article, and before its completion, the writer became ill. For this reason it has been decided to present the treatment under the title MURDER AND MANSLAUGHTER, rather than delay the entire volume for the time necessary to finish the work so unfortunately interrupted.]

**HOMŒOPATHIC.** (See also the title PHYSICIANS AND SURGEONS.)—See note 2.

**HOMOLOGATE.**—To homologate means to approve; to confirm; to say the like.<sup>3</sup>

**HOMOLOGATION.**—In civil law homologation is approbation; confirmation.<sup>4</sup> The term also means estoppel *in pais*.<sup>5</sup>

by the terms of his contract, to elect which tract of land he will sell first. *Belvidere First Nat. Bank v. Briggs*, 22 Ill. App. 228; *Rogers v. Meyers*, 68 Ill. 92; *Brown v. Cozard*, 68 Ill. 178; *Plain v. Roth*, 107 Ill. 588.

1. **Exhaustion of Other Property under Statute.**—*Gaither v. Wilson*, 164 Ill. 544; *Lay v. Gibbons*, 14 Iowa 377, 81 Am. Dec. 487; *Hale v. Heaslip*, 16 Iowa 451; *Foley v. Cooper*, 43 Iowa 376; *Kilmer v. Gallaher*, 107 Iowa 676; *Barker v. Rollins*, 30 Iowa 412; *Lambert v. Powers*, 36 Iowa 18; *Twogood v. Stephens*, 19 Iowa 405; *Eggers v. Redwood*, 50 Iowa 289; *Blake v. McCosh*, 91 Iowa 544.

In *Wisconsin*, under the Code of 1870, it was provided that where a part of the mortgaged property embraced the homestead which could be sold without injury to the owner, the homestead should not be sold until other lands covered by the mortgage had been exhausted, which changed the former rule adopted in this state. *Lloyd v. Frank*, 30 Wis. 306; *Hanson v. Edgar*, 34 Wis. 653.

In *Illinois* a statute which provides that when a release of homestead is made by mortgage including other lands, the other lands shall be first sold before resorting to the homestead, does not apply to a mortgage given for the purchase price of the land. *Gaither v. Wilson*, 164 Ill. 544.

**Partnership Property**, being liable to be taken in execution, must be exhausted before resorting to other property. *Lambert v. Powers*, 36 Iowa 18.

**Application of Payments So as to Preserve Homestead.**—Where one after having acquired a homestead executed a note for a gross sum of money, which included in part an indebtedness created before the acquisition of the homestead, upon a part payment of the whole of the consideration without direction as to the application of the payment it was held that the payment should be applied so as to cancel the debt created before the acquisition of the homestead, and which was a lien on the homestead. *Stewart First Nat. Bank v. Hollinsworth*, 78 Iowa 575.

**Offering for Sale Sufficient Exhausting.** Where, upon the foreclosure of a mortgage covering the homestead and other land, the

sheriff offers the land not included in the homestead without receiving bidders, this is a sufficient exhaustion of other property before resorting to the homestead as required by statute. *Burmeister v. Dewey*, 27 Iowa 468; *Brumbaugh v. Shoemaker*, 51 Iowa 148; *Eggers v. Redwood*, 50 Iowa 289.

**Waiver of Right.**—If the parties having notice of the sale of their homestead did not object thereto, they cannot afterwards claim that their property should have been exempted before the sale of the homestead. *Foley v. Cooper*, 43 Iowa 376.

**Right of Purchaser of Homestead.**—The right to require the exhaustion of other property subject to the mortgage, before resorting to the homestead, does not exist in favor of a purchaser of the homestead from the debtor after the execution of the mortgage. *Dilger v. Palmer*, 60 Iowa 117; *Barker v. Rollins*, 30 Iowa 412; *Kemerer v. Bournes*, 53 Iowa 172.

Where a senior mortgagee of property including the homestead takes a conveyance of the whole property without releasing his mortgage, he may, as against a junior mortgagee, have his debt satisfied out of the lands not included in the homestead, to the exclusion of the junior mortgagee's lien which was not a lien upon the homestead. *Linscott v. Lamart*, 46 Iowa 312.

2. **Homœopathic Specific.**—In *Humphrey's Specific Homœopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 253, it was said: "A 'homœopathic specific,' therefore, is a remedy pertaining to homœopathy which exerts a special action in the prevention or cure of a disease." This was a trademark case.

3. **Homologate.**—Used in the civil law of a confirmation of a proceeding by a court of justice. *Viales v. Gardenier*, 9 Mart. (La.) 324; *Burr. L. Dict.*

4. See **HOMOLOGATE**, *ante*.

5. **Homologation.** (See also the title **ESTOPPEL**, vol. 11, p. 420.)—In *Burkinshaw v. Nicolls*, 3 App. Cas. 1026, Lord Blackburn said: "When a person makes to another the representation 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems

**HONEST.** — See note 1.

**HONESTY.** — The word “honesty,” from the Latin *honestus*, is essentially a word that takes its meaning from its context. Primarily it means “suitable,” “becoming,” or “decent” — meanings that obviously lend themselves to divers contexts. In moneyed transactions it means financial integrity; in affairs of state it means loyalty; in matters of friendship it means steadfastness; and so on. In sexual relations it imports chastity. This is an accepted signification.<sup>2</sup>

**HONOR.** (See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 65.) — A term used in respect to commercial paper, signifying to accept and pay when due; as, to honor a bill;<sup>3</sup> especially used in the

to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or *homologation*.”

**1. Honest Account — Receiving Stolen Property.** — An instruction was asked that if the defendant gave an *honest* account of how he came by the property, it was incumbent upon the people to show that the account was false. In holding that such instruction was properly refused the court said: “Now, the only notion we can have of an *honest* account is a true account. If, therefore, according to this proposed instruction, a defendant in a larceny case should give an *honest* account of how he got the stolen property, and that account should be that he stole it, it would be incumbent on the people to show that the account was false — that is, that he did not steal it; a proposition which, it may be safely said, is not law.” *People v. Buelna*, 81 Cal. 141.

**Honest Belief — Slander.** — In *Toothaker v. Conant*, 91 Me. 438, it was said: “While the phrase ‘*honest* belief’ may be found in legal opinions which undertake to define privileged communications, the phrase without addition or qualification is not adequate and sufficient as a definition of the law of justification for what would otherwise be regarded as slanderous words. A man may inflict an injury upon another without intending any injury, and still be liable for his unjustifiable act.” See also the title **LIBEL AND SLANDER**.

**Honest Belief — Self-defense.** (See also the title **SELF-DEFENSE**.) — In *Tillery v. State*, 24 Tex. App. 271, it was said: “In instructing the jury upon the law of apparent danger, the charge makes the right of self-defense hinge upon the fact as to whether or not the defendant *honestly* believed at the time he acted that he was in danger of losing his life, etc. This idea of *honest* belief on his part is presented three several times in the charge upon self-defense, and while being subject to the objection that it is made too prominent to the minds of the jury, is, besides, not a correct statement of the law. The correct rule is that if it reasonably appeared to the defendant, from his standpoint, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules permitted in case the danger had been real. *Willson’s Texas Crim. Laws*, § 978. While it may be abstractly correct to require that the defendant’s belief of the existence of danger

should be an *honest* one, it is going too far, we think, to so instruct the jury.”

**Honest Belief of Guilt.** — See the title **MALICIOUS PROSECUTION**.

**Honest Claim — Consideration.** (See also the title **CONSIDERATION**, vol. 6, p. 711.) — Upon the question what constitutes the *honest* claim which will amount to a consideration to support a compromise agreement, *Cotton, L. J.*, in *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266, said: “Now what I understand to be the law is this, that if there is, in fact, a serious claim *honestly* made, the abandonment of the claim is a good ‘consideration’ for a contract. \* \* \* Now, by ‘*honest* claim’ I think is meant this, that a claim is *honest* if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one.” See also *Wahl v. Barnum*, 116 N. Y. 103.

**2. Honesty.** — *State v. Snover*, (N. J. 1899) 43 Atl. Rep. 1059. In this case, upon the trial of an indictment for having carnal intercourse with a woman under the age of consent, the defendant offered to prove “his reputation for morality, virtue, and *honesty* in living,” which was overruled as being immaterial. This was held to be error. The court said: “The contention of the state was that the question put to the defendant’s witness went outside of the issue, in that it called for his reputation for ‘*honesty* in living,’ which, it was argued, referred only to financial probity, hence was not germane to an issue that turned upon sexual laxity. This distinction, which is not suggested by the objection, is not well founded in fact.” The court then gave the definition of the text.

**Truth, Veracity, and Honesty.** — “According to the best lexicographers of our language, at least in this country, the words ‘truth,’ ‘veracity,’ and *honesty* are almost synonymous each of the other, very nearly the same definitions being given to each of such words.” *Wachtetter v. State*, 99 Ind. 297. This case was upon the impeachment of a witness.

**3. Honor.** — Thus where a consignee purchased bills and advised the consignor of their remittance, requesting him that he would “please to give them credit in exchange when the bills were duly *honored*,” and the bills were in due course accepted, but were not paid at maturity, it was held that the consignee, by his mode of treating the remitted bills, had made them his own, and judgment was for the consignor, *Park, J.*, saying: “The solicitor-general argues that the phrase ‘duly *honored*’ means accepted; whether it does so or not has

phrase "acceptance for honor."<sup>1</sup>

**HONORARIUM.** — An honorarium is a voluntary donation in consideration of services which admit of no compensation in money.<sup>2</sup>

**HONORARY.** — "Honorary" means without profit, fee, or reward, and in consideration of the honor conferred by holding a position of responsibility and trust.<sup>3</sup>

**HONOR POLICY.** — See note 4.

**HOOK.** — See note 5.

**HOPE.** — See note 6.

**HOPPER.** — A hopper is "a mechanical device which in the progress of the arts was resorted to to take the place of the hands for the purpose of feeding or conducting a substance from one position to another."<sup>7</sup>

**HOPPER BARGE.** — See note 8.

**HORN.** — See note 9.

**HORSEMANSHIP.** — See note 10.

been left to the jury, and they have found that it meant due payment; which is the opinion I should myself have formed." Lucas v. Groning, 7 Taunt. 164, 2 E. C. L. 164.

Honored means paid at maturity. Walton v. Mascall, 13 M. & W. 457.

1. Acceptance for Honor. — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 232.

2. McDonald v. Napier, 14 Ga. 105.

3. **Honorary Office.** — It was resolved by a board of health that on and after June 1, 1871, "the office of engineer to this board be *honorary*, and that no salary be attached to that office or paid to that officer after that date." This resolution was communicated to the incumbent of the office, who had been in receipt of an annual salary. He acknowledged the receipt of the communication and expressed his gratification at being retained as "*honorary* engineer." It was held that he could not recover for his services after June 1, 1871. Haswell v. New York, 81 N. Y. 255. The court said: "If a recompense was to be received or a payment made, either by salary or otherwise, the office would not be *honorary* alone, but one of emolument also."

In Clark v. Stanley, 66 N. Car. 59, it was held that an *honorary* officer was a public officer. See also the title **PUBLIC OFFICERS**.

4. **Honor Policy.** (See also the title **MARINE INSURANCE**.) — The plaintiff effected a time policy with the defendants for one thousand pounds on the "hull and machinery" of a steamship, which were valued at ten thousand pounds. The policy contained a proviso "five thousand pounds warranted uninsured." The policies effected by the plaintiff on the hull and machinery were for sums amounting in the whole to five thousand pounds. He had, however, by means of *honor* policies, effected further insurances to the extent of two thousand six hundred pounds upon "disbursements." The ship was lost within the insured period, and the defendants disputed their liability on the ground that the *honor* policies constituted a breach of the warranty. It was held that the *honor* policies did not cover any part of the subject-matter of the policy on "hull and machinery," and were, therefore, not a breach of the warranty. Roddick v. Indemnity Mut. Marine Ins. Co., (1895) 2 Q. B. 381, affirming (1895) 1 Q. B. 536.

5. **Libel and Slander.** — *Hook* does not com-

monly or ordinarily mean "steal." The words "you *hooked* my geese" are not actionable. Hays v. Mitchell, 7 Blackf. (Ind.) 117. See generally the title **LIBEL AND SLANDER**.

6. **Hoping — Precatory Trusts.** (See also the title **PRECATORY TRUSTS**.) — A testatrix bequeathed all her property "to my dearly beloved husband, W., *hoping* that he will leave it after his death to my son, W. C. W., if he is worthy of it." This was accompanied by the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is that my son is already certain of a handsome fortune, independent of his father, and that I cannot now feel any certainty what sort of character he may become." It was held that this did not create a trust. Eaton v. Watts, L. R. 4 Eq. 151.

**Hope — New Promise.** — See the title **LIMITATION OF ACTIONS**.

**Dying Declarations.** (See also the title **DYING DECLARATIONS**, vol. 10, p. 359.) — In Reg. v. Jenkins, L. R. 1 C. C. 187, the words "no *hope* at present of my recovery" were held not equivalent to "no *hope* of my recovery."

7. Carter Mach. Co. v. Hanes, 78 Fed. Rep. 348. This was a patent case.

8. **Hopper Barge.** — In The Mac, 7 P. D. 126, a *hopper barge* was held to be a ship or vessel within a salvage statute. See also Cope v. Vallette Dry Dock Co., 119 U. S. 629.

9. **Horn Chains.** — On a question whether, in a contract for the manufacture of *horn* chains, by "*horn* chains" were intended chains partly of hoof or chains wholly of *horn*, admission of the testimony of one of the parties to the contract, that he had experimented by putting *horn* rings and hoof rings together and that almost invariably the *horn* would break, was held to form no ground of exception, though the witness had previously testified that he was not a practiced manufacturer, had only put together rings made by others, and claimed to know no more as to hoof or *horn* than any one else. Swett v. Shumway, 102 Mass. 365. See generally the title **PAROT**.

10. **Horsemanship.** — An exhibition of feats of horses is not an exhibition of feats of *horsemanship*, which has reference to the riders. A *horseman* and his *horse* are not liable to a tax for conducting a public exhibition of feats of *horsemanship*. U. S. v. Buffalo Park, 16 Blachf. (U. S.) 189.



# HORSE RACING.

## I. GAMING, 746.

## II. HIGHWAYS, 746.

## III. ASSOCIATIONS, 747.

### CROSS REFERENCES.

See the titles *AGRICULTURAL SOCIETIES*, vol. 2, pp. 18, 23; *GAMBLING CONTRACTS*, vol. 14, pp. 598, 599, 614; *GAMING*, vol. 14, p. 664; *GAMING HOUSES*, vol. 14, p. 692; and see 10 ENCYC. OF PL. AND PR. 190. As to the meaning of the term "Horse" in statutes against racing, see the title *HORSES*, *post*.

**I. GAMING.** — Within statutes against gaming the term "game" has been frequently held to include horse racing.<sup>1</sup> Horse racing as gaming has received full treatment under previous titles in this work.<sup>2</sup>

**II. HIGHWAYS.** — In some states it is made an offense to race on a public highway, and this irrespective of the fact that there is no bet or wager on the race.<sup>3</sup> Although another rides his horse for him, the owner is still liable if he made the race.<sup>4</sup>

**1. Game.** — *Shropshire v. Glascock*, 4 Mo. 536. See also *Blaxton v. Pye*, 2 Wils. C. Pl. 309; *Swigart v. People*, 154 Ill. 284, *affirming* 50 Ill. App. 181; *Tatman v. Strader*, 23 Ill. 493; *Wade v. Deming*, 9 Ind. 35; *Cheesum v. State*, 8 Blackf. (Ind.) 332; *Ellis v. Beale*, 18 Me. 337.

**2. Gaming.** — See the titles *GAMBLING CONTRACTS*, vol. 14, pp. 598, 599, 614; *GAMING*, vol. 14, p. 664; *GAMING HOUSES*, vol. 14, p. 692.

**3. Bet Not Necessary.** — *Goldsmith v. State*, 1 Head (Tenn.) 154; *State v. Fiddler*, 7 Humph. (Tenn.) 502.

**Requisites.** — To support an indictment against a defendant for knowingly suffering his horse to be run in what is commonly called a horse race, along a public highway, it is not necessary to prove that a bet or wager was made, or a distance to be run agreed upon, or that judges were appointed to decide upon the result of the race. *Watson v. State*, 3 Ind. 123.

**Highway.** — In *Watson v. State*, 3 Ind. 123, it was held, upon the trial of an indictment for horse racing, that evidence that the race was run along a road leading from one specified town to another was sufficient *prima facie* to sustain the averment that the road in question was a public highway.

**Running Together.** — An indictment against two persons for horse racing along a public road should allege that the defendants ran together. *State v. Catchings*, 43 Tex. 654.

**Gaming — Horse Racing on Public Road.** — Under Code of *Tennessee* (1858), § 4882 (Annot. Code 1896, § 6818), running a horse along a public road is not within the meaning of the word "gaming," used in the statute, so far

as to authorize the grand jury to send for witnesses, or, after witnesses were before it, to find presentments upon their evidence. *Harrison v. State*, 4 Coldw. (Tenn.) 195. The court said: "The object of the statute authorizing the grand jury to send for witnesses is, clearly, to enable them, by a sort of inquisitorial examination, to ascertain the commission of the offenses enumerated in the statute, which can be committed secretly, and to suppress them by a vigorous punishment. But the offense of running a horse race along a public road is not, in its nature, of this character. It is, of necessity, open and public to the view, and more capable of proof than the offenses named in the statute." See generally the title *JURY AND JURY TRIALS*.

**Autrefois Convict.** (See generally the title *JEOPARDY*.) — To a presentment for gaming by betting on a horse race along a public road, it is a good defense that the defendant had been convicted and punished upon a presentment for running the same identical race. *Fiddler v. State*, 7 Humph. (Tenn.) 508.

**Punishment.** — An *Alabama* statute declared that horse racing on a public road should be a misdemeanor, but prescribed no punishment. The court said: "It is argued that because no punishment is annexed to the offense, none can be inflicted upon the accused. We do not so understand the law. The authorities fully sustain the proposition that where the statute prohibits an act, and declares it a misdemeanor, the offense is indictable, and punishable as a common-law misdemeanor." *Redman v. State*, 33 Ala. 429.

**4. State v. Wagster**, 75 Mo. 107.

**Rider.** — In *State v. Ness*, 1 Ind. 64, it was

**III. ASSOCIATIONS.** — Associations to conduct and in some cases to regulate horse racing have been authorized by statute in a number of states, and the courts have frequently had occasion to decide questions arising out of races conducted or authorized by them.<sup>1</sup>

held an offense for a person to permit his horse to be run in a horse race or to act as rider in the race.

In *Robb v. State*, 52 Ind. 218, an indictment charged the defendant with suffering his horse to run in a horse race. The evidence showed that the defendant rode in a race a horse which was owned by another person. It was held that the evidence was insufficient.

**Racing on Street.** (See also the title **STREETS AND SIDEWALKS**.) — Racing and driving on a public street at an unlawful and dangerous rate of speed, calculated to frighten horses of ordinary gentleness traveling thereon, give a right of action to a person injured thereby, independently of a municipal ordinance prohibiting such driving; and the setting forth of such ordinance and its violation in the complaint does not necessarily render the action one to recover private damages merely for such violation. *Mittelstadt v. Morrison*, 76 Wis. 265.

When a statute forbade racing within a mile of where a court was sitting, and an ordinance forbade immoderate driving, it was held that the defendants were jointly liable for the death of the plaintiff's intestate, where the death was caused by the intestate being run over by one of the defendants while racing with the other. *Hanrahan v. Cochran*, 12 N. Y. App. Div. 91.

In *Osborn v. Jenkinson*, 100 Iowa 432, it was held that the defendant was liable in damages for injuries sustained by the plaintiff by reason of injuries caused by the defendant, while engaged in a race, colliding with the plaintiff's buggy, there being a city ordinance that no person should drive on any street faster than six miles per hour.

In *Robinson v. Simpson*, 8 Houst. (Del.) 398, it was held that racing upon a street of a city was an act of negligence and that the person having control of the team would be liable in damages for personal injuries to another thereby sustained.

**1. Associations.** — See also the titles **AGRICULTURAL SOCIETIES**, vol. 2, p. 23; **SOCIETIES AND CLUBS**.

**Rules — Authority of Jockey Club.** — In *Grannan v. Westchester Racing Assoc.*, 153 N. Y. 449, it was held that under the *New York* statutes of 1895 a racing association and its patrons were as much subject to the reasonable rules and regulations of the *New York Jockey Club* as they would be if the rules were incorporated into and actually made a part of the act.

**Same — Notice of Rules.** — An advertisement by an agricultural society that the races at its annual fair would be conducted "under rules of American Trotting Association" was not notice to one who entered horses in such races that the society was a member of such association and that all questions arising about the races were to be referred to it for decision, so as to render a decision of the association upon a question so referred binding upon him.

*Moshier v. La Crosse County Agricultural Soc.*, 90 Wis. 37.

**Same — Entry of Horses.** — In *Corrigan v. Coney Island Jockey Club*, 61 N. Y. Super. Ct. 393, where the rules of a racing association provided that its executive committee should settle any dispute not provided for, it was held that the decisions of such committee upon the question of the right of a horse to enter in a particular race was final and should not be interfered with by the court. The court below (27 Abb. N. Cas. (N. Y.) 294), however, in that case, had granted a preliminary injunction to enjoin the racing association from violating its agreement by forbidding the horse to compete in the race for which it was entered.

**Same — Giving Presents to Jockeys.** — In *Grannan v. Westchester Racing Assoc.*, 153 N. Y. 449, it was held that a rule of the Jockey Club forbidding jockeys to receive presents was a reasonable rule, and that a party might be excluded from the track for its infringement.

**Same — Exclusion from Track.** — In *Grannan v. Westchester Racing Assoc.*, 153 N. Y. 450, it was held that permanent exclusion from all races conducted under the rules of the Jockey Club might be imposed and enforced as punishment for a breach of its reasonable rules.

**Judges.** — Where the judges were unable to determine whether a race complied with the conditions, it was held that it should be considered a draw. *Jackson v. Nelson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 315.

In *Wellington v. Monroe Trotting Park Co.*, 90 Me. 495, it was held in an action to recover a purse claimed to have been won by the plaintiff in a horse race, that the judges' decision, if honestly given, was final.

Where the judges of a horse race had discretionary power to exclude a horse violating a certain rule from further participation in the race, their decision allowing the horse to proceed after such violation should not be set aside except upon clear proof of fraud affecting the decision. *Porter v. Day*, 71 Wis. 296.

**Same — Postponement of Race.** — Where the judges have postponed a race, and notwithstanding such postponement, the riders, believing that the signal has been given to start, or yielding to the request of the bystanders, ride the race, the winner cannot recover if he was at any time aware of the postponement. *Molk v. Daviess County Agricultural, etc., Assoc.*, 12 Ind. App. 542.

**Same — Fraud.** — In *Wellington v. Monroe Trotting Park Co.*, 90 Me. 495, it was held that if the judges were induced by fraud on the part of one of their number to give the prize wrongfully to another, the plaintiff was not debarred from recovering the premium.

**Negligence.** — See *supra*, this title, *Highways*, and see the title **NEGLECT**.

**Same — Presumption of Negligence.** — Negligence of an association cannot be presumed from the mere fact that a spectator was injured by a loose horse. *Hart v. Wellington Park Club*, 157 Ill. 9.

**Same — Bolting Horse.** — In *Hallyburton v. Burke County Fair Assoc.*, 119 N. Car. 526, it was held that an association which had provided a grand stand for spectators from which the race could be easily seen was not liable for injuries to a spectator by reason of a horse bolting the track, it having taken the precaution of railing off the track from a place where spectators would be located; and the owner of the horse could not be held liable, where it was not shown that he knew of a habit of bolting in the horse.

In *Lane v. State Agricultural Soc.*, 62 Minn. 175, the complainant alleged that the defendant had engaged her to ride in a horse race promoted and controlled by it; that it negligently permitted a horse to run in a race, knowing that it had a dangerous habit of track bolting, of which the plaintiff was ignorant, and that by reason of such horse bolting the track during the race she was thrown from her own horse and injured. It was held that the complaint stated a cause of action.

**Same — Liability of State.** — In *Melvin v. State*, 121 Cal. 16, it was held that where a ticket holder of the state fair attended horse races upon a day when there was no other exhibit, and was injured by reason of the fall of defective and unsafe seats placed therein by the officers of the state agricultural society, the state was not liable upon contract for the resulting injury, nor was it liable in tort for neglect of public duty on the part of the state board of agriculture.

**Contributory Negligence.** — Where the marshal of the race course commanded a spectator to stand back, because the place in which he was standing was dangerous, and the spectator failed to do so, and was injured by a horse bolting the track, he was guilty of contributory negligence and cannot recover. *Hallyburton v. Burke County Fair Assoc.*, 119 N. Car. 526.

**Private Corporations.** — A racing association organized under the laws of *New York* state, which offers stakes and purses for races, is a private and not a public corporation, and is under no duty to allow all persons to whom it has no reasonable ground for objection to enter horses for such stakes and purses, but may choose its own customers, and may do, or refuse to do, any particular business offered to it. *Corrigan v. Coney Island Jockey Club*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 512.

But in *Grannan v. Westchester Racing Assoc.*, 16 N. Y. App. Div. 8, it was held that an association for promoting horse racing, incorporated under the *New York* Laws of 1895, was, by virtue of its special privileges or franchise, a quasi-public corporation and was to be classed with bridges, ferries, and carrier companies.

**Eligibility to Race — Warranty.** — The plaintiff purchased at public auction a horse described in the catalogue of sale as "eligible to Coney Island Futurity, 1891." The vendor afterwards canceled the entry for that race, and the executive committee of the defendant refused entry of the horse. It was held that this representation of eligibility constituted no part of the conditions of sale; that the horse was not sold with his engagements, and that the court would not disturb the decision of the defendant's executive committee. *Corrigan v.*

*Coney Island Jockey Club*, 61 N. Y. Super. Ct. 393.

**Shows and Amusements — License.** — Where a statute provided that a city might license "theatricals and other exhibitions, shows, and amusements," it was held that horse races to which the public were admitted upon payment of the fee were shows and amusements. *Webber v. Chicago*, 148 Ill. 313. See generally the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*.

**Stake Race.** — The American racing rules under which a meeting was conducted defined a sweepstake as a race "for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated." It was further provided that in such a race a person entering a horse thereby became liable for the entrance money, stake, or forfeit. It was held that a "free handicap sweepstake," an entry under which created no liability if the horse should be declared out, was not a stake race within the meaning of a rule providing extra weight for winners of stake races. *Stone v. Clay*, 61 Fed. Rep. 889.

**Premium.** — The mere racing of horses is not illegal or against public policy; and where a premium or reward is offered by a third party, in good faith and not as a cover for betting, to the winner in such a race, the latter may recover the premium even though he paid an entrance fee which went to make up in part such premium. *Porter v. Day*, 71 Wis. 296. See also the title *GAMBLING CONTRACTS*, vol. 14, p. 614.

**Race Meeting.** — In *State v. Roby*, 142 Ind. 168, it was held that the term "race meeting" in a statute meant horse-race meeting, so that a provision regulating race meetings was not unconstitutional as embracing a subject not embraced in the title of an act, which declared the act to be for the purpose of regulating horse racing.

**Length of Meeting.** — An *Indiana* statute prohibited the holding of a race meeting upon one track for longer than fifteen days and more than twice in sixty days, or without an interval of thirty days. It was held that when a meeting held for fifteen days on one track was continued on two other tracks close beside it successively for fifteen days on each, with the same judges, horses, bookmakers, etc., by arrangement between the track owners, this was a violation of the statute. *State v. Forsythe*, 147 Ind. 466.

**Partnership.** — In *Biegler v. Merchants' L. & T. Co.*, 164 Ill. 197, it was held that equity had jurisdiction to entertain a suit for the dissolution of a partnership and settlement of partnership accounts, and the appointment of a receiver, although the partnership was formed for the purpose of carrying on the business of horse racing.

**Sale of Betting Privileges.** — The object of the legislature in enacting the latter part of subsection 2 of section 204 of the *Ontario* Criminal Code apparently was to reserve the race courses of incorporated associations as places where bets might be made during the actual progress of a race meeting, without the bettors being subject to the penalties of that section. An agreement for the sale of betting and gaming privileges at a race meeting, by an unin-



**HORSE RAILWAYS.** (See also the title **STREET RAILWAYS.**) — See note 1.

corporated association which is the lessor of an incorporated association, the owner of the race course, is not illegal. *Stratford Turf Assoc. v. Fitch*, 28 Ont. 579.

**Betting Ring.** — A statute that declares betting on horse races illegal except by persons within the inclosure where the race is run is not vicious class legislation. The classification is not arbitrary or capricious, and the act embraces all persons, and affects alike all who choose to place themselves within its reach. *Debardelaben v. State*, 99 Tenn. 649.

1. **Horse-railway.** — A company to whom were granted the exclusive railway privileges of a city, contended that the word *horse-railway* at the time of the grant was synonymous with "street railway." It was held that the term *horse-railway* was not used in the grant as significant of any other form of street railway than that which is now strictly known as a *horse-railway*, and cable roads were not included in the monopoly. *Omaha Horse R.*

*Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324.

In *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213, it was held that the grant of the right to lay *horse-railway* tracks along certain streets did not preclude the operation of such tracks by electricity.

**Horse Power.** — A statute granted to a street-railway company the right to operate its road with steam, *horse*, or other power; this was held to include electricity, although it was contended that "other power" must be construed to mean "other power similar to *horse* power." The court said: "*Horse* power is the only animal power which has ever been used for the traction of street-railway cars in our northern cities, and it is the only animal power which could have occurred to the general assembly as fit to be used. The suggestion that 'other power' may mean mules cannot be entertained." *Taggart v. Newport St. R. Co.*, 16 R. I. 668.

# HORSES.

I. DEFINITION, 750.

II. SOUNDNESS, 751.

III. VICE, 754.

IV. WHAT CONSTITUTES UNSOUNDNESS OR VICE, 754.

## CROSS-REFERENCES.

See the titles ACCRETION, vol. 1, p. 467; AGISTMENT, vol. 2, p. 3; ANIMALS, vol. 2, p. 341; AUCTIONS AND AUCTIONEERS, vol. 3, p. 487; BICYCLES, vol. 4, p. 28; CARRIERS OF LIVE STOCK, vol. 5, p. 427; COMMERCIAL TRAVELERS, vol. 6, p. 225; CONTRACTS OF HIRE (LAW OF BAILMENTS), vol. 7, p. 299; CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; CROSSINGS, vol. 8, p. 421; CRUELTY TO ANIMALS, vol. 8, p. 443; DISTRESS, vol. 9, p. 644; EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 121, 126; GIFTS, vol. 14, p. 1006; HORSE RACING, ante; IMPLIED WARRANTIES, post; INNS AND INNKEEPERS; LIENS; LIVERY-STABLE KEEPERS; LOANS; MALICIOUS MISCHIEF; NEGLIGENCE; SALES; WARRANTY. And see BEASTS, vol. 3, p. 904; CATTLE, vol. 5, p. 771.

**I. DEFINITION.** — A horse is a hoofed quadruped of the genus *Equus* (*E. caballus*), having one toe to each foot, a mane, and a long flowing tail. It is supposed to be originally a native of Central Asia.<sup>1</sup> The term "horse" embraces generally all the classes and both sexes.<sup>2</sup>

**1. Definition.** — Webster's Dict.

In *State v. McDonald*, 10 Mont. 22, it was said: "A horse is 'a neighing quadruped used in war, draught, and carriage.' (Johns. Dict.) Webster uses the term in two senses: (1) Generically, as the animal simply, including all variations of age, sex, and condition; (2) specially, as indicating the male in distinction to the female. We believe that the term has a third sense, a popular sense, as denoting a castrated male in distinction to a stallion."

**Animals of the Horse Species.** — An indictment charged the defendant with the theft of "an animal of the horse species." The proof showed that the subject of the alleged theft was a horse. The court held the indictment sufficient, though it said: "Why the pleader did not describe the property stolen simply as a horse 'passeth our understanding.' Perhaps he was experimenting to ascertain how closely he could approach to the pitfall of bad pleading without falling into it." *Smythe v. State*, 17 Tex. App. 251.

**Detinue.** — In *Boggs v. Newton*, 2 Bibb (Ky.) 221, it was held that a declaration in detinue for a horse, without designating the animal either by name, color, size, figure, or any other characteristic mark, is bad.

**Real or Personal Property.** — In *Smitherman v. State*, 63 Ala. 26, it was said: "It is said that the designation of the property stolen as personal property cannot affect the validity of

the indictment, any more than the description of a horse, in an indictment for the larceny of that animal, as real property would make the indictment void; and the argument is a plausible one. But there is this difference in the cases: a horse cannot, under any circumstances, be realty. Of the two kinds of property, real and personal, a horse and other like chattels must necessarily be always personal. But of corn it is different."

**Horse Combination.** — On an indictment for selling lottery tickets it appeared that the tickets sold were headed, "Horse combination," and indorsed, "Decided to be legal by the highest tribunal in the state of Maryland." The purchaser testified that she bought the tickets as "policy" tickets, paying therefor nine cents, and that if she won she would get three dollars and sixty cents, and that she did not know whether the numbers on her tickets represented the numbers in a horse race or not. It was held that the tickets were admissible in evidence and the jury had the right to find that they were lottery tickets, as in fact they were. *Boylard v. State*, 69 Md. 511. See also the titles GAMING, vol. 14, p. 664; LOTTERIES.

**Work Horse.** — See WORK HORSE.

**2. Generic Term.** — *Ware v. Juda*, 2 C. & P. 351, 12 E. C. L. 165; *Haynes v. Crutchfield*, 7 Ala. 189; *South, etc., Alabama R. Co. v. Bees*, 82 Ala. 340; *People v. Pico*, 62 Cal. 52; *Taylor v. State*, 44 Ga. 264; *Baldwin v. People*, 2 Ill.

**II. SOUNDNESS.** — A horse is defined to be "sound" when he is free from hereditary disease, and is in the possession of his natural and constitutional

304; *Lunsford v. State*, 1 Tex. App. 448; *Pullen v. State*, 11 Tex. App. 91.

**Same — Indictment for Larceny.** (See also the title *LARCENY*, 12 ENCYC. OF PL. AND PR. 986.) — An indictment charged the larceny of a horse. This was held not sufficiently specific, the court saying: "The word 'horse,' as used in this section, is a generic term, which includes horse, as a species, mule, and ass. Horse, as a species, may again be subdivided into stallion, ridgling, gelding, and mare, and the same subdivision may be made as to mule and ass. Colloquially, the word 'horse,' among our people, usually means a male gelding of the horse species. So if section 4394 [of the code] was the only one with which we had to deal it would be proper to sustain this indictment on the idea that by it the defendant was sufficiently informed as to what kind of 'horse' he was charged with stealing; that is to say, he would understand the word 'horse' to mean what it usually does in everyday use and conversation. But the next section provides distinctly what indictments for this class of offenses shall contain, and declares that such indictments shall designate the nature, character, and sex of the animal, and also give some other description fixing its identity." *Brown v. State*, 86 Ga. 634.

**Same — Mares.** — In *State v. Dunnivant*, 3 Brev. (S. Car.) 9, 5 Am. Dec. 530, it was held that the word "horses," in a statute making it a felony maliciously to kill horses of another, included mares as *nomen generalissimum*. See also the title *MALICIOUS MISCHIEF*.

In *Ware v. Juda*, 2 C. & P. 351, 12 E. C. L. 165, it was held that an allegation in a declaration that the plaintiff lent a horse was supported by proof that he lent a mare.

In *Baldwin v. People*, 2 Ill. 304, it was held that proof that the defendant stole a mare or gelding will sustain an indictment for stealing a horse. See also *People v. Butler*, 2 Utah 504.

In an indictment for horse stealing, the animal, whether horse, mare, gelding, colt, or filly, may be described as a horse, although the statute mentions the particular species and gender. *Reg. v. Aldridge*, 4 Cox C. C. 143.

An indictment charged the stealing of a horse, while the proof showed that the animal taken was a mare. It was held that there was no variance. *People v. Pico*, 62 Cal. 52. To the same effect see *Davis v. State*, 23 Tex. App. 210; *State v. Ingram*, 16 Kan. 14.

In an action against a railroad company to recover damages for killing a horse, the complaint may be amended by describing the animal as a mare; and such amendment does not introduce a new cause of action against which the statute of limitations may be pleaded. *South, etc., Alabama R. Co. v. Bees*, 82 Ala. 340.

The term "horse" includes a mare. *Davis v. Collier*, 13 Ga. 491. This was upon the construction of an order of court directing the distribution of funds raised from the sales of a debtor's property.

But in *Thrasher v. State*, 6 Blackf. (Ind.) 460,

it was held that an indictment charging that the defendant suffered his mare to be run in a certain race, etc., was not supported by evidence that the animal run was a horse.

Where the defendant claimed a gray mare under a bill of sale executed in February, conveying "one gray horse, also one black horse and one gray mare," and the plaintiff claimed the same mare under a bill of sale executed in May following, conveying "two horses (one a bay and the other a gray mare)," and the mare was thereupon delivered to the plaintiff, it was held that the plaintiff was entitled to recover. *Miller v. Hahn*, 84 N. Car. 226.

**Same — Gelding Not Included.** — It has been held that an indictment for stealing a horse is not supported by evidence of the larceny of a gelding, and *vice versa*. *State v. Buckles*, 26 Kan. 237; *State v. Royster*, 65 N. Car. 539; *Hooker v. State*, 4 Ohio 348, 6 Wheel. Crim. L. 38; *Turley v. State*, 3 Humph. (Tenn.) 323; *Persons v. State*, 3 Tex. App. 240; *Jordt v. State*, 31 Tex. 571; *Banks v. State*, 28 Tex. 644; *Valesco v. State*, 9 Tex. App. 76; *Brisco v. State*, 4 Tex. App. 219; *Lunsford v. State*, 1 Tex. App. 448. But compare the cases *supra* and *infra*, this note.

An indictment for stealing "one iron-gray horse, a gelding," is not supported by proof of the stealing of an animal described as a horse or colt, and the variance between the allegation and proof is fatal. *State v. McDonald*, 10 Mont. 21.

A statute provided that every person convicted of stealing a horse, mare, gelding, colt, or filly should be guilty of grand larceny. It was held that evidence showing the larceny of a gelding would not sustain a charge for stealing a horse. *State v. Buckles*, 26 Kan. 241. The court said that if the statute had simply used the word "horse," and had not used the words "mare, gelding, colt, filly," etc., then proof of the larceny of a gelding would have been sufficient, as "horse" is generally used as a generic term including all animals of the horse kind. And so where the words of the statute were "horse, mare, or gelding, filly, foal, mule, or ass." *Turley v. State*, 3 Humph. (Tenn.) 324. See also *State v. Plunket*, 2 Stew. (Ala.) 12.

**Same — Gelding Included.** — In *Fein v. Territory*, 1 Wyo. 380, it was held that under an indictment for maliciously killing a horse testimony tending to prove the killing of a gelding was admissible.

In *People v. Butler*, 2 Utah 504, an indictment was for stealing two horses. The proof showed that one of the animals stolen was a gelding and the other a mare. It was held that the word "horse" included both gelding and mare. See also *State v. Donnegan*, 34 Mo. 67; *Baldwin v. People*, 2 Ill. 304; *Reg. v. Aldridge*, 4 Cox C. C. 143.

In *State v. Ingram*, 16 Kan. 19, it was said: "The fifth instruction refused was to the effect that if the proof showed the larceny of a horse, the jury must acquit, inasmuch as the indictment charged the larceny of a gelding. We think there was no error in refusing this



health and as much of his bodily perfection as is consistent with his natural formation.<sup>1</sup> A simple affirmation of soundness or mere expression of

instruction in the unqualified condition in which it was asked. Our statute, it is true, specifically mentions 'horse, mare, gelding, colt,' etc.; and the indictment charged the larceny of a gelding. But still, in common talk, the terms 'horse' and 'gelding' are used interchangeably."

**Same — Estray.** — The word "horse" in an estray law has been held to include a gelding. *Owens v. State*, 38 Tex. 557, where the court said: "It would be unreasonable to suppose that the legislature intended to exclude from among animals which might be estrayed that class of the horse kind called a gelding; since they may, as a general rule, be considered the most valuable animals of their kind, and at least as liable to stray from their owners. The word 'horse,' as used in the statutes of 1850, 1851, and 1866, defining the manner of estraying stock, was evidently intended to be used in a quasi-generic sense, to include every description of the male in contradistinction to the female or mare, whether stallion or gelding."

**Same — Affidavit for Continuance.** — In *Trevino v. State*, 1 Tex. App. 72, the appellant was indicted for theft of a "gelding" on June 29, 1875, arrested on the same day, and on the ensuing day he sued out attachments for several absent witnesses, which were returned "not found;" and thereupon he applied for a continuance, alleging in his affidavit that he could not go safely to trial without the testimony of two of such witnesses, by whom he expected to prove that the "horse" alleged to have been stolen was sold to the accused by one of such witnesses, who had the owner's authority to sell it; that the witnesses were not absent with the consent of the accused, etc. It was held that the showing was sufficient; that it was error to refuse the continuance on technical grounds, or because the affidavit called the animal a "horse" instead of a "gelding," it being manifest that the affidavit used the word in its ordinary, and not its statutory, significance.

**Same — Trover.** — In *Gravely v. Ford*, 2 *Ld. Raym.* 1209, it was held that evidence of trover and conversion of a gelding would support a count in trover for a horse.

**Mules.** — In *Goldsmith v. State*, 1 *Head (Tenn.)* 156, it was held that an indictment charging the offense of running a horse race in and along a public road was maintained by proof that mules and not horses were used. See also *Allison v. Brookshire*, 38 Tex. 199.

Mules and asses are embraced in the terms "cattle" and "horses," as used in a statute requiring railroad companies to maintain fences. *Toledo, etc., R. Co. v. Cole*, 50 *Ill.* 185; *Ohio, etc., R. Co. v. Brubaker*, 47 *Ill.* 462.

**Jackass.** — In *Robinson v. Robertson*, (Tex. App. 1884) 19 *Cent. L. J.* 237, a jackass was held exempt as a horse. See also *Richardson v. Duncan*, 2 *Heisk. (Tenn.)* 220.

**Colt Held to Be Within the Word "Horse."** — *Pullen v. State*, 11 *Tex. App.* 90. This case was upon an indictment for unlawfully branding a colt.

But in *Ames v. Martin*, 6 *Wis.* 361, it was

held that a colt four months old was not exempt under an exemption of a span of horses.

A statute prohibiting stallions from running at large was not intended to apply to colts until they were of such age as to be troublesome to mares or dangerous to be at large. *Aylesworth v. Chicago, etc., R. Co.*, 30 *Iowa* 459.

**Horse and Pony.** — In *Golden v. Cockril*, 1 *Kan.* 259, it was said: "Though a pony is defined by Webster to be a small horse, the terms 'horse' and 'pony' are not, in common usage and acceptance, synonymous or convertible terms; but, on the contrary, the term 'pony' is used to distinguish from horses in general a peculiar breed, having well-known and strongly marked characteristics. If the description in the mortgage of 'one pair of claybank horses' was meant to include 'a yellow pony with some white about him,' it must be deemed a singularly inapt and unsatisfactory description, nor is it aided in the slightest degree by the context." This case was upon a chattel mortgage in which the property mortgaged was described as "one pair of claybank horses."

**Includes Ridgling.** — A "ridgling" is not a gelding, but a horse. *Brisco v. State*, 4 *Tex. App.* 219.

**Horses and Cattle.** — See *CATTLE*, vol. 5, p. 771.

1. **Soundness.** — *Oliphant on Law of Horses* 71; *Kiddell v. Burnard*, 9 *M. & W.* 668; *Holliday v. Morgan*, 1 *El. & El.* 1, 102 *E. C. L.* 1, 28 *L. J. Q. B.* 9; *Elton v. Brogden*, 4 *Campb.* 281; *Coates v. Stephens*, 2 *M. & Rob.* 157; *Elton v. Jordan*, 1 *Stark.* 127, 2 *E. C. L.* 56; *Bolden v. Brogden*, 2 *M. & Rob.* 113; *Garment v. Barrs*, 2 *Esp.* 673; *Joliff v. Bendell*, *R. & M.* 136, 21 *E. C. L.* 397; *Watson v. Denton*, 7 *C. & P.* 85, 32 *E. C. L.* 446.

Chief Justice Best, in *Best v. Osborne*, *R. & M.* 290, held that "sound" meant "perfect."

"The word 'sound' means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted to be sound." *Per Parke, B.*, in *Kiddell v. Burnard*, 9 *M. & W.* 670. And in the same case *Alderson, B.*, said: "The word 'sound' means sound, and the only qualification of which it is susceptible arises from the purpose for which the warranty is given. If, for instance, a horse is purchased to be used in a given way, the word 'sound' means that the animal is useful for that purpose; and 'unsound' means that he at the time is affected with something which will have the effect of impeding that use."

In *Burton v. Young*, 5 *Harr. (Del.)* 233, it was said: "Any disease, infirmity, or defect which renders the horse less fit for present use and convenience, and not openly and palpably visible, and which is discoverable only by persons of skill and judgment in regard to the qualities of horses, constitutes unsoundness."

**Immediate Use.** — A warranty of soundness in a horse or mule sold amounts to a warranty against any defects which render it not capable of immediate use in any fair work at which

opinion does not constitute a warranty, unless it is so intended and understood at the time; but with the attendant circumstances such affirmation may be submitted to the jury, and it is for the jurors to say whether it was intended as a warranty.<sup>1</sup> So whether a horse is in fact sound or unsound is a question for determination by the jury.<sup>2</sup> In a suit for breach of warranty of the soundness of a horse, it must be shown that the disease or defect existed at the date of the sale.<sup>3</sup>

the owner may choose to put it. If at the time of the sale the animal has any disease which either diminishes its actual usefulness, so as to make it less capable of work of any description, or which, in its ordinary progress, will diminish its natural usefulness, it is unsound. *Kenner v. Harding*, 85 Ill. 265. See also *Kiddell v. Burnard*, 9 M. & W. 668; *Coates v. Stephens*, 2 M. & Rob. 157.

In *Elton v. Brogden*, 4 Campb. 281, Lord Ellenborough said: "A warranty of soundness is broken if the animal at the time of the sale had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable."

"If a horse be afflicted with an infirmity which renders him less fit for immediate use than he otherwise would be, and less able to perform the proper and ordinary labor of a horse, it would seem but reasonable that it should be regarded as an unsoundness." *Per Woods, J.*, in *Roberts v. Jenkins*, 21 N. H. 116. See also *Elton v. Jordan*, 1 Stark. 127, 2 E. C. L. 56.

But in *Bolden v. Brogden*, 2 M. & Rob. 113, it was held that a slight disorder in a horse at the time of the sale, not calculated permanently to diminish his usefulness, but which was temporary merely and from which he ultimately recovered, was not an unsoundness. See also *Garment v. Barrs*, 2 Esp. 673.

**1. Warranty.** (See also the titles IMPLIED WARRANTIES, *post*; WARRANTY.)—*Lindsay v. Davis*, 30 Mo. 406; *Halliday v. Briggs*, 15 Neb. 219; *Erskine v. Swanson*, 45 Neb. 767; *Wolcott v. Mount*, 36 N. J. L. 262; *Horton v. Green*, 66 N. Car. 596; *Osborne v. McCoy*, 107 N. Car. 730; *Baum v. Stevens*, 2 Ired. L. (24 N. Car.) 411; *Erwin v. Maxwell*, 3 Murph. (7 N. Car.) 241; *McFarland v. Newman*, 9 Watts (Pa.) 55; *Hahn v. Doolittle*, 18 Wis. 196.

**Examples.**—In *Wood v. Smith*, 4 C. & P. 45, 19 E. C. L. 267, the plaintiff, in buying a mare, said to the defendant: "She is sound, of course?" and the defendant replied: "Yes, to the best of my knowledge." On the plaintiff's asking: "Will you warrant her?" the defendant replied: "I never warrant; I would not even warrant myself." Lord Tenterden, C. J., held that the expressions used constituted a warranty and that the defendant was liable if he knew the mare to be unsound.

A bill of sale of "one pair of black geldings, sound and kind," establishes a warranty of soundness, especially where the seller had peculiar means of knowing the fact which the buyer did not have. *Hobart v. Young*, 63 Vt. 363. See also *Brown v. Bigelow*, 10 Allen (Mass.) 242.

But in *Holmes v. Tyson*, 147 Pa. St. 305, it was held that an affirmation from the vendor to the vendee at the time of sale, that the horse

was sound and gentle, amounted only to a representation and did not constitute a warranty. See also *Jackson v. Wetherill*, 7 S. & R. (Pa.) 480; *McFarland v. Newman*, 9 Watts (Pa.) 55.

On the sale of a horse, the words, "He is a good horse to work, and a good, substantial, honest horse," do not warrant the horse's soundness. *Hardy v. Anderson*, 7 Kulp (Pa.) 306.

**Implied Warranty—Latent Defects.**—There is no implied warranty where the seller is silent, although he is aware of latent defects. *Court v. Snyder*, 2 Ind. App. 440. See also the title IMPLIED WARRANTIES, *post*.

**Communication of Disease.** (See also the title ANIMALS, vol. 2, p. 380.)—A general warranty that an animal is sound and free from disease is necessarily a warranty against diseases of all kinds, including those which are infectious or contagious, and renders the warrantor liable for damages caused by the communication of such a disease to other stock with which the animals sold are properly placed in the course of business, and also for such other damages and expenses as are the direct and natural result of the breach of warranty. *Joy v. Bitzer*, 77 Iowa 73.

**Same—Implied Warranty.**—Where one purchases a lot of mules, some of which are infected with a contagious disease, which they soon afterwards, without fault of the purchaser, communicate to others in the lot, and the disease is of such a nature as to render the stock infected with it absolutely worthless, such a defect is covered by an implied warranty; and the vendee, in a suit for damages growing out of a breach of such warranty, is entitled to recover the purchase price of all the stock thus lost, together with expenses that he has properly and reasonably incurred in quarantining animals to prevent a spread of the disease and in doctoring and in otherwise taking care of them. *Snowden v. Waterman*, 105 Ga. 384. See also the title IMPLIED WARRANTIES, *post*.

**Burden of Proof.**—In an action on a warranty of a horse the plaintiff must positively prove that the horse was unsound. *Eaves v. Dixon*, 2 Taunt. 343.

**Evidence.**—Where the defendant's witnesses testified that the horse in controversy was sound, it was held no error to exclude testimony as to the price that they also offered for it. *Hobart v. Young*, 63 Vt. 363.

**2. Question for Jury.** (See generally the title QUESTIONS OF LAW AND FACT.)—*Lewis v. Peake*, 7 Taunt. 153, 2 E. C. L. 153; *Ellis v. Loftus Iron Co.*, 31 L. T. N. S. 483, 1 So. L. Rev. N. S. 186; *Lindsay v. Davis*, 30 Mo. 406; *Whitney v. Taylor*, 54 Barb. (N. Y.) 536.

**3. Time.**—*Kiddell v. Burnard*, 9 M. & W. 670; *Stamm v. Kuhlmann*, 1 Mo. App. 296; *Bailey v. Forrest*, 2 C. & K. 131, 61 E. C. L.



**III. VICE.** — A vice is a bad habit; and a habit, to constitute a vice, must either be shown by the temper of the horse, so as to make him dangerous or diminish his natural usefulness, or it must be a habit decidedly injurious to his health.<sup>1</sup>

**IV. WHAT CONSTITUTES UNSOUNDNESS OR VICE.** — Various diseases and habits of horses which do or do not constitute unsoundness or vice are specified in alphabetical order in the notes.<sup>2</sup>

131; *Postel v. Oard*, 1 Ind. App. 252; *Brown v. Jones*, 24 Ala. 463; *Miller v. McDonald*, 13 Wis. 673; *Buford v. Gould*, 35 Ala. 265; *Burton v. Young*, 5 Harr. (Del.) 233.

Thus proof that the horse balked seven weeks after the time when it was sold with a warranty that it was true to harness, relates to a time too remote to be admissible for the purpose of showing a breach of warranty existing at the time of the sale. *Smith v. Swarthout*, 15 Wis. 550. Compare *Daniells v. Aldrich*, 42 Mich. 58; *Finley v. Quirk*, 9 Minn. 194, 86 Am. Dec. 93.

Evidence of unsoundness is not sufficient to entitle the defendant to a verdict in an action for the price of a horse, unless the unsoundness be shown to have existed, either actually or potentially, at the time when the warranty was made. *Myers v. M'Farlane*, 3 Brev. (S. Car.) 513.

Proof of unsoundness at the time of the sale and warranty is proof of a breach thereof, without showing that the disease under which the animal afterward labored was the same as that existing at the time of the warranty. *Buford v. Gould*, 35 Ala. 265.

**Incipient Disease.** — But there is a breach of warranty of soundness where at the time of the sale the animal is suffering with a disease which is not then fully developed, but of which he afterwards dies, or which conduces to or results in a disease which afterwards proves fatal. *Fondren v. Durfee*, 39 Miss. 324; *Shewalter v. Ford*, 34 Miss. 417; *Thompson v. Bertrand*, 23 Ark. 730. Thus an allegation that a horse had the glanders at the time of the sale is sustained by proof that at such time he had the seeds of that disease, which afterwards developed into the perfect disease. *Woodbury v. Robbins*, 10 Cush. (Mass.) 520.

To constitute a breach of warranty of the soundness of an animal, the disease must have existed in a formed state at the time of the sale, and must have been of a permanent character, calculated materially to affect the value of the animal. *Wade v. DeWitt*, 20 Tex. 398.

1. *Oliphant on Law of Horses* 74; *Scholefield v. Robb*, 2 M. & Rob. 210.

2. **Age.** — A warranty that a horse is "sound and kind" does not extend to his age. *Willard v. Stevens*, 24 N. H. 271.

A representation at the time of the sale that a horse is fourteen years old is a warranty that he is no older. *Burge v. Stroberg*, 42 Ga. 89.

**Balkiness.** — The fact that a horse, on trial three or four days after purchase, proved to be balky is evidence that he was balky at the time of purchase. *Finley v. Quirk*, 9 Minn. 194.

**Blindness.** — The want of sight in an eye is a breach of a warranty of soundness. But it is

said that the mere statement that the horse's eyes are "as good as any horse's eyes in the world" does not of itself amount to a warranty. *House v. Fort*, 4 Blackf. (Ind.) 293.

In *Burton v. Young*, 5 Harr. (Del.) 233, it was said: "If a horse is deprived of sight in one eye, or the eye is defective, and this is only discoverable by persons skilled in horses, it constitutes unsoundness."

A warranty that a horse "is all right except that he will sometimes shy" amounts to a warranty of soundness; and such a warranty is broken where the horse proves to be partially blind. *Kingsley v. Johnson*, 49 Conn. 462.

**Bone Spavin.** — Bone spavin in the hock is unsoundness in a horse, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after. *Watson v. Denton*, 7 C. & P. 85, 32 E. C. L. 446.

**Castration.** — The want of castration in a male mule does not constitute a breach of warranty of his soundness. *Duckworth v. Walker*, 1 Jones L. (46 N. Car.) 507.

**Cataract** has been held to be unsoundness. *Higgs v. Theale*, before Pollock, C. B., Guildhall, Feb. 18, 1850.

**Chest Founder.** — Where, in an action on a warranty of a horse, the plaintiff obtained a verdict on the ground that the horse was chest-founded, the court refused to grant a new trial on the grounds that there was no known disease to constitute such an unsoundness, or that the defendant was taken by surprise, although the plaintiff, on application, had refused to inform him of the cause or nature of the unsoundness. *Atterbury v. Fairmanner*, 8 Moo. 32, 17 E. C. L. 99.

**Contraction of Hoof.** — Contraction of the hoof, where it is produced by inflammation, or accompanied by disease in the foot or any alteration in its natural structure, though it may not cause lameness at the time of sale, is an unsoundness if lameness be afterwards produced by it. *Greenway v. Marshall*, sitting Dec. 9, 1845; *Oliphant on Law of Horses* 81.

**Coughs and Colds.** — In *Bolden v. Brogden*, 2 M. & Rob. 113, Lord Coleridge held that a mere slight cold no more constituted unsoundness in a horse than it did in a human creature; but in *Coates v. Stephens*, 2 M. & Rob. 157, the rule was laid down that a cough at the time of the sale of a horse warranted sound is an unsoundness, and a breach of the warranty, though it be afterwards cured without any permanent injury to the horse.

"While a horse has a cough I say he is unsound, although that may either be temporary or may prove mortal." *Per* Lord Ellenborough in *Elton v. Brogden*, 4 Campb. 281. See also *Elton v. Jordan*, 1 Stark. 127, 2 E. C. L. 56. And see *Shillitoe v. Claridge*, 2 Chit.



425, 18 E. C. L. 386; *King v. Price*, 2 Chit. 416, 18 E. C. L. 383.

No distinction can be drawn from the slightness of the disease or the facility of the cure. Of course, if the disease is slight, the unsoundness is proportionally so, and so also ought to be the damages. *Kiddell v. Burnard*, 9 M. & W. 670.

**Crib Biting.** — Where it has not yet produced disease or alteration of structure, crib biting is not an unsoundness, but a vice, under a warranty that a horse is sound and free from this. *Scholefield v. Robb*, 2 M. & Rob. 210.

It is a mere accident arising from bad management in the training of a horse, and is no more connected with unsoundness than starting and shying. Its existence in a horse will not entitle a purchaser who bought under a general warranty to maintain an action for the breach of it on this fault alone. *Broennenburgh v. Haycock*, Holt N. P. 630, 3 E. C. L. 247. In this case the horse was only proved to be an incipient crib biter.

But cribbing affecting the health and condition of a horse so as to render him less able to perform service and of less value is unsoundness. *Washburn v. Cuddihy*, 8 Gray (Mass.) 430.

In *Walker v. Hoisington*, 43 Vt. 611, the court said: "As to this the auditor has found that the plaintiff warranted the horse to be sound and right. Perhaps this horse was physically sound although he was what is called a cribber, and perhaps not; as to that we make no decision and express no opinion; but the warranty was as to more than soundness, it was that the horse was sound and right. A fair interpretation of this warranty would make it mean that the horse was right in conduct and behavior as to all matters materially affecting its value, as well as in physical condition."

In *Dean v. Morey*, 33 Iowa 120, it was held that failure on the part of the defendant, in the sale of a horse to the plaintiff, to disclose his knowledge that the horse was a cribber, furnished no cause of action, it being shown that an examination of the horse's mouth by the plaintiff would have shown the defect.

**Curb — Curby Hocks.** — A horse with a curb is unsound, but a horse with curby hocks is not unsound. *Brown v. Elkington*, 8 M. & W. 132; *Dickenson v. Follett*, 1 M. & Rob. 299.

**Cutting.** — As cutting is not a disease or a habit, but arises from a defective structure, it is neither a vice nor an unsoundness. *Dickinson v. Follett*, 1 M. & Rob. 299. See *infra*, this note, *Defective Formation*.

**Defective Formation.** — Where a horse is warranted sound, the buyer cannot recover for a breach of the warranty unless he shows that the horse was unsound at the time of the sale; and mere defective formation not producing lameness at that time is not an unsoundness within the meaning of a warranty. *Bailey v. Forrest*, 2 C. & K. 131, 61 E. C. L. 131; *Dickenson v. Follett*, 1 M. & Rob. 299; *Brown v. Elkington*, 8 M. & W. 132.

**Dropsy.** — Dropsy of either the skin or the heart constitutes unsoundness. See *Eaves v. Dixon*, 2 Taunt. 343.

**Foal.** — The fact that a mare is with foal is not a breach of a warranty of soundness or fitness. *Whitney v. Taylor*, 54 Barb. (N. Y.) 536.

**Glanders.** — "The moment that symptoms of glanders appear in a horse — indications of the incipency of the disease — that is, if he really have the seeds of it in him, he is unsound, although it may be some time before the disease becomes fully developed in its most offensive conditions. And it is the future history of the case which is to show whether it was the glanders or not." *Woodbury v. Robbins*, 10 Cush. (Mass.) 520. See also *Horton v. Green*, 66 N. Car. 596; *Baird v. Graham*, 14 Ct. Sess. Cas. 615.

In *Reg. v. Henson*, Dears. C. C. 24, to bring a horse infected with the glanders into a public place, to the danger of infecting the queen's subjects, was held to be a misdemeanor at common law.

Where, in a suit to recover damages for a fraudulent representation of soundness, the plaintiff avers in his petition that the disease constituting the unsoundness is glanders, he is bound to prove such allegation; although unnecessary, it is not immaterial when made. Although the plaintiff in such case must show that the disease constituting the unsoundness is glanders, yet it is not necessary to show that the defendant knew that the animal sold by him was affected with the alleged form of disease; it is enough that he knew the animal to be unsound. *Lindsay v. Davis*, 30 Mo. 406.

**Harness, Quietness in.** — "If the horse was purchased to use in harness, if the vendor said it was all right, and it was actually ungovernable in harness, though a good saddle horse, that would be a breach of the warranty." *Per Paine, J.*, in *Smith v. Justice*, 13 Wis. 602. See also *Woodruff v. Weeks*, 28 Conn. 328.

**Hereditary Diseases.** — It would be no doubt a matter of great difficulty to maintain an action on a breach of warranty of soundness on the sale of a horse, on the ground of hereditary disease alone; but it is presumed to be just possible that if some general decay of the system or such like, developing itself after sale, could be proved to be hereditary, the purchaser might have his action. *Oliphant on Law of Horses* 92. An analogous case is found in goggles in sheep. *Joliff v. Bendell*, R. & M. 136, 21 E. C. L. 397.

**Kicking** is a vice in the temper of the animal. *Scholefield v. Robb*, 2 M. & Rob. 210.

**Lameness**, either temporary or permanent, is an unsoundness. *Coates v. Stephens*, 2 M. & Rob. 157; *Kiddell v. Burnard*, 9 M. & W. 670; *Elton v. Brogden*, 4 Campb. 281; *Elton v. Jordan*, 1 Stark. 127, 2 E. C. L. 56; *Garment v. Barrs*, 2 Esp. 673; *Erskine v. Swanson*, 45 Neb. 767.

Where a horse is warranted sound except as to a specified defect, and it appears that he was sound at the time of the sale except so far as this defect made him unsound, there is no breach of warranty, even though the defect may make him lame. *Morrill v. Bemis*, 37 Vt. 111.

A bill of sale of a horse, "sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week before the sale, and his lameness was palliated at the time of the sale, and the vendor then refused to give a warranty. *Brown v. Hoffman*, 10 Allen 311.

In *Hoffman v. Oates*, 77 Ga. 705, it was said:

**HOSIERY.** — See note 1.

"There is certainly no error in the charge that an implied warranty, arising upon the fitness of the thing sold for ordinary use, does not embrace defects discoverable by ordinary prudence and care. There is abundant evidence that these defects in the three horses were discoverable by such care and prudence. Starting the deaf horse would discover his defect. The moon-eyes were visible, and the sprained condition of the third might be as easily discovered."

**Navicular Joint Disease** is unsoundness. *Bywater v. Richardson*, 1 Ad. & El. 508, 28 E. C. L. 135; *Matthews v. Parker*, *Oliphant on Law of Horses* 471.

**Nerved Horse.** — A horse upon which the operation of nerving has been performed is unsound. *Best v. Osborne*, R. & M. 290.

**Overreaching** arises from the bad formation of the horse, and is neither an unsoundness nor a vice. *Brown v. Elkington*, 8 M. & W. 132; *Dickenson v. Follett*, 1 M. & Rob. 299.

**Plunging.** — In *Hall v. Colyer*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 80r, a warranty that a team was sound in every respect was held broken if one of the horses had a habit of making sudden plunges.

**Ringbone Held to Be Unsoundness.** — *Erskine v. Swanson*, 45 Neb. 768; *Hobart v. Young*, 63 Vt. 363.

**Roaring.** — Roaring constitutes an unsoundness in a horse if it renders him less serviceable for a permanency. *Onslow v. Eames*, 2 Stark. 81, 3 E. C. L. 326. But it is said not to be an unsoundness unless it is shown to proceed from some disease or organic defect. *Bassett v. Collis*, 2 Campb. 523. See also *Quintard v. Newton*, 5 Robt. (N. Y.) 72.

**Running Away.** — In an action for breach of warranty and deceit in the sale of a horse, the warranty was shown to be that the horse was kind and gentle and would work anywhere. The plaintiff claimed damages for injuries received by the running away of the horse. It was held that where there was no evidence to show that the defendant knew or had reason to believe that the horse was vicious or unsafe, the plaintiff was not entitled to recover for personal injuries. *Jones v. Ross*, 98 Ala. 448.

**Frightened at Trolley Car.** — In *Meyer v. Krauter*, 56 N. J. L. 696, where the vendee was a woman, and the vendor told her, "This is your horse, exactly the horse you want," and used other language of a like kind, it was held that this was no warranty against the horse's taking fright at a trolley car.

**Shortsightedness.** — A warranty of soundness on the sale of a horse is broken by a congenital malformation rendering him, at the time of sale, less fit for reasonable use. An extraordinary convexity of the cornea of the eye, producing shortsightedness and a liability to shy, is a malformation within this rule, and is not such a patent defect that a purchaser with express warranty is bound to notice it. *Holiday v. Morgan*, 1 El. & El. 1, 102 E. C. L. 1.

**Shying**, when confirmed, the result of playfulness, cowardice, etc., is a vice; when the result of defective sight, an unsoundness. *Holiday v. Morgan*, 28 L. J. Q. B. 9.

**Spavin.** — In *Fitzgerald v. Evans*, 49 Minn.

541, it was held that a special warranty upon a sale of a horse might be made to cover blemishes or defects, such as a spavin, which are open and visible, as well as other defects, if the intention to do so is carefully manifested. In this case the spavin was obvious and visible in the hock joint of the animal, but was of such character that it was uncertain in the mind of the plaintiff whether it would be harmless or injurious. See also *Chase v. Nichols*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 878.

**Splints.** — Some splints cause lameness; others do not. A splint, therefore, is not a patent defect against which a warranty is inoperative. The defendant, therefore, having warranted a horse sound at the time of the sale, is liable on his warranty if the horse afterwards becomes lame from the effects of a splint visible when the defendant sold him. *Margetson v. Wright*, 8 Bing. 454, 21 E. C. L. 342, 1 Moo. & S. 622; *Smith v. Bryant*, 10 Jur. N. S. 1107, 13 W. R. 79, 11 L. T. N. S. 346.

**Stumbling.** — A warrant that a horse is sure-footed and all right in every respect, except only his stumbling from temporary causes, is broken if he has such an organic defect that his stumbling can be avoided only by a peculiar method of shoeing, which fact the vendee, though using reasonable diligence, is unable to discover. *Morse v. Pitman*, 64 N. H. 11.

**Thinness of Sole.** — In *Bailey v. Forrest*, 2 C. & K. 131, 61 E. C. L. 131, the jury held thin-soled feet to be no breach of a warranty of soundness, under this instruction: "The mere fact of the horse in question being thin-soled at the time of the sale is not sufficient to constitute a breach of the warranty of soundness \* \* \* unless you are of opinion that that peculiar formation had produced, at the time of the sale, actual lameness."

**Warts**, unless they impede some natural function, do not constitute unsoundness. *Kiddell v. Burnard*, 9 M. & W. 670.

**Whistling.** — Whistling is generally considered unsoundness. *Onslow v. Eames*, 2 Stark. 81, 3 E. C. L. 326. See also *Moore v. Haviland*, 61 Vt. 58, holding that while expert testimony as to what whistling in horses is, and how it affects them, is competent, it cannot be shown thereby that whistling is universally regarded by those familiar with horses as unsoundness, it being for the jury to say whether the alleged unsoundness exists. But it is proper to allow the expert, a veterinary surgeon, who had opportunities for observing the horse's condition, to testify that he saw no indications that the horse was a whistler, and that he would have noticed such indications if they had existed.

**Yellows**, otherwise jaundice, is unsoundness. See *Oliphant on Law of Horses*.

1. **Hosiery — Tariff.** — In *Hall v. Hoyt*, 2 Hunt Mer. Mag. 342, 11 Fed. Cas. No. 5,934, it was held that *hosiery*, as used in a tariff law, has a more general meaning than "stockings," and signifies a class or description of goods. See also *Hadden v. Hoyt*, 2 Hunt Mer. Mag. 269, 11 Fed. Cas. No. 5,890. And see the title **REVENUE LAWS**.

# HOSPITALS AND ASYLUMS.

By W. J. TRACY.

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*See also the titles ABATEMENT OF NUISANCES*, vol. 1, p. 63; *BOARDS OF HEALTH*, vol. 4, p. 596; *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 893; *EXEMPTIONS FROM TAXATION*, vol. 12, p. 266; *LYSAINVITY; MUNICIPAL CORPORATIONS; POLICE POWER; PUBLIC OFFICERS*.

**I. SCOPE OF TITLE.** — This article is devoted to institutions for the sick or injured, the afflicted or diseased in body or mind; to hospitals or asylums for infants and orphans, and for aged and superannuated persons; also to hospitals for sick or injured animals. With institutions for educational or correctional purposes, or with alm-houses, poorhouses, and similar organizations, it has nothing to do. All these topics are, or will be, fully treated under their appropriate heads.<sup>1</sup> The article is further restricted because of the fact that hospitals and asylums have already been fully considered in their important relations to the law of charities and trusts for charitable uses and exemptions from taxation.<sup>2</sup>

**II. DEFINITIONS** — **Hospitals and Asylums** — **Hospital.** — An institution for the reception and care of sick, wounded, infirm, and aged persons; generally incorporated, and then of the class of corporations called charitable and eleemosynary.<sup>3</sup>

1. See the titles *HOUSES OF REFUGE AND CORRECTION*, *PAUP*; *POOR AND POOR LAWS*.

2. See the titles *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 897; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 266.

3. **Hospitals** are eleemosynary institutions designed for the benefit of poor and indigent persons. Anciently, the term "hospital" included both hospitals, popularly so called, and colleges. *Philips v. Bury*, 2 T. R. 346.



**Asylum.** — An institution for the protection and relief of the unfortunate.<sup>1</sup>

The Words "Charitable" and "Eleemosynary" are now considered synonymous. "Eleemosynary" is less broad and comprehensive, but in legal acceptance the expressions are substantially equivalent.<sup>2</sup>

**Titles, Names, or Appellations.** — Hospitals and asylums, sometimes when founded by private benefaction, less frequently when created by statute, have bestowed upon them names or appellations of a nature more or less fanciful. Such terms as "Home," "House," "Protectory," "Rest," "Sanitarium," "Harbor," "Shelter," "Institute," "Retreat," and the like, commonly enter into and form part of the name of the new institution. The name, of course, is of little importance, where the purpose and design are clear and properly carried out.<sup>3</sup>

**III. CLASSIFICATION.** — All hospitals and asylums may be divided into two general classes, public or private.

**1. Public Hospitals and Asylums.** — To constitute a public hospital, four elements or conditions must be present: the purpose must be charitable; the benefits gratuitously furnished;<sup>4</sup> the beneficiaries unrestricted and indefinite within the extent of the charity,<sup>5</sup> and the institution itself must be of governmental foundation and under governmental control.<sup>6</sup>

**1. Asylum.** — See the word ASYLUM, vol. 3, p. 167; State v. Bacon, 6 Neb. 291; Curtis v. Allen, 43 Neb. 189.

**Institution for the Blind — When an Asylum — Nebraska.** — Where educational institutions are under one department of the state government, and asylums under another department, it has been held that an institution where the blind were maintained and educated at public expense was an asylum rather than a school. State v. Bacon, 6 Neb. 286.

**Soldiers' Home an Asylum.** — In Wolcott v. Holcomb, 97 Mich. 361, the court, by Grant, J., held that a certain "Soldiers' Home," of the same type and nature as those established in nearly all the states, was an asylum; that it was purely eleemosynary in character, and that all institutions in the state established and maintained at the public expense for the care, education, and support of the unfortunate belong to this class of institutions, and are included in the term "asylum" as used in the constitution. "It is immaterial whether they are called schools, retreats, homes, or asylums."

**2. 'The Words 'Charitable' and 'Eleemosynary'** are practically synonymous, the latter being technically employed to designate a class of corporations organized for charitable purposes." People v. Fitch, 12 N. Y. App. Div. 584, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 188. See also the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 895, note.

**3. Name of Little Importance.** — See Atty.-Gen. v. Moore, 19 N. J. Eq. 517.

"An asylum may be a society, and a society may be an asylum. It is the thing, the corporate being, and not the name of the thing or corporate being, which is material." Dougherty v. Vandever, 5 Del. Ch. 71.

**4. See Philadelphia v. Masonic Home,** 160 Pa. St. 578, 40 Am. St. Rep. 736.

Probably in all or in the majority of both public and private charitable hospitals and asylums, where a patient or inmate is financially able to pay wholly or in part for his

treatment, maintenance, and general care, it is customary to require that such payment should be made. But the circumstance does not alter the character of the institution.

**5. Beneficiaries Unrestricted and Indefinite — United States.** — Russell v. Allen, 107 U. S. 167; Vidal v. Philadelphia, 2 How. (U. S.) 192. *Connecticut.* — Hearn v. Waterbury Hospital, 66 Conn. 98.

*Louisiana.* — Auch's Succession, 39 La. Ann. 1045.

*Massachusetts.* — McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529.

*Michigan.* — Downes v. Harper Hospital, 101 Mich. 555, 45 Am. St. Rep. 427.

*Missouri.* — Howe v. Wilson, 91 Mo. 51, 60 Am. Rep. 226.

*New York.* — Van Tassel v. Manhattan Eye, etc., Hospital, (Supm. Gen. T.) 15 N. Y. Supp. 620; Joel v. Woman's Hospital, 89 Hun (N. Y.) 73; Ward v. St. Vincent's Hospital, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 91.

*Pennsylvania.* — Philadelphia v. Fox, 64 Pa. St. 182; Donohugh's Appeal, 86 Pa. St. 309; Philadelphia v. Masonic Home, 160 Pa. St. 578, 40 Am. St. Rep. 736; Croxall's Estate, 162 Pa. St. 580.

*Canada.* — Donaldson v. General Public Hospital, 30 N. Bruns. 279.

It is obvious, however, that a certain degree of definiteness must, of necessity, be required and recognized. A public hospital or asylum is usually, perhaps invariably, designed for the benefit of the residents of a particular state, county, or municipality. Applicants for admission must, ordinarily, reside within certain territorial limits, and such fact — except perhaps in "emergency cases" — must be established before admission can be secured.

**6. See Dartmouth College v. Woodward,** 4 Wheat. (U. S.) 673; Head v. Curators, 47 Mo. 224.

"A Charity May Be Public though Administered by a Private Corporation; and to hold a corporation to be public because the charity was public would be to confound the popular with

**2. Private Hospitals and Asylums.** — There are many hospitals and asylums, whose foundation or organization is due to private philanthropy, which do not confine their benevolent ministrations to definite beneficiaries, but, like public hospitals, succor and relieve all within the legitimate scope and compass of their charity. Such institutions, from the nobleness of their design, are the instruments of incalculable good and are much favored at law.<sup>1</sup>

**Payments by Patients Financially Able Do Not Affect Status of Institution.** — As already stated in relation to public hospitals and asylums, the character of the institution is in no way changed by the fact that a patient or inmate of a private charitable hospital or asylum who is financially able to pay wholly or in part for his board, treatment, and care generally, will usually be required to do so. Where the funds so received are disbursed further to aid and relieve suffering in the legitimate mission of the hospital or asylum, the law will regard them as an incidental addition to the trust fund or income.<sup>2</sup>

**Beneficiaries Definite and Restricted.** — In many, perhaps in most, cases where hospitals or asylums are founded by private or individual benefaction, for purposes recognized by law as charitable and to furnish benefits gratuitously, the beneficiaries are strictly defined and restricted. The recipients of the charity are not "determined by some distinction which involuntarily affects or may affect any of the whole people,"<sup>3</sup> but they are limited and selected according to the pleasure of the founder. Institutions of this nature are usually established for the benefit of the sick, injured, helpless, or superannuated of some particular order, employment, church, religious sect or denomination, brotherhood, association, or society.

**Hospitals Maintained by Certain Corporations for the Benefit of Their Employees.** — It is not unusual for a railroad, manufactory, or other corporation, having in its service a large force of men, the nature of whose employment exposes them to physical danger, to maintain a hospital for sick or injured employees. Frequently the employees contribute to the support of such institution. Hospitals of this character fall within the present class — eleemosynary and charitable, but with definite beneficiaries.<sup>4</sup>

**Hospitals of Mutual Benevolent and Friendly Societies.** — In this class also belong hospitals and asylums of mutual benevolent or friendly societies, established for

the strictly legal sense of terms, and to jar with the whole current of decisions from the time of Lord Coke." *Regents v. Williams*, 9 Gill & J. (Md.) 401, 31 Am. Dec. 72, citing 2 Kent's Com. 273. See also *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 671.

**Status of Private Eleemosynary Corporation Not Changed by Receipt of Public Money.** — Where a corporation is eleemosynary and private at first, subsequent endowments by the state cannot affect its character and make it public. *Regents v. Williams*, 9 Gill & J. (Md.) 298, 31 Am. Dec. 72.

**1. Private Eleemosynary Corporation.** — See *Vincennes University v. Indiana*, 14 How. (U. S.) 276; *Cleaveland v. Stewart*, 3 Ga. 291; *Board of Education v. Bakewell*, 122 Ill. 339; *Washingtonian Home v. Chicago*, 157 Ill. 424; *Downing v. Indiana State Board of Agriculture*, 129 Ind. 455; *Louisville v. Louisville University*, 15 B. Mon. (Ky.) 643.

**Right of Municipality to Maintain Its Indigent Sick at Private Hospital.** — In *Tucker v. Board of Aldermen*, 4 Nev. 20, right and authority had been given by statute to the common council of such city to "establish a board of health to prevent the introduction and spread of disease; to establish a city infirmary and

provide for the indigent;" also "to make all necessary contracts and agreements for the benefit of the city." The Supreme Court held that under this statute the defendant was authorized, where there was no infirmary belonging to the city, to contract for the care and maintenance of its indigent sick at private hospitals or in any other manner expedient.

**2. Payments by Patients Do Not Change Status of Institution.** — *American Asylum v. Phoenix Bank*, 4 Conn. 178, 10 Am. Dec. 112; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Gooch v. Association, etc.*, 109 Mass. 559; *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427; *People v. Purdy*, 58 Hun (N. Y.) 386; *Philadelphia v. State Hospital*, 154 Pa. St. 9; *St. Joseph's Hospital Assoc. v. Ashland County*, 96 Wis. 636. Compare *Rolls v. Miller*, 25 Ch. D. 206.

*3. Philadelphia v. Masonic Home*, 160 Pa. St. 578, 40 Am. St. Rep. 736.

**4. Hospitals for Employees of Certain Corporations — Eleemosynary, with Definite Beneficiaries.** — *Union Pac. R. Co. v. Artist*, 60 Fed. Rep. 366; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 651.



the benefit of their own members and maintained by dues or assessments levied upon the membership generally.

**Non-eleemosynary — Conducted as Business Enterprises for Profit.** — Private hospitals and asylums are sometimes organized and carried on as business enterprises, for the profit and advantage of those conducting them or financially interested therein. Such institutions, although frequently productive of much good, are not charitable or eleemosynary.<sup>1</sup>

**IV. INCORPORATION — Public Hospitals and Asylums — Usually Incorporated.** — A public hospital or asylum is almost invariably an incorporated body. Incorporation is generally necessary to its creation and continued existence.

**Apparent Exceptions.** — There are some cases which seemingly form exceptions to the general rule. Certain municipal hospitals are without charters, but are formed and maintained under the general delegated authority given by the state to municipalities. There seem, also, to be instances where municipal corporations, by authority of their charters, have organized permanent and general public hospitals and asylums, but have omitted securing for them any especial charters. Such an institution is not, of itself, an incorporated body, but is apparently a distinct department or branch of the municipal organization, for which the municipality is responsible.<sup>2</sup>

**Private Hospitals and Asylums — Incorporation Not Necessary unless Made So by Statute.** — Unless required by statute, incorporation is, of course, not necessary for the establishment or maintenance of a private hospital or asylum.<sup>3</sup>

**Effect of Incorporation.** — An unincorporated private eleemosynary hospital does not become a public charitable institution upon receiving a charter from the state. Incorporation adds to the permanency and stability of an institution, but does not change its nature.<sup>4</sup>

**V. PUBLIC AND PRIVATE CHARITABLE HOSPITALS AND ASYLUMS — 1. Closely Analogous at Law.** — A public charitable hospital or asylum and an incorporated private charitable hospital or asylum exercising public charity are in many respects so closely analogous that it may perhaps be safely said that the law itself regards them in much the same manner. This applies, however, to

**1. Ordinance Regulating Private Asylum Should Not Be Oppressive or Unreasonable.** — The petitioner owned twenty-two acres of land with a number of buildings thereon, which property he used in carrying on a private asylum or hospital for mild cases of insanity, nervous diseases, and habitual drunkenness, his business apparently being well established. Subsequently an ordinance was enacted in the county requiring every person engaged in the business of maintaining a private hospital or hospital for the insane to take out a license, and also requiring that the buildings used in the business, with the walls, etc., surrounding them, should be of a prescribed height, thickness, etc. The ordinance contained one or more provisions of seemingly needless strictness. The petitioner was arrested and imprisoned for maintaining a hospital in violation of this ordinance. The Supreme Court, by De Haven, J., held that such ordinance was, under the circumstances, unreasonable and void in each and all of its provisions. It was declared invalid and the petitioner was discharged. *Ex p. Whitwell*, 98 Cal. 73, 35 Am. St. Rep. 152.

**Right of Municipality to Prohibit Private Hospitals Within Its Limits — Louisiana.** — In the early case of *Milne v. Davidson*, 5 Mart. N. S. (La.) 409, the Supreme Court sustained the validity of an ordinance of the city of New Orleans prohibiting private hospitals within its incorporated limits. The court, however,

by Porter, J., in its opinion, conceded that in the common-law states the law might be differently construed and such an ordinance held oppressive. But the peculiar conditions existing in New Orleans, where an epidemic periodically occurred, justified the vesting of extensive discretion in the city council, and therefore the inhibition of private hospitals was justifiable.

**Municipality Cannot Require Private Hospital to Take Out License, unless Such Right Is Given Municipality.** — See *Bessonies v. Indianapolis*, 71 Ind. 190.

**2. An Unincorporated Institution, organized, administered, and maintained by a municipality, and known as "The Insane Asylum," may be the object of a charitable bequest.** A bequest to such an institution is intended for the relief of the indigent insane of the city, and vests, at the testator's death, in the municipality for the use of the unfortunate cared for by it. *Vance's Succession*, 39 La. Ann. 371. See the title *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 893.

**3. Incorporation Adds to Permanency, but Does Not Otherwise Change Status.** — In the frequently cited case of *Atty.-Gen. v. Pearce*, 2 Atk. 87, Lord Chancellor Hardwicke declared that the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be.

**4. Atty.-Gen. v. Pearce, 2 Atk. 88.**



private institutions dispensing what some statutes term "purely public charity;" that is, to institutions whose beneficiaries are indefinite and unrestricted, rather than to those whose bounty is limited to particular beneficiaries.

**2. Support and Maintenance.** — There are, ordinarily, but three sources of revenue by which public or private charitable hospitals and asylums are supported and maintained: receipts of public money,<sup>1</sup> fees or other compensation paid by or for patients or inmates,<sup>2</sup> and donations or gifts.<sup>3</sup>

**3. Government — Officers and Employees** — *a.* **BOARD OF DIRECTORS.** — By whatever designation known, the control of every public or private charitable hospital and asylum must apparently be intrusted to a board clothed with plenary authority to act in the premises and fully carry out and administer the provisions of the charter. Such boards are usually designated boards of directors, trustees, superintendents, or commissioners. And it may safely be stated that so long as there is no palpable exhibition of injustice, oppression,

**1. Warrants on State Treasury for Expenses of Insane Asylum** — When to Be Issued. — See *Tandy v. Norman*, 16 Ky. L. Rep. 290.

**Unexpended Balance of Appropriation for Insane Asylum — Duty of Auditor.** — See *Norman v. Central Kentucky Lunatic Asylum*, 92 Ky. 10.

**2. Liability of Estate of Lunatic for Care and Maintenance.** — In *Humber v. Central Kentucky Lunatic Asylum*, 16 Ky. L. Rep. 756, it was held that the estate of one found by the verdict of a jury to be a lunatic is liable to the asylum for his support and treatment, unless such verdict also finds that he has not estate sufficient for his support.

**Liability of Relatives — Term "Relatives" Construed — Adult Child.** — The term "relatives," as used in Code *Iowa* (1873), § 1433 (Code 1897, § 2297), with reference to liability for the maintenance of a patient in the insane asylum, means only those who are legally bound for the support of such person. A father is not bound to maintain an adult child. *Monroe County v. Teller*, 51 Iowa 670.

**Liability for Support of Parent.** — In *Richardson County v. Smith*, 25 Neb. 767, it was held that there was no liability at common law or by statute against the children of insane persons for the maintenance of the latter in the state hospital for the insane.

**Liability of Brothers and Sisters of Insane Person.** — Under Comp. Stat. *Nebraska*, c. 40, the brothers and sisters of an insane person are not liable for the expenses incurred in his treatment in the insane hospital during such insanity. *Richardson County v. Frederick*, 24 Neb. 596.

**Husband Not Liable for Expense of Treatment of Insane Wife Ordered to Be Sent to Insane Hospital** — *Iowa Statute.* — *Delaware County v. McDonald*, 46 Iowa 170.

**Liability of County — Right of Recovery Over.** — As to the right of a county, under the statutes of *Massachusetts*, to recover, for the support of an insane person in its receptacle for the insane, of the city or town bound by law to maintain such person, and the right of the town or city to recover of such person such amount paid to the county, see *Newburyport v. Creedon*, 146 Mass. 134, 148 Mass. 158. See also *State v. Douglas County*, 18 Neb. 601; *Bangor v. Orneville*, 90 Me. 217.

**Constitutionality of Statute Authorizing Recovery by County — Husband's Liability for Support of Insane Wife.** — The *Nebraska* statute purporting to authorize the recovery from persons legally bound for the support of an insane person of the sum paid by the county for the care and treatment of such insane person at the state insane hospital, when the care and treatment have been furnished upon the finding of the proper commissioners of the county, was held to be unconstitutional. The case arose upon the liability of a husband to the county for the support of his insane wife. *Baldwin v. Douglas County*, 37 Neb. 283. See also *Richardson County v. Frederick*, 24 Neb. 596; *Richardson County v. Smith*, 25 Neb. 767.

**Policy of New York Statutes.** — In *Long Island State Hospital v. Stuart*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 48, it was said that it would seem that "the scheme of the law is to require primarily that the support of the indigent insane shall devolve upon the relative; that only upon failure or refusal to discharge that duty is care assumed by the state; and that before any relative can be legally charged with liability for the board of the patient in the state institution, an order must be made establishing the remissness of such relative, and directing the confinement of the patient at his charge and expense."

**Termination of Liability of Volunteer.** — An employee of a corporation was admitted to a hospital upon the express promise of the corporation that it would pay the hospital charges. Later, but while the patient was still incapable of being removed from the institution, the corporation withdrew its promise of responsibility and notified the hospital that it would pay nothing in future. No definite period of duration of liability had originally been agreed upon. It was held that the corporation could not terminate the contract abruptly and at its own volition; that there was an implied condition by which such contract was binding upon the promisor until the patient had so far recovered as to be able to leave the hospital without danger. *St. Barnabas Hospital v. Minneapolis International Electric Co.*, 68 Minn. 254.

**3.** See the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893.

malfeasance, or misfeasance in office, the disposition of the courts is to sustain the action of the governing board where it acted fairly within its discretion.<sup>1</sup>

*b. ELIGIBILITY OF WOMEN AS OFFICERS.* — In *Ohio* the position of medical superintendent of an insanity hospital is considered an "office" within the provision of the state constitution that "no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector."<sup>2</sup>

*c. TENURE OF AND REMOVAL FROM OFFICE.* — The terms of office of the governing boards are usually fixed by statute, and those of the staff and other officers by the charter or by the trustees under authority of the charter.<sup>3</sup> Courts have, as a rule, sustained boards of trustees in removing any officer or member of the hospital or asylum staff from his or her position before the expiration of the term, where it was manifestly an advantage to the institution that such removal should take place and the conduct of such officer furnished a reasonable ground for such action.<sup>4</sup>

**4. Confinement in Insane Asylum.** — It is held that a person may not be lawfully placed or detained in an insane asylum against his will unless actually insane. But the confinement of a person dangerously insane is always justifiable.<sup>5</sup>

**5. Liability for Tort or Negligence** — *a. PERSONAL LIABILITY OF OFFICER.* — A patient who enters a charitable institution for treatment, and is injured through the malpractice, lack of skill, or unprofessional conduct of any one of the hospital physicians, or is injured by reason of the neglect, tort, or act or omission of a nurse, attendant, or other employee or official of such institution, may bring an action against the offending party by whom the injury was directly caused.<sup>6</sup>

**1. Expulsion of Inmates.** — See *Tuck v. Industrial Home, etc.*, 106 Cal. 216; *People v. Sailors' Snug Harbor*, 54 Barb. (N. Y.) 533; which were cases of expulsion of inmates for disorderly conduct.

**Powers of General and Special Commissioners.** — See *Long v. Central Kentucky Lunatic Asylum*, 9 Ky. L. Rep. 699.

**Expenditures for Necessary Improvements — Powers of Commissioners.** — See *Norman v. Central Kentucky Lunatic Asylum*, 92 Ky. 10.

**2. Holder of Office Must Be Elector — Ohio.** — *State v. Wilson*, 29 Ohio St. 347. See also *State v. Rust*, 4 Ohio Cir. Ct. 329, 2 Ohio Cir. Dec. 577.

In *Massachusetts* the governor and council submitted to the justices of the supreme judicial court the question whether, under c. 291, § 2, of the Acts of 1879, which empowers the governor, "with the advice and consent of the council, to appoint nine persons, who shall constitute a state board of health, lunacy, and charity," it was competent to appoint a woman on said board, and they answered in the affirmative. Opinion of Justices, 136 Mass. 578.

3. See the local statutes.

4. *People v. Higgins*, 15 Ill. 110. See *Benthal v. Kilmorey*, 25 Ch. D. 39.

**Discharge of Physician and Steward During His Term, Without Charges Preferred Sustained — North Carolina.** — *Ellis v. State Inst. for Deaf, etc.*, 68 N. Car. 424. See also *Moore v. Archibald*, 5 N. Dak. 359.

**By-law Excluding from Practice in Hospital Physicians Who Do Not Comply with Codes of Ethics of Certain Medical Societies Upheld.** — *People v. Julia F. Burnham Hospital*, 71 Ill. App. 246.

**Abuse of Patients — Dangerous Drugs Administered by Irresponsible Attendants.** — In *State v. Hay*, 45 Neb. 321, where the superintendent of the hospital for the insane at Lincoln was removed by the governor, the court said: "We shall not argue to prove that the wanton abuse of patients committed to such institutions is cause for removal under the law of this case; and it is wholly immaterial whether such abuse be in the way of physical restraint of patients, or in permitting the giving by irresponsible attendants, at their pleasure, without prescription or direction of the physicians in charge, of dangerous doses of narcotics or other drugs."

**5. Van Deusen v. Newcomer**, 40 Mich. 90. In this case it was left undecided whether, in doubtful cases, an inquisition to determine the insanity of a person is prerequisite to his confinement in an asylum; *Cooley, J.*, and *Campbell, C. J.*, holding that it is; *Marston and Graves, JJ.*, holding the contrary. See the title *INSANITY*.

**6. Liability of Hospital Officer — Neglect of Patient.** — In the report of *Drefahl v. Connell*, 85 Wis. 109, it does not clearly appear how the suit was brought, whether against the defendant as superintendent of the hospital, or individually; but the Supreme Court, by *Cassoday, J.*, held that a complaint by an inmate of a county hospital, brought against the defendant, the superintendent of such hospital, alleging negligence and failure upon the part of the defendant properly to care for, treat, etc., the plaintiff, by reason of which neglect his malady was increased and augmented, stated a good cause of action.

**Unauthorized Autopsy.** — In *Burney v. Children's Hospital*, 169 Mass. 57, 61 Am. St. Rep.



b. **LIABILITY OF THE INSTITUTION.** — A Public Hospital or Asylum is liable for the tort or negligence of an officer or servant only when such corporation has been guilty of negligence in selecting such officer or servant. When the corporation has exercised due and reasonable care in the original selection of the offending officer or servant, it is not liable for his subsequent act, unless prior to the occurrence of such act knowledge of the unfitness and incapacity of such officer or servant was communicated to and fully brought home to the corporation.

**Private Charitable Institution.** — And the same principles apply in the case of private charitable hospitals and asylums.<sup>1</sup>

**VI. HOSPITALS FOR CONTAGIOUS DISEASES** — In General. — The terms "hospital for contagious diseases," "plague hospital," "pest house," "isolation hospital," and "emergency hospital," which frequently occur in statute and report, are almost self-descriptive and are nearly equivalent. Each denotes a place of shelter and refuge devoted to the care of unfortunates suffering from maladies so malignant and dangerous to the public, because of their infectious, contagious, and deadly character, as to require the isolation and seclusion of all persons afflicted with them.

**Are Public Hospitals.** — By whatever term known, each is a public hospital and is ordinarily under direct state or municipal management and control.<sup>2</sup>

273, a father intrusted a minor child to a hospital; the child died, and an autopsy was performed upon the dead body, without the knowledge or consent of the father. In an action brought by the father for damages, the court below sustained a general demurrer to the complaint. The Supreme Court reversed the court below sustaining such demurrer, and without going into the question whether the nature of the hospital was such that the action could be maintained against it for the alleged illegal acts of its officers and servants, held that the complaint stated a good cause of action.

**False Imprisonment in Insane Asylum.** — In *Van Deusen v. Newcomer*, 40 Mich. 90, the question whether the superintendent of an insane asylum is liable for detaining a sane person whom he in good faith considers to be insane was left undecided. *Cooley, J.*, and *Campbell, C. J.*, held the affirmative; *Marston and Graves, JJ.*, the negative.

1. **Where Hospital or Asylum Is a Public or Private Charitable Institution, No Liability** — *England.* — *Herion's Hospital v. Ross*, 12 Cl. & F. 507.

*Connecticut.* — *Hearns v. Waterbury Hospital*, 66 Conn. 99.

*Maryland.* — *Perry v. House of Refuge*, 63 Md. 21, 52 Am. Rep. 495.

*Massachusetts.* — *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436.

*Michigan.* — *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427.

*Missouri.* — *Murtaugh v. St. Louis*, 44 Mo. 480.

*New York.* — *Ward v. St. Vincent's Hospital*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 91; *Joel v. Woman's Hospital*, 89 Hun (N. Y.) 73; *Harris v. Woman's Hospital*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 37; *Van Tassell v. Manhattan Eye, etc., Hospital*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 781; *Eibee v. Long Island College Hospital*, (Cir. Ct.) 15 N. Y. Supp. 621, note;

*Proctor v. Manhattan Eye, etc., Hospital*, (Cir. Ct.) 15 N. Y. Supp. 621, note.

*Virginia.* — *Richmond v. Long*, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

See also *Union Pac. R. Co. v. Artist*, 60 Fed. Rep. 366; *Secord v. St. Paul, etc., R. Co.*, 18 Fed. Rep. 221; *Pierce v. Union Pac. R. Co.*, 66 Fed. Rep. 44; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Pittsburgh, etc., R. Co. v. Sullivan*, 141 Ind. 83, 50 Am. St. Rep. 313; *Summers v. Daviess County*, 103 Ind. 263; *York v. Chicago, etc., R. Co.*, 98 Iowa 553; *Eighmy v. Union Pac. R. Co.*, 93 Iowa 538; *Williamson v. Louisville Industrial School*, 15 Ky. L. Rep. 629; *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272; *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 228, 1 Am. St. Rep. 815; *Allan v. State Steamship Co.*, 132 N. Y. 91, 28 Am. St. Rep. 556; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648. See also the titles MASTER AND SERVANT; MUNICIPAL CORPORATIONS.

But see as *contra* to the foregoing, *Donaldson v. General Public Hospital*, 30 N. Bruns. 279; *Breux v. Montreal*, 9 Quebec Super. Ct. 503; *Glavin v. State Hospital*, 12 R. I. 412, 34 Am. Rep. 675. But shortly after this last case was decided the legislature of *Rhode Island* passed an act exempting hospitals incorporated by the legislature, which are sustained in whole or in part by charitable contributions or endowments, from liability for the neglect, carelessness, want of skill, and the like, of its officers and servants in the care and treatment of patients or inmates. But the statute expressly saves unimpaired any remedy by the aggrieved party against the offending officer personally. See Gen. Laws R. I. (1896), c. 177, § 38.

2. **Are Public Hospitals.** — See *Anderson v. O'Conner*, 98 Ind. 168; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299; *Thomson v. Boonville*, 61 Mo. 283; *Dooley v. Kansas City*, 82 Mo. 444, 52 Am. Rep. 380; *Richmond v. Henrico County*, 83 Va. 204.

**Erection of Smallpox Hospital in Adjoining Municipality.** — In *Elizabethtown Tp. v. Brock-*



**VII. HOSPITALS AND ASYLUMS AS NUISANCES — Not Nuisances Per Se.** — A hospital or asylum is not a nuisance *per se*,<sup>1</sup> nor is the law swift to adjudge one a nuisance in any particular case and thereby frustrate the humane work of such institution.<sup>2</sup>

**Must Cause Special Damage and Injury.** — The mere fact that the erection of a hospital or asylum in any particular locality will have the effect of depreciating the value of real estate in such neighborhood is not in itself sufficient to constitute it a nuisance unless some special damage and inconvenience be established.<sup>3</sup>

**Should Be So Managed as to Occasion Damage or Injury to None.** — When authority to establish a hospital or asylum is conferred upon a public or private corporation, the law contemplates that the management of the institution will be such as to cause prejudice or damage to none.<sup>4</sup>

**When Nuisances, Are Without Any Especial Defense or Immunity.** — Although a hospital or asylum is not in itself a nuisance, its management may cause it to become grievously so; and where the existence of the nuisance is unequivocally established, reluctant as the courts are to interfere with eleemosynary institutions, neither the status of the hospital or asylum as a charitable organization nor the fact that it is of statutory creation constitutes any justification to a continuance of such nuisance or interposes any defense to the abatement thereof.<sup>5</sup>

ville, 10 Ont. 372, it was held that under the statute 45 Vict., c. 29, § 12 (Ont.), one municipality cannot, without the previous consent of another municipality, establish a smallpox hospital, either of a permanent or temporary nature, within the territorial limits of the second corporation.

**Maintaining Leper in Private Family.** — Where the municipal authorities made an arrangement by which a woman suffering from leprosy, and in an advanced stage of the disease, was placed in a private family, consisting of a husband, wife, and several young children, occupying a house in a populated district, it was held that such contract was against public policy, there being no one at the house having authority to restrain such leper from wandering about the neighborhood and disseminating the plague; that the making of such contract did not constitute the house a hospital for contagious diseases; and that a perpetual injunction would lie against the execution of such contract. *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352.

**Powers of Board of Health.** — As to the power of health boards to establish quarantine, erect hospitals, rent buildings for temporary hospital purposes, and to isolate in their own houses persons sick with infectious diseases, see the title **BOARDS OF HEALTH**, vol. 4, p. 606 *et seq.*

**Liability of Municipality.** — As to the liability of municipalities for the acts of officials charged with the supervision and preservation of the public health, see the title **BOARDS OF HEALTH**, vol. 4, p. 607 *et seq.*

1. Hospitals and homes for the sick are very far from being nuisances *per se*. They are wise and beneficent charities, to be fostered and encouraged by liberal legislation, and not to be suppressed or even discouraged by what may seem to be harsh or restrictive laws. *Barnard v. Sherley*, 135 Ind. 567; *Bessonies v. Indianapolis*, 71 Ind. 190.

2. **Smallpox Hospital — England.** — In the early case of *Baines v. Baker*, Ambl. 158, the lord chancellor refused an injunction to stay the

building of a smallpox hospital. The petitioner asked for the writ because the new building was to be located very near several of his houses. The court said, however, that the charity was likely to prove of public advantage, and that the building "must not be far from a town, because those that are attacked with that disorder \* \* \* may not be in a condition to be carried far." See also *Atty.-Gen. v. Manchester*, (1893) 2 Ch. 87; *Wolcott v. Melick*, 11 N. J. Eq. 209, 66 Am. Dec. 790; *Ex p. Whitwell*, 98 Cal. 73, 35 Am. St. Rep. 152.

**Babies' Hospital — Nuisance.** — In *Gilford v. Babies' Hospital*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 159, an injunction was granted against the defendants, forbidding them to maintain a hospital for the care of sick infants upon Lexington avenue and Forty-fifth street, New York city. It appeared that the plaintiff was the owner of the contiguous dwelling; the locality was residential. The court held that the hospital was not a nuisance *prima facie*, but while not strictly within that class, there were certain features proper to consideration upon the contention of its being a nuisance in the way it was managed. An important feature in the case was consideration of the reasonable probability of contagious diseases arising in cases after reception. The court decided that the hospital could not be maintained upon the lot because of a restrictive covenant in the deed, but the fact of such hospital being a nuisance seems to have been affirmatively held.

3. *Crawford v. Protestant Hospital for Insane*, 7 Montreal Q. B. 57; *Gilford v. Babies' Hospital*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 159.

4. **Should Be So Conducted as to Injure No One.** — *Metropolitan Asylum Dist. v. Hill*, 50 L. J. Q. B. 353, 6 App. Cas. 193; *Tod-Heatly v. Benham*, 40 Ch. D. 80; *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352.

5. **When Nuisance Is Established Courts Will Act.** — *Metropolitan Asylum Dist. v. Hill*, 50

**VIII. ANIMAL HOSPITALS**—Are Charitable Institutions. — A point of vital importance, which probably is now to be considered as well-established law, is that a corporation, to be benevolent and charitable, need not be designed for the good and advantage of human beings; that animals of the brute creation may be the subjects and beneficiaries of charity and benevolence; and that a corporation organized for the care of animals, and for the amelioration of their condition, is within the legal acceptance of the term "charitable corporation," and as such is entitled to the full privileges and immunities belonging to such class.<sup>1</sup>

**May Take by Will, Testament, etc.** — It follows, necessarily, that any testamentary gift to or for an animal hospital will be sustained by the courts.<sup>2</sup>

**HOSTILE.** (See the title *ADVERSE POSSESSION*, vol. 1, pp. 796, 798.) — Hostile is defined as belonging to an enemy; appropriate to an enemy; showing ill will and malevolence, or a desire to thwart and injure; occupied by an enemy or a hostile people; inimical; unfriendly; as, hostile forces, hostile intentions, a hostile country, hostile to a sudden change.<sup>3</sup>

**HOSTILITIES.** — See note 4.

**HOSTLER.** — See note 5.

**HOTCHPOT.** (See also the titles *ADVANCEMENTS*, vol. 1, p. 760; *LEGACIES AND DEVISES*; *SUCCESSION*; *WILLS*.) — The word "hotchpot" is generally understood to signify mixing and blending together, and conveys much the same idea as the term *collatio bonorum*, which in the civil law is answerable to the word "hotchpot," and signifies that if a child advanced by the father shall, after his father's decease, challenge a child's part with the rest, he must cast in all that he had formerly received, and then take out an equal share with the others.<sup>6</sup> The chief use of the term in the American cases is in the law of advancements, where the shares of several children in the father's estate are adjusted by charging each child who has received anything by way of advancement with the value of the thing advanced (not, however, with interest or profits), and giving credit to him for his proper share of the whole estate, reckoning these charges as assets.<sup>7</sup> By bringing property into hotchpot is not meant that the

L. J. Q. B. 353, 6 App. Cas. 193; *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352; *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 458, 53 Am. St. Rep. 414, 41 Cent. L. J. 37.

1. *Massachusetts Soc., etc., v. Boston*, 142 Mass. 24.

2. See the title *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 933.

3. *Hostile.* — Webster's Dict., quoted in *Ballard v. Hansen*, 33 Neb. 865. In this case it was held that the word *hostile*, when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that he is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land.

4. *Hostilities.* (See also the title *INTERNATIONAL LAW*.) — The Revised Statutes of the United States provide that it shall be a misdemeanor to fit out a vessel with the intent that such vessel shall be employed in the service of a foreign state, to commit *hostilities* against the subjects of another foreign state. In *The Laurada*, 85 Fed. Rep. 770, the court said: "The term *hostilities* is certainly not expressly limited in its scope by the section to strictly maritime warfare, and may include all *hostilities* for which a vessel is adapted. A vessel, whether armed or unarmed, is in

and by itself a harmless thing. It is the use for which she is intended or to which she is put that determines whether she is an instrument of *hostility*. It can be of but little importance whether, on the one hand, she carries guns suitable for naval engagements or the bombardment of fortresses, or, on the other, has her crew armed with rifles and ammunition to effect a hostile and violent landing of a military expedition. In either case human agency converts the otherwise harmless thing into an engine of war." See also *U. S. v. The Mary N. Hogan*, 18 Fed. Rep. 529; *The City of Mexico*, 28 Fed. Rep. 148.

5. *Hostler* — Railroad Employee. — A *hostler*, in railroad parlance, is one who receives engines from the regular engineers as they come from the road, taking charge of them in the shops or roundhouse and cleaning and making them ready for departure on the road when they are wanted. *Chicago, etc., R. Co. v. Ashling*, 34 Ill. App. 105. See also *Chicago, etc., R. Co. v. Massig*, 50 Ill. App. 667. And see the title *FELLOW SERVANTS*, vol. 12, p. 893.

6. *Hotchpot.* — By *hotchpot* is meant that each child should draw at the death of his parent an equal distribution. *McCaw v. Blewit*, 2 McCord Eq. (S. Car.) 104. See also *McLure v. Steele*, 14 Rich. Eq. (S. Car.) 116.

7. *Advancements.* (See also the title *ADVANCEMENTS*, vol. 1, p. 760.) — Abb. L. Dict.



specific property is to be brought into the estate to be divided, but only that its value is to be taken into consideration in making a distribution of the estate of the intestate.<sup>1</sup> The doctrine arises out of the various statutes of distribution, which are based on a similar provision in the English statute of distributions, 22 and 23 Car. II., c. 10.<sup>2</sup>

The True Intention of the law is that the estate of the ancestor is to be considered as a common fund, out of which each child is to draw, at the death, an equal proportion. That part of the estate which has been given is to be estimated at what it is worth at the death, relation being had to its situation at the time of the gift.<sup>3</sup>

**Widow's Right to Share.** — In some jurisdictions it has been held that the widow of an intestate is not entitled to share in the benefits of a provision that advancements shall be brought into hotchpot.<sup>4</sup>

**HOTEL.** (See also the title INNS AND INNKEEPERS.) — A hotel is an inn or house for entertaining strangers or travelers.<sup>5</sup>

This applies to a total intestacy only. *Thompson v. Carmichael*, 3 Sandf. Ch. (N. Y.) 120; *Walton v. Walton*, 14 Ves. Jr. 318. As to testacy, see the title LEGACIES AND DEVISES.

1. *Jackson v. Jackson*, 28 Miss. 680; *Rav v. Loper*, 65 Mo. 470; *In re Blockley*, 29 Ch. D. 250.

In *In re Elliott*, 98 Mo. 384, it was said: "We have said bringing into *hotchpot*, under our statute, does not mean that the property or money advanced shall, in kind or specie, be thrown in with the property which has descended, but it is to be estimated and charged against the party according to its value at the time the advancement was made."

2. **Statutes.** — 2 Black. Com. 517. See *May v. May*, 15 Ala. 181. See also the title SUCCESSION.

3. *M'Caw v. Blewit*, 2 McCord Eq. (S. Car.) 104.

4. *May v. May*, 15 Ala. 182; *Logan v. Logan*, 13 Ala. 653; *Brunson v. Brunson*, Meigs (Tenn.) 630.

In *Ex p. Lawton*, 3 Desaus. (S. Car.) 199, it was held, under the statute of *South Carolina* for the abolition of the rights of primogeniture and the equitable distribution of intestates' estates, that the widow was not entitled to the benefits of the advancement made by father to child, and which the latter brought into *hotchpot*, but such advancement was to be taken into account only in adjusting the shares of the children.

But in *North Carolina* it has been held that the widow was entitled to share in property brought into *hotchpot*. *Davis v. Duke*, Conf. Rep. (1 N. Car.) 361.

5. *People v. Jones*, 54 Barb. (N. Y.) 317.

The terms *hotel*, "tavern," and "inn" are properly applied to places kept for the entertainment of travelers and casual guests. *Martin v. State Ins. Co.*, 44 N. J. L. 492.

**Synonymous with Inn.** — In *Cromwell v. Stephens*, 2 Daly (N. Y.) 17, it was said: "The word is of French origin, being derived from *hostel*, and more remotely from the Latin word *hospes*, a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another as well as the master of a house who entertains travelers or guests. \* \* \* A *hotel* in this country is what in France was known as a *hotellerie*, and in England as a com-

mon inn of that superior class usually found in cities and large towns." And that the terms *hotel* and "inn" are synonymous, see *Foster v. State*, 84 Ala. 452; *People v. Jones*, 54 Barb. (N. Y.) 311; *St. Louis v. Siegrist*, 46 Mo. 594.

**Same — In English Bankrupt Law.** — In interpreting this law to whose benefits the keepers of hotels are, among others, entitled, *Tindal, C. J.*, said: "It is evident that the word *hotel* is not used in the sense of the old word 'hostel,' for that means what is now termed an inn; and as the word 'inn' immediately precedes [in the act], it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the French, and rather implies a house to which people resort for lodging than for the sort of entertainment which is to be procured only at an inn." *Smith v. Scott*, 9 Bing. 14, 23 E. C. L. 246. See also *King v. Simmonds*, 1 H. L. Cas. 754.

**Tavern.** — In *St. Louis v. Siegrist*, 46 Mo. 594, it was said: "'Tavern,' *hotel*, and 'public house' are in this country used synonymously." See also *Foster v. State*, 84 Ala. 452; *People v. Jones*, 54 Barb. (N. Y.) 311.

**Lodging House.** — The plaintiff's building was a large structure, eight stories in height, those above the basement being exclusively used as lodgings for single persons at a fixed rate per night. There were no arrangements for boarding or cooking for guests, nor was there any bar or restaurant belonging to or connected with the plaintiff's occupation of the building. It was held that the structure was not an inn. *Cromwell v. Stephens*, 2 Daly (N. Y.) 15. See also *Ex p. Bowers*, 3 Mont. & A. 33.

But in *Ex p. Thorne*, 3 Ch. D. 457, it was held that a professional nurse who kept a lodging house for invalids and supplied them with board at a profit, as well as with lodging and nursing, was a keeper of a *hotel* within the English bankruptcy statute. And that a boarding house is a *hotel* within this statute, see *Gibson v. King*, 10 M. & W. 667.

**Intoxicating Liquors.** (See also the title INTOXICATING LIQUORS.) — In holding that a *hotel* was a "place" within the statute regulating the sale of intoxicating liquors, the court in *Com. v. Purcell*, 154 Mass. 389, said: "In common speech a *hotel* is a place; and



**HOURS.** — See note 1.

**HOURS OF LABOR.** — See the title LABOR REGULATIONS.

**HOUSE.** (See the titles ARSON, vol. 2, pp. 924, 931; BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2; BURGLARY, vol. 5, p. 55; DISORDERLY HOUSES, vol. 9, p. 512; DWELLING, DWELLING HOUSE, ETC., vol. 10, p. 353; INTOXICATING LIQUORS; LARCENY; SUNDAY. As to the distinction between house and message, see MESSAGE.) — In a general sense, a building or shed intended or used as a habitation or shelter for animals of any kind; but appropriately a building or edifice for the habitation of man; a dwelling place, mansion, or abode for any of the human species. It may be of any size and composed of any materials whatever.<sup>2</sup> Though the ownership

the enumeration of buildings, places, and tenements does not necessarily have the effect to require that a building shall not be described as a place. No doubt the word 'place' may include what could not properly be described as a building or tenement, but it does not follow that it may not include both." And see PLACE.

A statute provided that all places where intoxicating liquors were sold should be closed on Sundays. It then provided that in regular hotels and eating houses the word "place" should be held to mean the room or part of a room where such liquors were usually sold or exposed for sale, and that the keeping of such room or part of room securely closed should be held, as to such hotels and eating houses, as a closing of the place within the meaning of the act. It was held that the words "regular hotels and eating houses" designated places the principal and not the subordinate business of which was the carrying on of a hotel or an eating house. *Lederer v. State*, 3 Ohio Cir. Dec. 303, 5 Ohio Cir. Ct. 623.

So under an act prohibiting the granting of a liquor license to any person unless he proposes to keep "an inn, tavern, or hotel," a mere drinking saloon is not within these terms. *People v. Jones*, 54 Barb. (N. Y.) 311. And see *In re Liquor Licenses*, 4 Mont. Co. Rep. (Pa.) 79.

And as to the bedrooms necessary to constitute a hotel under the New York statute see *Matter of Place*, 27 N. Y. App. Div. 569.

**Hotel Bill.** — A guaranty to be responsible for H.'s hotel bill covers board and lodging, but not cigars, liquors, and billiards. A person keeping a house for the entertainment of travelers, with board and lodging, is an hotel keeper, and as such is under an obligation to furnish guests with board and lodging, and only such articles as he is obliged to furnish are proper items of a hotel bill. *Patterson v. Gage*, 11 Colo. 50.

**Hotel Purposes.** — Land with hotel buildings thereon was conveyed for a nominal sum in consideration of benefit expected by the grantor to accrue to his other land from the performance of a condition of the deed that for twenty years the grantee, his heirs and assigns, should use the granted premises exclusively for hotel purposes, and the condition and force of the condition should not be affected by the destruction or injury of the buildings by fire or otherwise. The grantee then conveyed the premises to J. S., in whose occupation the hotel was destroyed by fire four years after the original conveyance. J. S. then gave

a lease of part of the premises, and the lessee used them for other than hotel purposes for about a year, when the original grantor entered for breach of the condition. Fifteen months afterwards, J. S. brought a writ of entry against him to recover the premises, neither J. S. nor the original grantee having meanwhile offered to rebuild the hotel or done anything indicating such an intention. It was held that the premises were forfeited to the original grantor by breach of the condition, and the writ of entry could not be maintained. *Allen v. Howe*, 105 Mass. 241.

**Family Hotel.** — A family hotel, where rooms not designed to accommodate transient or casual guests are taken by families or individuals for some certain period, the cooking being done for all by the proprietor, and the meals served in the hotel dining room or in the apartments, is not a tenement house within the meaning of a building restriction. *Musgrave v. Sherwood*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 338. See also TENEMENT HOUSE.

**1. Business Hours.** (See also BUSINESS, vol. 5, p. 77.) — In *Clough v. Holden*, 115 Mo. 362, it was said: "Business hours, however, except in the case of banks, include the whole day unless there be some known custom or usage of trade to the contrary." See also *Swan v. Hodges*, 3 Head (Tenn.) 251.

**2. Webster's Dictionary**, followed in *State v. Mullen*, 35 Iowa 207; *Schenck v. Campbell*, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 292.

The first part only of this definition was adopted in *Com. v. Lambrecht*, 3 Pa. Co. Ct. 323, where it was said that "building," though not "property," might be substituted for house in pleading.

**A House** is a place of dwelling or habitation. *Schenck v. Campbell*, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 295.

"A permanent building in which the tenant, or the owner and his family, dwells or lies." *Chapman v. Royal Bank of Scotland*, 7 Q. B. D. 140.

A house means every kind of building or structure housed in, or roofed, regardless of the fact whether it is or has been inhabited. Any structure which has walls on all sides and is covered by roof is a house. *Maul v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 200; *People v. Stickman*, 34 Cal. 242.

A house is a structure of a permanent character, structurally severed from other tenements, and usually but not necessarily under its own separate roof, that is used or may be

used for the habitation of man, and of which the holding, as distinct from lodgings, is independent. Stroud's Jud. Dict., *citing* Evans's Case, Cro. Car. 473; Yorkshire F., etc., Ins. Co. v. Clayton, 8 Q. B. D. 421; Chapman v. Royal Bank of Scotland, 7 Q. B. D. 136.

**Boundaries.**—In Kendall v. Green, 67 N. H. 568, it was held that where land in a deed was described as beginning a certain distance from a *house*, the measurement was to be made from the side of the *house* and not from the edge of the eaves. The court said: "The parties must have intended the measurement to be made either from the external line of the eaves or from the foundation of the *house*. As no reason appears why they should have had the eaves in mind, and as it would be difficult, if not impracticable, to make the measurement from that high projection, the probability amounting almost to certainty is that their intention was that the division line should be determined by measuring twelve and a half feet from the foundation."

**Property—Building.**—A statute authorized the adoption of rules and regulations for the construction of *house* drainage. Upon the construction of this statute the court said: "Giving the word *house* its most comprehensive meaning, as we ought to in aid of a statute enacted for the preservation of the public health, we find that Webster defines it as 'a building intended or used as a habitation or shelter for animals of any kind.' Therefore, while it may be permissible for the pleader to use the word 'building' instead of *house*, yet he cannot substitute other words for it. The word 'property' is improper in this connection. A meadow and a natural lake are properties, but they are not *houses* or buildings within the meaning of the act." Com. v. Lambrecht, 3 Pa. Co. Ct. 325.

"The word *house* clearly means a building, in the ordinary use of the word, and such building or *house* is not necessarily the habitation of man or beast. There are slaughter *houses*, packing *houses*, smoke *houses*, etc., indicating *houses* in which animals are slaughtered, meats packed and smoked, etc." Ford v. State, 112 Ind. 378.

**House and Dwelling House.** (See also DWELLING, DWELLING HOUSE, ETC., vol. 10, p. 353.)—In State v. Garity, 46 N. H. 62, the court said: "The word *house* is not synonymous with 'dwelling *house*.' While the former is used in a broader and more comprehensive sense than the latter, it has a narrower and more restricted meaning than the word 'building.'" This was a disorderly-house case.

So in State v. Powers, 36 Conn. 79, it was held that the word *house* in a statute against disorderly *houses* was not confined to dwelling *houses*, but meant any building kept for the purpose named.

But *house* has been held to be synonymous with "dwelling *house*" in the following cases: In a covenant not to build more than two *houses* on a piece of ground. Schenck v. Campbell, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 292. In an act empowering owners and occupiers of *houses* to call on a water company to introduce water therein. Cooke v. New River Co., 38 Ch. D. 56, L. R. 14 App. 698. In a statute charging the support of a

rector upon the *houses* of inhabitants of the parish. Surman v. Darley, 14 M. & W. 181. In an indictment for arson. Com. v. Posey, 4 Call (Va.) 114, 2 Am. Dec. 560.

**Same—Intoxicating Liquors.** (See also the title INTOXICATING LIQUORS.)—In Sanders v. State, 2 Iowa 230, it was held that an information for the seizure of intoxicating liquors kept for illegal sale "in a certain *house* or place known and described as being the *house* occupied and kept by" the defendant, need not aver a sale contrary to law in such *house*, such averment being necessary only where the liquors were kept in a dwelling *house* or a *house* in which a family resided. The court said: "The statute qualifies the proceeding when against a 'dwelling *house*,' or 'a *house* in which a family resides.' The complaint does not show the *house* to come within this description, nor is there a place showing it to be such. We do not think we are bound to hold the word *house* to be equivalent to 'dwelling *house*,' especially when the statute uses the latter term."

**Same—House of a Person.**—In Wright v. Dressel, 140 Mass. 149, it was said: "But we think that according to the common use of language, in this state at least, when a man is commanded to enter, or it is alleged that goods are concealed in, 'the *house* of E. D., of Granby,' *prima facie* the words mean the *house* occupied by E. D., not the *house* owned by him; and that no sound distinction exists between this language and 'the dwelling *house* of E. D.'"

**Same—Use.**—Upon the question of the qualification of electors in Daniel v. Coulsting, 7 M. & G. 122, 49 E. C. L. 122, it was held that a building calculated to be used as a dwelling *house*, though not used as such, was properly described as a *house*. See also Maul v. State, (Tex. Crim. 1894) 26 S. W. Rep. 200; People v. Stickman, 34 Cal. 242.

**Unroofed Building.**—An indictment for perjury charged that the appellant saw a game played in a certain *house*. It was held that evidence that he saw the game played in an inclosure attached to a saloon, closed in on four sides, but with no roof, did not support the allegation, such a structure not being a *house*. Maul v. State, (Tex. Crim. 1894) 26 S. W. Rep. 200.

So an uncovered and uninclosed platform erected in a park was held not to be a *house* within a Sunday law. State v. Barr, 39 Conn. 40. See generally the titles INTOXICATING LIQUORS; SUNDAY AND HOLIDAYS.

**Part of a House.** (See also TENEMENT HOUSE.)—Occupation of part of a dwelling *house*, for the purposes of a private dwelling only, was held to constitute occupation of a *house* within an English statute so as to confer the municipal franchise upon the occupier. Greenway v. Bachelor, 12 Q. B. D. 381. See also Clutterbuck v. Taylor, (1896) 1 Q. B. 395; Henrette v. Booth, 15 C. B. N. S. 500, 109 E. C. L. 500. Compare Thompson v. Ward, L. R. 6 C. P. 327; Cook v. Humber, 11 C. B. N. S. 33, 103 E. C. L. 33; Wilson v. Roberts, 11 C. B. N. S. 50, 103 E. C. L. 50. The test in these cases seems to have been independent occupation and actual severance.

**Same.—A Portion of the Basement of a build-**



ing, separated from the rest by a party wall, having no interior communication with the rest of the building, and used as a bank, is a *house* within an act in relation to duties on inhabited *houses*. *Chapman v. Royal Bank of Scotland*, 7 Q. B. D. 136, 50 L. J. Q. B. 670.

**Same — Several Distinct Houses.** — A *house* originally entire may become several distinct *houses* by dividing it into distinctive partitions, and allotting them distinct avenues, so that the inhabitants have no communication with each other. *Tracy v. Talbot*, 6 Moo. & S. 214.

**Single Room.** (See also *HOUSEHOLDER*, *post*.) — Under a statute providing the qualifications of electors, it was held that a single room in a set of chambers in the Temple was not a *house*. *Cuthbertson v. Butterworth*, L. R. 4 C. P. 523.

**Block.** — A series of buildings, all communicating internally, composed of a dwelling, shop, office, candle manufactory and store, bread store, flour store, bakehouse, mill, engine-house, stables, five cottages, four used as dwellings and one as a storehouse, is one *house*, within a requirement that a railroad company desiring a part of a *house* should take the whole if called upon to do so by the owner. The structure was continuous, and if used for a common purpose, was a *house*. "Unless," said James, L. J., "we are to start with a proposition that a *house* ceases to be a *house*, either partly or partially, because part of it is used for the purpose of business, \* \* \* this is as much a *house* as if it had been originally built in the exact shape in which it now is, and every room in the *house* as they are placed had been used for the purpose of a private residence." *Richards v. Swansea Imp., etc., Co.*, 9 Ch. D. 425.

**Two Houses**, by the establishment of internal communication, became one *house*, within the meaning of a building restriction, having been so treated by a branch of the municipal government. *Snow v. Whitehead*, 53 L. J. Ch. 885. See also *Harvie v. South Devon R. Co.*, W. N. (74) 195.

**Approaches.** — In *U. S. v. Mueller*, 113 U. S. 153, the approaches or steps leading up to a *house* were held not to be included in the term. This case was upon the construction of a building contract.

**Barrel House.** — A barrel *house*, attached to a cooperage establishment, was held to be a *house* within an arson statute. *Pike v. State*, 8 Lea (Tenn.) 577.

**A Booth Theatre** which is taken to pieces and carried from place to place is not a "*house* or other place of public resort for the public performance of stage plays," within an act forbidding performances in unlicensed *houses*. *Davys v. Douglas*, 4 H. & N. 180.

**Boat.** — In *State v. Mullen*, 35 Iowa 207, it was held that a boat or vessel might come within the term "*house* of ill fame" within a statute against disorderly *houses*. See also the title *DISORDERLY HOUSES*, vol. 9, p. 512.

**Chicken House.** — A chicken *house* was held to fall within the ordinary meaning of the term *house*. *Gardner v. State*, 105 Ga. 662, a larceny case. See also *Williams v. State*, 105 Ga. 814.

**Churoh.** — Within an act giving to a municipal corporation power to prescribe the frontal line upon a street on which *houses* should be

erected, it was held that a church was a *house*. So in *Caiger v. St. Mary*, 50 L. J. M. C. 59, it was held that a chapel was a *house* within a statute providing for contributions towards opening a street. And in *Wright v. Ingle*, 16 Q. B. D. 379, a chapel was held to be a *house* within the Metropolis Local Management Act, 1855. But see *Angell v. Paddington*, L. R. 3 Q. B. 714, 9 B. & S. 496.

**Demolished House.** — In *Mulligan v. State*, 25 Tex. App. 199, it was held that where a tenant first demolished the *house* on his premises and then burnt the logs of which it was built, he could not be convicted of the arson of a *house*.

**A Freight-car Body** which has been detached from the wheels and placed upon permanent posts near a railway track at a station, and to which a platform has been attached, thus constituting a structure to be used as a freight warehouse, and which is used for this purpose only, is a *house*. *Carter v. State*, 106 Ga. 372.

**Fruit Stand.** — In *Willis v. State*, 33 Tex. Crim. 168, the following structure was held to be a *house*: "It is described as a fruit stand built somewhat in the shape of a piano box, about eight feet high, with shelves and counters; and the proprietor could, in making sales, stand inside or out of the structure, as he desired."

**Header Box.** — A header box usually used in connection with a grain harvester was held not to be a *house*, within a statute against burglary. *Williamson v. State*, 39 Tex. Crim. 60.

**Laundry.** — In London, etc., Laundry Co. v. Willesden Local Board, (1892) 2 Q. B. 271, it was held that a steam laundry was not a *house* for the purpose of the removal of *house* refuse, as that term was used in a public health act.

**Mill House.** — Upon an indictment for burning a mill *house*, the court said: "'Mill *house*' has no meaning not implying a building. By the ordinary use of the word *house* it is understood to mean a building, and when taken in connection with the words 'flouring,' 'grist,' 'mill,' etc., it is capable of but one meaning. This has been very clearly decided in a case similar to the present. See *Ford v. State*, 112 Ind. 373." *Jordan v. State*, 142 Ind. 422. See the title *ARSON*, vol. 2, pp. 924, 931.

In *Hiles v. Shrewsbury*, 3 East 457, it was held that a mill was not a *house* within a statute against arson, arson of a *house* at common law meaning the burning of a dwelling *house*.

**Office.** — In *Bigham v. State*, 31 Tex. Crim. 244, it was held that a sheriff's office was a *house* within a statute against burglary.

In *Anderson v. State*, 17 Tex. App. 305, it was held that a corner of a store picketed off as an office, where the books and accounts of the firm were kept, was a *house*. This was a burglary case.

**Same.** — **Counting House** includes an attorney's office. *R. Creek*, 3 B. & S. 459, 113 E. C. L. 459.

**Railway, Docks, Canal.** — The word *house* in an act establishing and imposing a rate or tax for lighting and watch, does not include a railway, *Reg. v. Midland R. Co.*, L. R. 10 Q. B. 389; nor a canal, *Reg. v. Neath Canal Co.*, L. R. 6 Q. B. 707; but does cover docks, *Peto v. Westham*, 2 El. & El. 144, 105 E. C. L. 144.



of a house may be so severed from that of the land as to constitute the house

**Shop.** — "The word *house* does not mean, it seems to me, necessarily a mere dwelling *house*, or a *house* only used, or exclusively or principally used, for a residence; the word *house* includes a shop, or may consist of a shop." James, L. J., in *Richards v. Swansea Imp., etc., Co.*, 9 Ch. D. 425.

But in *Powell v. Price*, 4 M. & G. 114, 56 E. C. L. 114, it was held that a shop separated from the rest of the owner's premises by a yard owned by him was no part of the *house*. Wilde, C. J., said: "No instance can be shown in the books where, under the word *house*, a shop situated as this has been held to pass. It could not pass by reason of its being within the curtilage; for there is no common curtilage, so as to make any of the burglary cases applicable. If, then, this shop cannot, either within any of the civil or criminal cases, be included within and considered as part of the *house*, I see no reason why we should give a larger signification to the word in this act."

**Same — House, Store, and Shop.** — A complaint alleging that the defendant kept a certain "*house*, store, and shop," for the purpose of selling liquors, etc., charges but one offense.

The words "*house*, store, and shop" designate but one place. *Rawson v. State*, 19 Conn. 292.

**Schoolhouse.** (See also the title *SCHOOLS*.) — A schoolhouse has been held to be a *house* within an arson statute. *Wallace v. Young*, 5 T. B. Mon. (Ky.) 155.

**Smokehouse.** — In *Irvin v. State*, 37 Tex. 413, it was said that a smoke *house* would be a *house* if the adjective were not employed to denote it a smoke *house*, and the adjective only renders the description of the *house* the more definite. This was a larceny case. See also *Albritton v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 398.

**Stable.** — A testator devised to his wife the use of a *house* in which he lived. There was a stable in the rear of the *house*, which was used by the testator in connection with it. The executor let this stable, and the widow claimed the rent. The master and the Probate Court allowed the rent to the executor. The appellate court said: "The mode of use in the testator's lifetime does not necessarily establish that the stable is included in the words '*house* in which we now live.'" *Smith v. Martin*, 2 Saund. 401, note 2. The connection between the *house* and stable is not set forth very clearly, nor does it appear very clearly whether the master excluded the allowance of the rent for the stable on the ground that, as matter of construction, the words could not include a stable, or on a finding that the stable was not so connected with the *house* as to pass with it. On the facts appearing, we cannot say that the master and judge of probate were wrong." *Bridge v. Bridge*, 146 Mass. 373.

Under an act prescribing the qualifications of electors a dwelling in the upper stories of a building, the lower part of which was used for a stable, was held to be a *house*. *Nunn v. Denton*, 7 M. & G. 66, 49 E. C. L. 66.

**Tent.** — Within a statute against keeping a

disorderly *house*, it was held that a tent was a *house*. *Killman v. State*, 2 Tex. App. 223. But in *Callahan v. State*, 41 Tex. 43, it was held that a tent was not a *house*. This was a larceny case. See also *Chapman v. Royal Bank of Scotland*, 7 Q. B. D. 136.

**Uncompleted House.** — The walls of a new *house* were erected to the height of five inches above the ground. Upon the question whether this constituted a *house* within a Public Health Act, the court said: "The first question is whether there was, under these circumstances, any 'front main wall of a *house* or building' on Burton's land within the meaning of the act. In my opinion there was not. There were indeed some beginnings of walls, but these did not in my opinion constitute a '*house* or building.'" *Ravensthorpe Local Board v. Hinchcliffe*, 24 Q. B. D. 171.

But within the English Land Clauses Act, an uncompleted *house* has been held to be a *house*. *Alexander v. Crystal Palace R. Co.*, 30 Beav. 556.

And a lot upon which piles were driven for the foundation of a church, being the only land so held and devoted in good faith to the erection of the church, was held to be a *house* of public worship, so as to be exempt as such from taxation. *Trinity Church v. Boston*, 118 Mass. 164.

**Warehouse.** — In *Daniel v. Coulsting*, 7 M. & G. 122, 49 E. C. L. 122, it was held that a dwelling *house* used as a warehouse and workshop was a *house* within an act prescribing suffrage qualifications.

**Workhouse.** — A workhouse has been held to be a *house* within an English water act. *Liskeard Union v. Liskeard Waterworks Co.*, 7 Q. B. D. 505.

**House or Place of Business — Intoxicating Liquors.** — Upon the meaning of the term "*house* or place of business," in a law regulating the sale of intoxicants, the court, in *Whitcomb v. State*, 2 Tex. Civ. App. 301, said: "The words '*house* or place of business' would include not only the *house* or room in which the liquor was kept for sale, but any arbor or structure kept by defendant for the purpose of the business of selling liquors. It would not include any other *house* or structure, however, not kept by defendant, and not used for the purpose of such business." See also the title *INTOXICATING LIQUORS*.

**House of His Usual Abode.** — In *Missouri, etc., Trust Co. v. Norris*, 61 Minn. 256, it was held that the term "*house* of his usual abode," as used in a statute providing for service of process, meant the person's customary dwelling place or residence, and was not equivalent to domicile in all particulars. See also *ENCYC. OF PL. AND PR.*, title *SERVICE OF PROCESS*. And see the title *DOMICIL*, vol. 10, p. 6.

**House of Her Husband.** (See also the title *DOWER*, vol. 10, p. 148.) — In a statute providing that a widow might remain in the *house* of her husband for ninety days next after his death, without being chargeable for rent therefor, it was held that by *house* of her husband was meant the *house* in which her husband owned the fee at the time of his death. She is not entitled as against the mortgagee or assignee

personalty,<sup>1</sup> yet as a general rule a house is a part of the freehold and passes or descends with the land.<sup>2</sup> Thus in a devise or grant the word "house" will carry the land upon which the house is built and the curtilage.<sup>3</sup>

of her husband. *Young v. Estes*, 59 Me. 441.

**House in the Occupation of.**—A man owning two adjoining houses sold one, which was conveyed by the description "all that messuage or dwelling house \* \* \* now in the occupation of the said P." In front of this house was a slight projection, nine feet broad, forming a sort of shallow portico, in the middle of which was the door, and which projected three feet beyond the line dividing the two houses. It was held that the part in front of the other house did not pass by the conveyance. *Fox v. Clarke*, L. R. 7 Q. B. 748.

**Almshouse.**—See ALMSHOUSE, vol. 2, p. 174.

**Bawdy House.**—See the title DISORDERLY HOUSES, vol. 9, p. 508.

**Boarding House.**—See BOARD, vol. 4, p. 589.

**Disorderly House.**—See the title DISORDERLY HOUSES, vol. 9, p. 508.

**Dwelling House.**—See DWELLING, DWELLING HOUSE, ETC., vol. 10, p. 353.

**Eating House.**—See EATING HOUSE, vol. 10, p. 449.

**Keep His House.**—See KEEP; and see generally the title INSOLVENCY and BANKRUPTCY.

**Lewd House.**—See the titles DISORDERLY HOUSES, vol. 9, p. 508. LEWD AND LASCIVIOUS COHABITATION AND CONDUCT. And see *Clifton v. State*, 53 Ga. 244.

**Outhouse.**—An outhouse must be parcel of a dwelling house. *Elsmore v. Hundred of St. Briavells*, 8 B. & C. 465, 15 E. C. L. 266. See OUTHOUSE.

**Public House.**—(See the titles GAMING HOUSES, vol. 14, p. 692; INNS AND INNKEEPERS; and see PUBLIC.

**Schoolhouse.** in an act making exemption from taxation, means public schoolhouse. *Chegaray v. New York*, 13 N. Y. 220. See also the title SCHOOLS. And see PUBLIC.

**Storehouse.**—See STORE.

**Tenement House.**—See TENEMENT HOUSE.

**Tippling House.**—See TIPPLING HOUSES, and see the titles INNS AND INNKEEPERS; INTOXICATING LIQUORS.

**Town House.**—"A house or building in which is transacted the public business of a town." It is not limited to a hall for town meetings, but may include offices for all the town officers, a lock-up, school, hospital, library, or rooms for every object for which a town has authority to provide a building. A condition in a deed of land to the inhabitants of a town that it "shall not be used for any other purpose than as a place for a town house" is not broken by the erection of a building larger than the present public business of the town requires, the unused parts of which are rented to tradesmen. "A town having in its town house rooms which it had authority to construct, as part of such building, and not having occasion to use them for the time being, is not obliged to keep them unoccupied, but may derive a revenue from them by renting them, or may allow them to be used gratuitously." *French v. Quincy*, 3 Allen (Mass.) 9. See generally the title TOWNS AND TOWNSHIPS.

**Whorehouse.**—See the title DISORDERLY

HOUSES, vol. 9, p. 508; and see *Wright v. Paige*, 36 Barb. (N. Y.) 440.

**Woodhouse.**—In an insurance policy covering a "wood house," the latter being under the same roof with a carriage house, which constituted two-thirds of the building, the term was held to include the carriage house, evidence having been adduced to show that the building was called "the wood house." *White v. Mutual F. Assur. Co.*, 8 Gray (Mass.) 566.

**1. House as Personal Property.**—*Lowenberg v. Bernd*, 47 Mo. 297.

In *Brown v. Turner*, 113 Mo. 27, it was held that a house built on the land of another was personal property.

**2. Real Property.**—In *Powers v. Harris*, 68 Ala. 410, it was said: "When this case was before us at a former term, *Harris v. Powers*, 57 Ala. 139, we said: 'Houses, as a general rule, are part of the freehold, and pass or descend with the land. The *prima facie* intendment is that they are part of the realty; and if there be no proof to take the case without the general rule, they are part and parcel of the land, and whoever owns the land owns the houses standing thereon.'"

**3. What Passes.** (See also CURTILAGE, vol. 8, p. 527; DWELLING, DWELLING HOUSE, ETC., vol. 10, p. 353.)—*Brown v. Turner*, 113 Mo. 27; *McMillan v. Solomon*, 42 Ala. 358; *Richmond v. State*, 5 Ind. 334; *Doe v. Collins*, 2 T. R. 498; *King v. Wycombe R. Co.*, 29 L. J. Ch. 462; *Workman v. Insurance Co.*, 2 La. 507; *Swift's Appeal*, 111 Pa. St. 516; *Gibson v. Brockway*, 8 N. H. 465; *Sparks v. Hess*, 15 Cal. 196.

**Message.** (See also MESSAGE.)—Whatever, in a will, will pass by message will pass by house, and *vice versa*. *Doe v. Collins*, 2 T. R. 502.

In a devise, house is synonymous with "message," and passes all within the curtilage, without *cum pertinentiis* being added. *Rogers v. Smith*, 4 Pa. St. 93. See also *Bennett v. Bittle*, 4 Rawle (Pa.) 339; *Grimes v. Wilson*, 4 Blackf. (Ind.) 333.

**Appurtenances.**—The word "appurtenances," in an insurance policy, covers everything appurtenant and accessory to a main building, as back buildings. *Workman v. Insurance Co.*, 2 La. 507, 22 Am. Dec. 141.

In *Doe v. Collins*, 2 T. R. 498, it was held that by the word house the appurtenances proper and convenient to its occupation passed. Thus a bequest of "the house I live in, and garden," was held to include granary, stable and coal shed, although the last had been used by the testator for trade as well as domestic purposes.

Within a Local Assessment Act it was held that the word house included all land upon which there was a building which was or might be used for the habitation of man. *Wright v. Ingle*, 16 Q. B. D. 390.

**Land Held with House.**—In *King v. Wycombe R. Co.*, 28 Beav. 107, it was said: "It is quite settled that land held with a house does not pass under the word house, even al-



**House** — In the Sense of a Branch of the Legislature. — The word "house" is frequently used in the sense of one branch of the legislature.<sup>1</sup> In this sense it

though it was intended to pass, but if the land is properly part of the curtilage of the *house*, if it is necessary to the enjoyment of and in fact forms part of that which is necessarily held and occupied with the *house*, then it does pass under the word *house*."

A Testator directed that his cousin A should continue to live at his *house* at C, and be at the charge of housekeeping, servants' wages, and coach horses to the number that he had maintained. He was seized of some land, which he had plowed by the coach horses, and whose produce was consumed by his domestic establishment. This land passed by the devise, and not only the *house* and curtilage. The court said: "By the grant or devise of an *house* with the appurtenances, only the garden and orchard will pass with the *house*; but the devise of the *house* with the lands appertaining will pass the land in question." The rule was controlled in this case by the testator's intention that everything about his *house* should be carried on after his death as before. *Blackborn v. Edgley*, 1 P. Wms. 600.

A testatrix who owned a *house* in S., with a yard and garden, and also owned several lots of land adjacent to said *house* and garden, with buildings on them which were held by tenants, made this devise: "I give and devise unto M., of S., my *house* and land in S. now occupied by me." It was held that M. took none of the land or buildings occupied by tenants at the date of the will. It was held, also, that parol evidence was inadmissible to show that the testatrix intended to devise such land and buildings to M. *Brown v. Saltonstall*, 3 Met. (Mass.) 423.

But in *Richmond v. State*, 5 Ind. 337, it was said: "The syllabus in the case of *Brown v. Saltonstall*, 3 Met. (Mass.) 423, quoted in several elementary works, and referred to by counsel, is inaccurate, and is not supported by the case. The devise was of 'my *house* and lands in Salem,' and the meaning of the word *house* was not defined by the court."

**Land Separated from House.** — A person held under the same lease a piece of ground on the south side of a public road, on which his *house* and garden were situated, and a corresponding piece of ground of equal width on the north side, on which he was prohibited from building, but which was used for the purposes of recreation and pleasure. A railway company was desirous of taking the north piece only. The court refused, on motion, to compel it to take both, as being parts of a *house* within the ninety-second section of the Lands Clauses Consolidation Acts. *Fergusson v. London*, etc., R. Co., 33 Beav. 103.

A shop fronting on a street and divided from its owner's dwelling and bakehouse in the rear by a yard or court communicating with the street by a passage, is not a part of the *house*, within the meaning of the statute enfranchising the occupiers of *houses* of the yearly value of ten pounds. *Powell v. Price*, 4 C. B. 105, 56 E. C. L. 105.

**Eminent Domain.** — Within the English Lands Clauses Act, which declares that a person

shall not be required to sell a part of a *house* if he is willing to sell the whole, the word *house* was held to comprise everything which would pass by that word in a conveyance. *King v. Wycombe R. Co.*, 28 Beav. 104; *Hewson v. London*, etc., R. Co., 2 L. T. 369, 8 W. R. 467; *Kerford v. Seacombe*, etc., R. Co., 57 L. J. Ch. 270; *Grosvenor v. Hampstead Junction R. Co.*, 1 De G. & J. 446; *Marson v. London*, etc., R. Co., L. R. 6 Eq. 101, L. R. 7 Eq. 546; *Richards v. Swansea Imp.*, etc., Co., 9 Ch. D. 425; *Pulling v. London*, etc., R. Co., 3 De G. J. & S. 661; *Cole v. West London*, etc., R. Co., 27 Beav. 242; *Salter v. Metropolitan Dist. R. Co.*, L. R. 9 Eq. 432. The term, however, does not include land not necessary for the use or convenience of the occupier of the *house*. *Fergusson v. London*, etc., R. Co., 3 De G. J. & S. 653; *Steele v. Midland R. Co.*, L. R. 1 Ch. 275; *Kerford v. Seacombe*, etc., R. Co., 57 L. J. Ch. 270.

**Garden and Orchard.** — In *Marston v. Stickney*, 58 N. H. 609, it was held that a garden and orchard would pass under the term *house*. And in the following cases "garden" was held included under *house*. *Cole v. West London*, etc., R. Co., 27 Beav. 242; *Smith v. Martin*, 2 Saund. 401; *Grosvenor v. Hampstead Junction R. Co.*, 1 De G. & J. 446; *King v. Wycombe R. Co.*, 28 Beav. 104; *Fergusson v. London*, etc., R. Co., 3 De G. J. & S. 653.

**Estovers.** — By grant of a *house*, estovers appendent thereto will pass. *Shep. Touch*, 89.

In a sale of a tract of land, a reservation of the "*house* and garden" for life implies a right to use the dooryard, and to necessary estovers. *Baxter v. Brand*, 6 Dana (Ky.) 296.

**House and Lot.** — So in *Smith v. Negbauer*, 42 N. J. L. 307, it was said: "The expression '*house* and lot,' used in reference to premises in a city, ordinarily imports a *house* with a curtilage, shut off from the neighboring grounds by some physical objects. Thus the deed bears upon its face an intimation that the land to be conveyed by it is inclosed within visible boundaries, and although the character of these boundaries be not indicated in the instrument, nevertheless the law permits extrinsic evidence of the actual condition of things, for the purpose of ascertaining the situation of the land;" and the boundaries control the measurements given in the deed. See generally the title BOUNDARIES, vol. 4, p. 756.

Under a devise of "the *house* and lot in the town of P., in which I now reside," the devisee will take only the lot which the testator, prior to the date of his will, had separated from his adjacent lands and inclosed by fences. *Phillipsburgh v. Bruch*, 37 N. J. Eq. 482.

**1. Branch of the Legislature.** (See also the titles LEGISLATURE; QUORUM; STATUTES.) — In the Constitution of *Mississippi* the words "branches" of the legislature and *houses* of the legislature frequently occurred. It was held that it was manifest that the terms "branch" and *house* were used indiscriminately to mean the same thing, *i. e.*, one division of the legislature. *Green v. Weller*, 32 Miss. 679.



means a sufficient number of members to constitute a quorum.<sup>1</sup>

**HOUSEBOTE.** (See also BOTE, vol. 4, p. 734.) — Housebote is the amount of wood necessary to use in making repairs of the buildings on the premises, and also for fuel; often known as firebote.<sup>2</sup>

**HOUSEHOLD.** (See also the titles EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 88, 89, 92, 95; HOMESTEAD, *ante*, p. 516; WILLS; and see EFFECTS, vol. 10, p. 446; FURNITURE, vol. 14, p. 568; GOODS, vol. 14, p. 1079.) — Household means those who dwell under the same roof and compose a family;<sup>3</sup> as an adjective, belonging to the household.<sup>4</sup>

1. **Quorum.** — In *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636, it was held that the word *house*, as applied to a branch of the legislature, meant a number of members sufficient to constitute a quorum to do business, and that an amendment of the constitution ratified by two-thirds of a majority of all the members elected was ratified by two-thirds of that *house*. See also *Southworth v. Palmyra*, etc., R. Co., 2 Mich. 288; *Green v. Weller*, 32 Miss. 651, set out in the preceding note.

The word *house* may mean either the whole number elected to a branch of the legislature or a majority of its members, the most common meaning being a number of its members sufficient to do business. *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636.

**Each House.** — In *Frellsen v. Mahan*, 21 La. Ann. 79, it was held that the term "each *house*," as used in the *Louisiana* Constitution, meant a majority of the members elected to either body.

**Entire Number.** — In a constitutional provision that "a majority of each *house* shall constitute a quorum to do business," etc., *house* means the entire number of which each branch of the legislature is composed. Matter of Executive Communication, 12 Fla. 653.

2. 2 Black. Com. 35.

3. **Household.** (See also FAMILY, vol. 12, p. 866.) — *Bowne v. Witt*, 19 Wend. (N. Y.) 475; *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

Persons who dwell together as a family constitute a *household*. *Arthur v. Morgan*, 112 U. S. 409. See also *Aaron v. State*, 37 Ala. 113.

**Household** means a man's home; the place where he holds house. *Hoopes's Estate*, 1 Brews. (Pa.) 464, 60 Pa. St. 220, 100 Am. Dec. 562. In this case it was held that *household* might embrace a school.

**Articles for Support of Household.** (See also the title SEPARATE PROPERTY (OF MARRIED WOMEN).) — In an act making the separate property of a married woman liable for necessities purchased for the use of the *household*, this term does not include a child of her husband by a former marriage. *May v. Smith*, 48 Ala. 487.

**Same — Servants.** — A statute rendered the wife's separate estate liable for articles of comfort and support of the *household*. The court said: "Some articles in the account seem to have been purchased for servants in the family. These, it is insisted, are not properly chargeable on the wife's statutory estate. Servants necessarily employed and residing in the family (and the necessity for their employment was not mooted on the trial) are a part of the *household* within the meaning of the statute. Necessaries supplied them can

be charged on the wife's estate." *Pippin v. Jones*, 52 Ala. 165.

4. **Household.** — The general definition of *household*, when used as a qualifying word, is pertaining or belonging to the house or family. *Alsup v. Jordan*, 69 Tex. 304; *Huston v. State Ins. Co.*, 100 Iowa 402. This latter case was upon an insurance policy on *household* furniture and family stores, which terms were held to include books, games, writing material, etc.

**Household Goods.** (See also GOODS, vol. 14, p. 1079; and see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 112.) — In *Smith v. Findley*, 34 Kan. 323, the court said: "Bouvier defines *household* goods to mean 'everything of a permanent nature (that is, articles of *household* which are not consumed in their enjoyment) that are used or purchased, or otherwise acquired by a person for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in a house, as malt, hops, or victuals.'" See also *Marquam v. Sengfelder*, 24 Oregon 2; *Carnagy v. Woodcock*, 2 Munf. (Va.) 234, 5 Am. Dec. 470.

"**Household** goods" is a wider term than "furniture," including everything about the house that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder. *Carnagy v. Woodcock*, 2 Munf. (Va.) 234, 5 Am. Dec. 470.

**Same — Use.** — In *Pellew v. Horsford*, 2 Jur. N. S. 514, it was held that articles in the nature of *household* goods would pass under that description, although they were never used by the testator, nor even kept in his house.

**Same — Bank Bills, Money, etc.** — Bank bills were held not to pass under a bequest of *household* goods. *Timewell v. Perkins*, 2 Atk. 102. But in *Lutz v. Lutz*, 2 Blackf. (Ind.) 72, it was held that money and obligations passed under a bequest of *household* goods.

**Same — Clock.** — In *Slanning v. Style*, 3 P. Wms. 334, a clock was held to pass under a bequest of *household* goods.

**Same — Coal.** — Coal remaining unconsumed at the testator's death was held to be included in *household* goods in *Hurley's Estate*, 12 Phila. (Pa.) 47, 35 Leg. Int. (Pa.) 68.

**Same — Gas Fixtures.** — Within a statute providing for the registration of conditional sales which excepted *household* goods from its operation, it was held that *household* goods included gas fixtures. *Iden v. Sommers*, (N. Y. Super. Ct. Jury T.) 18 N. Y. Supp. 189, 61 N. Y. Super. Ct. 177.

**HOUSEHOLDER.** (See the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 88; HOMESTEAD, *ante*, p. 516; JURY AND JURY TRIAL.) — A householder is the head or master of a family; a person who occupies a house and has charge of and provides for a family therein.<sup>1</sup>

Same — **Gun, Pistol, etc.** — The will of W. gave to his widow "all of the *household* property now in my dwelling house in the village of C., and the use of said dwelling house for and during the term of her natural life." In the dwelling house at the time of the testator's death were a quantity of coal and wood, provided for family use, and a shotgun. Upon settlement of accounts of the executors, it was held that these articles were properly allowed to the widow; that the shotgun might have been provided for the defense of the house, and in the absence of proof the court was not required to presume the contrary. Matter of Frazer, 92 N. Y. 239. But in Slanning v. Style, 3 P. Wms. 334, guns and pistols were held not to pass if used as arms in riding, or for shooting game.

Same — **Hospital.** — Where a man owned a hospital, in a town other than that of his residence, which he employed, under contracts with the naval commissioners, in entertaining the sick and wounded of the navy, the furniture of this hospital was not included in the expression "*household* goods," as used in an exception in a marriage settlement with his wife, by which she renounced her claims upon his property. Pratt v. Jackson, 2 P. Wms. 302, 1 Bro. P. C. (Toml. ed.) 222.

Same — **Innkeeper.** — In Com. v. Stremback, 3 Rawle (Pa.) 341, it was held that goods and chattels of an innkeeper, consisting of a quantity of liquors, bar furniture, and beds for his guests, were not *household* goods, within the meaning of the rule that suffering *household* goods to remain in the possession of the debtor after execution is a badge of fraud.

Same — **Plate.** — In Jesson v. Essington, Prec. Ch. 207, it was held that plate did not pass under a devise of *household* goods. But see Stapleton v. Conway, 1 Ves. 427; Kelly v. Powlet, Ambl. 605; Nicholls v. Osborn, 2 P. Wms. 421; Porter v. Tournay, 3 Ves. Jr. 313; Masters v. Masters, 1 P. Wms. 425; Lillcott v. Compton, 2 Vern. 638; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329, where plate was held to pass.

Same — **Provisions.** — In Slanning v. Style, 3 P. Wms. 334, victuals were held not to pass under a bequest of *household* goods.

Same — **Provisions — Chattel Mortgage.** — In a chattel mortgage a description of the chattels as "all personal property, including furniture and *household* goods of every description," is sufficient to create a lien on all personal chattels which may contribute to the use or convenience of the householder, or the ornament of his house, under the description of "furniture," and on every *household* article of a permanent nature which is not consumed in its enjoyment under the term "*household* goods;" but it will not cover wines, liquors, or groceries. Marquam v. Sengfelder, 24 Oregon 2.

Same — **Provisions — Contract for Carriage.** — Where a shipper entered into a special written agreement with a railway company to transport over its road one carload of *household*

goods and two horses, from Kansas City or the state line to Minneapolis, Kansas, at a greatly reduced rate, and the shipper, without the knowledge or consent of the railway company, put into the car limited quantities of potatoes, bacon, vinegar, and salt, a part of which he had for sale and barter, and the regular rates for the carriage of the potatoes, bacon, etc., were higher than the rates for *household* goods and horses, the company was held to be entitled to be paid by the shipper, in addition to the contract price for carrying the *household* goods and horses, its regular rates for carrying the potatoes, bacon, etc. Smith v. Findley, 34 Kan. 316.

Same — **Wheat.** — Under a statute requiring assessors to list, *i. e.*, describe, the property assessed, listing wheat as "*household* goods" is invalid. Thompson v. Davidson, 15 Minn. 412.

**Household Furniture.** (See also FURNITURE, vol. 14, p. 568; and see the title WILLS.) — In order to constitute an article *household* furniture, it must be provided for, and appropriated to uses in, the house. "There may be articles which are sometimes used in the house, but are carried out by day and brought in at night. These articles would not have such a fixedness as to be considered *household* furniture." Gooch v. Gooch, 33 Me. 535.

A clock not fastened to the wall passed as *household* goods in Slanning v. Style, 3 P. Wms. 334.

**Household Effects — Carriage — Tariff Law.** (See generally the title REVENUE LAWS.) — A carriage in use abroad for a year by its owner, who brings it to the United States for his own use there, and not for another person nor for sale, is "*household* effects" under Rev. Stat. U. S., § 2505, and free from duty. Arthur v. Morgan, 112 U. S. 495. See also EFFECTS, vol. 10, p. 446, and the title WILLS.

1. **Householder.** — Peterson v. Bingham, 13 Wash. 180 [following 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 783]; Woodward v. Murray, 18 Johns. (N. Y.) 400; Bowne v. Witt, 19 Wend. (N. Y.) 475; Aaron v. State, 37 Ala. 113; Carpenter v. Dame, 10 Ind. 125; Nelson v. State, 57 Miss. 288.

"Mr. Burrill, in his law dictionary, defines a *householder* to be the occupier of a house." Lester v. State, 2 Tex. App. 448.

**Householder** implies in its term the idea of a domestic establishment — of the management of a household. Katzenberg v. Lehman, 80 Ala. 514; Aaron v. State, 37 Ala. 106.

The person who provides for the household is the *householder*. Griffin v. Sutherland, 14 Barb. (N. Y.) 456. See also Rex v. Rufford, 8 Mod. 40; Slades's Bail, 1 Chit. 502, 18 E. C. L. 147; Rex v. Poynder, 1 B. & C. 178, 8 E. C. L. 77.

**Housekeeper.** (See also HOUSEKEEPER, *post.*) — *Householder* and "*housekeeper*" have been held synonymous. Lester v. State, 2 Tex. App. 448. See also Bradford v. State, 15 Ind. 353. Compare Rex v. Hall, 1 B. & C. 123, 8 E. C. L. 53.



**Householder and Freeholder Distinguished.**—In holding that a freeholder merely was not competent to sit upon a petit jury, the court said: "That a man may be a freeholder and not a *householder*, or a *householder* and not a freeholder, is a proposition so plain as to need no argument. A *householder* is the occupier of a house—a housekeeper, master of a family. Jacob's Law Dict., vol. 3, p. 350. The master of a house or family. (Bailey.) The master or chief of a family; one who keeps house with his family. (Webster.) A man may be all these, and yet not the owner of the soil. A freeholder is such as holds a freehold estate, that is, land or tenements, in fee simple, fee tail, or for term of life. Jacob's Law Dict., vol. 3, p. 139. A person who is the owner of a freehold estate, which is an estate in lands or other real property, for the life of the tenant or that of some other person, or for some uncertain period. Bouvier's Law Dict. An estate of inheritance, or for life, in real property. 4 Kent 24. The possession of the soil by a freeman. 2 Black. Com. 104. So it is obvious a man may be a large freeholder, and yet not a *householder*." Bradford v. State, 15 Ind. 353. See also Carpenter v. Dame, 10 Ind. 129. And see the title JURY AND JURY TRIAL.

**Jury and Jury Trial.** (See also the title JURY AND JURY TRIAL.)—The term *householder* in the Mississippi statute was held to refer to the civil status of the person, and not to his property, and to require that he shall occupy the position of chief in a domestic establishment, though he need be neither a husband nor a father. Nelson v. State, 57 Miss. 286.

**Same—Actual Occupancy of House.**—In Nelson v. State, 57 Miss. 286, the court held that a *householder* is any head or chief of a domestic establishment which he keeps together and provides for, but he need not be the actual occupant of the house. See also Bowne v. Witt, 19 Wend. (N. Y.) 475; Woodward v. Murray, 18 Johns. (N. Y.) 400.

**Intoxicating Liquors—Nature of Title.**—Within a statute requiring the written consent of the majority of the *bona fide householders* within a certain district to the licensing of a saloon, it was held that a *householder* was a person who occupied a house as residence or place of business, without any relation to the character or title by which the property was held. Shepard v. New Orleans, 51 La. Ann. 847. See also the title INTOXICATING LIQUORS.

**Married Woman—Grand Jury.**—In Rosenkrantz v. Territory, 2 Wash. Ter. 267, it was held that the husband and wife conjointly constitute the head of the family, and each, therefore, in contemplation of law, is a *householder*; and therefore a married woman residing with her husband might be a grand juror. But see Harland v. Territory, 3 Wash. Ter. 131, where this case was reversed; and see the title JURY AND JURY TRIAL.

**Millowner.** (See also the title BAIL (IN CIVIL CASES), vol. 3, p. 604.)—A surety who was engaged in the milling business and who rented and equipped a mill within the state, owning the machinery therein, was deemed a *householder*, within a statute requiring that the surety upon an undertaking on appeal should be a *householder*. Delamater v. Byrne, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 71.

**Overseers of Poor.**—Under the statute 43 Eliz., c. 2, § 1, making substantial *householders* liable to serve as overseers of the poor, and similar statutes, *householder* includes all tenants of houses. Persons who reside in another parish, but who rent a house occupied by a clerk in the parish in question, where they pay rates and taxes, are *householders* there. Rex v. Poynder, 1 B. & C. 178, 8 E. C. L. 77, 2 Dowl. & R. 258; Rex v. Hall, 1 B. & C. 123, 8 E. C. L. 53. But the term excludes lodgers and those having no permanent interest in the place, though having a temporary residence. It is, on the other hand, not so strict a word as "housekeeper." Rex v. Hall, 1 B. & C. 123, 8 E. C. L. 53.

In Reg. v. Spurrell, L. R. 1 Q. B. 72, Cockburn, C. J., said: "I think a man cannot be a *householder* within the true construction of the statute who has not an independent occupation. I do not think a man who occupies as servant, in which case the occupation is that of the master, can be said to be a *householder* in the proper sense of the term. \* \* \* On the other hand, if the occupation be not necessary to the service, then the fact that the advantage of the occupation is part of the remuneration for the service will not render that occupation less an occupation *qua* tenant than it would have been if the man had paid rent."

**Single Man Keeping House.**—A single man who keeps house and servants is a *householder*, within an act requiring petitioners for the opening of a road to be such. Kamer v. Clatsop County, 6 Oregon 238.

**Same—Suits Against Householders.**—The term is similarly construed in an act providing that a *householder* having a permanent residence in the state shall not be sued outside of the county of his residence. The court said: "An unmarried man, occupying a house, employing his own servants, and providing for the household as constituted, may be a *householder*; but an unmarried man who rents and occupies a room as a sleeping apartment and takes his meals elsewhere is not a *householder* in the meaning of the statute." Katzenberg v. Lehman, 80 Ala. 512.

**Same—Juror.**—A single man who rents a house which he occupies with a younger brother for all purposes, except that he takes his meals elsewhere, is a *householder*. Lester v. State, 2 Tex. App. 448, the court saying: "The juror in question rented the house; had actual and complete control of it; occupied it with such family as he had, and used it for all purposes except eating. We are of opinion he was a competent juror."

**Lodgings—Boarder.**—An unmarried merchant who had rented a store in which he slept was held not a *householder* and therefore not qualified as a juror. Brown v. State, 57 Miss. 424, 10 Cent. L. J. 376.

In Aaron v. State, 37 Ala. 106, the court held that a person who had merely rented a room for a year was not a competent juror under a statute requiring that jurors should be *householders*.

In Lane v. State, 29 Tex. App. 319, it was held that one who was a mere boarder and lodger in the private *house* of another was not a *householder*. The court commented on



- HOUSEKEEPER.** (See also the title BAIL (IN CIVIL CASES), vol. 3, p. 604.)  
— A housekeeper is defined as one who keeps house.<sup>1</sup>  
**HOUSE OF ENTERTAINMENT.** (See also the title INNS AND INNKEEPERS.)  
— A house of entertainment is a tavern; a common inn.<sup>2</sup>  
**HOUSE OF ILL FAME.** — See the title DISORDERLY HOUSES, vol. 9, p. 508.  
**HOUSE OF RELIGIOUS WORSHIP.** — See note 3.  
**HOUSE OF REPRESENTATIVES.** — See the title LEGISLATURE.

*Robles v. State*, 5 Tex. App. 346, where it was stated that one who rents a room and boards is a *householder*, saying that the statement was too broad. See *Lee v. State*, 34 Tex. Crim. 519.

In *Katzenberg v. Lehman*, 80 Ala. 514, it was held that an unmarried man who rents and occupies a room as his sleeping apartment and takes his meals elsewhere, in a city or town, is not a *householder*, within the meaning of the statute which prohibits an action against the *householder* except in the county of his residence.

1. *Housekeeper.* — *Lester v. State*, 2 Tex. App. 448.

In an action for services performed as *housekeeper* the court said: "The term *housekeeper* does not admit of any clear, accurate, and arbitrary limitation as to the character of the services which are embraced within the duties of such a person. Those duties are not very strictly defined by such an expression. Generally speaking, we know that it has reference to services performed in the taking care of a house in connection with the inmates residing therein, but exactly what special and particular duties are to be regarded as embraced within the term must almost always be de-

cided by the duties which are actually performed under the agreement as made." *Edgecomb v. Buckhout*, 146 N. Y. 342.

2. *House of Entertainment.* — A statute required a license for keeping a tavern, or *house of entertainment*. It was held that the terms "tavern" and *house of entertainment* were synonymous, and that by these terms were meant the common inns of the common law. *Bonner v. Welborn*, 7 Ga. 296.

3. *House of religious worship*, in an exemption from taxation, includes "such distinct tenements as are used for that purpose, and for purposes connected with it, and does not include distinct tenements used for other purposes, though under the same roof." Stores in the basement are not a part of such a *house*. *South Cong. Meetinghouse v. Lowell*, 1 Met. (Mass.) 538. See also *Trinity Church v. Boston*, 118 Mass. 164.

In *Matter of Vanderbilt*, N. Y. L. J. June 5, 1890, *Dos Passos* on Collateral Inheritance Tax 62, it was held that the institution known as the Young Men's Christian Association was not a seminary of learning or *house of religious worship*. See also the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 328; RELIGIOUS SOCIETIES.

# HOUSES OF REFUGE AND CORRECTION.

By W. J. TRACY.

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## CROSS-REFERENCES.

See also the titles *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 893; *HOSPITALS AND ASYLUMS*, ante; *RELIGIOUS SOCIETIES*.

**I. DEFINITIONS.** — Houses of Refuge and Correction are of statutory foundation and organization; institutions of various designations, but of the same purpose and object, are included under the term.

**Analogy Between Houses of Refuge and Houses of Correction.** — A house of refuge and a house of correction are alike in the essential element that each is a quasi-penal institution, whose desideratum is the reformation rather than the punishment of the inmate.

**Distinction Between Houses of Refuge and Houses of Correction.** — A house of refuge is usually for the young; for juvenile offenders, exclusively. A house of correction, originally, was designed for petty evil-doers of all ages, and in the absence of any statutory provision to the contrary the age of a person committed is of no especial importance.<sup>1</sup>

1. See Bouvier's Law Dict., Rawle's Revision (ed. 1897); Anderson's Law Dict.

**A Jail May Be Regularly Adopted and Established as a House of Correction.** — *Taunton v. Westport*, 12 Mass. 355; *Com. v. Justices*, 2 Pick. (Mass.) 414; *Day v. Hampden County*, 11 Met. (Mass.) 579; *Bergin's Petition*, 31 Wis. 383. See also *State v. Haley*, 52 Vt. 476.

**A Reformatory** is an institution or place in which efforts are made either to cultivate the intellect or instruct the conscience, or improve the conduct; where the inmates voluntarily submit themselves to its instruction or discipline or are forcibly detained therein. *Hughes v. Daly*, 49 Conn. 34.

**Reformatory** — Term Too Vague and Ambiguous to Vest a Legacy or Devise — Connecticut. — See *Hughes v. Daly*, 49 Conn. 34. See the last note in this title. And see the title *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, pp. 995, 925.

**Industrial School.** — There seems to be no clear distinction between a state reformatory and a state industrial school, as the latter term is now technically used in legislation. *State v.*

*Ray*, 63 N. H. 408, 56 Am. Rep. 529; *Benn's Petition*, 17 R. I. 573; *People v. Poly*, (Gen. Sess.) 17 Misc. (N. Y.) 162.

**Industrial School — Cruel and Unusual Punishment — Minnesota.** — The commitment of vicious and refractory minors to the state industrial school is not subjecting them to cruel and unusual punishment, and the act creating said industrial school (*Minnesota Laws* 1895, c. 153) is constitutional. *State v. Phillips*, 73 Minn. 77. See generally the title *CRUEL AND UNUSUAL PUNISHMENT*, vol. 8, p. 436.

**Workhouses — Must Be Public Institutions — Minnesota.** — Where a municipal corporation is empowered to maintain workhouses for the reception and confinement of certain prisoners, such institutions should be wholly public and under municipal control. Any arrangement, therefore, by which a House of the Good Shepherd, conducted by a private corporation, is treated as a workhouse for women, is irregular and illegal, and any contracts made by the municipality with such private corporation cannot be enforced. *Farmer v. St. Paul*, 65 Minn. 179.

**II. HISTORY AND ORIGIN.** — Houses of refuge and correction, using the words in their most comprehensive sense, are modern institutions, owing their existence and especially their recent growth and development to advanced and humane ideas in criminology. It is now apparently conceded — and many legislatures have acted upon the principle — that in the case of first offenders, of the young, and sometimes of females, generally, the welfare both of society and of the offender will be better promoted and conserved by the exercise of reformatory and corrective measures than by treatment wholly punitive.<sup>1</sup>

**III. COMMON NATURE, OBJECT, AND PURPOSE — 1. Public Institutions.** — All houses of refuge and correction, however designated, are alike in certain essential elements and features. Every institution of the kind, apart from certain private charitable reformatory organizations hereinafter mentioned, is a public institution;<sup>2</sup> is charitable and eleemosynary; and is penal or quasi-penal, although reformatory.

**2. Charitable and Eleemosynary.** — Every institution of a reformatory character, embraced within the meaning of the terms "houses of refuge and correction," is, in a legal sense, charitable and eleemosynary, so far as such terms may properly apply to a public corporation. In some states all such reformatory institutions are included in or united with the state charities. Sometimes they are specifically declared to be charitable corporations by the statutes which create them.<sup>3</sup>

**3. Penal or Quasi-penal, Although Reformatory.** — All such institutions are identical in spirit and purpose. The object of each is the reformation of the culprit and his restoration to society, as speedily as the general welfare will permit, prepared and equipped by reason of the training received while in confinement to lead a correct and useful life.<sup>4</sup> But all such institutions are distinctly penal as well as reformatory in character.<sup>5</sup>

**House of Detention.** — As employed in certain recent legislation, the term "house of detention" is given a restricted and technical meaning, and denotes a place for the confinement of alleged juvenile delinquents before trial and commitment. *Pennsylvania Act of May 12, 1897; New York Laws of 1892, c. 686, § 101.*

1. Reference is made to the numerous statutes of recent enactment, wherein such purpose is obvious. By way of illustration, see *Illinois Act of June 22, 1893, P. L. 23*, as amended by Act of June 25, 1895, establishing, etc., the State Home for Juvenile Female Offenders; *New York Act of May 16, 1892*, establishing, etc., Reformatory for Women.

**House of Refuge Is for Reformation Rather than for Punishment.** — In *Ex p. Crouse, 4 Whart. (Pa.) 9*, the court stated that a house of refuge was not a prison but a school, although it might be used as a prison for juvenile convicts who would otherwise be sent to the common jail. The object of the charity is the reformation of young offenders by training them in industry and furnishing them with the means of obtaining a living; by instilling in their minds principles of morality and religion; and above all by separating them from improper associates.

**2. Public Institutions.** — Reference is again made to the statute or statutes creating any particular institution of a reformatory character. It will always appear that such institution is founded and created by the state, or by municipal authority derived directly from the state; is under state or municipal control and

management, exclusively; and is supported by public funds. For illustration, see *Rhode Island Gen. Laws (ed. 1896), p. 1022, c. 285, § 50*. And see the title *HOSPITALS AND ASYLUMS, ante*.

**3. Charitable and Eleemosynary.** — See the title *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, pp. 894, 895; *Code of Tennessee (ed. 1896), §§ 4356, 4370; Act of 1895, c. 60, §§ 1, 15; Ex p. Crouse, 4 Whart. (Pa.) 9; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; Ex p. Nichols, 110 Cal. 651; Illinois Act of June 22, 1893, P. L. 23, amended Act of June 25, 1895, creating State Home for Juvenile Female Offenders, and declaring the same a charitable corporation.*

In *Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495*, it was held that a house of refuge, being a corporation organized for charitable purposes, was not liable in damages for an assault committed by one of its officers on an inmate.

4. *State v. Ray, 63 N. H. 408, 56 Am. Rep. 529; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; Ex p. Crouse, 4 Whart. (Pa.) 9; Jarrard v. State, 116 Ind. 98; Ex p. Nichols, 110 Cal. 651.*

**5. Industrial School — Quasi-penal Institution.** — In *State v. Ray, 63 N. H. 408, 56 Am. Rep. 529*, it is said that the great purpose of a certain industrial school was the separation of youthful offenders from hardened criminals of mature years, in the hope of their ultimate reformation and of their becoming useful citi-



**Penal Element Differs in Degree with Nature of Institution.** — In a house of detention or of refuge the penal phase is, usually, but slightly apparent.<sup>1</sup> In the other institutions the penal feature obtains in a greater degree, until in certain work-houses it seems to reach its highest development;<sup>2</sup> and although confinement in the most rigorous house of refuge and correction is ordinarily followed by no loss of civil rights, and in contemplation of law is radically different from imprisonment in a penitentiary, state, county, or municipal prison, yet in every instance there is a stigma and odium attaching thereunto which would, perhaps, hardly exist were the first-named institutions reformatory only.<sup>3</sup>

**IV. ORGANIZATION AND MAINTENANCE** — Of Statutory Creation. — Houses of refuge and correction, as we understand the terms, were unknown to the common law. They are always, when public institutions, created and organized by statute.<sup>4</sup>

**Incorporation.** — In the *United States* such institutions are ordinarily declared bodies politic and corporate by the statutes which create them. It is difficult, perhaps, to understand how a penal-reformatory institution can safely and properly accomplish the object of its creation unless it is incorporated.<sup>5</sup>

**Supported by Public Funds.** — As public institutions, houses of refuge and correction are maintained and supported out of the public funds.<sup>6</sup>

**V. MANAGEMENT** — **Inmates** — **Commitments.** — Who may be committed to houses of refuge and correction or admitted thereto, what courts or magistrates

zens; but that the fact could not be overlooked that the detention of the inmates was regarded to some extent in the nature of a punishment, with more or less disgrace attached on that account.

1. In *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702, it was stated, that, where minors must be confined for crime, a regard for public welfare requires in many cases that they be kept in some place where they may have an opportunity to improve, instead of being made morally worse by their confinement; where the prison officials are not mere jailers, but exercise parental duty as well as parental authority; and "where education for good is made a condition of their restraint."

2. *Farmer v. St. Paul*, 65 Minn. 179.

3. **A State Reformatory Is Not a Penitentiary.** — *Henderson v. People*, 165 Ill. 607; *Matter of Dumford*, 7 Kan. App. 90; *People v. Illinois State Reformatory*, 148 Ill. 413; *Exp. Nichols*, 110 Cal. 651; *State v. Ray*, 63 N. H. 408, 56 Am. Rep. 529.

**Incompetency as a Witness.** — It has been held that one who has been convicted of a felony and sentenced to a house of correction is disqualified to testify as a witness while his sentence remains unserved. *Park v. People*, 1 Lans. (N. Y.) 263, affirmed in 41 N. Y. 21. See also *Poage v. State*, 30 Ohio St. 230.

**Summary Transfer of Inmate of Reformatory to the Penitentiary Unlawful Even as a Disciplinary Measure.** — No person can be committed to the penitentiary except by sentence of a court of record having jurisdiction and in due process of law; therefore, where a person has been duly committed to the reformatory, the board of managers thereof cannot lawfully transfer him to the penitentiary, even as a disciplinary measure. *Matter of Dumford*, 7 Kan. App. 90.

But see "*Charter of Greater New York*," Act of May 4, 1897, New York Laws of 1897,

c. 378, which in placing all reformatory and penal institutions under the sole control of the commissioner of correction, authorizes him to effect any changes he deems expedient in the disposition of prisoners, for the proper employment of the persons committed or for the advantage of the institution.

4. Reference is made, generally, to the statutes creating such institutions. For a recent and illustrative act, by which it is made the duty of the various counties, cities, and towns, if financially able, to establish reformatory institutions "for the reformation, correction, employment, instruction, and education of neglected, evil-disposed, vicious, or incorrigible youths of both sexes," see Code of *Tennessee* (ed. 1896), § 4356; Act of 1895, c. 60, § 1.

5. Under Code of *Tennessee* (ed. 1896), § 4360; Act of 1895, c. 60, § 5, the organization of the proper board of trustees for a reformatory institution, established by any of the various counties, cities, and towns, as prescribed by the act, constitutes such institution a body corporate.

**Unincorporated Reformatory Institution.** — It may sometimes happen that a municipal corporation, having authority under its charter to establish a house of refuge or other reformatory institution, organizes the same, but neglects to obtain a special charter therefor. In such case it would perhaps seem that the institution should be treated as an integral part of the city or municipality itself; as a department thereof, without corporate existence except as derived from the municipality itself. *Vance's Succession*, 39 La. Ann. 371.

6. See generally the appropriation bills of any particular state, as periodically enacted, when the institution is under state control. When a municipal or county institution, see, by way of illustration, Code of *Tennessee* (ed. 1896), § 4384; Act of 1895, c. 60, § 29. See *Indianapolis v. Indianapolis Home for Friendless Women*, 50 Ind. 215.

are possessed of jurisdiction in the premises, and anything relative to the procedure in such cases, can, of course, be determined only by consulting the respective statutes. Some illustrative statutes are noted from which a general idea of the subject may be had.<sup>1</sup>

**1. Right of Commissioners of House of Refuge to Refuse Admission to Prisoner Duly Committed — Indiana.** — *Ainsworth v. State*, 49 Ind. 563, is a strong decision upholding the authority of managers, trustees, etc., of reformatory institutions, to enforce the rules and regulations governing the formalities or requisites of entrance to them. A minor convicted of larceny and duly committed to the house of refuge, was conveyed thereunto by a deputy sheriff, who had neglected to secure certain papers containing important information relative to the prisoner, required by the rules of the institution; also to provide himself with a medical certificate similarly required. Admission was refused in consequence. Proceedings were thereupon taken against the superintendent of the institution for contempt of court; which proceedings were sustained, and a fine imposed upon the superintendent. Upon demurrer, the supreme court reversed the judgment of the lower court, and held that the managers and proper authority were empowered to make rules of the kind in question and to enforce compliance with the same.

**No Power to Sell the Services of inmates of a reform school is vested in the trustees.** *Clement v. State Reform School*, 84 Ill. 311.

**Reformatory — Minor May Be Sentenced for Period to Be Determined by Managers of Institution — Illinois.** — A general sentence of a minor, convicted of burglary, to confinement in the state reformatory for a period to be terminated by the managers of the institution, is a sentence for the maximum term fixed by law as the punishment of burglary; the managers having the power to release the prisoner sooner, if he comes within the rules of the institution entitling him to such clemency. *People v. Illinois State Reformatory*, 148 Ill. 413.

**Alternative Sentence — Rhode Island.** — In Rhode Island, where a minor under eighteen is committed to the reform school, and the board of state charities and corrections deem it improper to receive him in such institution, by reason of his incorrigibility or vicious propensities, they are empowered to place him in a state workhouse. But upon his amendment he should be sent to the reform school. His stay at the workhouse, if he was sent there as a punishment, cannot be credited upon the term of his sentence to the reform school. *Bonn's Petition*, 17 R. I. 573. See also *Matter of Mason*, 3 Wash. 609.

**New Hampshire.** — In this state it was held that the police court had power to commit to the house of refuge where, by law, the alternative sentence might be fine or imprisonment, although such alternative sentence was actually a fine only. *State v. Shattuck*, 45 N. H. 205.

**Ohio — Reformatory for Males Only.** — See *State v. Wilson*, 4 Ohio Dec. 328, where it was said that under the laws then in force "none can be sent to said reformatory but males between sixteen and thirty years of age, convicted for the first time for an offense punishable by

imprisonment in the penitentiary, and that is discretionary with the court passing sentence."

**Workhouse.** — Usually More of a Penal than a Reformatory Institution — *Minnesota.* — In *Farmer v. St. Paul*, 65 Minn. 179, the court, in defining the term "workhouse," said that in Minnesota the word had a well-defined popular and legal signification: "It is a place or prison where persons convicted of minor offenses and misdemeanors may be confined and kept at labor." The various statutes under which workhouses are established and governed usually treat such institutions as penal rather than reformatory.

**But, in a Rhode Island Case, Bonn's Petition**, 17 R. I. 573, the court states that the state workhouse and house of correction and the state reform school are primarily reformatory institutions, and that in order to effect this, large discretionary power has been conferred upon the board of state charities and corrections.

**Minor Should Not Be Committed upon Mere Charge of Crime — Kansas.** — Males under the age of sixteen "who may be liable to punishment by imprisonment" can be committed to the state reform school, in Kansas. But the mere fact that a minor is charged with or accused of crime will not empower a court to commit him to said institution before a trial is held and conviction had. *Matter of Sanders*, 53 Kan. 200.

**Modification of Rule.** — A statute has been sustained, however, under which a grand jury, before whom an indictment against a minor under sixteen was pending, instead of ignoring or finding the same true, simply made return that the defendant was a suitable person to be sent to the house of refuge; whereupon the court made such commitment, without further trial. *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388.

**Minor Should Be Committed to Reformatory under Management of the Same Religious Belief as His Parents — New York.** — It is the imperative duty of any magistrate of the city of New York, in committing a minor to a reformatory, to select an institution under a management of the same religious belief as that held by the parents of the offender. *People v. Poly*, (Gen. Sess.) 17 Misc. (N. Y.) 162.

**Statutes Authorizing Commitments Sustained.** — See *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *Matter of Ferrier*, 103 Ill. 367, 42 Am. Rep. 10; *State v. Brown*, 50 Minn. 353, 36 Am. St. Rep. 651; *People v. Masten*, 79 Hun (N. Y.) 580; *Ex p. Crouse*, 4 Whart. (Pa.) 9; *Reynolds v. Howe*, 51 Conn. 472.

**Statutes Authorizing Commitments Held Unconstitutional.** — *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645; *Com. v. Horregan*, 127 Mass. 450.



**Welfare of the Offender the Principal Consideration in the Lesser Penal Reformatory Institutions.** — Courts generally are disposed to pay special attention to the true interest of the minor or offender in passing upon statutes authorizing commitments to reformatory institutions; mere technicalities should apparently have little weight.<sup>1</sup>

**Age of Offender at Time of Conviction.** — The age of the offender at the time of sentence is quite frequently a matter not only of the highest importance, but also a point difficult to ascertain. From the necessity of the case the determination of the question is commonly left to the sound judgment of the court or committing magistrate.<sup>2</sup>

**Discipline.** — In some instances the discipline to be pursued in a reformatory institution is in some degree prescribed by statute.<sup>3</sup> More frequently it is left wholly and absolutely to the board of managers of the institution.<sup>4</sup>

**Discharges.** — The system of releasing inmates upon parole, of conditional discharges, and other methods followed in reformatory institutions, vary so

**Investigation Should Be Had Before Commitment** — Tennessee. — Under the Tennessee statute, Laws of 1891, c. 195, an investigation and inquiry should be had in open court, in every case, before a minor is committed to the state industrial school. A committal based upon the personal acquaintance of the judge with the circumstances of a case, without such open and public examination, is improper. *State v. Kilvington*, 100 Tenn. 227.

**As to Commitment Being a Judicial Act to Be Publicly and Openly Performed**, see *In re Kindling*, 39 Wis. 35; *Atty.-Gen. v. McDonald*, 3 Wis. 805.

**Rights of Parents Not Determined by Summary Commitment of Minor.** — Cincinnati House of Refuge *v. Ryan*, 37 Ohio St. 197; *Prescott v. State*, 19 Ohio St. 188, 2 Am. Rep. 388; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702; *People v. Masten*, 79 Hun (N. Y.) 580; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452; *Com. v. M'Keagy*, 1 Ashm. (Pa.) 248.

In *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452, it is held that while a commitment to the house of correction is evidence of the condition of the child at the time of commitment, yet the father may thereafter show that the cause for commitment no longer exists and that the welfare of the child will permit its restoration to his charge.

**Commitment of Destitute Children to Quasi-penal Institution.** — In *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702, it is said that commitments of destitute children to such institutions, although stigmatized as the punishment of poverty as a crime, cannot justly be so considered: "the removal of children from poorhouses to these schools is mercy, not punishment."

**1. Welfare of the Offender a Chief Consideration.** — *Matter of Mason*, 3 Wash. 609; *Ex p. Crouse*, 4 Whart. (Pa.) 9; *Matter of Ferrier*, 103 Ill. 367, 42 Am. Rep. 10; *McLean County v. Humphreys*, 104 Ill. 378; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452; *Roth v. House of Refuge*, 31 Md. 329; *Ex p. Nichols*, 110 Cal. 651.

**2. Age of Minor at Commitment Should Always Be Ascertained and of Record.** — *Cohen v. State*,

10 Ind. App. 341; *Matter of Gates*, 93 Mich. 644.

**New York.** — *People v. Protestant Episcopal House of Mercy*, 133 N. Y. 207, holds that it is the duty of a magistrate in committing a girl over twelve years old, to a female reformatory, under the provisions of Consolidated Act, § 1466, as amended by Laws of 1886, c. 353, to ascertain her precise age, and to note and return the same in the warrant of commitment. It is also held, reversing the court below, that such return of age by the magistrate is conclusive, and cannot be collaterally impeached, attacked, or questioned.

**Age in Some Cases Can Only be Ascertained by Magistrate from Appearance of Party.** — *Matter of Serafina*, (Supm. Ct.) 66 How. Pr. (N. Y.) 178.

**Age when Convicted.** — *State v. Townley*, 147 Mo. 205, is a late and important case. The defendant, on July 10, plead guilty to assault with intent to commit rape. He was then under eighteen, and the ordinary penalty would have been a term in the reform school. The court took no action on the plea of guilty until August 3. Meanwhile, the defendant had completed his eighteenth year, and was thereupon sentenced to the penitentiary for three years. Upon appeal, the supreme court sustained the sentence imposed by the trial court, and held that defendant was not convicted when he plead guilty — the judgment of the court being essential to a conviction — and that when said judgment was rendered he had reached the age when he no longer could claim immunity from the penitentiary.

**3. Code of Tennessee**, title Tennessee Industrial School (ed. 1896), §§ 4418, 4425, 4429.

**4. Illinois.** — *Starr & Curtis's Annot. Statutes*, vol. 3, (Supp., ed. 1892), Act of June 18, 1891.

**Pennsylvania.** — *Huntington Reformatory Act of June 8, 1881*, P. L. 63; *Pepper & Lewis's Digest*, p. 2280 (1st ed.).

**Depraved Parent May Be Denied Access to Minor Child, an Inmate of Reformatory Institution** — **New York.** — When the mother of a minor inmate of a reformatory institution is of known immoral and vicious character she may be refused the privilege of visiting said child. *In re Diss Debar*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 667.



much that reference should be had in every instance to the charter, by-laws, and statutes governing any particular institution; and the same is true of final discharges.<sup>1</sup>

**VI. PRIVATE REFORMATORY INSTITUTIONS — In General.** — In addition to the houses of refuge and correction created by state laws, there are many institutions of a semi-public nature which would almost seem to come within the spirit and design of the class. They are, however, of private foundation and their legal status still somewhat undefined. Courts usually have no authority to commit an offender to any reformatory institution other than a public one. These private institutions are for the most part composed of Houses of the Good Shepherd or Magdalene Hospitals and sectarian reformatory schools.

**Houses of the Good Shepherd and Magdalene Hospitals** are, ordinarily, incorporated bodies under the direct control and management of some religious order or society.<sup>2</sup> Their object and purpose is the reformation of fallen women. Noble as are these charities, their sectarian character forms a constitutional objection in some, perhaps in most states, to the payment to them of any public money, even for the support of inmates.<sup>3</sup>

**Sectarian Reformatory Schools.** — There are many reformatory institutions, designed for the reclamation of vicious youth, which are under the control of various churches and religious organizations. They are known by different titles, but are all generally private charitable corporations, and labor under the same disadvantage as do Houses of the Good Shepherd, etc. Admission or entrance therein is largely a matter of volition with the minor himself, and unless directly authorized by a statute which is in accord with the constitution of the state, courts cannot commit offenders to such institutions.<sup>4</sup>

**HOVEL.** — See note 5.

**1. Discharge — Pennsylvania.** — In *Davenport v. House of Refuge*, 11 Phila. (Pa.) 458, 33 Leg. Int. (Pa.) 272, it was held that the managers of a house of refuge and not the court are authorized to discharge a minor who has been lawfully committed to the institution.

**Conditional Discharge of Prisoner — Re-arrest After Expiration of Term of Original Sentence.** — Under the *New York Statutes*, Laws 1881, c. 187, § 8, and Laws 1892, c. 704, a female inmate of the house of refuge for women, who has been conditionally discharged, may be re-arrested, upon cause shown, and held to serve out the unexpired portion of the term for which she was originally sentenced, although the date originally fixed for the expiration of sentence passed while she was free upon conditional release. *People v. Coon*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 261.

**2. Farmer v. St. Paul**, 65 Minn. 176.

**3. Sectarian — Religious Sect — How Defined.** — *Cook County v. Chicago Industrial School for Girls*, 125 Ill. 543, 8 Am. St. Rep. 386.

In *State v. Hallock*, 16 Nev. 373, the supreme court, by Leonard, C. J., in holding as illegal the payment of public money to any religious or sectarian institution, used the following language: "A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people."

**Contrary Doctrine.** — *Shepherd's Fold v. New York*, 96 N. Y. 137; *People v. Poly*, (Ct. Gen. Sess.) 17 Misc. (N. Y.) 162.

**Workhouse — An Institution under Control of a Particular Religious Denomination Cannot Be**

**Selected — Minnesota.** — A municipal corporation having the right to select or establish a workhouse, cannot designate for that purpose a private institution controlled by a religious sect; the officers of such institution possess no public functions, and commitments to it cannot be enforced. *Farmer v. St. Paul*, 65 Minn. 176.

**4. Protectory for Boys.** — It is interesting to compare the view taken of the term "reformatory," used in a last will and testament, as shown in *Hughes v. Daly*, 49 Conn. 34 (cited *supra*), with the construction placed upon the word "protectory," by a United States court, in passing upon the sufficiency of such word for testamentary purposes, in the case of another charitable bequest under the laws of Connecticut. In *Duggan v. Slocum*, 83 Fed. Rep. 246, a testator made a devise to his executors, in trust, "for the purpose of establishing or maintaining a Roman Catholic protectory for boys in said diocese of Hartford." The court sustained this provision, holding that a "protectory for boys" is an institution for the education and care of destitute and homeless boys, especially of those liable to become wayward and vicious; and that the nature of such institutions, under the care of the Catholic church, is well known. See the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, pp. 905, 925.

**5. In the Arson Act of 9 Geo. I.**, the word *hovel* meant grain raised from the ground to keep it from mice and rats. The word later signified a shed put up in a field to shelter cattle or utensils. *Ecclesfield's Case*, 2 W. Bl. 683, note b.

**HOW.** — See note 1.

**HOWEVER.** — See note 2.

**HUCKSTER.** — See note 3.

**HULL.** — See note 4.

**HUMAN BEING.** — See note 5.

**HUMANE PURPOSE.** — See note 6.

**HUNDRED.** — See note 7.

**HUNG.** — See note 8.

**HUNTING.** — See the title **GAME AND GAME LAWS**, vol. 14, p. 654.

**HURRICANE.** — See note 9.

1. **How Far**, as applied to flowing of land, may intend how long in point of duration, to what distance or extent of surface, and to what height. *Vandusen v. Comstock*, 3 Mass. 187.

2. **However.** — A testatrix provided that certain property should be divided between the children of her niece, and further: "If one or more of the said children should happen to die before their mother, without leaving any children, the share of such child or children so dying shall be equally distributed among the survivors of the said brothers and sisters; if, *however*, such child or children so dying shall leave a child or children, such child or children shall be entitled to their parent's share." In construing this will the court said: "Again, she declares that if any one die without children, his share shall go over; to whom? Why, the case she is supposing requires her to say to the other 'brothers and sisters;' for as yet, in her mind, the case of one dying leaving children has not arisen. But next she speaks of this, and declares 'if, *however*,' the one who dies shall leave children, they shall have their parent's share. *However* is most emphatic here, if we keep up the connection of the thought. It indicates an alternative intention, a contrast with the previous clause, and a modification of it under other circumstances. It is thus: I do not, *however*, so dispose of the survivorship in the case of those who die leaving children, but such children shall take the share which their parent, if surviving, would have taken." *Lewis's Appeal*, 18 Pa. St. 325.

3. **Huckster.** — A statute prohibited a municipal corporation from assessing any charge upon persons bringing provisions to markets in wagons, but allowed it to prevent *huckstering* and forestalling. An ordinance of the city defined a *huckster* to be any person not a farmer or a butcher who should sell, etc. In holding this ordinance void the court said: "It is conceded that the word, without being thus improved upon, signifies a petty dealer — a retailer of small articles of provisions, nuts, etc. Webster informs us that 'it seems to be from *hocken*, to take on the back, and to signify primarily a peddler, one that carries goods on his back.' Without entering into very nice distinctions, for which we acknowledge our want of qualifications, we feel no hesitation in saying that the legislature must be presumed to have intended what the common and ordinary import of the language used would indicate; and that it was no part of the franchises of municipal corporations to change the meaning of English words." *Mays v. Cincinnati*, 1 Ohio St. 272.

4. **Provisions.** — An insurance policy upon a *hull* and machinery was held not to cover provisions. *Roddick v. Indemnity Mut. Marine Ins. Co.*, (1895) 2 Q. B. 380. See generally the title **MARINE INSURANCE**.

5. **Human Being.** (See also the title **MURDER AND MANSLAUGHTER**.) — Within the definition of murder as the unlawful killing of a *human being*, Indians and slaves have been held to be *human beings*. *State v. McKenney*, 18 Nev. 139; *State v. Jones, Walk.* (Miss.) 85.

6. **Humane Purpose.** — In *Ford v. Ford*, 91 Ky. 577, it was held that a testator might provide by his will for the erection of a monument over the graves of himself and his family. Such a devise is for a *humane purpose* within the meaning of a statute which declares that a devise for any charitable or *humane purpose* shall be valid. See also the title **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 893.

**Humane and Charitable Purposes.** — A testator bequeathed one thousand pounds to a lunatic asylum thereafter to be instituted, "for the *humane* and charitable *purposes* of that institution." An asylum afterwards built under statutory compulsory powers, and maintained by compulsory rates, was held not entitled to the bequest. *Lechmere v. Curtler*, 24 L. J. Ch. 647.

7. **Hundred.** — In old English law a hundred was a division of the county. *Regan v. New York, etc.*, R. Co., 60 Conn. 124, 25 Am. St. Rep. 306.

**Weight or Measure.** (See also the title **WEIGHTS AND MEASURES**.) — In *Smith v. Wilson*, 3 B. & Ad. 732, 23 E. C. L. 171, it was said: "The word *hundred* does not necessarily denote that number of units, for one *hundred* and twelve pounds is called a hundred-weight; so, where that term is used with reference to ling or cod, it denotes six score."

**Hund.** — *Hund.* is an abbreviation for *hundred*. See *Glenn v. Porter*, 72 Ind. 527.

8. **Hung.** — A verdict finding the prisoner guilty of murder in the first degree and sentencing him to be *hung* was held sufficient. The court in *Noles v. State*, 24 Ala. 694, said: "Here the jury do not say, in so many words, he shall suffer death, but that he shall be *hung*. This finding is unequivocal. The term *hung* or 'sentencing a man to be *hung*,' found in this collocation, means to suspend him by the neck until he is dead." See also the titles **MURDER AND MANSLAUGHTER**; **VERDICT**.

9. **Hurricane.** (See also **CYCLONE INSURANCE**, vol. 8, p. 534.) — The words "tornado" and *hurricane* are synonymous and denote violent storm distinguished by the vehemence of the

**HURT.** — See note 1.

wind and its sudden changes. *Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22.

A fire-insurance policy provided that the company should not be liable for loss by fire caused by means of a *hurricane*. It was held error to refuse to charge the jury: "If you believe from the evidence that the fire was caused by a *hurricane*, then you will find for the defendant. A *hurricane* is a storm or wind of extraordinary violence — sufficient to throw down buildings." *Pelican Ins. Co. v. Troy Co-operative Assoc.*, 77 Tex. 225. See also the title FIRE INSURANCE, vol. 13, pp. 126, 223.

1. **Hurt — Life Insurance.** — An applicant for insurance was asked if he had received any wound or *hurt* or serious bodily injury. In construing this question the court said: "The words *hurt* and 'wound,' as used in the appli-

cation, mean an injury to the body causing an impairment of health or strength, or rendering the person more liable to contract disease, or less able to resist its effects. No such consequences followed from the *hurt* sustained by the insured. A cut on the face, finger, or on any part of the body, from which blood flows, though healing in a few days and leaving no evil consequences, is a *hurt* or wound, but not within the meaning of the contract under consideration." *Bancroft v. Home Ben. Assoc.*, 120 N. Y. 14. And see the title LIFE INSURANCE.

In an Action for Personal Injuries, the declaration contained nothing more specific than that the person was *hurt*, bruised, and wounded. The court said: "The word *hurt* is so general as to give no information." *Shaddock v. Alpine Plank Road Co.*, 79 Mich. 11.



# HUSBAND AND WIFE.

BY A. S. H. BRISTOW.

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## CROSS-REFERENCES.

As to matters of PROCEDURE, see the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, title *HUSBAND AND WIFE*, vol. 10, p. 191 and references there given.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: *ACKNOWLEDGMENTS*, vol. 1, p. 483; *ADMISSIONS*, vol. 1, p. 670; *ADOPTION OF CHILDREN*, vol. 1, p. 726; *ADULTERY (AS A CRIME)*, vol. 1, p. 746; *ALIMONY*, vol. 2, p. 91; *BASTARDY*, vol. 3, p. 871; *CIVIL DAMAGE ACTS*, vol. 6, p. 36; *COMMUNITY PROPERTY*, vol. 6, p. 293; *CRIMINAL CONVERSATION*, vol. 8, p. 260; *CURTESY*, vol. 8, p. 506; *DIVORCE*, vol. 9, p. 723; *DOMICIL*, vol. 10, p. 6; *DOWER*, vol. 10, p. 122; *DURESS*, vol. 10, p. 320; *EQUITABLE ELECTION*, vol. 11, p. 57; *EXECUTORS AND*

ADMINISTRATORS, vol. 11, p. 720; EXEMPTIONS (FROM EXECUTION), vol. 12, p. 59; GIFTS, vol. 14, p. 1006; HOMESTEAD, *supra*; INFANTS; MARRIAGE; MARRIAGE SETTLEMENTS; PARENT AND CHILD; PARTITION; PRIVATE INTERNATIONAL LAW; SEDUCTION; SEPARATE PROPERTY (OF MARRIED WOMEN); SEPARATION; SUCCESSION; WASTE; WITNESSES.

**I. NATURE OF RELATION AND GENERAL CONSIDERATIONS.** — At Common Law husband and wife are regarded as one person, and the legal existence of the wife is suspended during marriage, or, in other words, is merged in that of the husband.<sup>1</sup> On this principle depends most of the discussion to be found in this article.

In Equity, however, this common-law principle has been much modified; and for many purposes the courts of equity recognize husband and wife as distinct persons.

By Statute, too, in all jurisdictions in modern times, the principle either has been greatly restricted in its application or has been removed altogether.

**II. DISABILITIES ARISING FROM COVERTURE** — 1. **Of Husband.** — It may be stated as a general rule that marriage imposes no disabilities on the husband at common law except in so far as he is incapacitated to enter into valid transactions with the wife.<sup>2</sup>

2. **Of Wife** — *a.* **IN GENERAL.** — But as a result of the marital relation the wife is generally unable to act as a *feme sole*, and the common-law disabilities still exist as to the person and property of married women, except to the extent of changes by legislature in express terms or by reasonable construction.<sup>3</sup>

*b.* **TO MAKE CONTRACTS** — (1) *At Common Law.* — Thus, at common law the wife is incapable, except in a few special cases,<sup>4</sup> of contracting a personal obligation,<sup>5</sup> even with her husband's consent, though the contract be for

1. **Husband and Wife Deemed as One Person at Common Law.** — *Miller v. Newton*, 23 Cal. 563; *Rodemeyer v. Rodman*, 5 Iowa 426; *Pond v. Carpenter*, 12 Minn. 430; *Alpaugh v. Wilson*, 52 N. J. Eq. 424; *Kelso v. Tabor*, 52 Barb. (N. Y.) 128; *Davis v. Burnham*, 27 Vt. 562.

2. *Sims v. Ricketts*, 35 Ind. 181. See *infra*, this title, *Rights, Duties, and Liabilities Inter Se* — *Transactions Between Husband and Wife*.

3. **Disabilities of Married Women in General.** — *Brown v. Brown*, 121 N. Car. 8.

4. See *infra*, this title, *Disabilities Arising from Coverture* — *Of Wife* — *Special Circumstances Enabling Feme Covert to Act Sui Juris*.

5. **Incapacity of Married Women to Contract at Common Law** — *England.* — *Johnson v. Gallagher*, 3 De G. F. & J. 515; *Aylett v. Ashton*, 1 Myl. & C. 111.

*United States.* — *Canal Bank v. Partee*, 99 U. S. 325; *Norton v. Meader*, 4 Sawy. (U. S.) 620; *Drury v. Foster*, 2 Wall. (U. S.) 33.

*Alabama.* — *Childress v. Mann*, 33 Ala. 206. *District of Columbia.* — *Ritch v. Hyatt*, 3 MacArthur (D. C.) 536.

*Florida.* — *Wilson v. Fridenberg*, 22 Fla. 114; *Hodges v. Price*, 18 Fla. 342; *Prentiss v. Paisley*, 25 Fla. 927.

*Indiana.* — *O'Daily v. Morris*, 31 Ind. 111.

*Iowa.* — *Rodemeyer v. Rodman*, 5 Iowa 427.

*Kentucky.* — *Robinson v. Robinson*, 11 Bush (Ky.) 174.

*Maryland.* — *Davis v. Carroll*, 71 Md. 568; *Norris v. Lantz*, 18 Md. 260.

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*Pick. (Mass.)* 198, 26 Am. Dec. 655; *Crane v. Kelley*, 7 Allen (Mass.) 250.

*Michigan.* — *Jenne v. Marble*, 37 Mich. 319.

*Mississippi.* — *Mallett v. Parham*, 52 Miss. 921.

*New Jersey.* — *Lewis v. Perkins*, 36 N. J. L. 133.

*North Carolina.* — *Dougherty v. Sprinkle*, 88 N. Car. 300.

*Tennessee.* — *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576.

*Vermont.* — *Davis v. Burnham*, 27 Vt. 562; *Farrar v. Bessey*, 24 Vt. 89.

**Bills and Notes.** — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 168.

**Deeds.** — For a full discussion of this question, see the title **DEEDS**, vol. 9, p. 110.

**Bonds.** — See the title **BONDS**, vol. 4, p. 625.

**Covenants in Deeds of Conveyance.** — For a full discussion of a *feme covert's* liability on her covenants, see the title **COVENANTS**, vol. 8, p. 163.

**Contract for Purchase or Conveyance of Lands.**

— For a full discussion of the capacity of a married woman to make contracts to convey or purchase land, see the title **VENDOR AND PURCHASER**.

**Implied Contract.** — In *Tucker v. Cocke*, 32 Miss. 184, the disability of married women to contract was held to apply in a case of implied as well as express contracts. See the title **IMPLIED OR QUASI CONTRACTS**, *post*.

**Submission to Arbitration.** — See the title **ARBITRATION AND AWARD**, vol. 2, p. 615.



necessaries,<sup>1</sup> and any attempt to do so is not simply voidable, but is absolutely void. Her disabilities in this respect by reason of her coverture cannot be overcome by any form of acknowledgment or mode of execution, or by uniting with her husband in the contract.<sup>2</sup> But while as a general rule, at common law, an executory contract entered into by a married woman cannot be enforced either against her or in her favor against the party contracting with her,<sup>3</sup> it has been held that a contract executed by her and remaining executory on the part of the other party may be enforced by her, since if she has executed her part of the contract he cannot say that there is no consideration for his agreement.<sup>4</sup>

(2) *In Equity*. — The strict common-law rule imposing a general disability upon a married woman to enter into any contracts has, however, been greatly relaxed by the courts of equity, a married woman being allowed in equity, under certain conditions, to dispose of and charge her equitable separate estate as a *feme sole*.<sup>5</sup> But it is well settled that independently of statute a personal remedy cannot be had in a court of equity against a married woman, upon her contracts made during coverture, any more than in a court of law.<sup>6</sup>

A full discussion of this question will be found in another portion of this work.<sup>7</sup>

(3) *Under Enabling Statutes* — (a) *In General*. — Under statutes in most if not all jurisdictions, the doctrine of the common law as to the disability of a married woman to contract has been either abrogated or greatly modified, and the extent to which a married woman may contract and the manner in which

**Wife Contracting as Agent.** — See the title AGENCY, vol. 1, p. 947.

As to the wife's capacity to exercise a power, see the titles DEEDS, vol. 9, p. 110, note; POWERS.

**Appointment of Agent by Married Women.** — See the titles AGENCY, vol. 1, p. 942; ATTORNEY AND CLIENT, vol. 3, p. 416.

**Execution of Power of Attorney.** — For a full discussion of the capacity of a married woman to execute powers of attorney, see the title POWER OF ATTORNEY.

As to her capacity to release dower by power of attorney, see the title DOWER, vol. 10, p. 212.

**1. Married Woman's Contract for Necessaries Void at Common Law.** — *Shaw v. Thompson*, 16 Pick. (Mass.) 200, 26 Am. Dec. 655; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Fell v. Brown*, 115 Pa. St. 218; *Valentine v. Bell*, 66 Vt. 280. See also *Drais v. Hogan*, 50 Cal. 121; *Whipple v. Giles*, 55 N. H. 139; *Wilson v. Burr*, 25 Wend. (N. Y.) 386.

**Necessaries Furnished to Wife After Death of Absent Husband.** — In *Smout v. Ilbery*, 10 M. & W. 1, it was held that where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house went abroad, leaving his wife and family residing in England, and died abroad, the wife was not liable for goods supplied to her after her husband's death but before information of his death had been received, she having had originally full authority to contract, and having done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation of the authority being by the act of God, the continuance of the life of the principal is considered as being equally within the knowledge of both parties.

**2. Forms of Acknowledgment or Execution Im-**

**material.** — *Norton v. Meader*, 4 Sawy. (U. S.) 614; *Canal Bank v. Partee*, 99 U. S. 325; *Shartzer v. Love*, 40 Cal. 93; *Brown v. Orr*, 29 Cal. 120; *Scarlett v. Snodgrass*, 92 Ind. 262; *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Shallcross v. Smith*, 81 Pa. St. 132; *Cummings v. Miller*, 3 Grant Cas. (Pa.) 146.

**3. Roberts v. Pierson**, 2 Wils. C. Pl. 3; *Lanier v. Ross*, 1 Dev. & B. Eq. (21 N. Car.) 39; *Smith v. Plomer*, 15 East 607.

**4. Contract Executed by Wife Enforceable Against Other Party.** — *Neef v. Redmon*, 76 Mo. 195; *Walker v. Owen*, 79 Mo. 571. See also *Chamberlin v. Robertson*, 31 Iowa 408; *Gillespie v. Beecher*, 94 Mich. 374.

A promise made to a married woman, living separate from her husband, to pay a sum of money, in consideration of her agreement not to prosecute the party for bastardy, has been held to be good, though made without the concurrence of the husband, where the contracting party had had the full benefit of the promise not to sue. *Abshire v. Mather*, 27 Ind. 381.

**5. Contracts with Reference to Separate Estates in Equity.** — *Johnson v. Gallagher*, 3 De G. F. & J. 515; *Wilburn v. McCalley*, 63 Ala. 447; *Dobbin v. Hubbard*, 17 Ark. 196, 65 Am. Dec. 425; *Palmer v. Rankins*, 30 Ark. 771; *Rudd v. Peters*, 41 Ark. 177; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Batchelder v. Sargent*, 47 N. H. 264.

**6. No Personal Remedy in Equity on Wife's Contracts.** — *Hulme v. Tenant*, 1 Bro. C. C. 20; *Ex p. Jones*, 12 Ch. D. 484; *Johnson v. Gallagher*, 3 De G. F. & J. 515; *Aylett v. Ashton*, 1 Myl. & C. 111; *Prentiss v. Paisley*, 25 Fla. 927; *Hodges v. Price*, 18 Fla. 342; *Rodemeyer v. Rodman*, 5 Iowa 427; *Norris v. Lantz*, 18 Md. 260; *Pawley v. Vogel*, 42 Mo. 302.

**7. See the title SEPARATE PROPERTY (OF MARRIED WOMEN)**

her contracts shall be authenticated and enforced are definitely prescribed.<sup>1</sup> But where a special or limited power of making contracts is given to a married woman she is still considered as *prima facie* unable to contract at all, and the burden is on the person relying on the validity of her contract to bring it within the statutory rule.<sup>2</sup>

(b) **Statutes Authorizing Contracts with Reference to Separate Estates.** — In many jurisdictions, under statutes expressly or impliedly enabling a married woman to make contracts with reference or in relation to her separate estate, whether legal or equitable, the rule has been laid down that the general disability to contract imposed by coverture has not been removed, but only the disability to contract in connection with her separate property, and *femes covert*s are thereby subjected to a proprietary and not a personal liability.<sup>3</sup>

A Full Discussion of this question will be found in another part of this work.<sup>4</sup>

(c) **Statutes Wholly Removing Disability.** — But the recent tendency of legislation has been to remove entirely the disability of married women to contract, and by statute in some of the states it is expressly provided, with certain exceptions in some instances, that contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same

**1. Power of Married Women to Contract under Statute, in General.** — *Canal Bank v. Partee*, 99 U. S. 331.

**2. Presumption of Incapacity under Statutes Giving Limited Power.** — *Troy Fertilizer Co. v. Zachry*, 114 Ala. 177; *Way v. Peck*, 47 Conn. 23; *Rodemeyer v. Rodman*, 5 Iowa 426; *Tracy v. Keith*, 11 Allen (Mass.) 214; *West v. Laraway*, 28 Mich. 464; *Pollen v. James*, 45 Miss. 129; *Lewis v. Perkins*, 36 N. J. L. 133; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38.

**3. Statutes Authorizing Contracts with Reference to Separate Estates — England.** — *Scott v. Morley*, 20 Q. B. D. 128. See also *Dillon v. Cunningham*, L. R. 8 Exch. 23.

*Arkansas.* — *Warner v. Hess*, (Ark. 1899) 49 S. W. Rep. 489; *Walker v. Jessup*, 43 Ark. 163; *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101.

*District of Columbia.* — *Ritch v. Hyatt*, 3 MacArthur (D. C.) 536.

*Florida.* — *Hodges v. Price*, 18 Fla. 342.

*Kansas.* — *Wicks v. Mitchell*, 9 Kan. 80; *Tallman v. Jones*, 13 Kan. 438; *Furrow v. Chapin*, 13 Kan. 107; *Miner v. Pearson*, 16 Kan. 28.

*Michigan.* — *Russell v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444; *Howe v. North*, 69 Mich. 284; *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556; *Detroit Chamber of Commerce v. Goodman*, 110 Mich. 498.

*Nebraska.* — *Westervelt v. Baker*, 56 Neb. 63.

*New Hampshire.* — *Ames v. Foster*, 42 N. H. 381; *Whipple v. Giles*, 55 N. H. 139.

*North Carolina.* — *Huntley v. Whitner*, 77 N. Car. 392; *Dougherty v. Sprinkle*, 83 N. Car. 300; *Farthing v. Shields*, 106 N. Car. 289.

*Pennsylvania.* — *Shnyder v. Noble*, 94 Pa. St. 286; *Real Estate Invest. Co. v. Roop*, 132 Pa. St. 496.

*South Carolina.* — *Habenicht v. Rawls*, 24 S. Car. 461, 58 Am. Rep. 268; *Griffin v. Earle*, 34 S. Car. 248.

*West Virginia.* — *Stockton v. Farley*, 10 W. Va. 171, 27 Am. Rep. 566; *Carey v. Burruss*, 20 W. Va. 576, 43 Am. Rep. 790.

*Wisconsin.* — *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817.

In *Russell v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444, Cooley, J., said: "The test of competency to make the contract is to be found in this, that it does or does not deal with the woman's individual estate."

In *Mississippi* the rule of the text at one time prevailed. *Canal Bank v. Partee*, 99 U. S. 332; *Doyle v. Orr*, 51 Miss. 229; *Mallett v. Parham*, 52 Miss. 921. But by Annot. Code Miss. (1892), § 2289, the disability of married women to contract has been entirely removed.

**Contract for Necessaries.** — In *O'Malley v. Ruddy*, 79 Wis. 147, 24 Am. St. Rep. 702, it was held that the contract of a married woman to pay for necessities was not binding on her when it appeared that she had no separate estate or business.

**Suretyship for Husband.** — Under statute in *Wisconsin* it has been held also that a contract whereby a married woman binds herself as surety for the debt of her husband cannot be enforced against her. *Emerson-Talcott Co. v. Knapp*, 90 Wis. 34.

**Enforcement of Contract.** — Under statutes of the character mentioned in the text it has been held that the enforcement of the contract of a married woman is in the nature of a proceeding *in rem*, and in such a case no personal judgment can be rendered. *Canal Bank v. Partee*, 99 U. S. 332; *Mallett v. Parham*, 52 Miss. 921; *Doyle v. Orr*, 51 Miss. 229; *Griffin v. Ragan*, 52 Miss. 78; *Dougherty v. Sprinkle*, 83 N. Car. 302; *Johnson v. Cummins*, 16 N. J. Eq. 98, 84 Am. Dec. 142; *Groene v. Frondhof*, 1 Disney (Ohio) 504; *Stockton v. Farley*, 10 W. Va. 171, 27 Am. Rep. 566. But see *Miner v. Pearson*, 16 Kan. 28. See also the title JUDGMENTS AND DECREES.

**Imprisonment for Debt.** — It has been held that under the *English Married Women's Property Act* a married woman cannot be imprisoned under the Debtors Act for default in payment of a sum due under a judgment. *Scott v. Morley*, 20 Q. B. D. 120. See also the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

4. See the title SEPARATE PROPERTY (OF MARRIED WOMEN).



manner as if she were unmarried.<sup>1</sup>

(4) *Confirmation or Ratification of Contract.* — At common law, as a general rule, a married woman cannot ratify her postnuptial contracts during coverture, or after its termination, except on a new consideration.<sup>2</sup> The moral obligation resting on a woman to make good her unenforceable promise given during coverture is not a sufficient consideration to uphold the affirmation of the promise made either subsequently during coverture after the removal of her disability by statute or otherwise,<sup>3</sup> or after she becomes discoverd.<sup>4</sup> But an

**1. Statutes Wholly Removing Disability to Contract** — *Connecticut.* — Freeman's Appeal, 68 Conn. 533, 57 Am. St. Rep. 112.

*Georgia.* — Howard v. Simpkins, 70 Ga. 326; Hays v. Jordan, 85 Ga. 744; Rushing v. Clancy, 92 Ga. 770.

*Illinois.* — Hamilton v. Hamilton, 89 Ill. 349; Thomas v. Mueller, 106 Ill. 36; Casner v. Preston, 109 Ill. 531; Snell v. Snell, 123 Ill. 405, 5 Am. St. Rep. 526; Crum v. Sawyer, 132 Ill. 443.

*Indiana.* — Nelson v. Spaulding, 11 Ind. App. 453; Young v. McFadden, 125 Ind. 254; Koh-i-noor Laundry Co. v. Lockwood, 141 Ind. 140.

*Iowa.* — Spafford v. Warren, 47 Iowa 47.

*Maine.* — Mayo v. Hutchinson, 57 Me. 546; Yates v. Lurvey, 65 Me. 221.

*Massachusetts.* — Major v. Holmes, 124 Mass. 108; Kenworthy v. Sawyer, 125 Mass. 28.

*Minnesota.* — Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337; Security Bank v. Holmes, 68 Minn. 538.

*Missouri.* — Van Rheeden v. Bush, 44 Mo. App. 285.

*New Jersey.* — Warwick v. Lawrence, 43 N. J. Eq. 184, 3 Am. St. Rep. 299; Staats v. Van Sickel, 52 N. J. L. 370.

*New York.* — Busch v. Klein, (Supm. Ct. App. Div.) 55 N. Y. Supp. 917.

*Vermont.* — Valentine v. Bell, 66 Vt. 282.

*Washington.* — Murdoch v. Leonard, 15 Wash. 144.

And see the statutes of the various states.

It is held that a married woman cohabiting with her husband cannot be held liable for necessities furnished her unless she expressly agrees to pay therefor and they are furnished on her credit. Nelson v. O'Neal, 11 Ind. App. 296; Nelson v. Spaulding, 11 Ind. App. 453; Rushing v. Clancy, 92 Ga. 769; Byrnes v. Rayner, 84 Hun (N. Y.) 200. See also Lindholm v. Kane, 92 Hun (N. Y.) 372; Strong v. Moul, (Supm. Ct. Gen. T.) 22 N. Y. St. Rep. 762; Hightower v. Walker, 97 Ga. 748.

**Covenants.** — Under statute in *Minnesota* it has been held that a married woman is under no disability to join in the covenants in her husband's deed, and that if she does she is liable thereon. Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408; Security Bank v. Holmes, 68 Minn. 538. Compare Sanford v. Kane, 133 Ill. 199, 23 Am. St. Rep. 602. See also the title COVENANTS, vol. 8, p. 163.

Under statute in *Maryland* it was held that where a deed of lease to a married woman contained her separate covenant to pay a certain annual rent for the demised premises, and all taxes thereon, the wife was liable upon such covenant to an action at law. Worthington v. Cooke, 52 Md. 297. To the same effect see Cruzen v. McKaig, 57 Md. 454.

**Contract of Suretyship.** — By statute in some of the states allowing the wife to contract as a *feme sole* it is expressly provided that she shall not, directly or indirectly, become surety for her husband. Code of Alabama (1896), § 2529; Schening v. Cofer, 97 Ala. 726; Hawkins v. Ross, 100 Ala. 459; McNeil v. Davis, 105 Ala. 657; Elston v. Comer, 108 Ala. 76; Miller v. Shields, 124 Ind. 166; Stewart v. Babbs, 120 Ind. 568; Bowles v. Trapp, 139 Ind. 55; Warwick v. Lawrence, 43 N. J. Eq. 179, 3 Am. St. Rep. 299. See also Jones v. Rice, 92 Ga. 236; McCrory v. Grandy, 92 Ga. 319.

Under statute in *Vermont* it is provided that a wife cannot become a surety for her husband's debt except by way of mortgage. Bradley Fertilizer Co. v. Caswell, 65 Vt. 231. But a different rule obtains in other jurisdictions. Kenworthy v. Sawyer, 125 Mass. 28; Milliken v. Pratt, 125 Mass. 379, 28 Am. Rep. 241; Major v. Holmes, 124 Mass. 108. See also Hart v. Grigsby, 14 Bush (Ky.) 542.

Under statute in *Minnesota* it has been held that a married woman may make a valid contract, binding herself to pay a pre-existing debt of her husband. Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337.

**2. Married Woman's Contracts Incapable of Ratification.** — Meyer v. Haworth, 8 Ad. & El. 467, 35 E. C. L. 442; Littlefield v. Shee, 2 B. & Ad. 811, 22 E. C. L. 187; Howard v. Simpkins, 70 Ga. 326; Buchanan v. Hazzard, 95 Pa. St. 243. See also Watson v. Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462. And see the title CONSIDERATION, vol. 6, p. 681.

**As to the Effect of Re-acknowledgment of Deeds,** see the title ACKNOWLEDGMENTS, vol. 1, p. 562.

**As to the Operation of Statutes in Curing Defective Acknowledgments,** see the title ACKNOWLEDGMENTS, vol. 1, p. 565.

**3. Contract of Married Woman Not Validated by Subsequent Promise After Removal of Disability by Law.** — Howard v. Simpkins, 70 Ga. 326; Loomis v. Brush, 36 Mich. 40; Valentine v. Bell, 66 Vt. 283. See also State Nat. Bank v. Robidoux, 57 Mo. 446. But see Franklin v. Beatty, 27 Miss. 354.

**4. Affirmance of Contracts After Divorce.** — This rule has been applied where the affirmation of the contract took place after divorce. Putnam v. Tennyson, 50 Ind. 456; Thompson v. Warren, 8 B. Mon. (Ky.) 490; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Watkins v. Halstead, 2 Sandf. (N. Y.) 311; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762. But see Viser v. Bertrand, 14 Ark. 274; Hemphill v. McElhiney, 21 D. 50, 76.

**Affirmance After Death of Husband.** — And the same is true of an affirmation after the husband's death.

*England.* — Meyer v. Haworth, 8 Ad. & El.



obligation enforceable against a married woman in equity will support a promise to pay made after discovery and make it suable at law.<sup>1</sup>

*c.* TO MAKE WILLS. — At common law, as a general rule, a *feme covert* could not dispose of her personality by will, except under a marriage settlement or by her husband's consent,<sup>2</sup> or make a valid devise of lands, with or without her husband's consent, to any person whatever.<sup>3</sup>

A Full Discussion of this question, with the various modifications of the common-law rule by statute or otherwise, will be found in a subsequent portion of this work.<sup>4</sup>

*d.* TO SUE AND BE SUED. — As a general rule, at common law a *feme covert* could neither sue nor be sued alone, but she must sue or be sued in connection with her husband.<sup>5</sup>

In Equity, independently of statute, the same general rule prevails.<sup>6</sup>

By Statute, however, in most jurisdictions various modifications of the common-law rule have been made, in several jurisdictions the disability of a married woman in this respect being removed altogether.<sup>7</sup>

A full discussion of this question will be found elsewhere, to which reference is made in the note below.<sup>8</sup>

*e.* TO ACQUIRE AND HOLD PROPERTY. — There was never any impediment to the acquisition of property through purchase or otherwise, by a married woman, arising from any disability imposed by coverture, the only difficulty in the way being that at common law the ownership passed immediately to the husband.<sup>9</sup> But while at common law a *feme covert* is capable

467, 35 E. C. L. 442; *Littlefield v. Shee*, 2 B. & Ad. 811, 22 E. C. L. 187.

*Alabama.* — *O'Neal v. Robinson*, 45 Ala. 526; *Hetherington v. Hixon*, 46 Ala. 298.

*Delaware.* — *Ross v. Singleton*, 1 Del. Ch. 149, 12 Am. Dec. 86.

*Indiana.* — *Thomas v. Passage*, 54 Ind. 106; *Candy v. Coppock*, 85 Ind. 597; *Austin v. Davis*, 128 Ind. 472, 25 Am. St. Rep. 456; *Davis v. Schmidt*, (Ind. 1892) 31 N. E. Rep. 840.

*Missouri.* — *Kennerly v. Martin*, 8 Mo. 698.

*New Jersey.* — *Condon v. Barr*, 49 N. J. L. 53.

*North Carolina.* — *Felton v. Reid*, 7 Jones L. (52 N. Car.) 269.

*Vermont.* — *Hubbard v. Bugbee*, 58 Vt. 172.

See also *Nesbitt v. Turner*, 7 Kulp (Pa.) 41; *Foster v. Wilcox*, 10 R. I. 444, 14 Am. Rep. 698. *Compare Franklin v. Beatty*, 27 Miss. 354; *Walker v. Owen*, 79 Mo. 563.

In *Spitz v. Fourth Nat. Bank*, 8 Lea (Tenn.) 641, it was held that where a *feme covert* executed a note indorsed by herself and C. and B., and after the death of her husband executed a renewal note with the same indorsers, she was liable upon the renewal note.

In *New York* it has been held that where a married woman, who was carrying on business in her own name and on her own account, purchased goods in the line of her business without disclosing the fact of her coverture, and gave her promissory note for the amount of the purchase, and used the goods so purchased in her business, and had the exclusive use and benefit of the same, this was a sufficient consideration to support her promise to pay the note, made after the death of the husband. *Goulding v. Davidson*, 26 N. Y. 604. *Compare Smith v. Allen*, 1 Lans. (N. Y.) 101.

1. Contract Enforceable in Equity as Consideration for Promise After Discovery. — *Cleland v. Low*, 32 Ga. 458; *Condon v. Barr*, 49 N. J. L.

53; *Hubbard v. Bugbee*, 58 Vt. 172. Thus the promise of a married woman binding her separate equitable estate is a sufficient consideration for a new promise made after discovery. *Vance v. Wells*, 8 Ala. 399; *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750. See also *Lee v. Muggeridge*, 5 Taunt. 37, 1 E. C. L. 10, and the title SEPARATE PROPERTY (OF MARRIED WOMEN).

2. Incapacity of Married Woman to Dispose of Personality by Will. — 2 Black. Com. 498; *Marston v. Norton*, 5 N. H. 210; *Adams v. Kellogg*, Kirby (Conn.) 195, 1 Am. Dec. 18; *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 420.

3. Invalidity of Devise of Lands by Married Woman. — 2 Black. Com. 498; *Newlin v. Freeman*, 1 Ired. L. (23 N. Car.) 514; *Anderson v. Miller*, 6 J. J. Marsh. (Ky.) 568; *Marston v. Norton*, 5 N. H. 210.

4. See the title TESTAMENTARY CAPACITY.

5. Incapacity of Married Woman to Sue and Be Sued at Common Law. — *Hatchett v. Baddeley*, 2 W. Bl. 1081; *Beard v. Webb*, 2 B. & P. 105; *Marshall v. Rutton*, 8 T. R. 545; *Porter v. Rutland Bank*, 19 Vt. 410.

Judgment. — A judgment at the suit of a *feme covert* is void at common law. *Roberts v. Pierson*, 2 Wils. C. Pl. 3. *Compare Haydon v. Shearman*, 4 Ir. C. L. 169.

For a full discussion of this question see the title JUDGMENTS AND DECREES.

6. *Bynum v. Frederick*, 81 Ala. 489; *Smith v. Smith*, 18 Fla. 789; *Hubbard v. Barcus*, 38 Md. 174; *Bradley v. Emerson*, 7 Vt. 369.

7. See the statutes of the various states.

8. See the title HUSBAND AND WIFE, ENCYC. OF PL. AND PR., vol. 10, p. 191.

9. Capacity of Married Women to Acquire Property at Common Law. — *Clewis v. Malone*, (Ala. 1898) 24 So. Rep. 767; *Whitehead v. Arline*, 43 Ga. 223; *Cruzen v. McKaig*, 57 Md. 462; *Tillman v. Shackleton*, 15 Mich. 450, 93 Am. Dec.

of purchasing, yet the husband may disagree and thereby avoid the purchase, though if he neither agrees nor disagrees the purchase is good.<sup>1</sup> The courts of equity, and statutes of the various jurisdictions, have made great changes in the common-law rule, so that now a married woman may, as a general rule, not only acquire but hold property as a *feme sole*.<sup>2</sup>

*f. To BE SOLE TRADER* — (1) *At Common Law*. — Since at common law a married woman could not enter into any contract whatever, she could not bind herself as a *feme sole* trader.<sup>3</sup>

**By the Custom of London.** — An exception to this rule exists where a *feme covert* acts as sole trader by the custom of London. By this custom, "where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband meddeth nothing, such a woman shall be charged as *feme sole* concerning everything that toucheth her craft."<sup>4</sup> This custom has never been adopted in the United States generally,<sup>5</sup> though a similar custom has obtained in *South Carolina*.<sup>6</sup>

(2) *In Equity*. — The transactions of a married woman dealing as a *feme sole* trader will sometimes be recognized in the courts of equity<sup>7</sup> on principles peculiar to separate equitable estates of married women. This question will be found treated in another portion of this work.<sup>8</sup>

(3) *Under Statutes* — (a) **Statutes Expressly Enabling Married Women to Carry on Separate Business** — *44. IN GENERAL*. — In many jurisdictions, statutes have been passed expressly enabling married women to engage in trade or business on their sole or separate account.<sup>9</sup> The effect of such statutes is to invest a

198; *Knapp v. Smith*, 27 N. Y. 279. See also *infra*, *Rights, Duties, and Liabilities Inter Se* — *Property Rights*.

As to the capacity of a married woman to be the grantee in a deed at common law, see the title *DEEDS*, vol. 9, p. 132.

1. Co. Litt. 3 a; *Nolan v. Fox*, 15 U. C. C. P. 565; *Melvin v. Merrimack River Locks*, etc., 16 Pick. (Mass.) 167; *Baxter v. Smith*, 6 Binn. (Pa.) 427.

2. See the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

3. **Incapacity of Married Woman to Become Sole Trader at Common Law.** — *Petty v. Anderson*, 2 C. & P. 38, 12 E. C. L. 17; *Bradstreet v. Baer*, 41 Md. 19; *Carey v. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790.

4. **Married Woman as Sole Trader by Custom of London.** — *Beard v. Webb*, 2 B. & P. 93; *Lavie v. Phillips*, 3 Burr. 1776; *Petty v. Anderson*, 2 C. & P. 38, 12 E. C. L. 17. See also *Netterville v. Barber*, 52 Miss. 168; *Carey v. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790; *Norton v. Meader*, 4 Sawy. (U. S.) 620; *Canal Bank v. Partee*, 99 U. S. 330.

5. **Custom of London as to Sole Traders Not Generally Adopted in This Country.** — *Netterville v. Barber*, 52 Miss. 168; *Jacobs v. Featherstone*, 6 W. & S. (Pa.) 346; *Carey v. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790.

6. **Custom as to Sole Traders in South Carolina.** — *M'Daniel v. Cornwell*, 1 Hill L. (S. Car.) 428; *Newbiggin v. Pillans*, 2 Bay (S. Car.) 162; *Hobart v. Lemon*, 3 Rich. L. (S. Car.) 131; *Miller v. Tollison*, Harp. Eq. (S. Car.) 145; *Megrath v. Robertson*, 1 Desaus. (S. Car.) 435; *Wilthaus v. Ludecus*, 5 Rich. L. (S. Car.) 328; *Surtell v. Brailsford*, 2 Bay (S. Car.) 162.

7. *In City Council v. Van Roven*, 2 McCord L. (S. Car.) 465, it was held that a *feme sole* trader might be prosecuted under an ordinance pro-

hibiting retailers of liquors from selling to persons of color, though the liquor was handed to the negro by the woman's husband, she being present, and he acting as her clerk.

In *Dial v. Neuffer*, 3 Rich. L. (S. Car.) 78, it was held that a married woman may become a *feme sole* trader in the business of keeping a boarding house.

But in *M'Daniel v. Cornwell*, 1 Hill L. (S. Car.) 428, it was held that a *feme covert* could not carry on a farm and purchase and hire negroes in her own right as a sole trader. See also *Robards v. Hutson*, 3 McCord L. (S. Car.) 475. Nor could she become a common carrier. *Ewart v. Nagel*, 1 McMull. L. (S. Car.) 50.

**Right to Earnings.** — In *Megrath v. Robertson*, 1 Desaus. (S. Car.) 445, it was held that a *feme covert* may, by the permission of her husband, without any deed to that effect, become a sole trader and be entitled in her own right to all her earnings.

7. **Married Women Recognized as Sole Traders in Equity.** — *Rabitte v. Orr*, 83 Ala. 185; *Partridge v. Stocker*, 36 Vt. 108, 84 Am. Dec. 664; *Todd v. Lee*, 16 Wis. 481.

8. See the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

9. **Statutes Expressly Enabling Married Women to Carry on Separate Business.** — *Trieber v. Stover*, 30 Ark. 727; *Hickey v. Thompson*, 52 Ark. 234; *Wallace v. Rowley*, 91 Ind. 586; *Tallman v. Jones*, 13 Kan. 439; *Parker v. Bates*, 29 Kan. 597; *Van Rheeden v. Bush*, 44 Mo. App. 283. See also *Bradstreet v. Baer*, 41 Md. 23.

**Goods Purchased Before Marriage.** — The statute of *Wyoming*, permitting a married woman to conduct trade on her sole and special account and to sue and be sued as if she were a *feme sole*, has been held not to apply to a case where the proof tended to show that when the alleged sale was made the married woman



married woman with all the rights, powers, and privileges of a *feme sole* in respect to her separate business and the property therein, and to subject her to the liabilities she would be subject to in respect to such business and property if she were unmarried.<sup>1</sup> Hence, under such statutes, she may make contracts in her trade or business,<sup>2</sup> and sue and be sued<sup>3</sup> upon them in the courts, as if sole. The grant of the power without words of limitation necessarily carries with it the right to conduct business in the way and by the means usually employed in carrying on the same.<sup>4</sup> Accordingly a married woman trading under such statutes may make purchases and contract debts on her personal credit.<sup>5</sup> So, generally, she may employ agents in carrying on the business.<sup>6</sup>

*bb. POWER CONFERRED UNDER SPECIAL CIRCUMSTANCES.* — In some jurisdictions, statutes have been passed giving a married woman the privileges of a *feme sole* trader whenever her husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for her,<sup>7</sup> or shall desert or abandon her,<sup>8</sup> or

was conducting a business on her sole and separate account, and that the merchandise in question was sold and delivered to her for that business, but it did not appear that she was married at the time of the sale, and as a consequence the husband must be joined as a co-defendant in a suit against her. *Granger v. Lewis*, 2 Wyo. 231.

**Partnerships.** — As to the power of married women to enter into partnerships, see the title PARTNERSHIPS.

**Stockholders.** — As to the power of married women to become stockholders, see the title STOCKHOLDERS.

**Married Women as Corporators.** — It has been held under statute in *Pennsylvania* that married women are qualified to be corporators or officers in associations formed for the purpose of learning, benevolence, charity, or religion. *First Independent Ladies' Aid Soc.*, 1 Pa. Dist. 754.

**Goods Purchased — Earnings.** — As to the right of a married woman to the goods purchased and her profits and earnings in her separate trade or business, see the title SEPARATE PROPERTY (OF MARRIED WOMEN).

1. *Hickey v. Thompson*, 52 Ark. 234; *Camden v. Mullen*, 29 Cal. 564; *Wallace v. Rowley*, 91 Ind. 586; *Frecking v. Rolland*, 53 N. Y. 425.

2. **Power to Contract under Statutes Expressly Enabling Married Women to Carry on Separate Trade.** — *Trieber v. Stover*, 30 Ark. 727; *Hickey v. Thompson*, 52 Ark. 234; *Camden v. Mullen*, 29 Cal. 564; *Holmes v. Holmes*, 40 Conn. 117; *Wallace v. Rowley*, 91 Ind. 586; *Young v. Gori*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 13, note; *Barton v. Beer*, 35 Barb. (N. Y.) 78. See also *Nash v. Mitchell*, 71 N. Y. 203, 27 Am. Rep. 38; *Lauck v. Rohde*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 346.

Under statute in some jurisdictions it is expressly provided that when a married woman engages in trade or business as a *feme sole* she shall be bound by her contracts made in the course of such trade or business, in the same manner as if she were unmarried. *Martinez v. Ward*, 19 Fla. 175; *Crawford v. Feder*, 34 Fla. 397; *Pub. Stat. Mass.* (1882), p. 819; *Netterville v. Barber*, 52 Miss. 168; *Reed v. Newcomb*, 64 Vt. 49. See also *Real Estate Invest. Co. v. Roop*, 132 Pa. St. 503; *Walter v. Jones*, 142 Pa. St. 589.

3. **Capacity to Sue and Be Sued under Express Separate Trade Statutes.** — *Trieber v. Stover*, 30 Ark. 727; *Hickey v. Thompson*, 52 Ark. 234; *Camden v. Mullen*, 29 Cal. 564; *Young v. Gori*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 13, note; *Coster v. Isaacs*, (N. Y. Super. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 328.

Under statute in Connecticut it has been held that when a married woman carries on business and a right of action accrues to her therefrom, a suit can be brought only in her name. *Rockwell v. Clark*, 44 Conn. 534.

4. *Hickey v. Thompson*, 52 Ark. 234; *Frecking v. Rolland*, 53 N. Y. 425.

5. **Purchase on Credit under Express Separate Trade Statutes.** — *Hickey v. Thompson*, 52 Ark. 234; *Camden v. Mullen*, 29 Cal. 564; *Tallman v. Jones*, 13 Kan. 445; *Young v. Gori*, (Supm. Ct.) 13 Abb. Pr. (N. Y.) 13, note; *Frecking v. Rolland*, 53 N. Y. 425.

6. **Employment of Agents in Business.** — *Taylor v. Wands*, 55 N. J. Eq. 491; *Reed v. Newcomb*, 64 Vt. 49.

As to the husband's acting as the wife's agent, see *infra*, *Rights, Duties, and Liabilities Inter Se — Transactions Between Husband and Wife*.

7. **Wife Unsupported by Husband as Sole Trader under Statute.** — *Black v. Tricker*, 59 Pa. St. 13; *Orrell v. Van Gorder*, 96 Pa. St. 180; *Ellison v. Anderson*, 110 Pa. St. 493. See also *Young v. Pollak*, 85 Ala. 444.

Under Statute in Wisconsin, providing that any married woman, whose husband either from drunkenness, profligacy, or any other cause, shall neglect or refuse to provide for her support or the support and education of her children, shall have the right in her own name to transact business, etc., it has been held that the words "or from any other cause" in the statute, following "drunkenness, profligacy," must be limited to vices *ejusdem generis*, or to conduct tending to the same result, and that mere poverty, sickness, intellectual inferiority, or physical inability of the husband not caused by vice is not alone sufficient to enable the wife to act as a *feme sole*. *Edson v. Hayden*, 20 Wis. 682.

To the same effect see *Ellison v. Anderson*, 110 Pa. St. 486; *Weiler v. Greiner*, 12 Phila. (Pa.) 440, 34 Leg. Int. (Pa.) 13; *King v. Thompson*, 87 Pa. St. 365, 30 Am. Rep. 364.

8. **Abandoned Wife as Sole Trader under Stat-**



where the wife is living separate and apart from the husband.<sup>1</sup> But under statute in *Kentucky* it has been held that the insolvency of the husband does not alone authorize the court to grant the wife the power to trade as a *feme sole*.<sup>2</sup>

cc. FORMALITIES PREREQUISITE TO BECOMING SOLE TRADER. — In some of the states it is provided by statute that before a married woman can become a *feme sole* trader certain prerequisites must be complied with, such as the filing with the proper authorities a certificate of her business<sup>3</sup> or the written consent of the husband,<sup>4</sup> or the securing of a judgment or decree pronouncing her a *feme sole* trader.<sup>5</sup>

(b) *Separate Property Acts*. — Under statutes securing to a married woman separate rights in property and enabling her to enter into transactions in relation thereto, she may use her separate property for purposes of trade or business.<sup>6</sup> And it has been held that this right necessarily implies the right to purchase goods and to bind herself by contract for the payment of such purchases.<sup>7</sup> And under statutes giving a married woman separate property rights and making her liable on her contracts in relation thereto, it has been held that she may make herself personally liable for a purchase on credit of articles to

ute. — *Harley v. Leonard*, 4 Pa. Super. Ct. 435; *Foreman v. Hosler*, 94 Pa. St. 418; *Elsey v. McDaniel*, 95 Pa. St. 472; *People's Sav. Bank v. Denig*, 131 Pa. St. 241.

1. In *West Virginia* it is provided by statute that a married woman living separate and apart from her husband may in her own name carry on any trade or business. *Peck v. Marling*, 22 W. Va. 709.

2. *Moran v. Moran*, 12 Bush (Ky.) 301; *Kohn v. Steinau*, (Ky. 1895) 29 S. W. Rep. 885.

3. *Filing Certificate in Clerk's Office*. — See Pub. Stat. Mass. (1882), p. 819; *Long v. Drew*, 114 Mass. 77; *Todd v. Clapp*, 118 Mass. 495; *Dawes v. Rodier*, 125 Mass. 421; *Snow v. Sheldon*, 126 Mass. 332, 30 Am. Rep. 684; *Harnden v. Gould*, 126 Mass. 411; *Wheeler v. Raymond*, 130 Mass. 247; *Chapin v. Kingsbury*, 135 Mass. 580; *O'Neil v. Wolffsohn*, 137 Mass. 134; *Bancroft v. Curtis*, 108 Mass. 47; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Proper v. Cobb*, 104 Mass. 589; *Manton v. Tyler*, 4 Mont. 364.

4. Under Statute in *North Carolina*, a married woman of the age of twenty-one or upwards may, with the consent of her husband, become a free trader, by an antenuptial contract or a postnuptial writing executed in a prescribed form, but such contract or writing must be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business. *Williams v. Walker*, 111 N. Car. 604. In this case it was held that where the only evidence offered in the trial upon the issue as to whether a married woman was a free trader was a mortgage reciting that she was such, and the testimony of witnesses that they thought they had seen "the free trade papers" in the office of the register of deeds, the court properly instructed the jury to find that she was not a free trader.

Under the Code of *Alabama* a similar rule at one time prevailed. *Lathrop-Hatten Lumber Co. v. Bessemer Sav. Bank*, 96 Ala. 350; *Strauss v. Schwab*, 104 Ala. 669; *Falk v. Hecht*, 75 Ala. 293; *King v. Bolling*, 75 Ala. 390.

By Code Ala. (1896), § 2526, it is now provided that the wife has full capacity to contract as if she were sole, except as otherwise provided by law.

5. *Statutes Requiring Judgment or Decree Pronouncing Married Woman a Sole Trader*. — Cal. Code Civ. Pro., §§ 1811-1821; *Martinez v. Ward*, 19 Fla. 175; *McQuaid v. Fontane*, 24 Fla. 515; *Crawford v. Feder*, 34 Fla. 397. See also *Abrams v. Howard*, 23 Cal. 388; *Camden v. Mullen*, 29 Cal. 564; *Reading v. Mullen*, 31 Cal. 104.

In *Kentucky* by statute, at one time, provision was made by which married women were empowered by the courts to act as sole traders. *Moran v. Moran*, 12 Bush (Ky.) 301; *Ex p. Franklin*, 79 Ky. 497; *Azbill v. Azbill*, 92 Ky. 154.

For the law at present in *Kentucky* on this question, see Stat. Ky. (1894), § 2128.

In *Pennsylvania* it has been held under statute that there is no necessity for a decree to entitle a *feme covert* to the privileges of a *feme sole* trader, where for causes mentioned in the statute the husband has failed to support her. *Black v. Tricker*, 59 Pa. St. 13; *Orrell v. Van Gorder*, 96 Pa. St. 180; *Ellison v. Anderson*, 110 Pa. St. 493. Nor in a case where the wife has been deserted by the husband. *Harley v. Leonard*, 4 Pa. Super. Ct. 435; *Hentz v. Clawson*, 12 Phila. (Pa.) 432, 34 Leg. Int. (Pa.) 5; *Foreman v. Hosler*, 94 Pa. St. 418; *Elsey v. McDaniel*, 95 Pa. St. 472; *People's Sav. Bank v. Denig*, 131 Pa. St. 241; *Lewis v. Eddy*, 14 Phila. (Pa.) 148, 37 Leg. Int. (Pa.) 124.

6. *Right to Use Property in Trade under Separate Property Acts*. — *Miller v. Peck*, 18 W. Va. 75. See the title SEPARATE PROPERTY (OF MARIED WOMEN).

7. *Right to Bind Separate Property by Purchase of Goods*. — *Haight v. McVeagh*, 69 Ill. 624; *Nispel v. Laparle*, 74 Ill. 306.

To the same effect see *Meyers v. Rahte*, 46 Wis. 658; *Krouskop v. Shontz*, 51 Wis. 217, 37 Am. Rep. 817; *Brickley v. Walker*, 68 Wis. 572; *Barker v. Lynch*, 75 Wis. 630. Compare *Hitchcock v. Richold*, 5 Mackey (D. C.) 414; *Stewart v. Smith*, 3 Mackey (D. C.) 281.

be used in her separate business, as where she purchases goods for the purpose of carrying on a business, without having any property at the time of the purchase, the contract in such case being considered as having reference to her sole property.<sup>1</sup>

(c) **What Amounts to Separate Trade or Business.**—The expression "trade or business" as employed in the statutes of the various states of course includes pursuits mechanical, manufacturing, or commercial.<sup>2</sup>

g. **TO ACT AS AGENT OR IN FIDUCIARY CAPACITY — Married Woman as Agent.**—A married woman may, at common law, act as an agent for her husband,<sup>3</sup> or for a third person without the consent of her husband;<sup>4</sup> and, indeed, she may act as the agent of a third person even in a transaction with her husband.<sup>5</sup> Coverture does not take from her capacity in this respect, since it is not necessary that she should be able to act *sui juris* to enable her to act for another.<sup>6</sup>

**Married Woman Acting in Fiduciary or Representative Capacity.**—In the same way a married woman may act as a trustee.<sup>7</sup> But it has been said that since her husband is personally liable for any breach of trust which she may commit, she cannot act in the administration of a trust without his concurrence or assent.<sup>8</sup> So she may act as an executrix or administratrix, though it seems not without the husband's consent.<sup>9</sup>

h. **TO EXERCISE RIGHT OF SUFFRAGE.**—At common law a married woman was incapable of exercising the right of suffrage, her existence for such a purpose being merged in that of her husband.<sup>10</sup> But in some of the more

1. **Liability for Purchase on Credit under Separate Property Acts.**—*Tillman v. Shackleton*, 15 Mich. 447, 93 Am. Dec. 198; *Rankin v. West*, 25 Mich. 195; *First Commercial Bank v. Newton*, 117 Mich. 433. Compare *Glover v. Alcott*, 11 Mich. 482.

**Under Statute in Pennsylvania** a contrary view seems at one time to have obtained. *Robinson v. Wallace*, 39 Pa. St. 129. By the subsequent statute of June 3, 1887, in this state a married woman engaging in business is bound by her contracts in relation thereto as if she were unmarried. *Real Estate Invest. Co. v. Roop*, 132 Pa. St. 503; *Walter v. Jones*, 148 Pa. St. 589; *Wayne v. Lewis*, 23 W. N. C. (Pa.) 441. But this latter statute was repealed by Act of June 8, 1893 (P. L. 344), which enlarged her capacity to acquire and dispose of property, to sue and be sued, etc. *Harley v. Leonard*, 4 Pa. Super. Ct. 434.

2. See *Nash v. Mitchell*, 71 N. Y. 203, 27 Am. Rep. 38.

**Keeping Boarding House a Separate Trade or Business.**—*Chapman v. Briggs*, 11 Allen (Mass.) 546; *Dawes v. Rodier*, 125 Mass. 421; *Harnden v. Gould*, 126 Mass. 411.

**Farming a Separate Trade or Business.**—*Hickey v. Thompson*, 52 Ark. 237; *Camden v. Mullen*, 29 Cal. 564; *Snow v. Sheldon*, 126 Mass. 332, 30 Am. Rep. 684; *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817. Compare *Duncan v. Robertson*, 58 Miss. 390.

**Steam Engine for Sawing Lumber.**—It has been held that a married woman will be bound by her contracts for the purchase of a steam engine and other apparatus for sawing lumber, which was erected on her lands. *Netterville v. Barber*, 52 Miss. 171.

**Greater Portion of Produce Consumed in the Family.**—It has been held that if the occupation is one by which she supports herself and her family, and is carried on with her funds

and with implements and means belonging to her, it is immaterial that the produce is mainly consumed in the family, and that only a small part of it is raised to be sold. *Snow v. Sheldon*, 126 Mass. 333, 30 Am. Rep. 684.

But in *New York* it has been held that the management of her landed property by a married woman, the receipt of its rents and income and disposal of them, is not a trade or business within the meaning of the statute enabling a married woman to carry on business. *Nash v. Mitchell*, 71 N. Y. 203, 27 Am. Rep. 38.

**Business Must Be Continuing and Substantial Employment.**—*Holmes v. Holmes*, 40 Conn. 117. See also *Proper v. Cobb*, 104 Mass. 589.

3. **Power of Married Woman to Act as Agent of Husband.**—See *infra*, this title, *Rights, Duties, and Liabilities Inter Se — Transactions Between Husband and Wife*; and see the title *AGENCY*, vol. 1, p. 946.

4. **Married Woman Acting as Agent for Third Person.**—*Pullam v. State*, 78 Ala. 33, 56 Am. Rep. 21. See the title *AGENCY*, vol. 1, p. 947.

5. **Married Woman as Agent for Third Person in Transaction with Husband.**—A married woman might, at common law, act as an attorney for a third person in making livery to her husband. *Comyns' Dig., Attorney, C. 4*. See also the title *AGENCY*, vol. 1, p. 947.

6. Story on *Agency* (9th ed.) 37.

7. **Married Woman Acting as Trustee.**—*Lake v. De Lambert*, 4 Ves. Jr. 592; *U. S. Trust Co. v. Sedgwick*, 97 U. S. 308. See also the title *TRUSTS AND TRUSTEES*.

8. *U. S. Trust Co. v. Sedgwick*, 97 U. S. 309.

9. See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, pp. 752, 780.

10. **Disability of Married Woman to Exercise Right of Franchise at Common Law.**—*Reg. v. Harrauld*, L. R. 7 Q. B. 361.



recently admitted states in the *United States* a different rule is provided for by the organic law.<sup>1</sup>

i. TO BE ESTOPPED — (1) *Estoppel by Record*. — The operation of estoppel by record against married women will be found fully treated in another portion of this work.<sup>2</sup>

(2) *Estoppel by Deed*. — Since at common law the deed of a married woman is not only voidable but void as a contract, it cannot, as a general rule, apart from statute operate against her by way of estoppel.<sup>3</sup>

**Operation of Covenants as to After-acquired Title.** — Nor at common law will she be estopped by the covenants contained in a deed of her land in which she and her husband joined, from setting up an after-acquired title,<sup>4</sup> and this even in a jurisdiction where such conveyance is recognized as valid at common law.<sup>5</sup> In some jurisdictions, under statutes conferring upon married women the power to convey their separate estates, it has been held that power is not conferred upon a *feme covert* to bind herself by any covenants in a deed which, if given effect, would operate to prevent her successful assertion of after-acquired title, and that the sole effect of such conveyance is to pass whatever interest she has at the time the conveyance is made.<sup>6</sup> But a different rule has been applied under statutes in other jurisdictions.<sup>7</sup> A full treatment of this question will be found elsewhere in this work.<sup>8</sup>

(3) *Estoppel in Pais* — (a) **Estoppel Predicated on Contract.** — At common law a *feme covert* is incapable of entering into a contract, and hence at common law for this reason alone she cannot be estopped by contract or anything in the nature of a contract. Unless the element of fraud is present in the declaration or conduct of a *feme covert*, upon the faith of which conduct another might reasonably rely and has in fact relied to his injury, she is not estopped.<sup>9</sup> Moreover, under a statute subjecting married women to estoppel *in pais* like other persons, it has been held that in the absence of some element of fraud, misrepresentation, or concealment, a married woman is not estopped by the mere form of a contract which she is incompetent to make.<sup>10</sup>

(b) **Estoppel Predicated on Tort.** — The doctrine has sometimes been advanced that it is only in case of a pure tort, altogether disconnected from a contract,

1. See the title ELECTIONS, vol. 10, p. 591.

2. See the title JUDGMENTS AND DECREES.

3. See the title ESTOPPEL, vol. 11, p. 395.

Deed from Wife to Husband. — A deed direct from a wife to her husband, being void, cannot be treated as an estoppel. *Bohannon v. Travis*, 94 Ky. 59.

4. **Operation of Covenants of Married Woman by Way of Estoppel on After-acquired Title.** — See *Curry v. American Freehold Land Mortg. Co.*, 107 Ala. 429, 54 Am. St. Rep. 105; *Williams v. Baker*, 71 Pa. St. 476.

5. *Wight v. Shaw*, 5 Cush. (Mass.) 56; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448.

But by statutes in *Massachusetts* at present the law is otherwise. *Knight v. Thayer*, 125 Mass. 25.

6. *Preston v. Evans*, 56 Md. 476; *Wadkins v. Watson*, 86 Tex. 199, reversing *Wadkins v. Watson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 636.

7. *Guertin v. Mombteau*, 144 Ill. 32; *Littell v. Hoagland*, 106 Ind. 320; *Knight v. Thayer*, 125 Mass. 25; *Zimmerman v. Robinson*, 114 N. Car. 39.

But it has been held that a married woman who is not bound by a debt, nor by the covenants of a mortgage given by the husband to secure its payment, is not estopped from

claiming title to land conveyed to her in exchange for the mortgaged property, by a *bona fide* purchaser of the latter for the husband and wife before the recording of the mortgage. *Reeves v. Howes*, 104 Ind. 435. See also *Purdy v. Coar*, 109 N. Y. 448, 4 Am. St. Rep. 491.

8. See the title ESTOPPEL, vol. 11, p. 413.

9. **Estoppel in Pais Predicated on Contract Inoperative Against Married Women.** — *Schenck v. Stumpf*, 6 Mo. App. 381; *Towes v. Fisher*, 77 N. Car. 443; *Weathersbee v. Farrar*, 97 N. Car. 106; *Davidson's Appeal*, 95 Pa. St. 396. See also *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

**Thus the Parol Relinquishment of a Claim to Land** by a married woman has been held to be invalid by reason of her disability, and she is not thereby estopped from asserting her claim. *Towles v. Fisher*, 77 N. Car. 443.

**The Fact that a Promise Made by a Married Woman Has Been Acted Upon** by the promisee, does not estop her from denying the validity of the promise on the ground of her inability to contract. *Saulsbury v. Corwin*, 40 Mo. App. 275.

**As to the Necessity of the Element of Fraud in estoppels in pais generally**, see the title ESTOPPEL, vol. 11, p. 422.

10. *Cupp v. Campbell*, 103 Ind. 220.



that an estoppel against a married woman can operate.<sup>1</sup> And the rule seems to have been broadly laid down in some jurisdictions, that the doctrine of estoppel *in pais* has no application at common law to the case of a party incapable of making a contract, and that consequently a married woman cannot at common law be affected by an equitable estoppel.<sup>2</sup> But by other authorities a distinction has been observed between the cases which seek by the doctrine of estoppel to validate the contracts of married women, which by law are declared void, and cases where in the absence of any contract or independent of any contract her conduct has been held to prevent her from asserting what would otherwise be a right.<sup>3</sup> According to this rule a married woman may be bound by an estoppel, even where she has no power to bind herself by contract.<sup>4</sup> The rule stated is that a married woman has no more right to injure or mislead another by her conduct or representation than if she were *sui juris*, and where it is made to appear that by fraud, misrepresentation, or concealment she has influenced another to act to his injury, whether by the performance on his part of a void contract, or otherwise, equitable estoppel will operate against her.<sup>5</sup>

(c) **Effect of Statutes Enabling Married Women to Contract.** — Under statutes enabling a married woman to contract, it has been held, even in jurisdictions holding the common-law view that a married woman cannot be affected by an equitable estoppel, that she may be estopped by her acts relating to matters as to which she has capacity to contract, as if she were unmarried;<sup>6</sup> and it has been said that under such statutes any fraudulent act which would have estopped her when not connected with a contract will have this effect though connected with a contract.<sup>7</sup>

**Statutes Permitting Contract Relating to Separate Estate Only.** — Under statutes permitting a married woman to enter into contracts in reference to her separate

1. **View that Married Woman Is Estopped in Case of Pure Tort Only.** — *Farmington Nat. Bank v. Buzzell*, 60 N. H. 192; *Scott v. Battle*, 85 N. Car. 184, 39 Am. Rep. 694; *Williams v. Walker*, 111 N. Car. 609. See also *Williamson v. Jones*, 43 W. Va. 562; *Walker v. Brooks*, 99 N. Car. 207; *Burns v. McGregor*, 90 N. Car. 222.

2. **View that Estoppel in Pais Is Inapplicable to Married Women.** — *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305; *Remis v. Call*, 10 Allen (Mass.) 512; *Pierce v. Chace*, 108 Mass. 254; *Merriam v. Boston*, etc., R. Co., 117 Mass. 241; *Bodine v. Killeen*, 53 N. Y. 93; *Buffalo Third Nat. Bank v. Guenther*, (Buffalo Super. Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 428; *Powell's Appeal*, 98 Pa. St. 413. See also *Cook v. Walling*, 117 Ind. 11, 10 Am. St. Rep. 17.

3. *Galbraith v. Lunsford*, 87 Tenn. 89.

4. *Matthews v. Murchison*, 17 Fed. Rep. 760.

5. **View that Married Women May Be Estopped by Fraud though Connected with Contract.** — *Savage v. Foster*, 9 Mod. 35; *Sharpe v. Foy*, L. R. 4 Ch. 41; *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83; *Patterson v. Lawrence*, 90 Ill. 174, 32 Am. Rep. 22; *Connolly v. Branstler*, 3 Bush (Ky.) 702, 96 Am. Dec. 278; *Davis v. Tingle*, 8 B. Mon. (Ky.) 539; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413. See also *Henry v. Gauthreaux*, 32 La. Ann. 1103; *Chaffe v. Watts*, 37 La. Ann. 324; *Hand v. Hand*, 68 Cal. 135, 58 Am. Rep. 5. Compare *Parker v. Manning*, 7 T. R. 535.

But in *Cannam v. Farmer*, 3 Exch. 698, it was held that in an action on a promissory

note, to which the defendant pleads her coverture, the fact that in signing the note the defendant represented herself as being a widow would not bind her by way of estoppel. See also *Davenport v. Nelson*, 4 Campb. 26; *Keen v. Coleman*, 39 Pa. St. 299, 80 Am. Dec. 524.

**Expression of Opinion as to Legal Effect of Contract.** — A married woman cannot be estopped by an expression of her opinion as to the legal effect of a writing which she is about to execute, although the other party may have been misled and injured thereby. *Klein v. Caldwell*, 91 Pa. St. 145. See also *Brick v. Campbell*, 122 N. Y. 337.

**Feme Sole Claiming to Be Married.** — When a person makes a solemn declaration that she is married and that certain goods were the goods of her husband in her right, she will not be permitted to say that she was not married and that the goods were her sole property. *Mace v. Cadell*, 1 Cowp. 232; *Matthews v. Galindo*, 1 M. & P. 565. See also *Austie v. Mason*, 3 Anstr. 833.

6. **Effect of Statutes Enabling Married Women to Contract, on Operation of Estoppel.** — *Orr v. White*, 106 Ind. 341; *Rogers v. Union Cent. L. Ins. Co.*, 111 Ind. 343, 60 Am. Rep. 701; *Lane v. Schlemmer*, 114 Ind. 296, 5 Am. St. Rep. 621; *Cook v. Walling*, 117 Ind. 11, 10 Am. St. Rep. 17; *Parsons v. Rolfe*, 66 N. H. 620; *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 156; *Bodine v. Killeen*, 53 N. Y. 93; *Nash v. Mitchell*, 71 N. Y. 203, 27 Am. Rep. 38; *Noel v. Kinney*, 106 N. Y. 80, 60 Am. Rep. 423; *Powell's Appeal*, 98 Pa. St. 413.

7. See *Williamson v. Jones*, 43 W. Va. 562.

estate, it has been held that where a married woman represents as a fact that she is purchasing articles or borrowing money for the use of her separate estate, and her creditor does not know to the contrary, she will be afterwards estopped from denying the truth of such representations, upon the ground that it would be a fraud to allow her to repudiate a contract which she had induced the person with whom she dealt to believe that she had the power to make, when as a matter of fact she had no such power.<sup>1</sup> Where, however, she executes an obligation to pay the debt of another, her intention to bind her separate property, it has been said, though expressed in the clearest and strongest terms, does not estop her from disputing her legal liability for the payment of such debt, for the reason that the statute has denied to her the power to contract such a debt, and therefore the expression of her intention to do that which she has no power to do cannot bind her.<sup>2</sup> Nor will an estoppel arise if it appears that the creditor knew, at the time the debt was contracted, that her representation was not true, for in that case he would not be misled.<sup>3</sup>

**Statutes Prohibiting Contracts of Suretyship for Husband.** — Under statutes prohibiting the wife from becoming the surety of her husband, it has been held that where a married woman, to avoid the statute, makes a contract as her husband's surety, and at the same time makes a representation which is in good faith relied on and believed to be true that the contract is for her own benefit, she will be estopped to deny such representation.<sup>4</sup> And it has been held that she may estop herself by the form of the contract, apart from any positive misrepresentation.<sup>5</sup> But under statute in other jurisdictions, the rule has been broadly laid down that the doctrine of estoppel has no application to the contracts of married women where it is sought to hold them or their property liable for the debts of their husbands.<sup>6</sup>

(d) **Barring Title to Real Estate** — *ad. ACTS OR REPRESENTATIONS AMOUNTING TO POSITIVE FRAUD* — **Statutory Powers as to Realty.** — The power of a married woman to convey or encumber her real estate other than her equitable separate estate is wholly

1. **Estoppel in Connection with Contracts Not Relating to Separate Estate.** — *American Mortg. Co. v. Owens*, 72 Fed. Rep. 219; *Greig v. Smith*, 29 S. Car. 426; *Brown v. Thomson*, 31 S. Car. 436, 17 Am. St. Rep. 40; *Gwynn v. Gwynn*, 31 S. Car. 482; *Scottish American Mortg. Co. v. Deas*, 35 S. Car. 42, 28 Am. St. Rep. 832; *Bratton v. Lowry*, 39 S. Car. 386; *Rigby v. Logan*, 45 S. Car. 651. See also *Nelson v. McDonald*, 80 Wis. 605, 27 Am. St. Rep. 71.

**Representation as to Carrying On Separate Business.** — *Smith v. Weeks*, 65 Vt. 566. See also *Chaffe v. Watts*, 37 La. Ann. 324; *Sargeant v. French*, 54 Vt. 385; *Buffalo Third Nat. Bank v. Guenther*, (Buffalo Super. Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 428.

2. *Greig v. Smith*, 29 S. Car. 426; *Gwynn v. Gwynn*, 31 S. Car. 482.

3. **Effect of Knowledge of Promisee that Contract Is Not for Benefit of Separate Estate.** — *Gwynn v. Gwynn*, 31 S. Car. 482; *Tribble v. Poore*, 30 S. Car. 97. But see *Meiley v. Butler*, 26 Ohio St. 535.

**Indorsee of Note Not Affected by Knowledge of Payee.** — *Nott v. Thomson*, 35 S. Car. 461.

4. **Estoppel in Connection with Contracts of Suretyship for Husband.** — *Rogers v. Union Cent. L. Ins. Co.*, 111 Ind. 345, 60 Am. Rep. 701; *Lane v. Schlemmer*, 114 Ind. 296, 5 Am. St. Rep. 621; *Ward v. Berkshire L. Ins. Co.*, 108 Ind. 301; *Tombler v. Reitz*, 131 Ind. 9.

See also *Cook v. Walling*, 117 Ind. 9, 10 Am. St. Rep. 17.

**Where Promisee Has Knowledge of Nature of Contract — No Estoppel.** — *Sohn v. Gantner*, 134 Ind. 31. See also *Coats v. Gordon*, 144 Ind. 19.

**School Fund Mortgage.** — But it has been held that where a married woman, to obtain a loan from the school fund, complies with all the statutory requirements, and executes a mortgage upon her real estate to secure the loan so obtained, she is thereby estopped from disputing the validity of the mortgage, and this is true although the auditor, at the time the loan was made, may have known that the money so derived was to be used for the benefit of her husband or other persons. *Snodgrass v. Morris*, 123 Ind. 425; *Lloyd v. State*, 134 Ind. 506; *Welch v. Fisk*, 139 Ind. 637; *Davee v. State*, 7 Ind. App. 71. See also *Trimble v. State*, 145 Ind. 154, 57 Am. St. Rep. 163.

5. *Shirk v. North*, 135 Ind. 210; *Hacketts-town Nat. Bank v. Ming*, 52 N. J. Eq. 156. But see *Vogel v. Lechner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Voreis v. Nussbaum*, 131 Ind. 267.

6. **Jurisdictions Denying Operation of Estoppel in Connection with Contracts of Suretyship for Husband.** — *Richardson v. Stephens*, 1 Ala. 1899; 25 So. Rep. 39; *Bisland v. Provosty*, 14 La. Ann. 165; *Chaffe v. Oliver*, 33 La. Ann. 1009; *Harang v. Blanc*, 34 La. Ann. 632; *Farmington Nat. Bank v. Buzzell*, 60 N. H. 442. See



statutory, and any deed or other instrument purporting to convey or encumber her land, in which her husband has not joined, is absolutely void because of the want of power or capacity on her part to execute such an instrument alone.<sup>1</sup>

**Construction of Statutes — Conflict of Authority.** — Whether, under the statutes of the various states prescribing that the wife may convey her real estate by joining with her husband in the conveyance, she may lose her title to her real estate not belonging to her separate equitable estate<sup>2</sup> without conforming to the mode of conveyance prescribed by statute, by her acts or representations amounting to fraud, is not settled by the authorities. By some of the courts the doctrine of equitable estoppel in such case has been denied on the ground that to allow a married woman to do indirectly what she could not do directly by solemn deed would be practically to dispense with all the limitations which the law has imposed upon the capacity of a married woman to alienate her real estate;<sup>3</sup> and no distinction, it has been maintained, exists in this respect between land that is statutory separate estate and land that is not.<sup>4</sup>

**It Seems to Be the Prevailing Rule,** however, under the statutes prescribing the mode in which the wife's realty may be conveyed, that where a married woman contracts without conforming to the statutory mode in reference to her real estate by fraudulent means, and thus obtains inequitable advantages, she will be held estopped from setting up and relying on her coverture to retain her advantage;<sup>5</sup> and this rule has been applied apart from statutes giving to married women separate rights of property.<sup>6</sup>

**Positive Fraud Essential to Estoppel.** — But it seems to be agreed in almost all jurisdictions that to estop a married woman from asserting her rights in land, it is essential that she should be guilty of some positive act of fraud, or else of some act of concealment or suppression which in law would be equivalent thereto; for all who deal with a married woman directly, or deal in any manner affecting her rights, are chargeable with the knowledge of her disability, and that she can only convey land in the manner provided by statute.<sup>7</sup>

also *Penacook Sav. Bank v. Sandborn*, 60 N. H. 558; *Parsons v. Rolfe*, 66 N. H. 620.

1. *Cook v. Walling*, 117 Ind. 11, 10 Am. St. Rep. 17.

2. **Operation of Estoppel in Pais Against Separate Equitable Real Estate.** — As to the power of a married woman to bind her separate real estate in equity by acts *in pais* amounting to an equitable estoppel, see *Vaughan v. Vanderstegen*, 2 Drew. 363; *Vansandt v. Weir*, 109 Ala. 104; *Wood v. Terry*, 30 Ark. 385; *Glidden v. Strupler*, 52 Pa. St. 407. See also the title **SEPARATE PROPERTY (OF MARRIED WOMEN)**.

3. **View that Title to Land of Married Woman May Not Be Barred by Estoppel.** — *Behler v. Weyburn*, 59 Ind. 145 [overruling *Gatling v. Rodman*, 6 Ind. 289]; *Unfried v. Heberer*, 63 Ind. 67; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305; *Bemis v. Call*, 10 Allen (Mass.) 512; *Wales v. Coffin*, 13 Allen (Mass.) 213; *Pierce v. Chace*, 108 Mass. 254; *Williamson v. Jones*, 43 W. Va. 562. See also *Cook v. Walling*, 117 Ind. 11, 10 Am. St. Rep. 17.

In *Pennsylvania* the rule has been laid down broadly that the interests of a married woman in real estate cannot be divested except in the mode pointed out by statute, and she cannot be estopped by acts or declarations which, in the case of a *feme sole*, would operate as an estoppel. *Quinn's Appeal*, 86 Pa. St. 447; *Buchanan v. Hazzard*, 95 Pa. St. 240; *Innis v.*

*Templeton*, 95 Pa. St. 262, 40 Am. Rep. 643; *Davison's Appeal*, 95 Pa. St. 394; *Stivers v. Tucker*, 126 Pa. St. 74. In these cases, however, it does not appear that any element of fraud was involved.

Under statute in this state it has been held that where married women executed, without the joinder of their husbands, an instrument which virtually ratified a purchase by their father's executor of the decedent's interest in a partnership, the married women were estopped from subsequently objecting to such purchase. *Grim's Appeal*, 105 Pa. St. 375.

**Partition of Lands by Estoppel in Pais.** — See *Berry v. Seawall*, 65 Fed. Rep. 742.

4. *Cook v. Walling*, 117 Ind. 9, 10 Am. St. Rep. 17; *Williamson v. Jones*, 43 W. Va. 562.

5. **View that Title to Real Estate of Married Women May Be Barred by Estoppel in Pais.** — *Sharpe v. Foy*, L. R. 4 Ch. 40; *Patterson v. Lawrence*, 90 Ill. 174, 32 Am. Rep. 22; *Connolly v. Branstler*, 3 Bush (Ky.) 702, 96 Am. Dec. 278; *Henry v. Gauthreaux*, 32 La. Ann. 1109; *Fitzgerald v. Turner*, 43 Tex. 79; *Ryan v. Maxey*, 43 Tex. 192. See also *Howell v. Hale*, 5 Lea (Tenn.) 405.

6. *Sharpe v. Foy*, L. R. 4 Ch. 40; *Savage v. Foster*, 9 Mod. 35.

7. **View that Actual Fraud Is Necessary to Create Estoppel** — *Alabama*. — *Canty v. Sanderford*, 37 Ala. 91; *Wilder v. Wilder*, 89 Ala. 414, 18 Am. St. Rep. 130; *Steiner v. Trantum*, 98 Ala. 315; *Vansandt v. Weir*, 109 Ala. 104;



**Mere Acts of Affirmance of Invalid Contracts.** — Thus it seems to be the general rule that the mere fact that a married woman has received a part or the whole of the purchase-money for her real estate in consideration of her agreement, and has left the vendee in possession, or done other similar acts recognizing the validity of the agreement, and has thereby induced him to make valuable improvements on the land, is insufficient to estop her to claim title to the land where the form of conveyance prescribed by statute has not been observed.<sup>1</sup> But in *Kentucky* it has been held that while in such case the doctrine of estoppel cannot be enforced so as absolutely to preclude recovery of the real estate attempted to be conveyed, a married woman cannot be permitted to profit by her own wrong to the prejudice of a purchaser in good faith; and, therefore, if she has received and invested the proceeds of such sale in other real estate for her use and benefit, she should be put upon the terms of refunding the purchase-money and paying for such necessary improvements as may have been made in good faith.<sup>2</sup> And in some states the rule obtains that a married woman may, by acts *in pais* which are fraudulent in their results, though done without any intentional fraud, estop herself to assert title to her realty against persons misled to their prejudice by such acts.<sup>3</sup>

**bb. SILENCE OR CONCEALMENT OF FACTS** — (aa) *In General.* — It seems to be the prevailing rule that a married woman may be estopped to set up a claim to land, by a fraudulent concealment or suppression of facts,<sup>4</sup> though in a few cases it

*Curry v. American Freehold Land Mortg. Co.*, 107 Ala. 429, 54 Am. St. Rep. 105.

*Kentucky.* — *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 403.

*Missouri.* — *Schenck v. Stumpf*, 6 Mo. App. 381.

*Texas.* — *Cravens v. Booth*, 8 Tex. 243, 58 Am. Dec. 112; *Berry v. Donley*, 26 Tex. 737; *Fitzgerald v. Turner*, 43 Tex. 79; *Johnson v. Bryan*, 62 Tex. 623; *Steed v. Petty*, 65 Tex. 490; *Williams v. Ellingsworth*, 75 Tex. 480; *Wadkins v. Watson*, 86 Tex. 194; *Stone v. Sledge*, (Tex. Civ. App. 1894) 24 S. W. Rep. 698, 87 Tex. 49, 47 Am. St. Rep. 65; *McLaren v. Jones*, 89 Tex. 131; *Grandjean v. San Antonio*, (Tex. Civ. App. 1897) 38 S. W. Rep. 840, citing 14 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 640, 641, 644.

In *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 404, 49 Am. St. Rep. 303, the court said: "We are aware of no case in which it has been held that a married woman is estopped from asserting title to her lands except on the ground of fraud."

**Conduct Not Fraudulent Inoperative as Dedication.** — *Vansandt v. Weir*, 109 Ala. 104. See also *Todd v. Pittsburg, etc., R. Co.*, 19 Ohio St. 524.

**Acquiescence in Use of Lands as Public Highway Held No Estoppel.** — *McBeth v. Trabue*, 69 Mo. 642. See also *Todd v. Pittsburg, etc., R. Co.*, 19 Ohio St. 524.

**1. Effect of Mere Acts of Affirmance of Void Contract.** — *Harden v. Darwin*, 77 Ala. 481; *Rogers v. Higgins*, 48 Ill. 212; *Glidden v. Strupler*, 52 Pa. St. 400; *Innis v. Templeton*, 95 Pa. St. 267, 40 Am. Rep. 643; *Buchanan v. Hazzard*, 95 Pa. St. 242; *Dodd v. Benthal*, 4 Heisk. (Tenn.) 601. See also *Williamson v. Jones*, 43 W. Va. 562, citing 14 AM. AND ENG. ENCYC. OF LAW (1st ed.) 641. *See also Spafford v. Warren*, 47 Iowa 47.

**Verbal Agreement to Release Interest in Land and Taking Conveyance to Other Lands No**

**Estoppel.** — *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

**Contract to Convey Defectively Acknowledged — Allowing Possession to be Taken and Improvements Made — No Estoppel.** — *Stivers v. Tucker*, 126 Pa. St. 74. To the same effect see *McClure v. Douthitt*, 6 Pa. St. 414; *Thorndell v. Morrison*, 25 Pa. St. 326; *Richards v. McClelland*, 29 Pa. St. 385; *Keen v. Hartman*, 48 Pa. St. 497, 88 Am. Dec. 472; *Glidden v. Strupler*, 52 Pa. St. 400. See also *Wood v. Terry*, 30 Ark. 385; *Tolman v. Smith*, 74 Cal. 345; *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303. Compare *Norton v. Nichols*, 35 Mich. 148. See further on this question the title ACKNOWLEDGMENTS, vol. 1, p. 563.

**Mere Signing and Acknowledging Void Deed — Money Obtained by Husband for His Benefit — No Estoppel.** — *Drury v. Foster*, 2 Wall. (U. S.) 24.

**2. Hawkins v. Brown**, 80 Ky. 186; *McDanell v. Landrum*, 87 Ky. 409, 12 Am. St. Rep. 500. See also *Heck v. Fisher*, 78 Ky. 643; *Newman v. Moore*, 94 Ky. 149. But see *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303; *Mattox v. Hightshue*, 39 Ind. 95; *Glidden v. Strupler*, 52 Pa. St. 406.

**3. View that Intentional Fraud Unnecessary.** — *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Orr v. White*, 106 Ind. 341; *Ward v. Berkshire L. Ins. Co.*, 108 Ind. 304; *Kelley v. Fisk*, 110 Ind. 554; *Galbraith v. Lunsford*, 87 Tenn. 89. See also *Rosenthal v. Mayhugh*, 33 Ohio St. 168.

**Culpable Negligence in Executing Conveyance Held Ground of Estoppel.** — *Dobbin v. Cordiner*, 41 Minn. 165, 16 Am. St. Rep. 683.

**4. Title to Land of Married Woman Barred by Fraudulent Concealment of Facts.** — *Sharpe v. Foy*, L. R. 4 Ch. 40; *Savage v. Foster*, 9 Mod. 35; *Kelley v. Fisk*, 110 Ind. 552; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Stone v. Sledge*, (Tex. Civ. App. 1894) 24 S. W. Rep. 698, 87 Tex. 49, 47 Am. St. Rep. 65.

has been intimated that some affirmative or positive act of fraud is necessary.<sup>1</sup> Mere silence on the part of a married woman, apart from any fraudulent motive, as where she acquiesces in the sale of her real estate by a third person under the belief that the sale was lawful, will not estop her to assert her rights to the property.<sup>2</sup> Nor where a married woman makes an invalid deed will she be estopped from asserting title to the land attempted to be conveyed, by the mere fact that she stands by in silence and thereby encourages the purchaser to make valuable improvements on the land.<sup>3</sup>

(bb) *Permitting Transfer of Realty by Third Person.* — Where a married woman fraudulently stands by and encourages or permits a third person to transfer her interest in real estate without giving the purchaser notice of her right, it has been held that she will not afterwards be allowed to set up such right to avoid the purchase, notwithstanding the laws prescribing formal conveyances of real estate by *femes covert*.<sup>4</sup>

(cc) *Permitting Husband to Contract Debts on Faith of Ownership* — **Where Record Title Is in Husband.** — Where a wife permits the legal title to land belonging to herself to remain on the record in the name of her husband unquestioned, and knowingly permits him to procure credit on the faith of that title, she is estopped to assert title in the land against those who had no notice or knowledge of any such claim or interest on her part and who have acquired an interest in the land on the faith of the husband's ownership.<sup>5</sup> Moreover, it has been held that where the equitable title to land is in a married woman, and she permits the record title to remain in her husband and allows him to deal with it as his own and to obtain credit on the faith of his apparent ownership, she is estopped to assert her equitable interest therein apart from any actual fraud on her part.<sup>6</sup> But in other cases the rule has been laid down that the fact that the record title to the wife's separate realty is allowed to remain in the name of the husband while he contracts debts on the faith of his apparent ownership will not, in the absence of bad faith and fraudulent intent on the part of the wife, estop her from asserting her title.<sup>7</sup> But it is well settled that a married woman will not be estopped from claiming title to real estate as against the creditors of the husband where it does not appear that the credit was extended to the husband upon the faith of his apparent ownership.<sup>8</sup>

**Where Record Title Is in Wife.** — It has been held that if a contract for the erection of a building is made by the husband, and the building is erected on real

1. *Towles v. Fisher*, 77 N. Car. 437; *Weathersbee v. Farrar*, 97 N. Car. 106; *Wells v. Batts*, 112 N. Car. 289, 34 Am. St. Rep. 506; *Branch v. Ward*, 114 N. Car. 150; *Williamson v. Jones*, 43 W. Va. 562.

2. **Mere Silence Apart from Fraud Inoperative to Estop Married Woman.** — *Throckmorton v. Pence*, 121 Mo. 50; *Thurber v. La Roque*, 105 N. Car. 302. See *Heck v. Fisher*, 78 Ky. 643.

**Disposition by Husband of Crops Grown on Wife's Land.** — It has been held that only the positive and unequivocal assent of the wife to the disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same. *Brance v. Ward*, 114 N. Car. 148. And this rule holds in respect to growing crops, as well as those that have been gathered. *Wells v. Batts*, 112 N. Car. 283, 34 Am. St. Rep. 506. See also *Weathersbee v. Farrar*, 97 N. Car. 111.

3. *Glidden v. Strupler*, 52 Pa. St. 400; *Stivers v. Tucker*, 126 Pa. St. 74.

4. **Effect of Fraudulently Permitting Transfer of Realty by Third Person.** — *Savage v. Foster*, 9 Mod. 35.

5. **Fraudulently Permitting Husband to Contract Debts on Faith of Ownership of Lands Re-**

**corded in His Name.** — *Minnich v. Shaffer*, 135 Ind. 634; *Duckwall v. Kisner*, 136 Ind. 99; *Le Coil v. Armstrong-Landon-Hunt Co.*, 140 Ind. 256; *Besson v. Eveland*, 26 N. J. Eq. 468. See also *Hendershott v. Henry*, 63 Iowa 744; *Brooks v. Shelton*, 54 Miss. 354; *Porter v. Caspar*, 54 Miss. 361.

**Rule Otherwise Where Circumstances Exist Putting Purchaser on Inquiry.** — *Chadbourn v. Williams*, 45 Minn. 294.

6. **View that Permitting Record Title to Remain in Husband Estops Wife as to Creditors Apart from Actual Fraud.** — *Hopkins v. Joyce*, 78 Wis. 443. See also *Pierce v. Hower*, 142 Ind. 626. Compare *Marston v. Dresen*, 85 Wis. 530, distinguishing the case first cited above.

7. **View that Permitting Record Title to Remain in Husband Is Inoperative as Estoppel in Absence of Fraud.** — *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538; *Kemp v. Folsom*, 14 Wash. 16. See also *Steagall v. Steagall*, 90 Va. 73, and the case last cited in the next note above. Compare *Frederick v. Shorey*, 4 Wash. 75.

8. **Credit Must Be Given to Husband on Faith of Ownership.** — *De Vore v. Jones*, 82 Iowa 66; *Scrutchfield v. Sauter*, 119 Mo. 615.



estate belonging to his wife, in her separate right, with her full knowledge and consent, and she does not disclose her interest, and knowing what is being done takes no steps to prevent it, she will be estopped from setting up her rights as a defense to a mechanic's lien, although her title is of record.<sup>1</sup> But where the wife has her title deeds recorded, the records will afford constructive notice of her title, and if she does no act tantamount to a representation on her part that the title is in her husband, and she is not apprised of any claims of ownership being made by him, and the husband erects a building on her lot claiming it as his own, she will not be estopped to deny that the husband was the owner as against the contractor seeking to subject the property to a mechanic's lien.<sup>2</sup>

*cc. BARRING DOWER.* — A widow being a *feme sole* may effectually bar her right of dower by way of estoppel *in pais*.<sup>3</sup> But it has been held that estoppels *in pais* cannot operate against *femes covert*s for the purpose of barring dower.<sup>4</sup> This doctrine has, however, been denied where the *feme covert* has been guilty of positive fraud,<sup>5</sup> and in a case where from the long absence and desertion of her husband a presumption has arisen that he is dead, and the wife is consequently empowered to act as a *feme sole*, it has been held that she may divest herself of her right of dower by her conduct, though it involved no intentional fraud, if it was calculated to and did in fact mislead another who acted in good faith and with reasonable diligence.<sup>6</sup>

(e) **Barring Title to Personality** — *aa. IN GENERAL.* — A married woman may, by her acts *in pais* amounting to an equitable estoppel, bind her separate personal estate in equity.<sup>7</sup> Also, under statutes permitting married women to make contracts in relation to their statutory separate estates, a married woman may, as to such personality, by her contract or representation, create an estoppel against herself.<sup>8</sup> And even at common law the doctrine of equi-

1. *Bruck v. Bowermaster*, 36 Ill. App. 512. See also *Schwartz v. Saunders*, 46 Ill. 18; *McNichols v. Kettner*, 22 Ill. App. 493; *Kelley v. Fisk*, 110 Ind. 552.

*Contra.* — *Carpenter v. Carpenter*, 27 N. J. Eq. 502, reversing *Carpenter v. Carpenter*, 25 N. J. Eq. 194.

In *Feig v. Meyers*, 102 Pa. St. 10, it was held that a married woman who is in joint possession of her land with her husband, under an unrecorded deed to her, is not estopped from setting up her title as against judgment creditors of her husband, whose debts were contracted without notice of her title, and on the faith of his ownership of the land as shown by the record of the return and confirmation of an Orphans' Court sale of the premises to him. Compare *Anderson v. Armstead*, 69 Ill. 452.

2. *Campbell v. Jacobson*, 145 Ill. 390; *Huntley v. Holt*, 58 Conn. 445.

3. **Dower Barred by Acts After Discovery.** — *Sweeney v. Mallory*, 62 Mo. 485; *Hart v. Giles*, 67 Mo. 175. See also the title *DOWER*, vol. 10, p. 205.

4. **View that Dower May Not Be Barred by Acts in Pais of Feme Covert.** — *Rannells v. Gerner*, 80 Mo. 483.

5. **View that Dower May Be Barred by Actual Fraud of Feme Covert.** — *Craddock v. Tyler*, 3 Bush (Ky.) 360; *Connolly v. Branstler*, 3 Bush (Ky.) 702, 96 Am. Dec. 278.

6. *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

7. **Operation of Equitable Estoppel Against Separate Personality in Equity.** — *Vaughan v. Vanderstegen*, 2 Drew. 363, 23 L. J. Ch. 793, 2 W. R. 599; *Green v. Lyon*, 21 W. R. 695. See

also *Drake v. Glover*, 30 Ala. 390; *Vansandt v. Weir*, 109 Ala. 107. And see the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

8. **Estoppel as to Statutory Personality of Married Women in General.** — *Dewees v. Osborne*, 178 Ill. 39; *Ingals v. Ferguson*, 59 Mo. App. 304; *Rannells v. Gerner*, 80 Mo. 474; *Cottrell v. Spiess*, 23 Mo. App. 35; *Powell's Appeal*, 98 Pa. St. 403. See also *Brown's Appeal*, 9 W. N. C. (Pa.) 329; *Dilzer v. Beethoven Bldg. Assoc.*, 103 Pa. St. 86; *Williamson v. Jones*, 43 W. Va. 562.

**Under Statute in New Hampshire** it has been held that where the defendant, a married woman, induced the plaintiff to sell goods to her by representing that she was the owner of a check for one hundred dollars out of which she promised to pay for the goods when delivered, and the goods were delivered and she refused to pay, she was estopped to deny that she was the owner of the check. *Read v. Hall*, 57 N. H. 482.

**Where Contract of Wife Alone is Invalid.** — Under a statute requiring the written consent of the husband or of a judge of the Supreme Judicial Court, Superior Court, or Court of Probate, in order that a married woman may make a conveyance of shares of stock owned by her, it has been held that a mere delivery to her son of certificates of her shares with her signature indorsed, without any such written consent, is invalid as a contract, and that since the doctrine of estoppel cannot be applied to the case of a party incapable of making a contract, she is not estopped to deny the validity of the conveyance. *Merriam v. Boston, etc., R. Co.*, 117 Mass 241.



table estoppel has been applied against married women touching their choses in action.<sup>1</sup> But since at common law her personalty other than her choses in action belongs absolutely to her husband, it would appear that no question of estoppel arising from her acts *in pais* in respect thereto could arise apart from statute.

*bb. PERMITTING HUSBAND TO ACT AS OWNER.* — Under statutes giving to married women the power to dispose of their separate personal property and to enter into contracts in reference thereto, a married woman can be estopped to claim such property when, by her silence at a time when she is called upon to speak, she has induced others to act upon the belief thereby engendered that it does not belong to her but to her husband.<sup>2</sup>

**Permitting Transfer of Personalty.** — Thus, where a husband sold the personal property belonging to his wife, without her knowledge, but informed her of the sale before receiving the payment therefor, it has been held that her failure to notify the purchaser of her ownership, where she had an opportunity of doing so before he made the payment, would estop her from thereafter setting up her claim as against the purchaser.<sup>3</sup>

**Permitting Husband to Obtain Credit on Faith of Ownership.** — Or, if a married woman knows that her husband assumes as sole owner to deal with personalty belonging to her, and the third person is thereby deceived and gives credit to the husband on the faith of his exclusive ownership, the wife, or a third person claiming under her, is estopped to assert her ownership.<sup>4</sup>

(f) **Effect on Wife of Husband's Acts or Representations.** — A husband is not *jure mariti* the agent of his wife, competent to estop her by his acts done or representations made without her authority or knowledge.<sup>5</sup> But where a married

In *Tryon v. Sutton*, 13 Cal. 490, it was held that the mere fact that a note and mortgage were made directly to a wife will not estop either the wife or the husband from refusing effect to an assignment of the mortgage by the wife's sole act.

**1. Estoppel Against Married Woman with Respect to Her Choses in Action at Common Law.** — *In re Lush*, L. R. 4 Ch. 591; *Davis v. Tingle*, 8 B. Mon. (Ky.) 539; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513.

**Equity to Settlement.** — Thus it has been held that her equity to a settlement out of choses in action may be barred by an equitable estoppel. *In re Lush*, L. R. 4 Ch. 591; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513. See also *Wilks v. Fitzpatrick*, 1 Humph. (Tenn.) 54, 34 Am. Dec. 618.

**2. Effect of Permitting Husband to Act as Owner of Personalty.** — *Tracy v. Lincoln*, 145 Mass. 357; *Levy v. Gray*, 56 Miss. 318; *Coleman v. Semmes*, 56 Miss. 321.

**3. Effect of Knowingly Permitting Sale of Personalty by Husband.** — *Dann v. Cudney*, 13 Mich. 239, 87 Am. Dec. 755.

**Rule Otherwise Where Sale of Wife's Personalty by Husband Is Without Her Permission.** — *Klein v. Seibold*, 89 Ill. 540; *Anderson v. Crowley*, 96 Mich. 457. See also *Swager v. Lehman*, 63 Wis. 399; *McGregor v. Sibley*, 69 Pa. St. 388; *Kiefer v. Kinsick*, 144 Ind. 46.

**4. Effect of Permitting Husband to Obtain Credit on Faith of Ownership.** — *Flanagin v. Hambleton*, 54 Md. 222; *Levy v. Gray*, 56 Miss. 318; *Coleman v. Semmes*, 56 Miss. 321; *Ingals v. Ferguson*, 59 Mo. App. 304; *Swartz v. McClelland*, 31 Neb. 648; *Cravens v. Booth*, 8 Tex. 243, 58 Am. Dec. 112. See also *Jones v. Brandt*, 59 Iowa 340; *Myers v. McDonald*, 27 Iowa 391; *Powell's Appeal*, 98 Pa. St. 403.

**Permitting Husband to Use Wife's Money as His Own.** — When a married woman permits her husband to use her money as his own, to invest it in his own name and thereby obtain credit on the faith of his being the owner of it, she cannot be allowed, in equity, to interpose to the detriment of her husband's creditors her claim to the property so acquired. *Humes v. Scruggs*, 94 U. S. 27; *George Taylor Commission Co. v. Bell*, 62 Ark. 26; *Driggs, etc., Bank v. Norwood*, 50 Ark. 42, 7 Am. St. Rep. 78; *Warner v. Watson*, 35 Fla. 421; *Nelson v. Smith*, 64 Ill. 394; *Hockett v. Bailey*, 86 Ill. 74.

**A Wife Who Allows Stock Bought with Her Money to stand for several years in her husband's name, in order to give credit to him, is estopped to assert her ownership as against his creditors.** *Leete v. State Bank*, 115 Mo. 204; *Hamlen v. Bennett*, 52 N. J. Eq. 70.

**The Mere Care and Control of the wife's personal property by the husband will not *per se* operate to defeat the wife's right as against the creditors of the husband, where it does not appear that he held himself out as the owner of the property, or obtained credit as the apparent owner.** *Coon v. Rigden*, 4 Colo. 276; *Dean v. Bailey*, 50 Ill. 481, 99 Am. Dec. 533.

**5. Wife Not Bound by Acts of Husband Done Without Her Authority or Knowledge.** — *Coats v. Gordon*, 144 Ind. 19; *Saratoga County Bank v. Pruyn*, 90 N. Y. 255; *Towles v. Fisher*, 77 N. Car. 437; *Todd v. Pittsburg, etc., R. Co.*, 19 Ohio St. 524; *Gossard v. Lea*, 3 Tex. Civ. App. 3. See also *Mueller v. Kaessmann*, 84 Mo. 318; *Bradley v. Missouri Pac. R. Co.*, 91 Mo. 499; *Campbell v. Babcock*, 27 Wis. 512. Compare *Kanaga v. St. Louis, etc., R. Co.*, 76 Mo. 207; *Casler v. Byers*, 129 Ill. 658.

woman allows her husband so to act in reference to her property as to induce the belief that he acts as her agent, she will be estopped to deny such agency as against persons acting in reliance thereon.<sup>1</sup> The view has been expressed, however, that a married woman is estopped in such case only to the extent that she has capacity to contract.<sup>2</sup>

(g) **Estoppel After Discoverture.** — A married woman, after her discoverture, will be estopped by her acts and declarations like any other person.<sup>3</sup>

j. **TO COMMIT TORTS AND CRIMES.** — The capacity of married women to commit torts<sup>4</sup> and crimes,<sup>5</sup> together with their liability therefor, will be discussed in a subsequent portion of this article.

k. **SPECIAL CIRCUMSTANCES ENABLING FEME COVERT TO ACT SUI JURIS** — (1) *In General.* — In some instances where a *feme covert* is obliged to act as a *feme sole* from necessity, her disabilities are removed at common law.<sup>6</sup> But the burden to show the special circumstances bringing the given case within the exceptions of the common-law rule will be upon the person relying upon the wife's capacity.<sup>7</sup>

(2) *Alienage of Husband.* — If the husband is an alien, and has never been in the realm where the wife resides, she may enter into contracts and sue and be sued as a *feme sole*.<sup>8</sup> But this rule has been held not to apply where the husband once resided with the wife within the realm.<sup>9</sup>

(3) *Banishment or Transportation of Husband.* — A wife whose husband

1. **Effect of Husband's Acts Done with Wife's Acquiescence.** — *Anderson v. Armistead*, 69 Ill. 452; *McNichols v. Kettner*, 22 Ill. App. 493; *Schwartz v. Saunders*, 46 Ill. 24; *Bodine v. Killeen*, 53 N. Y. 93; *Early v. Rolfe*, 95 Pa. St. 58. See also *Chaffe v. Watts*, 37 La. Ann. 324.

2. *Bodine v. Killeen*, 53 N. Y. 93.

3. **Operation of Estoppel Against Widow.** — *Hart v. Giles*, 67 Mo. 175; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939; *Bullock v. Griffin*, 1 Strobb. Eq. (S. Car.) 60. See also the title **ESTOPPEL**, vol. II, p. 385; and see the title **DOWER**, vol. 10, p. 206.

4. See *infra*, this title, *Rights and Liabilities as to Third Persons*.

5. See *infra*, this title, *Criminal Liability*.

6. **Disabilities of Married Woman Removed by Circumstances of Necessity.** — *Canal Bank v. Partee*, 99 U. S. 330; *Norton v. Meader*, 4 Sawy. (U. S.) 620.

7. **Presumption of Existence of Disabilities.** — *Gregory v. Pierce*, 4 Met. (Mass.) 480; *Kendall v. Jennison*, 119 Mass. 251.

8. **Wife's Disabilities Removed by Alienage of Husband.** — *De Gaillon v. L'Aigle*, 1 B. & P. 358; *Kay v. De Pienne*, 3 Campb. 123; *Blumenberg v. Adams*, 49 Cal. 309; *Gregory v. Paul*, 15 Mass. 32; *Gallagher v. Delargy*, 57 Mo. 29; *Levi v. Marsha*, 122 N. Car. 565; *Wigg v. Gibbons*, 5 Ohio St. 580; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174, 15 Am. Dec. 673. See also *Dubois v. Hole*, 2 Vern. 613; *Rhea v. Rhenner*, 1 Pet. (U. S.) 107; *Worthington v. Cooke*, 52 Md. 297; *Abbot v. Bayley*, 6 Pick. (Mass.) 89; *Rose v. Bates*, 12 Mo. 30; *Musick v. Dodson*, 76 Mo. 628, 43 Am. Rep. 780; *M'Arthur v. Bloom*, 2 Duer (N. Y.) 151.

**Conveyance of Land.** — It has been held that where the husband is an alien always residing beyond the realm, the wife may make a valid conveyance of her lands as a *feme sole* and

without her husband joining in the deed. *Gallagher v. Delargy*, 57 Mo. 30. See also *Danner v. Berthold*, 11 Mo. App. 357; *Phelps v. Walther*, 78 Mo. 323, 47 Am. Rep. 112.

**Wife Must Hold Herself Out as Feme Sole.** — In *Barden v. De Keverberg*, 2 M. & W. 61, it was held that the fact that the husband was an alien and had never been in the country would not make a contract of a wife binding on her, unless it was shown that she represented herself as a *feme sole*, or that the person dealing with her believed her to be such.

**Under Statute in Kentucky** it has been held that the wife of a nonresident residing in that state may bring and defend actions as an unmarried woman; and the statute applies to a married woman who came to the state before the statute took effect, as well as to one "who shall come to this commonwealth without her husband, he residing elsewhere," etc. *Maysville, etc., R. Co. v. Herrick*, 13 Bush (Ky.) 122.

**Wife of Alien Enemy.** — The wife of an alien enemy has also been held liable to suits, as the husband was not amenable to the process of the court. *Derry v. Mazarine*, 1 Ld. Raym. 147. See also *M'Arthur v. Bloom*, 2 Duer (N. Y.) 152; *Gregory v. Paul*, 15 Mass. 32.

But in *De Wahl v. Braune*, 1 H. & N. 178, it was held that a *feme covert* cannot sue alone on a contract made with her before or after marriage, though her husband is an alien enemy.

9. **Status of Wife Whose Husband Has Once Resided in Realm.** — *Kay v. De Pienne*, 3 Campb. 123; *Stretton v. Busnach*, 1 Bing. N. Cas. 139, 27 E. C. L. 335. See also *Mason v. Jordan*, 13 R. I. 193; *Ferguson v. Neilson*, 17 R. I. 81, 33 Am. St. Rep. 855. Compare *Walford v. De Pienne*, 2 Esp. 554; *Franks v. De la Pienne*, 2 Esp. 587.



has been banished,<sup>1</sup> or transported for life as a convict,<sup>2</sup> may make a will, contract, and in everything act as a *feme sole*, just as if her husband were dead, he being regarded in such case as civilly dead.

(4) *Abandonment or Separation* — (a) *Without Leaving Realm*. — The mere fact that the husband has deserted the wife without leaving her the means of support, or that they are living apart, whether she is provided with a separate maintenance or not, will not be sufficient to enable the wife to contract,<sup>3</sup> or

1. *Wife's Disabilities Removed by Husband's Banishment*. — Belknap's Case, cited in De Gaillon v. L'Aigle, 1 B. & P. 358; Portland v. Prodgers, 2 Vern. 104; Robinson v. Reynolds, 1 Aik. (Vt.) 174, 15 Am. Dec. 673. See also Worthington v. Cooke, 52 Md. 307.

In De Gaillon v. L'Aigle, 1 B. & P. 358, the court said, in commenting upon the case of Lady Belknap: "The husband there was banished, but it is not stated whether he was banished for one year, or for five years, or for life." But in Coke Litt. 133a, it was considered that the banishment was for life.

In Troughton v. Hill, 2 Hayw. (3 N. Car.) 406, it was held that where the husband is banished for life under the penalty of incurring the crime of high treason if he returns, his wife may transfer her property the same as a *feme sole*.

2. *Husband's Transportation for Life as Affecting Wife's Disabilities*. — In the case of In Goods of Coward, 11 Jur. N. S. 569, it was held that the wife of a husband who had been transported for life as a felon might dispose by will of personal property which she had acquired after his conviction.

*Pardon*. — In the case of In Goods of Martin, 15 Jur. 686, it was held that a married woman had the power of passing by will personal property which she had acquired since the conviction of the husband, where it appeared that he had been convicted as a felon and sentenced to be transported for life, although he had received a pardon from the governor of the colony to which he had been transported, on the condition that he should not return to the United Kingdom during the remainder of his sentence.

In Newsome v. Bowyer, 3 P. Wms. 37, it was held that where a husband was attainted of felony and pardoned on condition of transportation for life, and afterwards the wife became entitled to some personal estate as orphan of a freeman of London, the personal estate should be decreed to belong to the wife as a *feme sole*. See also Atlee v. Hook, 23 L. J. Ch. 776.

*Transportation for a Term of Years*. — In Coombes v. Queen's Proctor, 16 Jur. 820, the wife of a felon who had been transported for a term of years was held to be incapable of disposing by will of her personal property acquired after the conviction of her husband, on the ground that the property belonged to the crown.

But in Carrol v. Blencow, 4 Esp. 27, it was held that a married woman whose husband had been transported for seven years might maintain an action as a *feme sole* on the ground of the husband having abjured the realm, even though the term of his transportation had expired. See also Sparrow v. Carruthers, cited in De Gaillon v. L'Aigle, 1 B. & P. 359, note a.

*Convict — Not Transported*. — In Crocker v. Sowden, 33 U. C. Q. B. 397, it was held that during the husband's imprisonment for felony the wife might contract as to her goods and chattels just as a *feme sole*; and it was intimated that she might execute a deed without her husband joining, during his imprisonment as a felon.

In Ex p. Franks, 7 Bing. 762, 20 E. C. L. 323, it was held that the wife of a convict sentenced to transportation for a limited term is liable to be made a bankrupt if she becomes a trader, although her husband remains in the country.

3. *Wife Not Enabled to Contract by Mere Fact of Separation from Husband*. — Marshall v. Rutton, 8 T. R. 545; Parker v. Lambert, 31 Ala. 89; Brooks's Estate, 8 Pa. Co. Ct. 514; Brown v. Killingsworth, 4 McCord L. (S. Car.) 429; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762. See also Miller v. Glentworth, 103 Pa. St. 84.

*Contract for Necessaries*. — And this rule is applied though the articles contracted for are of the class known as necessaries. Marshall v. Rutton, 8 T. R. 545; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762.

*Contract with Attorney to Institute Divorce Proceedings*. — In Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780, it was held that the abandonment of a married woman by her husband for a period of time sufficient to entitle her to a divorce does not remove her disability to contract with an attorney to procure a divorce unless the husband has gone beyond the limits of the state.

*The Bond of a feme covert* is void although she lives separate from her husband at the time of the execution. Freer v. Walker, 1 Bailey L. (S. Car.) 184.

*The Frequent Protracted Absence of the husband and the practice of his wife of transacting business as a feme sole* will not remove her disability. Rogers v. Phillips, 8 Ark. 366, 47 Am. Dec. 727.

*Absence for Seven Years — Presumption of Death*. — The rule has been laid down in some jurisdictions that an absence of the husband for seven years without being heard of raises the legal presumption of his death, and will have the effect of rendering the wife a *feme sole* for the purposes of contracting, suing, and being sued. Boyce v. Owens, 1 Hill L. (S. Car.) 8. See also Lake v. Ruffle, 6 N. & M. 684, 36 E. C. L. 445.

In King v. Paddock, 18 Johns. (N. Y.) 141, it was held that where a married man sailed in a vessel from New York on a voyage to South America, and neither he nor the vessel had ever been heard of since, this was sufficient evidence of his death on a plea of coverture in an action brought against the wife as a *feme sole* twelve years after the departure of her husband.



to sue and be sued,<sup>1</sup> or otherwise act<sup>2</sup> as a *feme sole*.

But by Statute in many jurisdictions this common-law rule has been abrogated or variously modified.<sup>3</sup>

(b) *Abjuration of Realm*. — It is a well-established principle of the common law that if the husband abandons his wife and abjures the realm she may hence-

1. *Incapacity of Wife to Sue and Be Sued Not Removed by Fact of Separation from Husband*. — *Ellah v. Leigh*, 5 T. R. 679; *Marshall v. Rutton*, 8 T. R. 545; *Gilchrist v. Brown*, 4 T. R. 766; *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Fuller v. Bartlett*, 41 Me. 241; *Tucker v. Scott*, 3 N. J. L. 510; *McDermott v. French*, 15 N. J. Eq. 78; *Morgan v. Andriot*, 2 Hilt. (N. Y.) 431; *Smith v. Smith*, 45 Pa. St. 403; *Brown v. Killingsworth*, 4 McCord L. (S. Car.) 429; *Reddin v. Smith*, 65 Tex. 26; *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762. See also *Lean v. Schutz*, 2 W. Bl. 1195.

The rule was at one time laid down in England that where the husband and wife lived separately by agreement, he allowing her a separate maintenance, she might be considered as a *feme sole* for the purpose of suing and being sued. *Corbett v. Poelnitz*, 1 T. R. 5; *Ringstead v. Lanesborough*, and *Bardwell v. Brooks*, cited in *Marshall v. Rutton*, 8 T. R. 548.

*Contra*. — In *Benadam v. Pratt*, 1 Ohio St. 403, it was held that a wife who, by the gross abuse of her husband, has been driven beyond the pale of his protection and lives and maintains herself as a single woman may, if she has specific property decreed to her as alimony, maintain an action at law in regard to such property without the joinder of her husband, although no divorce has been decreed.

And in *Illinois* the rule has been stated broadly that if the husband without cause deserts the wife, she may acquire property, control it and her person, contract, sue, and be sued, as a *feme sole*. *Love v. Moynahan*, 16 Ill. 278, 63 Am. Dec. 306; *Prescott v. Fisher*, 22 Ill. 390; *Burger v. Belsley*, 45 Ill. 74; *Peru v. French*, 55 Ill. 317; *Mix v. King*, 55 Ill. 438; *Anderson v. Jacobson*, 66 Ill. 522.

In *Texas* it has been held that where the wife has been wrongfully abandoned by her husband and left without means of support, she may sue for community property in her own name. *Leeds v. Reed*, (Tex. Civ. App. 1896) 36 S. W. Rep. 347; *Houston, etc., R. Co. v. Lackey*, 12 Tex. Civ. App. 229.

Under this rule it has been held that the wife, when abandoned by the husband, may sue alone for a tort committed on her person. *Texas, etc., R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *Ezell v. Dodson*, 60 Tex. 331; *St. Louis Southwestern R. Co. v. Griffith*, 12 Tex. Civ. App. 631.

And the rule has been applied whether it was shown that the husband left the state or not. *Texas, etc., R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *Leeds v. Reed*, (Tex. Civ. App. 1896) 36 S. W. Rep. 347; *St. Louis Southwestern R. Co. v. Griffith*, 12 Tex. Civ. App. 631; *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200; *Fullerton v. Doyle*, 18 Tex. 4.

But it has been held that the mere separation of the husband and wife and his refusal to join her in the action are not sufficient to

authorize the wife to prosecute alone a suit to recover damages for an assault and battery committed upon her during coverture. *Ezell v. Dodson*, 60 Tex. 331.

2. *Effect of Husband's Abandonment on Acquisition and Disposition of Personalty*. — In *Bell v. Bell*, 37 Ala. 536, 79 Am. Dec. 73, it was held that the possession of personal property by a married woman during coverture is the possession of the husband, though he has abandoned her, and though the property was acquired subsequent to the abandonment. See also *Com. v. Cullins*, 1 Mass. 116.

But in *Starrett v. Wynn*, 17 S. & R. (Pa.) 130, 17 Am. Dec. 654, it was held that if a husband deserts his wife and ceases to perform his marital duties, the acquisitions of personal property made by the wife during such desertion are her separate estate, and she may dispose of them by will or otherwise as if a *feme sole*.

*Will of Choses in Action by Deserted Wife Invalid*. — *Vreeland v. Ryno*, 26 N. J. Eq. 160. See also *Thrasher v. Ingram*, 32 Ala. 645.

*Election under Will*. — It has been held that the mere fact that the husband and wife are living apart will not invest the wife with the power of a *feme sole* for the purpose of making an election under a will. *High v. Worley*, 33 Ala. 196.

3. In *England*, under 3 & 4 Wm. IV., c. 74, §§ 77, 91, it has been held that a *feme covert*, when her husband has absconded and has not been heard of for some time, may pass a contingent life interest in freehold property. *Ex p. Gill*, 1 Bing. N. Cas. 168, 27 E. C. L. 344.

Under 20 and 21 Vict., c. 85, § 21, providing that if an order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects in regard to property and contracts, and suing and being sued, as if she had obtained a judicial separation, it has been held that a married woman from the moment of her desertion by her husband is to be treated as a *feme sole*, and may by will dispose of property acquired by her during such desertion. In *Goods of Elliott*, L. R. 2 P. & D. 274.

But it has been held that the husband is entitled to show that by reason of his absence, and of fraud, the protection order ought not to have been obtained. *Mudge v. Adams*, 6 P. D. 24.

By the *Alabama Civil Code* [1896], § 2526, it is provided that the wife has full capacity to contract as if she were sole, except as otherwise provided by law. See for cases under earlier statutes, *Young v. Pollak*, 85 Ala. 439; *Ex p. Cole*, 28 Ala. 50.

Under the *California Code Civ. Pro.*, § 370, a married woman may sue alone for personal injury to herself where she is "living separate

forth act as a *feme sole*.<sup>1</sup> In the *United States* it has been held that if the husband ceases to provide for his wife and family, wholly renounces his marital relation, and goes to another state or jurisdiction with the intention of permanently residing there, this is equivalent to an abjuration of the realm, and will enable the wife to contract and to sue and be sued as a *feme sole*, the residence of the husband in another state being regarded as equivalent to a residence in a foreign country.<sup>2</sup> And indeed in many jurisdictions the doctrine seems to have been applied where the husband has deserted his wife and accepted an abode in another state or jurisdiction, apart from any question of *animus revertendi*,<sup>3</sup> it being required in most of these jurisdictions, however, that there should be an absolute renunciation of the marital relation, coupled with a continued absence from the state.<sup>4</sup> But the rule to be deduced from

and apart from her husband by reason of his desertion of her." *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390.

Under Statute in Connecticut, it has been held that a married woman, abandoned by her husband, may transact business, and may sue and be sued, as a *feme sole*, and for this purpose it is sufficient if she has been in fact abandoned, and it is of no consequence that the abandonment has been caused by her misconduct. *Moore v. Stevenson*, 27 Conn. 14.

By the Kentucky Statutes (1894), § 2128, it is now provided that a married woman "may make contracts, and sue and be sued, as a single woman," etc. For earlier cases see *Hannon v. Madden*, 10 Bush (Ky.) 664; *McDanell v. Landrum*, 87 Ky. 404, 12 Am. St. Rep. 500.

Under a Statute in Louisiana providing that if the husband be "absent" the judge may, on being satisfied of that fact, authorize the wife to make contracts, absence from the state, and not from the parish, is referred to. *Wilkinson v. Stanbrough*, 1 La. Ann. 264.

Under Statute in Michigan it has been held that where a wife has been deserted by her husband she may make binding contracts for necessities, whether articles of merchandise or professional services, as though she were a *feme sole*. *Carstens v. Hanselman*, 61 Mich. 426, 1 Am. St. Rep. 606.

Under Statute in North Carolina it has been held that a married woman who had been abandoned by her husband can maintain an action in her own name for a tort, *Brown v. Brown*, 121 N. Car. 8; and that an action for possession of land, *Findley v. Saunders*, 98 N. Car. 462, or an action for personal property unlawfully withheld, *Heath v. Morgan*, 117 N. Car. 508, could be maintained against her.

Under Statute in Pennsylvania it has been held that a wife may sustain an action for defamation without the joinder of her husband, where it appears that he has deserted her and is unwilling to protect her reputation. *Rangler v. Hummel*, 37 Pa. St. 130. Compare *Smith v. Smith*, 45 Pa. St. 403.

In Tennessee it has been held that where the husband is dissipated, lives apart from the wife, and contributes nothing to her support, and the wife is engaged in business on her own account, this is such an abandonment, within the spirit of the statute, as will enable the wife to contract and to sue and be sued in her own name. *Yeatman v. Bellmain*, 6 Lea (Tenn.) 488. To the same effect see *Cocke v. Garrett*, 7 Baxt. (Tenn.) 360.

Under Statute in West Virginia it has been held that the legal disability of a married woman living separate and apart from her husband to enter into any contract is removed. *Peck v. Marling*, 22 W. Va. 708.

1. Removal of Wife's Disabilities by Husband's Abjuration of the Realm. — *Weyland's Case*, cited in 1 Coke Litt. 133a; *Carrol v. Blencow*, 4 Esp. 27; *Canal Bank v. Partee*, 99 U. S. 330; *Norton v. Meader*, 4 Sawy. (U. S.) 603; *Worthington v. Cooke*, 52 Md. 307; *Gallagher v. Delargy*, 57 Mo. 29; *Wagg v. Gibbons*, 5 Ohio St. 582; *Brown v. Killingsworth*, 4 McCord L. (S. Car.) 429; *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258. See also *Cornwall v. Hoyt*, 7 Conn. 427; *Cusack v. White*, 2 Mill (S. Car.) 279, 12 Am. Dec. 669; *Hall v. Faust*, 9 Rich. Eq. (S. Car.) 294.

2. Effect of Husband's Accepting Permanent Abode in Another State. — *Arthur v. Broadnax*, 3 Ala. 557, 37 Am. Dec. 707; *Mead v. Hughes*, 15 Ala. 146, 50 Am. Dec. 123; *Wolf v. Bauereis*, 72 Md. 486. See also *Krebs v. O'Grady*, 23 Ala. 731, 58 Am. Dec. 312; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174, 15 Am. Dec. 673.

Wife May under Such Circumstances Become Sole Trader. — *Arthur v. Broadnax*, 3 Ala. 557, 37 Am. Dec. 707; *James v. Stewart*, 9 Ala. 855; *Mead v. Hughes*, 15 Ala. 141, 50 Am. Dec. 123; *Roland v. Logan*, 18 Ala. 309; *Young v. Pollak*, 85 Ala. 439.

Conveyance of Real Estate Held Valid at Common Law. — *Buford v. Adair*, 43 W. Va. 211.

Contra in Some Jurisdictions under Statutes providing that a married woman cannot dispose of her real property without the consent of her husband and cannot execute a good and valid deed to pass real estate unless he shall join in the deed. *Rhea v. Rhenner*, 1 Pet. (U. S.) 105; *Harrison v. Brown*, 16 Cal. 288; *Beckman v. Stanley*, 8 Nev. 257. See also *Concord Bank v. Bellis*, 10 Cush. (Mass.) 276. Compare *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200.

May Maintain Suit for Personal Injury. — *Wolf v. Bauereis*, 72 Md. 486.

3. *Clark v. Valentino*, 41 Ga. 143; *Phelps v. Walther*, 78 Mo. 323, 47 Am. Rep. 112; *Palmer v. McMasters*, 6 Mont. 169. Compare *Chouteau v. Merry*, 3 Mo. 254; *Bracket v. Drew*, 20 N. H. 441.

4. Effect of Husband's Renunciation of Marital Relation Coupled with Continued Absence from State. — *Schwartz v. Reesch*, 2 App. Cas. (D. C.) 440; *Love v. Moynihan*, 16 Ill. 277, 63 Am. Dec. 306; *Prescott v. Fisher*, 22 Ill. 390; *Mix v. King*, 55 Ill. 434; *Smith v. Silence*, 4 Iowa



the decisions in *England* seems to be that the wife of an Englishman who departs the realm is capable of acting as a *feme sole* in those cases only where he is civilly dead and in a situation that precludes return, as where he is banished, transported, or has abjured the realm, and that his mere absence from the realm and desertion of his wife, no matter how long continued, will not render her a *feme sole*; <sup>1</sup> and this rule has been adopted to some extent in the *United States*.<sup>2</sup>

(5) *Insanity of Husband*. — It has been held that the facts that the husband is insane and is living separate from the wife at an almshouse, will not confer upon the wife any power to bind herself by contract.<sup>3</sup> On the other hand, it has been held that a wife whose husband is insane and is confined in an asylum outside the state in which she resides is thereby empowered to sue in her own name for a personal tort as though her husband were *exiliter mortuus*.<sup>4</sup>

(6) *Divorce*. — A woman may act as a *feme sole* where she has been divorced *a vinculo matrimonii*.<sup>5</sup> But it has been held that a divorce *a mensa et thoro* does not so far destroy the relation of husband and wife as to make the latter a *feme sole* so that she may contract, and sue and be sued,<sup>6</sup> though in *Massachusetts* a different rule has been laid down.<sup>7</sup>

III. RIGHTS, DUTIES, AND LIABILITIES INTER SE — 1. Personal Rights — *a*. OF HUSBAND — (1) *To Act as Head of Family*. — At common law, the husband is the head of the family, and as such the wife must love, honor, and obey him.<sup>8</sup> This doctrine has not been altered by statutes conferring increased property rights on married women, and hence the fact that the

324, 66 Am. Dec. 137; *Ayer v. Warren*, 47 Me. 231; *Gregory v. Pierce*, 4 Met. (Mass.) 478; *Chapman v. Lemon*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 235; *Osborn v. Nelson*, 59 Barb. (N. Y.) 375. See also *Kendall v. Jennison*, 119 Mass. 251; *King v. Paddock*, 18 Johns. (N. Y.) 141.

Clear Proof of Absolute Abandonment Necessary. — *Ayer v. Warren*, 47 Me. 231; *Gregory v. Pierce*, 4 Met. (Mass.) 478. See also *Com. v. Cullins*, 1 Mass. 116.

The Burden of Proof is on the person relying upon the fact to show that the husband, when he left the state, intentionally and actually renounced his marital rights and duties, and so far deserted and abandoned his wife that she was thereafter entitled to make contracts as a *feme sole*. *Gregory v. Pierce*, 4 Met. (Mass.) 480; *Kendall v. Jennison*, 119 Mass. 251.

1. Effect in England of Husband's Absence Not Amounting to Abjuration of Realm. — *Bogget v. Frier*, 11 East 301; *Marsh v. Hutchinson*, 2 B. & P. 226; *Williamson v. Dawes*, 9 Bing. 295, 23 E. C. L. 282. See also *Farrar v. Granard*, 1 B. & P. N. R. 80; *Kay v. De Pienne*, 3 Campb. 123. Compare *Cecil v. Juxon*, 1 Atk. 278.

2. In South Carolina the rule was at one time laid down that if the husband departs the state for the purpose of residing abroad without the intention of returning, such action renders the wife competent to contract and to sue and be sued as if she were a *feme sole*. *Bean v. Morgan*, 4 McCord L. (S. Car.) 148.

But in the later case of *Boyce v. Owens*, 1 Hill L. (S. Car.) 8, a contrary view was maintained.

In neither of these cases, however, was it positively shown that the husband left the country with the intention of not returning.

See also *Robinson v. Reynolds*, 1 Aik. (Vt.) 174, 15 Am. Dec. 673.

3. Wife's Disability to Contract Held Not to Be Removed by Husband's Insanity. — *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655.

4. Wife Empowered to Sue by Husband's Confinement in Insane Asylum Outside of State. — *Gustin v. Carpenter*, 51 Vt. 585.

Under statute in *Missouri* it has been held that the insanity and confinement of a husband in an asylum, and his failure for years, on this account, to support his wife, give her a right to bring an action in her own name for her earnings and those of her minor children. *Harris v. Bohle*, 19 Mo. App. 529.

In New Brunswick it has been held under statute that a married woman whose husband is insane and is confined in a lunatic asylum, and who is compelled to support herself by keeping a boarding house, may sue and recover in her own name the amount due from a boarder lodging in the house after her husband's insanity. *Abell v. Light*, 12 N. Bruns. 97.

5. Divorce a Vinculo as Removing Wife's Disabilities. — *Hatchett v. Baddeley*, 2 W. Bl. 1082; *Capel v. Powell*, 17 C. B. N. S. 743, 112 E. C. L. 743; *Chase v. Chase*, 6 Gray (Mass.) 159. See also *Piper v. May*, 51 Ind. 283.

6. Disabilities Not Removed by Divorce a Mensa. — *Lewis v. Lee*, 3 B. & C. 291, 10 E. C. L. 84; *Faithorne v. Blaquire*, 6 M. & S. 73; *Clark v. Clark*, 6 W. & S. (Pa.) 87; *Harley v. Leonard*, 4 Pa. Super. Ct. 435.

7. *Pierce v. Burnham*, 4 Met. (Mass.) 303; *Dean v. Richmond*, 5 Pick. (Mass.) 461. See also *Barber v. Barber*, 21 How. (U. S.) 582.

8. Husband Head of Family. — *Com. v. Wood*, 97 Mass. 229.



family lives in a house owned by the wife does not affect the husband's right in this respect.<sup>1</sup> Nor do statutes giving to a married woman the right to carry on any trade or business on her sole and separate account deprive the husband of his common-law right to regulate and control his household.<sup>2</sup>

**Absence or Insanity of Husband.** — But to this general common-law doctrine there are exceptions, and where the husband is insane,<sup>3</sup> or absent from home for a considerable time,<sup>4</sup> the wife is to be regarded, to some extent at least, as the head of the family and entitled to the control thereof.

(2) *To Confer Family Name.* — In accordance with this doctrine vesting in the husband the headship of the family, it is a general rule, fixed by custom at least, that marriage confers upon the wife the surname of the husband.<sup>5</sup>

(3) *To Fix Matrimonial Domicil or Residence.* — The husband as the head of the family has the right also to fix the matrimonial residence or domicil without the consent of the wife, and the wife is bound to follow her husband when he changes his residence, provided the change is made by him in the *bona fide* exercise of his power.<sup>6</sup> And it has been held that this rule is not altered by an antenuptial agreement to the contrary.<sup>7</sup> But the husband cannot change his residence through whim or caprice,<sup>8</sup> or as a mere punishment of the wife,<sup>9</sup> or take her to a place where he does not intend to reside with her himself,<sup>10</sup> or where her health or comfort will be endangered.<sup>11</sup>

(4) *Cohabitation.* — The husband is entitled to the society of the wife, and she is not justified in leaving him or in refusing him matrimonial intercourse without a valid cause.<sup>12</sup> In *England*, it seems, the husband has a remedy against the wife, where he is denied the right of cohabitation, by a suit for the restitution of conjugal rights, but by statute a decree can no longer be enforced by attachment.<sup>13</sup> In the *United States* no such remedy exists,<sup>14</sup> but

**1. Husband's Right as Head of Family Not Altered by Separate Property Acts.** — *Com. v. Wood*, 97 Mass. 229; *Com. v. Carroll*, 124 Mass. 30; *Com. v. Hill*, 145 Mass. 305. See also *Rogers v. Boyd*, 33 Ala. 175; *Elijah v. Taylor*, 37 Ill. 247.

**2. Com. v. Barry**, 115 Mass. 146; *Com. v. Carroll*, 124 Mass. 30. See also *Glover v. Alcott*, 11 Mich. 485.

**3. Wife of Insane Husband as Head of Family.** — *Sawyer v. Cutting*, 23 Vt. 486; *Robinson v. Frost*, 54 Vt. 105, 41 Am. Rep. 835.

Thus it has been held that, as between the wife and the husband's father, the wife is entitled to the custody and control of her insane husband, it appearing that no statutory guardian has been appointed. *Robinson v. Frost*, 54 Vt. 105, 41 Am. Rep. 835.

**4. Wife as Head of Family in Husband's Absence.** — *Ann Berta Lodge No. 42 v. Leverton*, 42 Tex. 18; *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532.

**5. Husband's Right to Confer Family Name.** — *Fendall v. Goldsmid*, 2 P. D. 263.

**6. Husband's Right to Fix Matrimonial Domicil.** — *Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Babbitt v. Babbitt*, 69 Ill. 277; *Boyce v. Boyce*, 23 N. J. Eq. 346; *Cutler v. Cutler*, 2 Brewst. (Pa.) 511; *Angier v. Angier*, 7 Phila. (Pa.) 305.

**For a Full Discussion of the Question as to What Determines the Domicil of the Wife**, see the title *DOMICIL*, vol. 10, p. 32.

**As to When the Refusal of the Wife to Remove Will Amount to Desertion** so as to give a cause for divorce, see the title *DIVORCE*, vol. 9, p. 767.

**As to What Will Amount to the Husband's Desertion** so as to give cause for divorce, see the title *DIVORCE*, vol. 9, p. 764 *et seq.*

**As to the Presumption that a Married Man's Domicil Is with His Wife and Family**, see the title *DOMICIL*, vol. 10, p. 23.

**7. Husband's Right to Fix Domicil Not Altered by Antenuptial Agreement.** — *Hair v. Hair*, 10 Rich. Eq. (S. Car.) 163.

**8. Cutler v. Cutler**, 2 Brewst. (Pa.) 511.

**9. Boyce v. Boyce**, 23 N. J. Eq. 346.

**10. Boyce v. Boyce**, 23 N. J. Eq. 346.

**11. Powell v. Powell**, 29 Vt. 148; *Gleason v. Gleason*, 4 Wis. 64.

**12. Husband's Right of Cohabitation.** — *Barnes v. Allen*, 30 Barb. (N. Y.) 668.

**A Postnuptial Contract in which the husband agrees to pay money to the wife in consideration of her living with him is void as being without consideration.** *Copeland v. Boaz*, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89; *Roberts v. Frisby*, 38 Tex. 219; *Ximines v. Smith*, 39 Tex. 50. See also *Merrill v. Peaslee*, 146 Mass. 460, 4 Am. St. Rep. 334.

See generally the title *ILLEGAL CONTRACTS*, *post*.

**13. Suit for Restitution of Conjugal Rights.** — *Reg. v. Jackson*, (1891) 1 Q. B. 685.

But a suit for the restitution of conjugal rights cannot be maintained on the ground of a total and absolute refusal of matrimonial intercourse; a cessation of cohabitation must be shown to warrant a decree. *Orme v. Orme*, 2 Add. Ecc. 382. See also *Southwick v. Southwick*, 97 Mass. 329.

**14. Suit for Restitution of Conjugal Rights Not Available in United States.** — See *Baugh*.

in a proper case the husband may apply for a divorce.<sup>1</sup>

(5) *Control and Custody of Wife*. — At common law the husband has, as a general rule, the right to the custody of his wife, whose actions he may control and restrain.<sup>2</sup> Accordingly the doctrine has been laid down that where the wife makes an undue use of her liberty, either by squandering away her husband's estate or by going into lewd company, it is lawful for the husband, in order to preserve his estate or his honor, to lay the wife under a restraint.<sup>3</sup> At one time, moreover, it was held that in order to prevent the wife from leaving him, the husband had the right to confine and restrain her for an indefinite time if he used no cruelty and imposed no hardship or unnecessary restraint, though there was no reason from her past conduct to apprehend that she would avail herself of her absence from his control to injure either his honor or his property.<sup>4</sup> But in a recent English case this doctrine was criticised, and it was held that the husband has no such control and dominion over the wife as to justify him in keeping her in confinement merely because she refuses to live with him.<sup>5</sup>

(6) *Chastisement of Wife*. — For this branch of the subject reference is made in the note below to another title in this work where the law is presented, and the cases are collected.<sup>6</sup>

(7) *Services of Wife*. — The wife's obligation, apart from statute, to render family services is co-extensive with the husband's obligation to support her.<sup>7</sup> Hence in a case where the wife had been appointed custodian of her insane husband, it was held that she could not recover compensation for her services in that capacity from his estate, notwithstanding a contract to that effect with the husband's guardian.<sup>8</sup>

(8) *Support*. — A married woman is not, it seems, apart from statute, bound to support her husband except to the extent that she owes him her services, though she has a separate estate and he is insolvent.<sup>9</sup> But provision is made by statute in some jurisdictions, for the maintenance, out of the wife's estate, of a husband unable to support himself.<sup>10</sup>

(9) *Burial*. — The general tendency of the courts is to hold that in the absence of any testamentary disposition, the duty as well as the right of the surviving wife to control and care for the dead body of the husband and to select a proper place of interment is paramount to that of the next of kin,<sup>11</sup> but

*v. Baugh*, 37 Mich. 62; *Cruger v. Douglas*, 4 Edw. (N. Y.) 433; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

1. See the title *DIVORCE*, vol. 9, p. 723.

2. *Husband's Right to Custody and Control of Wife*. — Bac. Abr., tit. Baron and Feme, B. See also *In re Cochrane*, 8 Dowl. P. C. 630.

3. *Rex v. Lister*, 1 Stra. 478; *State v. Craton*, 6 Ired. L. (28 N. Car.) 164.

4. *In re Cochrane*, 8 Dowl. P. C. 630. It should be stated, however, that it appeared in this case that before the restraint was exercised over the wife by the husband she had left him and had resided at Paris, living with her mother at a common boarding house there, and had been permitted by her mother to go to masked balls and other places of that description in the company of persons unknown to the husband, though there was nothing to show that she had suffered any loss of character whatever.

5. *Reg. v. Jackson*, (1891) 1 Q. B. 671. See also *State v. Weathers*, 98 N. Car. 687.

*Habeas Corpus*. — See the title *HABEAS CORPUS*, ante, p. 125, for the following matters: the wife's right to release from the custody of her husband by habeas corpus, the right of the husband to obtain custody of the wife by

habeas corpus; the right of the wife to obtain release of the husband by habeas corpus.

6. See the title *ASSAULT AND BATTERY*, vol. 2, pp. 963, 964.

7. *Husband's Right to Wife's Services in Family*. — *Randall v. Randall*, 37 Mich. 563.

As to the husband's right to the wife's earnings, see *infra*, this section, *Property Rights*.

8. *Grant v. Green*, 41 Iowa 88.

9. *Wife Not Bound to Support Insolvent Husband at Common Law*. — *Wyllie v. Collins*, 6 Ga. 223.

As to the liability of the wife's separate estate for necessities and family expenses, see the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

10. Civ. Code Cal. (1897), § 176; *Hickle v. Hickle*, 6 Ohio Cir. Ct. 490, 3 Ohio Cir. Dec. 552. See also the statutes of the various states.

11. *Duty of Wife to Bury Husband*. — *Latson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370.

A full discussion of the right of the wife to the custody of the dead body of the husband, and of her corresponding duty to make interment, will be found in the title *DEAD BODY*, vol. 8, p. 834.



this right, it seems, terminates with the burial, and thereafter the disposition or control of the remains belongs exclusively to the next of kin.<sup>1</sup>

*b. OF WIFE* — (1) *Cohabitation*. — The common law recognizes the right of the wife as well as of the husband to cohabitation, and in *England* this right is enforceable against the husband in a suit for the restitution of conjugal rights.<sup>2</sup> But this suit cannot be maintained on the ground of a total or absolute denial of matrimonial intercourse; a cessation of cohabitation must be shown to warrant a decree.<sup>3</sup> In the *United States*, as a general rule, at least, no such suit is maintainable, but the wife is left to her remedy by divorce.<sup>4</sup>

(2) *Maintenance* — (a) *In General*. — The marriage contract imposes upon the husband the duty of supporting his wife in a way suitable to her situation and his condition in life, and a failure to perform this duty is a wrong acknowledged at common law, though there was there no personal remedy, because there the wife could not sue the husband.<sup>5</sup> No court, not even the Ecclesiastical Court, had any original jurisdiction to give to the wife a separate maintenance, but it was always as incidental to some other matter, such as a proceeding for a divorce or legal separation, or an application in equity upon *supplicavit* for security of the peace against the husband, that she became entitled to a separate provision.<sup>6</sup> In many jurisdictions independently of statute, courts of equity may, in the exercise of an inherent and original power, entertain a bill for separate maintenance apart from any proceeding for divorce or separation.<sup>7</sup> But the apparent weight of authority is opposed to this rule.<sup>8</sup>

By Statute, however, in *England* and in many jurisdictions in the *United States*, the wife may appeal to the courts for support from the husband without asking for a divorce.<sup>9</sup>

(b) *Nonsupport of Wife as Criminal Offense*. — At common law it is not a criminal offense to leave a wife without the means of support.<sup>10</sup> But statutes exist in *England* and in many jurisdictions in the *United States* making the neglect or refusal by the husband to support the wife a criminal offense under certain

1. *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506.

2. *Suit by Wife for Restitution of Conjugal Rights*. — *Firebrace v. Firebrace*, 4 P. D. 63; *Yelverton v. Yelverton*, 1 Sw. & Tr. 586; *Orme v. Orme*, 2 Add. Ecc. 382.

The Matrimonial Causes Act of 1884, however, deprived the courts of the power to enforce a decree for the restitution of conjugal rights by attachment and substituted for that power two things: it gave power in the case of both husband and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. *Reg. v. Jackson*, (1891) 1 Q. B. 685.

3. *Orme v. Orme*, 2 Add. Ecc. 382. See also *Southwick v. Southwick*, 97 Mass. 329.

4. *Suit for Restitution of Conjugal Rights Not Recognized in United States*. — *Baugh v. Baugh*, 37 Mich. 62; *Cruger v. Douglas*, 4 Edw. (N. Y.) 433, *affirmed* 5 Barb. (N. Y.) 225; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

Under the Civil Code of Louisiana it has been held that if the husband decides to change the matrimonial domicile from one place to another for reasons of his own, the wife must follow him to his new abode, and her refusal without lawful cause will be construed as an abandonment within the meaning of the law and will justify his demand for a judgment ordering

her to comply with his request. *Gahn v. Darby*, 36 La. Ann. 70.

*Divorce*. — For a discussion of the wife's remedy by suit for divorce, see the title *DIVORCE*, vol. 9, p. 723.

5. *Husband's Maintenance of Wife an Unenforceable Duty at Common Law*. — *Butler v. Butler*, 4 Litt. (Ky.) 205; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120.

In *Hallett v. Hallett*, 8 Ind. App. 305, it was held that the wife of an insane husband had no right of action against her husband or his guardian for support out of his estate.

As to the husband's liability for his wife's necessities, see *infra*, this title, *Rights and Liabilities as to Third Persons*.

6. *Ball v. Montgomery*, 2 Ves. Jr. 191; *Ross v. Ross*, 69 Ill. 569.

For a discussion of the wife's right to alimony, see the title *ALIMONY*, vol. 2, p. 91.

7. See the title *ALIMONY*, vol. 2, p. 94.

8. *Furth v. Furth*, (N. J. 1898) 39 Atl. Rep. 128; *Pierce v. Pierce*, 9 Hun (N. Y.) 50, *affirmed* 71 N. Y. 154, 27 Am. Rep. 22. See the title *ALIMONY*, vol. 2, p. 94.

9. *Pape v. Pape*, 20 Q. B. D. 76; *Reg. v. Leresche*, (1891) 2 Q. B. 418; *Ross v. Ross*, 69 Ill. 569; *Carr v. Carr*, 6 Ind. App. 377; *Doole v. Doole*, 144 Mass. 278. See also the title *ALIMONY*, vol. 2, p. 95.

10. *Failure to Support Wife Not an Offense at Common Law*. — *Ex p. Jackson*, 45 Ark. 158.



circumstances.<sup>1</sup> It has been held to be a sufficient defense to a prosecution for this offense that there has been a divorce from bed and board,<sup>2</sup> or a separation by mutual consent,<sup>3</sup> or that the wife has been guilty of adultery,<sup>4</sup> or has treated the husband with such cruelty as would justify a divorce,<sup>5</sup> or that

1. **Nonsupport of Wife a Statutory Crime.** — 5 Geo. IV., c. 83, §§ 3, 4; *Rex v. Flintan*, 1 B. & Ad. 227, 20 E. C. L. 380; *Reeve v. Wood*, 5 B. & S. 364, 117 E. C. L. 364; *Flannagan v. Overseers of Poor*, 8 El. & Bl. 451, 92 E. C. L. 451; *Reeve v. Yeates*, 8 Jur. N. S. 751; *Reg. v. Holmes*, 29 Ont. 362; *Poole v. People*, 24 Colo. 510; *State v. Ransell*, 41 Conn. 433; *State v. Schweitzer*, 57 Conn. 532; *State v. McCullough*, (Del. 1898) 40 Atl. Rep. 237; *Com. v. Simmons*, 165 Mass. 356; *McLorinan v. Ryno*, 49 N. J. L. 603; *Cohen v. Watson*, 58 N. J. L. 499; *Beard v. State*, 11 Ohio Cir. Ct. 65, 5 Ohio Cir. Dec. 87.

In *Alabama* it is made a criminal offense by statute for a husband to abandon his family and leave them in danger of becoming a burden to the public. *Carney v. State*, 84 Ala. 7.

It has been held that this statute must be construed to mean that the danger of becoming a burden to the public need not be immediate or imminent, but that the family would probably become a burden by reason of a contingency likely to happen within a reasonable time and in the ordinary course of events. *Carney v. State*, 84 Ala. 7.

Under statute in *Missouri* in order to constitute the offense of wife abandonment two things must concur — a desertion or abandonment and nonsupport. *State v. Fuchs*, 17 Mo. App. 458; *State v. Larger*, 45 Mo. 510; *State v. Weber*, 48 Mo. App. 500; *State v. Satchwell*, 68 Mo. App. 39; *State v. Linck*, 68 Mo. App. 162.

In establishing the abandonment or desertion it is incumbent upon the state to give evidence of the absence of good cause for the abandonment, although in so doing it is necessary to prove a negative. *State v. Greenup*, 30 Mo. App. 209; *State v. Brinkman*, 40 Mo. App. 284; *State v. Satchwell*, 68 Mo. App. 39; *State v. Linck*, 68 Mo. App. 162.

Under statute in *New York* husbands are punishable as disorderly persons where they actually abandon their wives or children without adequate support, or leave them in danger of becoming a burden upon the public, or neglect to provide for them according to their means, or threaten to run away and leave their wives or children a burden upon the public. *People v. Hodgson*, (N. Y. 1891) 27 N. E. Rep. 378; *Bulkley v. Boyce*, 48 Hun (N. Y.) 259; *People v. Hinsdale*, 29 N. Y. App. Div. 364; *Duffy v. People*, 6 Hill (N. Y.) 75.

A similar statute exists in *New Jersey*. See *O'Shaughnessy v. McLorinan*, 43 N. J. L. 410. And see also **DISORDERLY PERSONS**, vol. 9, p. 585.

**Desertion Occurring in Another State.** — Under statute in *Delaware* it has been held not to be necessary that the desertion should have occurred in that state in order to warrant a prosecution against the husband, but it is sufficient if the husband is in the state. *State v. McCullough*, (Del. 1898) 40 Atl. Rep. 237. See also *Com. v. Bailey*, 1 Leg. Gaz. Rep.

(Pa.) 87. Compare *State v. Weber*, 48 Mo. App. 503; *People v. Vitan*, (Ct. Gen. Sess.) 8 N. Y. Crim. 25; *Bayne v. People*, 14 Hun (N. Y.) 181.

2. **Divorce a Mensa as Defense.** — Under statute in *New York* a husband is not guilty of desertion or abandonment of his wife, within the meaning of the statute, after a decree of separation from bed and board has been pronounced at the suit of the wife, though no allowance of alimony has been made. *People v. Cullen*, 153 N. Y. 635.

But it has been held that the fact that a divorce suit brought by the husband against the wife is still pending, and that a gross sum of fifty dollars as alimony *pendente lite* has been awarded, will be no defense to the prosecution for nonsupport. *People v. Mitchell*, 2 Thomp. & C. (N. Y.) 172. To the same effect see *State v. Gunzler*, 52 Mo. 172.

And under statute in *Massachusetts* it has been held that the facts that the husband has filed a libel for divorce against the wife, which has been dismissed, and that a motion for alimony *pendente lite* has been denied, will be immaterial. *Com. v. Simmons*, 165 Mass. 356.

3. **Separation by Consent as Defense.** — *State v. Weber*, 48 Mo. App. 500; *Com. v. Richards*, 131 Pa. St. 209.

But in *People v. Meyer*, (N. Y. Gen. Sess.) 12 Misc. (N. Y.) 613, it was held that an agreement for voluntary separation and support which the husband fails to carry out is no defense to a proceeding against him for abandonment and nonsupport.

4. **Wife's Adultery as Defense.** — *Rex v. Flintan*, 1 B. & Ad. 227, 20 E. C. L. 380; *Carney v. State*, 84 Ala. 7; *Hall v. State*, 100 Ala. 86; *State v. Schweitzer*, 57 Conn. 532; *People v. Bliskey*, (County Ct.) 21 Misc. (N. Y.) 433; *People v. Brady*, (Albany Ct. Sess.) 13 Misc. (N. Y.) 294. See also *Culley v. Charman*, 7 Q. B. D. 89.

**Mere Suspicion.** — But an abandonment is not excused by mere suspicion of the wife's infidelity, and the burden is upon the husband to show adultery. *Carney v. State*, 84 Ala. 7; *State v. Schweitzer*, 57 Conn. 532.

**Misconduct After Abandonment.** — Nor, it has been held, can misconduct of which the wife was guilty after the abandonment be set up unless it is connected in some way with, and tends to illustrate and explain, similar acts committed by her before the abandonment. *Hall v. State*, 100 Ala. 86.

**Contra — Adultery of Wife No Defense.** — In *State v. Tierney*, (Del. 1897) 39 Atl. Rep. 774, it was held that the husband is not relieved from liability to prosecution for nonsupport of his wife by reason of her adultery, but his remedy is to apply for a divorce.

5. **Wife's Cruelty as Defense.** — In *Com. v. Porter*, 4 Pa. Dist. 503, it was held that in a prosecution against a husband for deserting and failing to support his wife, in order to make a defense of cruelty and barbarous treat-

he has in good faith proffered support which has been rejected by the wife.<sup>1</sup> In the same way his inability to maintain the wife has been held to relieve him from liability.<sup>2</sup> But it has been held that the fact that the wife has means of her own will be no defense.<sup>3</sup>

(3) *Protection*. — The law imposes on the husband the obligation of protecting the wife from insult or injury as well as of supporting her.<sup>4</sup> And this obligation extends to the protection of the wife from his own acts as well as from the acts of a third person.<sup>5</sup>

**Exhibition of Articles of Peace Against Husband.** — Hence the wife may exhibit articles of peace against the husband on account of his cruelty.<sup>6</sup>

**Writ of Supplicavit.** — And in *England* she may have against the husband a writ of *supplicavit* addressed to the Chancery Court for the purpose of requiring him to give security to keep the peace, upon a showing that she is in need of such protection.<sup>7</sup> But this writ is practically unknown in the *United States*.<sup>8</sup> Under this writ, the court has power only to bind the husband to his behavior and not to remove the wife from him,<sup>9</sup> and its purpose is to protect the wife from violence and abuse. It cannot be used for the direct purpose of obtaining a permanent separate maintenance, though the husband has been guilty of cruel and abusive treatment of her such as would justify a libel for divorce from bed and board.<sup>10</sup>

(4) *Burial*. — It is the duty, as well as the right, of the husband to dispose

ment available, he must show such cruelty and barbarous treatment as would render his condition intolerable and his life burdensome.

**Personal Dislike** has been held to be no excuse for a refusal to support and live with the wife. *Boulo v. State*, 49 Ala. 24.

**1. Husband's Offer in Good Faith to Support as Defense.** — *Lutes v. Shelley*, 40 Hun (N. Y.) 197; *People v. Pettit*, 74 N. Y. 320.

But the rule is otherwise if the offer is not made in good faith. *People v. Du Bois*, (Ct. Sess.) 26 N. Y. Supp. 895; *People v. Frederick*, 78 Hun (N. Y.) 36.

And it is a question for the trial magistrate to determine whether the offer was made in good faith. *People v. Harris*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 830; *People v. Frederick*, 78 Hun (N. Y.) 36.

**2. Husband's Inability as Defense.** — See *Boulo v. State*, 49 Ala. 24. And in *State v. Linck*, 68 Mo. App. 161, it was held to be error to exclude evidence of the amount of the husband's income and his ability to support his wife and family.

**Under Statute in Wisconsin** it has been held to be a misdemeanor for a husband to abandon his wife, leaving her in a destitute condition, or, being of sufficient ability, to refuse or neglect to provide for her support, and the words "being of sufficient ability," as used in the statute, refer as well to capacity or skill to earn or acquire property as to property actually owned. *State v. Witham* 70 Wis. 473.

**Nonsupport by Minor.** — In *People v. Todd*, 61 Mich. 234, it was held, under statute in *Michigan*, that where a minor was prosecuted criminally for not supporting his wife and for making her a public burden, while he was of "sufficient ability," he could not be convicted where there was no evidence tending to show that he was emancipated, or that he owned any property.

**3. Wife's Ability to Support Herself Held to Be No Defense.** — *Poole v. People*, 24 Colo. 510.

But in *People v. Karlsioe*, 1 N. Y. App. 571, it was held to be error to exclude evidence of the means of the wife.

**4. Duty of Husband to Protect the Wife.** — Thus the husband has the right to defend the wife, and such defense may be an excuse for homicide. See *Pond v. People*, 8 Mich. 173. And see the title MURDER and MANSLAUGHTER.

**5.** See *Williams v. Monroe*, 18 B. Mon. (Ky.) 514.

**6. Exhibition of Articles of Peace by Wife Against Husband.** — *Reg. v. Howard*, 11 Mod. 109; *Vane's Case*, 13 East 171, note *a*; *Rex v. Brooke*, 4 Burr. 1991.

**7. Wife's Right to Writ of Supplicavit in England.** — *Heyn's Case*, 2 Ves. & B. 182; *Dobbyn's Case*, 3 Ves. & B. 183; *Tunnicliff's Case*, 1 Jac. & W. 348. See also *Vane's Case*, 13 East 171, note *a*.

If nothing new happened, it was the practice to discharge the husband at the end of the year. *Baynum v. Baynum*, Ambl. 63.

But if the ill usage continued, the discharge was refused. *Ex p. King*, Ambl. 333.

**8. Writ of Supplicavit Practically Unknown in United States.** — In *Adams v. Adams*, 100 Mass. 365, the court said: "No writ of *supplicavit* has ever issued from this court. The novelty of the application makes it necessary to examine into the origin and character of the process. \* \* \* In *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 141, Chancellor Kent doubted his power to grant the writ, even in a proper case, and asked why the party should not apply to a justice of the peace to bind the other to his good behavior. The only case cited in which it appears to have been granted in this country is *Prather v. Prather*, 4 Desaus. (S. Car.) 33."

**9.** *Rex v. Lee*, 2 Lev. 128.

**10.** *Head v. Head*, 3 Atk. 547. See also *Adams v. Adams*, 100 Mass. 365; *Duncan v. Duncan*, 19 Ves. Jr. 394. Compare *Prather v. Prather*, 4 Desaus. (S. Car.) 33.



of the body of his deceased wife by decent sepulture in a suitable place. He has the control of the body and must care for it, and may select the proper place for the interment regardless of the wishes of his wife's parents or other relatives.<sup>1</sup> And this carries with it the right of placing over the spot of burial a proper monument or memorial.<sup>2</sup> But it has been held that the husband cannot, after it has been interred, remove the dead body of his wife against the consent of the next of kin.<sup>3</sup>

**2. Property Rights** — *a. OF HUSBAND* — (1) *In Wife's Realty* — **Curtsey.** — The husband's right of curtesy in the lands of the wife has already been discussed in a preceding portion of this work.<sup>4</sup>

**Interest Apart from Curtsey.** — But the husband has at common law an estate in the lands of the wife *jure uxoris*, which is distinguishable from an estate by the curtesy initiate in that it is a vested interest in possession and is not dependent on the birth of issue.<sup>5</sup> He has a freehold interest in her estates of inheritance or estates for life,<sup>6</sup> and is entitled to the pernaney of the lands

**1. Duty of Husband to Bury Wife.** — Matter of Weringer, 100 Cal. 345; Durell v. Hayward, 9 Gray (Mass.) 248, 69 Am. Dec. 284; Johnston v. Marinus, (Supm. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 72.

For further discussion of this question see the title DEAD BODY, vol. 8, p. 838.

As to the husband's liability to third persons for burial expenses of the wife, see *infra*, this title, *Rights and Liabilities as to Third Persons*.

**2. Matter of Weringer**, 100 Cal. 345; Durell v. Hayward, 9 Gray (Mass.) 248, 69 Am. Dec. 284.

It has been held that the husband has the right to the custody of the body of his dead wife, and hence a license may be implied to enter the premises of another for the purpose of assuming such custody and removing the body for that purpose, but not a license to enter such premises for the purpose of attending his wife's funeral thereon, it not being shown that there had been a demand made for the body and a refusal to deliver it. Neilson v. Brown, 13 R. I. 651, 43 Am. Rep. 58.

**3. Fox v. Gordon**, 16 Phila. (Pa.) 185, 40 Leg. Int. (Pa.) 374.

**4. See the title CURTESY**, vol. 8, p. 506.

**5. Husband's Interest in Wife's Realty Distinct from Curtsey.** — Elliott v. Teal, 5 Sawy. (U. S.) 249; Kibbie v. Williams, 58 Ill. 30; Hackett v. Moxley, 68 Vt. 210.

**Right Not to Be Divested by Subsequent Legislation.** — Porter v. Bowers, 55 Md. 213; Van Note v. Downey, 28 N. J. L. 221.

**6. Husband Has Freehold Interest in Wife's Lands** — *England.* — *Robinson v. Nicks*, 11 Q. B. 916, 63 E. C. L. 916; *Harcourt v. Wyman*, 3 Exch. 817; *Tennent v. Welch*, 37 Ch. D. 622. *Canada.* — *Nolan v. Fox*, 15 U. C. C. P. 565. *United States.* — *Elliott v. Teal*, 5 Sawy. (U. S.) 249.

*Alabama.* — *Cheek v. Waldrum*, 25 Ala. 159; *Bishop v. Blair*, 36 Ala. 80; *Nunn v. Givhan*, 45 Ala. 370.

*Connecticut.* — *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

*Georgia.* — *Hudgins v. Chupp*, 103 Ga. 484, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 841.

*Indiana.* — *Butterfield v. Beall*, 3 Ind. 203; *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

*Kentucky.* — *Miller v. Shackelford*, 3 Dana (Ky.) 289.

*Maine.* — *Payne v. Parker*, 10 Me. 181, 25 Am. Dec. 221; *Trask v. Patterson*, 29 Me. 499.

*Massachusetts.* — *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23.

*Montana.* — *Hopkins v. Noyes*, 4 Mont. 550.

*New Jersey.* — *Bolles v. State Trust Co.*, 27 N. J. Eq. 308.

*North Carolina.* — *Lyon v. Akin*, 78 N. Car. 261.

*Pennsylvania.* — *Shallenberger v. Ashworth*, 25 Pa. St. 152.

*South Carolina.* — *Brown v. Lindsay*, 2 Hill Eq. (S. Car.) 542.

*West Virginia.* — *Laidley v. Central Land Co.*, 30 W. Va. 505.

**Husband's Interest in Wife's Life Estates.** — The rule applies to life estates of the wife as well as to her estates of inheritance. *Gray v. Mathis*, 7 Jones L. (52 N. Car.) 502.

Thus the right attaches to dower in the lands of the wife's former husband. The second husband succeeds to the dower estate which has been assigned to his wife as a consequence of her former marriage, in all respects as he does to her other freehold interests. *Neil v. Johnson*, 11 Ala. 616; *Doe v. Brown*, 5 Blackf. (Ind.) 309; *Barber v. Root*, 10 Mass. 260; *Van Note v. Downey*, 28 N. J. L. 219; *Mann's Appeal*, 50 Pa. St. 375; *Gould v. Webster*, 1 Tyler (Vt.) 409; *Ellsworth v. Hinds*, 5 Wis. 613.

**The Technical Phraseology of the Common Law** is that husband and wife are jointly seized in the right of the wife. *Nicholls v. O'Neill*, 10 N. J. Eq. 90.

**Life Estate Leased by Woman While Sole — Husband's Rights to Rents.** — In *Daniels v. Richardson*, 22 Pick. (Mass.) 565, the plaintiff, while sole, having a life estate only, demised that estate for the term of her life, reserving an annual rent, without any clause of re-entry. It was held that her husband did not become seized of the estate *jure uxoris* so as to make the rents and profits his own, and that the arrears of rent at his death survived to the wife. See also *Hayward v. Hayward*, 20 Pick. (Mass.) 517; *Haralson v. Bridges*, 14 Ill. 37.

**Emblements.** — If the husband of a tenant for life is in possession and tills the land, and the wife dies before the crop is gathered, it has been held that he takes the whole as emble-



and profits during the joint lives of himself and wife,<sup>1</sup> unless in contemplation of law there be a cessation of the coverture.<sup>2</sup> His interest may be conveyed by his deed alone,<sup>3</sup> and is subject to sale and execution at law against him,<sup>4</sup> and no act of the wife separate from the husband can divest him of his right.<sup>5</sup>

**Wife's Remainders or Reversionary Interests.** — But he acquires no interest in the wife's realty until actual seizin, and therefore can have no interest in her estates in reversion or remainder dependent on or after a preceding freehold estate therein in another, until the determination of that estate and a seizin in him.<sup>6</sup>

ments. *Spencer v. Lewis*, 1 *Houst. (Del.)* 223.

Under a statute at one time in force in *Alabama* which in effect was declaratory of the common law as to the control it gave to the husband over the wife's realty, it was held that at the termination of the life estate, the husband, like any other life tenant, was entitled to emblements, that is, the crop growing or matured and whether gathered or not gathered. *Weems v. Bryan*, 21 *Ala.* 302; *Bennett v. Bennett*, 34 *Ala.* 55.

**Improvements.** — The husband cannot charge the wife, or her estate after her death, for services rendered or moneys paid in improving her real estate during coverture. *Burleigh v. Coffin*, 22 *N. H.* 118, 53 *Am. Dec.* 236; *Marable v. Jordan*, 5 *Humph. (Tenn.)* 417, 42 *Am. Dec.* 441. See also *Washburn v. Sproat*, 16 *Mass.* 449.

**Waste.** — The husband may be held liable for waste committed on the wife's lands. *Stroebe v. Fehl*, 22 *Wis.* 337.

For a full discussion of this question, see the title **WASTE**.

**1. Husband Entitled to Rents and Profits During Joint Lives of Himself and Wife** — *Alabama*. — *Nunn v. Givhan*, 45 *Ala.* 370.

*Arkansas*. — *Shryock v. Cannon*, 39 *Ark.* 434. *Connecticut*. — *Chancey v. Strong*, 2 *Root (Conn.)* 369.

*Maryland*. — *Wright v. Wright*, 2 *Md.* 455, 56 *Am. Dec.* 723; *Porter v. Bowers*, 55 *Md.* 215.

*Massachusetts*. — *Merrill v. Bullock*, 105 *Mass.* 486; *Clapp v. Stoughton*, 10 *Pick. (Mass.)* 469.

*Mississippi*. — *Baynton v. Finnall*, 4 *Smed. & M. (Miss.)* 193.

*Missouri*. — *Conrad v. Howard*, 89 *Mo.* 217. *New Hampshire*. — *Burleigh v. Coffin*, 22 *N. H.* 118, 53 *Am. Dec.* 236.

*Tennessee*. — *Lucas v. Rickerich*, 1 *Lea (Tenn.)* 726.

*Vermont*. — *Shaw v. Partridge*, 17 *Vt.* 626.

*Virginia*. — *Dold v. Geiger*, 2 *Gratt. (Va.)* 98; *Guerrant v. Hocker*, 7 *Leigh (Va.)* 366.

**No Interest Beyond Joint Lives of Husband and Wife.** — The husband has not in any case a greater interest than during the joint lives of himself and wife, and he cannot, of course, convey or charge the lands for a longer period than while his own interest continues. *Robertson v. Norris*, 11 *Q. B.* 916, 63 *E. C. L.* 916; *Burns v. McAdam*, 24 *U. C. Q. B.* 449; *Neil v. Johnson*, 11 *Ala.* 617; *Rogers v. Brooks*, 30 *Ark.* 612; *Miller v. Shackelford*, 3 *Dana (Ky.)* 289; *Payne v. Parker*, 10 *Me.* 181, 25 *Am. Dec.* 221; *Boyle v. Chambers*, 32 *Mo.* 46; *Brown v. Lindsay*, 2 *Hill Eq. (S. Car.)* 542; *Arnold v. Hodges*, 10 *Humph. (Tenn.)* 39; *Evans v.*

*Kingsberry*, 2 *Rand. (Va.)* 120, 14 *Am. Dec.* 779; *Stroebe v. Fehl*, 22 *Wis.* 343.

**Under Statute in Georgia** prior to the Married Woman's Act of 1866, it was held that real estate belonging to the wife became vested in and passed to the husband in the same manner as personal property, and in case of the death of the husband without a will, such estate descended and became subject to distribution in the same manner as personal property. *Prescott v. Roe*, 29 *Ga.* 58; *Hooper v. Howell*, 52 *Ga.* 315; *De Vaughan v. McLeroy*, 82 *Ga.* 687.

As to the necessity of the joinder of the wife in the conveyance of her lands, see the title **DEEDS**, vol. 9, p. 110.

**Conversion of Realty into Personality.** — The husband has no right, without the consent of the wife, to convert her real property into personality so as to change the course of descent or right of succession. *Fletcher v. Wilson*, *Smed. & M. Ch. (Miss.)* 376.

**2. Effect of Divorce a Vinculo on Husband's Interest.** — *Starr v. Pease*, 8 *Conn.* 541; *Doe v. Brown*, 5 *Blackf. (Ind.)* 310; *Wright v. Wright*, 2 *Md.* 454, 56 *Am. Dec.* 723; *Barber v. Root*, 10 *Mass.* 260; *Gould v. Webster*, 1 *Tyler (Vt.)* 409. See also *Greneley's Case*, 8 *Coke* 72, and see the title **DIVORCE**, vol. 9, p. 858.

**Under Statute in Tennessee** a different rule has been laid down. *Brasfield v. Brasfield*, 96 *Tenn.* 580.

**Effect of Divorce a Mensa.** — The interest is not determined, it seems, by a divorce *a mensa et thoro*, apart from statute. *Stephens v. Totty*, *Cro. Eliz.* 908; *Kruger v. Day*, 2 *Pick. (Mass.)* 316.

**Effect of Separation.** — Nor by the fact that the husband and wife are living apart. *Haralson v. Bridges*, 14 *Ill.* 37.

**3. Conveyance of Husband's Interest by His Deed Alone.** — *Doe v. Brown*, 5 *Blackf. (Ind.)* 310; *Miller v. Shackelford*, 3 *Dana (Ky.)* 289; *Trask v. Patterson*, 29 *Me.* 499.

**Leases.** — The husband may lease the wife's real estate. *Harcourt v. Wyman*, 3 *Exch.* 817; *Burns v. McAdam*, 24 *U. C. Q. B.* 449; *Eaton v. Whitaker*, 18 *Conn.* 222, 44 *Am. Dec.* 586; *Brown v. Lindsay*, 2 *Hill Eq. (S. Car.)* 542. See also the title **LEASES**.

**4. Husband's Interest Subject to Execution Against Him.** — *Doe v. Brown*, 5 *Blackf. (Ind.)* 310; *Litchfield v. Cudworth*, 15 *Pick. (Mass.)* 23; *Nicholls v. O'Neill*, 10 *N. J. Eq.* 90. See the title **EXECUTIONS**, vol. 11, p. 630.

**5. Husband's Interest Not Divested by Wife's Acts.** — *Hudgins v. Chupp*, 103 *Ga.* 484; *Bolles v. State Trust Co.*, 27 *N. J. Eq.* 308; *Den v. Quinby*, 3 *N. J. L.* 540.

**6. No Interest in Wife's Remainders until Determination of Prior Estate.** — *Gentry v. Wag-*

**No Interest in Wife's Separate Estate.** — The husband has no interest in the wife's separate equitable realty,<sup>1</sup> nor indeed in any of her lands, under statutes giving her separate property rights.<sup>2</sup>

(2) *In Wife's Chattels Real.* — At Common Law, the husband, upon marriage, becomes possessed in the right of the wife of her chattels real, and he may forfeit, sell, assign mortgage, or otherwise dispose of them as he pleases, without her consent, by any act in his lifetime,<sup>3</sup> and they are liable to be sold for his debts.<sup>4</sup> Upon her death they vest absolutely in him if he survives.<sup>5</sup> The husband's rights in these respects apply to equitable as well as to legal terms for years,<sup>6</sup> though not if the term is vested in the wife to her separate use.<sup>7</sup>

**Reduction to Possession — Right of Survivorship.** — But marriage does not divest the wife of her chattels real, and if he does not reduce them to possession by disposing of them, or by some equivalent act, they survive to her and do not pass by his will.<sup>8</sup> The mere taking possession, collecting rents, interest, or dividends, will not be a disposition of the property or a reduction into possession so as to take away the wife's right of survivorship.<sup>9</sup> Nor will the erection by the husband of buildings on the leasehold lands of the wife be such a disposition of them as to take away her right.<sup>10</sup> An actual disposition by sale, lease, mortgage, or contract for such object has always been required to take away the wife's right of survivorship.<sup>11</sup> A mortgage, or a sale of part,

staff, 3 Dev. L. (14 N. Car.) 278; *Baker v. Flournoy*, 58 Ala. 650.

1. **Husband Has No Interest in Separate Equitable Realty.** — *Wyllie v. Collins*, 9 Ga. 223; *Buckalew v. Blanton*, 7 Coldw. (Tenn.) 214. See the title SEPARATE PROPERTY (OF MARRIED WOMEN).

2. **Husband's Interest Removed by Statute.** — *Morrill v. Atwood*, 52 Conn. 526; *Lynde v. McGregor*, 13 Allen (Mass.) 182, 90 Am. Dec. 188; *Sudbo v. Rusten*, 66 Minn. 108; *Ross v. Adams*, 28 N. J. L. 160; *Kip v. Kip*, 33 N. J. Eq. 213; *Manning v. Manning*, 79 N. Car. 293, 28 Am. Rep. 324; *Cecil v. Smith*, 81 N. Car. 285; *Young v. Greenlee*, 82 N. Car. 346.

*In Mississippi*, under statute, it has been held that although the husband as such has no estate in the lands of the wife, the possession of the husband *jure uxoris* is not so destroyed as to render him liable to the demand of the wife, the owner of the land, for the rent of the home. *Edwards v. Edwards*, (Miss. 1894) 15 So. Rep. 42.

**Under Statute in Tennessee**, the rents and profits of the wife's realty are protected from the husband's creditors, and the husband is unable to sell or dispose of the wife's real estate during her life without her joining in the conveyance in the manner prescribed by law in which married women shall convey land. *Coleman v. Satterfield*, 2 Head (Tenn.) 200.

But it has been held that the legislature did not intend, by exempting such rents and profits from seizure for the debts of the husband, thereby to create a separate estate in such rents and profits in the wife, and that the husband is still entitled to them. *Brasfield v. Brasfield*, 96 Tenn. 580.

*In Missouri*, under statutes giving to married women separate property rights, it has been held that while the husband has no interest in the wife's real estate which he can convey by his individual deed, he has the

right to possess and enjoy the land, and the right can only be divested for the causes and in the mode specified by statute. *Gideon v. Hughes*, 21 Mo. App. 528; *Meriwether v. Howe*, 48 Mo. App. 148; *O'Bryan v. Allen*, 95 Mo. 68.

See also the title SEPARATE PROPERTY (OF MARRIED WOMEN).

3. **Husband's Ownership of Wife's Chattels Real.** — *Bates v. Dandy*, 2 Atk. 207; *In re Bellamy*, 25 Ch. D. 624; *Moody v. Matthews*, 7 Ves. Jr. 183; *Mitford v. Mitford*, 9 Ves. Jr. 99; *Meriwether v. Booker*, 5 Litt. (Ky.) 255; *Allen v. Hooper*, 50 Me. 374; *Lawes v. Lumpkin*, 18 Md. 334. See also *Purdew v. Jackson*, 1 Russ. 51; *Bracebridge v. Cook*, Plowd. 416; *Doe v. Steward*, 1 Ad. & El. 300, 28 E. C. L. 89; *Chandos v. Talbot*, 2 P. Wms. 608; *Theobalds v. Duffoy*, 9 Mod. 102; *Donne v. Hart*, 2 Russ. & M. 360; *Duberley v. Day*, 16 Beav. 33.

4. **Liability of Wife's Chattels Real for Husband's Debts.** — *Allen v. Hooper*, 50 Me. 371.

5. **Wife's Chattels Real Vest in Husband Surviving.** — *In re Bellamy*, 25 Ch. D. 620; *Moody v. Matthews*, 7 Ves. Jr. 183; *Wrotesley v. Adams*, Plowd. 187; *Hauchet's Case*, 2 Dyer 251a; *Doe v. Polgrean*, 1 H. Bl. 535. See also *Lampet's Case*, 10 Coke 46.

6. *In re Bellamy*, 25 Ch. D. 623; *Mitford v. Mitford*, 9 Ves. Jr. 98; *Doe v. Steward*, 1 Ad. & El. 300, 28 E. C. L. 89; *Tudor v. Samyane*, 2 Vern. 270, explained in *Scarborough v. Borman*, 4 Myl. & C. 389, note.

7. See *Draper's Case*, Freem. Ch. 29; *Tullett v. Armstrong*, 4 Myl. & C. 395, *criticising Turner's Case*, 1 Vern. 7.

8. **Right of Wife by Survivorship.** — Co. Litt. 351a; *Bracebridge v. Cook*, Plowd. 416; *In re Bellamy*, 25 Ch. D. 620; *Moody v. Matthews*, 7 Ves. Jr. 183; *Mitford v. Mitford*, 9 Ves. Jr. 99; *Riley v. Riley*, 19 N. J. Eq. 230.

9. *Riley v. Riley*, 19 N. J. Eq. 230.

10. *Riley v. Riley*, 19 N. J. Eq. 230.

11. *Riley v. Riley*, 19 N. J. Eq. 230.



or for a less term, only bars the wife *pro tanto*; her right of survivorship remains in the equity of redemption or the residue of the term.<sup>1</sup>

Under the Married Women's Acts of the various jurisdictions, the common-law rule as above set forth has been abolished and the wife is invested with absolute right in her chattels real.<sup>2</sup>

(3) *In Wife's Personalty* — (a) *In General.* — Under the Common Law the husband, by intermarriage, acquires a right to the wife's chattels, and this right is either absolute and unlimited or qualified and limited, according to the nature and condition of the property.<sup>3</sup>

*In Equity*, however, a separate estate in the wife in her personalty is recognized under certain circumstances.<sup>4</sup>

And by Statute in *England* and in the *United States* generally, separate rights in their personalty have been secured to married women.<sup>5</sup>

(b) *Personalty in Possession.* — At common law the personal property which the wife has in her possession in her own right, at the time of her marriage, or which comes into her possession during the coverture, whether by gift, bequest, or otherwise, vests absolutely and immediately in the husband without any act on his part asserting his marital right, and he may dispose of it as he pleases; it becomes immediately liable for his debts, and on his death it goes to his personal representatives.<sup>6</sup>

**1. Sale or Mortgage of Part as Barring Wife's Right Pro Tanto.** — *Sym's Case*, Cro. Eliz. 33; *Clark v. Burgh*, 2 Coll. Ch. Cas. 221; *Bates v. Dandy*, 2 Atk. 207; *Druce v. Denison*, 6 Ves. Jr. 394; *Steed v. Cragh*, 9 Mod. 43; *Riley v. Riley*, 19 N. J. Eq. 230.

**2. Husband's Right to Wife's Chattels Real Abolished by Statutes.** — See the statutes of the various states, and the title SEPARATE PROPERTY (OF MARRIED WOMEN).

**3. Husband's Right to Wife's Personalty at Common Law.** — *McCaa v. Woolf*, 42 Ala. 392.

**4. See the title SEPARATE PROPERTY (OF MARRIED WOMEN).**

**5. See** *Bartlett v. Umfried*, 94 Mo. 530; *Rodgers v. Pike County Bank*, 69 Mo. 562; *Broughton v. Brand*, 94 Mo. 169; *Gilliland v. Gilliland*, 96 Mo. 522; *Hart v. Leete*, 104 Mo. 315; *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369; *Lewis's Estate*, 156 Pa. St. 337; *Taylor v. Clark*, (Tenn. Ch. 1895) 35 S. W. Rep. 442.

A full discussion of the rights of married women under separate property acts will be found in the title SEPARATE PROPERTY (OF MARRIED WOMEN).

**6. Husband's Right to Personalty in Possession — England.** — *Fleet v. Perrins*, L. R. 3 Q. B. 541.

*Alabama.* — *Harkins v. Coalter*, 2 Port. (Ala.) 463; *Hopper v. McWhorter*, 18 Ala. 229; *Nelson v. Goree*, 34 Ala. 565; *McCaa v. Woolf*, 42 Ala. 392.

*Arkansas.* — *Sadler v. Bean*, 9 Ark. 204; *Jamison v. May*, 13 Ark. 600; *Jackson v. Hill*, 25 Ark. 223.

*District of Columbia.* — *Hewett v. Burritt*, 3 App. Cas. (D. C.) 229.

*Georgia.* — *Pope v. Tucker*, 23 Ga. 484.

*Illinois.* — *Erringdale v. Riggs*, 148 Ill. 403; *Hanchett v. Rice*, 22 Ill. App. 442; *Tinkler v. Cox*, 68 Ill. 119.

*Indiana.* — *Mahoney v. Bland*, 14 Ind. 176; *Miller v. Blackburn*, 14 Ind. 62; *Standeford v. Devoil*, 21 Ind. 404, 83 Am. Dec. 351.

*Iowa.* — *McCrary v. Foster*, 1 Iowa 278.

*Kentucky.* — *Carpenter v. Hazelrigg*, (Ky.

1898) 45 S. W. Rep. 666; *Martin v. Poague*, 4 B. Mon. (Ky.) 524.

*Louisiana.* — *Quigly v. Muse*, 15 La. Ann. 197.

*Maine.* — *Allen v. Hooper*, 50 Me. 374; *Jordan v. Jordan*, 52 Me. 320; *Carleton v. Lovejoy*, 54 Me. 445.

*Massachusetts.* — *Com. v. Manley*, 12 Pick. (Mass.) 174; *Washburn v. Hale*, 10 Pick. (Mass.) 429.

*Missouri.* — *Fisk v. Wright*, 47 Mo. 351; *Walker v. Walker*, 25 Mo. 376; *Conrad v. Howard*, 89 Mo. 217; *Kidwell v. Kirkpatrick*, 70 Mo. 216.

*New York.* — *Switzer v. Valentine*, 4 Duer (N. Y.) 96; *Glann v. Younglove*, 27 Barb. (N. Y.) 480; *Stokes v. Macken*, 62 Barb. (N. Y.) 145.

*North Carolina.* — *Lanier v. Ross*, 1 Dev. & B. Eq. (21 N. Car.) 39; *Anderson v. Arrington*, 1 Jones Eq. (54 N. Car.) 215; *Little v. Marsh*, 2 Ired. Eq. (37 N. Car.) 18.

*Ohio.* — *Walden v. Chambers*, 7 Ohio St. 34; *Ramsdall v. Craighill*, 9 Ohio 199.

*Pennsylvania.* — *Bower's Appeal*, 68 Pa. St. 126; *Davis v. Zimmerman*, 67 Pa. St. 70.

*South Carolina.* — *Riddlehoover v. Kinard*, 1 Hill Eq. (S. Car.) 376; *Burgess v. Heape*, 1 Hill Eq. (S. Car.) 397; *Tucker v. Stevens*, 4 Desaus. (S. Car.) 532; *Sausey v. Gardner*, 1 Hill L. (S. Car.) 191.

*Tennessee.* — *Vaden v. Vaden*, 1 Head (Tenn.) 444; *Ewing v. Helm*, 2 Tenn. Ch. 369; *Taylor v. Clark*, (Tenn. Ch. 1895) 35 S. W. Rep. 442.

*Texas.* — *Black v. Bryan*, 18 Tex. 461; *Oliver v. Robertson*, 41 Tex. 425; *Franklin v. Piper*, 5 Tex. Civ. App. 253.

*Virginia.* — *Rixey v. Deitrick*, 85 Va. 42; *Hannon v. Hounihan*, 85 Va. 429.

*West Virginia.* — *Hill v. Wynn*, 4 W. Va. 453.

**Right Not Divested by Subsequent Legislation.** — Personal property which is in the husband's possession by virtue of his marital rights does not become divested by subsequent legislation. *Lovette v. Longmire*, 14 Ark. 339; *Farrell v.*



### Possession of Third Person.—The possession of the wife's agent,<sup>1</sup> trustee,<sup>2</sup>

Patterson, 43 Ill. 52; Dubois v. Jackson, 49 Ill. 52; Morris v. Morris, 94 N. Car. 617. See further on this question the title SEPARATE PROPERTY (OF MARRIED WOMEN).

**Recovery of Money Paid by Wife.**—Money paid by a married woman upon a bond to convey land to her is *prima facie* her husband's property, and may be recovered back by him on offering to surrender the bond. *Casey v. Wiggin*, 8 Gray (Mass.) 231.

**Personalty Acquired by Wife Living Apart in Adultery Belongs to Husband.**—*Agar v. Blethyn*, 2 C. M. & R. 699, Tyrw. & G. 160.

**Proceeds of Realty.**—If the wife sells and conveys her land, and the husband receives the consideration money without any reservation of rights on her part, the money belongs to him.

*United States.*—*Kesner v. Trigg*, 98 U. S. 54. *Arkansas.*—*Humphries v. Harrison*, 30 Ark. 79; *Hydrick v. Burke*, 30 Ark. 124.

*Indiana.*—*Lichtenberger v. Graham*, 50 Ind. 288.

*Kentucky.*—*Sheriff v. Buckner*, 1 Litt. (Ky.) 126.

*Maine.*—*Crosby v. Otis*, 32 Me. 256.

*Maryland.*—*Taggart v. Boldin*, 10 Md. 104; *Wylie v. Basil*, 4 Md. Ch. 327; *Sabel v. Slingluff*, 52 Md. 132.

*Missouri.*—*Tillman v. Tillman*, 50 Mo. 40.

*New York.*—*Martin v. Martin*, 1 N. Y. 473; *Wood v. Genet*, 8 Paige (N. Y.) 144.

*North Carolina.*—*Temple v. Williams*, 4 Ired. Eq. (39 N. Car.) 40; *Hackett v. Shuford*, 86 N. Car. 144; *Black v. Justice*, 86 N. Car. 504; *Giles v. Hunter*, 103 N. Car. 201.

*Ohio.*—*Ramsdall v. Craighill*, 9 Ohio 199.

*Pennsylvania.*—*Darlington's Appropriation*, 13 Pa. St. 430; *Benedict v. Montgomery*, 7 W. & S. (Pa.) 238, 42 Am. Dec. 230; *Gross v. Reddig*, 45 Pa. St. 406.

*South Carolina.*—*Clark v. Smith*, 13 S. Car. 585.

*Tennessee.*—*Hardison v. Billington*, 14 Lea (Tenn.) 346; *Chester v. Greer*, 5 Humph. (Tenn.) 26; *Cowden v. Pitts*, 2 Baxt. (Tenn.) 59.

*Vermont.*—*Ward v. Morrill*, 1 D. Chip. (Vt.) 322.

*Wisconsin.*—*Hamlin v. Jones*, 20 Wis. 536.

And the same doctrine has been applied where the husband receives a promissory note in his name for the purchase money. *Stull v. Graham*, 60 Ark. 472; *Talbott v. Dennis*, 1 Ind. 471; *McCrory v. Foster*, 1 Iowa 271; *Dixon v. Dixon*, 18 Ohio 113.

But the rule is otherwise in equity where by arrangement between the husband and wife the purchase money is to be regarded as hers. *Resor v. Resor*, 9 Ind. 348; *Drury v. Briscoe*, 42 Md. 161; *Dickinson v. Davis*, 43 N. H. 647; 80 Am. Dec. 202; *Williams v. Williams*, 6 Ired. Eq. (41 N. Car.) 20; *Dufa v. Young*, 70 N. Car. 450; *Beam v. Bridgers*, 108 N. Car. 276, 23 Am. St. Rep. 59. See also the title SEPARATE PROPERTY (OF MARRIED WOMEN).

**Things Held in Common.**—The mere fact that chattels are held by the wife in common with others will not prevent their vesting in the husband if they are in the possession of some third person not claiming them adversely. *Chambers v. Perry*, 17 Ala. 726; *Hopper v.*

*McWhorter*, 18 Ala. 229; *Stephens v. Doak*, 2 Ired. Eq. (37 N. Car.) 348; *Pettijohn v. Beasley*, 4 Dev. L. (15 N. Car.) 512; *Mardree v. Mardree*, 9 Ired. L. (31 N. Car.) 304; *Caffey v. Kelly*, Busb. Eq. (45 N. Car.) 48. Nor, it seems, will the fact that they are in the possession of the cotenant. *Walker v. Fenner*, 28 Ala. 373. See also *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501.

But where the wife's interest in chattels is unascertained, the husband's marital rights will not attach to her moiety until after a division has been made. *Swanson v. Swanson*, 2 Swan (Tenn.) 460; *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576. See also *Corley v. Corley*, 22 Ga. 178.

**Life Estate in Personalty.**—An estate for life in personalty belonging to a *feme sole* upon marriage, or coming into her possession during coverture, vests absolutely in the husband. *Smith v. Atwood*, 14 Ga. 402; *Darnall v. Adams*, 13 B. Mon. (Ky.) 273; *Swanson v. Swanson*, 2 Swan (Tenn.) 446; *Deadrick v. Armour*, 10 Humph. (Tenn.) 588. But he cannot dispose of a greater interest than he has. *Robinson v. Rice*, 20 Mo. 229; *Green v. Goodall*, 1 Coldw. (Tenn.) 404.

**Money Advanced to Wife by Minor Children.**—In *Partridge v. Arnold*, 73 Ill. 600, it was held that money advanced by minor children to pay for property conveyed to their mother does not, at common law, so become the property of the mother as the owner thereof that the title to it vests in her husband.

In *New Hampshire* the courts, apart from any express statutory provision, departed from the common law at an early period, and the rule was laid down that the personal property of the wife at the time of the marriage, or accruing to her in her right subsequently, if it accrues independently of her husband, and not upon any consideration moving from or connected with him, remains hers until he exercises his marital right by reducing it to possession. *Coffin v. Morrill*, 22 N. H. 359; *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 330; *Hall v. Young*, 37 N. H. 134; *Jordan v. Cummings*, 43 N. H. 137; *Hutchins v. Colby*, 43 N. H. 159; *Russ v. George*, 45 N. H. 467; *Hoyt v. White*, 46 N. H. 45; *George v. Cutting*, 46 N. H. 130, 88 Am. Dec. 195; *Caswell v. Hill*, 47 N. H. 410; *Houston v. Clark*, 50 N. H. 480; *Moulton v. Haley*, 57 N. H. 184.

**Effect of Cohabitation under Void Marriage.**—The personal property of the wife will not vest in the husband and become liable for his debts where it is shown that the marriage was void, and the fact of cohabitation will in general be immaterial. *Glasspool v. Young*, 9 B. & C. 696, 17 E. C. L. 474. See *Edwards v. Farebrother*, 3 C. & P. 524, 14 E. C. L. 427.

1. **Personalty in Possession of Wife's Agent.**—*Brewer v. Hobbs*, (Ky. 1895) 30 S. W. Rep. 603, 604; *Crosby v. Otis*, 32 Me. 256.

2. **Personalty in Possession of Wife's Trustee.**—*Pope v. Tucker*, 23 Ga. 484; *Brewer v. Hobbs*, (Ky. 1895) 30 S. W. Rep. 605; *Miller v. Bingham*, 1 Ired. Eq. (36 N. Car.) 423, 36 Am. Dec. 58; *Murphy v. Grice*, 2 Dev. & B. Eq. (22 N. Car.) 199; *Beall v. Darden*, 4 Ired. Eq. (39 N. Car.) 76; *McClanachan v. Siter*, 2 Gratt. (Va.)

bailee,<sup>1</sup> guardian,<sup>2</sup> or a tenant in common,<sup>3</sup> or of any third person not holding adversely,<sup>4</sup> is the possession of the husband, and this rule applies to money possessed by third persons as well as to other chattels.<sup>5</sup> But the possession of an executor or administrator of an estate is not the possession of the husband as to any interest in the estate belonging to the wife.<sup>6</sup>

(c) **Choses in Action** — *aa. IN GENERAL.* — As a general rule the wife's choses in action which belong to her at the time of her marriage, or which she acquires during coverture, belong, at common law, to the husband. They do not vest absolutely in him, however, but he has a potential right of ownership which, when exercised by reducing them to possession, vests the property absolutely in him.<sup>7</sup>

296. See also *Lenoir v. Rainey*, 15 Ala. 667; *Lindsay v. Harrison*, 8 Ark. 302. Compare *Taylor v. Wilson*, 8 Rich. L. (S. Car.) 285; *Gillis v. McKay*, 4 Dev. L. (15 N. Car.) 172.

Where Husband Holds as Trustee. — But this rule does not apply to personal property of the wife held by the husband as trustee. *Terrell v. Green*, 11 Ala. 207.

1. **Possession of Bailee.** — *Magee v. Toland*, 8 Port. (Ala.) 36; *Hopper v. McWhorter*, 18 Ala. 229; *Gwynn v. Hamilton*, 29 Ala. 233; *Armstrong v. Simonton*, Term (4 N. Car.) 266; *Whitaker v. Whitaker*, 1 Dev. L. (12 N. Car.) 310; *Granbery v. Mhoon*, 1 Dev. L. (12 N. Car.) 456; *Pettijohn v. Beasley*, 4 Dev. L. (15 N. Car.) 512. Compare *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Mason v. McNeil*, 23 Ala. 218.

2. **Possession of Guardian.** — *Magee v. Toland*, 8 Port. (Ala.) 36; *McDaniel v. Whitman*, 16 Ala. 343; *Chambers v. Perry*, 17 Ala. 726; *Sallee v. Arnold*, 32 Mo. 541; *Stephens v. Doak*, 2 Ired. Eq. (37 N. Car.) 348; *Davis v. Rhame*, 1 McCord Eq. (S. Car.) 195; *Daniel v. Daniel*, 2 Rich. Eq. (S. Car.) 115, 44 Am. Dec. 244. See also *Nicholson v. Wilborn*, 13 Ga. 470; *Wood v. Henderson*, 2 How. (Miss.) 893; *Miller v. Blackburn*, 14 Ind. 62. Compare *Crenshaw v. Hardy*, 3 Ala. 653; *Hudson v. Parker*, 9 Ala. 413.

3. **Possession of Tenant in Common.** — See *Walker v. Fenner*, 28 Ala. 373; *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Stephens v. Doak*, 2 Ired. Eq. (37 N. Car.) 348; *Ordinary v. Geiger*, 1 Brev. (S. Car.) 484.

4. **Possession of Person Not Holding Adversely.** — *Magee v. Toland*, 8 Port. (Ala.) 36; *Brown v. Fitz*, 13 N. H. 283; *Caffey v. Kelly*, Busb. Eq. (45 N. Car.) 48; *Sausey v. Gardner*, 1 Hill L. (S. Car.) 191; *Wallace v. Burden*, 17 Tex. 467.

In Georgia it has been intimated that if at the time of the marriage a specific chattel personal of the wife is in the adverse possession of some third person, such chattel is nevertheless to be considered as a chattel personal in her possession, and therefore that it is one which passes absolutely to the husband, so that he may recover it in his own name. *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Pope v. Tucker*, 23 Ga. 484.

As to the question in whose name action should be brought to recover the wife's personalty held adversely, see the title HUSBAND AND WIFE, 10 ENCYC. OF PL. AND PR. 200.

5. **Wife's Money in Hands of Third Person.** — The wife's money in the hands of an agent is the husband's. *Crosby v. Otis*, 32 Me. 256.

Money in the hands of the wife's guardian belongs to the husband. *McDaniel v. Whitman*, 16 Ala. 343; *Daniel v. Daniel*, 2 Rich. Eq. (S. Car.) 115, 44 Am. Dec. 244. See also *Miller v. Blackburn*, 14 Ind. 62.

**Money Deposited with Third Person for Wife's Benefit.** — But in *Fleet v. Perrins*, L. R. 4 Q. B. 500, it was held that where a person received money from another to be appropriated to the use of a married woman, and he wrote telling her that he held the money at her disposal, the money in his hands was a bare chose in action which, if not reduced to possession, would not vest in the husband. See also *Scrutton v. Pattillo*, L. R. 19 Eq. 369.

6. **Wife's Share of an Estate in Hands of Executor or Administrator.** — *Bibb v. McKinley*, 9 Port. (Ala.) 636. See also *Harper v. Archer*, 8 Smed. & M. (Miss.) 229; *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 209; *Blount v. Bestland*, 5 Ves. Jr. 515.

7. **Choses in Action Reduced to Possession Belong to the Husband.** — *George v. Goldsby*, 23 Ala. 326; *McCaa v. Woolf*, 42 Ala. 392; *Sadler v. Bean*, 9 Ark. 204; *Stull v. Graham*, 60 Ark. 472; *Bell v. Bell*, 1 Ga. 637; *Bridgford v. Riddell*, 55 Ill. 261; *McCrary v. Foster*, 1 Iowa 278; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Thrasher v. Tuttle*, 22 Me. 335; *Taggart v. Boldin*, 10 Md. 104; *Ames v. Chew*, 5 Met. (Mass.) 320; *Hayward v. Hayward*, 20 Pick. (Mass.) 517; *Dunn v. Sargent*, 101 Mass. 326; *Cummings v. Cummings*, 143 Mass. 340; *Killcrease v. Killcrease*, 7 How. (Miss.) 311; *Conrad v. Howard*, 89 Mo. 217; *Clark v. National Bank*, 47 Mo. 17; *Walden v. Chambers*, 7 Ohio St. 34; *Needles v. Needles*, 7 Ohio St. 438, 70 Am. Dec. 85; *Krause v. Beitel*, 3 Rawle (Pa.) 199, 23 Am. Dec. 113.

**Illustrations — Legacies and Distributive Shares.** — *Scott v. James*, 3 How. (Miss.) 307; *Harper v. Archer*, 28 Miss. 212; *Horner v. Webster*, 33 N. J. L. 387; *Jones v. Davenport*, 44 N. J. Eq. 337; *Ferrell v. Thompson*, 107 N. Car. 424; *Boose's Appeal*, 18 Pa. St. 392; *Heath v. Heath*, 2 Hill Eq. (S. Car.) 100; *Lasseter v. Turner*, 1 Verg. (Tenn.) 413. See also *Palmer v. Trevor*, 1 Vern. 261.

Where a husband acquires the possession of the wife's distributive share of the estate of an intestate under a voluntary division, although he does not acquire a legal, he does acquire an equitable, title which a Court of Chancery will uphold and enforce. *Vanderveer v. Alston*, 16 Ala. 494; *Anderson v. Anderson*, 37 Ala. 683; *Perryman v. Greer*, 39 Ala. 133; *McCaa v. Woolf*, 42 Ala. 394.

**Damages Growing Out of Torts to Person or**



66. WIFE'S RIGHT BY SURVIVORSHIP. — Accordingly, at common law, if the husband, without having reduced them to possession, dies before the wife,<sup>1</sup> or

**Reputation of Wife.** — *Anderson v. Anderson*, 11 Bush (Ky.) 327. See also *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; *Martin v. Robson*, 65 Ill. 137; *Coffin v. Morrill*, 22 N. H. 352; *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 375; *Perry v. Wheelock*, 49 Vt. 63.

**Chose in Action of Infant Wife.** — *Shanks v. Edmondson*, 28 Gratt. (Va.) 813.

**Right to Reduce to Possession Held a Vested Interest Not to Be Taken Away by Legislation.** — *Anderson v. Anderson*, 37 Ala. 683; *Kidd v. Montague*, 19 Ala. 619; *Sterns v. Weathers*, 30 Ala. 712; *Sperry v. Haslam*, 57 Ga. 412; *Westervelt v. Gregg*, 12 N. Y. 207, 62 Am. Dec. 160; *O'Connor v. Harris*, 81 N. Car. 284; *Benbow v. Moore*, 114 N. Car. 263. See also *Dunn v. Sargent*, 101 Mass. 336.

**But a Different Rule Has Been Laid Down in Other Jurisdictions.** — *Clarke v. McCreary*, 12 Smed. & M. (Miss.) 347; *Duncan v. Johnson*, 23 Miss. 130; *Hart v. Leete*, 104 Mo. 315; *Henry v. Dilley*, 25 N. J. L. 302; *Goodyear v. Rumbaugh*, 13 Pa. St. 480; *Mellinger v. Bausman*, 45 Pa. St. 526.

**1. Wife's Right of Survivorship on Husband's Death** — *England*. — *Fleet v. Perrins*, L. R. 4 Q. B. 500; *Topham v. Morecraft*, 8 El. & Bl. 972, 92 E. C. L. 972; *Stamper v. Barker*, 5 Madd. 157.

*Alabama*. — *Hair v. Avery*, 28 Ala. 267.  
*Delaware*. — *Lenderman v. Talley*, 1 Houst. (Del.) 523; *Connor v. Robertson*, 5 Harr. (Del.) 201.

*Georgia*. — *Stephens v. Beal*, 4 Ga. 319; *Salter v. Doe*, 10 Ga. 186; *Chappell v. Causey*, 11 Ga. 25; *Crawford v. Brady*, 35 Ga. 184; *De Vaughn v. McLeroy*, 82 Ga. 706.

*Kentucky*. — *Brown v. Langford*, 3 Bibb (Ky.) 497; *Baker v. Red*, 4 Dana (Ky.) 158; *Kellar v. Beelor*, 5 T. B. Mon. (Ky.) 573; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 582.

*Louisiana*. — *Bone v. Sparrow*, 11 La. Ann. 185.

*Maine*. — *Willis v. Roberts*, 48 Me. 257.

*Maryland*. — *Bond v. Conway*, 11 Md. 512.

*Massachusetts*. — *Hayward v. Hayward*, 20 Pick. (Mass.) 520; *Daniels v. Richardson*, 22 Pick. (Mass.) 565; *Legg v. Legg*, 8 Mass. 99; *Howes v. Bigelow*, 13 Mass. 384; *Stanwood v. Stanwood*, 17 Mass. 57.

*Mississippi*. — *Harper v. Archer*, 8 Smed. & M. (Miss.) 229.

*Missouri*. — *Croft v. Bolton*, 31 Mo. 355.

*New Hampshire*. — *Parsons v. Parsons*, 9 N. H. 321, 32 Am. Dec. 362; *Wheeler v. Moore*, 13 N. H. 481.

*New Jersey*. — *Snowhill v. Snowhill*, 2 N. J. Eq. 30; *Dare v. Allen*, 2 N. J. Eq. 415.

*New York*. — *Hunter v. Halett*, 1 Edw. (N. Y.) 388; *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 196; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; *Searing v. Searing*, 9 Paige (N. Y.) 283.

*North Carolina*. — *Poindexter v. Blackburn*, 1 Ired. Eq. (36 N. Car.) 286; *Rogers v. Bumpass*, 4 Ired. Eq. (39 N. Car.) 385; *Revel v. Revel*, 2 Dev. & B. L. (19 N. Car.) 272; *Weeks v. Weeks*, 5 Ired. Eq. (40 N. Car.) 111, 47 Am. Dec. 358; *Arrington v. Yarbrough*, 1 Jones

Eq. (54 N. Car.) 72; *Hairston v. Fairston*, 2 Jones Eq. (55 N. Car.) 123.

*Ohio*. — *Walden v. Chambers*, 7 Ohio St. 30; *Dixon v. Dixon*, 18 Ohio 113.

*Pennsylvania*. — *Hartman v. Dowdel*, 1 Rawle (Pa.) 279; *McVaugh v. McVaugh*, 10 Phila. (Pa.) 457, 30 Leg. Int. (Pa.) 217; *Moyer's Appeal*, 77 Pa. St. 482.

*Rhode Island*. — *Wilder v. Aldrich*, 2 R. I. 518.

*South Carolina*. — *Boozier v. Addison*, 2 Rich. Eq. (S. Car.) 273, 46 Am. Dec. 43; *Tuttle v. Rembert*, 2 Strobb. L. (S. Car.) 270; *Pitts v. Wicker*, 3 Hill L. (S. Car.) 197.

*Virginia*. — *Wallace v. Taliaferro*, 2 Call (Va.) 447; *Harcum v. Hudnall*, 14 Gratt. (Va.) 364.

**Rule Applicable to Chose Due to Husband and Wife Jointly.** — *Coppin v. —*, 2 P. Wms. 497; *Lodge v. Hamilton*, 2 S. & R. (Pa.) 493.

**Rule Applicable to Legacy or Distributive Share** — *England*. — *Garforth v. Bradley*, 2 Ves. 675; *Carr v. Taylor*, 10 Ves. Jr. 578.

*United States*. — *Gallego v. Chevallie*, 2 Brock. (U. S.) 285.

*Alabama*. — *Hair v. Avery*, 28 Ala. 272.

*Georgia*. — *Hooper v. Howell*, 50 Ga. 165.

*Kentucky*. — *Dunn v. Lancaster*, 4 Bush (Ky.) 581, 96 Am. Dec. 317.

*Massachusetts*. — *Howard v. Bryant*, 9 Gray (Mass.) 240; *Hayward v. Hayward*, 20 Pick. (Mass.) 517.

*Mississippi*. — *Harper v. Archer*, 8 Smed. & M. (Miss.) 229; *Duncan v. Johnson*, 23 Miss. 130; *Kilcrease v. Shelby*, 23 Miss. 161; *Harper v. Archer*, 28 Miss. 212.

*New Hampshire*. — *Tucker v. Gordon*, 5 N. H. 564; *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 362; *Marston v. Carter*, 12 N. H. 150.

*New York*. — *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 196; *Westervelt v. Gregg*, 12 N. Y. 205, 62 Am. Dec. 160.

*North Carolina*. — *Revel v. Revel*, 2 Dev. & B. L. (19 N. Car.) 272; *Hardie v. Cotton*, 1 Ired. Eq. (36 N. Car.) 61; *Poindexter v. Blackburn*, 1 Ired. Eq. (36 N. Car.) 286; *McBride v. Choate*, 2 Ired. Eq. (37 N. Car.) 610; *Rogers v. Bumpass*, 4 Ired. Eq. (39 N. Car.) 385; *Weeks v. Weeks*, 5 Ired. Eq. (40 N. Car.) 111, 47 Am. Dec. 358; *Mardree v. Mardree*, 9 Ired. L. (31 N. Car.) 295; *Arrington v. Yarbrough*, 1 Jones Eq. (54 N. Car.) 75.

*South Carolina*. — *Harleston v. Lynch*, 1 Desaus. (S. Car.) 244; *Ex p. Elms*, 3 Desaus. (S. Car.) 155; *Clifton v. Haig*, 4 Desaus. (S. Car.) 330; *Lewis v. Price*, 3 Rich. Eq. (S. Car.) 172.

*Tennessee*. — *Ross v. Wharton*, 10 Yerg. (Tenn.) 190.

*Compare Com. v. Manley*, 12 Pick. (Mass.) 173; *Peirce v. Thompson*, 17 Pick. (Mass.) 393.

But a legacy to the wife of certain specific chattels "which are now in her possession" has been held to vest in the husband immediately. *Sadler v. Bean*, 9 Ark. 202.

Until a decree of distribution the husband's marital rights will not attach to the wife's distributive share of an intestate's estate.



is divorced *a vinculo*,<sup>1</sup> she is entitled by survivorship to all her continuing choses in action, such as her bonds, notes, judgments, stocks, legacies, distributive shares, personal estates in remainder and reversion, as absolutely as if she had never been married. And no difference exists in this respect between choses in action accruing during the coverture and those accruing before marriage,<sup>2</sup> since a married woman, though incapable at common law of

Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Short v. Moore, 10 Vt. 446; Probate Ct. v. Niles, 32 Vt. 775. And even after a decree it must be reduced to possession before the marital rights attach. Foster v. Fifield, 20 Pick. (Mass.) 67; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 212; Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Probate Ct. v. Niles, 32 Vt. 775. Unless perhaps in a case where specific chattels have been set apart for the wife under the decree. Parks v. Cushman, 9 Vt. 320.

**Rule Applicable to Remainders, Reversionary Interests, etc.**—Scawen v. Blunt, 7 Ves. Jr. 296; Cox v. Morrow, 14 Ark. 617; De Vaughn v. McLeroy, 82 Ga. 709; Holloway v. Conner, 3 B. Mon. (Ky.) 395; Whitbie v. Frazier, 1 Hayw. (2 N. Car.) 275; Kornegay v. Carroway, 2 Dev. Eq. (17 N. Car.) 406; Weeks v. Weeks, 5 Ired. Eq. (40 N. Car.) 120, 47 Am. Dec. 358; Whitehurst v. Harker, 2 Ired. Eq. (37 N. Car.) 292; Cabeen v. Gordon, 1 Hill Eq. (S. Car.) 51; Goodwin v. Moore, 4 Humph. (Tenn.) 221; Hall v. M'Lain, 11 Humph. (Tenn.) 425. See also Jenkins v. Headley, (Ky. 1897) 40 S. W. Rep. 460; Hearne v. Kevan, 2 Ired. Eq. (37 N. Car.) 34; McBride v. Choate, 2 Ired. Eq. (37 N. Car.) 610; Hynes v. Lewis, Tayl. (1 N. Car.) 44; Hardie v. Cotton, 1 Ired. Eq. (36 N. Car.) 64. But in *Alabama* it has been held that where a remainder or reversionary estate in personality has vested in the wife under a will, and by the assent of the executor it has become a legal interest, and the possession is with the person in whom the precedent estate is vested and no adverse possession is shown, such remainder or reversionary interest passes to the husband by virtue of his marital rights at common law. Walker v. Walker, 41 Ala. 357. See also Hemphill v. Moody, 64 Ala. 477.

**Rule Applicable to Shares of Stock.**—Nicholson v. Drury Bldgs. Estate Co., 7 Ch. D. 55; Shuttleworth v. Greaves, 2 Jur. 957; Gannard v. Eslava, 20 Ala. 732; Mason v. Fuller, 36 Conn. 160; Winslow v. Crocker, 17 Me. 29; Stanwood v. Stanwood, 17 Mass. 59; Wells v. Tyler, 25 N. H. 340; Matter of Reciprocity Bank, 22 N. Y. 15; Slaymaker v. Gettysburg Bank, 10 Pa. St. 373; Arnold v. Ruggles, 1 R. I. 165; Wilder v. Aldrich, 2 R. I. 518; Rice v. McReynolds, 8 Lea (Tenn.) 36.

**Rule Applicable to Income from Wife's Chose in Action.**—Wilkinson v. Charlesworth, 11 Jur. 644.

**Rule Applicable to Money Due on a Bond.**—Brown v. Bokee, 53 Md. 155; Pickett v. Everett, 11 Mo. 568; Walker v. Walker, 25 Mo. 377; Slaymaker v. Gettysburg Bank, 10 Pa. St. 373. See also Scawen v. Blunt, 7 Ves. Jr. 294; Hutchins v. State Bank, 12 Met. (Mass.) 421.

**Rule Applicable to Promissory Notes.**—Richards v. Richards, 2 B. & Ad. 447, 22 E. C. L.

119; Gaters v. Madeley, 6 M. & W. 423; Hart v. Stephens, 6 Q. B. 937, 51 E. C. L. 937; Scarpellini v. Atcheson, 7 Q. B. 875, 53 E. C. L. 875; Sherrington v. Yates, 12 M. & W. 855; Lenderman v. Talley, 1 Houst. (Del.) 523.

**1. Effect of Divorce a Vinculo on Choses in Action Not Reduced to Possession.**—Wilkinson v. Gibson, L. R. 4 Eq. 162; Prole v. Soady, L. R. 3 Ch. 220; Wells v. Malbon, 31 Beav. 48; Arrington v. Arrington, 102 N. Car. 491; Wintercast v. Smith, 4 Rawle (Pa.) 177. See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 172.

**Effect of Divorce a Mensa.**—Under statute in *England* it has been held that by a decree of judicial separation the wife's choses in action not reduced into possession at the date of the decree become her absolute property as if she were a *feme sole*. Johnson v. Lander, L. R. 7 Eq. 228. See also *In re Coward*, L. R. 20 Eq. 179.

**Under Statute in Massachusetts** a similar decision has been made. Page v. Estes, 19 Pick. (Mass.) 269.

**Effect of Separation of Husband and Wife.**—The mere fact that a husband and wife are living apart cannot, at common law, deprive the husband of his right to bring the wife's choses in action under his control. Thrasher v. Ingram, 32 Ala. 655.

Nor will his adultery and desertion work any forfeiture of his rights. Vreeland v. Ryno, 26 N. J. Eq. 160.

But under statute in *Pennsylvania* it has been held that the abandonment of the wife will deprive the husband of the power to control her choses in action. Philippi v. Com., 18 Pa. St. 116.

**2. Survivorship of Choses in Action Accruing During Coverture.**—Fleet v. Perrins, L. R. 3 Q. B. 536, L. R. 4 Q. B. 506; Dalton v. Midland Counties R. Co., 13 C. B. 474, 76 E. C. L. 474; Richards v. Richards, 2 B. & Ad. 447, 22 E. C. L. 119; Garforth v. Bradley, 2 Ves. 676; Elliot v. Collier, 1 Wils. C. Pl. 168; Lenderman v. Talley, 1 Houst. (Del.) 523; Hayward v. Hayward, 20 Pick. (Mass.) 525; Kornegay v. Carroway, 2 Dev. Eq. (17 N. Car.) 405; Buckingham v. Carter, 2 Disney (Ohio) 43.

**In Connecticut** it has been held that at the common law the wife's chose in action accruing to her during the coverture vests absolutely in the husband without any reduction into possession. Fitch v. Ayer, 2 Conn. 143; Griswold v. Penniman, 2 Conn. 564; Cornwall v. Hoyt, 7 Conn. 426; Beach v. Norton, 8 Conn. 71; Whittlesey v. McMahan, 10 Conn. 137, 26 Am. Dec. 382; Morgan v. Thames Bank, 14 Conn. 99; Fourth Ecclesiastical Soc. v. Mather, 15 Conn. 598; Baldwin v. Carter, 17 Conn. 208, 42 Am. Dec. 735; Winton v. Barnum, 19 Conn. 171.

But it seems to have been the common-law rule in that state that as to choses in action

making a contract, is capable of having a chose in action conferred on her with her husband's consent.<sup>1</sup>

cc. RIGHTS OF HUSBAND AS SURVIVOR. — If the husband survives the wife, and she leaves choses in action which he has not reduced into possession, he cannot recover them in his own right before taking out letters of administration to the wife,<sup>2</sup> but he is entitled to recover and enjoy them as his own by acting as her administrator.<sup>3</sup> And the right to act as her administrator has been held to be a right at common law *jure mariti*.<sup>4</sup> By other authorities it has been held that the right was conferred by 31 Edw. III., stat. 1, c. 11, which directs that administration be granted to the next and most lawful of kin;<sup>5</sup> and by other authorities still, that it is derived from 29 Car. II., c. 3, relating to distributions.<sup>6</sup> It has been held that if the husband who has survived his wife dies before he has recovered the choses in action, his representatives are entitled to them.<sup>7</sup> But choses in action not reduced into possession during coverture will be assets in the husband's hands liable for the wife's debts *dum sola*.<sup>8</sup>

dd. WHAT AMOUNTS TO REDUCTION INTO POSSESSION — (aa) *In General*. — Any lawful exercise of ownership by the husband over his wife's chose in action, by which he appropriates it to his sole use, is a reduction into possession such as bars

belonging to the wife before marriage, if the husband did not reduce them into possession during coverture, they survived to the wife if she outlived him, or to her administrator if she did not. *Griswold v. Penniman*, 2 Conn. 564. See also *Burr v. Sherwood*, 3 Bradf. (N. Y.) 90, declaring the rule in Connecticut.

1. *Dalton v. Midland Counties R. Co.*, 13 C. B. 474, 76 E. C. L. 474; *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Phelps v. Phelps*, 20 Pick. (Mass.) 559. See also *Bidgood v. Way*, 2 W. Bl. 1236; *Abbot v. Blofield*, Cro. Jac. 644.

2. *Husband Surviving Cannot Recover Wife's Choses in Action in His Own Right*. — *Grosvenor v. Lane*, 2 Atk. 180; *Bourne v. Crofton*, 2 Molloy 318.

3. *Surviving Husband May Recover Wife's Choses in Action as Administrator*. — 2 Kent's Com. 135; *Duncan v. Prentice*, 4 Met. (Ky.) 216; *Thomas v. Wood*, 1 Md. Ch. 296; *Lowry v. Houston*, 3 How. (Miss.) 397; *Westervelt v. Gregg*, 12 N. Y. 206, 62 Am. Dec. 160; *Bunch v. Hurst*, 3 Desaus. (S. Car.) 289; *Ex p. Elms*, 3 Desaus. (S. Car.) 160. See also *Wiggins v. Blount*, 33 Ga. 409, and the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 768.

*Remainders or Reversionary Interests*. — And this rule has been applied to remainders or reversionary interests in personalty as well as to interests immediately reducible into possession. *Pinkard v. Smith*, Litt. Sel. Cas. (Ky.) 336; *Banks v. Marksberry*, 3 Litt. (Ky.) 281; *Ewing v. Handley*, 4 Litt. (Ky.) 346, 14 Am. Dec. 140; *Houck v. Camplin*, 25 Mo. 378; *Dade v. Alexander*, 1 Wash. (Va.) 30; *Wade v. Boxley*, 5 Leigh (Va.) 442; *Henry v. Graves*, 16 Gratt. (Va.) 244; *Drummond v. Sneed*, 2 Call (Va.) 494.

4. *Husband's Right to Act as Administrator Held to Be a Common-law Right*. — *Watt v. Watt*, 3 Ves. Jr. 244. See also *Cox v. Morrow*, 14 Ark. 614. Compare *Mayfield v. Clifton*, 3 Stew. (Ala.) 375; *Hogan v. Bell*, 4 Stew. & P. (Ala.) 310; *Johnson v. Johnson*, 33 Ala. 284; *Walker v. Walker*, 41 Ala. 353.

5. *Sand's Case*, 3 Salk. 22.

6. *Husband Administering on Wife's Choses in Action under Statute of Distributions*. — *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381; 2 Kent's Com. 136.

Under similar statutes in the *United States* the same rule has been laid down. *Whitaker v. Whitaker*, 6 Johns. (N. Y.) 112; *Wintercast v. Smith*, 4 Rawle (Pa.) 180. See also *Pickens v. Hill*, 30 Ind. 271.

But in other jurisdictions it has been held under statute that the husband does not acquire absolute title after the wife's death by administration, but only a distributive share as heir at law. *Matheney v. Guess*, 2 Hill Eq. (S. Car.) 65.

And in *Arkansas* it has been held that he is postponed to all of the next of kin in succession. *Cox v. Morrow*, 14 Ark. 603; *Vaughan v. Parr*, 20 Ark. 600; *Sorrels v. Trantham*, 48 Ark. 386.

And in *Vermont* it has been held that where the wife dies intestate and without issue, her choses in action not reduced to possession will descend to her collateral heirs to whom her realty would descend if she had any, and not to her husband. *Wilson v. Bates*, 28 Vt. 765.

A Full Discussion of this question will be found in the title SUCCESSION.

7. *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381; *Elliot v. Collier*, 3 Atk. 526; *Vreeland v. Ryno*, 26 N. J. Eq. 160; *Gilman v. McArdle*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 414. See also *Westervelt v. Gregg*, 12 N. Y. 206, 62 Am. Dec. 160.

But the husband's administrator cannot as such recover the wife's choses in action, and for that purpose administration must be taken out to the wife. However, should others acting as the wife's representatives recover her choses in action, they will take the property as trustees for the representative of the husband. *Betts v. Kimpton*, 2 B. & Ad. 273, 22 E. C. L. 71; *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381.

8. *Choses Not Reduced to Possession Before Wife's Death Liable for Her Antenuptial Debts*. — *Heard v. Stamford*, 3 P. Wms. 409.



her right thereto.<sup>1</sup> But nothing will be held to amount to a reduction into possession which does not give to the husband, for some moment of time, absolute dominion over the property without any concurrence of the wife.<sup>2</sup> The act of the husband must not only evince an intention to reduce into possession, but it must be such as to change the property in the chose in action.<sup>3</sup> No act of the wife is necessary to enable him to reduce her choses, nor can she in any manner prevent it.<sup>4</sup>

(bb) *Receiving Payment or Taking Actual Possession.* — If the husband receives payment or takes actual possession of the wife's chose in action as husband, this will, of course, amount to a reduction into possession.<sup>5</sup> But the receipt by the husband of interest on a debt due to the wife will not amount to a reduction of the debt.<sup>6</sup> Nor will a receipt of part payment of the principal be a reduction of the residue.<sup>7</sup> Nor is the mere taking possession of the evidence of a debt, as a bond, a note, or a lease, a sufficient reduction of the debt into possession.<sup>8</sup>

(cc) *Husband Taking Possession in Another Capacity* — **Intent.** — Reduction into possession by the husband so as to work a change of ownership is a question of intention to be inquired into upon all the circumstances.<sup>9</sup> The fact that the wife's choses in action have passed into the custody and possession of the husband is not a reduction into possession, when he does not receive them for the purpose of appropriating them to his own use. He must reduce them into possession as husband.<sup>10</sup>

**Presumption.** — But the receipt of the wife's choses in action is presumed to be a reduction into possession.<sup>11</sup> Still this may be explained by other evidence negating the intention to reduce into possession in such a manner as to transfer the title.<sup>12</sup>

1. **What Amounts to a Reduction into Possession in General.** — Howard v. Bryant, 9 Gray (Mass.) 239; Alexander v. Crittenden, 4 Allen (Mass.) 342; Com. v. Manley, 12 Pick. (Mass.) 173; Bridgman v. Bridgman, 138 Mass. 58.

2. Nicholson v. Drury Bldgs. Estate Co., 7 Ch. D. 55.

3. Blount v. Bestland, 5 Ves. Jr. 515; Pike v. Collins, 33 Me. 43; Brown v. Bokee, 53 Md. 163; Daniels v. Richardson, 22 Pick. (Mass.) 570; Douglass v. Miller, 3 Ohio N. P. 220, 4 Ohio Dec. 414; Pierson v. Smith, 9 Ohio St. 558.

4. **Reduction Not Dependent on Wife's Acts.** — Mardree v. Mardree, 9 Ired. L. (31 N. Car.) 295. See Thrasher v. Ingram, 32 Ala. 655.

5. **Effect of Taking Actual Possession of Chose in Action.** — Rees v. Keith, 11 Sim. 388; Johnson v. Johnson, 33 Ala. 284; McNeill v. Arnold, 17 Ark. 154; Humphries v. Harrison, 30 Ark. 79; Taggart v. Boldin, 10 Md. 104; Hart v. Leete, 104 Mo. 315; Matter of Gray, 1 Pa. St. 329; Johnston v. Johnston, 1 Grant Cas. (Pa.) 470.

**The Receipt of a Legacy** by the husband and his giving a receipt therefor in the wife's name amount to a reduction into possession. Rice v. McReynolds, 8 Lea (Tenn.) 36.

**Wrongful Possession by Husband Ineffectual.** — Moss v. Ashbrooks, 20 Ark. 128. See also Wardlaw v. Gray, 2 Hill Eq. (S. Car.) 644.

6. **Receipt of Interest Not a Reduction into Possession of Debt.** — Nash v. Nash, 2 Madd. 133; Hart v. Stephens, 6 Q. B. 937, 51 E. C. L. 937; Brown v. Bokee, 53 Md. 163. See also Burr v. Sherwood, 3 Bradf. (N. Y.) 85; Buckingham v. Carter, 2 Disney (Ohio) 41.

7. **Receipt of Part of Debt Not a Reduction of Remainder.** — Nash v. Nash, 2 Madd. 133;

Scrutton v. Pattillo, L. R. 19 Eq. 372; Brown v. Bokee, 53 Md. 163; Buckingham v. Carter, 2 Disney (Ohio) 41. See also Harper v. Archer, 28 Miss. 212.

8. **Taking Possession of Evidence of Debt Not a Reduction into Possession of Debt.** — Daniels v. Richardson, 22 Pick. (Mass.) 570; Pickett v. Everett, 11 Mo. 568; Walker v. Walker, 25 Mo. 376; Latourette v. Williams, 1 Barb. (N. Y.) 9; Wilson v. Bates, 28 Vt. 765; Barber v. Slade, 30 Vt. 191, 73 Am. Dec. 299.

9. Gochenaur's Estate, 23 Pa. St. 463; Moyer's Appeal, 77 Pa. St. 482.

10. **Taking Possession by Husband Without Purpose of Appropriation Not a Reduction into Possession.** — Gochenaur's Estate, 23 Pa. St. 463; Moyer's Appeal, 77 Pa. St. 482; Cox v. Scott, 9 Baxt. (Tenn.) 305.

**In Vermont** it has been held that to reduce the wife's property to his possession, the husband must not only take exclusive control of it, but must do some act evincing a clear intention to make the property his as against her and her rights. Barron v. Barron, 24 Vt. 375; Wilson v. Bates, 25 Vt. 765; Barber v. Slade, 30 Vt. 191, 73 Am. Dec. 299; Probate Ct. v. Niles, 32 Vt. 775; Caldwell v. Renfrew, 33 Vt. 213; Roberts v. Lund, 45 Vt. 82; White v. Waite, 47 Vt. 502; Perry v. Wheelock, 49 Vt. 63.

11. **Taking Possession by Husband Presumptively a Reduction into Possession.** — Resor v. Resor, 9 Ind. 349; Beam v. Bridgers, 108 N. Car. 276, 23 Am. St. Rep. 59; Matter of Gray, 1 Pa. St. 329; Johnston v. Johnston, 1 Grant Cas. (Pa.) 470.

12. Gochenaur's Estate, 23 Pa. St. 463; Moyer's Appeal, 77 Pa. St. 482.



**Possession as Agent, Trustee, Executor, or Administrator.** — Hence, as a general rule, possession taken by the husband as an executor or administrator,<sup>1</sup> trustee, or agent,<sup>2</sup> and not in the exercise of his marital rights, will not constitute a reduction into possession.

**Change of Character of Possession.** — But though the husband originally takes possession in another capacity than as husband, if he subsequently exercises dominion over the property inconsistent with his duties in that capacity, as where he takes possession as administrator, and, after final settlement of the estate, still retains the funds coming to the wife or mingles them with his other funds, his acts may amount to a reduction into possession.<sup>3</sup>

*(1) Assignment.* — Considerable Discussion Has Arisen in the courts as to whether an assignment by the husband of the wife's choses in action will amount to a reduction into possession so as to defeat the wife's right of survivorship.

**Choses Immediately Reducible.** — As to choses in action which are immediately reducible into possession, the prevailing rule seems to be to the effect that

**1. Husband Taking Possession as Executor or Administrator** — *England.* — Baker v. Hall, 12 Ves. Jr. 497.

*United States.* — Sowles v. Witters, 39 Fed. Rep. 407; Price v. Sessions, 3 How. (U. S.) 624, 4 How. (U. S.) 122.

*Alabama.* — Mayfield v. Clifton, 3 Stew. (Ala.) 375; Hogan v. Bell, 4 Stew. & P. (Ala.) 310.

*New Hampshire.* — Parsons v. Parsons, 9 N. H. 321.

*Pennsylvania.* — Gochenaur's Estate, 23 Pa. St. 463.

*South Carolina.* — *Ex p.* Wells, 3 Desaus. (S. Car.) 155.

*Tennessee.* — Ross v. Wharton, 10 Yerg. (Tenn.) 190.

*Vermont.* — White v. Waite, 47 Vt. 502.

*Virginia.* — Keagy v. Trout, 85 Va. 390; Wallace v. Taliaferro, 2 Call (Va.) 447.

**2. Husband Taking Possession as Agent or Trustee.** — Baker v. Hall, 12 Ves. Jr. 497; Wall v. Tomlinson, 16 Ves. Jr. 413; Hogan v. Bell, 4 Stew. & P. (Ala.) 310; Pierson v. Smith, 9 Ohio St. 558, 75 Am. Dec. 486.

**In the Absence of Any Agreement on the Part of the Husband** to refund choses in action to the wife, they become his absolute property on being reduced to possession in virtue of his marital rights. Machen v. Machen, 38 Ala. 366; Lyne v. State Bank, 5 J. J. Marsh. (Ky.) 545; Wylie v. Basil, 4 Md. Ch. 327; Fletcher v. Updike, 5 Thomp. & C. (N. Y.) 514.

**But the Husband May Repudiate All Claim as Husband** to choses in action accruing to the wife, and elect to treat them as hers, and hold or control them as her trustee, and, if such disclaimer and election are made before the title is vested in him, he will be deemed not to have reduced them into possession, and his marital rights will not attach.

*Alabama.* — Johnson v. Spaight, 14 Ala. 30; Machem v. Machem, 28 Ala. 374; Machen v. Machen, 38 Ala. 368.

*Indiana.* — Resor v. Resor, 9 Ind. 340; Fowler v. Rice, 31 Ind. 258.

*Maryland.* — Drury v. Briscoe, 42 Md. 154; State v. Reigart, 1 Gill (Md.) 27, 39 Am. Dec. 62.

*Massachusetts.* — Phelps v. Phelps, 20 Pick. (Mass.) 561; Stanwood v. Stanwood, 17 Mass. 59.

*Missouri.* — Woodford v. Stephens, 51 Mo. 443; Kidwell v. Kirkpatrick, 70 Mo. 216; Terry v. Wilson, 63 Mo. 493; Hart v. Leete, 104 Mo. 315.

*New York.* — Taggard v. Talcott, 2 Edw. (N. Y.) 628.

*North Carolina.* — Woodruff v. Bowles, 104 N. Car. 197; Beam v. Bridgers, 108 N. Car. 276, 23 Am. St. Rep. 59; Taylor v. Sikes, 108 N. Car. 724.

*Compare* Miller v. Blackburn, 14 Ind. 67.

**Election to Hold as Trustee Due to Ignorance or Mistake of Legal Rights Held Immaterial.** — Machem v. Machem, 28 Ala. 374; Lockhart v. Cameron, 29 Ala. 356; Machen v. Machen, 38 Ala. 364.

**The Disclaimer of the Husband** must be deliberate, precise, and clearly proved. Temple v. Williams, 4 Ired. Eq. (39 N. Car.) 39; Matter of Gray, 1 Pa. St. 327; Johnston v. Johnston, 31 Pa. St. 453; Wesco's Appeal, 52 Pa. St. 195.

**Declarations of Husband When Receiving Wife's Choses May Repel Presumption of Personal Acquisition.** — Matter of Gray, 1 Pa. St. 327; Gicker v. Martin, 50 Pa. St. 138; Johnston v. Johnston, 31 Pa. St. 453; Moyer's Appeal, 77 Pa. St. 485.

**Subsequent Declarations.** — And indeed it has been held that subsequent declarations of the husband are admissible as evidence of intention at the moment of taking possession to hold as trustee. Matter of Gray, 1 Pa. St. 327; Johnston v. Johnston, 31 Pa. St. 453; Moyer's Appeal, 77 Pa. St. 485.

**But After the Chose in Action Has Vested in Possession in the Husband,** no subsequent admission or agreement of the husband will operate as a disclaimer on his part. Frierson v. Frierson, 21 Ala. 555; Machen v. Machen, 38 Ala. 368; Turner v. Nye, 7 Allen (Mass.) 176; Bridgman v. Bridgman, 138 Mass. 58; Fletcher v. Undike, 5 Thomp. & C. (N. Y.) 513; Nolen's Appeal, 23 Pa. St. 37.

**3. Husband Ceasing to Hold in Fiduciary Capacity.** — Bridgman v. Bridgman, 138 Mass. 58; Dunn v. Sargent, 101 Mass. 336; Walker v. Walker, 25 Mo. 376; Mardree v. Mardree, 9 Ired. L. (31 N. Car.) 295; Pierson v. Smith, 9 Ohio St. 558, 75 Am. Dec. 486; Walden v. Chambers, 7 Ohio St. 31; Ellis v. Baldwin, 1 W. & S. (Pa.) 253; Woolper's Appeal, 2 Pa. St. 71.

equity will regard an assignment for a valuable consideration as a reduction into possession.<sup>1</sup> But the rule is otherwise where the assignment is without consideration.<sup>2</sup>

As to Choses in Action Which Are Not Presently Reducible into possession, such as remainders, reversionary interests, etc., whether vested or contingent, the rule sustained by the weight of authority is that an assignee will be in no better position than his assignor; that neither the husband alone nor the husband and wife jointly have the power during the coverture to assign the wife's expectant interest so as to defeat the wife's right when it falls in, should the husband be then dead.<sup>3</sup>

**1. Effect of Assignment of Choses in Action Presently Reducible into Possession.** — *United States.* — Cassell *v.* Carroll, 11 Wheat. (U. S.) 136.

*Arkansas.* — Cox *v.* Morrow, 14 Ark. 617.

*Connecticut.* — Tuttle *v.* Fowler, 22 Conn. 58.

*Kentucky.* — Lynn *v.* Bradley, 1 Met. (Ky.) 235; Thomas *v.* Kelsoe, 7 T. B. Mon. (Ky.) 523; Wright *v.* Arnold, 14 B. Mon. (Ky.) 513.

*Mississippi.* — Lowry *v.* Houston, 3 How. (Miss.) 394.

*New Hampshire.* — Pierce *v.* Dustin, 24 N. H. 417; Tucker *v.* Gordon, 5 N. H. 564; Wells *v.* Tyler, 25 N. H. 342.

*New York.* — Schuyler *v.* Hoyle, 5 Johns. Ch. (N. Y.) 196; Westervelt *v.* Gregg, 12 N. Y. 205, 62 Am. Dec. 160.

*Pennsylvania.* — Tritt *v.* Colwell, 31 Pa. St. 228.

*South Carolina.* — Forrest *v.* Warrington, 2 Desaus. (S. Car.) 254. See also Terry *v.* Brunson, 1 Rich. Eq. (S. Car.) 78.

*Texas.* — Hill *v.* Townsend, 24 Tex. 575.

*Virginia.* — Browning *v.* Headley, 2 Rob. (Va.) 340, 40 Am. Dec. 755. See also Taliaferro *v.* Taliaferro, 4 Call (Va.) 93.

As to the Husband's Power of Transferring the Wife's Notes, by indorsement, see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 171.

Where Assignee Procures Possession of Chattel Assigned by Husband Held Reduction to Possession. — Abington *v.* Travis, 15 Mo. 240. See also Widgery *v.* Tepper, 5 Ch. D. 516, 7 Ch. D. 423; Tidd *v.* Lister, 3 De G. M. & G. 857.

Reduction to Possession by Assignee Held Essential in the absence of reduction by the husband: George *v.* Goldsby, 23 Ala. 326; McCaa *v.* Woolf, 42 Ala. 392; Barnes *v.* Pearson, 6 Ired. Eq. (41 N. Car.) 482; Bryan *v.* Spruill, 4 Jones Eq. (57 N. Car.) 27; O'Connor *v.* Harris, 81 N. Car. 282; Arrington *v.* Yarbrough, 1 Jones Eq. (54 N. Car.) 72.

In *England* the rule as laid down in the text seems at one time to have obtained. Honner *v.* Morton, 3 Russ. 65; Salisbury *v.* Newton, 1 Eden 370; Carteret *v.* Paschal, 3 P. Wms. 197; Johnson *v.* Johnson, 1 Jac. & W. 456; Bates *v.* Dandy, 2 Atk. 207; Michelmores *v.* Mudge, 6 Jur. N. S. 770; Hutchings *v.* Smith, 9 Sim. 137; Ellison *v.* Elwin, 13 Sim. 316; Ashby *v.* Ashby, 1 Coll. Ch. Cas. 553. See also Fitzgerald *v.* Fitzgerald, 14 Jur. 485.

Effect of Sale of Land under Fines and Recoveries Act on Wife's Right to Outstanding Purchase Money. — See Tennent *v.* Welch, 37 Ch. D. 622.

**2. Assignment Without Valuable Consideration Inoperative as Reduction into Possession.** — Mitford *v.* Mitford, 9 Ves. Jr. 87; Johnson *v.*

Johnson, 1 Jac. & W. 456; Bates *v.* Dandy, 2 Atk. 207; Jewson *v.* Moulson, 2 Atk. 417; Burnett *v.* Kinnaston, 2 Vern. 401; Schuyler *v.* Hoyle, 5 Johns. Ch. (N. Y.) 209; Westervelt *v.* Gregg, 12 N. Y. 205, 62 Am. Dec. 160; Hartman *v.* Dowdel, 1 Rawle (Pa.) 279; Webb's Appeal, 21 Pa. St. 248; Smilie's Estate, 22 Pa. St. 130; Tritt *v.* Colwell, 31 Pa. St. 228. See also Grebill's Appeal, 87 Pa. St. 108.

**Second Assignee for Value Not Affected by Fact that Original Assignment Was Without Value When Without Means of Knowledge of Such Fact.** — McConnell *v.* Wenrich, 16 Pa. St. 365. See also Mott *v.* Clark, 9 Pa. St. 405, 49 Am. Dec. 566.

**Assignment in Insolvency or Bankruptcy.** — See the title INSOLVENCY AND BANKRUPTCY.

**3. Effect of Assignment of Wife's Reversionary Interests, etc.** — *England.* — Mitford *v.* Mitford, 9 Ves. Jr. 87; Purdew *v.* Jackson, 1 Russ. 70; Honner *v.* Morton, 3 Russ. 68; Hornsby *v.* Lee, 2 Madd. 16; Box *v.* Box, 6 Ir. Eq. 174.

*Kentucky.* — Lynn *v.* Bradley, 1 Met. (Ky.) 234; Thomas *v.* Kennedy, 4 B. Mon. (Ky.) 235; Hord *v.* Hord, 5 B. Mon. (Ky.) 81; Wright *v.* Arnold, 14 B. Mon. (Ky.) 513.

*Mississippi.* — Sale *v.* Saunders, 24 Miss. 24, 57 Am. Dec. 157.

*South Carolina.* — Matheney *v.* Guess, 2 Hill Eq. (S. Car.) 67; Terry *v.* Brunson, 1 Rich. Eq. (S. Car.) 78; Reese *v.* Holmes, 5 Rich. Eq. (S. Car.) 531; Duke *v.* Palmer, 10 Rich. Eq. (S. Car.) 387.

*Tennessee.* — Crittenden *v.* Posey, 1 Head (Tenn.) 315; Caplinger *v.* Sullivan, 2 Humph. (Tenn.) 548, 37 Am. Dec. 575; Bugg *v.* Franklin, 4 Sneed (Tenn.) 142.

*Virginia.* — Moore *v.* Thornton, 7 Gratt. (Va.) 99; Henry *v.* Graves, 16 Gratt. (Va.) 248, criticising dictum in Upshaw *v.* Upshaw, 2 Hen. & M. (Va.) 381.

Compare Bates *v.* Dandy, 2 Atk. 207; Hawkyns *v.* Obyn, 2 Atk. 549; Chandos *v.* Talbot, 2 P. Wms. 601; Meriwether *v.* Booker, 5 Litt. (Ky.) 257.

**Wife's Joinder in Assignment Does Not Affect the Rule.** — Honner *v.* Morton, 3 Russ. 65; Robinson *v.* Wheelwright, 6 De G. M. & G. 535; Stiffe *v.* Everitt, 1 Myl. & C. 37; Whittle *v.* Henning, 2 Phil. 731; Pickard *v.* Roberts, 3 Madd. 384; Box *v.* Box, Drury 42.

**Purchase by Husband of Preceding Life Estate Does Not Alter the Rule.** — Caplinger *v.* Sullivan, 2 Humph. (Tenn.) 548, 37 Am. Dec. 575. See also Crittenden *v.* Posey, 1 Head (Tenn.) 311; Moore *v.* Thornton, 7 Gratt. (Va.) 99.

**Assignment Held Good Where Husband or Assignee Gets Possession upon Expiration of Life Estate.** — Bugg *v.* Franklin, 4 Sneed (Tenn.)



And in England the Doctrine Has Been Extended so that where a husband makes an assignment for valuable consideration of the wife's reversionary choses in action, the assignment will not take effect as a reduction into possession, though subsequently the husband comes into a position where he has the power of reducing them into possession, if he does not actually do so before his death.<sup>1</sup>

But This Doctrine Has Been Repudiated by some of the authorities in the *United States*, and it has been held that where the husband assigns the wife's expectant interest during the coverture, if the husband survives until the right falls in, and then is capable of reducing it into possession, his previous assignment will operate on his actual situation, and the property will be transferred so as to defeat the wife's right of survivorship.<sup>2</sup>

(*cc*) *Pledge or Mortgage*. — The mere pledge by the husband of a chose in action, as for instance the giving to another, as a security for a temporary loan, a note given to the wife before marriage, will not amount to a reduction into possession so as to defeat the wife's right by survivorship.<sup>3</sup> And in *England* it has been held that an assignment of the wife's choses in action by way of mortgage will not amount to a reduction into possession.<sup>4</sup> But in some of the *United States* a distinction has been made in this respect between a mere pledge and a mortgage.<sup>5</sup>

(*ff*) *Release*. — Where a present debt is owed to the wife, the husband may, for a valuable consideration, make a valid release of the obligation so as to preclude any claim on the part of his wife after his death.<sup>6</sup> But the husband cannot release a debt due to the wife in respect to which there is no existing right of action.<sup>7</sup> *A fortiori*, where the wife has a right or duty which by no

129. See also *Caplinger v. Sullivan*, 2 Humph. (Tenn.) 548, 37 Am. Dec. 575; *Scobey v. Waters*, 10 Lea (Tenn.) 551; *De Vaughn v. McLeroy*, 82 Ga. 702.

**Pennsylvania Rule — Assignment by Husband Operative as Reduction.** — *Siter's Case*, 4 Rawle (Pa.) 483; *Smilie's Estate*, 22 Pa. St. 130; *Webb's Appeal*, 21 Pa. St. 248; *Woelper's Appeal*, 2 Pa. St. 71.

In *North Carolina* it has been held that a bequest of a chattel to A for life, and after A's death to B upon the assent of the executor, vests the legal interest of the remainder in B, and if B is a married woman, such legal estate may be sold by her husband, and the assignment will be valid, though he may die leaving his wife surviving him before the expiration of the life estate. *Howell v. Howell*, 3 Ired. Eq. (38 N. Car.) 522.

1. *Burnett v. Kinaston*, Freem. Ch. 241; *Ellison v. Elwin*, 13 Sim. 316. Compare *Honner v. Morton*, 3 Russ. 65; *Ashby v. Ashby*, 1 Coll. Ch. Cas. 553.

2. *Burnett v. Roberts*, 4 Dev. L. (15 N. Car.) 81; *Duke v. Palmer*, 10 Rich. Eq. (S. Car.) 380; *Browning v. Headley*, 2 Rob. (Va.) 340, 40 Am. Dec. 755. See also *Lynn v. Bradley*, 1 Met. (Ky.) 235.

3. **Mere Pledge of Chose in Action Not a Reduction into Possession.** — *Brown v. Bokee*, 53 Md. 163; *Latourette v. Williams*, 1 Barb. (N. Y.) 9; *Webb's Appeal*, 21 Pa. St. 248; *Tritt v. Colwell*, 31 Pa. St. 228.

4. **Mortgage of Chose in Action Not a Reduction into Possession — English Rule.** — *Prole v. Soady*, L. R. 3 Ch. 220; *Hutchings v. Smith*, 9 Sim. 137; *Michelmores v. Mudge*, 6 Jur. N. S. 770. See also *Widgery v. Tepper*, 5 Ch. D. 524.

5. **Mortgage of Chose in Action Held to Be a**

**Reduction into Possession.** — See *Latourette v. Williams*, 1 Barb. (N. Y.) 9; *Tritt v. Colwell*, 31 Pa. St. 228. Compare *Hartman v. Dowdel*, 1 Rawle (Pa.) 279.

6. **Release of Present Debt a Reduction into Possession.** — *Rogers v. Acaster*, 14 Beav. 445; *Jacks v. Adair*, 31 Ark. 616; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 582; *Weems v. Weems*, 19 Md. 344; *Com. v. Manley*, 12 Pick. (Mass.) 175. See also *Krumbaar v. Burt*, 2 Wash. (U. S.) 409. Compare *Salkeld v. Vernon*, 1 Eden 64.

**Costs Recovered by Wife.** — In *Chamberlain v. Hewitson*, 1 Ld. Raym. 73, it was held that if a *feme covert* sues another woman for incompetency with her husband and obtains a decree with costs, the husband may release them.

**Release After Divorce a Mensa Valid.** — *Stephens v. Totty*, Cro. Eliz. 908.

**Maintenance Allowed by Court for Support of Bastard Child of Woman While Sole May Not Be Released by Husband.** — *Philippi v. Com.*, 18 Pa. St. 116.

**Relinquishment of Interest Derived Through Wife Not a Surrender of Independent Claim.** — But a relinquishment by the husband to a coheir of the distributive share of the wife to lots belonging to the estate of her deceased father is no bar to the husband's subjecting the same lots to any just demands which he may have against the estate of the deceased. *Morton v. Massie*, 3 Mo. 482.

7. **Effect of Release of Chose in Action Not Due.** — *Rogers v. Acaster*, 14 Beav. 445; *Kemp v. Kelsey*, 2 Eq. Cas. Abr. 267, par. 18; *Needles v. Needles*, 7 Ohio St. 441, 70 Am. Dec. 85. See also *Bush v. Dalway*, 1 Ves. 19; *Medcalf v. Ives*, 1 Atk. 63. Compare *Anonymous*, 2 Rolle 141, *Green v. Acton*, 1 Salk. 146.

**Wife's Annuity.** — In *Hore v. Becher*, 12 Sim.



possibility can accrue to her during the coverture, such right is not releasable by the husband.<sup>1</sup>

(c) *Substitution*. — Choses in action belonging to the wife may be reduced to possession by the husband by substituting other securities taken in his own name.<sup>2</sup> But the substitution of a security in the name of the wife, or of himself and wife, will not have this effect.<sup>3</sup> Thus a transfer of shares of stock into the names of himself and wife,<sup>4</sup> or into the name of the wife alone,<sup>5</sup> will not amount to a reduction.

(h) *Judgment or Decree*. — With respect to a decree, judgment, order, or award in favor of the husband as to money to which he is entitled in right of his wife, it seems to be a settled rule that if he sues alone and recovers, the property vests in him by the recovery and is so changed as to take away the right of survivorship of the wife.<sup>6</sup> But when suit is brought in the joint

465, it was held that where a *feme sole*, entitled to an annuity secured by bond, married, and her husband executed a release of the annuity and died before the expiration of the annuity, leaving the wife surviving, the release operated as to the unexpired portion of the annuity so as to bind the wife. See also *Pigott v. Pigott*, L. R. 4 Eq. 558. But see *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83; *Stiffe v. Everitt*, 1 Myl. & C. 41; *Thompson v. Butler*, Moo. 522.

1. *Belcher v. Hudson*, Cro. Jac. 222. See also *Gage v. Acton*, 1 Salk. 326.

2. *Reduction into Possession by Substitution*. — *Winslow v. Crocker*, 17 Me. 29; *Dixon v. Dixon*, 18 Ohio 113. See also *Stewart's Appeal*, 3 W. & S. (Pa.) 476; *Yerby v. Lynch*, 3 Gratt. (Va.) 439.

*Acceptance of Conveyance of Lands*. — A legacy to a woman before marriage is reduced to possession by her husband by his receiving a quitclaim deed from the testator's residuary devisee, upon condition that he should pay all legacies which such devisee was bound to pay, of which this was one. *Howard v. Bryant*, 9 Gray (Mass.) 239.

*A Transfer of Bank Stock in the Name of the Husband*, the wife assenting to the transfer by signing it, has been held to amount to a reduction into possession so as to defeat the wife's right by survivorship. *Rice v. McReynolds*, 8 Lea (Tenn.) 36. See also *Cummings v. Cummings*, 143 Mass. 340.

3. *Substitution of Other Security in Name of Wife or of Wife and Husband*. — *Atchison v. Dixon*, L. R. 10 Eq. 589; *Shuttleworth v. Greaves*, 2 Jur. 957; *Nicholson v. Drury Bldgs. Estate Co.*, 7 Ch. D. 55; *Mason v. Fuller*, 36 Conn. 160; *Stanwood v. Stanwood*, 17 Mass. 59; *Phelps v. Phelps*, 20 Pick. (Mass.) 553; *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 373; *Wilder v. Aldrich*, 2 R. I. 518; *Arnold v. Ruggles*, 1 R. I. 165. See also *Sweeney v. Boston Five Cents Sav. Bank*, 116 Mass. 384.

*Transfer to Bank Account in Wife's Name*. — The same rule has been held to apply where a legacy to which a wife was entitled under a will was paid by the executors by means of a check drawn to the order of the husband and wife, by whom it was indorsed and deposited in a bank in the wife's name. *Parker v. Lechmere*, 12 Ch. D. 256. See also *Loyd v. Pughe*, L. R. 8 Ch. 88.

But the Payment of the Wife's Legacy in Bank to the Husband's Credit is a reduction to possession. *Roche v. Roche*, 7 Ir. Eq. 436.

*Substitution of Note to Wife for Note Payable to Husband* — *Second Note Held Wife's Property*. — *Reed v. Blaisdell*, 16 N. H. 194, 41 Am. Dec. 722.

*Fund in Court Carried Over to Account of Husband and Wife*. — The carrying over of a fund in court to the joint account of the husband and wife is not a reduction into possession by the husband. *Prole v. Soady*, L. R. 3 Ch. 224.

4. *Receipt of Dividends*. — And in the case of shares of stock, the rule is the same though the husband had acted in the affairs of the company and received the dividends until his death. *Shuttleworth v. Greaves*, 2 Jur. 957.

5. *Annuities — Signing Partial Transfer*. — In *Wildman v. Wildman*, 9 Ves. Jr. 174, it was held that where a large sum in three per cent. consolidated annuities was transferred to the name of a married woman as next of kin of an intestate, this sum, upon the husband's dying without having done any act with reference to it except signing partial transfers of it by her, survived to the wife. See also *Nicholson v. Drury Bldg's Estate Co.*, 7 Ch. D. 48.

6. *Reduction into Possession by Judgment in Suit by Husband* — *England*. — *Hilliard v. Hambridge*, Allen 36; *Garforth v. Bradley*, 2 Ves. 675; *Scarpellini v. Atcheson*, 7 Q. B. 875, 53 E. C. L. 875; *Richards v. Richards*, 2 B. & Ad. 447, 22 E. C. L. 119; *Heygate v. Annesley*, 3 Bro. C. C. 362; *Oglander v. Baston*, 1 Vern. 396; *Forbes v. Phipps*, 1 Eden 503.

*New York*. — *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 210; *Westervelt v. Gregg*, 12 N. Y. 206, 62 Am. Dec. 160.

*Ohio*. — *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; *Dixon v. Dixon*, 18 Ohio 113.

*Pennsylvania*. — *Stewart's Appeal*, 3 W. & S. (Pa.) 476.

See also *Henderson v. Guyot*, 6 Smed. & M. (Miss.) 210; *Henderson v. Laurens*, 2 Desaus. (S. Car.) 170. *Compare Bond v. Simmons*, 3 Atk. 20; *Packer v. Wyndham*, Prec. Ch. 412.

Under Statute in Ohio it has been held that the fact that a judgment had been obtained in the name of the husband is not conclusive evidence of a reduction to possession by the husband, and that the presumption arising therefrom may be rebutted by proof that the action was prosecuted at the instance of the wife and for her sole benefit, the name of the husband having been used merely as that of trustee holding the legal title for the benefit of his wife, without any intention on his part to appropriate the chose in action to his own use.

names of the husband and wife, the judgment or decree will not *sua vi* reduce the chose to possession.<sup>1</sup>

(ii) *Testamentary Disposition*. — It has been held that where the husband during his lifetime never claimed his wife's money as his own, the assertion of title to it by a bequest in his will does not make it a part of his estate which he could transfer to another after his wife's death.<sup>2</sup>

ee. BY WHOM REDUCTION MAY BE MADE — (aa) *In General*. — In some jurisdictions the right of the husband to reduce the choses in action of the wife into possession is personal and optional, and hence it has been held that the right cannot be exercised by a guardian appointed over him as an insane person.<sup>3</sup> But this strict rule is not observed in other jurisdictions. Thus it has been held that the right may be exercised by the guardian of an infant husband.<sup>4</sup>

(bb) *Wife*. — As a general rule, at common law, the possession of personal property reduced to possession by the wife in her own right is regarded as the possession of the husband.<sup>5</sup> But it has been held that the reduction of a chose into possession by the wife does not *ipso facto* make it the property of the husband, and the circumstances may be such as to exclude the idea of any assertion of right on the part of the husband.<sup>6</sup>

(cc) *Agent or Trustee*. — A receipt by the agent<sup>7</sup> or trustee<sup>8</sup> of the husband or

Pierson v. Smith, 9 Ohio St. 554, 75 Am. Dec. 486.

**Arbitration and Award**. — An award is a sort of judgment, and a sum of money awarded to the husband to which he is entitled in the right of his wife will vest the property in him and it will go to his executor instead of surviving to the wife. Oglander v. Baston, 1 Vern. 396. But an unfinished compromise will not have this effect. Macaulay v. Philips, 4 Ves. Jr. 15.

**1. Judgment in Suit by Husband and Wife Not of Itself a Reduction into Possession**. — Oglander v. Baston, 1 Vern. 396; Sherrington v. Yates, 12 M. & W. 855; Macaulay v. Philips, 4 Ves. Jr. 15; Adams v. Lavender, 1 M'Clel. & Y. 41; Mason v. McNeill, 23 Ala. 212; Pike v. Collins, 33 Me. 43; Knight v. Brawner, 14 Md. 1; Searing v. Searing, 9 Paige (N. Y.) 283; M'Dowl v. Charles, 6 Johns. Ch. (N. Y.) 132. See also Nanny v. Martin, 1 Ch. Cas. 27; McNeill v. Arnold, 17 Ark. 154; Bennett v. Dillingham, 2 Dana (Ky.) 437; Short v. Moore, 10 Vt. 446; Perry v. Wheelock, 49 Vt. 63.

**Effect of Replevin Bond Issued in Discharge of Judgment**. — In Weagle v. Hensley, 5 J. J. Marsh. (Ky.) 379, it was held that when the original judgment for the wife's choses in action would survive to the wife, a replevin bond executed in discharge of it survives to her, it being in effect a new judgment in favor of husband and wife.

**Obtaining Possession After Judgment**. — In Alexander v. Crittenden, 4 Allen (Mass.) 342, it was held that a judgment in an action in the name of the husband and wife for a legacy given to the wife by her late father, and the actual payment thereof by the executor, will reduce the legacy to the possession of the husband and make it absolutely his property.

**Where the Husband and Wife Brought an Action for Replevin for the slaves of the wife, and they were taken under the writ and delivered by the sheriff to the husband, this was held such a reduction into possession by the husband as, for the purposes of the suit, would**

perfect his title to the slaves, in the event of the wife's death after the seizure and delivery, and before judgment. McNeill v. Arnold, 17 Ark. 154.

**2. Grebill's Appeal**, 87 Pa. St. 105. Compare Dunn v. Sargent, 101 Mass. 336.

**3. Choses in Action Held Not Reducible by Guardian of Insane Husband**. — Andover v. Merrimack County, 37 N. H. 438.

But in Matter of Jenkins, 5 Russ. 187, it was held that where the husband is a lunatic, payment of the wife's chose in action into court to the credit of the lunacy is a reduction into possession for the lunatic.

**4. Reduction by Guardian of Infant Husband**. — Ware v. Ware, 28 Gratt. (Va.) 670.

**5. Reduction to Possession by Wife**. — Rogers v. Bolton, 8 L. R. Ir. 69; Bell v. Bell, 37 Ala. 536, 79 Am. Dec. 73.

**Legacies or Distributive Shares**, when paid to the wife with the husband's approbation, are paid to his lawfully authorized agent and virtually to him, and become as much his as any other funds he may hold. Chase v. Palmer, 25 Me. 348.

**Payment Made to Wife Against Husband's Order**. — The wife cannot receive payment for her chose in action except as her husband's agent, and hence if the debtor has express notice not to make payment to the wife the debt will not be discharged by such payment. Thrasher v. Tuttle, 22 Me. 335.

**6. Wife's Possession Not Husband's Possession under Special Circumstances**. — Standeford v. Devol, 21 Ind. 408; Timbers v. Katz, 6 W. & S. (Pa.) 298; Cox v. Scott, 9 Baxt. (Tenn.) 305.

**7. Reduction into Possession by Agent**. — *In re Barber*, 11 Ch. D. 442; Huntley v. Griffith, Moo. 452; Turton v. Turton, 6 Md. 375; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 210; Hill v. Royce, 17 Vt. 190.

**But the Husband May Elect to treat money coming into the hands of an agent as belonging to the wife**. Hill v. Hunt, 9 Gray (Mass.) 66; Chappelle v. Olney, 1 Sawy. (U. S.) 401.

**8. Reduction by Trustee**. — Hamilton v. Mills, 29 Beav. 193. See also Burnham v. Bennett,



wife will be a reduction into possession by the husband.

(c) *Husband's Creditors*. — In some jurisdictions the choses in action of the wife, such as legacies, distributive shares, or promissory notes, are held to be liable to the claims of the husband's creditors before they have been reduced to possession by him.<sup>1</sup> The weight of authority, however, it seems, is in favor of the rule that the right of the husband to reduce the wife's choses in action into possession is personal and optional, and the creditor cannot reach them by any process without the husband's assent and before he has asserted title thereto.<sup>2</sup>

(d) *Earnings — General Rule*. — At common law the husband is entitled not only to all the personal property which the wife owns at the time of her marriage, or which is reduced to possession during coverture, but also to her services, and whatever she acquires by her skill or labor during coverture belongs to him. The husband's right in this respect is absolute.<sup>3</sup>

2 Coll. Ch. Cas. 254; Hansen v. Miller, 14 Sim. 22.

1. Jurisdictions Holding that Husband's Creditors May Exercise Right of Reduction — *Delaware*. — Johnson v. Fleetwood, 1 Harr. (Del.) 442; Babb v. Elliott, 4 Harr. (Del.) 466.

*Kentucky*. — Tobin v. Dixon, 2 Met. (Ky.) 422. Compare Kilby v. Haggin, 3 J. J. Marsh. (Ky.) 208.

*Massachusetts*. — Holbrook v. Waters, 10 Pick. (Mass.) 354; Wheeler v. Bowen, 20 Pick. (Mass.) 563; Strong v. Smith, 1 Met. (Mass.) 476; Alexander v. Crittenden, 4 Allen (Mass.) 342; Shuttlesworth v. Noyes, 8 Mass. 229.

*Michigan*. — Westbrook v. Comstock, Walk. (Mich.) 317.

*Missouri*. — Hockaday v. Sallee, 26 Mo. 219. *Virginia*. — Dold v. Geiger, 2 Gratt. (Va.) 98; Vance v. McLaughlin, 8 Gratt. (Va.) 289.

Where Husband Dies Before Judgment Wife's Right Not Defeated. — Strong v. Smith, 1 Met. (Mass.) 476; Hockaday v. Sallee, 26 Mo. 219.

2. Jurisdictions Denying to Creditors of Husband the Right of Reduction — *United States*. — Gallego v. Shavellie, 2 Brock. (U. S.) 285.

*Alabama*. — Andrews v. Jones, 10 Ala. 460; Johnson v. Spaight, 14 Ala. 27.

*Georgia*. — Sayre v. Flournoy, 3 Ga. 541; Grote v. Pace, 71 Ga. 231; De Vaughn v. McLeroy, 82 Ga. 706.

*Maryland*. — Mann v. Higgins, 7 Gill (Md.) 265. But see Peacock v. Pembroke, 4 Md. 280.

*New Hampshire*. — Wheeler v. Moore, 13 N. H. 478; Marston v. Carter, 12 N. H. 164; Poor v. Hazleton, 15 N. H. 564; Nims v. Bigelow, 45 N. H. 343; Coffin v. Morrill, 22 N. H. 355.

*Pennsylvania*. — Dennison v. Nigh, 2 Watts (Pa.) 90; Robinson v. Woelpper, 1 Whart. (Pa.) 179, 29 Am. Dec. 44; Timbers v. Katz, 6 W. & S. (Pa.) 299; Donnelly's Estate, 2 Phila. (Pa.) 51, 13 Leg. Int. (Pa.) 37; Grebill's Appeal, 87 Pa. St. 105.

*South Carolina*. — Godbold v. Bass, 12 Rich. L. (S. Car.) 202.

*Tennessee*. — Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576.

In North Carolina the rule has been laid down that the interest of the husband in a legacy or distributive share of the wife cannot be seized under an execution against the husband before he has reduced it to possession.

*Bryan v. Spruill*, 4 Jones Eq. (57 N. Car.) 28.

But in Knight v. Leak, 2 Dev. & B. L. (19 N. Car.) 133, it was held that a vested legal remainder in the wife in a slave might be sold by the sheriff under execution against the husband during the coverture and before the death of the life tenant. The court decided the rule to be that "all vested legal interests of the debtor which he himself can legally sell, in things which are themselves liable to be sold under a fi. fa., may also be so sold."

In Vermont it has been held that the interest of the husband in the personal property of the wife which she inherits during coverture, after distribution has been made, but where no possession has in fact been taken by the husband, is such that it can be reached by attachment in the hands of the administrator and applied upon the husband's debts. Parks v. Cushman, 9 Vt. 320. Compare dictum in Probate Ct. v. Niles, 32 Vt. 775.

But in Short v. Moore, 10 Vt. 446, it was held that before a decree of distribution no such right exists. To the same effect see Probate Ct. v. Niles, 32 Vt. 775.

*Estate Dependent on Contingency Which Cannot Take Place until Husband's Death*. — In Sale v. Saunders, 24 Miss. 24, 57 Am. Dec. 157, it was held that where the wife had an estate in slaves dependent on a condition which could not take place until the death of the husband, she had no interest which the husband could reduce to possession and no interest which his creditors could reach.

3. *Husband's Right to Wife's Earnings at Common Law — England*. — Cecil v. Juxon, 1 Atk. 278; Buckley v. Collier, 1 Salk. 114.

*United States*. — Seitz v. Mitchell, 94 U. S. 580; Glenn v. Johnson, 18 Wall. (U. S.) 476.

*Alabama*. — Todd v. Todd, 15 Ala. 743; McLemore v. Pinkston, 31 Ala. 267, 68 Am. Dec. 167; Shaeffer v. Sheppard, 54 Ala. 244.

*Connecticut*. — Hinman v. Parkis, 33 Conn. 188.

*Illinois*. — Hazelbaker v. Goodfellow, 64 Ill. 238; Hanchett v. Rice, 22 Ill. App. 442.

*Indiana*. — Cranor v. Winters, 75 Ind. 301.

*Iowa*. — Duncan v. Roselle, 15 Iowa 501.

*Massachusetts*. — McKavlien v. Bresslin, 8 Gray (Mass.) 177.

*Michigan*. — Glover v. Alcott, 11 Mich. 471.



If the Wife Invests the Proceeds of her earnings or makes a purchase thereof in her name, it inures to the husband's benefit and is liable for his debts.<sup>1</sup>

**Payment to Wife Without Husband's Authority.**—And if the earnings are paid to the wife without the authority and against the direction of the husband, he may nevertheless recover them.<sup>2</sup>

**Necessity for Reduction to Possession.**—Money due for the wife's services is a chose in action which, as a general rule, does not require reduction into possession for the purpose of defeating the wife's right.<sup>3</sup>

In Equity, the wife's earnings do not become the property of the wife without a clear, express, irrevocable gift or some distinct act of the husband divesting himself of them, or setting them apart to her separate use.<sup>4</sup>

Under Statute, however, in most jurisdictions at least, the right of the wife to her earnings is recognized.

A Full Discussion of the effect of separate property acts on this question and of the extent to which the wife will be entitled to her earnings thereunder will be found in another volume of this work.<sup>5</sup>

*b. OF WIFE*—(1) *In Husband's Property*—(a) **Realty.**—The wife has no interest in the husband's realty except dower, or, in some states, rights substituted in place thereof, a discussion of which will be found in another portion of this work.<sup>6</sup>

(b) **Personalty**—**Wife's Distributive Share.**—By some of the earlier authorities it has been claimed that by the common law as it stood in the earlier part of the seventeenth century, the wife was entitled at the death of the husband to a reasonable part of his personalty, that is, a third if there were children and

*Mississippi.*—Henderson *v.* Warmack, 27 Miss. 830; Apple *v.* Ganong, 47 Miss. 189.

*New Hampshire.*—Hoyt *v.* White, 46 N. H. 45.

*New Jersey.*—Skillman *v.* Skillman, 13 N. J. Eq. 403, 15 N. J. Eq. 478, 82 Am. Dec. 279; National Bank of Metropolis *v.* Sprague, 20 N. J. Eq. 13.

*New York.*—Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Reynolds *v.* Robinson, 64 N. Y. 589.

*North Carolina.*—Kee *v.* Vasser, 2 Ired. Eq. (37 N. Car.) 553, 40 Am. Dec. 442; Syme *v.* Riddle, 88 N. Car. 463.

*Pennsylvania.*—Raybold *v.* Raybold, 20 Pa. St. 308; Hallowell *v.* Horter, 35 Pa. St. 375; Bucher *v.* Ream, 68 Pa. St. 421.

*South Carolina.*—Boozer *v.* Addison, 2 Rich. Eq. (S. Car.) 273, 46 Am. Dec. 43.

*West Virginia.*—Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455.

*Wisconsin.*—Connors *v.* Connors, 4 Wis. 112; Elliott *v.* Bently, 17 Wis. 591.

**Where Husband and Wife Are Living Separate.**—This rule has been applied though the husband and wife are living separate. McKavlin *v.* Bresslin, 8 Gray (Mass.) 177. See also Glover *v.* Drury Lane, 2 Chit. 117, 18 E. C. L. 269.

**But in a Case of Desertion of the Wife** by the husband, a different rule has been announced. Starrett *v.* Wynn, 17 S. & R. (Pa.) 130, 17 Am. Dec. 654. See also Spier's Appeal, 26 Pa. St. 233.

**1. Purchase with Wife's Earnings Inures to Her Husband's Benefit**—*Illinois.*—Schwartz *v.* Saunders, 46 Ill. 18.

*Indiana.*—Yopst *v.* Yopst, 51 Ind. 61.

*Iowa.*—Duncan *v.* Roselle, 15 Iowa 501.

*Massachusetts.*—Hawkins *v.* Providence, etc., R. Co., 119 Mass. 596, 20 Am. Rep. 353.

*Mississippi.*—Henderson *v.* Warmack, 27 Miss. 830; Apple *v.* Ganong, 47 Miss. 189.

*New Jersey.*—Cramer *v.* Reford, 17 N. J. Eq. 367.

*Pennsylvania.*—Raybold *v.* Raybold, 20 Pa. St. 308; Bucher *v.* Ream, 68 Pa. St. 421.

*South Carolina.*—Bridgers *v.* Howell, 27 S. Car. 425.

*Tennessee.*—Cox *v.* Scott, 9 Baxt. (Tenn.) 305.

*Virginia.*—Campbell *v.* Bowles, 30 Gratt. (Va.) 652.

**2. Effect of Payment to Wife Without Husband's Consent.**—Skillman *v.* Skillman, 13 N. J. Eq. 406; Glover *v.* Drury Lane, 2 Chit. 117, 18 E. C. L. 269.

**3. Money Due for Wife's Services Need Not Be Reduced to Possession.**—Todd *v.* Todd, 15 Ala. 743; Hoyt *v.* White, 46 N. H. 45; Peterson *v.* Mulford, 36 N. J. L. 486.

In Boozer *v.* Addison, 2 Rich. Eq. (S. Car.) 273, 46 Am. Dec. 43, it was held that where a sealed note for money, the earnings of a school kept by her, was given to a married woman during coverture, and the husband never laid any claim to it, upon the death of the husband the note survived to the wife, even as against the creditors of the husband.

4. McLemore *v.* Pinkston, 31 Ala. 266, 68 Am. Dec. 167; Skillman *v.* Skillman, 15 N. J. Eq. 478, 82 Am. Dec. 279. For a full discussion of this question see the title SEPARATE PROPERTY (OF MARRIED WOMEN). See also the title GIFTS, vol. 14, p. 1006.

5. See the title SEPARATE PROPERTY (OF MARRIED WOMEN).

6. See the title DOWER, vol. 10, p. 122.

As to the wife's right in community property in those states where such property exists, see the title COMMUNITY PROPERTY, vol. 6, p. 293.

a half if there were none, and he could make no disposition by will so as to defeat this right.<sup>1</sup> By other authorities it was maintained that the wife's right in this respect existed only by special custom in particular places.<sup>2</sup> Whatever may be the correct opinion on this point, it seems to be admitted that subsequently, by gradual changes apart from statutes, it became the rule that the husband could by will bequeath the whole of his goods and chattels.<sup>3</sup> By statute, however, a different rule has been maintained in many jurisdictions,<sup>4</sup> it being provided in some that dower shall include interest not only in the realty but in the personalty of the deceased husband.<sup>5</sup>

**Husband's Right as Against the Wife to Dispose of Personalty During Coverture.** — It may be stated as a general rule that at common law the husband, as against every person except his creditor, has a right to dispose of his personalty in any manner he thinks proper during his lifetime, and during coverture the wife has no interest in the property except so far as the husband may be liable for her support and maintenance.<sup>6</sup>

**Fraudulent Conveyance as Barring Wife's Distributive Share.** — And even in jurisdictions where, by the common law, by custom, or by statute, the wife is entitled to a distributive share in the husband's personalty, it is conceded that the husband has the power to dispose absolutely of his personalty during his lifetime, by sale or gift, and if he reserves no right to himself, the transfer will prevail against the wife though made to defeat her claim.<sup>7</sup> But according to many authorities, if the conveyance or transfer be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share, it will be ineffectual against her.<sup>8</sup> In other jurisdictions, however, it is held that if the conveyance, whether voluntary or not, be not revocable by the grantor it is not to be considered as a will in disguise, on the ground that he reserves to himself the possession and control of the property during his life, and it will not be set aside as in fraud of the wife.<sup>9</sup>

**1. Wife's Right to Distributive Share in Husband's Personalty Held to Be Common-law Right.**

— 2 Black. Com. 493, and see the title *EQUITABLE ELECTION*, vol. II, p. 94.

**2. Wife's Right to Distributive Share by Custom.**

— Co. Litt. 176*b*, and see the title *EQUITABLE ELECTION*, vol. II, p. 94.

**3. Modern Common-law View as to Wife's Right to Distributive Share.** — 2 Black. Com. 492; Holmes v. Holmes, 3 Paige (N. Y.) 363. See also the title *EQUITABLE ELECTION*, vol. II, p. 94.

In *Maryland* this change in the common-law rule did not take place. Griffith v. Griffith, 4 Har. & M. (Md.) 101; Coomes v. Clements, 4 Har. & J. (Md.) 480; Hays v. Henry, 1 Md. Ch. 337; Dunnock v. Dunnock, 3 Md. Ch. 140.

**4. Wife's Distributive Share under Statute.**

— Dodds v. Dodds, 23 Iowa 306; Ward v. Wolf, 56 Iowa 465; Linton v. Crosby, 61 Iowa 401; *In re Lyon*, 70 Iowa 376; Pringle v. Pringle, 59 Pa. St. 284; Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211. See also the statutes of the various states.

For a further discussion of the wife's right to a distributive share of the husband's personalty, see the title *SUCCESSION*.

5. See the title *DOWER*, vol. 10, p. 156.

**6. Husband's Power of Disposition of Personalty During Coverture.** — Cranson v. Cranson, 4 Mich. 235, 66 Am. Dec. 534; Schmoltz v. Schmoltz, 116 Mich. 692; Cameron v. Cameron, 10 Smed. & M. (Miss.) 394, 48 Am. Dec. 759; Holmes v. Holmes, 3 Paige (N. Y.) 363;

Pringle v. Pringle, 59 Pa. St. 285; Lightfoot v. Colgin, 5 Munf. (Va.) 42.

**Leasehold.** — It has been held that a married man can make a valid assignment of his lease without the consent of his wife, as in case of his chattels generally. Tibbals v. Iffland, 10 Wash. 452.

7. Padfield v. Padfield, 78 Ill. 16; Dunnock v. Dunnock, 3 Md. Ch. 140.

**8. Conveyance with Reservation of Right of Dominion Held to Be Invalid.** — Fairebeard v. Bowers, 2 Vern. 202; Hall v. Hall, 2 Vern. 277; Smith v. Smith, 22 Colo. 480, 55 Am. St. Rep. 142; Hays v. Henry, 1 Md. Ch. 337; Walker v. Walker, 66 N. H. 390, 49 Am. St. Rep. 616; Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211. See also Edmundson v. Cox, 7 Vin. Abr. 203; Smith v. Fellows, 2 Atk. 62; City v. City, 2 Lev. 130; Dunnock v. Dunnock, 3 Md. Ch. 140; Padfield v. Padfield, 78 Ill. 16.

**9. Conveyance with Reservation of Right of Dominion Held to Be Valid** — *Connecticut*. — Crofut v. Layton, 68 Conn. 91.

*Iowa*. — Samson v. Samson, 67 Iowa 259.

*Michigan*. — Cranson v. Cranson, 4 Mich. 235, 66 Am. Dec. 534.

*Mississippi*. — Cameron v. Cameron, 10 Smed. & M. (Miss.) 394, 48 Am. Dec. 759.

*Pennsylvania*. — Lines v. Lines, 142 Pa. St. 166; Pringle v. Pringle, 59 Pa. St. 284; Dickerson's Appeal, 115 Pa. St. 210; Ellmaker v. Ellmaker, 4 Watts (Pa.) 91.

*Tennessee*. — Richards v. Richards, 11 Humpb. (Tenn.) 429.



(2) *In Her Own Property* — (a) *In General*. — The rights at common law of a married woman in her own property generally have already been considered incidentally in discussing the husband's rights therein.<sup>1</sup> Her rights of separate property, secured to her by the courts of equity and by the statutes of the different jurisdictions, will be treated in another portion of this work.<sup>2</sup> There remain a few specific rights, which, for the sake of convenience, will be discussed here separately.

(b) *Pin Money* — *Definition*. — Pin money is an allowance made to the wife by the husband for her personal dress, decoration, and ornament.<sup>3</sup>

*It Is Not a Gift* from the husband to the wife to be considered like money set apart for the sole and separate use of the wife during coverture, excluding the *jus mariti*, but is a sum set apart for a specific purpose, due to the wife and payable by the husband for that specific purpose only.<sup>4</sup>

*Arrears*. — The allowance being intended for the adornment of the wife and not for accumulation, the acceptance from the husband of clothes and other necessities will be a bar to any arrears of pin money during such time as she is so provided.<sup>5</sup> And generally where she cohabits with the husband she may not collect from him or his personal representative arrears for more than one year, the presumption being that she has been compensated by other allowances in lieu of her pin money.<sup>6</sup> But where she lives separate from the husband the court will decree an account as far back as the arrears go, because in this case there can be no such presumption.<sup>7</sup> And where the wife accepts for several years a sum less than the stipulated allowance, she will, nevertheless, be entitled to the arrears where it appears that the husband subsequently undertook to pay them.<sup>8</sup> Upon the wife's death her personal representative is not entitled to any arrears whatever.<sup>9</sup>

(c) *Paraphernalia*. — The term "paraphernalia," as it is known to the law in *England* and in the *United States*, generally refers to articles of wearing apparel or of personal ornament, such as jewelry suitable to the wife's condition, and which she has acquired before marriage or which has been given to her by her husband either before or after marriage.<sup>10</sup> But to constitute para-

*Paraphernalia*. — *Lightfoot v. Colgin*, 5 Munf. (Va.) 42.

See also *Holmes v. Holmes*, 3 Paige (N. Y.) 363.

*Power of Revocation Reserved but Not Exercised*. — In *Pennsylvania* this rule has been applied though a power of revocation was reserved in the deed but never exercised. *Dickerson's Appeal*, 115 Pa. St. 210; *Lines v. Lines*, 142 Pa. St. 166.

1. See *supra*, this section, *Property Rights — Of Husband*.

2. See the title SEPARATE PROPERTY (OF MARRIED WOMEN).

3. *Pin Money Defined*. — *Howell v. Howell*, 11 Beav. 55; *Howard v. Digby*, 2 Cl. & F. 654.

*Provision Made by Marriage Settlement*. — Sometimes the husband makes the arrangement for pin money by marriage settlement. *Howard v. Digby*, 2 Cl. & F. 655. And see the title MARRIAGE SETTLEMENTS.

*Profits and Savings from Housekeeping*. — The allowance is sometimes made out of the wife's profits and savings from her housekeeping. *Slanning v. Style*, 3 P. Wms. 338. Compare *Tyrell's Case*, Freem. K. B. 304; *Mews v. Mews*, 15 Beav. 529.

In *North Carolina* there is a dictum to the effect that the doctrine of "pin money" does not exist in that state. *McKinnon v. McDonald*, 4 Jones Eq. (57 N. Car.) 6, 72 Am. Dec. 574.

4. *Pin Money Distinguished from Separate Estate — In Equity*. — *Howard v. Digby*, 2 Cl. & F. 654.

5. *Acceptance of Apparel as Barring Right to Arrears of Pin Money*. — *Powell v. Hankey*, 2 P. Wms. 84; *Thomas v. Bennet*, 2 P. Wms. 341; *Fowler v. Fowler*, 3 P. Wms. 355. See also *Howard v. Digby*, 2 Cl. & F. 678.

6. *Wife Not Allowed During Cohabitation Arrears for More than One Year*. — *Aston v. Aston*, 1 Ves. 267; *Townshend v. Windham*, 2 Ves. 7; *Peacock v. Monk*, 2 Ves. 190. See also *Miller v. Williamson*, 5 Md. 236; *Ridout v. Lewis*, 1 Atk. 269.

7. *Right to Arrears of Wife Separated from Husband*. — *Aston v. Aston*, 1 Ves. 267.

8. *Right to Arrears by Agreement*. — *Ridout v. Lewis*, 1 Atk. 269.

9. *Wife's Personal Representative Not Entitled to Arrears*. — *Howard v. Digby*, 2 Cl. & F. 634. See also *Miller v. Williamson*, 5 Md. 236.

10. *Paraphernalia Defined*. — *Johnson v. Plymouth*, 2 Atk. 104; *Graham v. Londonderry*, 3 Atk. 393; *Tasker v. Tasker*, (1895) P. 4; *Howard v. Menifee*, 5 Ark. 668; *Matter of Harrall*, 31 N. J. Eq. 101; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 215, 8 Am. Rep. 543.

A Gold Watch has been held to be paraphernalia. *Howard v. Menifee*, 5 Ark. 668; *Tillexan v. Wilson*, 43 Me. 186.

But in *Vass v. Southall*, 4 Ired. L. (26 N. Car.) 301, it was held that a watch worth one



phernalia, the articles must be either wearing apparel or ornaments of the person.<sup>1</sup>

Presents by a Third Person to the wife during coverture have been held to be gifts to her separate use and not paraphernalia.<sup>2</sup>

And in the Case of Presents from the Husband to the wife, it has been held that it must appear either from the use of apt words or by inference from the facts of the case that the intention was not to make an absolute gift, but to hand over the article only for the wife's decoration so long as the husband during his lifetime chooses that she shall be so adorned, otherwise it will be regarded as a gift to her separate use.<sup>3</sup>

Family Jewels do not pass to the wife either to her separate use or as paraphernalia.<sup>4</sup>

At Common Law the wife's paraphernalia during coverture belonged to the husband, and he could dispose of them in his lifetime,<sup>5</sup> but he could not dispose of them by will,<sup>6</sup> and if the wife survived him she could claim them against heirs and legatees, and indeed against all persons except the husband's creditors.<sup>7</sup> But articles except necessary apparel<sup>8</sup> may be subjected to the husband's debts.<sup>9</sup> But if subjected by the creditors, equity gives the wife a claim of reimbursement from the personalty and real estate of the decedent.<sup>10</sup>

hundred dollars, the gift of a husband to his wife, could not be considered as among the paraphernalia of the wife, when the husband at the time of the gift was a man of limited means and at his death was found to be insolvent.

**Necessity that Ornaments Be Worn.** — In *Seymore v. Tresilian*, 3 Atk. 358, it was said that where diamond earrings did not appear ever to have been worn by the wife, they might not be part of her paraphernalia. But in *Graham v. Londonderry*, 3 Atk. 393, it was held not to be necessary to prove that the wife wore the ornaments at all times, it being sufficient if she wore them only on birthdays and other like occasions.

**Paraphernal Property under Civil Law.** — Paraphernalia at common law is to be distinguished from paraphernal property under the civil law, which exists, for instance, in *Louisiana*, and which has been discussed in the title COMMUNITY PROPERTY, vol. 6, p. 308.

1. *Burton v. Pierpoint*, 2 P. Wms. 80. See also *Matter of Harrall*, 31 N. J. Eq. 101.

2. **Presents by Stranger During Coverture Not Paraphernalia.** — *Graham v. Londonderry*, 3 Atk. 393.

3. **When Gifts from Husband to Wife Regarded as Paraphernalia.** — *Tasker v. Tasker*, (1895) P. 4; *Graham v. Londonderry*, 3 Atk. 393; *Jervoise v. Jervoise*, 17 Beav. 566.

In *Northey v. Northey*, 2 Atk. 77, it was held that a present of jewels to a wife was paraphernalia, where it appeared that the husband himself kept the jewels and only sometimes permitted his wife to wear them.

4. **Family Jewels Not Paraphernalia.** — *Jervoise v. Jervoise*, 17 Beav. 566; *Calmady v. Calmady*, 11 Vin. Abr. 181.

5. **Husband's Power to Dispose of Paraphernalia During His Lifetime — England.** — *Northey v. Northey*, 2 Atk. 77; *Marshall v. Blew*, 2 Atk. 217; *Seymore v. Tresilian*, 3 Atk. 358; *Graham v. Londonderry*, 3 Atk. 393; *Tipping v. Tipping*, 1 P. Wms. 730.

*Arkansas.* — *Howard v. Menifee*, 5 Ark. 668.

*Indiana.* — *State v. Hays*, 21 Ind. 288.

*Massachusetts.* — *Hawkins v. Providence, etc.*, R. Co., 119 Mass. 596, 20 Am. Rep. 353.

*New York.* — *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 215, 8 Am. Rep. 543; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

6. **Husband May Not Dispose of Paraphernalia by Will.** — *Northey v. Northey*, 2 Atk. 77; *Marshall v. Blew*, 2 Atk. 217; *Seymore v. Tresilian*, 3 Atk. 358; *Graham v. Londonderry*, 3 Atk. 393; *Tipping v. Tipping*, 1 P. Wms. 730; *Howard v. Menifee*, 5 Ark. 668; *State v. Hays*, 21 Ind. 288; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 215, 8 Am. Rep. 543.

7. **Wife's Rights as Survivor Against All Persons Except Husband's Creditors.** — *Graham v. Londonderry*, 3 Atk. 393; *Tipping v. Tipping*, 1 P. Wms. 730; *Howard v. Menifee*, 5 Ark. 668; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 215, 8 Am. Rep. 543.

8. **Necessary Apparel Not Liable for Husband's Debts.** — 2 Black. Com. 436; *Townshend v. Windham*, 2 Ves. 7.

9. **Rights in General of Husband's Creditors.** — *Ridout v. Plymouth*, 2 Atk. 104; *Snelson v. Corbet*, 3 Atk. 369; *Inclendon v. Northcote*, 3 Atk. 430; *Townshend v. Windham*, 2 Ves. 7; *Campion v. Cotton*, 17 Ves. Jr. 273; *Tipping v. Tipping*, 1 P. Wms. 730.

**Paraphernalia Purchased with Wife's Pin Money.** — In *Tyrell's Case*, *Freem. K. B.* 304, it was held that a widow's claim to paraphernalia must yield to the claims of her husband's creditors, though she had bought the ornaments out of her own pin money.

Under Statute in *Massachusetts* it has been held that articles of apparel and ornament of the widow are not liable for the debts of the deceased husband. *Hawkins v. Providence, etc.*, R. Co., 119 Mass. 598, 20 Am. Rep. 353.

10. **Wife's Right of Reimbursement for Paraphernalia Subjected for Husband's Debts.** — *Ridout v. Plymouth*, 2 Atk. 104; *Snelson v. Corbet*, 3 Atk. 369; *Graham v. Londonderry*, 3 Atk. 393; *Inclendon v. Northcote*, 3 Atk. 430; *Tipping v. Tipping*, 1 P. Wms. 730; *Howard*

Under Statute in New York giving to married women increased property rights, it has been held that articles constituting paraphernalia at common law become the wife's separate property.<sup>1</sup>

But in England and in Some of the United States it has been held that the separate property acts have not abolished the wife's paraphernalia, and that the husband retains the same rights to her wearing apparel and articles of ornament as at common law.<sup>2</sup>

(d) **Equity to Settlement** — *aa. ORIGIN AND NATURE OF RIGHT.* — While rights are given to the husband over the property of the wife, no provision is made at common law to secure the performance of the husband's duty to support the wife, and whatever may have been her fortune, she may, with her children, be left destitute of the means of subsistence. To remedy this defect of the common law, the courts of equity have from the earliest period exercised their power of giving to the wife the right of a provision out of her own property which is termed the equity of the wife.<sup>3</sup> It is said to be an equity grounded upon natural justice and is that kind of parental care which a court of chancery exercises for the benefit of orphans, and as the father would not have married his daughter without insistence upon some provision, so this court, which stands *in loco parentis*, will not do it.<sup>4</sup>

*bb. JURISDICTION OF CHANCERY TO ENFORCE RIGHT* — (*aa*) *In General.* — A court of chancery and no other court has jurisdiction for the purpose of enforcing the wife's equity.<sup>5</sup>

(*bb*) *When Husband Seeks Aid of Court.* — It is well settled as a general rule that the wife is entitled to an adequate settlement out of her estate for herself and children whenever the aid of the court of equity is invoked by the husband to get possession of such estate, if there has been no previous adequate provision made for her;<sup>6</sup> and a creditor<sup>7</sup> or an assignee of the husband occu-

*v. Menifee*, 5 Ark. 668; *Matter of Harrall*, 31 N. J. Eq. 101. As to the wife's right in such case to marshal assets, see the title **MARSHALING ASSETS**.

1. **Paraphernalia Held to Be Separate Property under New York Statute.** — *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 216, 8 Am. Rep. 543.

2. **Paraphernalia Held Not to Be Abolished by Statute.** — *Tasker v. Tasker*, (1895) P. 4; *Hawkins v. Providence, etc., R. Co.*, 119 Mass. 595, 20 Am. Rep. 353; *Smith v. Abair*, 87 Mich. 62.

3. **Origin of Right to Equity to a Settlement.** — *Bell v. Bell*, 1 Ga. 640; *Barron v. Barron*, 24 Vt. 390.

4. **Nature of Equity to Settlement.** — *Jewson v. Moulson*, 2 Atk. 417.

5. **Wife's Equity Enforceable Only in Courts of Equity.** — *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249.

It has been held that such equitable power does not exist in *Pennsylvania*. *Yohe v. Barnett*, 1 Binn. (Pa.) 364. But in *Rees v. Waters*, 9 Watts (Pa.) 94, this decision was criticised, and it was said that while it is true that the courts in that state cannot afford specific relief to the wife in the same manner and to the same extent as it could be administered to her by a court of equity, yet where a suit is brought to recover either equitable or legal property belonging to the wife, the courts may lay their hands upon the action and prevent a recovery unless upon the just and equitable terms of making a suitable provision for the wife.

6. **Settlement Where Husband Seeks Aid of**

**Equity** — *England.* — *Milner v. Colmer*, 2 P. Wms. 639.

*Alabama.* — *Andrews v. Jones*, 10 Ala. 400.

*Kentucky.* — *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69.

*Maryland.* — *Mann v. Higgins*, 7 Gill (Md.) 265; *Duval v. Farmers Bank*, 4 Gill & J. (Md.) 287, 23 Am. Dec. 558; *Groverman v. Dufferdier*, 11 Gill & J. (Md.) 15; *McVey v. Boggs*, 3 Md. Ch. 94; *Helms v. Franciscus*, 2 Bland (Md.) 576, 20 Am. Dec. 402. See also *Oswald v. Hoover*, 43 Md. 368; *Kuhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681.

*New York.* — *Howard v. Moffatt*, 2 Johns. Ch. (N. Y.) 206.

*Virginia.* — *Browning v. Headley*, 2 Rob. (Va.) 340, 40 Am. Dec. 755.

7. **Settlement as Against Husband's Creditor — Seeking Aid of Chancery** — *Arkansas.* — *Beeman v. Cowser*, 22 Ark. 429.

*Georgia.* — *Howard v. Napier*, 3 Ga. 193.

*Kentucky.* — *Holloway v. Conner*, 3 B. Mon. (Ky.) 399; *Hord v. Hord*, 5 B. Mon. (Ky.) 81; *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69; *Athey v. Knotts*, 6 B. Mon. (Ky.) 27; *Bowling v. Bowling*, 6 B. Mon. (Ky.) 31; *Hays v. Blanks*, 7 B. Mon. (Ky.) 347; *Pierce v. Pierce*, 7 B. Mon. (Ky.) 433; *Sims v. Spalding*, 2 Duv. (Ky.) 121; *Bennett v. Dillingham*, 2 Dana (Ky.) 436.

*Michigan.* — *Westbrook v. Comstock*, Walk. (Mich.) 315.

*New York.* — *Smith v. Kane*, 2 Paige (N. Y.) 303.

See also *Perryclear v. Jacobs*, 2 Hill Eq. (S. Car.) 504.



pies in this respect the same position as the husband, and this whether the assignee be an assignee in bankruptcy or insolvency, or for valuable consideration,<sup>1</sup> the doctrine being placed by some of the authorities on the ground that the husband or person claiming under him, since he seeks the intervention of a court of equity to gain possession of the wife's estate, must do equity.<sup>2</sup>

(cc) *When Wife Seeks Aid of Court.* — But the courts generally have not limited the doctrine to this narrow principle, and whatever doubts may have been expressed at one time on the question,<sup>3</sup> it seems now to be generally settled that if the wife's property in action is of equitable cognizance, she is permitted actively to assert her claim by a bill in the name of her trustee or next friend against the husband<sup>4</sup> or his assignee, though for a valuable consideration.<sup>5</sup>

(da) *Injunction to Restrain Husband from Recovering at Law.* — It was the ancient rule in England that though the ecclesiastical court, which had concurrent jurisdiction with the courts of equity in regard to legacies, had given its consent that the husband should have the wife's portion, a court of chancery would grant an injunction to stay the proceedings in the ecclesiastical court until a settlement on the wife should be made.<sup>6</sup> And in later times it has been held that a court of equity will enjoin proceedings in a court of law to recover a legacy charged on lands with legal powers of distress, on the ground that there was a concurrent remedy in a court of equity.<sup>7</sup> But whether a court of equity will interfere to restrain proceedings at law for the recovery of the wife's property where no concurrent remedy exists has been the occasion of much doubt. In an early English case it seems that an injunction was granted by a court of equity to restrain a husband from recovering a debt due on a bond.<sup>8</sup> But later English dicta have cast some doubt upon the correctness of this ruling.<sup>9</sup> In the *United States* it seems to be the prevailing rule that equity may interfere to restrain the husband or his assignee from proceeding at law to possess himself of the wife's property in action,<sup>10</sup> though the courts in some jurisdictions have refused to recognize this rule.<sup>11</sup>

1. **Settlement as Against Husband's Assignee — Seeking Aid of Chancery.** — *Jewson v. Moulson*, 2 Atk. 417; *Mitford v. Mitford*, 9 Ves. Jr. 100; *Duval v. Farmers Bank*, 4 Gill & J. (Md.) 282, 23 Am. Dec. 558; *McVey v. Boggs*, 3 Md. Ch. 94; *Page v. Estes*, 19 Pick. (Mass.) 271; *Udall v. Kenney*, 3 Cow. (N. Y.) 590.

2. See *Sturgis v. Champneys*, 5 Myl. & C. 97; *Duval v. Farmers Bank*, 4 Gill & J. (Md.) 291, 23 Am. Dec. 558; *Wiles v. Wiles*, 3 Md. 1, 56 Am. Dec. 733.

3. See *Bosvil v. Brander*, 1 P. Wms. 459.

4. **Settlement Where Wife Seeks Aid of Equity — England.** — *Elibank v. Montolieu*, 5 Ves. Jr. 737; *Wallace v. Auldjo*, 1 De G. J. & S. 643.

*Georgia.* — *Bell v. Bell*, 1 Ga. 637; *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249.

*Kentucky.* — *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 341, 17 Am. Dec. 69; *Tevis v. Richardson*, 7 T. B. Mon. (Ky.) 654; *Moore v. Moore*, 14 B. Mon. (Ky.) 208; *Tabor v. Tabor*, 98 Ky. 173.

*Maryland.* — *Helms v. Franciscus*, 2 Bland (Md.) 579, 20 Am. Dec. 402.

*New York.* — *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 473, 3 Cow. (N. Y.) 590.

*Tennessee.* — *Dearin v. Fitzpatrick*, Meigs (Tenn.) 551.

*Vermont.* — *Barron v. Barron*, 24 Vt. 390.

**Petition by Wife of Insane Husband.** — Where stock was bequeathed to a married woman whose husband was of unsound mind, though

no commission of lunacy had issued against him, the court, on a bill filed by the husband and wife for payment of the legacy, transferred the fund into court to the joint account of the plaintiffs, and afterwards, in consideration of the poverty of the parties, made an order, on the petition of the wife, that the dividends should be paid to her for her life. *Steed v. Calley*, 2 Myl. & K. 52.

5. *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 473, 3 Cow. (N. Y.) 590; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 74, 25 Am. Dec. 516; *Perry-clear v. Jacobs*, 2 Hill Eq. (S. Car.) 504.

6. *Jewson v. Moulson*, 2 Atk. 417; *Tanfield v. Davenport*, Tothill 179.

7. *Duncombe v. Greenacre*, 28 Beav. 472.

8. *Winch v. Page*, Bunb. 87. See also *Jewson v. Moulson*, 2 Atk. 420.

9. See *Sturgis v. Champneys*, 5 Myl. & C. 105; *Oswell v. Probert*, 2 Ves. Jr. 680; *Gleaves v. Paine*, 1 De G. J. & S. 87. But see dictum in *Ruffles v. Aston*, L. R. 19 Eq. 539.

10. **Injunction to Restrain Proceeding at Law to Recover Wife's Property in Action.** — *Bell v. Bell*, 1 Ga. 642; *Lay v. Brown*, 13 B. Mon. (Ky.) 295; *Moore v. Moore*, 14 B. Mon. (Ky.) 208; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 74, 25 Am. Dec. 516; *M'Elhatton v. Howell*, 4 Hayw. (Tenn.) 20. See also *Rees v. Waters*, 9 Watts (Pa.) 92; *Gore v. Waters*, 2 Bailey L. (S. Car.) 477; *Barron v. Barron*, 24 Vt. 375.

11. *Wiles v. Wiles*, 3 Md. 1, 56 Am. Dec. 733. See also *Dold v. Geiger*, 2 Gratt. (Va.) 103.



(cc) *Where Wife Is Ward of Court.* — There is a class of cases where a court of equity may interfere in behalf of the wife or her children, and may take from the husband not only the property in action which he has acquired by the marriage, but also that which he has reduced to possession, for the purpose of securing a suitable provision for the wife herself and also for the issue of the marriage. These are cases where the husband has married a ward in chancery without the consent of those who by law are intrusted with the protection of her property and her rights. In such cases, as the husband is guilty of a contempt and as the whole property of the infant *feme covert* is under the special protection of the court, the court itself, even without the consent of the wife, may, upon the application of any of her friends in her behalf, restrain the husband and his creditors from interfering with her estate until a proper settlement is made.<sup>1</sup>

cc. OUT OF WHAT INTERESTS SETTLEMENT IS ALLOWED — (aa) *In General* — **Equitable Interests.** — It may be stated as a general rule that the wife's equity to a settlement will attach to her property which has not been reduced into possession by the husband and which is of equitable cognizance, such as legacies and distributive shares.<sup>2</sup>

**Legal Interests.** — And in the *United States* it seems to be the prevailing rule that her equity will attach to her property in action which is recoverable at law.<sup>3</sup> And even in *England*, where it seems to be unsettled whether a court

**1. Interposition of Court of Equity in Behalf of Ward of Court.** — *Ball v. Coutts*, 1 Ves. & B. 300; *Winch v. James*, 4 Ves. Jr. 386; *Chassaing v. Parsonage*, 5 Ves. Jr. 15; *Wells v. Price*, 5 Ves. Jr. 398; *Priestley v. Lamb*, 6 Ves. Jr. 421; *Millet v. Rowse*, 7 Ves. Jr. 419; *Bathurst v. Murray*, 8 Ves. Jr. 74; *Halsey v. Halsey*, 9 Ves. Jr. 471; *Pearce v. Crutchfield*, 16 Ves. Jr. 48; *In re Healy*, 1 Con. & L. 393; *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 464, 3 Con. (N. Y.) 591.

**2. Settlement Out of Equitable Interests** — *England.* — *Lloyd v. Mason*, 5 Hare 149; *Blount v. Bestland*, 5 Ves. Jr. 515; *Adams v. Peirce*, 3 P. Wms. 11; *Brown v. Elton*, 3 P. Wms. 202; *Re Woodward*, 8 Ir. Eq. 50; *Napier v. Napier*, 1 Dr. & War. 407; *Coster v. Coster*, 9 Sim. 597; *Brett v. Greenwell*, 3 Y. & C. Exch. 230; *Packer v. Packer*, 1 Coll. Ch. Cas. 92; *Eedes v. Eedes*, 11 Sim. 569.

*United States.* — *Ward v. Amory*, 1 Curt. (U. S.) 419; *Shaw v. Mitchell, Davies* (U. S.) 216.

*Alabama.* — *Bradford v. Goldsborough*, 15 Ala. 311; *Guild v. Guild*, 16 Ala. 121.

*Georgia.* — *Howard v. Napier*, 3 Ga. 192.

*Kentucky.* — *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69; *Smith v. Peyton*, 6 T. B. Mon. (Ky.) 263; *Bowling v. Winslow*, 5 B. Mon. (Ky.) 29; *Athey v. Knotts*, 6 B. Mon. (Ky.) 24; *Hays v. Blanks*, 7 B. Mon. (Ky.) 347; *McCauley v. Rodes*, 7 B. Mon. (Ky.) 462; *Sims v. Spalding*, 2 Duv. (Ky.) 121.

*Maine.* — *Tucker v. Andrews*, 13 Me. 124; *Thrasher v. Tuttle*, 22 Me. 335.

*Maryland.* — *Berrett v. Oliver*, 7 Gill & J. (Md.) 191; *Mann v. Higgins*, 7 Gill (Md.) 265; *Wiles v. Wiles*, 3 Md. 1, 56 Am. Dec. 733; *McVey v. Boggs*, 3 Md. Ch. 94; *Hall v. Hall*, 4 Md. Ch. 283.

*Massachusetts.* — *Sawyer v. Baldwin*, 20 Pick. (Mass.) 378.

*Michigan.* — *Westbrook v. Comstock*, Walk. (Mich.) 314.

*Mississippi.* — *Carter v. Carter*, 14 Smed. & M. (Miss.) 59.

*New York.* — *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 196; *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 464; *Haviland v. Myers*, 6 Johns. Ch. (N. Y.) 25; *Glen v. Fisher*, 6 Johns. Ch. (N. Y.) 33, 10 Am. Dec. 310; *Haviland v. Bloom*, 6 Johns. Ch. (N. Y.) 178; *Udall v. Kenney*, 3 Cow. (N. Y.) 590; *Wickes v. Clarke*, 3 Edw. (N. Y.) 58; *Partridge v. Havens*, 10 Paige (N. Y.) 618.

*South Carolina.* — *Tattnell v. Fenwick*, 1 Desaus. (S. Car.) 143; *Bethune v. Beresford*, 1 Desaus. (S. Car.) 174; *Ex p. Beresford*, 1 Desaus. (S. Car.) 263; *Hill v. Hill*, 1 Strobb. Eq. (S. Car.) 1; *Ryan v. Bull*, 3 Strobb. Eq. (S. Car.) 86; *Durr v. Bowyer*, 2 McCord Eq. (S. Car.) 372; *Heath v. Heath*, 2 Hill Eq. (S. Car.) 100; *Myers v. Myers*, *Bailey Eq.* (S. Car.) 23.

*Tennessee.* — *Wilks v. Fitzpatrick*, 1 Humph. (Tenn.) 54, 34 Am. Dec. 618; *Phillips v. Haswell*, 10 Humph. (Tenn.) 197; *Coppedge v. Threadgill*, 3 Sneed (Tenn.) 577; *Dearin v. Fitzpatrick*, Meigs (Tenn.) 551.

*Vermont.* — *Barron v. Barron*, 24 Vt. 375.

*Virginia.* — *Poindexter v. Jeffries*, 15 Gratt. (Va.) 363.

In *North Carolina* it has been held that a wife has no right to have a provision made for her out of a distributive share accruing to her during her coverture. *Allen v. Allen*, 6 Ired. Eq. (41 N. Car.) 293.

In this state also the wife has no equity against an insolvent husband or his creditors for a provision out of her legacy, distributive share, or other equitable property. *Bryan v. Bryan*, 1 Dev. Eq. (16 N. Car.) 47; *Lassiter v. Dawson*, 2 Dev. Eq. (17 N. Car.) 383.

**3. Settlement Out of Legal Interests.** — *Bell v. Bell*, 1 Ga. 642; *Lay v. Brown*, 13 B. Mon. (Ky.) 295; *Moore v. Moore*, 14 B. Mon. (Ky.) 208; *Van Epps v. Van Deussen*, 4 Paige (N. Y.) 74, 25 Am. Dec. 516; *M'Elhattan v. How-*

of equity will interfere to restrain proceedings at law for the recovery of purely legal interests, the rule has been laid down that where the husband, or one claiming under him, applies to a court of equity for its assistance to obtain the wife's property, the nature of the property, whether legal or equitable, is immaterial, on the ground that the wife's equity depends not upon any right of property in her, but on the control which courts of equity exercise over property falling under their dominion.<sup>1</sup>

(bb) *Interests in Lands.* — The wife's equity attaches not only to her personal property, but to the rents and profits of her equitable real estate, whether of inheritance,<sup>2</sup> or for life,<sup>3</sup> or for years.<sup>4</sup> And her equity has been allowed where the husband or person claiming under him has for collateral reasons sought the aid of a court of equity to secure the rents and profits of the wife's legal estates in lands.<sup>5</sup>

(cc) *Reversionary Interests.* — A settlement will not be ordered out of the wife's reversionary interests in personalty while they remain reversionary.<sup>6</sup> But the rule is otherwise where the interest has ceased to be reversionary.<sup>7</sup>

(dd) *Property Not Accruing to Husband by Virtue of His Marital Rights.* — The wife's equity to a settlement attaches only to property that the husband takes in the right of the wife.<sup>8</sup> Under this principle it has been held that a wife has no equity to a settlement out of property given for the benefit of herself and her husband during their joint lives.<sup>9</sup>

dd. *RIGHTS OF CHILDREN.* — The wife's equity is for the benefit of her children as well as herself, and they are to be considered in making the settlement. The mother will not be permitted to say that she claims a settlement for

ell, 4 Hayw. (Tenn.) 20. See also Rees v. Waters, 9 Watts (Pa.) 92; Gore v. Waters, 2 Bailey L. (S. Car.) 477. Compare Helms v. Franciscus, 2 Bland (Md.) 576, 20 Am. Dec. 402; Wiles v. Wiles, 3 Md. 1, 56 Am. Dec. 733; Dold v. Geiger, 2 Gratt. (Va.) 103; Poindexter v. Jeffries, 15 Gratt. (Va.) 363.

**Where Aid of Chancery Is Sought by Husband or Person Claiming under Him.** — And in a few cases courts of equity have refused their assistance in the recovery of interests not of an equitable nature except on the condition of a settlement on the wife. Howard v. Napier, 3 Ga. 192; Holloway v. Conner, 3 B. Mon. (Ky.) 395; Tobin v. Dixon, 2 Met. (Ky.) 422. See also Corley v. Corley, 22 Ga. 178.

1. Freeman v. Fairlie, 11 Jur. 447; Osborn v. Morgan, 9 Hare 434; Sturgis v. Champneys, 5 Myl. & C. 97.

2. **Where an Equitable Estate in Fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate by curtesy of her husband could not be interfered with.** Smith v. Matthews, 3 De G. F. & J. 139. See also Wortham v. Pemberton, 1 De G. & Sm. 644; Clark v. Cook, 3 De G. & Sm. 333; Barron v. Barron, 24 Vt. 392; Poindexter v. Jeffries, 15 Gratt. (Va.) 363.

**The Proceeds of the Sale of the wife's real estate made by her and her husband, so long as they remain in the hands of the purchaser, constitute a part of the estate out of which she has a right of settlement when creditors of the husband seek the aid of a court of equity to subject the proceeds.** Beeman v. Cowser, 22 Ark. 429. See also Lay v. Brown, 13 B. Mon. (Ky.) 295; Moore v. Moore, 14 B. Mon. (Ky.) 208.

3. **Settlement Out of Equitable Life Estate in Realty.** — See Sturgis v. Champneys, 5 Myl. & C. 97; Barron v. Barron, 24 Vt. 392.

4. **Settlement Out of Equitable Term for Years.** — Hanson v. Keating, 4 Hare 1 [overruling Tudor v. Samyne, 2 Vern. 270; Turner's Case, 1 Vern. 7; Jewson v. Moulson, 2 Atk. 417]. See also Barron v. Barron, 24 Vt. 392.

5. **Husband Asking Aid of Chancery to Recover Rents of Legal Estates in Lands.** — Freeman v. Fairlie, 11 Jur. 447; Sturgis v. Champneys, 5 Myl. & C. 97. Compare Matter of Cumming, 2 De G. F. & J. 376; Gleaves v. Paine, 1 De G. J. & S. 87.

**If a Husband Mortgages the Legal Interest in a Term for Years belonging to him in right of his wife, it has been held that on a claim to foreclose this mortgage against the husband and wife as defendants, no equity for a settlement upon the wife arises.** Hill v. Edmonds, 16 Jur. 1133.

6. **No Settlement Out of Reversionary Interest in Personalty.** — Osborn v. Morgan, 9 Hare 432; Box v. Box, Drury 42.

7. **The wife has a right to an equity for a settlement out of a reversionary interest as against an assignee upon the interest ceasing to be reversionary in the lifetime of the husband and wife.** Greedy v. Lavender, 19 L. J. Ch. 494. See Scott v. Spashett, 3 Macn. & G. 603.

8. **No Settlement Allowed Out of Property Not Accruing to the Husband by Virtue of His Marital Rights.** — See Life Assoc. v. Siddal, 3 De G. F. & J. 271; Knight v. Knight, L. R. 18 Eq. 487.

9. **No Settlement Out of Property Given to Husband and Wife Jointly.** — Ward v. Ward, 14 Ch. D. 506; In re Bryan, 14 Ch. D. 516; Atcheson v. Atcheson, 11 Beav. 485.



herself and not for her children.<sup>1</sup> And this rule extends to the children by her past, present, or any future marriage.<sup>2</sup>

**Effect of Mother's Death.** — When a settlement has been made upon the wife during her life, it will upon her death survive and descend to her children.<sup>3</sup> But the children, after the death of the mother, have no original equity independent of her which will entitle them to enforce a settlement where no steps had been taken to that end by the wife prior to her death.<sup>4</sup> And indeed the same rule has been applied though the mother had, prior to her death, filed her bill and the defendant had appeared but no further steps were taken.<sup>5</sup> And the cases hold generally that the children have no equity after the death of the mother unless there has been a contract<sup>6</sup> or decree<sup>7</sup> for a settlement in her lifetime. If, however, there has been an order or decree referring the matter to a master to approve a proper settlement to be made upon the wife and the children, and she dies before the master has made his report, the children will have a right to a settlement under the order where no act has been done by the mother to waive the equity,<sup>8</sup> and this rule has been applied though in the preliminary order or decree the children have not been named or expressly provided for.<sup>9</sup>

**Effect of Waiver by Mother.** — The wife's equity being regarded as a personal right, although her children are to be included in the benefit of the settlement when made, she may waive it even after an order or decree for the terms of a settlement to be proposed or reported,<sup>10</sup> at any time before the proposals signed by the husband and wife have been carried in and the settlement has been consummated by the approval of the court.<sup>11</sup>

**AMOUNT OF SETTLEMENT.** — According to the English practice in early times it was a general rule that the fund out of which the wife claimed her equity should be equally divided between the wife and children on the one hand and the husband on the other.<sup>12</sup> But in the *United States* and in *England* in modern times the rule is that the amount of the wife's estate which shall be secured to her is left to the discretion of the court and must be

**1. Right of Children to Be Included in Settlement.** — *Murray v. Elibank*, 13 Ves. Jr. 1; *Spirett v. Willows*, L. R. 4 Ch. 407; *Johnson v. Johnson*, 1 Jac. & W. 452; *Howard v. Napier*, 3 Ga. 205; *Hord v. Hord*, 5 B. Mon. (Ky.) 52; *Helms v. Franciscus*, 2 Blau (Md.) 581, 20 Am. Dec. 402; *McVey v. Boggs*, 3 Md. Ch. 94; *Groverman v. Diffenderffer*, 11 Gill & J. (Md.) 15; *Hall v. Hall*, 4 Md. Ch. 283; *Howard v. Moffatt*, 2 Johns. Ch. (N. Y.) 206; *Mumford v. Murray*, 1 Paige (N. Y.) 620; *Hill v. Hill*, 3 Strobb. Eq. (S. Car.) 98.

**Where Provision Has Already Been Made for Children.** — But the wife may have her equity though the children have been otherwise provided for. *Pryor v. Hill*, 4 Bro. C. C. 138.

**2. Croxtton v. May**, L. R. 9 Eq. 404; *Conington v. Gilliat*, 25 W. R. 69; *Spirett v. Willows*, L. R. 1 Ch. 520.

**3. Survivor to Children of Settlement Made in Lifetime of Wife.** — *Greer v. Boone*, 5 B. Mon. (Ky.) 554.

**Acquiescence in Exclusion of Children.** — It has been held that an acquiescence on the part of a child for a long period after he became of age, in an order excluding him from benefit under the settlement, will defeat his claim on his mother's death. *Johnson v. Johnson*, 1 Jac. & W. 452.

**4. Equity Not Enforceable by Children After Mother's Death.** — *Scriven v. Tapley*, Amb. 509; *Bell v. Bell*, 1 Ga. 640; *Greer v. Boone*, 5 B. Mon. (Ky.) 554. See also *Baker v. Bay-*

*don*, 8 Hare 210; *De la Garde v. Lempriere*, 6 Beav. 344. Compare *Steinmetz v. Halthin*, 1 Glyn & J. 64; *Mumford v. Murray*, 1 Paige (N. Y.) 620.

**5. Wallace v. Auldjo**, 1 De G. J. & S. 643.

**6. Effect of Contract for Settlement During Wife's Lifetime.** — *Lloyd v. Williams*, 1 Madd. 449. See also *Lloyd v. Mason*, 5 Hare 149; *Hill v. Hill*, 3 Strobb. Eq. (S. Car.) 98.

**7. Lloyd v. Williams**, 1 Madd. 449; *Wallace v. Auldjo*, 1 De G. J. & S. 643.

**8. Effect of Preliminary Decree or Order During Wife's Lifetime.** — *Murray v. Elibank*, 10 Ves. Jr. 84, 13 Ves. Jr. 1, 14 Ves. Jr. 496. See also *Groves v. Perkins*, 6 Sim. 576; *Groves v. Clarke*, 1 Keen 132; *Macaulay v. Philips*, 4 Ves. Jr. 15; *Helms v. Franciscus*, 2 Bland (Md.) 544, 20 Am. Dec. 402.

**9. Hill v. Hill**, 3 Strobb. Eq. (S. Car.) 100. See also *Rowe v. Jackson*, 2 Dick. 604.

**10. Effect on Children of Wife's Waiver.** — *Murray v. Elibank*, 10 Ves. Jr. 88, 13 Ves. Jr. 6; *Fenner v. Taylor*, 2 Russ. & M. 100; *Hodgens v. Hodgins*, 11 Bligh 104; *Hill v. Hill*, 3 Strobb. Eq. (S. Car.) 98. See also *Macaulay v. Philips*, 4 Ves. Jr. 19; *Baldwin v. Baldwin*, 5 De G. & Sm. 319; *Lovett v. Lovett*, Johns. 118. Compare *Whittem v. Sawyer*, 1 Beav. 593; *Heath v. Levis*, 13 W. R. 129.

**11. Ex p. Gardner**, 2 Ves. 671.

**12. See In re Suggitt**, L. R. 3 Ch. 215; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Taunton v. Morris*, 11 Ch. D. 781.



determined by the circumstances of each particular case.<sup>1</sup> Numerous cases occur both in the United States and in England where, under the circumstances of the case, the whole fund was given to the wife.<sup>2</sup> But according to the English rule the whole will not be settled on the wife except under special circumstances, as where the husband is insolvent, or is guilty of aggravated misconduct towards the wife, such as adultery, desertion, or cruelty.<sup>3</sup>

*ff.* FORM OF SETTLEMENT — (aa) *In General* — Provision for Children. — The wife's equity is not for herself alone, but for herself and children, and provision should generally be made for the children in the settlement.<sup>4</sup>

**Limitation Over on Wife's Death in Default of Children.** — In *England* the principle on which the courts act is to let in the equity of the wife and children, and to that extent exclude the husband's marital right, but as soon as that equity is satisfied the provisions are at end, and the marital right ought to return; and it is the practice to make an ultimate limitation, after the death of the wife and failure of children, for the benefit of the husband, whether he survives the wife or not, on the ground that the fund belongs originally to the husband and the court will not deprive him of it without doing that which is equitable after providing for the wife and children.<sup>5</sup>

**1. Amount of Equity Dependent on Circumstances** — *England*. — *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Scott v. Spashett*, 3 Macn. & G. 599; *Taunton v. Morris*, 11 Ch. D. 779; *Freeman v. Fairlie*, 11 Jur. 447; *Green v. Otte*, 1 Sim. & St. 250; *Spirett v. Willows*, L. R. 1 Ch. 520; *Napier v. Napier*, 1 Dr. & War. 407; *Walker v. Drury*, 17 Beav. 482; *Gardner v. Marshall*, 14 Sim. 575; *Roberts v. Cooper*, (1891) 2 Ch. 335; *Ward v. Yates*, 1 Drew. & Sm. 80.

*Arkansas*. — *Beeman v. Cowser*, 22 Ark. 434.

*Georgia*. — *Howard v. Napier*, 3 Ga. 192.

*Kentucky*. — *Hays v. Blanks*, 7 B. Mon. (Ky.) 347; *Marshall v. McDaniel*, 8 B. Mon. (Ky.) 173.

*Maryland*. — *Helms v. Franciscus*, 2 Bland (Md.) 577, 20 Am. Dec. 402; *Duval v. Farmers Bank*, 4 Gill & J. (Md.) 282, 23 Am. Dec. 558; *McVey v. Boggs*, 3 Md. Ch. 94.

*Massachusetts*. — *Davis v. Newton*, 6 Met. (Mass.) 544.

*New York*. — *Udall v. Kenney*, 3 Cow. (N. Y.) 606.

*Tennessee*. — *Phillips v. Hassell*, 10 Humph. (Tenn.) 197.

*Virginia*. — *Pointexter v. Jeffries*, 15 Gratt. (Va.) 363.

**Property Previously Received in Wife's Right.** — Thus it has been held that in determining the amount of the wife's equity it is proper to take into consideration property which the husband has received previously in the right of the wife. *Re Merriman*, 31 L. J. Ch. 367; *Green v. Otte*, 1 Sim. & St. 250; *Scott v. Spashett*, 3 Macn. & G. 604; *Gardner v. Marshall*, 14 Sim. 575. See also *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Duval v. Farmers Bank*, 4 Gill & J. (Md.) 282, 23 Am. Dec. 558; *Hill v. Hill*, 3 Strobh. Eq. (S. Car.) 94.

**Size of Fund.** — The size of the fund is also a circumstance to be taken into consideration. *In re Kincaid*, 1 Drew. 326, 17 Jur. 106; *Davis v. Newton*, 6 Met. (Mass.) 544. See also *In re Suggitt*, L. R. 3 Ch. 218; *Taunton v. Morris*, 11 Ch. D. 781; *McVey v. Boggs*, 3 Md. Ch. 94.

**2. Allowance of Whole Fund to Wife** — *England*. — *Re Merriman*, 31 L. J. Ch. 367; *Newman v. Wilson*, 31 Beav. 34; *Vandenanker v.*

*Desbrough*, 2 Vern. 96; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Scott v. Spashett*, 3 Macn. & G. 604; *Gardner v. Marshall*, 14 Sim. 575; *Brett v. Greenwell*, 3 Y. & C. Exch. 230; *Nicholson v. Carline*, 22 W. R. 819; *Re Kincaid*, 1 Drew. 326; *Layton v. Layton*, 1 Smale & G. 179; *Barrow v. Barrow*, 5 De G. M. & G. 782; *Smith v. Smith*, 3 Giff. 121; *Taunton v. Morris*, 11 Ch. D. 779; *Boxall v. Boxall*, 27 Ch. D. 220; *Reid v. Reid*, 33 Ch. D. 220; *Conington v. Gilliat*, 25 W. R. 69.

*Kentucky*. — *Bennett v. Dillingham*, 2 Dana (Ky.) 436; *Athey v. Knotts*, 6 B. Mon. (Ky.) 24.

*Maine*. — *Tucker v. Andrews*, 13 Me. 124.

*Maryland*. — *McVey v. Boggs*, 3 Md. Ch. 94; *Hall v. Hall*, 4 Md. Ch. 283.

*New York*. — *Haviland v. Myers*, 6 Johns. Ch. (N. Y.) 25. See also *Dumond v. Magee*, 4 Johns. Ch. (N. Y.) 318.

*South Carolina*. — *Ryan v. Bull*, 3 Strobh. Eq. (S. Car.) 86; *Hill v. Hill*, 3 Strobh. Eq. (S. Car.) 94.

*Virginia*. — *James v. Gibbs*, 1 Patt. & H. (Va.) 277.

**Insolvency of Husband.** — The whole fund has been settled on the wife in the case of the husband's insolvency. *Koeber v. Sturgis*, 22 Beav. 588; *Squires v. Ashford*, 23 Beav. 132; *In re Cordwell*, L. R. 20 Eq. 644; *Taunton v. Morris*, 11 Ch. D. 779; *McVey v. Boggs*, 3 Md. Ch. 94. See also *In re Suggitt*, L. R. 3 Ch. 215.

But in the earlier English cases the whole was denied to the wife notwithstanding the husband's insolvency. *Burdon v. Dean*, 2 Ves. Jr. 607; *Beresford v. Hobson*, 1 Madd. 362; *Oswell v. Probert*, 2 Ves. Jr. 680. See also *Wright v. Morley*, 11 Ves. Jr. 22.

**3.** *In re Suggitt*, L. R. 3 Ch. 215; *Reid v. Reid*, 33 Ch. D. 220; *Wilkinson v. Charlesworth*, 10 Beav. 324.

**4.** See *supra*, this section, *Rights of Children*.

**5. Limitation Over on Wife's Death in Default of Children.** — *Croton v. May*, L. R. 9 Eq. 404; *Carter v. Taggart*, 1 De G. M. & G. 286; *Gent v. Harris*, 10 Hare 383; *Ward v. Yates*, 1 Drew. & Sm. 80; *Walsh v. Wason*, L. R. 8 Ch. 482. See also *In re Suggitt*, L. R. 3 Ch. 215; *Smithers v. Green*, Seton (4th ed.) 675.

But it seems that this rule may be altered by

(bb) *By Husband*. — The wife's settlement is commonly made under the direct authority of the court, but this is not indispensably necessary, for if it be voluntarily made by the husband under circumstances in which it would have been ordered by the court, it will be sustained, and all such settlements are deemed valid, even against creditors of the husband.<sup>1</sup>

35. *HOW RIGHT MAY BE BARRED* — (aa) *Reduction to Possession by Husband*. — The wife's equity does not attach to property which formerly belonged to the wife, but in which the husband has without fraud obtained a vested legal interest in possession by virtue of his marital rights. In other words, her equity to a settlement does not include property which the husband has reduced to possession.<sup>2</sup> But the mere fact that the property comes into the possession of the husband, or the person claiming under him, will not defeat the wife's equity if he takes possession as the wife's agent or otherwise not in the exercise of his marital rights.<sup>3</sup> And the same rule has been applied where property is turned over to him by mistake, as where it was turned over to him by executors through mistake of the meaning of the will.<sup>4</sup> Nor will the payment to the assignee of a fund in which the wife has a right to a settlement affect her equity if the payment is made after suit is commenced by the wife.<sup>5</sup>

(bb) *Where Wife Has Adequate Independent Provision*. — The wife's equity does not attach where she has secured to her an adequate independent provision for the support of herself and children,<sup>6</sup> and this, it has been held, though the pro-

the misconduct of the husband. *Spirett v. Willows*, L. R. 1 Ch. 520; *Carter v. Taggart*, 1 De G. M. & G. 286.

1. *Settlement Voluntarily Made by Husband*. — *Wheeler v. Caryl*, Ambl. 121; *Moore v. Rycault*, Prec. Ch. 22; *Middlecome v. Marlow*, 2 Atk. 519; *Montefiore v. Behrens*, L. R. 1 Eq. 171; *Helms v. Franciscus*, 2 Bland (Md.) 577, 20 Am. Dec. 402; *Perryclear v. Jacobs*, 2 Hill Eq. (S. Car.) 504.

But an excessive settlement will be void as to creditors to the extent of the excess. *In re Wray*, 16 Jur. 1126.

2. *No Settlement Out of Property Vested in Husband* — *Arkansas*. — *Jackson v. Hill*, 25 Ark. 223.

*Georgia*. — *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68.

*Iowa*. — *McCrory v. Foster*, 1 Iowa 271.

*Kentucky*. — *Hurdt v. Courtenay*, 4 Met. (Ky.) 139; *Watson v. Robertson*, 4 Bush (Ky.) 37; *Basham v. Chamberlain*, 7 B. Mon. (Ky.) 443; *Martin v. Trigg*, 8 B. Mon. (Ky.) 528.

*Missouri*. — *Hart v. Leete*, 104 Mo. 315.

*New York*. — *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366, 31 Am. Dec. 257.

*Pennsylvania*. — *Rees v. Waters*, 9 Watts (Pa.) 92.

*South Carolina*. — *Thomas v. Sheppard*, 2 McCord Eq. (S. Car.) 36, 16 Am. Dec. 632.

*Tennessee*. — *Dearin v. Fitzpatrick*, Meigs (Tenn.) 559; *Mitchell v. Sevier*, 9 Humph. (Tenn.) 149.

*Virginia*. — *Dold v. Geiger*, 2 Gratt. (Va.) 103; *Poindexter v. Jeffries*, 15 Gratt. (Va.) 363; *Ware v. Ware*, 28 Gratt. (Va.) 670.

*Wife's Realty*. — This rule applies to the husband's interest in the wife's lands of which he has acquired possession. *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; *Wickes v. Clarke*, 8 Paige (N. Y.) 161; *Mitchell v. Sevier*, 9 Humph. (Tenn.) 148. See also *Hill v. Edmonds*, 16 Jur. 1133.

*Possession by Husband's Assignee*. — The rule of the text has been applied where the prop-

erty was reduced into possession by the assignee of the husband. *Dearin v. Fitzpatrick*, Meigs (Tenn.) 559.

*Possession of Administrator After Division of Estate*. — Under statute in *Georgia* it has been held that a division of an estate, at the instance of the administrator, setting apart one share to the husband in right of his wife, and leaving it in the possession of the administrator, neither husband nor wife being present or represented, and no refunding bond being given, is not such a reduction into possession as will defeat the wife's equity. *Bell v. Bell*, 1 Ga. 637.

*Effect of Decree Directing Payment to Husband and Wife*. — It has been held that a decree directing payment of a fund to the husband and wife will not deprive the wife of her equity to a settlement. *Crook v. Turpin*, 10 B. Mon. (Ky.) 243.

*After the Husband Became Insolvent* the wife's attorney received a fund, the property of the wife, and by her direction paid it to her son. It was held that the fund was not liable to be appropriated by the chancellor to pay the debts of the husband without making suitable provision for the wife. *Athey v. Knotts*, 6 B. Mon. (Ky.) 124.

3. *Possession by Husband Not by Virtue of Marital Right*. — *Lowe v. Cody*, 29 Ga. 117; *Embry v. Robinson*, 7 Humph. (Tenn.) 444; *Barron v. Barron*, 24 Vt. 375.

4. *Property Turned Over to Husband by Mistake*. — *Lowe v. Cody*, 29 Ga. 117.

5. *Crook v. Turpin*, 10 B. Mon. (Ky.) 243. See also *Murray v. Elibank*, 10 Ves. Jr. 84, 13 Ves. Jr. 1; *Macaulay v. Phillips*, 4 Ves. Jr. 15.

6. *Equity Barred by Adequate Independent Provision*. — *Aguilar v. Aguilar*, 5 Madd. 414; *Spicer v. Spicer*, 24 Beav. 365; *Re Erskine*, 1 Kay & J. 302; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 74, 25 Am. Dec. 516.

*Subsequent Provision from Bounty of Third Person Held Not to Affect Settlement Already Made*. — *Marshall v. McDaniel*, 8 B. Mon. (Ky.) 173.



vision comes through a third person and not through the husband.<sup>1</sup>

**Maintenance by Husband as Affecting Wife's Equity to Income.** — And it has been held that if a married woman having a life interest in a fund is living with her husband and is maintained by him, the courts will not require him to make a settlement on her in order that he may receive her income, and this though the maintenance is furnished to the wife out of her own income and not in a very adequate manner, by reason of the husband's being in embarrassed circumstances.<sup>2</sup> But the husband will be compelled to make a settlement where he fails in the discharge of his marital duties in this respect, as where he deserts his wife without making proper provision for her support.<sup>3</sup>

(cc) *Fraud of Wife.* — A married woman may also by fraud preclude herself from her equity to a settlement. Thus she may not set up her equity against her husband's assignee where by her representations she has led the assignee to believe that before marriage she had assigned her interest to the husband.<sup>4</sup> Nor will a court of chancery allow a wife's equity to be enforced where it would work a fraud on her antenuptial creditors.<sup>5</sup>

(dd) *Marriage Settlement.* — The circumstances under which a marriage settlement, whether antenuptial or postnuptial, will bar the wife's equity to a settlement will be discussed in another portion of this work.<sup>6</sup>

(ee) *Waiver.* — The wife may waive her equity to a settlement, and the court cannot, as a general rule, refuse to take the wife's consent<sup>7</sup> unless she is an infant or a ward of chancery married without its consent.<sup>8</sup> But as a general rule, to constitute a valid waiver the wife's consent must be given with a full knowledge of her right<sup>9</sup> and under an examination before the court,<sup>10</sup> apart

1. *Giacometti v. Prodgers*, L. R. 8 Ch. 338.

2. **Maintenance by Husband as Affecting Wife's Equity to Income.** — *Vaughan v. Buck*, 13 Sim. 404. See also *Sleech v. Thorington*, 2 Ves. 561; *Udall v. Kenney*, 3 Cow. (N. Y.) 607. Compare *Wilkinson v. Charlesworth*, 10 Beav. 324.

3. **Effect of Desertion and Failure to Support on Settlement Out of Income.** — *Sleech v. Thorington*, 2 Ves. 561; *Watkins v. Watkins*, 2 Atk. 96; *Coster v. Coster*, 1 Keen 200. See also *Rishton v. Cobb*, 9 Sim. 615; *Re Ford*, 32 Beav. 621; *Wright v. Morley*, 11 Ves. Jr. 23; *Bond v. Simmons*, 3 Atk. 20; *Elliott v. Cordell*, 5 Madd. 155.

**Living Apart Not Amounting to Desertion.** — But the rule of the text does not apply where the husband goes abroad under such circumstances as not to constitute desertion, as where the wife refuses to live with her husband, an officer abroad, he being willing to receive her, *Bullock v. Menzies*, 4 Ves. Jr. 798; or where the husband and wife are living apart in the absence of evidence as to the cause of the separation, *Duncan v. Duncan*, 19 Ves. Jr. 394. See also *Spicer v. Spicer*, 24 Beav. 365.

**Separation on Account of Husband's Cruelty.** — The rule of the text has been applied where the wife has been forced to live separate from her husband by reason of the husband's conduct, as, for instance, his ill treatment and cruelty towards her. *Oxenden v. Oxenden*, 2 Vern. 494; *Williams v. Callow*, 2 Vern. 752; *Nicholls v. Danvers*, 2 Vern. 671; *Gilchrist v. Cator*, 1 De G. & Sm. 188. See also *Coster v. Coster*, 9 Sim. 600.

**Offer to Resume Cohabitation.** — But the court may, it seems, deny or discontinue the wife's equity if the husband in good faith offers to resume cohabitation. See *Watkins v. Watkins*, 2 Atk. 96; *Head v. Head*, 3 Atk. 295.

4. **Equity Barred as Against Husband's Assignee by Fraudulent Representation.** — *In re Lush*, L. R. 4 Ch. 591.

5. **Equity Not Allowed as Against Wife's Antenuptial Creditors.** — *Barnard v. Ford*, L. R. 4 Ch. 247; *Bonner v. Bonner*, 17 Beav. 86.

6. See the title MARRIAGE SETTLEMENTS.

7. **Equity Barred by Wife's Waiver.** — *Willats v. Cay*, 2 Atk. 67; *Wright v. Rutter*, 2 Ves. Jr. 673; *Longbottom v. Pearce*, 3 De G. & J. 545, note; *Howard v. Moffatt*, 2 Johns. Ch. (N. Y.) 208. See also *Ex p. Warfield*, 11 Gill & J. (Md.) 23. Compare *Ex p. Higham*, 2 Ves. 579.

**Remainder or Reversionary Interests in Personality.** — The court cannot take the wife's consent to part with her remainders or reversionary interests in personality. *Osborn v. Morgan*, 9 Hare 432; *Box v. Box*, *Drury* 42.

8. **Consent of Infant or Ward of Chancery Inoperative as Waiver.** — *Abraham v. Newcombe*, 12 Sim. 566; *Stackpole v. Beaumont*, 3 Ves. Jr. 98; *Cheatham v. Huff*, 2 Tenn. Ch. 616; *Phillips v. Hassell*, 10 Humph. (Tenn.) 197. See also *Stubbs v. Sargon*, 2 Beav. 496; *Ex p. Warfield*, 11 Gill & J. (Md.) 23; *Shipway v. Ball*, 16 Ch. D. 376; *Bennett v. Biddles*, 10 Jur. 534.

But if the money is obtained by the husband by a privy examination of the wife during infancy, and she permits it to remain with the husband after she comes of age and to be used by him, the husband receives the money divested of any trust. *Jennings v. Jennings*, 2 Heisk. (Tenn.) 283.

9. **Consent by Wife Must Be Given with Full Knowledge of Her Rights.** — *Wright v. Rutter*, 2 Ves. Jr. 673; *Watson v. Marshall*, 17 Beav. 363.

10. **Waiver Must Be Given under Examination Before Court.** — *Beaumont v. Carter*, 32 Beav. 586; *Wright v. Rutter*, 2 Ves. Jr. 673; *Macau-*



from her husband or his solicitor or other person representing him.<sup>1</sup> Nor will her consent be permitted to operate as a waiver until the amount of the fund is ascertained.<sup>2</sup> The court has the power of postponing the question of transfer, though the wife may have given her consent, and may ask her to reconsider her decision.<sup>3</sup> And so long as the transfer remains incomplete, the wife can at any time revoke her consent.<sup>4</sup>

(ff) *Abandonment of Husband.* — It has been held that where a wife is entitled to a chose in action which consists of a principal sum, and not merely income, she is entitled to her equity out of the fund though she is voluntarily living separate from her husband, but not in a state of adultery.<sup>5</sup> Where, however, the wife is living apart from the husband in a state of adultery, the court will not allow her equity to a settlement; nor, on the other hand, will it allow the whole of the property to the husband, since the law gives to him the right of the wife's property in consideration of his supporting and maintaining her.<sup>6</sup>

(gg) *Assignment.* — Doubts were formerly entertained as to the wife's equity to a settlement as against a particular assignee of the husband for valuable consideration.<sup>7</sup> But it has long since been a well-established rule of the common law that the mere fact of an assignment by the husband of the wife's interests not reduced to possession will not bar the equity of the wife, and this rule applies against assignees in bankruptcy or insolvency or against a particular assignee for valuable consideration.<sup>8</sup> This rule is recognized by the

*lay v. Philips*, 4 Ves. Jr. 15. See also *Hallenbeck v. Bradt*, 2 Paige (N. Y.) 316. Compare *Shilleto v. Collett*, 7 Jur. N. S. 385.

**Where the Wife Is Abroad** the examination may be conducted by commissioners appointed for that purpose. *Campbell v. French*, 3 Ves. Jr. 323; *Tasburgh's Case*, 1 Ves. & B. 507; *Gibbons v. Kibbey*, 10 W. R. 55; *Ireland v. Trembath*, 14 W. R. 275. See also *Minet v. Hyde*, 2 Bro. C. C. 663.

**Where Amount Is under Two Hundred Pounds.** — In England it was at one time held that when the sum in controversy was under two hundred pounds the husband, though he had deserted his wife, was entitled to it without the wife's consent. *Foden v. Finney*, 4 Russ. 428. See also *Re Surridge*, 17 Ir. Ch. 163; *Elworthy v. Wickstead*, 1 Jac. & W. 69. But this rule has been overturned by subsequent decisions. *Re Kincaid*, 1 Drew. 326; *In re Cutler*, 14 Beav. 220.

It seems, however, that when the sum is under two hundred pounds consent will be presumed and a separate examination will be unnecessary, except under special circumstances, as where a ward of court married on the day after she came of age. *White v. Herrick*, L. R. 4 Ch. 345.

1. *In re Bendyshe*, 3 Jur. N. S. 727.

2. **Amount of Fund Must Be Ascertained.** — *Edmonds v. Townshend*, 1 Anstr. 93; *Jernegan v. Baxter*, 6 Madd. 32; *Sperling v. Rochfort*, 8 Ves. Jr. 180; *Godber v. Laurie*, 10 Price 152; *Moss v. Dunlop*, 8 W. R. 39. See also *Packer v. Packer*, 1 Coll. Ch. Cas. 92.

3. **Postponement of Transfer by Court After Waiver by Wife.** — *Wright v. Rutter*, 2 Ves. Jr. 673; *Penfold v. Mould*, L. R. 4 Eq. 565.

4. **Revocation of Wife's Consent.** — *Penfold v. Mould*, L. R. 4 Eq. 566.

5. **Abandonment of Husband No Bar to Settlement Out of Absolute Interests.** — *Eedes v. Eedes*, 11 Sim. 569.

6. **Adultery of Wife as Barring Equity to Settle-**

**ment.** — *Ball v. Montgomery*, 2 Ves. Jr. 197; *Carr v. Eastabrooke*, 4 Ves. Jr. 146.

In *In re Lewin*, 20 Beav. 378, the court, under the peculiar circumstances of the case, ordered the whole income of the fund in court belonging to a *feme covert* who had committed adultery to be paid to her upon her undertaking to reside in England and to have no further communication with the adulterer.

And in *Greedy v. Lavender*, 13 Beav. 62, the wife was held to be entitled to a settlement in a contest between her and the husband's assignee in a case where it appeared that both husband and wife had been guilty of adultery.

**Where Wife Is Ward of Chancery.** — The adultery of the wife will not bar her equity where she is a ward of court, married without its consent. *Ball v. Coutts*, 1 Ves. & B. 303. See also *Re Walker*, L. & G. t. Sugd. 299.

7. See *Scott v. Spashett*, 3 Macn. & G. 604.

8. **Mere Assignment No Bar to Wife's Equity in General — England.** — *Salisbury v. Newton*, 1 Eden 370; *Macaulay v. Philips*, 4 Ves. Jr. 18; *Wright v. Morley*, 11 Ves. Jr. 12; *Elliott v. Cordell*, 5 Madd. 149.

*Georgia.* — *Bell v. Bell*, 1 Ga. 643.

*Kentucky.* — *Thomas v. Kennedy*, 4 B. Mon. (Ky.) 235; *Crook v. Turpin*, 10 B. Mon. (Ky.) 243; *Moore v. Moore*, 14 B. Mon. (Ky.) 210.

*Maryland.* — *Norris v. Lantz*, 18 Md. 269.

*Massachusetts.* — *Page v. Estes*, 19 Pick. (Mass.) 269; *Davis v. Newton*, 6 Met. (Mass.) 545.

*New York.* — *Haviland v. Myers*, 6 Johns. Ch. (N. Y.) 25; *Udall v. Kenney*, 3 Cow. (N. Y.) 590.

*Tennessee.* — *M'Elhatton v. Howell*, 4 Hayw. (Tenn.) 25.

**Joinder of Wife in Assignment.** — The fact that the wife has united in the assignment will not, at common law, alter the rule of the text, since her contracts are null and void. *Hord v. Hord*, 5 B. Mon. (Ky.) 81; *Norris v. Lantz*, 18 Md. 269; *M'Elhatton v. Howell*, 4 Hayw. (Tenn.) 25;

*English* authorities when applied to the wife's absolute interests in action.<sup>1</sup>

**Wife's Income.** — But these authorities make a distinction in this respect between an assignment of the wife's absolute interest and an assignment of income to which the husband is entitled in her right. With respect to the latter interest it is held that the wife has no right to a settlement as against a particular assignee for valuable consideration where the assignment has been made while the husband was maintaining the wife, although he may afterwards have become unable to maintain her, or although he deserts her and leaves her destitute.<sup>2</sup> But the wife is entitled to her equity out of income as against the husband's assignee in insolvency or bankruptcy, who stands precisely in the place of the husband.<sup>3</sup>

**c. JOINT OWNERSHIP OF PROPERTY** — (1) *Realty* — (a) **Joint Tenancy and Tenancy in Common.** — If a man and a woman become possessed of an estate as joint tenants or as tenants in common, and afterwards marry, they will retain their moieties after marriage and continue to hold as joint tenants or tenants in common.<sup>4</sup> And if one joint tenant or cotenant makes a conveyance of his interest to the wife of the other, the husband and wife hold thereafter as joint tenants or tenants in common.<sup>5</sup>

**Lands Granted to Husband and Wife During Coverture.** — But it has been held that in consequence of the theoretic unity of husband and wife, lands granted to husband and wife jointly during coverture cannot be held by them as tenants in common or as joint tenants, notwithstanding the terms of the grant.<sup>6</sup> The

*Coppedge v. Threadgill*, 3 Sneed (Tenn.) 577; *Wilks v. Fitzpatrick*, 1 Humph. (Tenn.) 54, 34 Am. Dec. 618.

**Joinder of Wife in Assignment and Levy of Fine of Share of Proceeds of Real Estate.** — In *May v. Roper*, 4 Sim. 360, it was held that where a married woman, entitled to a share of the proceeds of real estate directed to be sold, joined with her husband in assigning and levying a fine of her share to a mortgagee, she was barred of her equity to a settlement. See also *Forbes v. Adams*, 9 Sim. 462.

1. *Scott v. Spashett*, 3 Macn. & G. 603; *Marshall v. Fowler*, 16 Jur. 1128.

2. **Assignment of Income for Valuable Consideration as Bar.** — *Tidd v. Lister*, 3 De G. M. & G. 857; *In re Carr*, L. R. 12 Eq. 612; *Elliott v. Cordell*, 5 Madd. 149; *Stanton v. Hall*, 2 Russ. & M. 175; *Re Duffy*, 28 Beav. 386; *Lumb v. Milnes*, 5 Ves. Jr. 517; *Brown v. Clark*, 3 Ves. Jr. 166. See also *Wright v. Morley*, 11 Ves. Jr. 12.

**Life Interests in Personality.** — The rule of the text has been applied to the wife's life interests in personality standing in the name of trustees. *Elliott v. Cordell*, 5 Madd. 149; *Tidd v. Lister*, 3 De G. M. & G. 857; *Re Duffy*, 28 Beav. 386. See also *Wright v. Morley*, 11 Ves. Jr. 12.

**Assignment of Reversionary Interest.** — The rule is not altered though the interest of the wife was reversionary at the time when the assignment was made. *Life Assoc. v. Siddal*, 3 De G. F. & J. 271. See also *Stanton v. Hall*, 2 Russ. & M. 175; *Tidd v. Lister*, 10 Hare 140, 3 De G. M. & G. 857.

**Income from Real Estate.** — And the same rule has been applied to income accruing from the wife's life estates in realty to which she was entitled in equity. *Tidd v. Lister*, 3 De G. M. & G. 857.

**Equitable Mortgage.** — It has been applied also to the husband's life interest in the wife's

realty upon which an equitable mortgage had been given by the husband and wife, where a bill by the mortgagee was brought to subject the husband's interest, the husband having become bankrupt subsequent to the giving of the mortgage; and this though the husband affected to bind the inheritance which belonged to the wife. *Durham v. Crackles*, 8 Jur. N. S. 1174. See also *In re Carr*, L. R. 12 Eq. 609.

**Arrears of Income.** — The rule of the text applies to arrears of income. *Newman v. Wilson*, 31 Beav. 34; *In re Carr*, L. R. 12 Eq. 609. Compare *Life Assoc. v. Siddal*, 3 De. G. F. & J. 271.

3. **Settlement Out of Income as Against Assignee in Bankruptcy.** — *Sturgis v. Champneys*, 5 Myl. & C. 97; *Durham v. Crackles*, 8 Jur. N. S. 1174; *Taunton v. Morris*, 11 Ch. D. 779; *Burdon v. Dean*, 2 Ves. Jr. 607; *Oswell v. Probert*, 2 Ves. Jr. 680; *Ex p. Coysegame*, 1 Atk. 192; *Pryor v. Hill*, 4 Bro. C. C. 142. And this though the husband and the wife were living together. *Koeber v. Sturgis*, 22 Beav. 588; *Squires v. Ashford*, 23 Beav. 132.

4. **Effect of Intermarriage of Joint Tenants or Tenants in Common.** — *Co. Litt.* 187*b*; *Moody v. Moody*, Ambli. 649; *Bevins v. Cline*, 21 Ind. 37; *Chandler v. Cheney*, 37 Ind. 391; *Den v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371; *McDermott v. French*, 15 N. J. Eq. 78; *Fulper v. Fulper*, 54 N. J. Eq. 431, 55 Am. St. Rep. 590; *Banzer v. Banzer*, (C. Pl. Eq. T.) 10 Misc. (N. Y.) 24; *Hiles v. Fisher*, 144 N. Y. 313, 43 Am. St. Rep. 762; *Ames v. Norman*, 4 Sneed (Tenn.) 606, 70 Am. Dec. 269. See also *Stark's Estate*, 9 Kulp (Pa.) 120.

5. **Effect of Conveyance by One Joint Tenant to Wife of Another.** — *Lane v. Pannell*, 1 Rolle 317, 438; *Banzer v. Banzer*, (C. Pl. Eq. T.) 10 Misc. (N. Y.) 24; *Tindell v. Tindell*, (Tenn. Ch. 1896) 37 S. W. Rep. 1105.

6. **Rule that Husband and Wife Cannot Hold as Joint Tenants under Grant to Both.** — *Pollok v.*



prevailing doctrine in modern times, however, is that when lands are granted to husband and wife, and it appears from the words of the grant that the intention was to create a joint tenancy or a tenancy in common, they will take and hold as joint tenants or tenants in common, and not as tenants of the entirety.<sup>1</sup>

(b) **Estates by Entireties.**—Though the modern tendency is to regard the creation of an estate by the entireties as resting not upon a rule of law arising from the supposed incapacity of husband and wife to hold in moieties, but upon a rule of construction based on the presumption of intention,<sup>2</sup> it may be laid down as a general proposition that where land is conveyed to both husband and wife, they become seized of the estate thus granted *per tout, et non per my*, and not as joint tenants or tenants in common. The estate thus created is, however, essentially a joint tenancy, modified by the common-law doctrine that the husband and wife are one person. Upon the death of one spouse the entire estate goes to the survivor, but the survivor takes no new estate, since there is a mere change in the person holding, and not an alteration in the estate held. Neither spouse can alien or forfeit any part of the estate without the assent of the other, so as to defeat the right of the survivor. There can be no severance of the estate by the act of either, and no partition of the lands during their joint lives. This is the common-law doctrine established in *England* and in the *United States*,<sup>3</sup> with the exception of

Kelly, 6 Ir. C. L. 367; *Stuckey v. Keefe*, 26 Pa. St. 397. See also *French v. Mehan*, 56 Pa. St. 286; *Young's Estate*, 166 Pa. St. 650.

1. **View that Grant to Husband and Wife May Create Joint Tenancy**—*United States*.—*Hunt v. Blackburn*, 128 U. S. 464.

*District of Columbia*.—*Carroll v. Reidy*, 5 App. Cas. (D. C.) 59.

*Indiana*.—*Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253; *Lash v. Lash*, 58 Ind. 526; *Barden v. Overmeyer*, 134 Ind. 660; *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422; *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162.

*Maryland*.—*Fladung v. Rose*, 58 Md. 13.

*New Jersey*.—*McDermott v. French*, 15 N. J. Eq. 78; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52; *Fulper v. Fulper*, 54 N. J. Eq. 431, 55 Am. St. Rep. 590.

*New York*.—*Cloos v. Cloos*, 55 Hun (N. Y.) 450, 24 Abb. N. Cas. (N. Y.) 219; *Jooss v. Fey*, 129 N. Y. 17; *Miner v. Brown*, 133 N. Y. 312; *Hiles v. Fisher*, 144 N. Y. 313, 43 Am. St. Rep. 762.

2. **Rationale of Doctrine of Tenancy by Entireties.**—*In re March*, 27 Ch. D. 166; *Edwards v. Beall*, 75 Ind. 401; *Hadlock v. Gray*, 104 Ind. 598; *Wales v. Coffin*, 13 Allen (Mass.) 215; *Shaw v. Harsey*, 5 Mass. 521; *Miner v. Brown*, 133 N. Y. 308; *Hiles v. Fisher*, 144 N. Y. 313, 43 Am. St. Rep. 762.

3. **Common-law Doctrine of Tenancy by Entireties**—*England*.—2 Black. Com. 182; Co. Litt. 187a; *Green v. King*, 2 W. Bl. 1211; *Back v. Andrew*, 2 Vern. 120; *Doc v. Parratt*, 5 T. R. 652.

*District of Columbia*.—*Alsop v. Fedarwisch*, 9 App. Cas. (D. C.) 408.

*Illinois*.—*Thompson v. Williams*, 111 Ill. 178, 41 Am. St. Rep. 422, *citin*, 9 Am. AND ILL. REPORTS OF LAW OFFICIALS, 1880-1881, 1882-1883, 1884-1885, 1886-1887, 1888-1889, 1890-1891, 1892-1893, 1894-1895, 1896-1897, 1898-1899, 1900-1901, 1902-1903, 1904-1905, 1906-1907, 1908-1909, 1910-1911, 1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 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2784-2785, 2786-2787, 2788-2789, 2790-2791, 2792-2793, 2794-2795, 2796-2797, 2798-2799, 2800-2801, 2802-2803, 2804-2805, 2806-2807, 2808-2809, 2810-2811, 2812-2813, 2814-2815, 2816-2817, 2818-2819, 2820-2821, 2822-2823, 2824-2825, 2826-2827, 2828-2829, 2830-2831, 2832-2833, 2834-2835, 2836-2837, 2838-2839, 2840-2841, 2842-2843, 2844-2845, 2846-2847, 2848-2849, 2850-2851, 2852-2853, 2854-2855, 2856-2857, 2858-2859, 2860-2861, 2862-2863, 2864-2865, 2866-2867, 2868-2869, 2870-2871, 2872-2873, 2874-2875, 2876-2877, 2878-2879, 2880-2881, 2882-2883, 2884-2885, 2886-2887, 2888-2889, 2890-2891, 2892-2893, 2894-2895, 2896-2897, 2898-2899, 2900-2901, 2902-2903, 2904-2905, 2906-2907, 2908-2909, 2910-2911, 2912-2913, 2914-2915, 2916-2917, 2918-2919, 2920-2921, 2922-2923, 2924-2925, 2926-2927, 2928-2929, 2930-2931, 2932-2933, 2934-2935, 2936-2937, 2938-2939, 2940-2941, 2942-2943, 2944-2945, 2946-2947, 2948-2949, 2950-2951, 2952-2953, 2954-2955, 2956-2957, 2958-2959, 2960-2961, 2962-2963, 2964-2965, 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3330-3331, 3332-3333, 3334-3335, 3336-3337, 3338-3339, 3340-3341, 3342-3343, 3344-3345, 3346-3347, 3348-3349, 3350-3351, 3352-3353, 3354-3355, 3356-3357, 3358-3359, 3360-3361, 3362-3363, 3364-3365, 3366-3367, 3368-3369, 3370-3371, 3372-3373, 3374-3375, 3376-3377, 3378-3379, 3380-3381, 3382-3383, 3384-3385, 3386-3387, 3388-3389, 3390-3391, 3392-3393, 3394-3395, 3396-3397, 3398-3399, 3400-3401, 3402-3403, 3404-3405, 3406-3407, 3408-3409, 3410-3411, 3412-3413, 3414-3415, 3416-3417, 3418-3419, 3420-3421, 3422-3423, 3424-3425, 3426-3427, 3428-3429, 3430-3431, 3432-3433, 3434-3435, 3436-3437, 3438-3439, 3440-3441, 3442-3443, 3444-3445, 3446-3447, 3448-3449, 3450-3451, 3452-3453, 3454-3455, 3456-3457, 3458-3459, 3460-3461, 3462-3463, 3464-3465, 3466-3467, 3468-3469, 3470-3471, 3472-3473, 3474-3475, 3476-3477, 3478-3479, 3480-3481, 3482-3483, 3484-3485, 3486-3487, 3488-3489, 3490-3491, 3492-3493, 3494-3495, 3496-3497, 3498-3499, 3500-3501, 3502-3503, 3504-3505, 3506-3507, 3508-3509, 3510-3511, 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3694-3695, 3696-3697, 3698-3699, 3700-3701, 3702-3703, 3704-3705, 3706-3707, 3708-3709, 3710-3711, 3712-3713, 3714-3715, 3716-3717, 3718-3719, 3720-3721, 3722-3723, 3724-3725, 3726-3727, 3728-3729, 3730-3731, 3732-3733, 3734-3735, 3736-3737, 3738-3739, 3740-3741, 3742-3743, 3744-3745, 3746-3747, 3748-3749, 3750-3751, 3752-3753, 3754-3755, 3756-3757, 3758-3759, 3760-3761, 3762-3763, 3764-3765, 3766-3767, 3768-3769, 3770-3771, 3772-3773, 3774-3775, 3776-3777, 3778-3779, 3780



one or two jurisdictions.<sup>1</sup>

**Husband's Interest During Coverture.** — But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the rights of the

46 Pa. St. 248; *Diver v. Diver*, 56 Pa. St. 106; *French v. Mehan*, 56 Pa. St. 286.

*South Carolina.* — *Bomar v. Mullins*, 4 Rich. Eq. (S. Car.) 80.

*Tennessee.* — *Taul v. Campbell*, 7 Yerg. (Tenn.) 319, 27 Am. Dec. 508.

*Vermont.* — *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517.

*Virginia.* — *Thornton v. Thornton*, 3 Rand. (Va.) 183.

*Wisconsin.* — *Ketchum v. Walsworth*, 5 Wis. 95, 68 Am. Dec. 49; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

See also *Lott v. Wilson*, 95 Ga. 12; *Kempton v. Hallowell*, 24 Ga. 52, 71 Am. Dec. 112; *Scott v. Causey*, 89 Ga. 749.

**Husband, Wife, and Third Person as Grantees.** — If a joint estate be made of land to husband and wife and to a third person, the husband and wife have but a moiety in law, and the third person the other moiety, because the husband and wife are but one person in law. Thus in a grant to husband and wife and a third person, the husband and wife take one-half and the other person takes the other half; and if there are two others, the husband and wife take one-third and each of the others one-third. *Anderson v. Tannehill*, 42 Ind. 141; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Den v. Hardenbergh*, 10 N. J. L. 45, 18 Am. Dec. 371. And the same rule has been applied though by the terms of the deed the estate was granted to be held in common. *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Johnson v. Hart*, 6 W. & S. (Pa.) 319, 40 Am. Dec. 565.

**Conveyance to Husband and Wife Not Designated as Such.** — In order to create a tenancy by entireties it is not necessary that the husband and wife should be described in the conveyance as husband and wife, or that their marital relations should be referred to. *Chandler v. Cheney*, 37 Ind. 395; *Hulett v. Inlow*, 57 Ind. 414, 26 Am. Rep. 64; *Morrison v. Seybold*, 92 Ind. 302; *Dodge v. Kinzy*, 101 Ind. 102; *Hadlock v. Gray*, 104 Ind. 596; *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422.

**Estates in Which Tenancy by Entireties May Exist.** — A tenancy by entireties may exist not only in a fee simple but in an estate for life or for years. 2 Kent's Com. 132; *Vinton v. Beamer*, 55 Mich. 559; *Den v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371; *Jones v. Potter*, 89 N. Car. 220. See also *Price v. Price*, 5 Ala. 578; *Cleary v. M'Dowall*, Cheves L. (S. Car.) 139; *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 49 Am. St. Rep. 921; *Park v. Pratt*, 38 Vt. 545. And it has been held that husband and wife may hold a remainder as tenants by the entireties, the wife at the same time having the estate for life. *Bomar v. Mullins*, 4 Rich. Eq. (S. Car.) 80.

**Conveyance to Husband and Wife of Wife's Equitable Interest.** — Where the wife is the equitable owner of lands, the mere fact that a

conveyance is made to her and her husband will not vest an estate by entireties in them. *Moore v. Moore*, 12 B. Mon. (Ky.) 664. See also *Norman v. Cunningham*, 5 Gratt. (Va.) 63.

**Fee Simple by Entireties under Rule in Shelley's Case.** — In *Auman v. Auman*, 21 Pa. St. 343, it was held that a conveyance of land to A. and his wife, for and during their natural lives, or the life of the survivor, without impeachment of waste and reserving the yearly rent of one peppercorn, and after their decease to the lawful heirs of them, the said A. and wife, in fee simple, gives to the first takers a joint estate in fee simple by entireties under the rule in Shelley's Case. See also *Green v. King*, 2 W. Bl. 1211; *Doe v. Wilson*, 4 B. & Ald. 303, 6 E. C. L. 494. Compare *Hadlock v. Gray*, 104 Ind. 596.

**Deed of Partition in Name of Husband and Wife.** — In *Harrison v. Ray*, 108 N. Car. 215, 23 Am. St. Rep. 57, it was held that where, upon a partition of lands, a coparcener by his direction had the deed of his interest drawn to himself and wife jointly, an estate by entireties would not be created, since the deed only assigned to him in severalty and by metes and bounds what was already his. In the same way it has been held that where land is held in common by a married woman and others, and all join in the partition, and the married woman's share is conveyed to her and her husband, the law looks at the character of the transaction rather than at the form of the conveyance in order to define her interest, and considers the share as still hers, a divided share being substituted for an undivided one; but if the husband has paid money for equality of partition and the conveyance is to the husband and wife, he acquires an interest in common with her in proportion to the amount. *Stehman v. Huber*, 21 Pa. St. 260.

**Effect of Divorce a Vinculo.** — Since a divorce *a vinculo* destroys the common-law fiction of unity of husband and wife, a husband and wife holding by entireties will, after such divorce, cease to hold in that character and will become joint tenants or tenants in common. *Thornley v. Thornley*, (1893) 2 Ch. 233; *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53; *Harrer v. Wallner*, 80 Ill. 197; *Lash v. Lash*, 58 Ind. 526; *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581; *Stelz v. Shreck*, 123 N. Y. 263, 26 Am. St. Rep. 475; *Hopson v. Fowlkes*, 92 Tenn. 697, 36 Am. St. Rep. 120. See also *Beach v. Hollister*, 3 Hun (N. Y.) 19; *Ames v. Norman*, 4 Sneed (Tenn.) 696, 70 Am. Dec. 269. Compare *Matter of Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94.

**1. Jurisdictions Denying Doctrine.** — *Phelps v. Jepson*, 1 Root (Conn.) 48, 1 Am. Dec. 33; *Whittlesey v. Fuller*, 11 Conn. 337; *Sergeant v. Steinberger*, 2 Ohio 305, 15 Am. Dec. 553; *Wilson v. Fleming*, 13 Ohio 68; *Penn v. Cox*, 16 Ohio 30; *Farmers*, etc., *Nat. Bank v. Wallace*, 45 Ohio St. 152. See also *Bartholomew v. Muzzy*, 61 Conn. 387, 29 Am. St. Rep. 206.

survivor,<sup>1</sup> yet subject to this limitation the husband has the rights in it which are incident to his own property and the rights which by the common law he acquires in the real property of his wife — rights which do not flow from the unity of the estate and in which the wife has no concern. He is entitled during the coverture to the full control and the usufruct of the land to the exclusion of the wife,<sup>2</sup> and has, according to the weight of authority, the power to sell, mortgage, or lease for the same period,<sup>3</sup> and his life interest is

**1. Neither Spouse May Destroy Right of Survivor** — *England*. — *Doe v. Parratt*, 5 T. R. 652; *Thornley v. Thornley*, (1893) 2 Ch. 233.

*Illinois*. — *Orthwein v. Thomas*, (Ill. 1887) 13 N. E. Rep. 564; *Almond v. Bonnell*, 76 Ill. 536. *Kentucky*. — *Cochran v. Kerney*, 9 Bush (Ky.) 199.

*Maryland*. — *McCubbin v. Stanford*, 85 Md. 378, 60 Am. St. Rep. 329.

*Massachusetts*. — *Pierce v. Chace*, 108 Mass. 254; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462.

*Missouri*. — *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Atkison v. Henry*, 80 Mo. 151.

*New Jersey*. — *Den v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388; *Washburn v. Burns*, 34 N. J. L. 18; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52.

*New York*. — *Torrey v. Torrey*, 14 N. Y. 430; *Jackson v. Leek*, 19 Wend. (N. Y.) 339; *Gardenier v. Furey*, 50 Hun (N. Y.) 82; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Zornlein v. Bram*, 100 N. Y. 12; *Hiles v. Fisher*, 144 N. Y. 313, 43 Am. St. Rep. 762.

*North Carolina*. — *Topping v. Sadler*, 5 Jones L. (50 N. Car.) 357.

*Pennsylvania*. — *Fairchild v. Chastelleux*, 1 Pa. St. 176, 44 Am. Dec. 117; *Clark v. Thompson*, 12 Pa. St. 274; *Gibbs v. Tiffany*, 4 Pa. Super. Ct. 29; *Swisshelm's Appeal*, 56 Pa. St. 475, 94 Am. Dec. 107.

*Tennessee*. — *Miller v. Miller*, Meigs (Tenn.) 484, 33 Am. Dec. 157.

*Virginia*. — *Corr v. Porter*, 33 Gratt. (Va.) 278.

*West Virginia*. — *Farmer's Bank v. Corder*, 32 W. Va. 233.

See also *Simpson v. Biffle*, 63 Ark. 289. *Compare Creighton v. Clifford*, 6 S. Car. 188.

**Necessity of Joint Conveyance.** — The husband cannot make a conveyance of an estate by entireties without joining his wife so as to divest her title as survivor. *Doe v. Parratt*, 5 T. R. 652; *Wales v. Coffin*, 13 Allen (Mass.) 213. But they may join in a conveyance or mortgage. *Allen v. O'Donald*, 12 Sawy. (U. S.) 17; *McLead v. Aetna L. Ins. Co.*, 107 Ind. 394; *Fawcner v. Scottish American Mortg. Co.*, 107 Ind. 555; *Crooks v. Kennett*, 111 Ind. 347; *Bartholomew v. Pierson*, 112 Ind. 430; *People's Bldg., etc., Assoc. v. Billing*, 104 Mich. 186; *McDuff v. Beauchamp*, 50 Miss. 531; *Corr v. Porter*, 33 Gratt. (Va.) 278. See also *Hunt v. Blackburn*, 128 U. S. 464.

**Estate by Entireties Created in Fraud of Creditors.** — It has been held that estates by entireties cannot be created at the expense of creditors and held in fraud of their rights, and hence that where money which rightfully belongs to the husband's creditors is applied to the purchase of lands which are conveyed to the husband and his wife jointly, his undivided half may be subjected at the suit of his credit-

ors, and it will be presumed that the husband made one-half of the payments, in the absence of any other showing. *Newlove v. Callaghan*, 86 Mich. 297, 24 Am. St. Rep. 123; *Michigan Beef, etc., Co. v. Coll*, 116 Mich. 261.

**Operation of Conveyance upon Grantor's Right of Survivorship.** — Upon the death of the wife, the husband's mortgagee or grantee pending the marriage will be entitled to the benefit of the husband's right of survivorship in an estate by entireties. *Berrigan v. Fleming*, 2 Lea (Tenn.) 271.

Under statute in *Missouri* the same rule has been declared. *Hume v. Hopkins*, 140 Mo. 65.

It has been said also that if the husband survives, the purchaser at an execution sale of his interest during the coverture becomes the absolute owner of the whole estate. *Ames v. Norman*, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269. See also *Fleek v. Zillhaber*, 117 Pa. St. 213.

But it has been held that a mortgage by a wife of an estate by entireties is inoperative to pass the after-acquired title by way of estoppel in case she survives the husband. *Naylor v. Minock*, 96 Mich. 182.

**2. Husband's Right to Usufruct.** — *Thornley v. Thornley*, (1893) 2 Ch. 233; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462; *Den v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388; *Washburn v. Burns*, 34 N. J. L. 18; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Hiles v. Fisher*, 144 N. Y. 313, 43 Am. St. Rep. 762.

**Surplus After Mortgage Foreclosure.** — It has been held that where an estate by entireties has been sold under a mortgage foreclosure, the surplus money after the satisfaction of the mortgage is constructively realty and is held by entireties, and the money is to be invested under the direction of the court and the income paid to the husband. *Germania Sav. Bank v. Jung*, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 81.

**3. Husband's Power to Transfer His Life Interest** — *England*. — *Pollok v. Kelly*, 6 Ir. C. L.

*Massachusetts*. — *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462.

*Missouri*. — *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

*New Jersey*. — *Den v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388; *Washburn v. Burns*, 34 N. J. L. 21.

*New York*. — *Torrey v. Torrey*, 14 N. Y. 430; *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Jackson v. McConnell*, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; *Meeker v. Wright*, 76 N. Y. 272.

*North Carolina*. — *Topping v. Sadler*, 5 Jones L. (50 N. Car.) 357.



subject to the claims of his creditors.<sup>1</sup>

**Effect of Statutory Enactments.**—By statute in many jurisdictions tenancies by entireties have been practically abolished, the statutes in many cases expressly declaring that conveyances to husband and wife shall create tenancies in common,<sup>2</sup> unless, as it is sometimes provided, a right of survivorship is expressly called for by the terms of the instrument creating the estate.<sup>3</sup> But in most jurisdictions, notwithstanding the married women's acts and general statutory provisions relating to joint tenancies and tenancies in common, the common-law doctrine is still recognized, though in a modified form in some instances.<sup>4</sup>

*Pennsylvania.*—Fairchild v. Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117.

*Tennessee.*—Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269.

*Compare* Chandler v. Cheney, 37 Ind. 391; Thornburg v. Wiggins, 135 Ind. 178, 41 Am. St. Rep. 422; Naylor v. Minock, 96 Mich. 182.

**1. Life Interest Subject to Claims of Creditors.**—Washburn v. Burns, 34 N. J. L. 21; Jackson v. McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; Hiles v. Fisher, 144 N. Y. 313, 43 Am. St. Rep. 762; Stoebler v. Knerr, 5 Watts (Pa.) 181; French v. Mehan, 56 Pa. St. 286; Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; Roanes v. Archer, 4 Leigh (Va.) 550; Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692. *Compare* Simpson v. Biffle, 63 Ark. 289; Cox v. Wood, 20 Ind. 54; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471; Chandler v. Cheney, 37 Ind. 391; McConnell v. Martin, 52 Ind. 434; Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210; Barren Creek Ditching Co. v. Beck, 99 Ind. 250; Dodge v. Kinzy, 101 Ind. 105; Vinton v. Beamer, 55 Mich. 559.

**2. Tenancies by Entireties Abolished by Statute**—*England.*—Thornley v. Thornley, (1893) 2 Ch. 229; *In re* March, 27 Ch. D. 166; *In re* Jupp, 39 Ch. D. 148.

*Canada.*—*Re* Wilson, etc., Incandescent Electric Light Co., 20 Ont. 397.

*Alabama.*—Donegan v. Donegan, 103 Ala. 488, 49 Am. St. Rep. 53.

*Illinois.*—Cooper v. Cooper, 76 Ill. 57.

*Maine.*—Robinson, Appellant, 88 Me. 17, 51 Am. St. Rep. 367.

*Massachusetts.*—Pray v. Stebbins, 141 Mass. 221, 55 Am. Rep. 462.

*Minnesota.*—Wilson v. Wilson, 43 Minn. 398; McAlister v. Osborne, 43 Minn. 401, note.

*Mississippi.*—Krippendorf v. Wolf, 70 Miss. 81.

*New Hampshire.*—Clark v. Clark, 56 N. H. 105; Stilphen v. Stilphen, 65 N. H. 126.

See also Griffin v. Patterson, 45 U. C. Q. B. 554; Matter of Shaver, 31 U. C. Q. B. 603; Matter of Buchanan, 8 Cal. 509; Wilson v. Fairchild, 45 Minn. 203; Bradley v. Love, 60 Tex. 472.

**3.** Croan v. Joyce, 3 Bush (Ky.) 454; Elliott v. Nichols, 4 Bush (Ky.) 502; Wilson v. Wilson, 43 Minn. 398; McAlister v. Osborne, 43 Minn. 401, note; Gresham v. King, 65 Miss. 387. See also Rogers v. Grider, 1 Dana (Ky.) 242; Ross v. Garrison, 1 Dana (Ky.) 35; Moore v. Moore, 12 B. Mon. (Ky.) 664.

**4. Tenancies by Entireties Held Not to Be Abolished by Statute—United States.**—Myers v. Reed, 17 Fed. Rep. 401 (declaring rule in *Oregon*).

*District of Columbia.*—Alsop v. Fedarwisch, 9 App. Cas. (D. C.) 408.

*Arkansas.*—Robinson v. Eagle, 29 Ark. 202; Simpson v. Biffle, 63 Ark. 289.

*Indiana.*—Dyer v. Eldridge, 136 Ind. 654; Humbert v. Collings, 20 Ind. App. 93; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471; Arnold v. Arnold, 30 Ind. 305; Falls v. Hawthorn, 30 Ind. 444; Simpson v. Pearson, 31 Ind. 1, 99 Am. Dec. 577; Chandler v. Cheney, 37 Ind. 391; Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Edwards v. Beall, 75 Ind. 406; Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210; Dodge v. Kinzy, 101 Ind. 102; Hadlock v. Gray, 104 Ind. 596; Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162.

*Kansas.*—Wilson v. Johnson, 4 Kan. App. 747.

*Maryland.*—Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266.

*Michigan.*—Fisher v. Provin, 25 Mich. 347; Ætna Ins. Co. v. Resh, 40 Mich. 241; Manwaring v. Powell, 40 Mich. 371; Allen v. Allen, 47 Mich. 74; Jacobs v. Miller, 50 Mich. 119; Vinton v. Beamer, 55 Mich. 559; Speier v. Opfer, 73 Mich. 38, 16 Am. St. Rep. 556; Matter of Lewis, 85 Mich. 340, 24 Am. St. Rep. 94, *overruling* dictum in Dowling v. Salliotte, 83 Mich. 135; Naylor v. Minock, 96 Mich. 182.

*Missouri.*—Russell v. Russell, 122 Mo. 235, 43 Am. St. Rep. 581; Bains v. Bullock, 129 Mo. 117.

*New Jersey.*—Fulper v. Fulper, 54 N. J. Eq. 431, 55 Am. St. Rep. 590; Den v. Hardenbergh, 10 N. J. L. 49, 18 Am. Dec. 371; Washburn v. Burns, 34 N. J. L. 18; McDermott v. French, 15 N. J. Eq. 78; Bolles v. State Trust Co., 27 N. J. Eq. 309; See v. Zabriskie, 28 N. J. Eq. 422; Kip v. Kip, 33 N. J. Eq. 216; Buttler v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52.

*New York.*—Matter of Fox, (Surrogate Ct.) 9 Misc. (N. Y.) 661; Farmers, etc., Nat. Bank v. Gregory, 49 Barb. (N. Y.) 155; Reynolds v. Strong, 82 Hun (N. Y.) 202; O'Connor v. McMahon, 54 Hun (N. Y.) 66; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762; Grosser v. Rochester, 148 N. Y. 235.

*North Carolina.*—Phillips v. Hodges, 109 N. Car. 248.

*Oregon.*—Noblitt v. Beebe, 23 Oregon 4.

*Pennsylvania.*—Stark's Estate, 9 Kulp (Pa.) 120; Leet v. Miller, 6 Pa. Dist. 725; Diver v. Diver, 56 Pa. St. 106; Swisshelm's Appeal, 56 Pa. St. 475, 94 Am. Dec. 107; McCurdy v. Canning, 64 Pa. St. 39; Boyertown Nat. Bank v. Hartman, 147 Pa. St. 558, 30 Am. St. Rep. 759; Bramberry's Estate, 156 Pa. St. 632, 36 Am. St. Rep. 64, *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 851.



Thus, in some jurisdictions, under statutes securing to married women separate rights in property, it has been held that although estates by entireties have not been abolished, and the right of survivorship still exists as at common law, yet the husband and wife become tenants in common or joint tenants of the use during coverture, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or charge his or her moiety during the same period.<sup>1</sup>

(2) *Personalty*. — The rule seems to be well established at common law that choses in action due to husband and wife jointly, if not reduced to possession during the coverture, go to the survivor absolutely.<sup>2</sup> By numerous authorities the rule is based on the doctrine of tenancy by the entireties, which it is held applies to personalty as well as to realty.<sup>3</sup> In accordance with this view it has been held that if the husband and wife are possessed of shares of stock standing in their joint names, the husband is entitled to the dividends during the joint lives of himself and wife, and is entitled to the shares in the contingency of his surviving the wife, but if the wife survives the husband, she is entitled to the shares absolutely and the husband cannot during their joint lives so dispose of them as to extinguish this right.<sup>4</sup> And

*South Carolina*. — *Bomar v. Mullins*, 4 Rich. Eq. (S. Car.) 80; *Georgia*, etc., *R. Co. v. Scott*, 38 S. Car. 34; *McLeod v. Tarrant*, 39 S. Car. 271.

*Tennessee*. — *Miller v. Miller*, Meigs (Tenn.) 484, 33 Am. Dec. 157; *Berrigan v. Fleming*, 2 Lea (Tenn.) 271; *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 49 Am. St. Rep. 921; *Chambers v. Chambers*, 92 Tenn. 707.

*Vermont*. — *Corinth v. Emery*, 63 Vt. 505, 25 Am. St. Rep. 780.

*West Virginia*. — *Farmer's Bank v. Corder*, 32 W. Va. 233.

1. *Kip v. Kip*, 33 N. J. Eq. 213; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52; *O'Connor v. McMahon*, 54 Hun (N. Y.) 66; *Hiles v. Fisher*, 144 N. Y. 313, 43 Am. St. Rep. 762; *Grosser v. Rochester*, 148 N. Y. 235. *Compare Chandler v. Cheney*, 37 Ind. 391; *Carver v. Smith*, 90 Ind. 224, 46 Am. Rep. 210; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462; *Bram v. Bram*, 34 Hun (N. Y.) 487; *Goelet v. Gori*, 31 Barb. (N. Y.) 314; *Beach v. Hollister*, 5 Thomp. & C. (N. Y.) 568; *Bruce v. Nicholson*, 109 N. Car. 202, 26 Am. St. Rep. 562; *McCurdy v. Canning*, 64 Pa. St. 49.

2. *Choses in Action Due to Husband and Wife Go to Survivor*. — *England*. — *Bidgood v. Way*, 2 W. Bl. 1239; *Hill v. Saunders*, 7 Dowl. 17.

*Indiana*. — *Abshire v. State*, 53 Ind. 64.

*Maine*. — *Pike v. Collins*, 33 Me. 43.

*Massachusetts*. — *Draper v. Jackson*, 16 Mass. 450.

*Mississippi*. — *Pender v. Dicken*, 27 Miss. 252.

*Missouri*. — *Shields v. Stillman*, 48 Mo. 86. *New York*. — *Matter of Brooks*, 5 Dem. (N. Y.) 326; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *Schoonmaker v. Elmendorf*, 10 Johns. (N. Y.) 49; *McElroy v. Albany Sav. Bank*, 8 N. Y. App. Div. 46; *Borst v. Spelman*, 4 N. Y. 284; *Sanford v. Sanford*, 45 N. Y. 723.

*Pennsylvania*. — *Lodge v. Hamilton*, 2 S. & R. (Pa.) 491; *Hamm v. Meisenhelter*, 9 Watts (Pa.) 349; *Frankenfield v. Gruver*, 7 Pa. St. 448; *Gillan v. Dixon*, 65 Pa. St. 395.

*Tennessee*. — *Johnson v. Johnson*, 113, 98 Am. Dec. 445.

*Vermont*. — *Richardson v. Daggett*, 4 Vt. 336.

And this rule has been held to apply though the consideration of the chose in action passed from the husband alone. *Johnson v. Lusk*, 1 Tenn. Ch. 3.

3. *Doctrine of Estate by Entireties Applied to Personalty*. — *Ward v. Ward*, 14 Ch. D. 506; *In re Bryan*, 14 Ch. D. 516; *Gordon v. Whieldon*, 11 Beav. 170; *Atcheson v. Atcheson*, 11 Beav. 485; *Moffatt v. Burnie*, 18 Beav. 211; *Phelps v. Simons*, 159 Mass. 417, 38 Am. St. Rep. 430; *Bramberry's Estate*, 156 Pa. St. 632, 36 Am. St. Rep. 64.

Thus it has been held that where a conveyance of land to a husband and wife vests in them an estate by entireties, if on the sale of the land they accept from their vendee his bond and mortgage to secure to them a portion of the purchase money, it will be presumed that they hold the sum so secured not as joint tenants or tenants in common, but as tenants by entireties. *Bramberry's Estate*, 156 Pa. St. 632, 36 Am. St. Rep. 64. To the same effect see *Allen v. Tate*, 58 Miss. 585.

But in *Young's Estate*, 166 Pa. St. 645, it was held that where the conveyance would create neither a tenancy in common nor a joint tenancy in an unmarried person, it will not create a tenancy by the entireties, though the grantees may be described as husband and wife.

*Under Statute* in some jurisdictions the doctrine of tenancy by entireties as applied to personalty has been denied. *Sloan v. Frothingham*, 72 Ala. 589; *Wait v. Bovee*, 35 Mich. 425; *State v. Brady*, 53 Mo. App. 202; See *v. Zabriskie*, 28 N. J. Eq. 422; *Matter of Albrecht*, 136 N. Y. 91, 32 Am. St. Rep. 700. *Compare Gifford v. Rising*, 55 Hun (N. Y.) 61.

*Husband and Wife as Tenants in Common*. — Under statute it has been held that husband and wife may hold personal property as tenants in common. *Kaufman v. Schoeffel*, 46 Hun (N. Y.) 571; *Chambovet v. Cagney*, 35 N. Y. Super. Ct. 474. See also *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652.

4. *Bramberry's Estate*, 156 Pa. St. 632, 36 Am. St. Rep. 64.

it has even been said that the doctrine of tenancy by entireties applies to personality in possession.<sup>1</sup> On the other hand, it has been said that the doctrine of entireties has no application to personality whatever,<sup>2</sup> and it would seem on principle that if the personality is reduced to possession it belongs to the husband absolutely, since the wife's right of survivorship ought not to be greater when the whole title is in her husband as well as in herself than when it is solely in herself.<sup>3</sup>

**3. Transactions Between Husband and Wife — a. ANTENUPTIAL CONTRACTS.** — It may be laid down as a general rule at common law that executory contracts made between husband and wife before marriage are invalidated by the marriage.<sup>4</sup> A debt due to the wife by the husband<sup>5</sup> or to the husband by the wife<sup>6</sup> is extinguished by the intermarriage, and the obligation will not be revived by the termination of the marriage by divorce<sup>7</sup> or by the death of one of the spouses.<sup>8</sup> But at common law the intermarriage of an administratrix with an obligor in a bond payable to her as administratrix does not extinguish the debt.<sup>9</sup> Nor will intermarriage extinguish an antenuptial contract which was not to be enforced until after the marriage should be determined.<sup>10</sup>

In Equity also no extinguishment will take place in the case of antenuptial contracts made in consideration of marriage, as marriage settlements, since it would be inequitable that the intermarriage upon which alone the contract is to take effect should itself be a destruction of the contract.<sup>11</sup>

By Statute also in many jurisdictions an antenuptial debt due from a husband to his wife will not be extinguished by the intermarriage.<sup>12</sup> And the same rule has been applied under statute to antenuptial debts due from the wife to the husband.<sup>13</sup>

**b. POSTNUPTIAL CONTRACTS — (1) At Common Law.** — It is a well-established doctrine of the common law that husband and wife cannot make a valid contract with each other during the coverture.<sup>14</sup> The reason for the doc-

1. *Phelps v. Simons*, 159 Mass. 417, 38 Am. St. Rep. 430.

2. *Abshire v. State*, 53 Ind. 66.

3. See *Polk v. Allen*, 19 Mo. 467. See also opinion of dissenting judges in the case cited in the second note preceding.

4. *Effect of Intermarriage on Antenuptial Contracts.* — *In re Price*, 11 Ch. D. 163; *Phillips v. Barnett*, 1 Q. B. D. 436; *Smith v. Stafford*, Hob. 216; *Butler v. Butler*, 14 Q. B. D. 831; *Long v. Kinney*, 49 Ind. 235; *Suttles v. Whitlock*, 4 T. B. Mon. (Ky.) 451; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 238; *Patterson v. Patterson*, 45 N. H. 164.

5. *Antenuptial Debt by Husband to Wife.* — *Flenner v. Flenner*, 29 Ind. 568; *Abbott v. Winchester*, 105 Mass. 115; *Power v. Lester*, 23 N. Y. 527; *Matter of Callister*, 153 N. Y. 301, 60 Am. St. Rep. 620, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 817; *Smiley v. Smiley*, 18 Ohio St. 543.

6. *Antenuptial Debt by Wife to Husband.* — *Long v. Kinney*, 49 Ind. 235; *Farley v. Farley*, 91 Ky. 497.

7. *Antenuptial Debt Not Revived by Divorce.* — *Farley v. Farley*, 91 Ky. 497.

But under Statute in Maine it has been held that a woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage. *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

8. *Antenuptial Debt Not Revived by Death of Spouse.* — *Abbott v. Winchester*, 105 Mass. 115; *Smiley v. Smiley*, 18 Ohio St. 543.

9. *King v. Green*, 2 Stew. (Ala.) 133, 19 Am. Dec. 46.

10. *Cage v. Acton*, 12 Mod. 288; *Milbourn v. Ewart*, 5 T. R. 385; *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83; *Long v. Kinney*, 49 Ind. 239; *Farley v. Farley*, 91 Ky. 497.

11. *Validity of Antenuptial Marriage Settlements.* — *Cannel v. Buckle*, 2 P. Wms. 243. For a full discussion of this question see the title MARRIAGE SETTLEMENTS.

12. *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Flenner v. Flenner*, 29 Ind. 564; *Barton v. Barton*, 32 Md. 214; *Power v. Lester*, 23 N. Y. 527. See also *Matter of Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620. Compare *Smiley v. Smiley*, 18 Ohio St. 543.

13. *Clark v. Clark*, 49 Ill. App. 163. But see a different rule under statutes in other states. *Long v. Kinney*, 49 Ind. 235; *Farley v. Farley*, 91 Ky. 497.

14. *Invalidity of Postnuptial Contracts at Common Law — England.* — Co. Litt. 112 a; *Beard v. Beard*, 3 Atk. 72.

*United States.* — *Wallingsford v. Allen*, 10 Pet. (U. S.) 583.

*Alabama.* — *Frieron v. Frieron*, 21 Ala. 549; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

*Arkansas.* — *Pillow v. Wade*, 31 Ark. 678.

*Connecticut.* — *Dibble v. Hutton*, 1 Day (Conn.) 221.

*Illinois.* — *Hoker v. Boggs*, 63 Ill. 161.

*Kentucky.* — *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528.

*Maine.* — *Martin v. Martin*, 1 Me. 394;

trine generally assigned is that the wife having lost her legal unity, she and her husband are one person in legal contemplation, and it would be absurd for a person to enter into a contract with himself.<sup>1</sup> On the other hand, the ground is stated to be that the wife is under the coercion of the husband, and being thereby deprived of her freedom of volition, she should not be bound by her contracts with her husband.<sup>2</sup> This rule applies without restriction to executory contracts between husband and wife;<sup>3</sup> and it applies to executed contracts such as conveyances of lands made by one spouse directly to the other.<sup>4</sup> But a conveyance of lands may be made by one spouse to the other through a third person as an intermediary.<sup>5</sup>

(2) *In Equity*. — But courts of equity, though they follow the law, will, under particular circumstances, give effect to postnuptial contracts between husband and wife.<sup>6</sup> Thus, it may be laid down as a general rule that a postnuptial contract, if *bona fide*, and made upon sufficient consideration, and wholly or partly executed, will without the intervention of a trustee be sustained in equity.<sup>7</sup> Indeed, it has been intimated that equity will enforce a

Wyman v. Whitehouse, 80 Me. 257; Johnson v. Stillings, 35 Me. 427; Allen v. Hooper, 50 Me. 371.

Maryland. — Preston v. Fryer, 38 Md. 221.

Massachusetts. — Bassett v. Bassett, 112 Mass. 99; Roby v. Phelon, 118 Mass. 541.

Michigan. — Loomis v. Brush, 36 Mich. 40; Jenne v. Marble, 37 Mich. 319.

Missouri. — Frissell v. Rozier, 19 Mo. 448.

Nebraska. — Aultman v. Obermeyer, 6 Neb. 260.

New Hampshire. — Patterson v. Patterson, 45 N. H. 164.

New York. — Berkowitz v. Brown, (C. Pl. Eq. T.) 3 Misc. (N. Y.) 1; White v. Wager, 25 N. Y. 328; Dean v. Metropolitan El. R. Co., 119 N. Y. 540.

Ohio. — Fowler v. Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Pennsylvania. — Johnston v. Johnston, 31 Pa. St. 450.

Vermont. — Sweat v. Hall, 8 Vt. 187; Barron v. Barron, 24 Vt. 375.

Wisconsin. — Putnam v. Bicknell, 18 Wis. 333.

**A Divorced Wife** cannot maintain an action at law against her former husband upon an implied contract arising during coverture. Pittman v. Pittman, 4 Oregon 298.

1. Gamble v. Gamble, 11 Ala. 972; Stone v. Gazzam, 46 Ala. 269; Hoker v. Boggs, 63 Ill. 191.

2. Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528. See also Winebrinner v. Weisiger, 3 T. B. Mon. (Ky.) 32.

3. **Executory Contracts Between Husband and Wife Invalid at Common Law**. — Jenne v. Marble, 37 Mich. 322. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 19.

4. **Conveyance from One Spouse Directly to the Other Invalid** — *England*. — Beard v. Beard, 3 Atk. 72.

Illinois. — Newman v. Willetts, 48 Ill. 534.

Indiana. — Fletcher v. Mansur, 5 Ind. 267; Sims v. Ricketts, 35 Ind. 181, 9 Am. Rep. 679.

Maine. — Martin v. Martin, 1 Me. 394.

Maryland. — Gebb v. Rose, 40 Md. 387.

New York. — Voorhees v. Presbyterian Church, 17 Barb. (N. Y.) 103; Simmons v. McElwain, 26 Barb. (N. Y.) 419; Shepard v.

Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396.

Ohio. — Fowler v. Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

West Virginia. — Cosner v. McCrum, 40 W. Va. 339.

**A Deed of Personality**, as for instance, a transfer of slaves by the husband to the wife in consideration of love and affection, has been held to come under the same rule. Gamble v. Gamble, 11 Ala. 966.

5. **Conveyance from One Spouse to the Other through Third Person** — *Illinois*. — Huftalin v. Misner, 70 Ill. 55.

Kentucky. — Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528.

Maryland. — Gebb v. Rose, 40 Md. 387.

Massachusetts. — Motte v. Alger, 15 Gray (Mass.) 322.

New Hampshire. — Jewell v. Porter, 31 N. H. 34.

New York. — Meriam v. Harsen, 2 Barb. Ch. (N. Y.) 232; Jackson v. Stevens, 16 Johns. (N. Y.) 110; White v. Wager, 25 N. Y. 328.

Ohio. — Dukes v. Spangler, 35 Ohio St. 119.

South Carolina. — Garvin v. Ingram, 10 Rich. Eq. (S. Car.) 130.

Virginia. — Shepperson v. Shepperson, 2 Gratt. (Va.) 501.

See also Thatcher v. Omans, 3 Pick. (Mass.) 521. Compare Vicknair v. Trosclair, 45 La. Ann. 373.

6. 2 Story's Eq. Jur. (13th ed.), § 1372; Gamble v. Gamble, 11 Ala. 972; Corr's Appeal, 62 Conn. 409.

As to the validity and effect of contracts of separation between husband and wife, see the title **SEPARATION**.

7. **Contracts Between Husband and Wife Enforceable in Equity** — *England*. — Hart v. Hart, 18 Ch. D. 670; Nicol v. Nicol, 30 Ch. D. 143; McGregor v. McGregor, 21 Q. B. D. 424; Vansittart v. Vansittart, 4 Kay & J. 63.

United States. — Smith v. Seiberling, 35 Fed. Rep. 677; Kesner v. Trigg, 98 U. S. 54; Jones v. Clifton, 101 U. S. 229.

Alabama. — Gamble v. Gamble, 11 Ala. 972.

Arkansas. — Ogden v. Ogden, 60 Ark. 70, 46 Am. St. Rep. 151.

California. — See *California Appellate Cases*, 1909.



contract for value between a husband and wife under any circumstances when the wife is put in such a position that she can be regarded for the purposes of the contract as a *feme sole*.<sup>1</sup> A full discussion of the validity and effect in equity of postnuptial transfers of property will be found in another portion of this work.<sup>2</sup>

(3) *Under Statute*. — By statute in several jurisdictions husband and wife are enabled, subject to certain restrictions in some instances, to enter into contracts generally with each other which will be enforceable at law.<sup>3</sup> But in other jurisdictions it has been held that the common-law disability of a married woman to contract with her husband has not been abrogated by statutes enabling her to contract generally,<sup>4</sup> and in others still the common-law rule has been relaxed only so far as to enable her to manage and enjoy her separate business or estate.<sup>5</sup>

**Invalidity of Certain Contracts Regardless of Statute.** — And notwithstanding the statutes of the various states enabling husband and wife to contract with each other, some specific contracts have been declared to be invalid, either as being without consideration or as being against public policy.<sup>6</sup>

*Indiana*. — *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679.

*Kentucky*. — *Eckermeyer v. Hoffmeier*, 98 Ky. 724.

*Massachusetts*. — *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292.

*Nebraska*. — *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867.

*New Hampshire*. — *Chadbourn v. Gilman*, 64 N. H. 353.

*New Jersey*. — *Vought v. Vought*, 50 N. J. Eq. 177.

*New York*. — *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396.

*Virginia*. — *Gosden v. Tucker*, 6 Munf. (Va.) 1.

*West Virginia*. — *Cosner v. McCrum*, 40 W. Va. 339; *Hunter v. Strider*, 41 W. Va. 321.

*Wisconsin*. — *Putnam v. Bicknell*, 18 Wis. 333.

**Note to Wife Regarded as Declaration of Trust.** — It has been held that if a note be given by the husband to the wife for money advanced by her out of her separate estate, it constitutes a declaration of trust in favor of the wife. *Murray v. Glasse*, 17 Jur. 816. See also *McC Campbell v. McC Campbell*, 2 Lea (Tenn.) 664, 31 Am. Rep. 623. Compare *Fowle v. Torrey*, 135 Mass. 90.

And the same rule has been applied to a note given by the husband to the wife at the time of reducing into possession a chose of action belonging to her, the circumstances showing that it was not his intention to reduce the chose for his own benefit. *Drury v. Briscoe*, 42 Md. 154; *Moyer's Appeal*, 77 Pa. St. 482; *McC Campbell v. McC Campbell*, 2 Lea (Tenn.) 661, 31 Am. Rep. 623.

But where the chose in action has already been reduced to possession by the husband, it has been held that a note subsequently given by the husband to the wife in consideration of the receipt of the chose in action will not be enforced as a declaration of trust. *Turner v. Nye*, 7 Allen (Mass.) 181; *Bridgman v. Bridgman*, 138 Mass. 58.

**Wife's Note Payable to Husband.** — In *Morrison v. Thistle*, 67 Mo. 596, it was held that in equity a note made by a wife payable to her

husband is, in the hands of a third party, capable of enforcement as a charge against her separate estate.

1. *Bateman v. Ross*, 1 Dow. 235; *Vansittart v. Vansittart*, 4 Kay & J. 63, 2 De G. & J. 249; *Nicholl v. Jones*, L. R. 3 Eq. 696; *Gibbs v. Harding*, L. R. 5 Ch. 336.

2. See the title MARRIAGE SETTLEMENTS.

3. **Contracts Between Husband and Wife Valid under Statute.** — *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. Rep. 117; *Dimond v. Sander-son*, 103 Cal. 97; *Corr's Appeal*, 62 Conn. 409; *Crum v. Sawyer*, 132 Ill. 443; *Despain v. Wag-ner*, 163 Ill. 598; *Grubbe v. Grubbe*, 26 Oregon 363.

Thus, under Statute in Oregon it has been held that a married woman may maintain an action at law against her husband for money voluntarily delivered to him under an express agreement to repay it. *Grubbe v. Grubbe*, 26 Oregon 363.

4. *Lord v. Parker*, 3 Allen (Mass.) 129; *Kneil v. Egleston*, 140 Mass. 202; *McCorkle v. Gold-smith*, 60 Mo. App. 475; *Lindsay v. Archibald*, 65 Mo. App. 117; *Hendricks v. Isaacs*, 117 N. Y. 417, 15 Am. St. Rep. 524. See also *Clark v. Patterson*, 18 Mass. 388, 35 Am. St. Rep. 498; *Whitney v. Wheeler*, 116 Mass. 490; *Fowle v. Torrey*, 135 Mass. 90; *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452; *Matter of Callister*, 153 N. Y. 303, 60 Am. St. Rep. 620; *Matter of Reuter*, 5 Dem. (N. Y.) 162.

5. *Kedey v. Petty*, (Ind. 1899) 54 N. E. Rep. 798; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Mathes v. Shank*, 94 Ind. 501; *Barnett v. Harshbarger*, 105 Ind. 412; *Jenne v. Marble*, 37 Mich. 319. See also *Johnson v. Jonchert*, 124 Ind. 105; *Luntz v. Greve*, 102 Ind. 173; *Walker v. Long*, 109 N. Car. 510.

6. **Contracts for Services.** — An agreement by a married man to pay to his wife a specified price for her services as housekeeper has been held to be void as being contrary to public policy and without consideration. *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160. See also *Kedey v. Petty*, (Ind. 1899) 54 N. E. Rep. 798; *Matter of Reuter*, 5 Dem. (N. Y.) 162.

*c. AGENCY OF ONE SPOUSE FOR THE OTHER — (1) Agency of Husband for Wife.* — At common law the wife had no power to appoint a third person to act in her stead, and hence she could not authorize her husband to become her agent.<sup>1</sup> But as a general rule she may appoint him as her agent in cases where by statute or otherwise she is *sui juris* and capable of acting for herself, as there is nothing in the relationship to prevent the husband from acting as her agent.<sup>2</sup> Generally, however, the husband's agency cannot be inferred from the marital relation alone. Some previous appointment or general holding out to the public as agent, or subsequent adoption or ratification of his acts, is essential in order to hold the wife bound thereby.<sup>3</sup> And the question

Nor, it has been held, will the law regard the labors of a wife in the field instead of in her household as a consideration for a promise founded thereon from the husband. *Whitaker v. Whitaker*, 52 N. Y. 371, 11 Am. Rep. 711.

In *Matter of Callister*, 153 N. Y. 302, 60 Am. St. Rep. 620, the court said, in a case where the wife had brought action against the estate of her deceased husband for services rendered to him: "It was not until after the death of Mr. Callister that there was legislation which would enable a husband to make a valid and enforceable promise to his wife to pay her for her personal services, rendered apart from a separate business. Laws 1892, c. 594; Laws 1896, c. 272."

**Under Statute in Pennsylvania** enabling a married woman to contract generally, however, it has been held that if the husband agrees to pay wages to his wife for extra and unusual services in the course of his business, outside of the family relation, as for services as cook in his restaurant, the contract will be valid and binding. *Nuding v. Urich*, 169 Pa. St. 292. See also the title CONSIDERATION, vol. 6, p. 750.

**Obligation to Support Wife as Consideration for Note.** — In *Whitaker v. Whitaker*, 52 N. Y. 371, 11 Am. Rep. 711, it was held that the meritorious consideration arising out of the husband's obligation to support the wife is not sufficient in equity to sustain a promissory note given by the husband to his wife as against his collateral heirs.

**Contract for Support of Husband by Wife.** — A contract whereby the wife, in consideration of the conveyance of land to her by her husband, agrees to support him for life has been held to be illegal. *Corcoran v. Corcoran*, 119 Ind. 138, 12 Am. St. Rep. 390.

**Personal Property Acquired through Wife as Consideration.** — Personal estate owned and possessed by a *feme sole* at the time of her marriage will not amount to an absolute consideration for a promise from the husband to the wife, since upon the marriage the property vests absolutely in the husband. *Buchanan v. Lee*, 69 Ind. 117; *Terry v. Wilson*, 63 Mo. 193.

**Contract to Regulate Domestic Conduct.** — A contract by the husband to pay to the wife a sum of money in consideration of her faithfully observing an agreement, among other things not to scold, find fault, or get angry, and to use every means in her power to promote peace and harmony, has been held to be void as being against public policy, because its enforcement would involve an inquiry into those private matters of the family which the

law, in the interests of society, holds sacred. *Miller v. Miller*, 78 Iowa 177, 16 Am. St. Rep. 431.

**Maltreatment of Wife as Consideration.** — But in *Reamey v. Bayley* (Pa. 1887) 11 Atl. Rep. 438, it was held that a bond given by the husband to his wife to be due and payable on the contingency of the husband not treating his wife kindly and faithfully is not void as being without consideration or against public policy.

**1. Incapacity of Wife to Appoint Husband as Agent at Common Law.** — See the title AGENCY, vol. 1, p. 942.

**Agency from Necessity.** — But it seems that even at common law the husband has authority by virtue of his marital relation alone to act as the wife's agent under circumstances of necessity. Thus it has been held that at common law, if a conveyance to a married woman is legally delivered to the husband and accepted by him for his wife, the law will presume an acceptance by her, because it was for her benefit and the husband occupied the relation to the wife that would authorize him to accept the deed for her. *M'Gehee v. White*, 31 Miss. 46.

**2. Where Wife Is Sui Juris.** — *McMurtry v. Brown*, 6 Neb. 377. See the title AGENCY, vol. 1, p. 947.

As to the wife's power to appoint an agent to deal with her equitable or statutory separate estate, see the title SEPARATE PROPERTY (OF MARRIED WOMEN).

**3. Agency Not Inferred from Marital Relation Alone.** — *United States*. — *Dodge v. Knowles*, 114 U. S. 435; *Weightman v. Washington Critic Co.*, 4 App. Cas. (D. C.) 136.

*Arkansas.* — *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101.

*Georgia.* — *Williams v. Roberts*, 92 Ga. 291; *Axson v. Belt*, 103 Ga. 578; *Stilwell v. Woodruff*, 76 Ga. 347.

*Indiana.* — *Barnett v. Gluting*, 3 Ind. App. 415.

*Iowa.* — *Miller v. Hollingsworth*, 33 Iowa 224; *Price v. Seydel*, 46 Iowa 698.

*Maine.* — *Ferguson v. Spear*, 65 Me. 277; *Verrill v. Parker*, 65 Me. 578.

*Massachusetts.* — *Merrill v. Parker*, 112 Mass. 215.

*Missouri.* — *Garnett v. Berry*, 3 Mo. App. 101.

*New York.* — *Bates v. Brockport First Nat. Bank*, 89 N. Y. 286.

*Pennsylvania.* — *Dearie v. Martin*, 78 Pa. St. 55.

*Wisconsin.* — *Ladd v. Hildebrandt*, 27 Wis. 135, 9 Am. Rep. 445.

See also the title AGENCY, vol. 1, p. 958.



is in other respects controlled by the general principles of agency.<sup>1</sup>

(2) *Agency of Wife for Husband* — In General. — There is nothing in the matrimonial relation to prevent the wife from acting as the husband's agent.<sup>2</sup> But as a general rule the wife derives no original authority to act for the husband by virtue of the marriage contract alone, and the acts of the wife are not binding upon the husband unless she is in fact his agent.<sup>3</sup> Such agency may be founded on the husband's assent, precedent<sup>4</sup> or subsequent<sup>5</sup> to the act performed, or it may be express<sup>6</sup> or implied.<sup>7</sup> Thus it may be implied from the acts and conduct of the principal, as where he has permitted previous similar dealings on the wife's part.<sup>8</sup> And indeed it appears that in some cases the law will presume the wife to be the agent of the husband when no such presumption would exist as to another person, and also will in some cases imply a larger authority to the wife than to an ordinary agent, as in case of matters pertaining to the domestic management;<sup>9</sup> and in other cases when the husband is absent it appears that the wife has authority to act in his behalf which would not exist if he were at home.<sup>10</sup> But these inferences are founded in the fact that it is usual and customary to permit the wife to act in such cases.<sup>11</sup>

**Clear Evidence of Agency.** — And indeed it has been held that to establish the agency of the husband for the wife the evidence must be of a stronger and more satisfactory character than that required between independent parties. *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *McLaren v. Hall*, 26 Iowa 297; *Eystra v. Capelle*, 61 Mo. 578.

**Husband's Knowledge Not Imputable to Wife.** — In *Satterfield v. Malone*, 35 Fed. Rep. 452, it was held that the knowledge of a husband as to the title of real estate which his wife purchased could not be imputed to the wife, where it was not shown that he acted as her agent in the transaction. To the same effect see *Weightman v. Washington Critic Co.*, 4 App. Cas. (D. C.) 136.

1. *Heustis v. Kennedy*, 23 Ill. App. 42; *Barnett v. Gluting*, 3 Ind. App. 415; *Hunt v. Poole*, 139 Mass. 224; *Thompson v. Kehrmann*, 1 Mo. App. Rep. 190, 60 Mo. App. 488; *Gleaton v. Tyler*, 43 S. Car. 474; *Johnson v. Valido Marble Co.*, 64 Vt. 348. See the title AGENCY, vol. 1, p. 930.

2. **Matrimonial Relation Not Antagonistic to Wife's Agency for Husband.** — *Cox v. Hoffman*, 4 Dev. & B. L. (20 N. Car.) 180.

3. **General Rule that no Agency Arises from Fact of Marriage Alone.** — *Debenham v. Mellon*, 6 App. Cas. 24; *Gray v. Otis*, 11 Vt. 628.

4. **Prior Authorization of Wife by Husband.** — *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281.

5. **Subsequent Assent or Ratification.** — *Millard v. Harvey*, 34 Beav. 237.

**Hiring of Chattel.** — In *Hill v. Sewald*, 53 Pa. St. 271, 91 Am. Dec. 209, it was held that where a wife, in the absence of her husband, hired a chattel for him, as where she agreed for the erection of boilers, etc., in his mill, and after his return he did not disavow the contract, the act was to be viewed as the act of the husband.

6. **Express Authority to Wife.** — *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281.

**Specific Authority.** — But in the same case it was held that where the express agency of the wife extends only to the performance of certain specific acts, the husband will not be bound by her acts and admissions performed in excess of that authority.

**Mode of Appointment.** — The agency of a wife for her husband may be created either verbally or by writing, and the "addition of a seal to the writing surely cannot have the effect to destroy the agency." *Goodwin v. Kelly*, 42 Barb. (N. Y.) 194.

7. *Cox v. Hoffman*, 4 Dev. & B. L. (20 N. Car.) 180.

8. **Authority Implied from Previous Dealings of Parties.** — *Cox v. Hoffman*, 4 Dev. & B. L. (20 N. Car.) 180; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

**Agency to Receive Notice.** — In *Plimmer v. Sells*, 3 N. & M. 422, 28 E. C. L. 404, it was held to be competent for a jury to infer agency in a wife to accept a notice with respect to a particular transaction in her husband's trade from the circumstances of her being seen twice in his counting house, appearing to conduct his business with reference to the transaction in question, and on one of these occasions giving directions to the foreman.

9. **Wife's Implied Authority in Domestic Affairs.** — *Freestone v. Butcher*, 9 C. & P. 643, 38 E. C. L. 269; *Ruddock v. Marsh*, 1 H. & N. 601; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Benjamin v. Benjamin*, 15 Conn. 357, 39 Am. Dec. 384.

**Admission by Wife as Manager of Household.** — In *Pickering v. Pickering*, 6 N. H. 124, it was held that it must be presumed, until the contrary appears, that the wife conducts and manages the household affairs as the agent of her husband, and her declarations in relation to matters done under her direction while thus acting as agent are admissible in evidence against him.

In *Anonymous*, 1 Stra. 527, Pratt, C. J., allowed the wife's declaration that she agreed to pay four shillings per week for nursing a child as being good evidence to charge the husband, this being a matter usually transacted by women.

10. **Implied Authority from Husband's Absence.** — *Benjamin v. Benjamin*, 15 Conn. 357, 39 Am. Dec. 384.

11. *Benjamin v. Benjamin*, 15 Conn. 357, 39 Am. Dec. 384.



**Control and Management of Husband's Property.** — Thus the wife has, it seems, in the absence of the husband, a general authority to exercise the usual and ordinary control over the property left in her possession by him, unless the presumption of authority is rebutted by proof that he has constituted some other person his agent for that purpose.<sup>1</sup>

**Receipt of Money Due to Husband.** — At common law the wife cannot receive payment on the husband's outstanding choses in action except as agent of the husband, and he will not be bound thereby unless he gives authority to her or knows of the payments and makes no objection.<sup>2</sup> But it has been held that a payment to the wife, in the husband's absence, of a debt due to him is binding on him by virtue of her implied agency, provided there be no intent on the part of the debtor to deprive the husband of his rights.<sup>3</sup>

**4. Wills Between Husband and Wife.** — A full discussion of the validity and effect of wills between husband and wife will be found elsewhere in this work.<sup>4</sup>

**5. Torts Between Husband and Wife — Personal Injuries.** — The common-law unity of husband and wife operates equally to preclude either spouse from successfully maintaining an action for damages for personal injuries against the other.<sup>5</sup> Thus the wife cannot maintain a civil action to recover damages against the husband for personal injuries, as, for instance, assault and battery,<sup>6</sup> false imprisonment,<sup>7</sup> or slander,<sup>8</sup> committed upon her during coverture, and this even after the dissolution of marriage by divorce;<sup>9</sup> nor, it has been held, can she maintain such action against one who acts with the husband and under his direction in doing the injury.<sup>10</sup>

**Injuries to Property.** — Nor could either spouse maintain a civil action at common law for damages on account of injury to the property rights of the other,<sup>11</sup>

**1. Wife's Authority to Control Husband's Property.** — *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Rotch v. Miles*, 2 Conn. 638; *Benjamin v. Benjamin*, 15 Conn. 356, 39 Am. Dec. 384; *Bufford v. Speed*, 11 Bush (Ky.) 338; *Church v. Landers*, 10 Wend. (N. Y.) 79; *Chunot v. Larson*, 43 Wis. 539, 28 Am. Rep. 567.

**Making Repairs.** — In *McAfee v. Robertson*, 41 Tex. 355, it was held that in a suit for necessary repairs done upon the homestead, at the request of the wife, during the protracted absence of the husband, it is error to instruct the jury that such contract, to be binding on the husband, must be ratified by him.

**2. Payment of Money to Wife Without Authority.** — *Husche v. Sass*, 67 Ill. App. 246; *Thrasher v. Tuttle*, 22 Me. 335; *Kowing v. Manly*, 49 N. Y. 192. See also *Allen v. Williamsburgh Sav. Bank*, (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 342, 65 N. Y. 314.

**Express Authority to Control Rents and Profits of Wife's Lands.** — Where the wife is expressly authorized by the husband to receive and control the rents and profits of her lands, payments made to her will be binding on the husband, though some of the payments were received in repairs and though such repairs resulted not only in her benefit as tenant for life, but to the benefit of the reversioner. *Cheney v. Pierce*, 38 Vt. 515.

**3. Authority to Receive Payments Implied from Husband's Absence.** — *Spencer v. Tisue*, Add. (Pa.) 316.

**Express Authority.** — In *Stall v. Meek*, 70 Pa. St. 181, it was held that a husband expecting to be absent may make his wife his agent for receiving money collected from his debtors.

**4.** See the titles TESTAMENTARY CAPACITY; WILLS.

**5. No Action for Personal Injury by One Spouse to the Other.** — *Kujek v. Goldman*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 34, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 823.

**6. Assault and Battery.** — *Phillips v. Barnet*, 1 Q. B. D. 436; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Longendyke v. Longendyke*, 44 Barb. (N. Y.) 366; *Schultz v. Schultz*, 89 N. Y. 644, reversing *Schultz v. Schultz*, 27 Hun (N. Y.) 26.

**Under a Statute in Iowa** providing that should either the husband or the wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right accruing out of it, in the same manner and extent as if they were unmarried, it has been held that the wife is not authorized to maintain an action against the husband for an assault and battery during coverture. *Peters v. Peters*, 42 Iowa 182.

**7. False Imprisonment.** — *Main v. Main*, 46 Ill. App. 106.

**8. Slander.** — *Freethy v. Freethy*, 42 Barb. (N. Y.) 641. Compare *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594.

**9. No Action After Divorce a Vinculo.** — *Phillips v. Barnet*, 1 Q. B. D. 436; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589.

**10.** *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589.

**11. No Common-law Action for Injury to Property by Either Spouse.** — *Whitney v. Whitney*, (Supm. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 350; *Freethy v. Freethy*, 42 Barb. (N. Y.) 641.

**An Action of Replevin**, being an action of tort, cannot be maintained by the husband against

but in equity either spouse could maintain an action against the other for the protection of his or her property and to restrain the other from improper use or destruction thereof.<sup>1</sup>

By Statute in some of the states the right is given to the husband and the wife to sue each other for injuries to property or rights growing out of property.<sup>2</sup>

**6. Suits Between Husband and Wife.** — A full discussion of the capacity of one spouse to maintain suit against the other will be found elsewhere.<sup>3</sup>

**IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS** — **1. Rights Against Third Persons** — *a. ON CONTRACT.* — The respective rights of husband and wife on the wife's contracts with third persons have already been discussed incidentally in a preceding portion of this article.<sup>4</sup>

*b. IN TORT* — (1) *In General.* — The property rights of husband and wife have been considered in a preceding section of this article,<sup>5</sup> and the capacity of husband and wife to maintain suits for torts committed upon the wife's property or for any infringement of her property rights in the nature of a tort is fully discussed elsewhere.<sup>6</sup> This section will be confined to a treatment of the rights of husband and wife to sue for torts of a personal nature.

(2) *Injuries to Wife's Person or Reputation* — (a) *Damages for Wife's Pain and Suffering* — *In General.* — As a general rule, where an injury to the absolute rights of the person, as batteries or injury to health, reputation, or liberty, is inflicted upon a married woman, an action may be maintained at common law in the name of the husband and wife for damages where the ground of the action is the wife's personal pain or suffering, physical or mental.<sup>7</sup> The action is to be

the wife during coverture. *Hobbs v. Hobbs*, 70 Me. 383.

**Action Against Person Acting under Wife's Direction.** — In *Burns v. Kirkpatrick*, 91 Mich. 364, 30 Am. St. Rep. 485, it was held that a brother of the wife was liable to the husband in an action of trespass for the value of certain goods, the title to which was in the husband, taken from his house, although the defendant did not convert the goods to his own use, and the act of removal was done under the direction of the plaintiff's wife.

**1. Remedy in Equity for Injury to Property by Either Spouse.** — *Larison v. Larison*, 9 Ill. App. 31; *Davidson v. Smith*, 20 Iowa 466; *Whitney v. Whitney*, (Supm. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 350. See also *Donnelly v. Donnelly*, 9 Ont. 673; *Heck v. Vollmer*, 29 Md. 511.

But it has been held that a wife who causelessly deserts her husband is not entitled to the aid of a court of equity in getting possession of such chattels as she has contributed to the furnishing and adornment of her husband's house. *Black v. Black*, 30 N. J. L. 215.

**2. Remedy under Statute.** — *Larison v. Larison*, 9 Ill. App. 27; *Main v. Main*, 46 Ill. App. 108; *Peters v. Peters*, 42 Iowa 184; *White v. White*, 58 Mich. 546; *Berdell v. Parkhurst*, 19 Hun (N. Y.) 358; *Howland v. Howland*, 20 Hun (N. Y.) 472; *Mason v. Mason*, 66 Hun (N. Y.) 386; *Whitney v. Whitney*, (Supm. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 350; *Ryerson v. Ryerson*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 738. See also *Emerson v. Clayton*, 32 Ill. 493; *Chestnut v. Chestnut*, 77 Ill. 346; *Markham v. Markham*, 4 Mich. 305. Compare *Walker v. Reamy*, 36 Pa. St. 474.

Under the Statute in Wisconsin it has been held that the husband can maintain an action of replevin against his wife for goods claimed

by her as her own property. *Carney v. Gleissner*, 62 Wis. 493.

**Recovery of Real Estate.** — Under statute it has been held that a married woman may maintain an action against her husband to recover possession of her real estate from which she is excluded by him. *Minier v. Minier*, 4 Lans. (N. Y.) 421; *Wood v. Wood*, 83 N. Y. 575. See also *Manning v. Manning*, 79 N. Car. 293, 28 Am. Rep. 324.

3. See the title HUSBAND AND WIFE, 10 ENCYC. OF PL. AND PR. 195.

4. See *supra*, this title, *Rights, Duties, and Liabilities Inter Se* — *Property Rights*.

5. See *supra*, this title, *Rights, Duties, and Liabilities Inter Se* — *Property Rights*.

6. See the title HUSBAND AND WIFE, 10 ENCYC. OF PL. AND PR. 191.

**7. Damages for Suffering Incident to Personal Injury to Wife** — *Connecticut.* — *Fuller v. Naugatuck R. Co.*, 21 Conn. 571.

*Iowa.* — *McKinney v. Western Stage Co.*, 4 Iowa 423.

*Kentucky.* — *Weagle v. Hensley*, 5 J. J. Marsh. (Ky.) 378.

*Maine.* — *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Starbird v. Frankfort*, 35 Me. 89.

*Massachusetts.* — *Jordan v. Middlesex R. Co.*, 138 Mass. 425.

*New York.* — *Paige v. Raimy*, 2 Hill (N. Y.) 309; *Brooks v. Schwerin*, 54 N. Y. 348.

*North Carolina.* — *Harper v. Pinkston*, 112 N. Car. 293.

*Ohio.* — *Gallagher v. Thompson*, *Wright (Ohio)* 466.

*Pennsylvania.* — *Clark v. Koch*, 9 Phila. (Pa.) 109, 30 Leg. Int. (Pa.) 108; *Carr v. Easton*, 7 Pa. Co. Ct. 404.

*Canada.* — *Smith v. Carder*, 11 U. C. Q. B. 77; *Hunter v. Ogden*, 31 U. C. Q. B. 132.



regarded at common law as the action of the wife subject to the right on the part of the defendant of insisting on having the husband joined.<sup>1</sup>

**Husband's Right to Damages When Recovered.** — But at common law if the damages are collected or reduced to possession during the coverture they become the absolute property of the husband.<sup>2</sup>

**Husband's Release of Damages.** — This includes the husband's right to release the damages before they are paid, whether after judgment or before suit is brought.<sup>3</sup>

**Effect of Husband's Death.** — But since the injury to the wife is the meritorious cause of action, if the husband dies before or during the pendency of the suit the damages will belong to the wife and will not go to his administrator; the cause of action survives to the wife, and she may sue to judgment and execution.<sup>4</sup>

**Effect of Wife's Death.** — But upon the death of the wife the action will not, at common law, survive to the husband nor even to the wife's administrator.<sup>5</sup> By statute in some states, however, the action survives to the wife's administrator.<sup>6</sup>

**Damages Considered as Wife's Separate Estate under Statute.** — But under the Married Women's Acts of the various states the sole right of action is given to the

**Notice of Damage to Tortfeasor.** — It has been held, in an action by a married woman and her husband against a town for an injury occasioned to the wife by reason of the insufficiency of a highway, that, under a statute requiring notice to be given by the person injured or claiming damages, a written notice signed by the married woman alone and delivered to the selectmen of the town is sufficient. *Church v. Westminster*, 45 Vt. 380.

**Admissibility of Husband's Admission.** — It has been held, in an action by husband and wife to recover damages for injuries done to the person of the wife, that the husband has, apart from statute, such an interest in the action that his admission of facts tending to defeat it is receivable in evidence. *Shaddock v. Clifton*, 22 Wis. 114, 94 Am. Dec. 588.

But in *Burrell Tp. v. Uncapher*, 117 Pa. St. 353, 2 Am. St. Rep. 664, it was held that in an action brought by husband and wife in right of the wife to recover damages for injuries to her, the husband cannot be regarded as a party to the record so as to make him competent to be called for cross examination or so as to render declarations made by him admissible against his wife.

**Negligence of Husband Imputed to Wife.** — It has been held that in an action at common law by a husband and wife for a personal injury to the wife the contributory negligence of the husband will defeat the suit. *Pennsylvania R. Co. v. Goodenough*, 55 N. J. L. 577. See also *Yahn v. Ottumwa*, 60 Iowa 429; *Nesbit v. Garner*, 75 Iowa 314, 9 Am. St. Rep. 486; *Carlisle v. Sheldon*, 38 Vt. 440.

And the rule has been applied notwithstanding the Married Women's Acts in *New Jersey*. *Pennsylvania R. Co. v. Goodenough*, 55 N. J. L. 577.

But under separate property acts in some states it has been held that the contributory negligence of the husband not acting as the wife's agent is no bar to her claim for damages. *Flori v. St. Louis*, 3 Mo. App. 231; *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548.

But where the proceeds of the recovery become community property, it has been held that the recovery is as much for the husband as for the wife, and for that reason his negligence will affect her right of recovery. *Missouri Pac. R. Co. v. White*, 80 Tex. 202. See also *Gulf, etc., R. Co. v. Greenlee*, 62 Tex. 352.

**Wrong Inflicted through Husband's Connivance.** — If the wrong to the wife is inflicted through the husband's connivance, his conduct is an answer to an action for the wrong. *Pennsylvania R. Co. v. Goodenough*, 55 N. J. L. 588.

Thus where slanderous reports concerning the wife are circulated at the instance or by the management of the husband, the husband and wife cannot maintain an action for the slander, nor can the wife sue alone. *Tibbs v. Brown*, 2 Grant Cas. (Pa.) 39. But under statute in *Michigan* a different rule has been laid down. *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594.

1 *Weldon v. Winslow*, 13 Q. B. D. 784.

2 **Husband's Right to Damages When Collected.** — *Harrison v. Almond*, 4 Dowl. P. C. 321; *Campbell v. Great Western R. Co.*, 20 U. C. C. P. 345; *Turtle v. Muncy*, 2 J. J. Marsh. (Ky.) 82; *Anderson v. Anderson*, 11 Bush (Ky.) 327; *Shaddock v. Clifton*, 22 Wis. 114, 94 Am. Dec. 588.

3 **Husband's Right to Release Damages.** — *Anderson v. Anderson*, 11 Bush (Ky.) 327; *Turtle v. Muncy*, 2 J. J. Marsh. (Ky.) 82; *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Southworth v. Packard*, 7 Mass. 95; *Beach v. Beach*, 2 Hill (N. Y.) 260, 38 Am. Dec. 584.

4 **Effect of Husband's Death.** — *Weldon v. Winslow*, 13 Q. B. D. 784; *Gallagher v. Thompson*, *Wright* (Ohio) 469; *Church v. Westminster*, 45 Vt. 380.

5 **Effect of Wife's Death — At Common Law.** — *Earl v. Tupper*, 45 Vt. 275; *Church v. Westminster*, 45 Vt. 380.

6 **Effect of Wife's Death — Under Statute.** — *Norcross v. Stuart*, 50 Me. 87; *Earl v. Tupper*, 45 Vt. 275.



wife for torts committed against her, and it is the prevailing rule that she is required to bring suit in her name alone.<sup>1</sup> In some jurisdictions, however, the statutes have been held to be permissive merely, and the husband may or may not be joined,<sup>2</sup> and under the Married Women's Acts in a few jurisdictions it has been held that the common-law rule has not been abrogated.<sup>3</sup>

**Right of Action Considered as Community Property.** — Under statute in some jurisdictions the cause of action for the recovery of damages for injury to the person of the wife is regarded as community property, and the community estate being represented by the husband, the right to sue for such injuries is vested in him and must be asserted by him,<sup>4</sup> unless exceptional facts are shown indicating that the wife's rights and necessities require that she should receive

**1. Sole Right of Action for Tort Vested in Married Woman under Statute** — *Alabama*. — Barker v. Anniston, etc., St. R. Co., 92 Ala. 314.

*Georgia*. — Atlanta, etc., R. Co. v. Percy, 73 Ga. 479; Pavlovski v. Thornton, 89 Ga. 829. See Lewis v. Atlanta, 77 Ga. 756, 4 Am. St. Rep. 108.

*Illinois*. — Chicago, etc., R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; Chicago v. Speer, 66 Ill. 154; Hennies v. Vogel, 66 Ill. 401; Chicago, etc., R. Co. v. Dickson, 67 Ill. 122; Chicago, etc., R. Co. v. Button, 68 Ill. 409; Anderson v. Friend, 71 Ill. 475; Rock Island v. Deis, 38 Ill. App. 409.

*Iowa*. — Pancoast v. Burnell, 32 Iowa 394; Musselman v. Gallagher, 32 Iowa 383; Tuttle v. Chicago, etc., R. Co., 42 Iowa 518.

*Kansas*. — Townsden v. Nutt, 19 Kan. 282; Campbell v. Stagg, 37 Kan. 419.

*Michigan*. — Hyatt v. Adams, 16 Mich. 180; Berger v. Jacobs, 21 Mich. 215; Leonard v. Pope, 27 Mich. 145; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

*Minnesota*. — Colvill v. Langdon, 22 Minn. 565.

*Nebraska*. — Omaha Horse R. Co. v. Doolittle, 7 Neb. 481; Chadron v. Glover, 43 Neb. 732.

*New Hampshire*. — Harris v. Webster, 58 N. H. 481.

*New York*. — Ball v. Bullard, 52 Barb. (N. Y.) 141; Campbell v. Perry, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 330. See also Haden v. Clarke, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 291; Weld v. New York, etc., R. Co., 68 Hun (N. Y.) 249. Compare Ball v. Burleson, (Supm. Ct. Spec. T.) 23 Abb. N. Cas. (N. Y.) 332.

*Ohio*. — Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Rep. 481.

*Vermont*. — Story v. Downey, 62 Vt. 243.

*Virginia*. — Norfolk, etc., R. Co. v. Dougherty, 92 Va. 372. See also Richmond, etc., R., etc., Co. v. Bowles, 92 Va. 738.

*Wisconsin*. — Shanahan v. Madison, 57 Wis. 276; Fife v. Oshkosh, 89 Wis. 540.

**Slander.** — By statute in some jurisdictions the wife has a right of action in her name alone for slanderous words actionable *per se*. Pavlovski v. Thornton, 89 Ga. 829; Pancoast v. Burnell, 32 Iowa 394; Leonard v. Pope, 27 Mich. 145; Harris v. Webster, 58 N. H. 481; Shanahan v. Madison, 57 Wis. 280. Compare Enders v. Beck, 18 Iowa 86.

**Mental Suffering Arising from Wife's Incapacity to Work.** — It has been held that, apart from the husband's right of damages for the loss of the pecuniary earnings of the wife, the wife

has such an interest in her working capacity as to entitle her to recover damages for its destruction or impairment, on the principle that such deprivation or impairment will be calculated to give rise to mental pain and suffering. Atlanta St. R. Co. v. Jacobs, 88 Ga. 647; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500.

**2.** Weldon v. Winslow, 13 Q. B. D. 784; Weldon v. Neal, 51 L. T. N. S. 289; Weldon v. Riviere, 53 L. J. Q. B. 448; Lowe v. Fox, 54 L. J. Q. B. 561; Barnett v. Leonard, 66 Ind. 422; Logan v. Logan, 77 Ind. 558; Hamm v. Romine, 98 Ind. 77; Ohio, etc., R. Co. v. Cosby, 107 Ind. 32; Portland v. Taylor, 125 Ind. 522.

**3.** Snashall v. Metropolitan R. Co., 19 D. C. 399; Anderson v. Anderson, 11 Bush (Ky.) 327; Laughlin v. Eaton, 54 Me. 156; Treusch v. Kamke, 63 Md. 278; Wolfe v. Bauereis, 72 Md. 481; Samarzevosky v. Baltimore City Pass. R. Co., 88 Md. 479.

But Acts Maryland, 1898, c. 457, authorizes suits by married women for torts committed against them, as fully as if they were unmarried. Samarzevosky v. Baltimore City Pass. R. Co., 88 Md. 479.

**4. Right of Action for Tort Considered as Community Property.** — Cooper v. Cappel, 29 La. Ann. 213; Ford v. Brooks, 35 La. Ann. 157; Holzap v. New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; Fournet v. Morgan Louisiana, etc., R., etc., Co., 43 La. Ann. 1202; Texas Cent. R. Co. v. Burnett, 61 Tex. 638; San Antonio St. R. Co. v. Helm, 64 Tex. 147; Gallagher v. Bowie, 66 Tex. 265; Western Union Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772; Rice v. Mexican Nat. R. Co., 8 Tex. Civ. App. 130; Wartelsky v. McGee, 10 Tex. Civ. App. 220.

**Effect of Domicil in Another State.** — In Louisiana suit to recover damages for the malicious prosecution of a married woman must be brought in the name of the husband even though the husband and wife were married in another state. Myerson v. Alter, 4 Woods (U. S.) 126.

In California, however, though the right of action and the damages recovered are community property, both husband and wife are necessary parties. Sheldon v. Steamship Uncle Sam, 18 Cal. 527, 79 Am. Dec. 193; Matthew v. Central Pac. R. Co., 63 Cal. 450; McFadden v. Santa Ana, etc., R. Co., 87 Cal. 464; Neale v. Depot R. Co., 94 Cal. 425; Lamb v. Harbaugh, 105 Cal. 680; McKune v. Santa Clara Valley Mill, etc., Co., 110 Cal. 481.

the aid of the court; and it has been held that a mere separation of the husband and wife and his refusal to join her in the action will not alter the rule.<sup>1</sup>

(b) **Consequential Damages.** — Where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense or is deprived of the society or the services of his wife, he is entitled to recovery therefor, and he may bring a separate action in his own name,<sup>2</sup> but apart from statute<sup>3</sup> no such damages are recoverable in an action by the wife alone or by the husband and wife jointly.<sup>4</sup>

1. *Ezell v. Dodson*, 60 Tex. 331; *Rice v. Mexican Nat. R. Co.*, 8 Tex. Civ. App. 130.

2. **Husband's Right of Action for Consequential Damages.** — *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *McKinney v. Western Stage Co.*, 4 Iowa 423; *Laughlin v. Eaton*, 54 Me. 158; *Skoglund v. Minneapolis St. R. Co.*, 45 Minn. 330, 22 Am. St. Rep. 733; *Blair v. Chicago, etc., R. Co.*, 89 Mo. 334; *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Cregin v. Brooklyn Crosstown R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459; *Kelley v. Mayberry Tp.*, 154 Pa. St. 440; *Nanticoke v. Warne*, 106 Pa. St. 376; *Henry v. Klopfer*, 147 Pa. St. 178; *Hunt v. Winfield*, 36 Wis. 154, 17 Am. Rep. 482. See also *Campbell v. Great Western R. Co.*, 20 U. C. C. P. 345, 563; *Fox v. St. John*, 23 N. Bruns. 244; *Hyatt v. Adams*, 16 Mich. 180; *Meese v. Fond du Lac*, 48 Wis. 325; *Holmes v. Fond du Lac*, 42 Wis. 282. But compare *Chidsey v. Canton*, 17 Conn. 475; *Harworth v. Lowell*, 4 Cush. (Mass.) 310; *Roberts v. Detroit*, 102 Mich. 64.

**Where Money Expended Belongs to Wife.** — In *Walden v. Clark*, 50 Vt. 383, in an action by a husband for loss of his wife's services and money expended by reason of an injury to his wife, it was held that he was not entitled to claim damages for money expended in the care, nursing, and medical attendance of his wife, where the money expended was furnished by the wife.

**Contributory Negligence.** — Where the wife is not entitled to recover for injuries sustained because she is guilty of contributory negligence, the husband will not be entitled to recover consequential damages. *Winner v. Oakland Tp.*, 153 Pa. St. 408. See also *Nanticoke v. Warne*, 106 Pa. St. 373.

**Recovery for Mental Suffering of Husband.** — It seems to be the rule that the right of action for mental suffering is restricted to the person who has received the physical injury and that the husband is not entitled to damages for his mental distress caused by his wife's condition. *Hyatt v. Adams*, 16 Mich. 180; *Stone v. Evans*, 32 Minn. 243. Compare *Baker v. Bolton*, 1 Campb. 493.

3. **Statutory Rules for Recovery of Consequential Damages.** — Under statutes in some jurisdictions giving to a married woman the right to carry on any trade or business and to perform labor and services for her own account, she has a right of action in her own name for consequential damages. *Mewhirter v. Hatten*, 42 Iowa 290, 20 Am. Rep. 618; *Tuttle v. Chicago, etc., R. Co.*, 42 Iowa 518; *Dickens v. Des Moines*, 74 Iowa 216; *Campbell v. Stagg*, 37 Kan. 117; *Johnson v. McElmurry & Co.*, 135 Mass. 425; *London v. Cunningham*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 408; *Woolsey v. Ellenville*, 61 Hun (N. Y.) 136; *Becker v.*

*Janinski*, (C. Pl. Tr. T.) 27 Abb. N. Cas. (N. Y.) 45; *Filer v. New York Cent. R. Co.*, 49 N. Y. 56, 10 Am. Rep. 327; *Brooks v. Schwerin*, 54 N. Y. 343; *Uransky v. Dry Dock, etc., R. Co.*, 118 N. Y. 304, 16 Am. St. Rep. 759; *Fife v. Oshkosh*, 89 Wis. 540.

Under statutes in some jurisdictions also provision is made by statute for the recovery of consequential damages in a joint action by husband and wife. *Brockbank v. Whitehaven Junction R. Co.*, 7 H. & N. 834; *Campbell v. Great Western R. Co.*, 20 U. C. C. P. 563; *Fox v. St. John*, 23 N. Bruns. 244; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Du Bois v. Baker*, 120 Pa. St. 266; *Henry v. Klopfer*, 147 Pa. St. 178; *Kelley v. Mayberry Tp.*, 154 Pa. St. 440.

4. **Consequential Damages Not Recoverable at Common Law by Wife or by Husband and Wife Jointly** — *California*. — *Matthew v. Central Pac. R. Co.*, 63 Cal. 450.

*Connecticut*. — *Fuller v. Naugatuck R. Co.*, 21 Conn. 571.

*District of Columbia*. — *Scott v. Metropolitan R. Co.*, 4 Mackey (D. C.) 152.

*Indiana*. — *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *Ohio, etc., R. Co. v. Cosby*, 107 Ind. 32.

*Iowa*. — *McKinney v. Western Stage Co.*, 4 Iowa 420; *Mewhirter v. Hatten*, 42 Iowa 288, 20 Am. Rep. 618.

*Michigan*. — *Berger v. Jacobs*, 21 Mich. 215.

*Missouri*. — *Brown v. Hannibal, etc., R. Co.*, 23 Mo. App. 214.

*New York*. — *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Burnham v. Webster*, 54 N. Y. Super. Ct. 30.

*Pennsylvania*. — *King v. Thompson*, 87 Pa. St. 365, 30 Am. Rep. 364.

*Vermont*. — *Whitcomb v. Barre*, 37 Vt. 148; *Earl v. Tupper*, 45 Vt. 275; *Kavanaugh v. Janesville*, 24 Wis. 618; *Shanahan v. Madison*, 57 Wis. 276.

See also *Hennies v. Vogel*, 66 Ill. 401; *Barnes v. Hurd*, 11 Mass. 59; *Uertz v. Singer Mfg. Co.*, 35 Hun (N. Y.) 116.

**Slandorous Words Not Actionable Per Se.** —

Where slanderous words are actionable only by reason of special damage the husband must sue alone. *Coleman v. Harecourt*, 1 Lev. 140; *Dengate v. Gardiner*, 2 Jur. 470; *Saville v. Sweeny*, 4 B. & Ad. 514, 24 E. C. L. 108; *Johnson v. Dicken*, 25 Mo. 580; *Klein v. Hentz*, 2 Duer (N. Y.) 633; *Harper v. Pinkston*, 112 N. Car. 293. Compare *Davies v. Solomon*, L. R. 7 Q. B. 112; *Lynch v. Knight*, 9 H. L. Cas. 577; *Campbell v. Campbell*, 25 U. C. C. P. 368.

And this though the husband and wife are living separate under a deed of separation. *Beach v. Ranney*, 2 Hill (N. Y.) 309. See also *Saville v. Sweeny*, 4 B. & Ad. 514, 24 E. C. L.



(c) **Where Injury Results in Death.** — In the absence of specific statutory provision the husband has no right of action for the death of the wife as the result of an injury, except as the executor or administrator of her estate;<sup>1</sup> but it has been held that where a cause of action would exist if the wife had lived, if she survives after the injury even for a few days, the husband may maintain an action for the loss of the society and services of the wife during that time.<sup>2</sup>

(3) **Aiding or Encouraging Wife in Injury to Husband.** — The general rule has been laid down that he who knowingly assists the wife in the violation of her duty as such is guilty of a wrong for which an action will lie where injury is thereby inflicted upon the husband.<sup>3</sup>

(4) **Alienation of Wife's Affections** — (a) **In General.** — The husband is entitled to the society, comfort, and assistance of his wife, and whoever, by the alienation of her affections, deprives him thereof commits a wrong against the husband for which damages are recoverable,<sup>4</sup> and this though the wrongdoer is the wife's parent.<sup>5</sup>

(b) **Facts Requisite to Confer Right of Action** — **In General.** — Actions of this kind are based mainly on what is termed the "loss of consortium," that is, loss of the conjugal society, affection, and assistance of the wife.<sup>6</sup>

**Partial Alienation.** — The husband has a right of action even for the partial alienation of his wife's affections, and so it does not devolve upon the plaintiff to show that the wife had affection for him at the time in question, and that the defendant had completely alienated it from him;<sup>7</sup> and it has even been said that if a wife has no affection for her husband another person has no right to interfere to cut off any chance of its springing up in the future, and a person so interfering is liable to an action for damages.<sup>8</sup>

**Enticing or Harboring Wife.** — Actions for alienation of affections frequently charge that the defendant has harbored the wife, enticed her away, or induced her to abandon the husband,<sup>9</sup> but the alienation of the wife's affections for which the law gives redress may be accomplished notwithstanding her con-

108; *Coward v. Wellington*, 7 C. & P. 531, 32 E. C. L. 616.

See the title **LIBEL AND SLANDER**.

**Injuries Received Before Marriage.** — But it has been held that the marriage of a woman after injuries received in a railroad accident cannot affect her in the recovery of damages for the loss of her capacity to earn money in an action by herself and husband. *Raub v. Blairstown Creamery Assoc.*, 56 N. J. L. 264.

1. **Husband's Right of Action for Wife's Death by Wrongful Act.** — See the title **DEATH BY WRONGFUL ACT**, vol. 8, p. 888.

2. *Baker v. Bolton*, 1 Campb. 493; *Long v. Morrison*, 14 Ind. 596, 77 Am. Dec. 72; *Hyatt v. Adams*, 16 Mich. 195; *Philippi v. Wolff*, (Supm. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 199; *Lynch v. Davis*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 323.

3. **Aiding or Encouraging Wife in Injury to Husband.** — *Barnes v. Allen*, 30 Barb. (N. Y.) 668; *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

**Selling Laudanum to Wife.** — Thus an action may be maintained by a husband against a druggist to recover damages for selling to the plaintiff's wife secretly, from day to day, large quantities of laudanum to be used by her as a beverage, which were so used by her with the defendant's knowledge and without the knowledge or consent of the husband. *Hoard v. Peck*, 56 Barb. (N. Y.) 202. To the same effect see *Holleman v. Harward*, 119 N. Car. 150.

4. **Right of Husband to Recover for Alienation**

**of Wife's Affections.** — *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 731.

5. **Alienation of Wife's Affections by Parent.** — *McKenzie v. Lautenschlager*, 113 Mich. 171; *Glass v. Bennett*, 89 Tenn. 485.

6. **Loss of Consortium the Gist of the Action.** — *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 734; *Hermance v. James*, (Supm. Ct. Gen. T.) 32 How. Pr. (N. Y.) 146; *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843. See also *Rudd v. Rounds*, 64 Vt. 439.

7. **Right of Action for Partial Alienation of Affection.** — *Fratini v. Caslini*, 66 Vt. 275, 44 Am. St. Rep. 843.

**Right to Enjoin Further Interference with Wife.** — In *Ex p. Warfield*, (Tex. Crim. 1899) 50 S. W. Rep. 937, it was held that in a suit brought for damages on an alleged partial alienation of the affections of the plaintiff's wife, in which it was averred that on account of the past conduct of the defendant in that suit the plaintiff was apprehensive and had just grounds to fear that by continuance thereof the wife's affections would be entirely alienated, the plaintiff had the right to invoke the restraining power of a court of equity to prevent the utter alienation of his wife's affections, and the defendant could be enjoined from speaking to or talking with her, or visiting the house where she was staying.

8. *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 734.

9. *Jonas v. Hirshburg*, 18 Ind. App. 601; *Higham v. Vanosdol*, 101 Ind. 161; *Tasker v.*



tinued residence under the husband's roof; indeed, it has been said that such continued residence, after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to the injury from which an elopement might well be accepted in the nature of an alleviation.<sup>1</sup>

**Adultery.** — Nor is it necessary for the maintenance of the action that it be shown that the defendant has debauched the wife,<sup>2</sup> and indeed, in an action for the alienation of the wife's affections, and for her enticement away from the husband, it has been held that proof of adultery was inadmissible where the declaration contained no averment of adulterous intercourse.<sup>3</sup>

**Effect of Husband's Consent.** — It is a general rule of law that no one can maintain an action for a wrong when he consents or contributes to the acts which cause the loss. Under this principle the law is clearly settled that the husband's consent to the wife's acts will go in bar of an action for alienation of the wife's affections.<sup>4</sup>

**Marriage.** — In this action direct proof of a formal marriage is not requisite, but evidence of cohabitation and repute and of the defendant's admission that the plaintiff and his alleged wife were married may be allowed to satisfy the jury.<sup>5</sup>

(c) **Damages Recoverable — Compensatory Damages.** — The measure of damages in an action for alienation of the wife's affections is, as a general rule, the value of her conjugal society, affection, and assistance,<sup>6</sup> less, it has been held, the value of the husband's duty to support, clothe, cherish, and care for her, when this duty has not been discharged by the husband, as where the wife is living apart from the husband.<sup>7</sup>

**Injury to Feelings and Reputation.** — It has been held also that the husband may recover for the injury done to his feelings and for the disgrace and dishonor brought upon him and his family.<sup>8</sup>

**Exemplary Damages.** — Where it appears that the defendant wilfully and maliciously committed the injury, the plaintiff, in addition to any compensatory damages, is entitled to damages as a punishment to the defendant and as an example to others; but such damages are based on the enormity of the offense, and its malicious, wilful, and aggravated character must be proved before awarding exemplary damages.<sup>9</sup>

**Circumstances in Mitigation of Damages.** — Evidence which tends to show that the plaintiff has in fact suffered less injury than would otherwise be the probable inference from the act complained of will be received in mitigation or reduction of damages.<sup>10</sup>

(d) **Evidence — Mutual Feelings of Husband and Wife.** — In an action for the aliena-

Stanley, 153 Mass. 148; Hartpence v. Rogers, 143 Mo. 623; Glass v. Bennett, 89 Tenn. 481; Rudd v. Rounds, 64 Vt. 439.

1. **Enticement of Wife Away from Home Not Essential.** — Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 581; *Compare* Lellis v. Lambert, 24 Ont. App. 653.

2. **Adultery Not an Essential Element of Cause of Action.** — Higham v. Vanosdol, 101 Ind. 160; Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 385. *Compare* Lellis v. Lambert, 24 Ont. App. 653.

3. *Perry v. Lovejoy*, 49 Mich. 529.

4. **Effect of Husband's Consent to Wife's Act.** — Prettyman v. Williamson, (Del. 1898) 39 Atl. Rep. 734; Peek v. Traylor, (Ky. 1896) 34 S. W. Rep. 705.

5. **Direct Proof of Formal Marriage Unnecessary.** — *Perry v. Lovejoy*, 49 Mich. 529.

6. **Value of Consortium as Measure of Damages.** — Prettyman v. Williamson, (Del. 1898) 39 Atl. Rep. 733; Hartpence v. Rogers, 143 Mo. 623; Rudd v. Rounds, 64 Vt. 432.

7. *Rudd v. Rounds*, 64 Vt. 432. See also Prettyman v. Williamson, (Del. 1898) 39 Atl. Rep. 733.

8. **Injury to Feelings and Reputation as Element of Damages.** — Hartpence v. Rogers, 143 Mo. 623.

9. **Exemplary Damages.** — Prettyman v. Williamson, (Del. 1898) 39 Atl. Rep. 734; Hartpence v. Rogers, 143 Mo. 623. See also Jonas v. Hirshburg, 18 Ind. App. 581. *Compare* *People v. Deane*, 52 Cal. 304.

10. **Circumstances in Mitigation of Damages.** — Prettyman v. Williamson, (Del. 1898) 39 Atl. Rep. 734.

**Evidence of Unhappy Relations Between Husband and Wife Prior to Alienation Admissible in Mitigation of Damages.** — *Higham v. Vanosdol*, 101 Ind. 160; *Harvey v. Harvey*, 100 Mass. 236.

**Negligence Not Amounting to Consent.** — It

tion of the wife's affections it is relevant to inquire as to the terms upon which the husband and wife lived together before her connection with the defendant.<sup>1</sup> It is usual to give evidence of what they have said or written to or of each other in order to show their mutual temper and conduct, and whether they were living with each other on good or bad terms.<sup>2</sup> It is, however, always required that proof should be given that the declarations or letters of the wife, when the husband is the plaintiff, purporting to express her feelings, were made or written prior to the existence of any facts calculated to excite suspicion of misconduct on her part, and when the husband had no grounds to suspect collusion.<sup>3</sup>

**Feelings of Wife Towards Defendant.** — In this action it is proper also to show the feelings of the wife towards the defendant during the whole period of alienation, and her correspondence with him is admissible for that purpose,<sup>4</sup> but although this evidence is admissible, it is necessary, in order to hold the defendant in damages, to show that he was wilfully responsible for the wife's affection for him.<sup>5</sup>

(5) *Enticing or Harboring Wife.* — An action for damages will lie on the part of the husband against a person who has by fraud, persuasion, or violence enticed his wife away from him, or harbored her. This question will be found treated in a preceding portion of this work.<sup>6</sup>

(6) *Criminal Conversation.* — A full discussion of the action for criminal conversation will be found elsewhere in this work.<sup>7</sup>

(7) *Alienation of Husband's Affections* — (a) **Right of Action in General.** — In some jurisdictions the substantive right of a married woman to maintain an action at common law for the alienation of her husband's affections has been denied.<sup>8</sup> On the other hand, the rule has been broadly laid down that a married woman, independently of any statute, has a right of action for the alienation and loss of her husband's conjugal affection and society, and may sue therefor in her own name without joining her husband as coplaintiff.<sup>9</sup> By still other authorities it is held that at common law a married woman has a cause of action against a party who wrongfully alienates the affections of her husband, but, by reason of the disability of coverture, that right remains in abeyance and cannot be prosecuted by the *feme covert* in her own name.<sup>10</sup>

has been said also that if the husband be guilty of negligence and loose and improper conduct respecting the wrongful acts of the wife, not amounting to consent on his part, such conduct may be considered in mitigation or reduction of the damages. *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 734.

**1. Evidence of Mutual Feelings of Husband and Wife.** — *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843; *Rudd v. Rounds*, 64 Vt. 439.

**Divorce Negating Reconciliation.** — Where, after the commencement of an action for the alienation of the wife's affections, the plaintiff instituted proceedings against the wife for divorce, and obtained a decree, it was held that it was competent to show the fact of the divorce for the purpose of negating any claim that there had been up to that time a reconciliation between the husband and the wife. *Mead v. Randall*, 111 Mich. 268.

**2. Perry v. Lovejoy**, 49 Mich. 530; *McKenzie v. Lautenschlager*, 113 Mich. 171; *Rudd v. Rounds*, 64 Vt. 439; *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843. See also *White v. Ross*, 47 Mich. 172.

The defendant has a right to show what the wife, when exhibiting wounds and bruises claimed to have been inflicted by the husband, said of their effect upon her feelings towards

the plaintiff. *Rudd v. Rounds*, 64 Vt. 432; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

**3. Higham v. Vanosdol**, 101 Ind. 161; *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843.

**4. Evidence of Wife's Feelings Towards Defendant.** — *Puth v. Zimbleman*, 99 Iowa 641; *Childs v. Muckler*, 105 Iowa 279; *Rudd v. Rounds*, 64 Vt. 439. See also *Edgell v. Francis*, 66 Mich. 303.

**5. Childs v. Muckler**, 105 Iowa 279.

**6. Action for Enticement or Harboring of Wife.** — See the title ABDUCTION, vol. 1, p. 163.

**7. See the title CRIMINAL CONVERSATION**, vol. 8, p. 260.

**8. Lellis v. Lambert**, 24 Ont. App. 653; *Morgan v. Martin*, 92 Me. 190; *Doe v. Roe*, 82 Me. 503; *Houghton v. Rice*, (Mass. 1899) 54 N. E. Rep. 843; *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79; *Crocker v. Crocker*, decided in the United States Circuit Court under the laws of *Massachusetts*, and cited in 50 Cent. L. J. 222.

**9. Foot v. Card**, 58 Conn. 4, 18 Am. St. Rep. 258.

**10. Haynes v. Nowlin**, 129 Ind. 584, 28 Am. St. Rep. 213; *Postlewaite v. Postlewaite*, 1 Ind. App. 473; *Smith v. Smith*, 98 Tenn. 101.



Nor can she sue by joining with her husband, since this would allow him to join in an action for an injury which he had caused, though he acted under the influence of another.<sup>1</sup> If, however, the husband dies or there is an absolute divorce, the right of action remains in the property of the wife, and may be prosecuted by her as a *feme sole*.<sup>2</sup>

**Under Enabling Statutes.** — In some jurisdictions in which the right to damages in such a case is regarded as belonging to the wife at common law, it has been held that the wife can maintain an action therefor under statutes enabling her to sue as a *feme sole*.<sup>3</sup> And in other jurisdictions the same conclusion has been reached, under the various Married Women's Acts tending to give equal rights to husband and wife, irrespective of any substantive right existing at common law.<sup>4</sup>

(b) **Facts Requisite to Confer Right of Action — In General.** — As in the case of actions for the alienation of the wife's affections, the wife's right of action rests upon the loss of the consortium.<sup>5</sup>

**Direct Acts of Interference.** — In order to sustain an action for the alienation of the husband's affections it must appear, in addition to the fact of alienation or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is on the plaintiff to show such interference.<sup>6</sup>

**Action Against Husband's Parents.** — A distinction seems to be made between an action against a stranger, and an action against the parents of the husband. Where the father or mother is charged with the alienation, the *quo animo* is said to be the important consideration.<sup>7</sup> Parents are under obligation by the law of nature to protect their children from injury and relieve them when in distress, and this obligation is recognized by the common law. Accordingly it appears that though a parent directly interferes, as by giving to his son advice on his domestic affairs, the wife will have no cause of action against the parent, though the result of his action is the alienation of the husband's affections, if he acts in good faith; and the motive of the parent in such case is presumed to be good until the contrary is proved.<sup>8</sup>

**Adultery or "Procuring and Enticing."** — By some of the authorities it is maintained that at common law there can be no action by a wife for the alienation of the husband's affections where no adultery, or "procuring and enticing" the husband to continue absent and apart from her, or "harboring and secret-

1. *Bassett v. Bassett*, 20 Ill. App. 544.

2. *Postlewaite v. Postlewaite*, 1 Ind. App. 473; *Smith v. Smith*, 98 Tenn. 101.

3. **Right of Action under Statutes Enabling Wife to Sue as Feme Sole**—*United States*. — *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13, declaring the law under the *Kansas* statute.

*Indiana*. — *Logan v. Logan*, 77 Ind. 558; *Haynes v. Nowlin*, 129 Ind. 581, 28 Am. St. Rep. 213; *Wolf v. Wolf*, 130 Ind. 599; *Postlewaite v. Postlewaite*, 1 Ind. App. 473; *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. Rep. 266; *Holmes v. Holmes*, 133 Ind. 386; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310; *Railsback v. Railsback*, 12 Ind. App. 659.

*Missouri*. — *Clow v. Chapman*, 125 Mo. 101, 46 Am. St. Rep. 468; *Nichols v. Nichols*, 134 Mo. 187.

*New York*. — *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40; *Breiman v. Paasch*, (Brooklyn City Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 249; *Baker v. Baker*, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 293; *Warner v. Miller*, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 221; *Churchill v. Lewis*, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 226; *Sim-*

*mons v. Simmons*, (Supm. Ct.) 21 Abb. N. Cas. (N. Y.) 469. Compare *Van Arnam v. Ayers*, 67 Barb. (N. Y.) 544.

See also *Smith v. Smith*, 98 Tenn. 101.

4. *Bassett v. Bassett*, 20 Ill. App. 547; *Huling v. Huling*, 32 Ill. App. 522; *Price v. Price*, 91 Iowa 693, 51 Am. St. Rep. 360; *Warren v. Warren*, 89 Mich. 123; *Lockwood v. Lockwood*, 67 Minn. 476; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. Compare *Mulford v. Clewell*, 21 Ohio St. 191.

5. *Van Olinda v. Hall*, 88 Hun (N. Y.) 452; *Lockwood v. Lockwood*, 67 Minn. 476.

6. *Waldron v. Waldron*, 45 Fed. Rep. 315; *Van Olinda v. Hall*, 88 Hun (N. Y.) 452; *Whitman v. Egbert*, 27 N. Y. App. Div. 374. See also *Hodecker v. Stricker*, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 515.

7. *Rice v. Rice*, 104 Mich. 371.

8. *Huling v. Huling*, 32 Ill. App. 522; *Rice v. Rice*, 104 Mich. 371; *Tucker v. Tucker*, 74 Miss. 93; *Pollock v. Pollock*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 82, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834.



ing" him is shown.<sup>1</sup> On the other hand, it has been held not to be a prerequisite to the right of the plaintiff to maintain the action that she should have been abandoned by the husband in the literal sense.<sup>2</sup>

**Effect of Wife's Consent.** — To sustain the action it must appear that the wife was not a consenting party.<sup>3</sup>

(c) **Damages Recoverable.** — It has been held that in an action for the alienation of her husband's affections the plaintiff may recover for the loss of the husband's support, affection, society, and protection,<sup>4</sup> and for mental anguish, mortification, and injury to her feelings.<sup>5</sup> The amount of damages lies in the sound discretion of the jury, since they are not capable of actual measurement.<sup>6</sup>

(d) **Evidence — Prior Relations Between Husband and Wife.** — In an action for the alienation of the husband's affections, evidence is admissible tending to show the state of domestic happiness in which the plaintiff and her husband had lived prior to the alleged alienation,<sup>7</sup> and for this purpose declarations made by the husband long before the commencement of the suit have been held to be competent as bearing upon the state of his feelings towards his wife.<sup>8</sup>

(8) **Enticement or Abduction of Husband.** — Under statutes in some jurisdictions the wife may maintain an action in her own name against a person who has induced her husband to abandon her,<sup>9</sup> the gist of the action being the loss of the consortium.<sup>10</sup>

**Proof of Interference Inducing Abandonment.** — But to maintain this action it must be established that the husband was induced to abandon the wife by some active interference on the part of the defendant.<sup>11</sup>

**Action Against Parent.** — And where the action is brought against the parent of the husband, it must further be made to appear that the parent acted in

1. *Lellis v. Lambert*, 24 Ont. App. 653; *Houghton v. Rice*, (Mass. 1899) 54 N. E. Rep. 843.

2. *Foot v. Card*, 58 Conn. 11, 18 Am. St. Rep. 258.

3. **Wife's Consent as Barring Right of Action.** — *Van Olinda v. Hall*, 88 Hun (N. Y.) 452.

4. **Loss of Consortium Principal Element of Damages.** — *Waldron v. Waldron*, 45 Fed. Rep. 322; *Rice v. Rice*, 104 Mich. 371; *Wilson v. Coulter*, 29 N. Y. App. Div. 85.

5. **Injury to Feelings as Element of Damages.** — *Waldron v. Waldron*, 45 Fed. Rep. 322; *Rice v. Rice*, 104 Mich. 371.

6. *Rice v. Rice*, 104 Mich. 371.

**Deduction of Wife's Earnings.** — It has been held that though the services of a wife belong to her husband, the defendant, in an action for the alienation of affections, has no right to show the plaintiff's ability to earn money, for the purpose of setting off her earnings against her maintenance. *Bowersox v. Bowersox*, 115 Mich. 24.

**Social Position of Parties.** — It seems that the social position of the husband and wife may be taken into consideration by the jury as bearing upon the value of the husband's consortium. *Bailey v. Bailey*, 94 Iowa 598; *Rice v. Rice*, 104 Mich. 371.

**Wealth and Social Position of Defendant.** — It has been held that in an action for the alienation of the husband's affections, a direction to the jury to take into consideration the wealth and social position and the pecuniary circumstances of the defendant in aggravation of damages is erroneous. *Bailey v. Bailey*, 94 Iowa 598. Compare *Waldron v. Waldron*, 45 Fed. Rep. 322.

**Exemplary Damages.** — If the jury believes

that the injury was inflicted wantonly and maliciously, it may assess exemplary or punitive damages. *Lockwood v. Lockwood*, 67 Minn. 476.

7. *Bailey v. Bailey*, 94 Iowa 598.

8. *Bailey v. Bailey*, 94 Iowa 598.

9. **Enticement or Abduction of Husband.** — *Williams v. Williams*, 20 Colo. 51; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 47 Am. St. Rep. 759; *Romaine v. Decker*, 11 N. Y. App. Div. 20; *Wilson v. Coulter*, 29 N. Y. App. Div. 85; *Gerner v. Gerner*, 185 Pa. St. 233.

**Action Against Another Woman.** — Thus recovery may be had against another woman. *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40; *Bennett v. Bennett*, 116 N. Y. 584; *Romaine v. Decker*, 11 N. Y. App. Div. 20.

**Action Against Parents of Husband.** — The action may be maintained also against the father or mother of the husband. *Huling v. Huling*, 32 Ill. App. 522; *Rice v. Rice*, 104 Mich. 371; *Tucker v. Tucker*, 74 Miss. 93; *Pollock v. Pollock*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 82.

And where it was shown that the father and mother of the husband acted in concert in inducing the separation of their son from the plaintiff, it was held that the action might be brought against them jointly for the joint wrong, although each defendant did not participate directly in all the conversations and acts of the other. *Price v. Price*, 91 Iowa 693, 51 Am. St. Rep. 360. See also *Young v. Young*, 8 Wash. 81.

10. *Buchanan v. Foster*, 23 N. Y. App. Div. 542.

11. *Buchanan v. Foster*, 23 N. Y. App. Div. 542. See also *Wilson v. Coulter*, 29 N. Y. App. Div. 85.

bad faith, for good faith on his part will be presumed until the contrary is shown.<sup>1</sup>

**2. Liabilities as to Third Persons — a. OF HUSBAND — (1) On His Own Contracts.** — It may be laid down as a general rule that the liability of a husband on his own contracts is unaffected by coverture.

**Contracts in Name of Wife.** — He will be liable on his contracts made for his benefit though made in the wife's name.<sup>2</sup> And at common law, since the wife is incapable as a general rule of entering into contracts, the husband will be liable on the contracts made by him in her name as her agent,<sup>3</sup> and this on a well-established principle of agency.<sup>4</sup> Moreover, he may be held liable on contracts made in her name, though by principles of equity or by statute she is capable of contracting, in a case where he acts without her authority.<sup>5</sup>

**Joint Contract of Husband and Wife.** — There is nothing in the marriage relation to prevent the husband from entering into a joint contract with the wife in cases where she has the capacity to contract.<sup>6</sup> And where a husband and wife jointly execute a contract, and by reason of disability the wife is not bound, the husband remains bound, especially when the fact of the disability is known to him.<sup>7</sup>

**(2) Wife's Antenuptial Contracts — (a) Common-law Doctrine Stated.** — At common law the husband is, during coverture, liable for the antenuptial debts of the wife to the extent of his property, whether he knew of their existence or not, and whether he obtained any property from her or not.<sup>8</sup> By some of the authorities this rule is made to depend on the fact that by marriage the legal

**1. Huling v. Huling**, 32 Ill. App. 522; **Tucker v. Tucker**, 74 Miss. 93; **Pollock v. Pollock**, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 82, and *citing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834. See also **Price v. Price**, 91 Iowa 693, 51 Am. St. Rep. 360; **Rice v. Rice**, 104 Mich. 371; **Young v. Young**, 8 Wash. 81.

**2. Husband's Liability for His Contracts in Wife's Name.** — Thus in **Shields v. Casey**, 155 Pa. St. 253, 35 Am. St. Rep. 879, it was held that if a husband subscribes to stock, and it is shown that the subscription is for himself and not for his wife, he cannot avoid responsibility for the amount of the subscription by placing it in the name of his wife. And see **National Commercial Bank v. McDonnell**, 92 Ala. 397.

**3. Husband's Liability on Contracts Made as Wife's Agent.** — **National Commercial Bank v. McDonnell**, 92 Ala. 397; **Hoppe v. Saylor**, 53 Mo. App. 4; **Ingram v. Nedd**, 44 Vt. 462. Compare **Taylor v. Shelton**, 30 Conn. 127.

**4. See the title AGENCY**, vol. 1, p. 1122.

**5. Dodge v. Knowles**, 114 U. S. 435. See generally the title **AGENCY**, vol. 1, p. 1124.

**6. Joint Contract of Husband and Wife, the Latter Having Capacity to Contract.** — **Fitzpatrick v. Reilly**, 46 Ill. App. 520; **Sturmshelsz v. Frickey**, 43 Md. 569; **Reiman v. Hamilton**, 111 Mass. 245; **McGavock v. Whitfield**, 45 Miss. 452; **Vanneman v. Swedesboro Loan, etc., Assoc.**, 42 N. J. Eq. 263; **Granger v. Roll**, 6 S. Dak. 611; **Holmes v. Reynolds**, 55 Vt. 39; **Reed v. Newcomb**, 59 Vt. 630. See also **Matter of Grove**, 6 Dem. (N. Y.) 369.

**7. Husband Liable on Joint Contract though Wife Is under Disability to Contract.** — **Wilson v. Fridenberg**, 22 Fla. 114; **Johnston v. Jones**, 12 B. Mon. (Ky.) 326; **Browning v. Carson**, 163 Mass. 261; **Pickens v. Knisley**, 36 W. Va. 794. See also **Bellows v. Litchfield**, 83 Iowa 36.

Where a note executed by husband and wife is void as to the wife, the husband is still liable

as the maker. **Browning v. Carson**, 163 Mass. 255.

And it has been held that a wife's coverture is no bar to a recovery against her husband on her promissory note where he is surety. **McGavock v. Whitfield**, 45 Miss. 452; **Willingham v. Leake**, 7 Baxt. (Tenn.) 453.

**8. Liability of Husband for Wife's Antenuptial Debts at Common Law — England.** — **Beck v. Pierce**, 23 Q. B. D. 320; **Lewis v. Nangle**, Ambl. 150.

**Indiana.** — **Hetrick v. Hetrick**, 13 Ind. 44.

**Massachusetts.** — **Pitkin v. Thompson**, 13 Pick. (Mass.) 64; **Haines v. Corliss**, 4 Mass. 659; **Howes v. Bigelow**, 13 Mass. 389.

**Mississippi.** — **Cannon v. Grantham**, 45 Miss. 94.

**Ohio.** — **Alexander v. Morgan**, 31 Ohio St. 59.

**South Carolina.** — **Clawson v. Hutchinson**, 11 S. Car. 323.

**Tennessee.** — **Allen v. McCullough**, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27.

**Wisconsin.** — **Platner v. Patchin**, 16 Wis. 333.

See also **Barnes v. Underwood**, 47 N. Y. 354.

**Action for Use and Occupation of House.** — In **Richardson v. Hall**, 1 Brod. & B. 50, 5 E. C. L. 14, it was held that a husband was not liable, in an action for use and occupation, to pay for the enjoyment of a house by his wife *dum sola*. **Dallas, C. J.**, said: "We think that in this case the husband is not liable in this form of action, without inquiring whether he would be liable in an action of a different description. This is an action given by the statute for use and occupation. The use and occupation is made the measure of the damages, and the plaintiff can only recover to the extent of the occupation proved."

**Debts Contracted by Widow by Previous Marriage.** — A second husband will be liable for debts contracted by his wife while she was a



existence of the wife is merged in that of the husband,<sup>1</sup> though by other decisions the ground of the liability is made to rest on the fact that by marriage the husband acquires an absolute title to all the personal property of the wife and is entitled to the use of her real estate during coverture.<sup>2</sup>

(b) **Doctrine under Statute — Effect of Separate Property Acts.** — It seems to be the prevailing rule that the husband's liability for the wife's antenuptial contracts is not taken away by statutes securing to the married woman the right to hold property.<sup>3</sup>

**Statutes Expressly Releasing Husband from Liability.** — But by statute in some of the states the husband is expressly released from all liability for the wife's antenuptial debts.<sup>4</sup> Under statutes in some jurisdictions it has been held that to charge the husband with the debts of the wife contracted before marriage, it must appear that he has received property or effects in the right of his wife sufficient to pay them, and he cannot be charged with the debts of his wife

widow by a previous marriage. *Mitchinson v. Hewson*, 7 T. R. 344.

**Liability as Shareholder in Joint-stock Company.**

— The rule of the text has been applied so as to make the husband liable to contribute to the payment of the debts of a joint-stock company of which the wife was a shareholder *dum sola*. *In re Northumberland, etc., Banking Co.*, 1 De G. F. & J. 533. See also *Ex p. Burlinson*, 3 De G. & Sm. 18.

**Admissions of Wife.** — Evidence of the wife's admissions, made subsequent to the marriage, of a debt due by her previous to the marriage is inadmissible to charge the husband. *Brown v. Lasselle*, 6 Blackf. (Ind.) 147, 38 Am. Dec. 135; *Ross v. Winners*, 6 N. J. L. 366; *Sheppard v. Starke*, 3 Munf. (Va.) 29.

**Necessity of Joinder of Husband and Wife as Codefendants at Common Law.** — It is an elementary rule of the common law that when a *feme sole* who has contracted a debt marries, the husband and wife must in general be jointly sued in an action brought for its recovery.

*England.* — *Mitchinson v. Hewson*, 7 T. R. 344; *Garrard v. Guibilei*, 13 C. B. N. S. 832, 106 E. C. L. 832; *Robinson v. Hardy*, 1 Keb. 281.

*Alabama.* — *Sprague v. Morgan*, 7 Ala. 952.

*Arkansas.* — *Ellis v. Clarke*, 19 Ark. 420, 70 Am. Dec. 603.

*Georgia.* — *Nicholson v. Wilborn*, 13 Ga. 467.

*Indiana.* — *Campbell v. Baldwin*, 6 Blackf. (Ind.) 364; *Tobin v. Connery*, 13 Ind. 65; *Shore v. Taylor*, 46 Ind. 345; *Crawford v. Thompson*, 91 Ind. 266, 46 Am. Rep. 598.

*Iowa.* — *Reunecker v. Scott*, 4 Greene (Iowa) 185.

*Kentucky.* — *Fultz v. Fox*, 9 B. Mon. (Ky.) 499; *Beaumont v. Miller*, 1 Met. (Ky.) 68.

*Maine.* — *Hamlin v. Bridge*, 24 Me. 145.

*Missouri.* — *Benjamin v. Bartlett*, 3 Mo. 86; *Walker v. Deaver*, 79 Mo. 664; *Wisdom v. Newberry*, 30 Mo. App. 241; *Todd v. Works*, 51 Mo. App. 267.

*New York.* — *Angel v. Felton*, 8 Johns. (N. Y.) 149; *Gage v. Reed*, 15 Johns. (N. Y.) 403.

*Pennsylvania.* — *Nutz v. Reutter*, 1 Watts (Pa.) 229; *Carl v. Wonder*, 5 Watts (Pa.) 97.

*Texas.* — *Nash v. George*, 6 Tex. 234; *Rountree v. Thomas*, 32 Tex. 286.

*Vermont.* — *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258; *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587.

*Virginia.* — *Coles v. Hurt*, 75 Va. 380.

*Wisconsin.* — *Platner v. Patchin*, 19 Wis. 333.

**Judgment Against Both.** — When the husband and wife are sued for a debt of the wife contracted while sole, the judgment must be against both; and if the judgment is against the husband alone, it will be reversed on error. *Gray v. Thacker*, 4 Ala. 136; *Gruen v. Bamberger*, 11 Mo. App. 261.

**1. Merger of Legal Existence of Wife in That of Husband as Foundation of Rule.** — *Cannon v. Grantham*, 45 Miss. 94; *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *Alexander v. Morgan*, 31 Ohio St. 546; *Platner v. Patchin*, 19 Wis. 333.

**2. Husband's Ownership of Wife's Property as Foundation of Rule.** — *Harrison v. Trader*, 27 Ark. 289; *Allen v. McCullough*, 2 Heisk. (Tenn.) 183, 5 Am. Rep. 27.

**3. Husband's Liability Not Abrogated by Married Women's Property Acts.** — *Ferguson v. Williams*, (Ark. 1898) 44 S. W. Rep. 1126; *Kies v. Young*, 64 Ark. 381; *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *Alexander v. Morgan*, 31 Ohio St. 546; *Platner v. Patchin*, 19 Wis. 333. Compare *Biery v. Ziegler*, 93 Pa. St. 367, 39 Am. Rep. 756.

**Partnership Debts.** — This rule has been held to include partnership debts of the wife. *Alexander v. Morgan*, 31 Ohio St. 546.

In *Illinois* it has been held that the statutory provision in that state for the protection of married women in their separate property did not entirely abolish the ground of the husband's liability for the wife's antenuptial debts, and hence did not abolish the liability. *Connor v. Berry*, 46 Ill. 370, 95 Am. Dec. 417; *McMurtry v. Webster*, 48 Ill. 123.

But in a later case it was held that a subsequent enactment, taking from the husband all control over the earnings of his wife, when taken in connection with the prior statute granting to the wife her property rights, takes away the reason of the common-law rule, and hence has virtually abolished the rule. *Howarth v. Warmser*, 58 Ill. 48.

**4. Statutes Expressly Relieving Husband of Liability for Wife's Antenuptial Debts.** — *Cannon v. Grantham*, 45 Miss. 88; *Davis v. Wilkerson*, 48 Miss. 585.

**Under Statute in Iowa** it has been held that the husband is not liable for the debts made by his wife while single under a contract "purporting to bind herself only." *Reunecker v. Scott*, 4 Greene (Iowa) 185.



contracted *dum sola* beyond the value of the property he has received by her.<sup>1</sup>

(c) **Valid Contract of Wife Prerequisite to Husband's Liability.**—In order to hold the husband liable the contract must have been of sufficient validity to bind the wife before marriage.<sup>2</sup>

(d) **Termination or Discharge of Liability**—*as. DEATH OF HUSBAND OR WIFE.*—*(a) In General.*—The husband's responsibility for the wife's antenuptial debts continues only so long as he sustains the relation of husband, and therefore if a debt is not reduced to judgment against him and his wife during coverture, the obligation of the husband ceases; and the rule is not altered by the fact that the husband receives property by the wife, even though he receives the very property for the purchase of which the debt was contracted.<sup>3</sup> Hence such liability is not continued against him in case he survives his wife,<sup>4</sup> except of course in his character as her personal representative,<sup>5</sup> nor against his legal representative in case he dies first.<sup>6</sup>

#### 1. Statutes Restricting Husband's Liability to Amount of Property Received through Wife.

—Beck v. Pierce, 23 Q. B. D. 321; Curry v. Shrader, 19 Ala. 831; Bryan v. Doolittle, 38 Ga. 258; Clark v. Miller, 88 Ky. 108. See also Conlon v. Moore, Jr. 9 C. L. 190; Button v. Dehoney, (Ky. 1895) 20 S. W. Rep. 615; Fultz v. Fox, 9 B. Mon. (Ky.) 499.

2. **Valid Contract of Wife Prerequisite to Husband's Liability.**—Caldwell v. Drake, 4 J. J. Marsh. (Ky.) 246.

**Contract of Wife During Former Marriage.**—Under a plea to the general issue in an action of assumpsit against husband and wife for goods sold to the wife before the marriage, it is competent to prove that she was married to another husband, who is still alive, since in such case she was incompetent to enter into a contract. Cowley v. Robertson, 3 Campb. 438.

In Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780, it was held that a promise by a married woman to pay to an attorney a fee for obtaining for her a divorce from her husband is not binding on her, and therefore cannot be enforced against a subsequent husband.

**Debts Contracted While Living Separate from Previous Husband.**—It has been held that a *feme covert* living apart from her husband and having a separate maintenance may contract and be sued as a *feme sole*, and her second husband is liable for such debts. Corbett v. Poelnitz, 1 T. R. 5.

And in Prescott v. Fisher, 22 Ill. 390, it was held that where a deserted wife has contracted debts, and is afterwards divorced and again marries, her second husband will be jointly liable with her for the debts contracted.

**Debts Charged on Separate Estate During Previous Marriage.**—Under statute in *Arkansas* providing that no bargain or contract made by a married woman in respect to her sole and separate property shall be binding on her husband, it has been held that a second husband is not liable upon judgments recovered against his wife during her former marriage on debts contracted by her for the benefit of her separate business and estate. Gill v. Kayser, 60 Ark. 266. To the same effect see Wood v. Orford, 52 Cal. 412.

3. **Husband's Liability Terminated by Dissolution of Coverture.**—Bryan v. Doolittle, 38 Ga. 258; Hetrick v. Hetrick, 13 Ind. 44; Cannon v. Grantham, 45 Miss. 88; Barnes v. Underwood, 47 N. Y. 354; Hawthorne v. Beckwith, 89 Va. 786.

4. **Husband's Liability Terminated by Wife's Death**—*England.*—Lewis v. Nangle, Amb. 150.

*Arkansas.*—Lamb v. Belden, 16 Ark. 539.

*Indiana.*—Hetrick v. Hetrick, 13 Ind. 44.

*Mississippi.*—Waul v. Kirkman, 13 Smed. & M. (Miss.) 599.

*New Jersey.*—Randolph v. Simpson, 7 N. J. L. 346.

*New York.*—Williams v. Kent, 15 Wend. (N. Y.) 360.

*South Carolina.*—Buckner v. Smyth, 4 Desaus. (S. Car.) 371; Witherspoon v. Dubose, Bailey Eq. (S. Car.) 166.

*Tennessee.*—Jones v. Walkup, 5 Sneed (Tenn.) 138.

*Vermont.*—Cole v. Shurtleff, 41 Vt. 311, 98 Am. Dec. 587.

*Virginia.*—Hawthorne v. Beckwith, 89 Va. 786.

See also *Howes v. Bigelow*, 13 Mass. 384.

**Rule under Statute.**—A contrary rule has been laid down in some jurisdictions under statutes providing that the husband's liability for the debts of his wife contracted before marriage, to the extent of the personal property he may receive with or through her, or derive from the sale or rent of her lands, shall not be extinguished by her death. Beck v. Pierce, 23 Q. B. D. 320; Hetrick v. Hetrick, 13 Ind. 44. Compare *Bell v. Stocker*, 10 Q. B. D. 127.

**Debt Reduced to Judgment.**—If judgment is recovered against the wife before her marriage a *sci. fa.* lies against her and her husband after marriage, and if a judgment is obtained against them on such *sci. fa.*, and she afterwards dies, he will be bound by the judgment. *Obrian v. Ram*, 3 Mod. 186; Beck v. Pierce, 23 Q. B. D. 320.

5. **Husband's Liability as Wife's Personal Representative.**—Lewis v. Nangle, Amb. 150; Williams v. Kent, 15 Wend. (N. Y.) 360; Lamb v. Gatlin, 2 Dev. & B. Eq. (22 N. Car.) 41; Jones v. Walkup, 5 Sneed (Tenn.) 135.

**Extent of Liability at Common Law.**—The husband is liable as administrator of the wife to the extent of choses in action due to her at her death and which were not reduced to possession by him or her husband before her death. Day v. Messick, 1 Houst. (Del.) 328.

6. **Husband's Liability Terminated by His Death.**—Bryan v. Doolittle, 38 Ga. 258; Cureton v. Moore, 2 Jones Eq. (55 N. Car.) 204; Chapline v. Moore, 7 T. B. Mon. (Ky.) 150.

**Liability in Equity.** — It was formerly held that the husband was chargeable in equity after the death of his wife for her antenuptial debts to the extent of her personal fortune which he had received by her.<sup>1</sup> This doctrine, however, was afterwards overturned, and it is now settled that the rule as to the husband's liability is the same in equity as at law.<sup>2</sup> In the same way the rule as to the nonliability of the husband's estate in case of his death before the antenuptial debt of the wife is reduced to judgment will be enforced in courts of equity the same as in courts of law.<sup>3</sup>

(bb) *Effect of Husband's Promise to Pay.* — It has been held that the husband cannot be made liable for the antenuptial debt of his wife not reduced to judgment during coverture by a mere promise after marriage and during coverture to pay the debt, if the only consideration for the promise is his pre-existing liability to pay it.<sup>4</sup> Nor, it seems, will a simple voluntary promise by the husband, after the death of his wife, to pay her debts contracted before marriage render him legally liable, since the promise is without consideration.<sup>5</sup>

(cc) *Permitting Judgment by Default.* — But if after the wife's decease the husband voluntarily incurs the liability to pay her antenuptial debts by submitting to a judgment against himself alone, he has no claim against the wife's estate for the amount paid by him on such judgment, the payment being regarded as a voluntary courtesy, upon which no cause of action accrues, and which will not uphold an assumpsit.<sup>6</sup> Nor will the rule be otherwise in equity, though it is shown that the husband consented to the judgment under a misapprehension of its legal effects, or of his rights.<sup>7</sup>

bb. **DIVORCE A VINCULO.** — Under the divorce laws in *Tennessee* it has been held that a husband's liability for the wife's antenuptial debts is not relieved by a divorce *a vinculo*, as in the case of the dissolution of the marriage relation by death.<sup>8</sup> But this rule has elsewhere met with disapproval.<sup>9</sup>

cc. **EFFECT OF ANTENUPTIAL AGREEMENT BETWEEN HUSBAND AND WIFE.** — The common-law rule holding the husband liable for the wife's debts cannot be altered by a contract between the parties in contemplation of marriage so as to affect the rights of parties outside of the marriage agreement, since to hold differently would be to recognize the power of two individuals in contemplation of marriage to change by agreement the established law of the land.<sup>10</sup> But it has been held that while such a contract cannot bind the wife's creditors against their will, they may give effect to it if they elect to do so, and if such election is made the creditor must abide by it and cannot thereafter hold the husband and his property liable.<sup>11</sup>

dd. **BANKRUPTCY OF HUSBAND.** — It has been held that the liability of the husband for the antenuptial debts of the wife is at an end by his discharge in bankruptcy.<sup>12</sup>

**Debt Reduced to Judgment.** — But if judgment be recovered against the husband and wife for the debt of the wife *dum sola*, and the husband afterwards dies, his estate continues liable, and a scire facias may be issued against his executor. *Burton v. Rodney*, 5 Harr. (Del.) 441.

1. *Ball v. Smith*, Freem. Ch. 230. See also *Freeman v. Goodham*, Ch. Cas. 295, 4 Vin. Abr. 129; *Morrow v. Whitesides*, 10 B. Mon. (Ky.) 411.

2. *Thomond v. Suffolk*, 1 P. Wms. 462; *Heard v. Stamford*, 3 P. Wms. 409; *Morrow v. Whitesides*, 10 B. Mon. (Ky.) 411. See also *Jones v. Walkup*, 5 Sneed (Tenn.) 135.

3. *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150; *Cureton v. Moore*, 2 Jones Eq. (55 N. Car.) 204.

4. *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587.

5. *Hetrick v. Hetrick*, 13 Ind. 44. See also *Beck v. Pierce*, 23 Q. B. D. 320; *Warren v. Williams*, 10 Cush. (Mass.) 79. Compare *Crawford v. Verry*, 12 Ind. 427.

6. *Warren v. Williams*, 10 Cush. (Mass.) 80.

7. *Warren v. Jennison*, 6 Gray (Mass.) 559.

8. *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27.

9. *Wilson v. Wilson*, 30 Ohio St. 365.

10. **Husband's Liability Not Affected by Antenuptial Agreement with Wife.** — *Harrison v. Trader*, 27 Ark. 288; *Christian v. Hanks*, 22 Ga. 125; *Obermayer v. Greenleaf*, 42 Mo. 304; *Coles v. Hurt*, 75 Va. 387.

11. *Coles v. Hurt*, 75 Va. 380.

12. **Husband Released from Liability by Discharge in Bankruptcy.** — *Miles v. Williams*, 10 Mod. 160, 1 P. Wms. 249. See also *Vanderheyden v. Mallory*, 1 N. Y. 465.



**cc. EFFECT OF INFANCY OF HUSBAND OR WIFE. — Infancy of Husband.** — As an incident to the marriage contract which an infant is competent to enter into, the husband is liable to pay the debts of his wife contracted by her before marriage, notwithstanding his infancy. Prior to her marriage the wife is responsible for such debts, and unless the liability to pay them attached to the husband her creditors would be remediless, as at common law she cannot be sued alone, separate from her husband, and if she could, a judgment against her would be fruitless, as all her estate is absolutely or qualifiedly vested in her husband.<sup>1</sup>

**Infancy of Wife — Contract for Necessaries.** — Also, since a contract made by an infant for necessities is binding and may be enforced against him, a contract made by a wife *dum sola* for necessities furnished to her when an infant will be binding upon the husband.<sup>2</sup>

**ff. STATUTE OF LIMITATIONS.** — The husband's liability for the wife's antenuptial debts may be barred by the statute of limitations.<sup>3</sup>

**When Statute Begins to Run.** — Though the husband's liability for the wife's antenuptial contracts first accrues upon marriage, unless he has previously done some act making him responsible for them, it has been said that the statute of limitations begins to run in the husband's favor as well as in the wife's from the time when the cause of action accrued against her.<sup>4</sup>

**Promise of Husband Inoperative to Remove Statutory Bar.** — The promise of the husband during coverture to pay the debt of the wife *dum sola* is not in law the promise of the wife, and will not take the demand out of the influence of the statute of limitations so as to authorize a judgment against the husband and wife.<sup>5</sup>

**Acknowledgment or Part Payment by Wife.** — Nor will an acknowledgment or part payment of an antenuptial debt by a wife after marriage, where it is not authorized or ratified by the husband, be of any avail against herself or her husband, since during coverture the wife is incapable of making a promise in law, express or implied.<sup>6</sup> But it seems that an acknowledgment or part payment by a wife before marriage of her antenuptial debts keeps them alive as against her and her after-taken husband.<sup>7</sup>

**(3) Wife's Postnuptial Contracts — (a) In General.** — The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature;<sup>8</sup> and this rule applies whether by statute or otherwise

1. **Infancy of Husband Immaterial.** — Roach v. Quick, 9 Wend. (N. Y.) 238; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258. See also Paris v. Stroud, Barn. 95.

2. **Contract for Necessaries Furnished to Wife When Unmarried Infant.** — Helpey v. Clayton, 17 C. B. N. S. 553, 112 E. C. L. 553; Nicholson v. Wilborn, 13 Ga. 467; Anderson v. Smith, 33 Md. 465; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258. See also Bonney v. Reardin, 6 Bush (Ky.) 34.

3. **Statute of Limitations as Bar to Husband's Liability.** — Beck v. Pierce, 23 Q. B. D. 320; Moore v. Leseur, 18 Ala. 606. See also the statutes of various states and the title LIMITATION OF ACTIONS.

4. **When Statute Begins to Run.** — Beck v. Pierce, 23 Q. B. D. 320.

5. **Husband's Promise Inoperative to Remove Statutory Bar.** — Moore v. Leseur, 18 Ala. 610; Powers v. Southgate, 15 Vt. 471, 40 Am. Dec. 691; Farrar v. Bessey, 24 Vt. 89.

6. **Wife's Promise Inoperative to Remove Statutory Bar.** — Beck v. Pierce, 23 Q. B. D. 320; Neve v. Hollands, 18 Q. B. 262, 83 E. C. L. 262; Pittam v. Foster, 1 B. & C. 248, 8 E. C.

L. 106; Axon v. Blakely, 2 McCord L. (S. Car.) 6, 13 Am. Dec. 697; Farrar v. Bessey, 24 Vt. 89.

7. Beck v. Pierce, 23 Q. B. D. 320.

8. **Contracts of Wife Not Generally Binding on Husband by Virtue of Marriage Relation.** — Freestone v. Butcher, 9 C. & P. 643, 38 E. C. L. 269; Phillipson v. Hayter, L. R. 6 C. P. 41; Atkins v. Curwood, 7 C. & P. 756, 32 E. C. L. 721; Debenham v. Mellon, 6 App. Cas. 32; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 454; Phillips v. Sanchez, 35 Ill. 187; Compton v. Bates, 10 Ill. App. 82; Edwards v. Tyler, 141 Ill. 454; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Tuttle v. Hoag, 46 Mo. 41, 2 Am. Rep. 481; Sawyer v. Cutting, 23 Vt. 486; Savage v. Davis, 18 Wis. 614.

**Signing Husband's Name to Contract.** — Thus the simple fact of marriage does not confer upon the wife authority to sign her husband's name to a contract. Shaw v. Emery, 38 Me. 484; Bates v. Enright, 42 Me. 118.

**Money Lent to Wife.** — A husband is not liable for money lent to his wife unless it is done at his request or with his assent. Walker v. Simpson, 7 W. & S. (Pa.) 88, 42 Am. Dec. 216;



the wife has capacity to contract, as well as at common law.<sup>1</sup> The wife may, however, be her husband's agent, and as such bind him.<sup>2</sup> This agency is frequently spoken of as being of two kinds: first, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to furnish; second, that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases of agency.

**As Husband's Agent in Law.** — The first of these, sometimes called an "agency in law" or an "agency of necessity,"<sup>3</sup> is not, it is said, accurately speaking, referable to the law of agency, for the liability of the husband in such cases is not at all dependent upon any authority conferred by him.<sup>4</sup> He would, under such circumstances, be liable although the necessities were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife and to supply her with necessities suitable to her situation and his own circumstances and condition in life.<sup>5</sup> But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature by the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril.<sup>6</sup>

**As Husband's Agent in Fact.** — The other ground upon which the husband is held liable is by proof that he expressly or impliedly authorizes his wife to make the contracts. This is purely and simply a question of agency which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons.<sup>7</sup> The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied.<sup>8</sup> Of course the husband is estopped from denying that the wife had such authority as she was held out by him to have, in such a manner as to raise a belief in such authority, which

*Schwartz v. Bisland*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 534.

**Money Deposited with Wife.** — If money be deposited with a married woman, her husband will not be liable therefor unless the deposit was made at his request or the wife received it as his agent. *Gilbert v. Plant*, 18 Ind. 308.

1. *Holmes v. Reynolds*, 55 Vt. 39. See also *Bates v. Enright*, 42 Me. 114.

2. In *Stevenson v. Hardie*, 2 W. Bl. 873, Blackstone, J., said: "It is true that no complete or perfect contract can be made by a *feme covert* by her own authority; yet by the assent of her husband she may contract as his substitute, as in case of either sale or loan."

3. **Agency "in Law" or "of Necessity."** — *Debenham v. Mellon*, 6 App. Cas. 31; *Johnston v. Sumner*, 3 H. & N. 261; *Atkins v. Curwood*, 7 C. & P. 756, 32 E. C. L. 721; *Seaton v. Benedict*, 5 Bing. 28, 15 E. C. L. 354; *Phillips v. Sanchez*, 35 Fla. 187; *Compton v. Bates*, 10 Ill. App. 82; *Eames v. Sweetser*, 101 Mass. 80; *Raynes v. Bennett*, 114 Mass. 428; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Anthony v. Phillips*, 17 R. I. 188.

4. *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362.

5. *Compton v. Bates*, 10 Ill. App. 82; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Anthony v. Phillips*, 17 R. I. 188.

6. *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362.

7. **Wife's Agency in Fact.** — *Freestone v. Butcher*, 9 C. & P. 643, 38 E. C. L. 269; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Atkins v. Curwood*, 7 C. & P. 756, 32 E. C. L. 721; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Compton v. Bates*, 10 Ill. App. 82; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Tuttle v. Hoag*, 46 Mo. 41, 2 Am. Rep. 481; *Anthony v. Phillips*, 17 R. I. 188; *Sawyer v. Cutting*, 23 Vt. 486; *Savage v. Davis*, 18 Wis. 614. See the title AGENCY, vol. I, p. 930.

**Burden of Proof on Party Relying upon Wife's Authority.** — *Phillips v. Sanchez*, 35 Fla. 187; *Compton v. Bates*, 10 Ill. App. 82.

**Question of Fact for Jury.** — *Debenham v. Mellon*, 6 App. Cas. 31; *Reid v. Teakle*, 13 C. B. 627, 76 E. C. L. 627; *Lane v. Ironmonger*, 13 M. & W. 368; *Phillips v. Sanchez*, 35 Fla. 187; *Hart v. Young*, 1 Lans. (N. Y.) 417.

8. **Agency in Fact May Be Express or Implied.** — *Phillipson v. Hayter*, L. R. 6 C. P. 41; *Freestone v. Butcher*, 9 C. & P. 643, 38 E. C. L. 269; *Harrison v. Hall*, 1 M. & Rob. 85; *Stevenson v. Hardie*, 2 W. Bl. 872; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Hudson v. Sholem*, 65 Ill. App. 64; *Compton v. Bates*, 10 Ill. App. 82; *Cousins v. Kelsey*, 33 La. Ann. 880; *Tuttle v. Hoag*, 46 Mo. 41, 2 Am. Rep. 481; *Sauter v. Scrutfield*, 28 Mo. App. 155; *Savage v. Davis*, 18 Wis. 614.

belief was acted on in making the contract sought to be enforced.<sup>1</sup>

**Ratification.** — On General Principles of Agency, also, the contract of a married woman may be made binding upon her husband by his subsequent ratification thereof.<sup>2</sup> This ratification may arise by his subsequent promise to pay the debt<sup>3</sup> or by his allowing the wife to retain articles purchased by her and to use them, without expressing any disapprobation.<sup>4</sup> And it has been held that even where a husband and wife are living separate, and the wife improvidently takes up the goods of a tradesman for which the husband would not ordinarily be liable, he will be bound by her contract if, having any control over the goods so as to have it in his power to return them to the vendor, he does not return them or cause them to be returned.<sup>5</sup>

**Effect of Prior Notice Not to Credit Wife.** — But it has been held that where goods which are not necessities are sold by a merchant to a married woman after notice from the husband not to sell any goods to his wife on his credit, the husband does not ratify the purchase so as to render himself liable by merely permitting the goods to remain in his home.<sup>6</sup>

(b) **Where Credit Is Given to Wife Alone.** — Where the wife contracts an indebtedness and credit is given to her solely, the husband cannot be made liable.<sup>7</sup> and

**1. Agency Implied from Prior Conduct of Parties.** — *Filmer v. Lynn*, 4 N. & M. 559, 30 E. C. L. 397, 1 Hurl. & W. 59; *Compton v. Bates*, 10 Ill. App. 82; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713. See also *Gulick v. Grover*, 33 N. J. L. 466.

**Contracts Made by Mistress.** — The same rule has been applied to contracts made by a mistress, though the creditor knew that she was a mistress and not a wife. *Ryan v. Sams*, 12 Q. B. 460, 64 E. C. L. 460.

**As to Third Parties — Agency Not Revocable by Private Agreement Between Husband and Wife.** — *Debenham v. Mellon*, 6 App. Cas. 32; *Watts v. Moffett*, 12 Ind. App. 399.

**2. Husband's Ratification of Wife's Contract.** — *Seaton v. Benedict*, 5 Bing. 28, 15 E. C. L. 354; *Mickelberry v. Harvey*, 58 Ind. 523; *Woodward v. Barnes*, 43 Vt. 330. See also *Morgan v. Chetwynd*, 4 F. & F. 451.

**3. Subsequent Promise to Pay Wife's Debts.** — *West v. Wheeler*, 2 C. & K. 714, 61 E. C. L. 714; *Jenner v. Hill*, 1 F. & F. 260; *Day v. Burnham*, 36 Vt. 37.

**Promise Accompanied with Order to Sell No More Goods to Wife.** — A promise by a husband to pay for necessities supplied to his wife, even if accompanied by directions to sell no more goods to her on his credit, is a ratification of her contract even if she had not previous authority to purchase them. *Conrad v. Abbott*, 132 Mass. 330.

**Promise Induced by Wife's Fraud.** — And the rule of the text has been applied though the husband's promise was induced by the wife's fraud, where the fraud was not participated in by the creditor. *Allen v. Aldrich*, 29 N. H. 63.

**Where Husband and Wife Are Living Separate.** — The rule of the text has been applied though at the time of the contract the husband and wife were living separate and the contract was for articles not necessities. *Mickelberry v. Harvey*, 58 Ind. 523. See also *Allen v. Aldrich*, 29 N. H. 63.

**4. Permitting Wife to Purchase and Use Goods Without Disapproval.** — *Heney v. Sargent*, 54 Cal. 396; *Sterling v. Potts*, 5 N. J. L. 891; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160; *Ham-*

*ilton v. Peck*, (Tex. Civ. App. 1896) 38 S. W. Rep. 403; *Walling v. Hannig*, 73 Tex. 580; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713; *Woodward v. Barnes*, 43 Vt. 330. See also *Black v. Bryan*, 18 Tex. 461.

**5. Waithman v. Wakefield**, 1 Campb. 120. See also *Heney v. Sargent*, 54 Cal. 396.

**6. Segelbaum v. Enslinger**, 117 Pa. St. 255. See also *Devendorf v. Emerson*, 66 Iowa 608. Compare *Bonnier v. Bonnier*, 3 Rev. Lég. 35; *Rennick v. Ficklin*, 3 B. Mon. (Ky.) 166.

**Protests Not Communicated to Tradesman.** — In *Atkins v. Curwood*, 7 C. & P. 756, 32 E. C. L. 721, it was held that the fact that the husband saw the wife wearing extravagant clothes will not be construed as a ratification of the purchase, if it be shown that he disapproved of the conduct of the wife in ordering the things, though such disapproval was never brought to the plaintiff's notice.

**7. Husband Not Liable Where Credit Is Given to Wife Alone.** — *Bentley v. Griffin*, 5 Taunt. 356, 1 E. C. L. 131; *Metcalf v. Shaw*, 3 Campb. 22; *Shelton v. Pendleton*, 18 Conn. 417; *Taylor v. Shelton*, 30 Conn. 122; *Halle v. Einstein*, 34 Fla. 589; *Connerat v. Goldsmith*, 6 Ga. 14; *Sweet v. Penrice*, 24 Miss. 416; *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481; *Hill v. Goodrich*, 46 N. H. 41; *Stammers v. Macomb*, 2 Wend. (N. Y.) 454; *Simmons v. McElwain*, 26 Barb. (N. Y.) 420; *Catron v. Warren*, 1 Coldw. (Tenn.) 358; *Carter v. Howard*, 39 Vt. 106.

And the mere fact that the husband assents to the transaction, or acts as the wife's agent in the transaction, will be immaterial. *Taylor v. Shelton*, 30 Conn. 127; *Maulsby v. Byers*, 67 Md. 440; *Sweet v. Penrice*, 24 Miss. 416; *Roberts v. Kelley*, 51 Vt. 97.

**Contract Concealed from Husband.** — In *Franklin v. Foster*, 20 Mich. 75, it was held that where money was lent to a married woman on her request, and without any authority from her husband, with an understanding that the fact should be concealed from the husband, the loan was regarded as made to the wife alone, and the husband could not be charged. Compare *Day v. Burnham*, 36 Vt. 37.

**Question of Fact.** — In *Bentley v. Griffin*, 5



this though the contract is not binding on the wife or on her property.<sup>1</sup> Accordingly it has been held that the contract of the wife for goods sold to her on her credit alone is not binding on the husband, though the seller may have expected her to procure the money from her husband.<sup>2</sup> And if the wife did not profess to act for the husband, but for herself alone, a subsequent ratification of the contract by the husband will not be binding upon him.<sup>3</sup> Nor, if the plaintiff has chosen the wife as his debtor, can he afterwards make the husband his debtor by showing that the things for which the charges were made were beneficial to the husband.<sup>4</sup>

(c) **Rescission of Husband's Contract.** — Without the authority of her husband a wife has no power to rescind his contract, any more than she has to make contracts for him.<sup>5</sup>

(d) **Sale or Disposition of Husband's Property.** — The disposition by the wife of the husband's property by sale, exchange, or otherwise will not be binding on him without his prior authorization or subsequent approval.<sup>6</sup> But should a married woman sell the property of her husband without authority, the sale will be good to pass the title if it is afterwards ratified by him, by delivery of the property to the purchaser, or otherwise.<sup>7</sup> Nor can a husband stand by and see the wife use the proceeds of the sale of the property sold by her without his knowledge, and afterwards reclaim the property.<sup>8</sup>

**Effect of Husband's Absence.** — And the mere fact that a husband has absconded or otherwise absented himself, though announcing his intention never to return, will not clothe the wife with implied authority to sell or dispose of his property as she pleases and as if she were the owner, where such sale is not necessary to enable her to secure necessities.<sup>9</sup>

**Effect of Husband's Sickness or Insanity.** — It seems also that the mere fact that the husband is sick or insane, and therefore incapable of transacting his busi-

Taunt. 356, 1 E. C. L. 131, it was held to be a question of fact whether a tradesman who furnishes goods to a wife gives credit to her or to her husband. See also *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Hart v. Young*, 1 Lans. (N. Y.) 417.

1. *Taylor v. Shelton*, 30 Conn. 127.

2. *Morris v. Root*, 65 Ga. 686.

3. **Contract on Wife's Credit Alone Cannot Be Ratified by Husband.** — *Bentley v. Griffin*, 5 Taunt. 356, 1 E. C. L. 131; *Meiners v. Munson*, 53 Ind. 138; *Happek v. Hartby*, 7 Baxt. (Tenn.) 411. See also *West v. Wheeler*, 2 C. & K. 714, 61 E. C. L. 714; *Freestone v. Butcher*, 9 C. & P. 643, 38 E. C. L. 269.

4. *Carter v. Howard*, 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497; *Roberts v. Kelley*, 51 Vt. 97.

5. **Unauthorized Rescission of Husband's Contracts.** — *Vaught v. Wellborn*, 16 Ala. 377; *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281. See also *Gray v. Otis*, 11 Vt. 628; *Kellogg v. Robinson*, 32 Conn. 335.

6. **Unauthorized Sale of Husband's Property by Wife Not Binding on Husband.** — *Dunnahoe v. Williams*, 24 Ark. 264; *Edwards v. Tyler*, 141 Ill. 454; *Dresel v. Jordan*, 104 Mass. 413; *Ness v. Singer Mfg. Co.*, 68 Minn. 237; *Brown v. Hannibal*, etc., R. Co., 33 Mo. 309; *Alexander v. Miller*, 16 Pa. St. 215.

**Grant of License to Enter Tenement.** — A wife has no authority by law, without the husband's consent, to give an irrevocable license to enter his tenement. *Nelson v. Garey*, 114 Mass. 418.

**Trifling Gift to Needy Brother.** — In *Spencer v. Storrs*, 38 Vt. 156, it was held that at common law the wife has the legal right, without

asking leave of the husband, to make a reasonable and moderate gift within the means of the husband to an old and needy brother, and that the husband cannot annul the gift by taking it back or changing it into a debt against the brother. In this case it appeared that the gift was a frock valued at about five dollars.

**Authority to Transfer in Payment of Debt Not Included in Authority to Sell.** — *Butts v. Newton*, 29 Wis. 632.

7. *Pike v. Baker*, 53 Ill. 163.

8. *Delano v. Blanchard*, 52 Vt. 578. See also *Huff v. Price*, 50 Mo. 228.

9. **Wife's Authority to Dispose of Husband's Property Not Implied from His Absence.** — *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Richelieu Wine Co. v. Ragland*, 43 Ill. App. 257; *Butts v. Newton*, 29 Wis. 632. Compare *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532.

**Sewing Machine.** — This doctrine has been applied to the sale of a sewing machine kept in the house and used by the wife exclusively. *Wheeler, etc., Mfg. Co. v. Morgan*, 29 Kan. 519.

**Hiring Husband's Horse.** — In *Savage v. Davis*, 18 Wis. 608, where it appeared that the husband was absent from home but a day or two, leaving his horse in the general care of his wife, who had hired it to the defendant, it was held that the law would not presume that the wife was authorized to enter into such contract of hire as the agent of her husband during his absence. Compare *Church v. Landers*, 10 Wend. (N. Y.) 79.



ness, will not constitute the wife his general agent to sell or otherwise dispose of his property.<sup>1</sup>

(e) **Contracts of Wife Engaged in Business on Her Own Account.**—Where the wife engages in business in her own name with the knowledge and consent of the husband, it is the rule at common law that the business is presumed to be that of the husband, and she is considered as his agent, and hence he is presumptively bound by the contracts which she may make relating to such business.<sup>2</sup>

**Where Credit Is Given to Wife Exclusively.**—But if it appears that when the wife incurred the indebtedness, the credit was given to her exclusively, the presumption that she is acting as an agent of her husband is rebutted, and he cannot be held responsible.<sup>3</sup> Thus if it is especially agreed between a vendor and a husband at the time of the sale to the wife that there shall be no contract on the part of the husband, but that the wife alone shall be responsible, no liability will attach against the husband.<sup>4</sup>

**Under Statutes** in some of the states the husband is released from all liability on contracts entered into by his wife in reference to her separate business.<sup>5</sup>

(f) **Contracts for Necessaries**—*IN GENERAL.*—At common law it is the duty of the husband to support the wife, and the mere fact that the wife has separate property will not, as a general rule, release him from liability.<sup>6</sup> If he refuses or neglects to supply his wife with what is necessary for decency and comfort

**1. Authority to Sell Husband's Property Not Implied from His Sickness or Insanity.**—*Alexander v. Miller*, 16 Pa. St. 215; *Sawyer v. Cutting*, 23 Vt. 486.

**2. Common-law Liability of Husband for Contracts of Wife Relating to Business Carried on in Her Name.**—*Petty v. Anderson*, 3 Bing. 170, 11 E. C. L. 84; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Foulds v. Curtelett*, 21 U. C. C. P. 368; *Vezeina v. Lefebvre*, 2 Montreal Leg. N. 179; *Morgan v. Gauvreau*, 11 L. C. Jur. 113; *Godfrey v. Brooks*, 5 Harr. (Del.) 396; *Jenkins v. Flinn*, 37 Ind. 352; *Jones v. Worcher*, (Ky. 1890) 13 S. W. Rep. 911; *Knowles v. Hull*, 99 Mass. 562; *Boas v. Malone*, 140 Pa. St. 572. See also *Rotch v. Miles*, 2 Conn. 638; *Curtis v. Engel*, 2 Sandf. Ch. (N. Y.) 287; *Palen v. Lent*, 5 Bosw. (N. Y.) 713; *Snell v. Stone*, 23 Oregon 327; *MacKinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Foulds v. Curtelett*, 21 U. C. C. P. 368; *Halpenny v. Pennock*, 33 U. C. Q. B. 229.

**3. Husband Not Liable for Debts in Wife's Business Contracted on Her Credit.**—*Exp. Shepherd*, 10 Ch. D. 573; *Smallpiece v. Dawes*, 7 C. & P. 40, 32 E. C. L. 428; *Jenkins v. Flinn*, 37 Ind. 352; *Weisker v. Lowenthal*, 31 Md. 416; *Swett v. Penrice*, 24 Miss. 416; *Tuttle v. Hoag*, 46 Mo. 42, 2 Am. Rep. 481; *Noble v. Kreuzkamp*, 111 Pa. St. 68. See also *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817; *Carreau v. Chapotel*, 45 La. Ann. 850.

**4. Agreement Between Plaintiff and Husband that Latter Shall Not Be Bound.**—*Thompson v. Hibberd*, 14 Phila. (Pa.) 190, 37 Leg. Int. (Pa.) 127.

**5. Statutes Releasing Husband from Liability on Wife's Contracts in Her Business.**—*Trieber v. Stover*, 30 Ark. 727; *Gillies v. Lent*, (C. Pl. Gen. T.) 2 Abb. Pr. N. S. (N. Y.) 455. See also *Haight v. McVeagh*, 69 Ill. 624; *Jaycox v. Wing*, 66 Ill. 182.

**Under Statute in Maine** it has been held that a *feme covert* may purchase and sell goods on her own account, and for such dealings her husband may not be liable, though she does it

with his knowledge and consent, if such knowledge and consent extend no further than to the transaction of the business on her own account and credit, and not to the fact that she professes to act for him. *Colby v. Lamson*, 39 Me. 119; *Oxnard v. Swanton*, 39 Me. 125.

**Massachusetts—Failure to File Certificate.**—In Massachusetts the contracts of a wife in relation to her own separate business are to be considered as binding upon the husband, unless either he or she files a certificate with the town or city clerk giving the particulars required by Stat. Mass. 1862, c. 198; and if there has been a failure to file such certificate, it will be of no avail to prove that the wife was not acting as the husband's agent or with his consent, but that the contract was her own, in relation to her separate estate and upon her exclusive credit. *Feran v. Rudolphsen*, 106 Mass. 471. See also *Browning v. Carson*, 163 Mass. 255; *Knowles v. Hull*, 99 Mass. 562.

It has been held, however, that this rule has no application to a husband who is domiciled in another state and whose wife comes into Massachusetts and trades upon her own account. *Hill v. Wright*, 129 Mass. 296.

But it has been held that the rule applies to purchases made in the prosecution of a business carried on in Massachusetts by parties domiciled there, even if they are made by the married woman outside the state, and contemplate payment at the place where they are made. *Ridley v. Knox*, 138 Mass. 85.

**6. Common-law Duty of Husband to Support Wife.**—*Neil v. Johnson*, 11 Ala. 615; *Wylly v. Collins*, 9 Ga. 236; *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. (N. Y.) 450; *Strong v. Skinner*, 4 Barb. (N. Y.) 546; *Callahan v. Patterson*, 4 Tex. 61, 51 Am. Dec. 712; *McCormick v. McCormick*, 7 Leigh (Va.) 66. See also *Dolan v. Brooks*, 168 Mass. 350.

As to when the wife's separate estate will be chargeable for necessities, see the title *SEPARATE PROPERTY [THE MARRIED WOMAN'S]*.

in his condition of life, he gives to her credit to procure it for herself on his account and at his charge.<sup>1</sup> The mere fact that more or other goods than her necessities require are sold to the wife will not prevent a recovery for those that are properly necessities.<sup>2</sup> But it has been held that a recovery cannot be had for a fractional value of articles not necessities, on the ground that they might have answered the purpose of other articles which would have been necessities.<sup>3</sup>

**Ground of Husband's Liability.** — The husband's liability for necessities furnished to the wife has often been spoken of as resting upon the ground of the wife's agency.<sup>4</sup> To some extent this theory may be reasonably and appropriately applied. But it is well stated that the husband may be liable for necessities furnished to the wife in certain cases, though the existence of an agency or assent expressed or implied is in fact wholly disproved in evidence, as where he issues a prohibition against her pledging his credit and at the same time fails to supply necessities himself.<sup>5</sup> In such cases the better view would appear to be that the husband's liability arises by virtue of the marital relation and in consequence of the obligation assumed by him in marriage to make suitable provisions for his wife; it depends upon an authority to do for the wife what law and duty require him to do.<sup>6</sup> This view has been said to be further supported by the fact that the husband's liability is applicable as well to supplies furnished to the wife when she is insane, and to the care of her lifeless remains, as to contracts expressly made by her.<sup>7</sup>

*bb. WHAT ARE NECESSARIES — (aa) In General.* — Necessaries, it is said, consist of food, drink, clothing, washing, medical attention, and a suitable place of residence. These may be regarded as necessities in the absolute sense of the word.<sup>8</sup> But the husband may control the style of living, and may, by the mode of life which he adopts, or the position which he allows his wife to

**1. General Rule as to Husband's Liability for Wife's Contracts for Necessaries.** — *Montague v. Benedict*, 3 B. & C. 636, 10 E. C. L. 208; *Eames v. Sweetser*, 101 Mass. 78.

**Articles Furnished by Town under Pauper Laws.** — Under the pauper laws of *Massachusetts* it has been held that a town may maintain an action against a husband for supplies furnished to his wife where she has been neglected by him and is standing in need of relief, but the amount of recovery will be restricted to supplies which are necessary for her support as a pauper. *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *New Bedford v. Chace*, 5 Gray (Mass.) 28; *Monson v. Williams*, 6 Gray (Mass.) 416; *Brookfield v. Allen*, 6 Allen (Mass.) 585; *Sturbridge v. Franklin*, 160 Mass. 149.

But in *Indiana* it has been held that the provision made by law for the support of the poor is a charitable provision, and the commissioners of the county cannot sue a husband for the support of his wife who is a pauper. *Switzerland County v. Hildebrand*, 1 Ind. 555; *Noble County v. Schmoke*, 51 Ind. 416. To the same effect see *Delaware County v. McDonald*, 46 Iowa 170; *Bennington v. McGennes*, 1 D. Chip. (Vt.) 45.

**Board and Lodging Furnished to Wife While Staying at House of Parent.** — It has been held that the law will not imply a contract as between father and son-in-law to pay board furnished to the wife of the latter while staying at her father's house, on the ground that "persons in such a near connection as father and children do not usually live together upon a footing of obligation to account with and pay for attentions and services or board and lodging."

*Cantine v. Phillips*, 5 Harr. (Del.) 428. Compare *Burkett v. Trowbridge*, 61 Me. 251. But such liability may arise by an express contract. *Daubney v. Hughes*, 60 N. Y. 187. See also *Cantine v. Phillips*, 5 Harr. (Del.) 428.

**Necessaries Furnished to Wife of Minor.** — It has been held that a husband, though a minor, is liable for necessities furnished to his wife. *Cantine v. Phillips*, 5 Harr. (Del.) 428.

**Breach of Contract to Take Necessaries.** — It has been held that while a husband may be liable for necessities furnished on the order of his wife, he is not liable for a mere breach of the contract to take a necessary unless the wife is shown to be his agent in fact. *Sulter v. Mustin*, 50 Ga. 242.

**2. Eames v. Sweetser**, 101 Mass. 78; *Roberts v. Kelley*, 51 Vt. 97.

**3. Thorpe v. Shapleigh**, 67 Me. 235.

**4. See Sauter v. Scrutchfield**, 28 Mo. App. 155; *Black v. Bryan*, 18 Tex. 464.

**5. Bergh v. Warner**, 47 Minn. 250, 28 Am. St. Rep. 362; *Sauter v. Scrutchfield*, 28 Mo. App. 155; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560.

**6. Husband's Liability Arising from Marriage Relation.** — *Raynes v. Bennett*, 114 Mass. 428; *Hall v. Weir*, 1 Allen (Mass.) 261; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sauter v. Scrutchfield*, 28 Mo. App. 155; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560; *Black v. Bryan*, 18 Tex. 464.

**7. Cunningham v. Reardon**, 98 Mass. 538, 96 Am. Dec. 670.

**8. Absolute Necessaries of Wife.** — *Wallis v. Biddick*, 22 W. R. 761; *Shelton v. Pendleton*, 18 Conn. 417; *St. John's Parish v. Bronson*, 40



assume, confer upon the wife a power to pledge his credit for more than the mere absolute necessities of life. Practically, what shall be considered as necessities will vary with the rank, position, and estate of the husband.<sup>1</sup> In determining what is a reasonable expenditure of money for one's family, the income or capacity to earn or produce income is to be considered as well as the amount of property possessed.<sup>2</sup> And it has been held that evidence of the style of living and expenditure in the circle to which the husband introduces his wife and where he expects to find her intimates and associates is admissible for this purpose also.<sup>3</sup>

(bb) *Domestic Service.* — Domestic service in accordance with the means of the husband and the social station of the family belongs to the class of necessities, and a wife living with her husband has an implied power to bind the husband therefor.<sup>4</sup>

(cc) *Medical Attention.* — Among the articles commonly known as necessities also are the necessary medicine, medical aid, and advice for the wife.<sup>5</sup> But the services of a person not professing to be a physician or to have any medical skill are not, as a matter of law, necessities for which the husband will be liable.<sup>6</sup>

(dd) *Services of Counsel* — **In General.** — It may be laid down as a general rule that where the services of counsel become necessary for the sustenance or protection of the wife, whether such necessity arises by reason of the conduct of the husband or from other cause, the husband will be liable in an action therefor.<sup>7</sup>

Conn. 75, 16 Am. Rep. 17; Reed v. Crissey, 63 Mo. App. 191; Sauter v. Scrutchfield, 28 Mo. App. 150.

**Suitable Lodgings** are necessary. Oltman v. Yost, 62 Minn. 261.

**Pew Rent.** — It has been held that religious instruction does not belong to the class of necessities, as that term is understood at common law, and hence a husband is not liable for rent of a church pew hired and occupied by his wife against his consent. St. John's Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17.

**1. What Are Necessaries to Be Determined by Means and Position of Husband.** — Phillipson v. Hayter, L. R. 6 C. P. 42; Manby v. Scott, Sid. 109; Morgan v. Chetwynd, 4 F. & F. 451; Shelton v. Hoadley, 15 Conn. 535; Raynes v. Bennett, 114 Mass. 429; Sauter v. Scrutchfield, 28 Mo. App. 150.

In some of the decisions it is said that the condition and position of both husband and wife are to be considered. Clark v. Cox, 32 Mich. 212; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Keller v. Phillips, 39 N. Y. 354. And in other decisions the question is spoken of as depending on the standing and condition of the wife. Thorpe v. Shapleigh, 67 Me. 238; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175. But see Compton v. Bates, 10 Ill. App. 85, where an instruction to that effect was held to be erroneous.

**The Fact that the Husband Wore Diamonds** and kept a fast horse has been held to be competent as having some tendency to show his means and station in life. Raynes v. Bennett, 114 Mass. 428.

**The Fact that the Husband Has Paid for Silk Dresses** bought by his wife upon his credit has been held admissible in evidence as having some bearing upon the issue of the authority which he had given to her to make purchases, and upon the question of his means and station in life. Raynes v. Bennett, 114 Mass. 428.

**The Record of the City Treasurer** showing the amount of property for which the husband was assessed has been held not to be admissible, even though connected with the evidence that he had paid the taxes assessed, since the appraisal and assessment were the acts of third parties and the payment of the taxes assessed is not of itself an admission of their correctness. Raynes v. Bennett, 114 Mass. 427.

**2. Capacity to Earn Income to Be Considered.** — Clark v. Cox, 32 Mich. 212.

**3. Style of Living in Wife's Circle of Acquaintances to Be Considered.** — Clark v. Cox, 32 Mich. 212.

But in Raynes v. Bennett, 114 Mass. 424, evidence that articles of jewelry furnished to a wife were such as were usually worn by women who dressed as the defendant's wife did was held to be inadmissible as furnishing no test of what it was proper for her to wear, and as tending to mislead the jury. To the same effect see Compton v. Bates, 10 Ill. App. 84.

**4. When Domestic Service Regarded as Necessaries.** — Phillips v. Sanchez, 35 Fla. 187; Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279; Wagner v. Nagel, 33 Minn. 351.

**5. Medical Services as Necessaries.** — Forristall v. Lawson, 34 L. T. N. S. 903; Beale v. Arabin, 36 L. T. N. S. 249; Harrison v. Grady, 12 Jur. N. S. 140; D'Orsonnens v. Christin, 7 Montreal Leg. N. 338; Cothran v. Lee, 24 Ala. 380; Bevier v. Galloway, 71 Ill. 517; Seybold v. Morgan, 43 Ill. App. 39; Reed v. Crissey, 63 Mo. App. 184; Tebbets v. Hapgood, 34 N. H. 420; Comstock v. Green, 88 Hun (N. Y.) 64. See also McClallen v. Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

**6. Wood v. O'Kelley, 8 Cush. (Mass.) 406.**

**7. Liability of Husband for Legal Services Rendered to Wife.** — See Rice v. Shepherd, 12 C. B. N. S. 332, 104 E. C. L. 332; Ladd v. Lynn, 2 M. & W. 265.

**Illustration of Rule — Legal Measures to Pro-**  
Volume XV.



**In Defense of Wife Charged with Crime.** — Legal services rendered to a married woman for the purpose of defending her against a crime with which she is charged are necessities for which the husband may be liable.<sup>1</sup> But it has been held that where the employment of the particular attorney is forbidden by the husband, in order to recover against the husband the attorney must show that all the legal services rendered and the disbursements made for which recovery is sought were reasonably necessary for the wife's defense.<sup>2</sup>

**To Secure Protection from Husband.** — The doctrine is well settled that when the conduct of the husband towards his wife makes it necessary that she should apply to the law for protection, the husband will be chargeable for the legal services thereby made necessary in the same way as though he failed to furnish her with proper support.<sup>3</sup> Thus it has been held that where the conduct of the husband is such that it becomes necessary for the wife to exhibit articles of peace against him for her safety and protection, the husband is liable on the retainer of the wife to an attorney for professional services rendered by him.<sup>4</sup> But it has been held that a husband is not liable for the expense of an indictment instituted against himself by the wife for an assault, since that is a proceeding instituted not for the protection of the wife, but for the punishment of the husband.<sup>5</sup>

**Fees in Actions for Divorce** — **Divorce a Mensa et Thoro.** — It has been held that counsel are entitled to recover of the husband reasonable fees for services rendered to the wife in a suit against the husband for a divorce *a mensa et thoro*, if it be made to appear affirmatively that the suit is reasonably and justifiably instituted.<sup>6</sup>

**Divorce a Vinculo Matrimonii.** — And in *England* the rule has been stated that the wife has the same power of pledging her husband's credit for the costs

cure Subsistence and Restitution of Conjugal Rights. — *Wilson v. Ford*, L. R. 3 Exch. 63.

**Legal Services in Proceedings for Nonsupport.** — In *McQuhae v. Rey*, (N. Y. City Ct. Gen. T.) 2 Misc. (N. Y.) 476, *affirmed* (C. Pl. Gen. T.) 3 Misc. (N. Y.) 550, it was held that the husband was not liable for legal services rendered to the wife in a proceeding brought by the people against him for failure on his part to support his wife, in which she was really a witness for the people and not a party to the suit.

**1. Legal Services in Defense of Wife Charged with Crime Regarded as Necessaries.** — *Artz v. Robertson*, 50 Ill. App. 27.

**Where a Wife Was Indicted for Keeping a Disorderly House**, which she had done with her husband's concurrence, it was held that he was liable to an attorney whom she employed to defend her and by whom he knew that she was defended. *Shepherd v. Mackoul*, 3 Campb. 326.

**Proceedings to Require Wife to Keep the Peace on Groundless Charge by Husband.** — It has been held that the husband is liable to an attorney for services rendered on behalf of a wife in a proceeding to require her to keep the peace brought by the husband on a groundless charge. *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515.

**Fees for Defending Wife Against Prosecution as Common Drunkard.** — In the same way it has been held that the husband may be held liable for legal services rendered to the wife in defending her successfully against a complaint made by him charging her with being a common drunkard. *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

*2. Artz v. Robertson*, 50 Ill. App. 27.

*3. Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Morrison v. Holt*, 42 N. H. 480.

**4. Expense of Exhibiting Articles of Peace Against Husband.** — *Shepherd v. Mackoul*, 3 Campb. 326; *Turner v. Rooke*, 10 Ad. & El. 47, 37 E. C. L. 35; *Morris v. Palmer*, 39 N. H. 123. See also *Williams v. Fowler*, 1 McCl. & Y. 269.

**Where Proceedings Are Groundless.** — But it has been held that the husband cannot be made liable when the referee before whom the case was heard did not find that any of the expenses were necessities, and did not allow the items or report that there were reasonable grounds for instituting the proceedings. *Smith v. Davis*, 45 N. H. 566.

**5. Legal Services in Prosecution by Indictment Against Husband.** — *Grindell v. Godmond*, 5 Ad. & El. 755, 31 E. C. L. 431.

Under statute in *Massachusetts* the same rule has been laid down. *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

**6. Legal Services in Prosecution of Divorce a Mensa et Thoro.** — *Brown v. Ackroyd*, 5 El. & Bl. 819, 85 E. C. L. 819; *Rice v. Shepherd*, 12 C. B. N. S. 332, 104 E. C. L. 332; *Stocken v. Patrick*, 29 L. T. N. S. 507; *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 229; *Langbein v. Schneider*, (N. Y. City Ct.) 27 Abb. N. Cas. (N. Y.) 228; *Peck v. Marling*, 22 W. Va. 708. See also *Taylor v. Hailstone*, 52 L. J. Q. B. 101.

But the rule is otherwise where at the commencement of the suit there were not reasonable grounds for the proceedings. *Brown v. Ackroyd*, 5 El. & Bl. 819, 85 E. C. L. 819; *Baylis v. Watkins*, 10 Jur. N. S. 114.

due to her solicitor in a suit for the dissolution of the marriage as for costs in a suit for divorce *a mensa et thoro*.<sup>1</sup> But legal services rendered to a wife in the prosecution of an action for divorce *a vinculo matrimonii* are not, by great weight of authority in the *United States*, recognized at common law as coming within the list of articles known as necessities, for the reason that necessities are to be provided by a husband for his wife to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another.<sup>2</sup> And the same rule has been applied to legal services in defending the wife, though successfully, in a suit instituted by the husband for a divorce *a vinculo matrimonii*,<sup>3</sup> though a contrary view has been maintained in some jurisdictions.<sup>4</sup>

(*ee*) *Advances for Purchase of Necessaries*.—Advances of money to a wife are not regarded as necessities at common law, and the husband will not be liable for money lent to the wife without his request or assent, though it is afterwards applied by her in procuring necessities, since courts of law will not recognize any privity between the husband and a person making such advances.<sup>5</sup> But by the prevailing rule equity allows one who has lent money to a wife with which to purchase necessities to stand in the stead of the persons supplying the necessities and to recover of the husband the amount actually employed by the wife out of the money so lent her in paying for necessities, the lender being required to see that the loan is properly applied.<sup>6</sup> In *Massachusetts*,

1. Rule in England as to Services in Prosecution of Divorce a Vinculo.—*Stocken v. Patrick*, 29 L. T. N. S. 507; *Ottaway v. Hamilton*, 3 C. P. D. 398.

2. Rule in United States as to Services in Prosecution of Divorce a Vinculo.—*Pearson v. Darrington*, 32 Ala. 227; *Shelton v. Pendleton*, 18 Conn. 417; *Dow v. Eyster*, 79 Ill. 254; *Williams v. Monroe*, 18 B. Mon. (Ky.) 518; *Isbell v. Weiss*, 60 Mo. App. 54; *Yeiser v. Lowe*, 50 Neb. 310; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Dorsey v. Goodenow*, *Wright (Ohio)* 120; *Thompson v. Thompson*, 3 Head (Tenn.) 527. See also *Peck v. Marling*, 22 W. Va. 708. Compare *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *Glenn v. Hill*, 50 Ga. 94.

In *Iowa* the rule has been laid down that the husband is not liable to the attorney of his wife for services in prosecuting an action brought by her for a divorce. *Johnson v. Williams*, 3 Greene (Iowa) 97, 54 Am. Dec. 491.

But in *Preston v. Johnson*, 65 Iowa 285, it was held that where a wife employs an attorney to begin an action for divorce against her husband, and the attorney begins such action in good faith upon the wife's verified statement of facts, which, if true, would entitle her to a divorce, and the action is afterwards dismissed, the attorney may recover his fees from the husband without proving that the wife is in fact entitled to a divorce. See also *Clyde v. Peavy*, 74 Iowa 47.

In *Sherwin v. Maben*, 78 Iowa 467, however, it was held that where a wife commences and prosecutes an action for divorce against her husband, and the ground of her complaint is not true, and an action is not necessary for her protection, her husband is not liable to her attorneys for their fees and advances made by them at the wife's request in prosecution of the action.

Under Statutes in Kentucky providing that "in suits for alimony and divorce the husband shall pay the costs of each party unless it shall be made to appear in the cause that

the wife is in fault, and has ample estate to pay the same," it has been held that the attorney cannot maintain a separate action against the husband for his fees, but the amount must be fixed and ascertained by the court in which the divorce is granted and allowed as part of the wife's costs in the action. *Williams v. Monroe*, 18 B. Mon. (Ky.) 514. See also *Ballard v. Caperton*, 2 Met. (Ky.) 412; *Nikirk v. Nikirk*, 3 Met. (Ky.) 432; *Meyar v. Meyar*, 3 Met. (Ky.) 298; *Thomas v. Thomas*, 7 Bush (Ky.) 665; *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523.

3. Jurisdictions Holding Services in Defense of Wife Not Necessaries.—*Cooke v. Newell*, 40 Conn. 596; *McCullough v. Robinson*, 2 Ind. 630; *Coffin v. Dunham*, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695.

4. Defending Divorce Suit Against Wife Held to Be Chargeable Against Husband.—*Porter v. Briggs*, 38 Iowa 166, 18 Am. Rep. 27. See also *Gossett v. Patten*, 23 Kan. 341.

5. Advances Made for Purchase of Necessaries Not Necessaries at Common Law.—*Knox v. Bushell*, 3 C. B. N. S. 334, 91 E. C. L. 334; *Paule v. Goding*, 2 F. & F. 585; *Jenner v. Morris*, 3 De G. F. & J. 45; *Zeigler v. David*, 23 Ala. 127; *Gilbert v. Plant*, 18 Ind. 308; *Anderson v. Cullen*, 16 Daly (N. Y.) 15; *Schwartz v. Bisland*, (C Pl. Gen. T.) 4 Misc. (N. Y.) 534; *Marshall v. Perkins*, 20 R. I. 34; *Gill v. Read*, 5 R. I. 347, 73 Am. Dec. 73. See also *Grindell v. Godmond*, 5 Ad. & El. 755, 31 E. C. L. 141.

6. Advances to Wife Regarded as Necessaries in Equity.—*Harris v. Lee*, 1 P. Wms. 482; *Matter of Wood*, 1 De G. J. & S. 465; *Deare v. Soutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 De G. F. & J. 45; *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Reed v. Crissey*, 63 Mo. App. 184; *Walker v. Simpson*, 7 W. & S. (Pa.) 88, 42 Am. Dec. 216. See also *Johnston v. Manning*, 12 Ir. C. L. 148; *Marshall v. Per-*



however, the conclusion was reached in a recent case that advances cannot be considered as necessities in a court of equity, or the ground either of subrogation or of a general equity.<sup>1</sup>

(ff) *Expenses of Wife's Burial.* — The common law casts on the surviving husband the duty and legal obligation of burying his deceased wife and of compensating or reimbursing a third person performing services or incurring expenses in this respect, suitable to the rank and fortune of the husband;<sup>2</sup> and this rule applies though at the time of her death the wife was living apart from her husband, whether by reason of his desertion or cruelty<sup>3</sup> or of her own volition.<sup>4</sup> Nor in such case will notice of the death be required to hold the husband liable.<sup>5</sup> The fact that the wife has a separate equitable estate will be immaterial, since no one, excepting the wife by her own contract, can fasten a charge upon her separate equitable estate.<sup>6</sup> Nor, it has been held, if the wife has a separate statutory estate will the husband be entitled to any credit for such expenditures on the settlement of his administration of her estate.<sup>7</sup> The obligation of the husband in this respect has been placed upon a broader ground than the mere right of the wife to necessities, namely on the ground of common decency.<sup>8</sup> But in some of the decisions funeral expenses have been treated as necessities,<sup>9</sup> and for the sake of convenience they are discussed here.

(gg) *Whether Question of Law or Fact.* — The question whether the article furnished to a wife falls within the class of necessities is often one of some difficulty. In some cases it is undoubtedly the duty of the court to rule as matter of law that certain articles do not come within the class of necessities for which a wife may pledge the credit of her husband without his consent.<sup>10</sup>

kins, 20 R. I. 34. Compare *May v. Skey*, 16 Sim. 588.

**Advances Made During Husband's Sickness.** — In *Leuppie v. Osborn*, 52 N. J. Eq. 637, it was held that the rule that when the husband deserts his wife without making provision for her support, and a third person advances money to her which she uses to obtain necessities, an equitable debt is thereby created, does not apply to a case where the husband's failure to do his duty is the result of misfortune, as, for instance, sickness.

1. *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447.

2. **Liability of Husband for Wife's Burial Expenses.** — *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776; *Lott v. Graves*, 67 Ala. 43; *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168. See also *Jenkins v. Tucker*, 1 H. Bl. 90.

The husband is proximately liable at common law for the expenses of his wife's funeral, whether he is or is not her legatee. *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168.

3. **Funeral Expenses of Wife Living Apart by Reason of Husband's Cruelty or Desertion.** — *Jenkins v. Tucker*, 1 H. Bl. 90; *Scott v. Carothers*, 17 Ind. App. 673; *Cunningham v. Reardon*, 98 Mass. 538, 66 Am. Dec. 670.

4. **Funeral Expenses of Wife Voluntarily Living Apart.** — *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776; *Bradshaw v. Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344; *Seybold v. Morgan*, 43 Ill. App. 40. See also *Carley v. Green*, 12 Allen (Mass.) 106; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384.

5. *Bradshaw v. Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344; *Cunningham v. Reardon*, 98 Mass. 538, 66 Am. Dec. 670.

6. **Husband Liable though Wife Has Separate**

**Equitable Estate.** — *Lott v. Graves*, 67 Ala. 43. See also *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598.

**Wife Living Apart on Separate Maintenance.** — In *Bertie v. Chesterfield*, 9 Mod. 31, it was held that the estate of the husband in the possession of his devisee is liable for the funeral expenses of the testator's wife although she was living apart from him on a separate maintenance.

7. *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Matter of Weringer*, 100 Cal. 345; *Staples's Appeal*, 52 Conn. 425; *Waesch's Estate*, 166 Pa. St. 204. See also *Costigan's Estate*, 13 Phila. (Pa.) 264, 36 Leg. Int. (Pa.) 383; *Darmody's Estate*, 13 Phila. (Pa.) 207, 36 Leg. Int. (Pa.) 96.

But in *Waesch's Estate*, 166 Pa. St. 204, it was intimated that if the husband is insolvent, the wife's estate becomes liable.

8. *Bradshaw v. Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344.

9. *Scott v. Carothers*, 17 Ind. App. 673; *Cunningham v. Reardon*, 98 Mass. 538, 66 Am. Dec. 670.

10. **What Are Necessaries Sometimes a Question of Law.** — *Phillipson v. Hayter*, L. R. 6 C. P. 43; *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17; *Raynes v. Bennett*, 114 Mass. 428; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sauter v. Scrutchfield*, 28 Mo. App. 157.

**Articles Clearly Luxuries.** — In *Phillipson v. Hayter*, L. R. 6 C. P. 41, evidence of the purchase of articles clearly luxuries was not allowed to go to the jury, and the matter was ruled upon by the court. See also *Sauter v. Scrutchfield*, 28 Mo. App. 157; *Sulter v. Mustin*, 50 Ga. 242.



Thus it has been said that a stock of goods sold for purposes of trade or material for building a house would not be necessities within the meaning of this rule of law.<sup>1</sup> But except in a very clear case the question is generally held to be one for the jury.<sup>2</sup>

*cc. PRESUMPTION OF AUTHORITY FROM COHABITATION* — (*aa*) *In General*. — A presumption arises during cohabitation that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department, which is ordinarily confined to the management of the wife.<sup>3</sup> This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements if she could not order such things as are proper for the use of the house and for her own use without the interference of her husband.<sup>4</sup>

*Excessive or Extravagant Purchases*. — But if the articles purchased do not fall fairly within the domestic department, or are not properly necessities, but are excessive in amount or extravagant in their nature, the presumption of authority from cohabitation will not arise.<sup>5</sup>

(*bb*) *Woman Passing as Wife*. — If a man lives with a woman, allowing her to use his name and pass for his wife, he is *prima facie* bound to pay for neces-

1. *Raynes v. Bennett*, 114 Mass. 428.

2. *What Are Necessaries Generally Question for Jury*. — *Compton v. Bates*, 10 Ill. App. 84; *Raynes v. Bennett*, 114 Mass. 428; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Tupper v. Cadwell*, 12 Met. (Mass.) 559, 46 Am. Dec. 704; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sauter v. Scrutchfield*, 28 Mo. App. 157.

*Jewelry*. — In *Raynes v. Bennett*, 114 Mass. 428, it was held that the question whether a gold watch, a gold chain, and a gold locket, furnished to the wife when she and her husband were living together, were necessities, was a question to be submitted to the jury.

*Sewing Machine*. — The question whether a sewing machine is a necessary for the wife in such a sense that the husband can be sued for it is for the jury. *Willey v. Beach*, 115 Mass. 559.

*Household Furniture*. — In *Hunt v. De Blaquiere*, 5 Bing. 550, 15 E. C. L. 535, it was held that it was a question for the jury whether articles of household furniture were necessities for a wife living apart from her husband.

3. *Presumption of Authority to Purchase Necessaries from Fact of Cohabitation* — *England*. — *Etherington v. Parrot*, 1 Salk. 118; *Debenham v. Mellon*, 6 App. Cas. 24; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Harrison v. Grady*, 13 L. T. N. S. 369, 12 Jur. N. S. 140; *Jewsbury v. Newbold*, 26 L. J. Exch. 247; *Clifford v. Laton*, 3 C. & P. 15, 14 E. C. L. 188.

*Alabama*. — *Hughes v. Chabwick*, 6 Ala. 671.  
*Colorado*. — *Hardenbrook v. Harmon*, 11 Colo. 9.

*Illinois*. — *Compton v. Bates*, 10 Ill. App. 78. See also *Gotts v. Clark*, 78 Ill. 229.

*Indiana*. — *Watts v. Moffett*, 12 Ind. App. 399; *Litson v. Brown*, 26 Ind. 489.

*Kansas*. — *Hartmann v. Tegart*, 12 Kan. 177.

*Maine*. — *Furlong v. Hysom*, 35 Me. 332.

*Minnesota*. — *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279; *Wagner v. Nagel*, 33 15 C. of L.—56

Minn. 348; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362.

*Missouri*. — *Sauter v. Scrutchfield*, 28 Mo. App. 155; *Rutherford v. Coxe*, 11 Mo. 347.

*New Hampshire*. — *Tebbetts v. Hapgood*, 34 N. H. 420.

*New Jersey*. — *Vusler v. Cox*, 53 N. J. L. 518.

*New York*. — *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560; *M'Cutchen v. M'Gahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Keller v. Phillips*, 39 N. Y. 353.

*Vermont*. — *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

*Living Separate under Same Roof*. — The doctrine of the text holds though the husband and wife are living apart, if they remain under the same roof. *Harrison v. Grady*, 12 Jur. N. S. 140. See also *Hentze v. Marjenhoff*, 42 S. Car. 427.

*Cohabitation Without Maintenance of Establishment*. — But in *England* it has been held that no presumption of authority will arise from the mere fact of cohabitation without any house or establishment for the wife to manage. *Debenham v. Mellon*, 6 App. Cas. 32.

4. *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362.

5. *No Presumption of Authority in Case of Articles Not Necessaries*. — *Phillipson v. Hayter*, L. R. 6 C. P. 42; *Jewsbury v. Newbold*, 26 L. J. Exch. 247; *Harrison v. Grady*, 14 W. R. 139, 13 L. T. N. S. 369, 12 Jur. N. S. 140. See also *Freestone v. Butcher*, 9 C. & P. 643, 38 E. C. L. 269; *Raynes v. Bennett*, 114 Mass. 428. Compare *Lane v. Ironmonger*, 13 M. & W. 368.

This rule has been applied in the case of jewelry unsuitable to the husband's and the wife's station in life. *Montague v. Benedict*, 3 B. & C. 631, 10 E. C. L. 205, 5 Dowl. & R. 532.

In *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, it was held that the wife was not presumed to have authority to purchase diamond earrings, for the reason that they were not articles of ordinary household use.

saries furnished to her,<sup>1</sup> even by a person who knew that the parties were not married.<sup>2</sup>

**Discontinuance of Cohabitation.** — But it has been held that when he has turned her away and they are living separate he is not liable for necessaries furnished to her, if he can show that in point of fact they were not married.<sup>3</sup>

(cc) *Rebuttal of Presumption.* — Since the law recognizes the husband's right himself to furnish necessaries to the wife, this presumption of authority on the part of the wife arising from cohabitation is open to rebuttal.<sup>4</sup>

**Proof of Supply by Husband.** — Thus it has been held that a husband who suitably supplies his wife with necessaries, or with money to purchase them, will not be held liable for goods purchased by her on his credit without his previous authority or subsequent sanction, though the goods be of the quality ordinarily known as necessaries.<sup>5</sup> But there is some authority for the view that if the articles purchased are such as are ordinarily used in households such as the husband maintains, he will be liable notwithstanding it may turn out that the articles were not necessary to the comfort of the family, or were not needed under the particular circumstances, unless it was known to the tradesman that they were not needed.<sup>6</sup>

**Effect of Husband's Prohibition of Purchase on Credit.** — The husband has the right to withdraw by an express prohibition the agency which the law presumptively gives to the wife during cohabitation to purchase necessaries, and if he makes

**1. Presumption of Authority from Allowing Woman to Pass as Wife.** — *Paule v. Goding*, 2 F. & F. 585.

**Allowing Woman to Assume Name Without Cohabitation.** — But it has been held that the mere fact that a man has allowed a woman to call herself by his name, he not cohabiting with her, nor otherwise holding her out as his wife, will not suffice to make a *prima facie* case against him of liability for her debts. *Gomme v. Franklin*, 1 F. & F. 465.

**Holding Out Party to Bigamous Marriage as Wife.** — In *Robinson v. Nahon*, 1 Campb. 245, it was held that if a man marries a woman, visits her frequently, and holds her out to the world as his wife, he does not discharge himself from liability for necessaries furnished to her by proving a previous marriage between himself and another woman, who has resided in the same house with him ever since, unless he brings home a clear knowledge of the celebration of the first marriage to the party who furnished the necessaries to the second wife.

**Necessaries Furnished After Death of Alleged Husband.** — Where a man who had for some years cohabited with a woman who passed for his wife went abroad, leaving the woman and her family at his residence in England, after authorizing a tradesman to furnish necessaries to his alleged wife after his departure, it was held that the woman might have the same authority to bind him by her contracts for necessaries as if she had been his wife, but that his executor was not bound to pay for any goods supplied to her after his death, but before notice of it had been received, in the absence of any express contract to pay for goods furnished to the woman after his death. *Blades v. Free*, 9 B. & C. 167, 17 E. C. L. 351.

**2. Watson v. Threlkeld**, 2 Esp. 637. In this case Lord Kenyon said: "What, however, I have said must not be taken to be the case of a common strumpet, who may assume the name of a person without his authority from having casually known him; it must be

where the man permits the woman to assume his name, where she lives in his house and is part of his family."

**3. Effect of Discontinuance of Cohabitation with Person Passing as Wife.** — *Munro v. De Chémant*, 4 Campb. 215.

**Recognition of Woman as Wife Subsequent to Separation.** — Where a man and a woman had been married, though by a minister not strictly authorized to perform the ceremony, and they were hence not *stricti juris* man and wife, and after living together for some time they separated, it was held that the alleged husband was liable for goods furnished to the wife after the separation, where it appeared that shortly previous to the bringing of the action the defendant recognized the woman as his wife. *Hawley v. Ham*, Taylor (U. C.) 529.

**4. Presumption Open to Rebuttal.** — *Etherington v. Parrot*, 1 Salk. 118; *Sauter v. Scrutchfield*, 28 Mo. App. 155; *Keller v. Phillips*, 39 N. Y. 353; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560.

**5. Proof of Supply by Husband in Rebuttal of Presumption.** — *Seaton v. Benedict*, 5 Bing. 28, 15 E. C. L. 354; *Montague v. Benedict*, 3 B. & C. 631, 10 E. C. L. 205; *Holt v. Brien*, 4 B. & Ald. 252, 6 E. C. L. 472; *Reneaux v. Teakle*, 8 Exch. 680; *Reid v. Teakle*, 13 C. B. 627, 76 E. C. L. 627; *Clark v. Cox*, 32 Mich. 204; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 561. See also *Debenham v. Mellon*, 6 App. Cas. 31; *Morgan v. Chetwynd*, 4 F. & F. 451; *Bergh v. Warner*, 47 Minn. 252, 28 Am. St. Rep. 362. Compare *Ruddock v. Marsh*, 1 H. & N. 601.

**Adequate Allowance Made During Temporary Absence of Husband.** — The rule of the text has been applied where the husband makes an adequate allowance to the wife during a temporary absence from home. *Holt v. Brien*, 4 B. & Ald. 252, 6 E. C. L. 472; *Dennys v. Sargeant*, 6 C. & P. 419, 25 E. C. L. 465. See also *Bird v. Jones*, 3 M. & R. 121.

**6. Sauter v. Scrutchfield**, 28 Mo. App. 155.



such prohibition no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his duty that supplies become absolutely necessary.<sup>1</sup> Whenever, therefore, a tradesman who has been forbidden to discharge this duty of the husband undertakes to sell goods to the wife, he does so at his peril and with the burden of showing not only that the goods sold are included in the class of articles denominated necessities or are needed for present use in the conduct of the domestic concerns,<sup>2</sup> but also that the husband has so far neglected his duty that unless the tradesman or some other third person does furnish the articles, the wife cannot reasonably be supplied with them and must suffer through want thereof.<sup>3</sup> But where it is shown that the articles purchased are not only in their nature suitable and necessary, but that the husband has failed in his duty to supply them, he cannot by notice to the vendor divest the wife of the power of making the purchase.<sup>4</sup>

*dd. WHERE HUSBAND AND WIFE ARE LIVING SEPARATE* — (aa) *In General*. — Where the husband and the wife are living separate, the presumption is against the authority of the wife to bind the husband by her contracts for necessities, and the tradesman seeking to hold the husband liable for necessities furnished to the wife must show affirmatively, in order to establish his cause of action, the special circumstances which fix the responsibility on the husband.<sup>5</sup> Nor will

1. **Rebuttal of Presumption by Notice to Tradesman Not to Furnish Goods to Wife.** — *Etherington v. Parrot*, 1 Salk. 118; *Ex p. Holmes*, 10 Mor. Bankr. Cas. 12; *Hughes v. Rees*, 5 Montreal Leg. N. 70; *Bevier v. Galloway*, 71 Ill. 517; *Sauter v. Scrutfield*, 28 Mo. App. 155; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560; *Keller v. Phillips*, 39 N. Y. 353.

**Effect of Prohibition to Wife Not Communicated to Creditor.** — And indeed it is the doctrine of the later *English* cases, at least, that the presumption of authority arising from cohabitation may be destroyed by a prohibition by the husband to the wife not to trade on his account, though the prohibition is not communicated to the creditor. *Jolly v. Rees*, 15 C. B. N. S. 628, 109 E. C. L. 628; *Debenham v. Mellon*, 6 App. Cas. 31. See also *Compton v. Bates*, 10 Ill. App. 78. Compare *Johnston v. Sumner*, 3 H. & N. 261.

**Mere Complaint of Extravagance.** — But in *Morgan v. Chetwynd*, 4 F. & F. 451, it was held that when the question is as to an express prohibition to the wife to order goods on credit, it must appear that there was a direct, present, positive, absolute prohibition, and not a mere complaint of extravagance or declaration as to the future that if such extravagance is continued he will not be answerable for her debts.

**Rule Where Husband Has Held Out Wife as Agent.** — In *Watts v. Moffett*, 12 Ind. App. 399, it was held that if the presumption of authority from cohabitation is further strengthened by the conduct of the husband through a series of years in permitting his wife to exercise this power, and acquiescing therein, he will not be relieved from liability on contracts for necessities by a revocation of her authority which is not communicated to the tradesmen. See also *Debenham v. Mellon*, 6 App. Cas. 36; *Cothran v. Lee*, 24 Ala. 380.

**Notice to Servants.** — In *Etherington v. Parrot*, 1 Salk. 118, it was held that notice to a servant of a tradesman is sufficient.

**Successful Defense Against Suit on One Bill Not**

**Notice as to Subsequent Bills.** — *Ogden v. Prentice*, 33 Barb. (N. Y.) 160.

**Notice Not to Sell Except on Order — Conduct Held Equivalent to Order.** — See *Kreiger v. Smith*, 13 Mont. 235.

**The Burden of Proof is on the defendant to show that the credit was given against his express dissent and that notice of such dissent was given to the plaintiff.** *Keller v. Phillips*, 39 N. Y. 353.

2. *Woodward v. Barnes*, 43 Vt. 330.

3. **Notice Ineffectual Where Husband Fails to Provide for Wife.** — *Devendorf v. Emerson*, 66 Iowa 698; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Barr v. Armstrong*, 56 Mo. 588; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33; *Mott v. Comstock*, 8 Wend. (N. Y.) 544; *Theriot v. Baglioli*, 9 Bosw. (N. Y.) 578; *Keller v. Phillips*, 39 N. Y. 353; *Woodward v. Barnes*, 43 Vt. 330.

**Effect of Private Arrangement Where Husband Fails to Supply Necessaries.** — And whenever the husband neglects to supply his wife with necessities, or the means of procuring them, she may pledge his credit for them notwithstanding any private agreement between her husband and herself. *Reed v. Crissey*, 63 Mo. App. 195.

4. *Pierpont v. Wilson*, 49 Conn. 450; *McGrath v. Donnelly*, 131 Pa. St. 551; *Woodward v. Barnes*, 43 Vt. 330.

**Question for Jury.** — The question whether the necessary supplies were furnished is for the jury. *McGrath v. Donnelly*, 131 Pa. St.

5. **No Presumption of Authority in Favor of Wife Living Separate** — *England*. — *Ozard v. Darnford*, cited in 1 Selw. N. P. (13th ed.) 229; *Edwards v. Towels*, 6 Scott N. R. 641, 5 M. & G. 624, 44 E. C. L. 328; *Clifford v. Laton*, 3 C. & P. 15, 14 E. C. L. 188; *Mainwaring v. Leslie*, M. & M. 18, 22 E. C. L. 236; *Johnston v. Sumner*, 3 H. & N. 261.

*Georgia*. — *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

*Illinois*. — *Rea v. Durkee*, 25 Ill. 503.



the fact that the tradesman had no knowledge that the wife was living separate from her husband avail to relieve him from the burden of proof.<sup>1</sup>

(3) *Separation by Consent.* — If a husband and his wife separate by mutual consent, and the husband makes to the wife an adequate allowance for her support which is regularly paid, he is not liable to be sued upon her contracts for necessities,<sup>2</sup> and this though the separation is not by deed and there is no written agreement in respect to the allowance;<sup>3</sup> and in such case notice to the tradesman of the agreement for separation and allowance is in general unnecessary.<sup>4</sup> But the husband is liable for necessities supplied to the wife unless she has a competent provision from him or from some fund of her

*Minnesota.* — *S. E. Olson Co. v. Youngquist*, 72 Minn. 432.

*New Jersey.* — *Snover v. Blair*, 25 N. J. L. 94; *Vusler v. Cox*, 53 N. J. L. 518.

*New York.* — *Blowers v. Sturtevant*, 4 Den. (N. Y.) 46; *Mott v. Comstock*, 8 Wend. (N. Y.) 544.

*North Carolina.* — *Pool v. Everton*, 5 Jones L. (50 N. Car.) 241.

*Pennsylvania.* — *Cany v. Patton*, 2 Ashm. (Pa.) 140; *Walker v. Simpson*, 7 W. & S. (Pa.) 83, 42 Am. Dec. 216; *Breinig v. Meitzler*, 23 Pa. St. 156.

*Compare* *Black v. Bryan*, 18 Tex. 466.

**Where Necessaries Are Furnished by a Town.** — It has been held that if the wife has been abandoned, or is living away from the husband with his consent or for justifiable cause, he is chargeable with her support though the necessities are furnished by a city or town under the laws for relief to paupers. *Sturbridge v. Franklin*, 160 Mass. 149; *Howard v. Whetstone*, 10 Ohio 365; *Springfield Tp. v. Demott*, 13 Ohio 105. See also *Rumney v. Keyes*, 7 N. H. 571. But in such case it has been held that the burden is on the town to prove that the wife is living apart from her husband for justifiable cause. *Sturbridge v. Franklin*, 160 Mass. 149. See also *Monroe County v. Budlong*, 51 Barb. (N. Y.) 516.

**Insane Wife Supported by County.** — It has been held that a husband who has voluntarily permitted an insane wife to absent herself from his house and become a public charge is liable to an action by the county to recover the amount of the expenditure necessarily incurred by the public authorities for her support, and that an insane wife is incapable of abandoning her husband. *Goodale v. Lawrence*, 88 N. Y. 520. To the same effect see *Alna v. Plummer*, 4 Me. 258. *Compare* *Monroe County v. Budlong*, 51 Barb. (N. Y.) 493.

1. **Notice of Separation to Creditor Immaterial.** — *Wallis v. Biddick*, 22 W. R. 761; *Harshaw v. Merryman*, 18 Mo. 106; *Porter v. Bobb*, 25 Mo. 36; *Vusler v. Cox*, 53 N. J. L. 516; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

2. **Nonliability of Husband upon Voluntary Separation with Adequate Allowance.** — *Negus v. Forster*, 46 L. T. N. S. 675, 30 W. R. 691; *Hodgkinson v. Fletcher*, 4 Campb. 70; *Mizen v. Pick*, 3 M. & W. 481; *Holder v. Cope*, 2 C. & K. 437, 61 E. C. L. 437; *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Rawlins v. Vandyke*, 3 Esp. 250; *Reeve v. Conyngham*, 2 C. & K. 444, 61 E. C. L. 444; *Johnston v. Sumner*, 3 H. & N. 261; *Zealand v. Dewhurst*, 23 U. C. C. P. 117; *Fredd v. Eves*, 4 Harr. (Del.) 385; *Reese v. Chilton*, 26 Mo. 598; *Le Boutil-*

*lier v. Fiske*, 47 Hun (N. Y.) 324; *Kimball v. Keyes*, 11 Wend. (N. Y.) 34; *Mott v. Comstock*, 8 Wend. (N. Y.) 544.

**Sufficiency of Allowance.** — What sum per annum amounts to a competent provision must depend on the station of the parties, the income of the husband, and the circumstances of each particular case. *Dixon v. Hurrell*, 8 C. & P. 717, 34 E. C. L. 599; *Holder v. Cope*, 2 C. & K. 437, 61 E. C. L. 437.

The adequacy of the allowance is a question of fact for the jury. *Hodgkinson v. Fletcher*, 4 Campb. 70; *Holder v. Cope*, 2 C. & K. 437, 61 E. C. L. 437.

**Effect of Transfer of Property to Trustees for Wife.** — Where, on the separation of husband and wife, the former, by deed, absolutely transferred to trustees for the wife certain personal property, no longer to be liable to his interference, in an action against the husband for a debt subsequently contracted by the wife the defendant must show that the trustees gave effect to the deed by taking possession. *Burrett v. Booty*, 8 Taunt. 343, 4 E. C. L. 125.

**Effect of Contract with Third Person to Maintain Wife.** — Where husband and wife separate by mutual consent, and the husband makes a contract with a third person to maintain the wife, if the wife leaves such third person voluntarily and without any just cause she will not carry with her authority to pledge the credit of her husband for her support; but it is otherwise if she be driven from the house of such third person by improper usage there. *Pidgin v. Cram*, 8 N. H. 350.

**Effect of Reconciliation.** — It has been intimated that if husband and wife separate, provision being made for the wife's maintenance, though the husband gives notice that he will not pay his wife's debts contracted during a separation, if the articles purchased are necessities, suitable to her estate and condition, the husband will be liable therefor after her return upon a reconciliation between them. *Rennick v. Ficklin*, 3 B. Mon. (Ky.) 166.

3. *Holder v. Cope*, 2 C. & K. 437, 61 E. C. L. 437.

**Effect of Deed of Separation Executed under Restraint.** — It has been held that a deed of separation between husband and wife, securing an allowance duly paid, even though executed by the wife under restraint, is an answer to an action against the husband for necessities supplied to the wife. *Mallalieu v. Lyon*, 1 F. & F. 431.

4. **Notice of Allowance to Creditor Unnecessary to Relieve Husband.** — *Mizen v. Pick*, 3 M. & W. 481; *Wallis v. Biddick*, 22 W. R. 761; *Reeve v. Conyngham*, 2 C. & K. 444, 61 E. C.

own.<sup>1</sup> And if the wife is to be supported by a stipulated allowance from him, whenever he fails to pay the allowance she may pledge his credit for her support. The mere agreement of the husband to pay the allowance does not relieve him of his legal obligations; nothing short of actual performance will suffice.<sup>2</sup>

**Burden of Proof.** — According to the prevailing rule it devolves on the plaintiff to show either the inadequacy of the allowance or failure by the husband to pay.<sup>3</sup>

**Agreement to Accept Allowance that Is Inadequate.** — Where the husband consents that the wife may live apart from him upon the agreement that she shall accept a certain sum for her support, and will thereafter maintain herself from her own means or by her own exertion, it seems to be the prevailing rule that though the allowance is inadequate she does not carry his credit with her so as to make him responsible for necessaries, unless she has offered to return to him and the offer has been refused.<sup>4</sup> This rule rests on the ground that the consent of the husband that the wife shall live apart from him upon the agreement and condition that she shall support herself is dependent upon the performance of the condition. She cannot avail herself of her husband's con-

L. 444; *Cany v. Patton*, 2 Ashm. (Pa.) 144. Compare *Tod v. Stokes*, 12 Mod. 244; *Rawlins v. Vandyke*, 3 Esp. 250.

But a different rule has been laid down. *Lawrence v. Brown*, 91 Iowa 342. And in some cases it has been intimated that notice is necessary, but that a general reputation of the separation will be sufficient. *Baker v. Barney*, 8 Johns. (N. Y.) 73, 5 Am. Dec. 326; *Le Boutilier v. Fiske*, 47 Hun (N. Y.) 324.

It seems to be settled that if the tradesman has given credit to the wife before separation and the husband has recognized the debt, he continues liable for her engagements with that tradesman after separation and settlement until notice thereof is given to the tradesman. *Anonymous*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 656; *Cany v. Patton*, 2 Ashm. (Pa.) 145. See also *Wallis v. Biddick*, 22 W. R. 761; *Raymond v. Cowdrey*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 34.

**1. Liability of Husband Failing to Make Adequate Allowance.** — *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Dixon v. Hurrell*, 8 C. & P. 717, 34 E. C. L. 599; *Tait v. Lindsay*, 12 U. C. C. P. 414; *Johnston v. Sumner*, 3 H. & N. 261; *Seybold v. Morgan*, 43 Ill. App. 39; *McClary v. Warner*, 69 Ill. App. 223; *Mayhew v. Thayer*, 8 Gray (Mass.) 175; *Oltman v. Vost*, 62 Minn. 261; *McKinney v. Guhman*, 38 Mo. App. 347; *Rumney v. Keyes*, 7 N. H. 571; *Vusler v. Cox*, 53 N. J. L. 518; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; *Raymond v. Cowdrey*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 34; *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248; *Cany v. Patton*, 2 Ashm. (Pa.) 140; *Frost v. Willis*, 13 Vt. 202. See also *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729; *Pearson v. Darrington*, 32 Ala. 243.

**Agreement of Tradesman Not to Hold Husband Liable.** — But if both the husband and the wife deal with the same tradesman, and the latter agrees with the husband not to charge him with goods to be supplied to the wife, the tradesman cannot thereafter charge the husband for such goods. *Dixon v. Hurrell*, 8 C. & P. 717, 34 E. C. L. 599.

**Effect of Notice to Tradesman that Husband Will Not Be Liable.** — It has been said that if

the husband has not made proper provision for the wife, he will be liable to a tradesman furnishing her with necessaries, although he has given notice to the tradesman that he will not pay any of his wife's debts. *Dixon v. Hurrell*, 8 C. & P. 717, 34 E. C. L. 599.

**Salary of Servant Continuing to Work After Dismissal by Husband.** — In *Condon v. Callahan*, (Brooklyn City Ct. Gen. T.) 9 Abb. N. Cas. (N. Y.) 407, it was held that where a husband employed a household servant to attend his wife, who was living separate from him, and afterwards dismissed the servant, but the servant continued to work for the defendant's wife upon the wife's telling her that the husband would pay her, the husband was not liable for such services, it appearing further that the wife had not requested the husband to supply a servant.

**2. Effect of Husband's Failure to Make Prompt Payment.** — *Nurse v. Craig*, 2 B. & P. N. R. 148; *Beale v. Arabin*, 36 L. T. N. S. 249; *McKinney v. Guhman*, 38 Mo. App. 347; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326. See also *Collier v. Brown*, 3 F. & F. 67.

**Evidence of Payment of Allowance.** — In an action against a husband for necessaries supplied to his wife, where the defense is a separate maintenance, the wife's receipts are no evidence to prove that the allowance has been paid. *Hodgkinson v. Fletcher*, 4 Campb. 70.

**3. Burden of Proof as to Adequacy or Payment of Allowance.** — *Johnston v. Sumner*, 3 H. & N. 261; *McKinney v. Guhman*, 38 Mo. App. 347; *Bloomington v. Brinckerhoff*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 49. But see *Dixon v. Hurrell*, 8 C. & P. 717, 34 E. C. L. 599; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Pidgin v. Cram*, 8 N. H. 352; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326.

**4. Effect of Agreement upon Inadequate Allowance by Parties.** — *Brown v. Bignell*, 7 H. & N. 877, criticising a dictum in *Johnston v. Sumner*, 3 H. & N. 261; *Eastland v. Burchell*, 3 Q. B. D. 432; *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297. Compare *Hornbuckle v. Hornbury*, 2 Stark. 177; *Harrison v. Hall*, 1 M. & Rob. 85,



sent to the separation, which alone justifies her in living apart from him, and repudiate the condition upon which the consent is given.<sup>1</sup>

(cc) *Desertion of Wife by Husband — Without Cause.* — Where, without legal and sufficient cause, the husband has deserted his wife and family without furnishing adequate means for their support, the wife has, under the circumstances, an implied authority, derived from the legal duty of the husband to make suitable provision for her, to act as his agent and procure such supplies as may be necessary for her support.<sup>2</sup> And the rule has been applied though the wife has means of support which are inadequate or has refused the offer of an allowance by the husband on the ground that it was insufficient.<sup>3</sup> But if it is shown that the wife has adequate means of support the husband will not be liable for necessaries.<sup>4</sup>

**Offer of Reconciliation.** — But the husband who has causelessly deserted his wife may in good faith seek a reconciliation, and if the wife, under such circumstances, refuses without good cause to live with him again, she becomes from that time the party in the wrong, and has no longer any authority to pledge his credit, even for necessaries, any more than she would have had if she had herself originally left him without cause.<sup>5</sup> And it makes no difference that he desires her to change her residence, and to live with him at some other place, not unsuitable for her residence, since he has the right to choose his own residence, and it is the duty of the wife to conform to his wishes in this respect.<sup>6</sup> But the request of the husband for the wife to live with him will have no such effect if it is accompanied with such threatening language and such unreasonable claims as to show insincerity on his part.<sup>7</sup>

**Abandonment for Cause.** — It has been held that if a husband has a cause for divorce, as, for instance, extreme cruelty, when he abandons the wife and continues to live apart from her, he will not be liable to an action for necessaries provided for her by one having notice of the separation.<sup>8</sup>

(dd) *Wife Forced to Live Apart through Husband's Misconduct.* — It is well settled that a wife who is wrongfully turned out of doors by her husband without the means of supplying herself with necessaries, or who leaves her husband under stress of circumstances of such a character as in law is regarded as a justifiable cause for abandonment, becomes his agent by necessity, and carries with her an implied credit, or an implied authority to charge him with necessaries, which as a wrongdoer he shall not be permitted to repel.<sup>9</sup> And this rule

1. *Eastland v. Burchell*, 3 Q. B. D. 436; *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297.

2. **Liability of Husband Abandoning Wife Without Cause.** — *Eiler v. Crull*, 99 Ind. 375; *Tibbetts v. Wadden*, 94 Iowa 173; *Hall v. Weir*, 1 Allen (Mass.) 261; *Allen v. Aldrich*, 29 N. H. 72; *Hardy v. Eagle*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 441. See also *Jenner v. Hill*, 1 F. & F. 269; *Deare v. Soutten*, L. R. 9 Eq. 151.

**Goods Furnished by Wife's Son.** — This rule has been applied in a case where the necessaries were furnished by the wife's son by a former marriage. *Eiler v. Crull*, 99 Ind. 375.

**Use and Disposition of Husband's Property.** — It is a well-settled rule that where the husband wrongfully abandons his wife she may use and dispose of his property for the purpose of securing necessaries and support for herself and children. *Loy v. Loy*, 128 Ind. 150; *Rawson v. Spangler*, 62 Iowa 59; *Preston v. Bancroft*, 62 Vt. 86.

**Rule Applied Where Husband in Prison and Wife Destitute.** — *Ahern v. Easterby*, 42 Conn. 546.

**Wife May Apply Children's Earnings to Family**

**Support.** — *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539. See also *Loy v. Loy*, 128 Ind. 150.

In Texas it has been held that if the husband deserts his wife, ceases to discharge all his duties, and contributes in no manner to her support and that of the family, the power to manage, control, and dispose of the community property for purposes of support is transferred to the wife. *Wright v. Hays*, 10 Tex. 133; *Cheek v. Bellows*, 17 Tex. 616; *Fullerton v. Doyle*, 18 Tex. 12; *Carothers v. McNese*, 43 Tex. 221; *Zimpelman v. Robb*, 53 Tex. 274.

3. *Arnold v. Brandt*, 16 Ind. App. 169; *Llewellyn v. Levy*, 163 Pa. St. 647.

4. **Nonliability of Husband Where Wife Has Sufficient Allowance.** — *War v. Huntly*, 1 Salk. 118; *Anderson v. McLeod*, 2 Has. & War. (P. E. Island) 142.

5. **Effect of Husband's Offer of Reconciliation.** — *Walker v. Loughton*, 31 N. H. 111.

6. *Walker v. Loughton*, 31 N. H. 111.

7. *Walker v. Loughton*, 31 N. H. 111.

8. **Liability of Husband Deserting Wife for Cause.** — *Sawyer v. Richards*, 65 N. H. 185.

9. **Husband's Liability upon Separation through His Default** — *England*. — *Eastland v. Burchell*,



obtains though the husband has given notice to the creditor that he will not be responsible.<sup>1</sup> The principle on which the rule is founded is that, being bound to support his wife, the husband cannot relieve himself from this obligation by his own wrongful act.<sup>2</sup> But if a tradesman deals with a wife separated from her husband, it is incumbent on him to make inquiry, and if he would make the husband responsible for the articles furnished he must prove that the separation occurred under such circumstances as will render the husband *prima facie* liable.<sup>3</sup> Moreover, the articles furnished must be necessities suitable and proper, regard being had to the condition of the parties.<sup>4</sup> Nor can a recovery be had for a fractional value of articles not necessities, on the

3 Q. B. D. 436; *Harrison v. Grady*, 12 Jur. N. S. 140; *Tempany v. Hakewill*, 1 F. & F. 438; *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Forristall v. Lawson*, 34 L. T. N. S. 903; *Etherington v. Parrot*, 1 Salk. 118; *Aldis v. Chapman*, cited in 1 Selw. N. P. (13th ed.) 232; *Emery v. Emery*, 1 Y. & J. 501; *Houlston v. Smyth*, 2 C. & P. 22, 12 E. C. L. 9; *Ewers v. Hutton*, 3 Esp. 255; *Johnston v. Sumner*, 3 H. & N. 261; *Wilson v. Glossop*, 19 Q. B. D. 381; *Bolton v. Prentice*, 2 Stra. 1214. See also *Mallalieu v. Lyon*, 1 F. & F. 431.

*Canada*. — *Griffith v. Patterson*, 20 Grant Ch. (U. C.) 615; *Hughes v. Rees*, 10 Ont. Pr. 301.

*Alabama*. — *Zeigler v. David*, 23 Ala. 127.

*Delaware*. — *Collins v. Mitchell*, 5 Harr. (Del.) 369; *Kemp v. Downham*, 5 Harr. (Del.) 417; *Biddle v. Frazier*, 3 Houst. (Del.) 258.

*Georgia*. — *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

*Illinois*. — *Ross v. Ross*, 69 Ill. 569; *Seybold v. Morgan*, 43 Ill. App. 39; *Wilson v. Bishop*, 10 Ill. App. 590.

*Iowa*. — *Descelles v. Kadmus*, 8 Iowa 54.

*Kentucky*. — *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523.

*Massachusetts*. — *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78; *Dowe v. Smith*, 11 Allen (Mass.) 107; *Mayhew v. Thayer*, 8 Gray (Mass.) 172.

*New Hampshire*. — *Allen v. Aldrich*, 29 N. H. 73.

*New Jersey*. — *Snover v. Blair*, 25 N. J. L. 94.

*New York*. — *Comstock v. Green*, 88 Hun (N. Y.) 64; *Pomeroy v. Wells*, 8 Paige (N. Y.) 406. See also *Sykes v. Halstead*, 1 Sandf. (N. Y.) 421.

*Pennsylvania*. — *Hultz v. Gibbs*, 66 Pa. St. 360; *Com. v. Wall*, 4 Pa. Dist. 326. See also *Breinig v. Meitzler*, 23 Pa. St. 161.

*South Carolina*. — *Clement v. Mattison*, 3 Rich. L. (S. Car.) 93.

*Texas*. — *Black v. Bryan*, 18 Tex. 453.

**Evidence of Violence Not Shown to Be Cause of Separation.** — In *Blowers v. Sturtevant*, 4 Den. (N. Y.) 46, it was held that when it was shown that the husband had used violence towards his wife on an occasion five months before their separation, and there had been other difficulties and quarrels, but when she left the house it was not from any apprehension of ill treatment, but in order to make a visit, and she refused to return unless his relatives who lived with him should go away, he was not liable for board furnished to her by her father during such separation.

**Quarrels or Disagreements not amounting to**

cruelty will not justify the wife in leaving the husband nor render him liable for necessities. *Reed v. Moore*, 5 C. & P. 200, 24 E. C. L. 277; *Blowers v. Sturtevant*, 4 Den. (N. Y.) 46; *Breinig v. Meitzler*, 23 Pa. St. 161.

In *Biddle v. Frazier*, 3 Houst. (Del.) 263, the court said: "Mere disagreement, or incompatibility of taste, temper, or dispositions, or mere quarreling, jealousy, or discontent with her situation, will not be sufficient."

**Effect of Subsequent Bigamous Marriage of Wife.** — If a husband who without cause has expelled his wife from his house afterwards designedly misleads her into the belief that he is dead, and she, honestly acting on that belief, marries another, whom she leaves at once upon learning that her husband is alive, he cannot avail himself of her second marriage, or of a conviction of bigamy against her by reason of such marriage, in defense of an action against him for necessities subsequently furnished to her; and such action may be maintained although the plaintiff (a brother of the wife) was too young to know the circumstances under which the wife left her husband at the time when they occurred. *Cartwright v. Bate*, 1 Allen (Mass.) 514, 79 Am. Dec. 759.

**Effect of Abduction of Child to Compel Settlement of Maintenance.** — A right of action against a husband for board of his wife after she has justifiably left him is not barred by the fact that the plaintiff and the wife conspired to abduct and conceal a minor child of the defendant in order to compel him to settle a separate maintenance upon his wife. *Burden v. Shannon*, 14 Gray (Mass.) 433.

**Effect of Husband's Request for Wife's Return.** — It has been held that where the misconduct of the husband justifies the wife in leaving him, a subsequent request on his part that she should return to his protection will not determine his liability for necessities to her during the separation. *Emery v. Emery*, 1 Y. & J. 501. Compare *Bennett v. Jones*, 9 N. Bruns. 397.

**1. Effect of Notice Not to Supply Wife with Necessaries.** — *Harris v. Morris*, 4 Esp. 41; *Watkins v. De Armond*, 89 Ind. 553; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483; *Black v. Bryan*, 18 Tex. 467. See also *Stevens v. Story*, 43 Vt. 327.

**2. Billing v. Pilcher**, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523.

**3. Burden of Proof as to Cause of Separation on Plaintiff.** — *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *Hultz v. Gibbs*, 66 Pa. St. 360.

**4. Thorpe v. Shapleigh**, 67 Me. 235.

ground that they might have answered the purpose of other articles which would have been necessities.<sup>1</sup> Nor can the wife pledge the husband's credit for necessities when she is fully supplied, or has adequate means from her husband or from other sources with which she can supply herself.<sup>2</sup>

(*cc*) *Abandonment by Wife Without Cause.* — If a wife leaves her husband without sufficient cause, and without his consent, she carries with her no authority to pledge his credit for her support and maintenance, in the absence of any express promise on the part of the husband to pay for such necessities.<sup>3</sup> And if a tradesman brings an action against a husband for goods furnished to a wife while she is living apart from her husband, it is for him to show that she was absent from some cause that would justify her absence and that she had not gone away of her own accord.<sup>4</sup> And the rule has been laid down that the fact that the tradesman had no knowledge that the wife was living separate from her husband will not avail to relieve him from the burden of proof.<sup>5</sup>

1. *Thorpe v. Shapleigh*, 67 Me. 235.

2. *Where Wife Has Adequate Means of Support.*

— *Liddlow v. Wilmot*, 2 Stark. 86, 3 E. C. L. 328; *War v. Huntly*, 1 Salk. 118; *Baseley v. Forder*, 9 B. & S. 599; *Clifford v. Laton*, 3 C. & P. 15, 14 E. C. L. 188; *Archibald v. Flynn*, 32 U. C. Q. B. 523; *Litson v. Brown*, 26 Ind. 489; *Hunt v. Hayes*, 64 Vt. 89, 33 Am. St. Rep. 917; *Stevens v. Story*, 43 Vt. 327. See also *Johnston v. Sumner*, 3 H. & N. 261.

*Precarious Income Not Sufficient — Pension Determinable at Will of Crown.* — *Thompson v. Hervey*, 4 Burr. 2177.

*Insufficient Allowance.* — In *Baker v. Sampson*, 14 C. B. N. S. 385, 108 E. C. L. 385, it was held that where by his cruelty a husband compels his wife to live apart from him, he is liable upon contracts made by her for necessities, notwithstanding she in fact receives from him an allowance, which is found by the jury to be insufficient, regard being had to his means and position in life. To the same effect see *Pearson v. Darrington*, 32 Ala. 242.

*Separate Maintenance Secured by Void Deed.* — It has been held that a separate maintenance secured by a deed executed by the husband and the wife, but not by her trustee, is void, and such separate maintenance is no answer to an action for necessities furnished to her, after having left her own house on account of the husband's cruelty, especially when she had solicited to be received again by her husband and was not received. *Ewers v. Hutton*, 3 Esp. 255.

3. *Nonliability of Husband for Necessaries of Wife Living Apart Without Cause — England.* — *Manby v. Scott*, Sid. 109; *Mainwaring v. Leslie*, 2 C. & P. 507, 12 E. C. L. 238; *Clifford v. Laton*, 3 C. & P. 15, 14 E. C. L. 188; *Hindley v. Westmeath*, 6 B. & C. 200, 13 E. C. L. 141; *Bailey v. Calcott*, 4 Jur. 699; *Morkill v. Jackson*, 14 L. C. Rep. 181; *Manning v. De Wolf*, 3 Nova Scotia Dec. 261.

*Delaware.* — *Collins v. Mitchell*, 5 Harr. (Del.) 369.

*Illinois.* — *Rea v. Durkee*, 25 Ill. 503; *Ross v. Ross*, 69 Ill. 569; *Bevier v. Galloway*, 71 Ill. 518; *Schnuckle v. Bierman*, 89 Ill. 454.

*Kansas.* — *Hartmann v. Tegart*, 12 Kan. 177.

*Massachusetts.* — *Benjamin v. Dockham*, 132 Mass. 181.

*Missouri.* — *Rutherford v. Cox*, 11 Mo. 349; *Reese v. Chilton*, 26 Mo. 598.

*Nebraska.* — *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729.

*New York.* — *Catlin v. Martin*, 69 N. Y. 393; *Bostwick v. Brower*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 709; *Monroe County v. Budlong*, 51 Barb. (N. Y.) 493.

*Pennsylvania.* — *Lippincott's Estate*, 12 Phila. (Pa.) 142, 35 Leg. Int. (Pa.) 374.

*Tennessee.* — *Brown v. Patton*, 3 Humph. (Tenn.) 135.

*Texas.* — *Morgan v. Hughes*, 20 Tex. 141.

*Vermont.* — *Brown v. Mudgett*, 40 Vt. 68; *Thorne v. Kathan*, 51 Vt. 520.

*Involuntary Separation.* — In *Bates v. Enright*, 42 Me. 113, it was said: "But involuntary separation, without the wife's fault, and in some instances where, by operation of law, it exists through her fault, will not relieve the husband from his legal responsibility to provide for her. If, therefore, she be imprisoned for felony, he will be liable for necessities."

*Creditor Inducing Wife to Leave Husband for Purpose of Securing Divorce.* — In *Corry v. Lackey*, 105 Mich. 363, it was held that if a person who furnishes necessities to a wife has induced the wife to leave or remain away from her husband for the purpose of having the marriage relations between them dissolved, he cannot recover for the necessities.

*Notice to Tradesman Not to Furnish Goods.* — The rule of the text is especially true where the husband gives notice to the tradesman not to furnish necessities to the wife. *Manby v. Scott*, Sid. 109. See also *Robison v. Gosnold*, 6 Mod. 171.

*Effect of Husband's Promise to Pay.* — When there are facts from which it can reasonably be inferred that the husband promised to pay for necessities, he will be responsible though the wife abandoned him without cause. *Brown v. Patton*, 3 Humph. (Tenn.) 135.

4. *Burden of Proof as to Cause for Separation on Creditor.* — *Mainwaring v. Leslie*, 2 C. & P. 507, 12 E. C. L. 238; *Clifford v. Laton*, 3 C. & P. 15, 14 E. C. L. 188; *Rea v. Durkee*, 25 Ill. 503; *Hartmann v. Tegart*, 12 Kan. 177; *Sturbridge v. Franklin*, 160 Mass. 149; *Reese v. Chilton*, 26 Mo. 598; *Blowers v. Sturtevant*, 4 Den. (N. Y.) 46. Compare *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Allen v. Aldrich*, 29 N. H. 63; *Rumney v. Keyes*, 7 N. H. 571.

5. *Creditor's Ignorance of Separation Held to Be Immaterial.* — *Harshaw v. Merryman*, 18 Mo.



But it has been held that where prior to the separation the tradesman has furnished to the wife, on the husband's credit, goods which have been paid for by the husband, he may continue to supply the wife, and the husband will be liable until he receives actual notice of the separation.<sup>1</sup>

**Offer on Part of Wife to Return.** — Where a woman leaves her husband and lives separately from him without justifiable cause, and he afterwards receives her, or she afterwards offers to return and he refuses to receive her, his liability for her contracts for necessities revives from her return or offer to return.<sup>2</sup> But it seems to be the rule that upon her offer to return, though she is thereupon received back by him, he does not become liable for necessities supplied to her during her absence.<sup>3</sup>

**ee. EFFECT OF WIFE'S ADULTERY.** — Where a wife, having committed adultery, has eloped from her husband, he is not liable for necessities furnished to her afterwards; and this rule applies without notice to the persons who furnished the necessities, for the very fact of separation is enough to put persons on their guard and to require them to ascertain the cause of the separation.<sup>4</sup> In the same way, a wife who is turned away from home by the husband for the cause of adultery, which she is shown to have committed, does not carry with her credit on the husband;<sup>5</sup> and if the wife has been guilty of adultery, the husband will not be liable though she has been living apart from him either

106; *Reese v. Chilton*, 26 Mo. 598; *Vusler v. Cox*, 53 N. J. L. 518; *M'Cutchin v. M'Gahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Sturievant v. Starin*, 19 Wis. 269. See also *Lungworthy v. Huckmore*, cited in *Tod v. Stokes*, 12 Mod. 245. Compare *Brown v. Mudgett*, 40 Vt. 68.

**1. Notice of Separation Held to Be Necessary in Case of Prior Dealings Between Parties.** — *Hartmann v. Tegart*, 12 Kan. 181; *Hartjen v. Ruebsamen*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 150; *Anthony v. Phillips*, 17 R. I. 188. See also *Wallis v. Biddick*, 22 W. R. 761. Compare *Day v. Wamsley*, 33 Ind. 115.

**2. Revivor of Husband's Liability by Wife's Offer to Return.** — *Child v. Hardyman*, 2 Stra. 875; *Henderson v. Stringer*, 2 Dana (Ky.) 291; *M'Gahay v. Williams*, 12 Johns. (N. Y.) 293; *M'Cutchin v. M'Gahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Cunningham v. Irwin*, 7 S. & R. (Pa.) 247, 10 Am. Dec. 458. See also *Ewers v. Hutton*, 3 Esp. 256.

**Offer Made through Third Person.** — In *M'Gahay v. Williams*, 12 Johns. (N. Y.) 293, it was held that if application to receive the wife back is made to the husband by a third person on behalf of the wife, and the husband, without questioning the authority of the person applying, puts his refusal on some other ground, it will be tantamount to a personal application by the wife herself.

**3. Oinson v. Heritage**, 45 Ind. 73, 15 Am. Rep. 258; *Reese v. Chilton*, 26 Mo. 600; *Williams v. Prince*, 3 Strobb. L. (S. Car.) 490. But see dictum in *Robison v. Gosnold*, 6 Mod. 171.

**Husband's Offer to Take Wife Back on Condition of Her Surrender of Property.** — In *Reed v. Moore*, 5 C. & P. 200, 24 E. C. L. 277, it was held that where a wife leaves her husband in consequence of a dispute, though it is not shown that the husband's conduct rendered it improper for her to live with him, he is liable for her board and lodging at the house of a

third person, where it appears that he made no offer to take her back, and was not willing to receive her unless she would consent to give up a certain portion of the property which was settled upon her.

**4. Nonliability of Husband for Necessaries Furnished to Wife After Adulterous Elopement.** — *Govier v. Hancock*, 6 T. R. 603; *Morris v. Martin*, 1 Stra. 647.

**Proceedings in Divorce Court Establishing Adultery Inadmissible in Absence of Decree.** — *Needham v. Bremner*, L. R. 1 C. P. 583, 12 Jur. N. S. 434, 35 L. J. C. Pl. 313, 14 W. R. 694, 14 L. T. N. S. 437, 1 H. & R. 731.

**Where Husband Cohabits with Wife Guilty of Adultery.** — But it seems that if a wife, though guilty of adultery, cohabits with her husband, he is liable for her necessities. *Robinson v. Greinold*, 1 Salk. 119.

**5. Nonliability of Husband for Necessaries Furnished to Wife Put Away for Adultery.** — *Ham v. Toovey*, cited in 1 Selw. N. P. (13th ed.) 228; *Gill v. Read*, 5 R. I. 344, 73 Am. Dec. 73. See *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Hardie v. Grant*, 8 C. & P. 512, 34 E. C. L. 506; *Hunter v. Boucher*, 3 Pick. (Mass.) 289. But see dicta in *Robison v. Gosnold*, 6 Mod. 171, and *Wilson v. Glossop*, 19 Q. B. D. 871.

**Necessity of Notice Where Husband Leaves Wife in His House.** — The defendant's wife having committed adultery, he left her with his two children, bearing his name, but without making any provision for her in consequence of the separation, and she continued in a state of adultery. It was held that the husband was liable for necessities furnished to her unless it appeared that the plaintiff knew or ought to have known the circumstances under which she was living. *Norton v. Fazan*, 1 B. & P. 226.

**Wife Put Away Without Proof of Adultery — Husband Not Liable for Articles Not Necessaries.** — *Hardie v. Grant*, 8 C. & P. 512, 34 E. C. L. 506.



in consequence of his misconduct<sup>1</sup> or by his consent.<sup>2</sup>

**Effect of Husband's Consent to Adultery.** — But it has been held that a husband's duty of supporting a wife living apart from him is not terminated by her adultery committed with his consent,<sup>3</sup> though it is given upon condition that she shall not look to him for support, since his agreement that she shall violate the marriage contract is not a justification of his violating that contract by throwing her out of doors and refusing to support her.<sup>4</sup>

**Effect of Pardon or Condonation.** — And it has been held also that though the wife has been guilty of an adulterous elopement, yet if she has returned to her husband and has been pardoned by him, he will be liable for necessities furnished to her if he afterwards turns her out of doors.<sup>5</sup>

*ff. EFFECT OF DIVORCE OR PENDENCY OF SUIT THEREFOR — Necessaries Furnished Pendente Lite.* — The fact that a divorce suit is pending between husband and wife will not relieve the husband, if he would otherwise be liable for necessities furnished to the wife, where alimony *pendente lite* has not been assigned before the supplies were furnished.<sup>6</sup> And the rule is not altered though alimony *pendente lite*<sup>7</sup> or permanent alimony<sup>8</sup> is subsequently decreed for past as well as for future expenses.

**Effect of Prior Allowance of Alimony Pendente Lite.** — But where a court of competent jurisdiction has by decree fixed the amount of alimony to be paid to the wife for her sustenance *pendente lite*, so long as the husband is not in default in making payment according to the order of court, and the wife continues to live separate and apart from him, the husband is not liable on her contracts, and this whether the allowance is sufficient or insufficient.<sup>9</sup>

**Effect of Failure to Pay Permanent Alimony After Divorce a Mensa et Thoro.** — A husband separated from his wife by a divorce *a mensa et thoro* for adultery on his part, with a decree for alimony, is liable for necessary supplies furnished to the wife after the separation if he omits to pay the alimony.<sup>10</sup>

**Liability Subsequent to Divorce ab Initio.** — But after a sentence of divorce *ab initio* the liability of a husband for his wife's contract for necessities does not continue.<sup>11</sup>

*gg. EFFECT OF HUSBAND'S LUNACY.* — The authority of a wife to contract debts for necessities is not revoked by the husband's becoming insane, and an action may be maintained against him for necessities supplied to her during the

1. Necessaries Furnished to Wife Turned Away by Husband's Cruelty and Subsequently Committing Adultery. — *Govier v. Hancock*, 6 T. R. 603. See also *Almy v. Wilcox*, 110 Mass. 443; *Howard v. Whetstone Tp.*, 10 Ohio 365.

2. Necessaries Furnished to Wife Guilty of Adultery and Living Apart with Husband's Consent. — *Cooper v. Lloyd*, 6 C. B. N. S. 519, 95 E. C. L. 519.

3. Effect of Husband's Consent to Wife's Adultery. — *Wilson v. Glossop*, 19 Q. B. D. 379.

4. *Ferren v. Moore*, 59 N. H. 106.

5. Effect of Pardon. — *Harris v. Morris*, 4 Esp. 41.

6. Husband's Liability for Necessaries Furnished to Wife Pending Suit for Divorce. — *Houlston v. Smyth*, 3 Bing. 127, 11 E. C. L. 64; *Hughes v. Rees*, 10 Ont. Pr. 301; *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Johnston v. Allen*, (C. Pl. Gen. T.) 39 How. Pr. (N. Y.) 506; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 484; *Black v. Bryan*, 18 Tex. 466. See also *Catlin v. Martin*, 69 N. Y. 393.

In *Minck v. Martin*, 54 N. Y. Super. Ct. 136, it was held that the husband was liable for necessities furnished to his wife at about the time when alimony *pendente lite* was asked for and denied.

7. *Keegan v. Smith*, 5 B. & C. 375, 11 E. C. L. 253.

Effect of Agreed Sum in Lieu of Alimony. — The rule of the text has been applied where, subsequent to the supply of necessities, the husband paid to his wife an agreed sum in lieu of alimony, upon an adjustment of proceedings for divorce. *Burkett v. Trowbridge*, 61 Me. 252.

8. *Dowe v. Smith*, 11 Allen (Mass.) 107. In this case the rule of the text was declared, though the supplies were furnished by the father and the divorce proceedings were undertaken under his direction.

9. Effect of Payment of Alimony Pendente Lite upon Liability for Necessaries. — *Willson v. Smyth*, 1 B. & Ad. 801, 20 E. C. L. 486; *Crittenden v. Schermerhorn*, 39 Mich. 661, 33 Am. Rep. 440; *Bennett v. O'Fallon*, 2 Mo. 69, 22 Am. Dec. 440; *Hare v. Gibson*, 32 Ohio St. 33, 30 Am. Rep. 568.

10. Effect of Failure to Pay Alimony After Divorce a Mensa et Thoro. — *Hunt v. De Blaquiére*, 5 Bing. 550, 15 E. C. L. 535.

11. Liability of Husband for Wife's Necessaries After Divorce ab Initio. — *Anstey v. Manners*, Gow. 10.

period of his lunacy.<sup>1</sup> But the authority of a wife to pledge her husband's credit is no greater in the case of his being a lunatic than in the ordinary case of husband and wife, and hence where a wife whose husband was a lunatic, and was in an asylum at the time, gave orders for necessary repairs to their dwelling house, the husband was not liable where it appeared that the wife had received money sufficient for and applicable to the payment of such repairs.<sup>2</sup>

*hh. WIFE'S CONTRACTS FOR NECESSARIES FOR THIRD PERSONS.* — The obligation of the husband for necessities does not extend beyond his wife and his own children, and a wife cannot make a binding contract on him to support even near relatives, as she is not presumably his agent for that purpose.<sup>3</sup>

**Necessaries for Children.** — But it may be stated as a general rule that if a husband living separate from his wife suffers his children to reside with their mother, he is liable for necessities furnished for them on her contracts, for as a father he has the right to the custody of the children and may obtain possession of their persons by *habeas corpus*; and where he does not assert that right, but suffers them to remain with their mother, he thereby constitutes her his agent to procure necessities for them.<sup>4</sup> This rule has been declared in cases where the husband had voluntarily abandoned the wife;<sup>5</sup> where he had turned her away from home;<sup>6</sup> and indeed where no cause of separation appeared.<sup>7</sup> But it has been held that when the wife leaves her husband without cause, taking her child with her, the fact that her husband does not attempt to compel her to give up the custody of the child does not of itself authorize her to bind him for the child's support, and that proof of the husband's ability and willingness to support the child and notice to the wife of such ability and willingness is sufficient to relieve him from liability on the

**1. Husband's Liability for Necessaries Supplied During His Lunacy.** — *Read v. Legard*, 6 Exch. 636; *Booth v. Cottingham*, 126 Ind. 431. See also *Matter of Wood*, 1 De G. J. & S. 465; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655.

**2. *Richardson v. Du Bois***, L. R. 5 Q. B. 51; *Chappell v. Numm*, 41 L. T. N. S. 287.

**3. *Baker v. Witten***, 1 Okla. 160.

**Where Goods Are Sent to Home of Third Person.** — If a wife living apart from her husband orders goods to be addressed and sent to a third person, and they are sent to the house of such third person, that not being the place of abode of the wife, the husband is not liable to pay for them. *Reeve v. Conyngham*, 2 C. & K. 444, 61 E. C. L. 444.

**Expensive Hat Intended as Present to Friend — Husband Held Not Liable.** — *Sulter v. Mustin*, 50 Ga. 242.

**4. General Rule as to Husband's Liability for Necessaries Furnished to Children on Wife's Contract.** — *Rawlins v. Vandyke*, 3 Esp. 252; *McMillen v. Lee*, 78 Ill. 443; *Rumney v. Keyes*, 7 N. H. 580.

**Rule Otherwise Where Husband Makes Adequate Provision.** — *Atkins v. Pearce*, 2 C. B. N. S. 763, 89 E. C. L. 763.

**Effect of Notice Not to Supply Wife.** — Where, on separation, the husband made arrangements with certain merchants to supply the wife and children with necessities, and the wife had notice of the arrangement, it was held that the husband would not be liable on the wife's contracts for necessities furnished for the children by another merchant, especially if the husband gave public notice in a

newspaper which the plaintiff took, prohibiting all persons from trusting his family without his special orders, and if he and his wife had no previous dealings with the plaintiff. *Kimball v. Keyes*, 11 Wend. (N. Y.) 34.

But it has been held that a notice in a newspaper is without effect as to the plaintiff where there is no proof tending to show that it came to his attention. *Walker v. Loughton*, 31 N. H. 115.

**Husband Held Not Liable for Education of Children.** — *Hodges v. Hodges*, Peake Add. Cas. 79; *Bailey v. Calcott*, 4 Jur. 699.

**Husband Held Not Liable for Necessaries for Wife's Children by Former Marriage.** — *Tubb v. Harrison*, 4 T. R. 118; *Menefee v. Chesley*, 98 Iowa 55 (under statute).

**5. *Walker v. Loughton***, 31 N. H. 115. See also *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 540.

**Insincere Offer of Reconciliation Immaterial.** — *Walker v. Loughton*, 31 N. H. 115.

**6. *Rawlins v. Vandyke***, 3 Esp. 252; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78.

But in *Hancock v. Merrick*, 10 Cush. (Mass.) 41, it was held that although the wife left the husband justifiably, he will not be liable on her contracts for the support of their child, whom she takes with her, if her custody of the child is contrary to the wishes of the husband, who had repeatedly requested the return of the child.

**Where Wife Has Legal Custody by Order of Court Though Against Husband's Wishes — Husband Liable.** — *Baseley v. Forder*, 9 B. & S. 599, L. R. 3 Q. B. 559.

**7. *McMillen v. Lee***, 78 Ill. 443; *Rumney v. Keyes*, 7 N. H. 577.



wife's contract for the child's support.<sup>1</sup>

**Effect of Wife's Adultery.** — It has been held that a father's obligation to provide for his child is not affected by the wife's misconduct, and hence if, notwithstanding her adultery, he suffers his child to live separate from him with her, he thereby constitutes her his agent to contract for the child's necessities and is liable to those who furnish them upon his credit.<sup>2</sup> But it has been held that though a wife is treated with such violence and cruelty by her husband as to be justified in leaving him, a person who has received her into his house, and has supported her and her children, whom she brought with her, cannot recover the expenses of supporting the children if one of his motives in receiving the woman and children was to facilitate an adulterous intercourse with her.<sup>3</sup>

**ii. WHERE CREDIT IS NOT GIVEN TO HUSBAND — Credit Given to Wife Alone.** — The common-law liability of the husband for necessities and suitable comforts has always rested on the assumption that credit was given to the husband and not to the wife, and that the purchase was made with his implied assent. In no case does this liability arise when the facts show affirmatively that credit was given to the wife and not to the husband, and the goods were not sold upon his implied assent that they were to be charged to him.<sup>4</sup>

**Effect of Charging Goods in Wife's Name.** — But it seems that the mere fact that goods are charged on the plaintiff's books in the wife's name will not be sufficient to show that credit was given to the wife exclusively.<sup>5</sup>

**Acceptance of Wife's Promissory Note.** — But it has been held that the circumstance of the creditor's taking the note of a married woman in payment of goods purchased is conclusive that the purchase was made not on the husband's credit, but on the credit of the wife alone.<sup>6</sup>

**Necessaries Furnished on Credit of Third Person.** — The husband cannot be made liable for necessities furnished to the wife on the credit of a third person.<sup>7</sup>

1. *Baldwin v. Foster*, 138 Mass. 449.

**Support of Child After Divorce.** — Under statute in *Massachusetts* it has been held that the wife has no authority to bind the husband by a contract for the support of their child after the custody of the child had been given to the mother by decree upon a libel for divorce, and that the remedy to secure provision for the support of the child was under a decree of court. *Brow v. Brightman*, 136 Mass. 187.

2. **Necessaries for Children Furnished on Contract of Wife Living in Adultery.** — *Gill v. Read*, 5 R. L. 343, 73 Am. Dec. 73. Compare *Atkins v. Pearce*, 2 C. B. N. S. 763, 89 E. C. L. 763.

3. *Almy v. Wilcox*, 110 Mass. 443.

4. **Nonliability of Husband for Necessaries Where Credit Is Given to Wife Alone — England.** — *Holt v. Brien*, 4 B. & Ald. 252, 6 E. C. L. 472; *Metcalfe v. Shaw*, 3 Campb. 22; *Bentley v. Griffin*, 5 Taunt. 356, 1 E. C. L. 131; *Jewsbury v. Newbold*, 26 L. J. Exch. 247.

*Alabama.* — *Gafford v. Dunham*, 111 Ala. 551; *Hughes v. Chadwick*, 6 Ala. 651; *Pearson v. Darrington*, 32 Ala. 231; *O'Connor v. Chamberlain*, 59 Ala. 431; *Gayle v. Marshall*, 70 Ala. 522.

*Connecticut.* — *Shelton v. Pendleton*, 18 Conn. 422.

*Georgia.* — *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

*New York.* — *Ehrich v. Bucki*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 118.

*Ohio.* — *Dorsey v. Goodenow*, *Wright* (Ohio) 120.

*Vermont.* — *Carter v. Howard*, 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497.

See also *Gaffield v. Scott*, 40 Ill. App. 380; *McMahon v. Lewis*, 4 Bush (Ky.) 138.

Compare *Black v. Bryan*, 18 Tex. 453.

5. *Jewsbury v. Newbold*, 26 L. J. Exch. 247; *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764; *Furlong v. Hysom*, 35 Me. 332. See also *Godfrey v. Brooks*, 5 Harr. (Del.) 396; *Rigoney v. Neiman*, 73 Pa. St. 332. Compare *Taylor v. Brittan*, 1 C. & P. 14, note.

**Admissibility of Book Entries to Show that Credit Was Given to Husband.** — In *Dexter v. Booth*, 2 Allen (Mass.) 559, it was held that the plaintiff's account book with his suppletory oath was properly admitted for the limited purpose of proving the charges and the circumstances of the delivery of goods to the plaintiff's wife, but the testimony was inadmissible to prove that credit was given to the husband. But in *Arnold v. Allen*, 9 Daly (N. Y.) 198, it was held that the custom of a tradesman to enter in his books the names of married women who deal with him, although the credit is given to their husbands, may be proof in explanation of such entries when produced in evidence in an action against the husband for goods charged to his wife in the plaintiff's books.

6. *Moses v. Fogartie*, 2 Hill L. (S. Car.) 335. See also *Metcalfe v. Shaw*, 3 Campb. 22; *Bentley v. Griffin*, 5 Taunt. 356, 1 E. C. L. 131.

7. **Husband Not Liable for Necessaries Furnished on Credit of Third Person.** — *Harvey v. Norton*, 4 Jur. 42.



But if a third person purchases necessities from a tradesman and supplies them to the wife, he may hold the husband liable, since it makes not the slightest difference whether a tradesman supplied the articles or whether any other person provides her with them by buying them for cash or contracting for them on credit.<sup>1</sup>

*jj. ASSIGNMENT OF CLAIM AGAINST HUSBAND.* — It seems that the liability of the husband on the wife's contracts for necessities arises for the benefit of such persons only as furnish the necessities, and cannot be enforced in the name of an assignee.<sup>2</sup> So it has been held that if the brother of the married woman makes a contract for necessities for the wife while acting for himself individually and not as agent of the plaintiff, the latter cannot by voluntarily paying the debt make the husband his debtor.<sup>3</sup>

*kk. STATUTORY MODIFICATIONS* — *Effect of Statutes Enabling Married Women to Contract.* — Under statutes enabling married women to contract, it seems that the husband will not be released from liability on the wife's contracts for necessities unless it affirmatively appears either that there is an express contract on her part to pay out of her separate estate, or the circumstances clearly show that she assumed liability for payment exclusive of the liability of her husband.<sup>4</sup> And the rule has been applied in jurisdictions where the wife is by statute capable of contracting as a *feme sole*.<sup>5</sup> But under a statute of this character it has been held that where the wife avails herself of such power by making an express contract in her own name for necessities, she will no longer be deemed as acting as agent for her husband, and there will be no implied agreement on his part to pay for such necessities.<sup>6</sup>

*Statutes Expressly Imposing Liability on Both Husband and Wife.* — In many states statutes have been passed imposing a liability on the wife for necessities without releasing the husband.<sup>7</sup> Thus the statutes in several of the states provide substantially that family expenses are chargeable on the property of both husband and wife or either of them, it appearing to be immaterial whether the articles are contracted for by the wife or not.<sup>8</sup>

1. *Wray v. Cox*, 24 Ala. 337.

2. *Assignment of Claim for Necessaries Against Husband.* — *Bates v. Enright*, 42 Me. 105.

*Right of Wife to Give Husband's Negotiable Note for Necessaries.* — From the above principle the rule has been laid down that the mere right of the wife to procure necessities on the credit of her husband will not authorize her to give his negotiable notes therefor, especially for a past or executed consideration. *Bates v. Enright*, 42 Me. 118. See also *Metcalf v. Shaw*, 3 Campb. 22.

3. *Wray v. Cox*, 24 Ala. 337.

4. *Effect of Statutes Enabling Married Women to Contract on Husband's Liability.* — *Rushing v. Clancy*, 92 Ga. 769; *Powers v. Russell*, 26 Mich. 179; *Dunbar v. Meyer*, 43 Miss. 684; *Cook v. Ligon*, 54 Miss. 374; *Wilson v. Herbert*, 41 N. J. L. 454. See also *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279; *Chester v. Pierce*, 33 Minn. 370.

As to what will constitute a charge on the wife's separate estate, see the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

*Where Wife Is Feme Sole Trader under Statute.* — Under statute in *Pennsylvania* it has been held that the primary liability for necessities for the support of the wife and family is upon the husband, and he will be liable to a person furnishing them although the wife has been decreed a *feme sole* trader. *Markley v. Wartman*, 9 Phila. (Pa.) 236, 21 Leg. Int. (Pa.) 196.

6. *Hallock v. Bacon*, 64 Hun (N. Y.) 90.

6. *Byrnes v. Rayner*, 84 Hun (N. Y.) 199; *Strong v. Moul*, (Supm. Ct. Gen. T.) 22 N. Y. St. Rep. 762.

7. *Statutes Imposing Liability on Husband and Wife.* — *Harmon v. Siler*, 99 Ala. 306; *Jordan v. Smith*, 83 Ala. 299; *Buckingham v. Hurd*, 52 Conn. 404; *Gabriel v. Mullen*, 111 Mo. 119; *Bedsworth v. Bowman*, 104 Mo. 44. See also *George v. Edney*, 36 Neb. 604; *Kelley v. Mills*, 2 Ohio Dec. 265; *Rigoney v. Neiman*, 73 Pa. St. 332; *Hoff v. Koerper*, 103 Pa. St. 396. See further on this question the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

8. *Statutes.* — *Kelly v. Cannon*, 1 Colo. App. 465.

*Illinois.* — *Schlesinger v. Keifer*, 131 Ill. 104; *Hayden v. Rogers*, 22 Ill. App. 557; *Hudson v. King*, 23 Ill. App. 118; *Dunn v. Pickard*, 24 Ill. App. 423; *Hoyle v. Warfield*, 28 Ill. App. 628; *Glaubenslee v. Low*, 29 Ill. App. 408; *Walcott v. Hoffman*, 30 Ill. App. 77; *Illingworth v. Burley*, 33 Ill. App. 394; *Harrison v. Hill*, 37 Ill. App. 30; *Gaffield v. Scott*, 40 Ill. App. 380; *Houck v. Smith*, 46 Ill. App. 64; *Harrison v. Harrison*, 53 Ill. App. 501; *Hedding v. Hyman*, 54 Ill. App. 434, 162 Ill. 357; *Hudson v. Sholem*, 65 Ill. App. 63.

*Iowa.* — *Jones v. Glass*, 48 Iowa 345; *Schurz v. McMenamy*, 82 Iowa 432; *Hecht v. Gitch*, 82 Iowa 596; *Haggard v. Holmes*, 90 Iowa 308; *Morse v. Minton*, 101 Iowa 603; *Murdy v. Skyles*, 101 Iowa 549.

*Oregon.* — *Holmes v. Page*, 19 Oregon 232;

(4) *Wife's Torts* — (a) *Antenuptial Torts*. — The husband is answerable for the antenuptial torts of his wife the same as for her antenuptial contracts;<sup>1</sup> and this doctrine extends to devastavits, breaches of trust, and other like torts committed before marriage while acting as trustee,<sup>2</sup> guardian,<sup>3</sup> executor, or administrator.<sup>4</sup>

By Statute in some jurisdictions the husband's liability for the wife's torts is abrogated expressly<sup>5</sup> or by implication.<sup>6</sup>

(b) *Postnuptial Torts* — *aa. AT COMMON LAW* — (*aa*) *Torts Committed by Wife Alone*. — The general rule of the common law is that the husband is liable for the torts of his wife where the act is done by her alone, and that he and she must be joined in a suit therefor.<sup>7</sup> The husband is not joined as defendant in such case on the ground that the wife's misconduct is imputed to him, but because so long as her marital relation continues the wife is incapable of being sued alone,<sup>8</sup> and no individual liability separate and apart from his wife attaches to him.<sup>9</sup> Even in cases where husband and wife are sued for their joint act, a

*Dodd v. St. John*, 22 Oregon 250; *Phipps v. Kelly*, 12 Oregon 213.

In *Gaffield v. Scott*, 40 Ill. App. 380, the court said: "The old law as to the agency of the wife binding the husband in ordinary domestic matters \* \* \* has become unimportant by the statute making both husband and wife responsible for family expenses."

1. *Husband's Liability for Wife's Antenuptial Torts*. — *Brown v. Kemper*, 27 Md. 672; *Jillson v. Wilbur*, 41 N. H. 106; *Overholt v. Ellswell*, 1 Ashm. (Pa.) 200; *Hawk v. Harman*, 5 Binn. (Pa.) 43. See also *Horton v. Payne*, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 374.

*Marriage de Jure Necessary*. — *Overholt v. Ellswell*, 1 Ashm. (Pa.) 200.

2. *Antenuptial Tort Committed by Wife as Trustee Against Beneficiary*. — *Palmer v. Wakefield*, 3 Beav. 227.

3. *Antenuptial Tort by Married Woman as Guardian Against Ward*. — *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27.

4. *Antenuptial Tort by Wife as Personal Representative Against Estate*. — *Bachelor v. Bean*, 2 Vern. 61; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Bobbe v. Frowner*, 18 Ala. 89; *Phillips v. Richardson*, 4 J. J. Marsh. (Ky.) 212; *Crane v. Van Dayne*, 9 N. J. Eq. 268; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 154. See also *Ferguson v. Collins*, 8 Ark. 241; *Bunce v. Van der Grift*, 8 Paige (N. Y.) 39; *Goods of McCready*, Tuck. (N. Y.) 374.

*Executrix de Son Tort*. — This rule applies to an executrix *de son tort*. *Hubble v. Fogartie*, 3 Rich. L. (S. Car.) 413, 45 Am. Dec. 775.

*Death of Husband or Wife Before Judgment — No Liability*. — *Adair v. Shaw*, 1 Sch. & Lef. 263; *Phillips v. Richardson*, 4 J. J. Marsh. (Ky.) 212; *Maffit v. Com.*, 5 Pa. St. 359; *Tabb v. Boyd*, 4 Call (Va.) 457. Compare *Knox v. Pickett*, 4 Desaus. (S. Car.) 92; *Moone v. Henderson*, 4 Desaus. (S. Car.) 459.

5. *McElfresh v. Kirkendall*, 36 Iowa 224.

6. *Culmer v. Wilson*, 13 Utah 138, 57 Am. St. Rep. 713.

7. *Liability of Husband for Wife's Torts — England*. — *Wainford v. Heyl*, L. R. 20 Eq. 324; *Anonymous*, 1 Vent. 93.

*Canada*. — *Lee v. Hopkins*, 20 Ont. 666.

*Indiana*. — *Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356.

*Iowa*. — *McElfresh v. Kirkendall*, 36 Iowa 226; *Luse v. Oaks*, 36 Iowa 562.

*Maine*. — *Marshall v. Oakes*, 51 Me. 309.

*Massachusetts*. — *Heckle v. Lurvey*, 101 Mass. 345, 3 Am. Rep. 366.

*Missouri*. — *Andrews v. Ormsbee*, 11 Mo. 400; *Bruce v. Bombeck*, 79 Mo. App. 235, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 823; *Merrill v. St. Louis*, 12 Mo. App. 466.

*New Hampshire*. — *Carleton v. Haywood*, 49 N. H. 314.

*New Jersey*. — *Hildreth v. Camp*, 41 N. J. L. 306.

*New York*. — *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.) 90; *Kowing v. Manly*, 49 N. Y. 200, 10 Am. Rep. 346.

*North Carolina*. — *Presnell v. Moore*, 120 N. Car. 390.

*Ohio*. — *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593.

*Pennsylvania*. — *Hawk v. Harman*, 5 Binn. (Pa.) 43; *Wheeler, etc., Mfg. Co. v. Heil*, 115 Pa. St. 491, 2 Am. St. Rep. 575.

*South Carolina*. — *Henderson v. Wendler*, 39 S. Car. 555, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 824.

*Vermont*. — *Lombard v. Batchelder*, 58 Vt. 558.

See also *Midland Ins. Co. v. Smith*, 6 Q. B. D. 561.

*Illustrations of Rule — Slander by Wife*. — *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Austin v. Bacon*, 49 Hun (N. Y.) 386; *Fitzgerald v. Quann*, 109 N. Y. 441; *Presnell v. Moore*, 120 N. Car. 390; *McQueen v. Fulgham*, 27 Tex. 463.

*Conversion by Wife*. — *Catterall v. Kenyon*, 3 Q. B. 310, 43 E. C. L. 749; *Tobey v. Smith*, 15 Gray (Mass.) 535; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *Kowing v. Manly*, 49 N. Y. 200, 10 Am. Rep. 346.

*Waste Committed by Wife — Husband and Wife Living Separate*. — *Page v. Read*, 1 Vern. 143.

8. *Coxe v. Cropwell*, Cro. Jac. 5; *Kowing v. Manly*, 49 N. Y. 200, 10 Am. Rep. 346.

9. *Andrews v. Ormsbee*, 11 Mo. 400; *Kowing v. Manly*, 49 N. Y. 200, 10 Am. Rep. 346.

*Wife Acting as Husband's Agent*. — But the husband will be liable alone for the injury done to the property of a third person by the negligence, carelessness, or unskillfulness of his wife in the execution of his business as agent. *Cox v. Hoffman*, 4 Dev. & B. L. (20 N. Car.) 180.



verdict of not guilty as to the husband will not, it has been held, relieve him from a judgment against him if the wife is found guilty.<sup>1</sup>

**Effect of Divorce or Death of Wife.** — Where a husband has obtained a divorce *a vinculo* from the wife, he is not liable to be joined in a suit for a tort committed by her during the coverture.<sup>2</sup> Nor will an action for a tort committed by the wife survive against the husband if she dies before or pending the action.<sup>3</sup>

**Effect of Separation.** — But the husband is answerable to a third person for the torts committed by his wife during coverture so long as the relation of husband and wife continues, though they may be permanently living apart.<sup>4</sup>

(bb) **Torts Committed in Husband's Presence.** — If the tort is committed by the wife in the husband's presence it is presumed to have been committed by the husband's coercion, and in the absence of circumstances to rebut this presumption, he alone is liable, and the action should be brought against him alone.<sup>5</sup> This presumption, it has been said, is one of the compensations or offsets which the old common law gave for the benefit and protection of the wife from its stern and unyielding doctrines in relation to the superior marital rights of the husband, by which the personal property and the legal existence of the wife are nearly all lost or merged in her baron or lord.<sup>6</sup>

(cc) **Tort Based on Contract.** — The general principle that for the torts or frauds of the wife an action may be maintained against her or her husband applies only to torts *simpliciter*, or cases of pure and simple tort, and not where the substantive basis of the fraud is the contract of the wife.<sup>7</sup> But this broad exception to the general rule has been held to be subject to these qualifications: first, that where the wife by false and fraudulent representations obtains property and retains it, if the recovery can be had without giving effect to the contract in a joint action against her and her husband to recover the loss actually sustained for her tort, her disability of coverture cannot be successfully pleaded in bar of the action;<sup>8</sup> and second, that the disability cannot be invoked as a defense in cases where the false and fraudulent representations which induce the making of the contract are antecedent to and not a part of the contract, though connected with it.<sup>9</sup>

(dd) **Tort Committed in Fiduciary Capacity.** — It seems to be an established rule that apart from statute a husband is liable to be sued jointly with his wife, both at law and in equity, for any breach of trust on the part of the wife during coverture,<sup>10</sup> and for all the assets received or devastated committed

In the same way where the wife as agent of the husband makes a false representation whereby a third person suffers damages, the latter will be entitled to an action for damages against the husband. *Taylor v. Green*, 8 C. & P. 316, 34 E. C. L. 407.

**Trespass by Animal Acquired by Husband through Marriage.** — At common law the husband, after the marriage, becomes, independently of all antenuptial agreements, the absolute owner of all personal property in possession of the wife, and a trespass can be sustained against him alone for an act done after the marriage by cattle belonging to the wife at the time of her marriage. *Cram v. Dudley*, 28 N. H. 537.

1. Anonymous, 1 Vent. 93; *Ferguson v. Brooks*, 67 Me. 256. Compare *Drury v. Dennis*, Yelv. 106; *Hales v. Whyte*, Cro. Jac. 203; *Mayo v. Cogshill*, Cro. Car. 406; *Sisco v. Cheeney*, Wright (Ohio) 1.

2. *Capel v. Powell*, 17 C. B. N. S. 743, 112 E. C. L. 743.

3. *Kowing v. Manly*, 49 N. Y. 201, 10 Am. Rep. 37.

4. *Head v. Briscoe*, 5 C. & P. 484, 24 E. C. L. 419.

5. **Husband's Liability for Wife's Torts Committed in His Presence.** — *Kosminsky v. Goldberg*, 44 Ark. 401; *Estill v. Fort*, 2 Dana (Ky.) 238; *Marshall v. Oakes*, 51 Me. 308; *Carleton v. Haywood*, 49 N. H. 316; *Park v. Hopkins*, 2 Bailey L. (S. Car.) 411.

6. *Marshall v. Oakes*, 51 Me. 311; *Carleton v. Haywood*, 49 N. H. 319.

7. **Nonliability of Husband and Wife on Wife's Torts Based on Contract.** — *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. N. S. 258, 103 E. C. L. 258; *Prentiss v. Paisley*, 25 Fla. 627; *Merrill v. St. Louis*, 12 Mo. App. 476; *Keen v. Hartman*, 48 Pa. St. 497, 88 Am. Dec. 472; *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626. See also *Rawlings v. Bell*, 1 C. B. 951, 50 E. C. L. 951.

8. *Wirt v. Dinan*, 44 Mo. App. 583.

9. *Wirt v. Dinan*, 44 Mo. App. 583. See also *supra*, this title, *Disabilities Arising from Coverture — Of Wife — To Be Estopped*.

10. **Husband's Liability for Wife's Breach of Trust During Coverture.** — Where a woman who has been with a trustee until she has afterwards married, her separate estate will not be liable for her breach of the trust during cover-



either by himself or by his wife during the coverture in respect of an estate of which his wife is legal personal representative.<sup>1</sup> And even if the husband of an administratrix dies before the wife, his assets are chargeable in equity.<sup>2</sup> But the estate of the husband of an administratrix will be discharged in equity for so much of the intestate's estate as, though received by him during the coverture, had after his death come to his widow, the administratrix.<sup>3</sup>

By Statute in many jurisdictions, providing in effect that on the marriage of an executrix her powers shall cease, this common-law doctrine has been abrogated.<sup>4</sup>

*bb. UNDER STATUTE.*—Statutes have been passed in several jurisdictions expressly relieving the husband from liability for the wife's torts<sup>5</sup> unless they were committed by his authority, direction, or encouragement.<sup>6</sup> The statutes changing the common law are, it has been held, to be strictly construed, and the latter will be held to be no further abrogated than the clear import of the language used in the statute requires; and hence the common-law disability of a married woman to be sued alone in tort remains, except in so far as it is removed by express statutory enactments.<sup>7</sup> It has accordingly been held that the modern statutes enlarging the rights and liabilities of married women in respect to property do not by implication release the husband from his common-law liability for the personal torts committed by his wife,<sup>8</sup> though in some jurisdictions it has been held that he may not be liable for torts committed by her in the management and control of her separate estate.<sup>9</sup> But

ture, but the husband alone is liable. *Wainford v. Heyl*, L. R. 20 Eq. 321; *In re Smith*, 48 L. J. Ch. 205.

And it has been held that the husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence and is not confined to losses arising from her active misconduct. *Bahin v. Hughes*, 31 Ch. D. 390.

1. **Liability of Husband for Wife's Devastavit During Coverture.**—*Adair v. Shaw*, 1 Sch. & Lef. 242; *Paget v. Read*, 1 Vern. 143; *Smith v. Smith*, 21 Beav. 385; *Clough v. Bond*, 3 Myl. & C. 490; *In re Smith*, 48 L. J. Ch. 205; *Bohe v. Frowner*, 18 Ala. 95; *Ferguson v. Collins*, 8 Ark. 241; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 153; *Bunce v. Vander Grift*, 8 Paige (N. Y.) 37; *Goods of McCready, Tuck*, (N. Y.) 376; *Scott v. Gamble*, 9 N. J. Eq. 218. *Compare Knox v. Pickett*, 4 Desaus. (S. Car.) 92.

**Acts of Executrix de Son Tort Without Husband's Consent.**—In *Hinds v. Jones*, 48 Me. 348, it was held that an action does not lie against the husband as an executor *de son tort* for acts of his wife done without his knowledge and consent; but the rule is otherwise where he advises or aids her in the commission of the wrongful acts, for every one thus participating becomes a principal.

2. *Smith v. Smith*, 21 Beav. 385; *Clough v. Bond*, 3 Myl. & C. 491; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Bunce v. Vander Grift*, 8 Paige (N. Y.) 37.

3. *Adair v. Shaw*, 1 Sch. & Lef. 275; *Tyler v. Bell*, 2 Myl. & C. 89.

4. *Ferguson v. Collins*, 8 Ark. 241; *Hinds v. Jones*, 48 Me. 348. See also the statutes of the various states.

5. **Statutes Expressly Relieving Husband of Liability for Wife's Torts.**—*Austin v. Cox*, 118 Mass. 58; *McCarty v. De Best*, 120 Mass. 89; *Burt v. McBain*, 20 Mich. 260; *Ricci v. Mueller*, 41 Mich. 214; *Weber v. Weber*, 47 Mich.

569; *Mason v. Mason*, 66 Hun (N. Y.) 386; *Vocht v. Kuklence*, 119 Pa. St. 365; *Story v. Downey*, 62 Vt. 243. See also *Hill v. Duncan*, 110 Mass. 238; *Arthurs v. Chatfield*, 9 Pa. Co. Ct. 34; *Quick v. Miller*, 103 Pa. St. 67; *Lee v. Hopkins*, 20 Ont. 666.

6. See *Austin v. Cox*, 118 Mass. 58; *Ricci v. Mueller*, 41 Mich. 214; *Weber v. Weber*, 47 Mich. 569; *Story v. Downey*, 62 Vt. 243.

7. *Fitzgerald v. Quann*, 109 N. Y. 441.

8. **Husband's Liability Not Released by Implication from Property Acts.**—*Seroka v. Kattenburg*, 17 Q. B. D. 177; *Choen v. Porter*, 66 Ind. 196; *Ferguson v. Brooks*, 67 Me. 258; *Morgan v. Kennedy*, 62 Minn. 348, 54 Am. St. Rep. 647; *Nichols v. Nichols*, 147 Mo. 387; *Bruce v. Bombeck*, 79 Mo. App. 235; *Fowler v. Chichester*, 26 Ohio St. 9.

In New York, prior to the amendment of 1890, the rule of the text obtained. *Fitzgerald v. Quann*, 109 N. Y. 441, *affirmed* 33 Hun (N. Y.) 652, *reversed* 62 How. Pr. (N. Y.) 331; *Austin v. Bacon*, 49 Hun (N. Y.) 386; *Horton v. Payne*, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 374; *Anderson v. Hill*, 53 Barb. (N. Y.) 238; *Tait v. Culbertson*, 57 Barb. (N. Y.) 9; *Solomon v. Waas*, 2 Hilt. (N. Y.) 179; *Mangam v. Peck*, 111 N. Y. 401; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 547. *Compare Trebing v. Vetter*, (Brooklyn City Ct.) 12 Abb. N. Cas. (N. Y.) 302, note; *Muser v. Miller*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 308, note; *Gillies v. Lent*, (C. Pl. Gen. T.) 2 Abb. Pr. N. S. (N. Y.) 455.

9. *Choen v. Porter*, 66 Ind. 196; *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Quilty v. Battie*, 135 N. Y. 209. See also *Callahan v. Matthews*, 87 Hun (N. Y.) 527. *Compare Muser v. Lewis*, 50 N. Y. Super. Ct. 431; *Genenz v. De Forest*, (Supm. Ct. Gen. T.) 15 Civ. Pro. (N. Y.) 145.

But under the Statutes of Missouri it has been held that a married woman and her husband

the modern tendency of the decisions seems to be that since the common-law rule which made the husband liable for the wife's torts proceeded upon the ground that as the husband succeeded *jure mariti* to the entire estate of the wife, real and personal, and to the right to her earnings, so that she could not respond in damages for any wrong that she might commit, and upon the further ground of the husband's absolute dominion over the person of the wife, statutes changing the relation between husband and wife as to the right of property and the personal control will, by implication, discharge the husband from his liability for all the torts of the wife during coverture which he neither aided, advised, nor countenanced, on the principle that a liability which has for its consideration rights conferred should not longer exist when the consideration has failed.<sup>1</sup>

*b. OF WIFE* — (1) *Contracts of Husband*. — No liability is imposed on the wife at common law by the contracts of the husband, though in making the contract he acts under her appointment as agent.<sup>2</sup> Nor, under the statutes securing to married women separate property rights and removing their disabilities generally, can the wife's property be taken for the debts of the husband, or be bound by his contracts unless he acts as her agent.<sup>3</sup> But he may be appointed her agent to contract with reference to her separate estate.<sup>4</sup> And in jurisdictions where she may contract as a *feme sole*, with specified limitations in some instances, he may as her agent enter into contracts generally.<sup>5</sup> But in no case can she authorize her husband to make a contract that would bind her to any greater extent than she could bind herself.<sup>6</sup>

(2) *Contracts of Wife* — (a) *Antenuptial Contracts* — *as. IN GENERAL*. — At common law coverture does not extinguish the wife's antenuptial debts as to herself. She still remains debtor in conjunction with her husband, who becomes jointly bound with her so long as the coverture lasts.<sup>7</sup> And if no action is brought during the coverture, and the wife survives, or if the coverture is dissolved by the death of the husband pending suit and before judgment, the cause of action survives to the wife and may proceed to judgment and execu-

are jointly liable for damages accruing to adjoining property by reason of the negligence of the wife's servant in repairing and remodeling a building owned by her in fee. *Flesh v. Lindsay*, 115 Mo. 1, 37 Am. St. Rep. 374. See also *Wirt v. Dinan*, 44 Mo. App. 583. To the same effect see *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

1. *Husband Held to Be Released from Liability by Implication*. — *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 378; *Haggbush v. Ragland*, 75 Ill. 40; *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489; *Lane v. Bryant*, 100 Ky. 138; *Harris v. Webster*, 58 N. H. 481; *Culmer v. Wilson*, 13 Utah 147, 57 Am. St. Rep. 713.

But though the wife was the active participant in making an unlawful entry, the husband is liable if he has expressly directed the proceeding. *Baugherschnittz v. Bailey*, 29, Ill. App. 295.

2. *Contracts of Husband Acting as Wife's Agent Not Binding at Common Law*. — *Weisbrod v. Chicago, etc., R. Co.*, 18 Wis. 40, 86 Am. Dec. 743. See also the title AGENCY, vol. 1, p. 942.

3. See the title SEPARATE PROPERTY (OF MARRIED WOMEN).

4. *Husband's Contracts in Reference to Wife's Separate Estate*. — *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101; *Humphrey v. McCauley*, 55 Ark. 143, *Kent's Int. Com. & C.*; *McClellan*, 43 Mich. 564; *Luebe v. Thorpe*, 94 Mich. 268; *McMurtry v. Brown*, 6 Neb. 368;

*Bodey v. Thackara*, 143 Pa. St. 171, 24 Am. St. Rep. 526; *Scottish American Mortg. Co. v. Deas*, 35 S. Car. 42, 28 Am. St. Rep. 832; *Brown v. Thompson*, 31 S. Car. 436, 17 Am. St. Rep. 40; *Camden v. Hiteshew*, 23 W. Va. 236; *Weisbrod v. Chicago, etc., R. Co.*, 18 Wis. 40, 86 Am. Dec. 743; *Lavassar v. Washburne*, 50 Wis. 200. See also the title SEPARATE PROPERTY (OF MARRIED WOMEN).

5. *Contracts of Husband as Agent in Jurisdictions Allowing Wife to Contract as Feme Sole*. — *Barnett v. Gluting*, 3 Ind. App. 415; *Verrill v. Parker*, 65 Me. 578; *Roberts v. Hartford*, 86 Me. 460; *Arnold v. Spurr*, 130 Mass. 347; *Wheaton v. Trimble*, 145 Mass. 345, 1 Am. St. Rep. 463; *Duggan v. Wright*, 157 Mass. 228. See also *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436; *Elliott v. Bodine*, 59 N. J. L. 567.

*Husband Executing Note in Wife's Name*. — Under statute in *Washington* it has been held that the wife may authorize the husband to execute a note in her name. *Richmond v. Voorhees*, 10 Wash. 316.

6. *Bowles v. Trapp*, 139 Ind. 55, *citing* 14 AM. AND ENG. ENCYC. OF LAW (1st ed.) 620; *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 622; *Hall v. Callahan*, 66 Mo. 310; *Ingram v. Nedd*, 44 Vt. 462.

7. *Wife Jointly Liable with Husband on Her Antenuptial Contracts*. — *Cannon v. Greenwood*, 45 Miss. 92; *Parker v. Steed*, 1 Lea (Tenn.) 206; *Granger v. Lewis*, 2 Wyo. 231.



tion.<sup>1</sup> But an action at law cannot, during the coverture, be sustained against the wife alone, so as to subject her separate equitable estate.<sup>2</sup> And in equity it seems that the husband and the wife must be sued jointly, and in that case it is only when nothing can be recovered from the husband that the plaintiff is entitled to proceed against the wife's separate equitable estate.<sup>3</sup>

But by Statute in many jurisdictions the husband is released from liability and the wife is made liable as a *feme sole* for her debts contracted before her marriage.<sup>4</sup>

**Imprisonment for Debt.** — At common law the person of a married woman during coverture could be taken in execution upon a joint judgment against her and her husband for her antenuptial debts, whether the husband was or was not arrested.<sup>5</sup> But according to the *English* practice, the wife was entitled to be discharged unless she had separate property from which she could pay the debt, and this though the husband was not and could not be taken in execution.<sup>6</sup> By statute in most jurisdictions, however, the liability of the wife to be imprisoned for her antenuptial debts has been either modified or totally abolished.<sup>7</sup>

**bb. EFFECT OF HUSBAND'S BANKRUPTCY.** — The rule has been laid down in *England* that if an action is brought and judgment recovered against husband and wife during the coverture for a debt of the wife contracted before marriage, and the husband becomes bankrupt and obtains his discharge, the wife's liability is gone at law,<sup>8</sup> and the discharge has been held to operate as an absolute extinguishment of the debt against her;<sup>9</sup> but in a decision in *New York* the effect of the discharge has been held to be merely a suspension of the remedy for the recovery of the debt as against the wife during coverture.<sup>10</sup> In equity, however, it is the prevailing rule that if property is settled by a woman upon her marriage to her separate use, it is liable after her husband's bankruptcy for debts contracted by her before her marriage, for the reason that a different rule would work a fraud upon her creditors.<sup>11</sup>

**1. Survivor of Cause of Action Against Wife on Husband's Death.** — *Woodman v. Chapman*, 1 Campb. 189; *Chubb v. Stretch*, L. R. 9 Eq. 559; *Cannon v. Grantham*, 45 Miss. 92; *Parker v. Steed*, 1 Lea (Tenn.) 206. See also *Gage v. Reed*, 15 Johns. (N. Y.) 403; *Beville v. Cox*, 109 N. Car. 265; *Parker v. Cowan*, 1 Heisk. (Tenn.) 518.

**Survivor upon Abandonment by Husband.** — Also it has been held that if a husband abandons his wife, and the facts of the abandonment are such as to justify her being treated as a *feme sole*, her antenuptial debt is revived against her by the abandonment precisely as it would have been by his death. *Clarke v. Windham*, 12 Ala. 798.

**2.** *Haygood v. Harris*, 10 Ala. 291.

**3.** *Biscoe v. Kennedy*, 1 Bro. C. C. 17, note; *Chubb v. Stretch*, L. R. 9 Eq. 561.

**In New York** it has been held that the separate equitable estate of a married woman cannot be charged in any case for debts contracted by her as a *feme sole*, and that the doctrine of appointment or appropriation in equity relates wholly to engagements made, or debts contracted, by a married woman as such having a separate estate and in reference to it. *Vanderheyden v. Mallory*, 1 N. Y. 463. See also the title SEPARATE PROPERTY (OF MARRIED WOMEN).

**4. Sole Liability of Wife under Statute.** — *Jay v. Robinson*, 25 Q. B. D. 467; *Zachary v. Cadenhead*, 40 Ala. 236; *Madden v. Gilmer*, 40 Ala. 637; *Wood v. Orford*, 52 Cal. 412; *Cannon*

*v. Grantham*, 45 Miss. 88; *Conrad v. Howard*, 89 Mo. 217. See also *Robinson v. Lynes*, (1894) 2 Q. B. 577.

Thus both husband and wife are liable under statute in *Missouri* on their joint note made before marriage. *Conrad v. Howard*, 89 Mo. 217.

**5. Liability of Wife to Imprisonment for Antenuptial Debt.** — *Sparkes v. Bell*, 8 B. & C. 1, 15 E. C. L. 143; *Ivens v. Butler*, 7 El. & Bl. 159, 90 E. C. L. 159; *Com. v. Badlam*, 9 Pick. (Mass.) 362; *M'Kinstry v. Davis*, 3 Cow. (N. Y.) 339, 15 Am. Dec. 269. See also *Scott v. Morley*, 20 Q. B. D. 120; *Evans v. Chester*, 2 M. & W. 847.

**6.** *Ivens v. Butler*, 7 El. & Bl. 159, 90 E. C. L. 159.

**7.** See *Dillon v. Cunningham*, L. R. 8 Exch. 23; *Scott v. Morley*, 20 Q. B. D. 120. See also the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS; and see the statutes of the various states.

**8. Effect of Husband's Bankruptcy on Wife's Liability for Antenuptial Debts.** — *Lockwood v. Salter*, 5 B. & Ad. 303, 27 E. C. L. 82; *Miles v. Williams*, 1 P. Wms. 249. See generally the title INSOLVENCY AND BANKRUPTCY.

**9.** *Lockwood v. Salter*, 5 B. & Ad. 303, 27 E. C. L. 82; *Miles v. Williams*, 1 P. Wms. 249.

**10.** *Vanderheyden v. Mallory*, 1 N. Y. 465.

**11. Liability of Separate Estate of Wife of Bankrupt.** — *Chubb v. Stretch*, L. R. 9 Eq. 555; *Hamlin v. Bridge*, 24 Me. 145. Compare *Vanderheyden v. Mallory*, 1 N. Y. 465.



(b) **Postnuptial Contracts.** — The wife's liability on her contracts entered into during coverture has already been discussed in a preceding portion of this title.<sup>1</sup>

(3) **Wife's Torts** — (a) **In General.** — As a general rule a married woman is liable for her torts; the liability is hers, though during the coverture it must be enforced in an action against herself and her husband,<sup>2</sup> and no liability attaches against her separate equitable estate.<sup>3</sup> Upon the husband's death, a right of action not reduced to judgment during the coverture survives against the wife on her torts not committed in the husband's presence and by his coercion.<sup>4</sup>

**Torts Committed in Husband's Absence.** — The wife is jointly liable with her husband for all torts committed by her when not in company with him, and this though they were committed by the husband's direction.<sup>5</sup>

**Torts Committed in Husband's Presence.** — If the husband was present, the *prima facie* presumption is that the wife acted under his coercion,<sup>6</sup> but this presumption may be overcome by evidence that she instigated the act or was the more active party, or by other facts submitted to the jury to rebut such presumption.<sup>7</sup>

**Under Statute** in some of the *United States* a married woman may be sued alone for her torts committed during coverture.<sup>8</sup> Under statute in *England*

**Outlawry of Husband.** — A similar rule has been laid down in the case of the husband's outlawry. *Biscoe v. Kennedy*, 1 Bro. C. C. 17, note.

**Insolvency of Husband No Ground for Discharge from Custody if Wife Has Separate Property.** — See *Sparkes v. Bell*, 8 B. & C. 1, 15 E. C. L. 143.

1. See *supra*, this title, *Disabilities Arising from Coverture — Of Wife — To Make Contracts*.

2. **Wife Jointly Liable with Husband for Her Torts.** — *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. N. S. 266, 103 E. C. L. 266; *Capel v. Powell*, 17 C. B. N. S. 745, 112 E. C. L. 745; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Crawford v. Doggett*, 82 Tex. 139, 27 Am. St. Rep. 859.

**Liability to Execution by Capias ad Satisfaciendum.** — It has been held that at common law a wife is liable to be taken in execution on a joint judgment against herself and her husband for her torts, whether the husband was or was not taken. *Langstaff v. Rain*, 1 Wils. C. Pl. 149; *Scott v. Morley*, 20 Q. B. D. 120; *Pitts v. Meller*, 2 Stra. 1167; *Finch v. Duddin*, 2 Stra. 1237; *Solomon v. Waas*, 2 Hilt. (N. Y.) 181; *Merrill v. St. Louis*, 12 Mo. App. 474. Compare *Hall v. White*, 27 Conn. 495; *Com. v. Keeper*, 14 Phila. (Pa.) 396, 37 Leg. Int. (Pa.) 485; *Vocht v. Kukulne*, 119 Pa. St. 365; *Whalen v. Gabell*, 120 Pa. St. 284.

But according to the English practice, when it appeared that the wife had no separate property, the court in its discretion might discharge her whether the husband had or had not been taken. *Edwards v. Martyn*, 17 Q. B. 693, 79 E. C. L. 693.

By statute in most jurisdictions her liability in this respect has been either modified or entirely abolished. *Scott v. Morley*, 20 Q. B. D. 120.

See also the title **IMPRISONMENT FOR DEBT AND THE CURIA ALIOQUI**.

3. *Wainford v. Heyl*, L. R. 20 Eq. 323.

4. **Survivor of Action Against Wife.** — *Hyde v.*

*S.*, 12 Mod. 246; *Douge v. Pearce*, 13 Ala. 127; *Baker v. Braslin*, 16 R. I. 635. See also *Steinhauser v. Spraul*, 114 Mo. 560; *Kowing v. Manly*, 49 N. Y. 201, 10 Am. Rep. 346.

5. **Joint Liability with Husband for Torts Committed in His Absence.** — *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Franklin's Appeal*, 115 Pa. St. 537, 2 Am. St. Rep. 583; *Wheeler, etc., Mfg. Co. v. Heil*, 115 Pa. St. 490, 2 Am. St. Rep. 575. See also *Hildreth v. Camp*, 41 N. J. L. 306.

6. **Presumption of Coercion from Husband's Presence.** — *Kosminsky v. Goldberg*, 44 Ark. 401; *Marshall v. Oakes*, 51 Me. 308; *Warner v. Moran*, 60 Me. 227; *Ferguson v. Brooks*, 67 Me. 251; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Dailey v. Houston*, 58 Mo. 361; *Hildreth v. Camp*, 41 N. J. L. 306; *Cassin v. Delany*, 38 N. Y. 178; *Wheeler, etc., Mfg. Co. v. Heil*, 115 Pa. St. 487, 2 Am. St. Rep. 575; *Longey v. Leach*, 57 Vt. 377; *Doherty v. Madgett*, 58 Vt. 323.

7. **Presumption of Coercion Open to Rebuttal — Arkansas.** — *Kosminsky v. Goldberg*, 44 Ark. 401.

*Maine.* — *Marshall v. Oakes*, 51 Me. 308; *Warner v. Moran*, 60 Me. 227; *Ferguson v. Brooks*, 67 Me. 251.

*Michigan.* — *Miller v. Sweitzer*, 22 Mich.

*Minnesota.* — *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772.

*New Hampshire.* — *Carleton v. Haywood*, 49 N. H. 314.

*New Jersey.* — *Hildreth v. Camp*, 41 N. J. L. 306.

*New York.* — *Wagener v. Bill*, 19 Barb. (N. Y.) 321; *Cassin v. Delany*, 38 N. Y. 178.

*Pennsylvania.* — *Wheeler, etc., Mfg. Co. v. Heil*, 115 Pa. St. 487, 2 Am. St. Rep. 575; *Hess v. Heft*, 3 Pa. Super. Ct. 582.

*See also* *McCowan v. Johnson*, 1 McCord L. (S. Car.) 578, 10 Am. Dec. 698.

8. **Liability of Wife for Her Torts under Statute.** — *Michigan* — *Dailey v. Houston*, 58 Mo. 361.

it seems that the plaintiff has the option of suing the husband and the wife together or of suing the wife alone, and judgment may be entered against the wife and execution issued against her separate property if she has any.<sup>1</sup>

(b) **Torts Committed by Agent.** — It seems to be the common-law rule that a married woman cannot be a trespasser by prior or subsequent assent, and that accordingly she cannot, by reason of prior or subsequent assent or authority from her, be held liable for the tort of her husband or any third party in which she does not participate as an actor.<sup>2</sup> But it has been held to be a necessary consequence of the enlargement of a married woman's power under the statutes giving to her the right to hold, manage, and dispose of her property in the same manner as if she were sole, that she should have a corresponding increase of responsibility for all acts relating thereto and growing out of her management and control. Hence it has been held that when she appoints her husband as agent in enforcing some supposed right, and in making such appointment acts of her own free will and without coercion from him, she may be made responsible for personal injuries inflicted, though not in her presence, upon a third person by him while acting within the scope of his authority.<sup>3</sup>

(c) **Torts Committed by Husband and Wife Jointly.** — The husband and wife may be jointly sued and charged for a tort done by both of them, if the wife does not act by the husband's coercion,<sup>4</sup> or if the injury is not of such a nature that it

*v. McBain*, 29 Mich. 260; *Ricci v. Mueller*, 41 Mich. 214; *Weber v. Weber*, 47 Mich. 569; *Vocht v. Kuklence*, 119 Pa. St. 371; *Story v. Downey*, 62 Vt. 243.

**Removal of Presumption of Coercion.** — In *Connecticut*, under a statute making the wife responsible for her own torts committed by her without the actual coercion of the husband, it has been held that the presumption of coercion from the presence of the husband is abolished, and the wife is required to prove for her justification that her husband in fact compelled her to commit the tort for which she is sued. *Blakeslee v. Tyler*, 55 Conn. 397.

**Injury by Bite of Dog Belonging to Wife.** — Under a statute in *Alabama* providing that the husband is not liable for the wife's torts "in the commission of which he does not participate; but the wife is liable \* \* \* for her torts and is suable therefor as though she were sole," it was held, in an action brought to recover damages for the bite of a vicious dog kept by the wife on her premises, that she was not liable, since the statute has not changed the marital relations of the husband to his wife as the head of the household, and the wife could not keep the dog without his consent and participation. *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122.

**Injury from Husband's Dog on Wife's Premises.** — In *Massachusetts* it has been held that a wife is not necessarily, as a matter of law, a keeper of dogs which her husband owns and keeps on premises which she owns and which both occupy as husband and wife, although she carries on a separate business upon the premises; and if the husband keeps his dogs on such premises against her consent, and she does nothing to maintain or keep them, she is not, in contemplation of law, a keeper of the dogs so as to make her liable for injuries resulting from a bite of one of them. *McLaughlin v. Kemp*, 152 Mass. 7. Compare *Quilty v. Battie*, 135 N. Y. 201.

1. *Seroka v. Kattenburg*, 17 Q. B. D. 177.

**2. Nonliability of Wife for Acts of Agent at Common Law.** — 1 Chitty on Pleadings (16th Am. ed.) 86; *Ferguson v. Brooks*, 67 Me. 259; *Vanneman v. Powers*, 56 N. Y. 43; *Ferguson v. Neilson*, 17 R. I. 81. See also *Birdseye v. Flint*, 3 Barb. (N. Y.) 500. Compare *Sikes v. Johnson*, 16 Mass. 389.

In *Ferguson v. Neilson*, 17 R. I. 81, it was held that a married woman was not liable for a tort caused by the negligence of a servant employed by her, though she was living apart from her husband, who had never resided within the state.

**3. Liability of Wife for Torts of Agent under Statute.** — *Ferguson v. Brooks*, 67 Me. 251; *Shane v. Lyons*, 172 Mass. 199; *Schmidt v. Keehn*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 267; *Vanneman v. Powers*, 56 N. Y. 43. See also *Baum v. Mullen*, 47 N. Y. 577.

**Ratification of Tort.** — And the rule is true where the wife ratifies the acts of the husband as well as where he acts under a prior appointment. *Krumm v. Beach*, 96 N. Y. 398.

In *Graves v. Spier*, 58 Barb. (N. Y.) 349, it was held that a married woman was liable for a fraud of her husband acting for her as her agent in the purchase of real estate, although she was wholly ignorant of the fraud practiced and did not authorize it, where she had the fruits of the bargain, kept the property bargained for, and sold it and retained the proceeds.

**4. Torts Committed by Husband and Wife Jointly.** — *Hyde v. S.*, 12 Mod. 246; *Vine v. Saunders*, 4 Bing. N. Cas. 96, 33 E. C. L. 290; *Marshall v. Oakes*, 51 Me. 308; *Steinhauser v. Spraul*, 114 Mo. 560; *Carleton v. Haywood*, 49 N. H. 318; *Smith v. Sanders*, 56 N. H. 339. See also *Byford v. Giron*, 90 Iowa 661; *Crow v. Manning*, 45 La. Ann. 1221; *Hayden v. Woods*, 16 Neb. 306; *Wright v. Kerr*, Add. (Pa.) 13.

**Joint Conversion of Property.** — Thus an action of tort for the conversion of property of a third person may be maintained against a husband



must have been done by one person alone.<sup>1</sup> Thus the husband and wife may be jointly sued and charged for a tort done by both of them where the wife acted under the husband's direction, and as his servant and agent, though not in his presence.<sup>2</sup>

(d) **Torts Committed in Fiduciary Capacity.** — A married woman was liable at common law to be sued jointly with her husband for her devastavits and breaches of trust committed during coverture, and in case of her survival of the husband, to be sued singly, the same as for her torts in general.<sup>3</sup> And it has been held that though the waste during the coverture is the act of the husband, yet it is an act for which the wife is responsible after the determination of the coverture, because it was her folly to take a husband who would so conduct himself.<sup>4</sup> It has been intimated, however, that this rule will not be applicable if administration be taken by the husband in the name of the wife without her consent given in the first instance or subsequently by her intermeddling.<sup>5</sup> By statute in *England* it seems that a wife is liable as a *feme sole* by reason of any breach of trust or devastavit committed by her as trustee, executrix, or administratrix, either before or after her marriage.<sup>6</sup> But by the statutes in most of the *United States*, providing substantially that on the marriage of an executrix her powers shall cease, the liability of a wife for devastavits during coverture is virtually taken away.<sup>7</sup>

**V. CRIMINAL LIABILITY — 1. Husband's Liability for Wife's Crimes.** — Where a crime is committed by a married woman by the direction<sup>8</sup> of the husband, or with his concurrence,<sup>9</sup> he will be liable to criminal prosecution therefor, and

and wife when they jointly commit the offense. *Berry v. Nevys*, Cro. Jac. 661; *Newman v. Cheyney*, Latch 126; *Draper v. Fulkes*, Yelv. 165; *Estill v. Fort*, 2 Dana (Ky.) 238; *Tobey v. Smith*, 15 Gray (Mass.) 535. Or the action may be brought against the husband alone. *Estill v. Fort*, 2 Dana (Ky.) 238; *Kowing v. Manly*, 49 N. Y. 199, 10 Am. Rep. 346.

**Joint Trespass.** — Also a husband and wife may be jointly sued in trespass for their joint act where the wife does not commit the act under the husband's coercion. *Vine v. Saunders*, 4 Bing. N. Cas. 96, 33 E. C. L. 290; *Smalley v. Kerfoot*, 2 Stra. 1094.

**Joint Assault.** — Thus it has been held that a joint action of trespass will lie against a husband for an assault committed by both. *Vine v. Saunders*, 4 Bing. N. Cas. 99, 33 E. C. L. 291; *Roadcap v. Sipe*, 6 Gratt. (Va.) 213.

1. *Vine v. Saunders*, 4 Bing. N. Cas. 96, 33 E. C. L. 290.

A husband and wife cannot be jointly sued for slander by both. *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Blake v. Smith*, 19 R. I. 476. See also *Swithin v. Vincent*, 2 Wils. C. Pl. 227.

2. *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270. See also *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366.

3. **Liability of Wife for Torts Committed in Fiduciary Capacity.** — See *Kingham v. Lee*, 15 Sim. 399; *Bunce v. Vander Grist*, 8 Paige (N. Y.) 37; *Goods of McCready*, Tuck. (N. Y.) 376.

4. *Mounson v. Bourn*, Cro. Car. 519; *Horsey v. Daniel*, 2 Lev. 145; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Soady v. Turnbull*, L. R. 1 Ch. 494. See also *Bellew v. Scott*, 1 Stra. 440; *Bohe v. Frowner*, 18 Ala. 95; *Bunce v. Vander Grist*, 8 Paige (N. Y.) 37.

5. *Adair v. Shaw*, 1 Sch. & Lef. 258, note; *Witcher v. Wilson*, 47 Miss. 663; *Crawley on Husband and Wife* 212.

6. See statute 45 and 46 Vict., c. 75.

7. See the statutes of the various states; and see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 747.

8. **Husband's Liability for Wife's Crimes Committed by His Direction.** — *U. S. v. Birch*, 1 Cranch (C. C.) 571; *Mulvey v. State*, 43 Ala. 318, 94 Am. Dec. 684; *State v. Roberts*, 55 N. H. 483. See also *Com. v. Pratt*, 126 Mass. 462.

9. **Husband's Liability for Wife's Crimes Committed with His Concurrence.** — *Williamson v. State*, 16 Ala. 436.

**Use of Residence for Illegal Sale of Intoxicating Liquors.** — At common law the husband has the right to regulate and control his own household, and it is his right and duty to prevent his wife from using his house for an illegal business or purpose; and hence, if he does not use reasonable means to prevent her from using it for the illegal sale of intoxicating liquors, he becomes participator in the offense and is liable to indictment therefor. *Com. v. Wood*, 97 Mass. 229; *Com. v. Barry*, 115 Mass. 146, *Com. v. Carroll*, 124 Mass. 30; *Com. v. Walsh*, 165 Mass. 62; *Wayne County v. Keller*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 280. See also *Hensly v. State*, 52 Ala. 10; *State v. McDaniel*, *Houst. Crim. Cas.* (Del.) 506; *Bell v. State*, 92 Ga. 49; *State v. Colby*, 55 N. H. 72.

And it has been held that the statutes which have been passed to enlarge the rights and privileges of married women have not changed the rule. *Com. v. Barry*, 115 Mass. 146; *Com. v. Kennedy*, 119 Mass. 213; *Com. v. Pratt*, 126 Mass. 462; *Com. v. Walsh*, 165 Mass. 62; *State v. McDaniel*, 1 *Houst. Crim. Cas.* (Del.) 506.

Thus the rule has been applied though the house in which the intoxicating liquors were sold was the separate property of the wife, provided it was also the domicile of the family. *Com. v. Barry*, 115 Mass. 146; *Com. v. Kennedy*, 119 Mass. 213.



the law will imply that it was committed under his coercion if done in his presence and with his knowledge.<sup>1</sup> But it has been said that the husband may show the contrary — that the act was committed against his will — and thus discharge himself from liability.<sup>2</sup>

**Crimes Committed Without Husband's Knowledge or Consent.** — The husband is, as a general rule, not liable criminally for the acts of his wife committed without his knowledge or consent, as where the crime is committed in his absence and contrary to his express instructions.<sup>3</sup>

**2. Wife's Liability for Her Crimes.** — Coverture is no protection to a married woman where she is shown to have taken an active or willing part in the commission of a crime.<sup>4</sup>

And the rule has been applied though the place where the liquors were kept and sold was the wife's hotel and not a mere private dwelling house. *Com. v. Pratt*, 126 Mass. 462.

**1. Liability for Crimes Committed in Husband's Presence.** — Rather *v. State*, 1 Port. (Ala.) 138; *Hensly v. State*, 52 Ala. 10; *Com. v. Pratt*, 126 Mass. 462.

**2. Rather v. State**, 1 Port. (Ala.) 138.

**3. Husband's Liability for Crimes Committed Without His Knowledge.** — *State v. Baker*, 71 Mo. 475. See also *State v. Montgomery*, Cheves L. (S. Car.) 120.

**Selling Liquor Without License.** — Thus it has been held that the husband is not criminally liable for the acts of his wife in selling liquor without license when the sale is made in his absence and contrary to his express instructions. *State v. Baker*, 71 Mo. 475.

But where it appeared that a husband and wife lived together in a house, in one of the rooms of which the wife kept a store without a license, the husband was held liable to indictment therefor though he had nothing to do with the store, and was not present when the liquor was sold by the wife, and had remonstrated with her against such illegal traffic. *State v. McDaniel*, Houst. Crim. Cas. (Del.) 506.

**Wife's Libel.** — In *Mills v. State*, 18 Neb. 575, it was held that the husband cannot be made criminally liable for a letter containing libelous charges written by his wife, where it appears that he did not know of the libelous matter contained in the letter.

**Liability for Fine and Forfeiture Incurred by Wife.** — It has been held that the husband is liable in a *qui tam* action under statute in *New York* for a forfeiture incurred by the wife by retailing liquors without a license in his absence. *Hasbrouck v. Weaver*, 10 Johns. (N. Y.) 247. See also *Wayne County v. Keller*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 280.

And the principle has been held to be general, that where the penalty for the wife's act consists of a pecuniary forfeiture merely, the husband is liable with his wife, whatever the form of prosecution, and must be joined in the action and must be a party to the judgment. *Rather v. State*, 1 Port. (Ala.) 132. Compare *State v. Montgomery*, Cheves L. (S. Car.) 120.

But in *Rex v. Crofts*, 7 Mod. 398, it was held that where a married woman sold gin, contrary to a penal statute, the husband was not liable thereunder and need not be joined in a prosecution against her, the prosecution being for a pecuniary penalty, and in default of payment, corporal punishment.

**4. Criminal Liability of Married Women.** — *Rex v. Chedwick*, 1 Keb. 585; *Goldstein v. People*, 82 N. Y. 233; *State v. Montgomery*, Cheves L. (S. Car.) 120.

**Crimes Not Imputable to Married Women — Wrongfully Exercising Trade.** — In *Reg. v. Atkinson*, 2 Ld. Raym. 1248, Holt, C. J., said that "baron and feme could not be indicted for exercising a trade, not being qualified, because it is the exercise of the husband. If the wife be qualified that qualifies the husband, but still it is the exercise of the husband."

**Murder of Apprentice by Failure to Provide Food.** — Where a man and his wife were indicted for the murder of a boy who was bound as a parish apprentice to the husband, and it appeared that both prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment, but the surgeon who opened the body deposed that in his judgment the boy died from debility and not through the wounds, etc., which he received, it was held that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband. *Rex v. Squire*, cited in 1 Russ. on Crimes (9th ed.) 678.

And in *Rex v. Saunders*, 7 C. & P. 277, 32 E. C. L. 510, it was held that a married woman could not be convicted of the murder of her illegitimate child, three years old, by the omission to supply it with proper food, unless it should be shown that her husband supplied her with food to give to the child and that she wilfully neglected to give it.

**Permitting Use of Residence for Unlawful Gaming.** — In *Bell v. State*, 92 Ga. 49, it was held that when husband and wife reside together he is the head of the house, whether it be owned by or rented to one or the other, and that when both are present it is his duty, not hers, to prevent unlawful gaming therein; and in order to hold the wife liable criminally for permitting such gaming, it must appear affirmatively that she was active in the granting of permission, not merely that she was passive in the matter and took no measures to hinder or prevent the game.

**Keeping Tavern Open After Hours.** — In *Quebec v. Walsh*, 10 Quebec 23, it was held that a female defendant described in the complaint as M. W., wife of T. D., was, in the absence of proof to the contrary, presumed to be in the power of her husband, and would not be held responsible for keeping her tavern open after

**Joint Indictment with Husband.** — It follows that when both husband and wife are guilty of the offense charged, and coercion is shown not to exist, they may be jointly indicted and convicted.<sup>1</sup>

**Indictment Against Wife Alone.** — Or the wife may be indicted and convicted alone.<sup>2</sup>

**Effect of Coercion by Husband.** — But the matrimonial subjection of the wife to her husband exonerates her, as a general rule, for crimes committed by his coercion.<sup>3</sup> And after the fact of coercion in giving assistance to the husband has been established, the mere fact that the wife may be the more active in consummating the offense will not, as a matter of law, render her guilty.<sup>4</sup>

**Presumption of Coercion from Husband's Presence.** — Where a crime is committed by a wife in the presence of her husband, the presumption of law is that she acted under his coercion.<sup>5</sup> But in order to make out the defense that she was acting under the coercion or control of her husband, it must appear that he was present at the time.<sup>6</sup> If the wife does a criminal act in the absence of

hours unless it appeared that she was separated from her husband's bed and board.

**Wife as Accessory After Fact.** — By the common law the wife might harbor the husband without incurring liability as an accessory. *Reg. v. Manning*, 2 C. & K. 903, 61 E. C. L. 903. See also the title *ACCESSORY*, vol. 1, p. 268.

1. **Joint Indictment with Husband.** — *Com. v. Murphy*, 2 Gray (Mass.) 510; *Com. v. Tryon*, 99 Mass. 442; *Goldstein v. People*, 82 N. Y. 233; *State v. Potter*, 42 Vt. 495.

2. *Rex v. Crofts*, 7 Mod. 397; *Com. v. Lewis*, 1 Met. (Mass.) 153.

3. **Effect of Coercion by Husband.** — *State v. Nelson*, 20 Me. 336; *State v. Parkerson*, 1 Strobb. L. (S. Car.) 170. See also *Martin v. Com.*, 1 Mass. 347.

**Whether Exception Exists in Cases of Treason, Murder, and Robbery.** — It has been said that to this general rule an exception exists in cases of treason, murder, and robbery. 1 Hawk. P. C., c. 1, § 11. See also *Com. v. Neal*, 10 Mass. 152, 6 Am. Dec. 105.

But it would seem to be the better view that no exception to the general rule exists in the case of robbery. See *Rex v. Knight*, 1 C. & P. 116, note, 11 E. C. L. 336, note; *Reg. v. Buncombe*, 1 Cox C. C. 183; *Reg. v. Dykes*, 15 Cox C. C. 771; *People v. Wright*, 38 Mich. 744, 31 Am. Rep. 331; *Miller v. State*, 25 Wis. 384.

And an exception in the case even of treason and murder has been denied. 1 Russ. on Crimes (9th Am. ed.) 33.

4. *State v. Houston*, 29 S. Car. 108.

5. **Presumption of Coercion from Husband's Presence.** — *Rex v. Price*, 8 C. & P. 19, 34 E. C. L. 277; *Reg. v. Laugher*, 2 C. & K. 225, 61 E. C. L. 225; *Com. v. Eagan*, 103 Mass. 71; *State v. Williams*, 65 N. Car. 398; *Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559; *Tabler v. State*, 34 Ohio St. 127; *State v. Boyle*, 13 R. I. 537; *Uhl v. Com.*, 6 Gratt. (Va.) 706.

**Under Statute in Arkansas providing that married women acting under the threats, commands, or coercion of their husbands shall not be found guilty of any crime or misdemeanor if it appears from all the facts and circumstances of the case that violence, threats, commands, or coercion were used.** It has been held that the coercion of the husband must be made to appear from all the facts and circumstances,

and is not to be presumed merely from his presence. *Freel v. State*, 21 Ark. 212; *Edwards v. State*, 27 Ark. 493.

**Under the Penal Code of Georgia it has been held that a wife is not excused by the mere presence of her husband for any criminal act done voluntarily by her, and in order for her to stand excused it must appear that "violent threats, command, and coercion were used"** by him. *Bell v. State*, 92 Ga. 49.

**Application of Rule in Case of Treason, Murder, and Robbery.** — It seems that the doctrine of presumption of coercion from the husband's presence does not apply to any case of treason, murder, or robbery, on account of the heinous and aggravated nature of these offenses. *Reg. v. Manning*, 2 C. & K. 887, 61 E. C. L. 887; *Rex v. Knight*, 1 C. & P. 116, note, 11 E. C. L. 336, note; *Reg. v. Cruise*, 8 C. & P. 541, 34 E. C. L. 522, 2 Moody 53; *Reg. v. Torpey*, 12 Cox C. C. 45; *Bibb v. State*, 94 Ala. 32; *State v. Barnes*, 48 La. Ann. 460; *Miller v. State*, 25 Wis. 385.

**Offenses in Which Wife Is Presumed to Be Principal Agent.** — Nor does the rule apply in case of certain offenses where the wife is presumed to be the principal agent, as in the case of the offense of keeping a bawdy house. 1 Hawk. P. C., c. 1, § 12; *Com. v. Lewis*, 1 Met. (Mass.) 151; *Com. v. Cheney*, 114 Mass. 281; *Com. v. Hopkins*, 133 Mass. 381, 43 Am. Rep. 527. See also the title *DISORDERLY HOUSES*, vol. 9, p. 531.

**Perjury.** — Under statute in *Massachusetts* it has been intimated that where a wife testifies in open court in behalf of her husband, and in his presence, and commits perjury, the rule that there is a presumption of coercion does not apply. *Com. v. Moore*, 162 Mass. 441. See also *Smith v. Meyers*, 54 Neb. 11.

**Proof of Marriage.** — Where an indictment is brought against a woman as a single person, it is necessary that the fact of coverture be established in order that the rule of presumption of coercion may operate. *Rex v. Hassall*, 2 C. & P. 434, 12 E. C. L. 207; *Reg. v. Woodward*, 8 C. & P. 561, 34 E. C. L. 524; *Davis v. State*, 15 Ohio 82, 45 Am. Dec. 559. As to what proof of marriage will be sufficient in such cases, see the title *MARRIAGE*.

6. **Presence of Husband Essential to Constitute Coercion.** — *Com. v. Butler*, 1 Allen (Mass.) 4;



her husband, even in obedience to his order, her coverture will be no defense.<sup>1</sup> But to establish the fact of his presence it does not seem to be necessary to show that the act was done literally in his sight. It is sufficient if he was near enough for her to be under his immediate control or influence.<sup>2</sup>

**Conclusiveness of Presumption.** — The presumption of coercion from the presence of the husband is *prima facie* only, subject to be controlled by evidence that the wife acted voluntarily and not by compulsion.<sup>3</sup>

**3. Crimes Committed by One Spouse Against Other.** — On the principle of the unity of husband and wife, certain offenses, such as larceny and arson, could not at common law be committed by one spouse against the other.<sup>4</sup> But this principle does not operate in the case of other crimes, such as assault and battery, or manslaughter, and these crimes may be committed by one spouse against the other.<sup>5</sup>

**For a Full Discussion** of this question as applied to the specific offenses, reference should be made to other portions of this work dealing with such offenses.

**HUSBAND OF A SHIP.** — See *SHIP'S HUSBAND* and references there given.

**HUSBANDRY.** — Husbandry is defined to mean the business of a farmer, comprehending the various branches of agriculture.<sup>6</sup>

Com. v. Roberts, 132 Mass. 267. Compare Rex v. Knight, 1 C. & P. 116 note, 11 E. C. L. 336 note.

**1. Criminal Act by Husband's Order.** — Rex v. Morris, R. & R. C. C. 270; Rex v. Hughes, cited in 1 Russ. on Crimes (9th Am. ed.) 40; Com. v. Murphy, 2 Gray (Mass.) 510; Com. v. Feeney, 13 Allen (Mass.) 560; Martin v. Com., 1 Mass. 347; Com. v. Trimmer, 1 Mass. 476; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; Seiler v. People, 77 N. Y. 413; State v. Collins, 1 McCord L. (S. Car.) 355; State v. Potter, 42 Vt. 495; Uhl v. Com., 6 Gratt. (Va.) 706.

**2. Proximity Requisite to Constitute Presence.** — Thus if the husband was near enough for the wife to be under his immediate influence and control, if not at the very spot or in the same room, he is not absent within the meaning of the law. Conolly's Case, 2 Lewin C. C. 229; State v. Fertig, 98 Iowa 139; Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Flaherty, 140 Mass. 454.

Or if the husband is on the premises and near at hand, his momentary absence from the room or momentary turning of his back may still leave the wife under his influence. Com. v. Welch, 97 Mass. 593; Com. v. Munsey, 112 Mass. 287. Compare State v. Shee, 13 R. I. 535.

But it has been held to be error to instruct the jury that if the husband was on the premises and in the house this would be sufficient presence to raise the presumption of coercion. Com. v. Daley, 148 Mass. 13.

**3. Conclusiveness of Presumption from Husband's Presence** — *England.* — Reg. v. Torpey, 12 Cox C. C. 45; Rex v. Dicks, cited in 1 Russ. on Crimes (9th Am. ed.) 35; Reg. v. Pollard, cited in 1 Russ. on Crimes (9th Am. ed.) 41. See also Brown v. Atty.-Gen., 77 L. T. N. S. 414. Compare Rex v. Knight, 1 C. & P. 116, note, 11 E. C. L. 336, note.

*United States.* — U. S. v. Terry, 42 Fed. Rep. 317.

*Maine.* — State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422; State v. Nelson, 29 Me. 337.

*Maryland.* — Nolan v. Traber, 49 Md. 460, 33 Am. Rep. 277.

*Michigan.* — People v. Wright, 38 Mich. 744, 31 Am. Rep. 331.

*Missouri.* — State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414; Smith v. Schoene, 67 Mo. App. 604.

*New York.* — Wagener v. Bill, 19 Barb. (N. Y.) 321; Seiler v. People, 77 N. Y. 413; Goldstein v. People, 82 N. Y. 231; People v. Ryland, 97 N. Y. 126.

*North Carolina.* — State v. Williams, 65 N. Car. 398.

*Ohio.* — Tabler v. State, 34 Ohio St. 127.

*Rhode Island.* — State v. Shee, 13 R. I. 535.

*South Carolina.* — State v. Parkerson, 1 Strobb, L. (S. Car.) 169.

*Virginia.* — Uhl v. Com., 6 Gratt. (Va.) 706.

*Wisconsin.* — Miller v. State, 25 Wis. 384.

It has been held, upon an indictment against a married woman for the unlawful selling of intoxicating liquors, that where the evidence was that the husband was in an adjoining room, sick upon his bed, and that the door between the shop and the room was open, there was no conclusive presumption of law that the wife was acting under the immediate influence and control of her husband. Com. v. Gormley, 133 Mass. 580.

**Proof of Husband's Disapproval Unnecessary.** — But where it is shown in the rebuttal of the presumption of coercion that the wife committed the offense willingly, without any participation on the part of the husband, it will not be necessary to go further and prove that the husband actually disapproved of the commission of the offense. State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414.

**4.** See the title ARSON, vol. 2, p. 934. And see the title LARCENY.

**5.** See the title ASSAULT AND BATTERY, vol. 2, p. 964. And see the title MURDER AND MANSLAUGHTER.

**6. Implements of Husbandry.** — Slade's Estate, 122 Cal. 434. This case was upon the construction of an exemption from execution of the implements of *husbandry*. See generally the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 122.

A steam engine used exclusively for work-



**HUSH MONEY.**—See BLACKMAIL, vol. 4, p. 577, and the titles EXTORTION, vol. 12, p. 576; LIBEL AND SLANDER; THREATS AND THREATENING LETTERS.

**HYDRAULIC MINING.** (See also the title MINES AND MINING CLAIMS.)—Hydraulic mining is defined to be mining by means of the application of water, under pressure, through a nozzle, against a natural bank.<sup>1</sup>

**HYGEIA.**—See note 2.

**HYPNOTISM.** (See generally the titles SPIRITUALISM; TESTAMENTARY CAPACITY; UNDUE INFLUENCE.)—An abnormal mental condition characterized by insensibility to most impressions of sense, with excessive sensibility to some impressions, and an appearance of total unconsciousness; especially, that variety which is artificially induced, usually by concentrating the attention of the subject upon some object of vision, as a bright bit of glass, or upon the operator, who generally aids in producing the result by making a few slight passes with his hands. When in this condition, the mental action and the volition of the subject are to a large extent under the control of the operator.<sup>2</sup>

**HYPOTHECARY ACTION.**—A hypothecary action is a real action which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt.<sup>3</sup>

**HYPOTHECATE, HYPOTHECATION.** (See also the titles BOTTOMRY AND RESPONDENTIA, vol. 4, p. 736; MARITIME LIENS; MASTERS OF VESSELS; MORTGAGES; PLEDGE AND COLLATERAL SECURITY.)—Hypothecation, when applied to maritime transactions, is perhaps about the same as bottomry or respondentia, though it is usually predicated of a loan by the master on the vessel, freight, or cargo, made in order to raise money for the necessities of the voyage. In a more general sense, it is a pledge to secure any debt or engagement without a delivery or possession. It is often confounded with pledge or *pignus*.<sup>5</sup>

ing a threshing machine, though capable of being used for other purposes, when passing a turnpike gate at the same time as the machine, which belongs to the same owner, is exempt from toll as an implement of *husbandry*, under a statutory exemption of such implements. Reg. v. Maltby, 8 El. & Bl. 712, 92 E. C. L. 712.

**Agriculture.** (See also AGRICULTURE, vol. 2, p. 26.)—In Simons v. Lovell, 7 Heisk. (Tenn.) 516, it was said: "It [agriculture] is equivalent to *husbandry*, and *husbandry* Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces."

**Servant in Husbandry.**—A person employed to keep the general accounts of a farm, to weigh out food for cattle, to set the men at work, and to lend a hand at anything if wanted, a sort of bailiff or superintendent, is not a servant in *husbandry*, within the meaning of an act providing for a summary conviction of such for misconduct or misdemeanor in the execution of the contract of service. Davies v. Berwick, 3 El. & El. 549, 107 E. C. L. 549.

1. Jacob v. Day, 111 Cal. 575; Civ. Code Cal., § 1425.

2. Hygeia.—In holding that the word *Hygeia* might be used as a trademark the court said: "In the standard dictionaries the word *Hygeia* is uniformly used as a proper name, and not as an adjective. In Webster's

International Dictionary it is used solely as the name of the 'goddess of health,' while in the Century Dictionary it is used in this sense, and also as the name of one of the planetoids discovered in 1849." Hygeia Distilled Water Co. v. Hygeia Ice Co., 70 Conn. 534. See also the title TRADEMARKS.

3. Hypnotism.—Century Dict.

In People v. Ebanks, 117 Cal. 653, it was held that the expert testimony of a hypnotist was not admissible to prove that the defendant when under the influence of *hypnotism* had made statements to him denying his knowledge of the homicide of which he was charged; that from these statements the hypnotist was willing to testify that the defendant was not guilty.

**Hypnotism as Defense to Charge of Crime.**—In People v. Worthington, 105 Cal. 172, it was said: "Counsel offered testimony as to the effect of *hypnotism* upon those subject to such influence. The court ruled out the evidence, and, I think, rightly. There was no evidence which tended to show that the defendant was subject to the disease, if it be such. Merely showing that she was told to kill the deceased and that she did it does not prove *hypnotism*, or, at least, does not tend to establish a defense to a charge of murder."

4. Lovell v. Cragin, 136 U. S. 142.

5. White v. Cole, 24 Wend. (N. Y.) 129, in which case it was doubted whether the term applied to mortgages proper.

The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have

**HYPOTHESIS.** (See also the titles EVIDENCE, vol. 11, p. 484; EXPERT AND OPINION EVIDENCE, vol. 12, p. 459.) — See note 1.

**HYPOTHETICAL OPINION.** — See note 2.

**HYPOTHETICAL QUESTION.** — See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 459.

the debt paid out of the price." Pothier's definition, quoted in The Young Mechanic, 2 Curt. (U. S.) 404, and there adopted by Curtis, J., as "an accurate description of a maritime lien."

**Power to Hypothecate.** — Where an agent with power "to mortgage, *hypothecate*, or create a lien" on land of his principal borrowed money, for which he gave a note secured by a deed of trust the principal is liable upon the note, it being one transaction with the deed of trust, upon which alone judgment could have been obtained. Taylor v. Hudgins, 42 Tex. 244.

1. **Hypothesis.** — In Mudsill Min. Co. v. Watrous, 61 Fed. Rep. 171, it was said: "We shall again resort to the *hypothesis* as a means of testing the evidential value of facts tending to discover the instrumentality by which these samples were 'salted.' *Hypothesis*, to quote from Lindsay's translation of Ueberweg's Logic (section 134), 'is the preliminary admission of an uncertain premise, which states what is held to be a cause, in order to test it by its consequences. Every single consequence which has no material truth, and has been derived with formal correctness, proves the falsehood of the *hypothesis*. Every consequence which has material truth does not prove the truth of the *hypothesis*, but vindicates for it a growing probability which, in case of corroboration without exception, approaches to a position where the difference from complete certainty vanishes. The *hypothesis* is the more improbable in proportion as it must be propped up by artificial auxiliary *hypothesis*. It gains in probability by simplicity, and harmony or (partial) identity with other probable or certain presuppositions.' Subject to the conditions thus stated, the *hypothesis* has been of great value in the extraction of scientific truth, and, says Mr. Wharton, in his very scientific work upon Evidence, 'is of no less value in the extraction of juridical truth.' That author vindicates in a most satisfactory way the use of the *hypothesis*, and sums up his conclusion by saying that 'juridical conviction may be therefore defined to be the fitting of facts to *hypothesis*. If, in criminal issues, there is reasonable doubt whether the facts fit the *hypothesis* of guilt, then there must be an acquittal. In civil issues, when there are conflicting *hypotheses*, the judgment must be for that for which there is a preponderance of proof.' Whart. Ev., § 14." This case was upon a bill for the rescission of the

purchase of a mine on the ground that it was "salted."

**Misleading Charge.** — A charge to the jurors in a criminal case instructing them that they should acquit if they could account for the loss of the articles alleged to have been stolen by the defendant, on any *hypothesis* consistent with the defendant's innocence, was held to be misleading. The court said: "An *hypothesis* is a mere supposition. The jury cannot 'account' for the innocence of the accused by supposing that the pocket-book was left at the place where the railroad ticket was bought, or by supposing that some other person than the defendant took it. The facts proven must show that one or the other of these things actually occurred, and the verdict must be founded on these facts, and not on a supposition. This is not the effect and purport of the charge. It was, therefore, incorrect, and properly refused." Du Bois v. State, 50 Ala. 140, citing McAlpine v. State, 47 Ala. 78.

**Direct Evidence.** — Where the evidence was direct, the trial court refused to instruct that the *hypothesis* contended for by the prosecution must be established to an absolute moral certainty. The appellate court said: "A *hypothesis* is a supposition; a proposition or principle which is supposed or taken for granted, in order to draw a conclusion or inference for proof of the point in question; something not proved, but assumed for the purpose of argument. Webster's Dict. Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as a *hypothesis* in the theory of the prosecution, and an instruction based upon such a theory becomes irrelevant and immaterial. From these premises the conclusion is natural and irresistible that there was nothing in the case to warrant such an instruction, and therefore it was proper for the court to refuse it." People v. Gilbert, 60 Cal. 111.

And that the word *hypothesis* in a charge in a criminal case is of doubtful meaning, see Johnson v. State, 102 Ala. 1.

2. **Hypothetical Opinion.** (See also the title JURY AND JURY TRIAL.) — A statute declared that a *hypothetical opinion* should not disqualify a juror. The court said: "A *hypothetical opinion* is one 'founded on information supposed' (believed) 'to be true.'" People v. Welch, 49 Cal. 184.

# ICE.

BY LOMAX PITTMAN.

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### CROSS-REFERENCES.

*For the liability of a city to a person injured by slipping on ice and falling on its streets, see the titles HIGHWAYS, ante; MUNICIPAL CORPORATIONS; NEGLIGENCE.*

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BOUNDARIES, vol. 4, p. 756; DAMS, vol. 8, p. 699; LAKES AND PONDS; MILLS; NAVIGABLE WATERS; PUBLIC WATERS; RIPARIAN RIGHTS; RIVERS; WATERS AND WATERCOURSES.*

**I. SCOPE OF ARTICLE.** — As will be seen by a glance at the foregoing analysis, the treatment of this title is confined generally to the rights of property in ice; to the right to harvest ice on public waters, and its limitations; to the right to harvest ice on private waters; and to contract and conveyances generally between the harvester or his predecessor in title and mill owners or other persons as affecting his right to harvest ice on particular waters.

**II. AS PROPERTY** — **1. Scope of This Section.** — The nature of property in ice possessed by its owner, *i. e.*, whether realty or personalty, may, of course, become of controlling import in determining the various matters related to such property, chief among which may be mentioned, first, whether or not



the owner has made an unavoidable contract for its sale whereby the title to it passes, and second, whether it may be the subject of larceny. It often assumes the character of real or personal property according to the circumstances of the particular case in which the inquiry is made.

2. **When Unharvested** — *a. GENERAL RULE.* — The title to unharvested ice is in the owner or lessee of the water on which it forms.<sup>1</sup> His ownership of the water may result either from his title to the bed of the stream or pond which it covers,<sup>2</sup> or from the purchase from the owner of the soil of the exclusive right to gather ice forming on such water.<sup>3</sup>

*b. PASSES BY CONVEYANCE AS PART OF REALTY.* — Unless specially reserved, a conveyance of real estate carries with it, of course, the right to all ice thereafter forming on the land which in the absence of conveyance would have been the property of the grantor.<sup>4</sup> This is true in the case of a lease of land bordering on a stream, and extending to the centre thereof. The tenant is entitled as against the landlord and his assigns to the use of the ice forming on the stream on the side of his land.<sup>5</sup>

**Ice Which Has Already Formed on the Land Conveyed** may be regarded as attached to the soil, and like other accessions is a part of the realty; so that in the absence of a special reservation by the grantor, his title to it passes by the conveyance to the grantee.<sup>6</sup>

*c. ICE ALREADY FORMED MAY BE SOLD AS PERSONALTY.* — Any sale as a distinct commodity of ice already formed is to be regarded as a sale of personalty, whether in the water or out of the water.<sup>7</sup>

1. **Title to Ice Follows Title to Land or Water on Which It Is Formed** — *Illinois.* — *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

*Indiana.* — *State v. Pottmeyer*, 30 Ind. 287, 33 Ind. 402, 5 Am. Rep. 224; *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Julien v. Woodsmall*, 82 Ind. 568.

*Massachusetts.* — *Richards v. Gauffret*, 145 Mass. 486.

*Michigan.* — *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Clute v. Fisher*, 65 Mich. 48.

*New York.* — *Myer v. Whitaker*, (Supm. Ct.) 55 How. Pr. (N. Y.) 376.

*Canada.* — *McDonald v. Lake Simcoe Ice, etc., Co.*, 26 Ont. App. 411.

The grantee of land bounded on the east by low-water mark on the west side of a river takes no title to any part of the stream beyond such low-water mark, and has no right to cut ice from the river. *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51.

2. **Title to Ice Incident to Title to Land.** — *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Julien v. Woodsmall*, 82 Ind. 568; *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Clute v. Fisher*, 65 Mich. 48; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160.

**The Owner of the Fee Is Entitled to Ice as Against the Owner of an Easement to Overflow Such Land.** — *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Julien v. Woodsmall*, 82 Ind. 568; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Dodge v. Berry*, 26 Hun (N. Y.) 246; *Searle v. Gardner*, 22 W. N. C. (Pa.) 73. See also *infra*, this title, *Respective Rights of Mill Owner and Riparian Proprietors*.

3. See *infra*, this title, *Respective Rights of Mill Owner and Riparian Proprietors; Ice-producing Property Passing under Eminent Domain Proceedings*.

**What Lease Sufficient to Convey Ice Thereafter Forming on Pond.** — The owner of a pond leased to another the exclusive right to harvest from the pond "all such ice as can be so cut in form and shape to use either for private use or as merchandise," but reserved to himself the right to cut all ice needed for his own use. Such a lease was held not a mere revocable license, but a contract enabling the lessee to maintain an action against any one except the lessor who harvested ice from the pond. *Richards v. Gauffret*, 145 Mass. 486.

4. **Passes by Conveyance of Real Estate.** — This is simply another way of expressing the doctrine announced in the preceding subsection, viz., that in the absence of express contract the title to ice is in the owner, at the time of its formation, of the water or land on which it forms. See the cases cited in the first note to the last subsection.

5. **Tenant's Right Against Landlord.** — *Marsh v. McNider*, 88 Iowa 390, 45 Am. St. Rep. 240, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 853.

6. **Passes by Conveyance of Real Estate when Formed and Unharvested.** — *Higgins v. Kusterer*, 41 Mich. 325, 32 Am. Rep. 160.

7. *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160, the court, by Campbell, C. J., declaring that it would be unprofitable to determine such a case by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements, and applying the plain test that the character of ice as property should be determined by its uses, which are necessarily those of personalty.

**An Unexecuted License to Take Ice passes no title to the ice unharvested.** Such a license is

d. **DAMAGES FOR TAKING ICE FROM ANOTHER'S LAND.** — Different rules have been laid down for determining the measure of damages for the unlawful harvesting of ice upon the land of another. In one jurisdiction it has been laid down that the measure of damages for wrongful taking is the value of the ice as soon as it has been harvested and converted into a chattel.<sup>1</sup> In another jurisdiction, however, it has been held that the damages in such a case are to be measured merely by the damage done to the realty, and that the value of ice after having been harvested is an improper consideration in determining the question.<sup>2</sup>

3. **When Harvested.** — Ice, of course, when harvested becomes personal property.<sup>3</sup> When harvested by a tenant of a mortgagor from a pond on the mortgaged premises, and stored in a house thereon before foreclosure, such ice becomes the personal property of the tenant.<sup>4</sup>

**Passing by Deed to Land as Fixture.** — It has been held that ice in an icehouse on premises sold for the prosecution of a business for which ice is necessary passes as a fixture with the premises where the vendor fails expressly to reserve it or to arrange for its removal.<sup>5</sup>

4. **Right to Take Ice a Profit a Prendre.** — The right to take ice on another's land is a profit a *prendre* which may be so annexed to the dominant estate as to pass with it by a grant transferring the land with its appurtenances.<sup>6</sup>

**III. RIGHTS OF OWNERS OF LANDS BOUNDED BY WATERS** — 1. **Under Common-law Rules as to Navigable Waters.** — At common law those waters are navigable in which the tide ebbs and flows.<sup>7</sup> The proprietary rights of owners of lands bounded by watercourses in which the tide does not ebb and flow extend to the middle of the channel<sup>8</sup> and carry with them the right of property in ice formed upon the stream to the centre thereof.<sup>9</sup> This view is adopted in a few of the United States.<sup>10</sup>

effective only to the extent to which it is executed. *Balcom v. McQuesten*, 65 N. H. 81.

1. **Value of Ice After Conversion to Chattel — Measure of Damages.** — The rule is analogous to cases in which coal has been wrongfully taken from the soil of another. In an action of trespass against the taker of ice, the measure of damages is the value of the ice after it is made a chattel — that is, when scraped, ploughed, sawed, cut, and severed, ready for removal. *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

2. **Must Be Measured by Damage to Realty.** — *Van Rensselaer v. Mould*, 48 Hun (N. Y.) 396.

3. **Harvested Ice Personal Property.** — *Ward v. People*, 6 Hill (N. Y.) 144; *Gregory v. Rosenkrans*, 72 Wis. 220.

**Larceny.** — When put away in an icehouse for the purpose of use ice becomes personal property so as to be the subject of larceny. *Ward v. People*, 6 Hill (N. Y.) 144.

4. **Title of Tenant of Mortgagor to Ice Harvested Before Foreclosure.** — The mortgagee of land who becomes a purchaser on foreclosure is not entitled to ice cut by a lessee of the mortgagor before foreclosure, although the house in which it is stored, the land on which it was situated, and the pond from which the ice was cut were all sold under the mortgage. *Gregory v. Rosenkrans*, 72 Wis. 220.

5. **Ice in Ice-house Passing as Fixture.** — *Hill v. Mundy*, 89 Ky. 36. See also the title **FIXTURES**, vol. 13, p. 609 *et seq.*

6. **Huntington v. Asher**, 96 N. Y. 604, 48 Am. Rep. 652, *reversing* 26 Hun (N. Y.) 496. See the title **EASEMENTS**, vol. 10, p. 409.

7. See the titles **BOUNDARIES**, vol. 4, p. 756; **NAVIGABLE WATERS**.

8. See the titles **BOUNDARIES**, vol. 4, p. 756; **NAVIGABLE WATERS**.

9. See the next note *infra*.

10. **Ice on Nontidal Stream Belongs to Riparian Owner to Middle of Stream.** — In *Illinois* this doctrine as to the test of navigability was applied to the Mississippi river. Hence, since the public street of a town on the Mississippi river must extend to the centre of the river, the fee to such extension is in the town as trustee for the public, and the village authorities of such town may prevent a person from harvesting ice which may have formed on the extension of the street in the bed of the river. *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90.

**Michigan.** — In *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435, it was held that a riparian proprietor (the lessee for a term of years of a riparian owner on the Detroit river) who had erected icehouses on his leased land for the purposes of harvesting and dealing in ice could recover in an action of trespass against the defendant, who, prior to the execution of the lease, had obtained from the plaintiff's lessor a parol license to erect a boom near the shore on the river front of the premises and to use such boom for the purpose of keeping and securing sawlogs therein until the plaintiff's lessor should desire to use the river front for other purposes, or should lease the premises, and who after the lease continued to occupy the water for such purposes on the plaintiff's side of the stream. And see *Oliver v. Olmstead*, 112 Mich. 483, in which the above case was cited with approval, and in which it was



**2. Where Streams Navigable in Fact Are Considered Navigable.** — In most of the United States, the legal test to determine the navigability of a stream is its actual navigability — not the ebb and flow of the tide therein.<sup>1</sup> Of the states so holding, the only ones in which cases have arisen involving the right of the general public to take ice from large navigable rivers are *Kansas* and *Missouri*. In both the ice belongs to the first appropriator.<sup>2</sup>

**3. Lands Bounded by Nonnavigable Waters.** — The bed of an unnavigable fresh-water stream, pond, or lake is the subject of private ownership, and the owners of such bed have the exclusive right to harvest the ice forming thereon.<sup>3</sup> The same person may own the land on both sides of the stream or on all sides of the lake, in which case he is entitled to all ice forming on the water covering his land.<sup>4</sup> As has been seen, these doctrines are applied in a

held that the right to cut and remove ice from a river might be leased by a riparian owner, and that the lessee might enjoin or maintain an action at law against a subsequent purchaser of the land with notice for harvesting ice. This action failed on a point apart from this consideration. Whether or not the particular river was navigable in fact does not appear, but under the rule as prevailing in this state as laid down in the case of *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435, that is an immaterial consideration. See also *Grand Rapids Ice, etc., Co. v. South Grand Rapids Ice, etc., Co.*, 102 Mich. 227.

**Applicable to Inland Lakes as Well as Rivers.** — The doctrine that the ownership of land bounded by navigable fresh-water streams is not restricted to the meander line applies by analogy to inland lakes; hence the owner of a fractional subdivision of land made so by an inland lake, even though navigable, owns the soil under the water of the lake, which would be included within the subdivision if the lines were fully extended, and may maintain trespass against any one cutting ice formed over such soil without his consent. *Clute v. Fisher*, 65 Mich. 48.

**Wisconsin.** — In *Reysen v. Roate*, 92 Wis. 543, the court, following the same doctrine, observed: "It is settled in this state that the title to the bed of a stream is in the riparian owners, whether the stream be navigable or not. *Olson v. Merrill*, 42 Wis. 203. Ice which forms on streams or ponds the bed of which is the subject of private ownership belongs to the owner of such bed, and such owner may maintain trespass for its removal. *Gould on Waters*, § 191, and authorities cited; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902."

**New York — Question Undecided.** — Although, as regulating boundaries, the doctrine prevailing in New York is similar to that prevailing in the above states, yet in *Van Rensselaer v. Mould*, 48 Hun (N. Y.) 396, the court expressly left undetermined the question whether ice formed on a navigable stream like the Hudson river could be considered property in the sense that the owner of the land under the water can appropriate it to his own use to the exclusion of others.

**New York Statute.** — There is, however, a state statute providing that the owner of land on the Hudson river shall have the exclusive right to gather the ice formed on the river adjacent to his land after performing certain acts of appropriation. *Slingerland v. Inter-*

*national Contracting Co.*, 43 N. Y. App. Div. 215. See 1 Laws N. Y. 1895, c. 953, p. 882.

1. See the title *NAVIGABLE WATERS*.

**2. Ice in Streams Navigable in Fact Belongs to First Appropriator** — *Kansas*. — *Wood v. Fowler*, 26 Kan. 682.

*Missouri*. — *Hickey v. Hazard*, 3 Mo. App. 480. In this case a person had surveyed, marked, and staked off ice on the Mississippi river and had expended money for its preservation. It was held that he thereby acquired such possession as would support an action of trespass.

**3. Exclusive Right of Owners of Bed to Harvest Ice on Unnavigable Stream** — *Indiana*. — *Julien v. Woodsmall*, 82 Ind. 568; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580.

*Iowa*. — *Gehlen v. Knorr*, 101 Iowa 700; *Marsh v. McNider*, 88 Iowa 390, 45 Am. St. Rep. 240.

*Maine*. — *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813.

*Michigan*. — *Hoag v. Place*, 93 Mich. 450; *Clute v. Fisher*, 65 Mich. 48; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902.

*New York*. — *Myer v. Whitaker*, (Supm. Ct.) 55 How. Pr. (N. Y.) 376; *Dodge v. Berry*, 26 Hun (N. Y.) 246.

*Pennsylvania*. — *Searle v. Gardner*, 22 W. N. C. (Pa.) 73, (Pa. 1888) 13 Atl. Rep. 835.

*Wisconsin*. — *Reysen v. Roate*, 92 Wis. 543.

**Title to Bed of Lake or Pond Like That to Bed of River.** — The presumption is that lands under the waters of inland nonnavigable ponds and lakes belong to the proprietors of the adjoining lands, and the same rule applies in the legal construction of grants of land bounded on them as is applied to conveyances bounded on fresh-water streams. *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669.

**A Riparian Owner Is Entitled Not Only to the Exclusive Right to Harvest Ice, but to the Ice Itself.** — *Hoag v. Place*, 93 Mich. 450.

**4. Where Riparian Owner Owns Entire Bed — Property in Ice Forming Thereon.** — *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Myer v. Whitaker*, (Supm. Ct.) 55 How. Pr. (N. Y.) 376. See *infra*, this title, *Respective Rights of Mill Owner and Riparian Proprietors*.

*Contra.* — But see *Marshall v. Peters*,



few states to *de facto* navigable streams which are not navigable according to the common-law rule requiring ebb and flow of the tide to make a stream navigable.<sup>1</sup>

**Where Title of Riparian Owner Does Not Extend to Bed.** — If the deed under which a riparian owner holds expressly fixes his boundary at the water's edge he takes no title to any part of the bed of the water and has no right to harvest ice thereon;<sup>2</sup> or if the bed of the unnavigable stream has never passed from the general government, any appropriator is entitled to the ice formed thereon who can obtain it without trespassing on the lands of riparian owners.<sup>3</sup>

**4. Harvesting Ice as Affecting Rights of Other Riparian Owners.** — The owner of land covered by water is entitled to gather ice therefrom for all purposes so far as such purposes are reasonable and do not affect the rights of others on the stream.<sup>4</sup>

**Temporarily Damming Up Stream to Make Ice Pond.** — Ponds on unnavigable streams from which ice may be taken in the winter season may be made by riparian owners to collect and retain the water to a reasonable extent.<sup>5</sup>

**Pollution of Stream by Upper Riparian Owner.** — The right of a riparian owner to have the stream which bounds or goes through his land flow in its natural state regards the quality as well as the quantity of water, and a lower riparian owner may maintain an action for damages against<sup>6</sup> persons above him or restrain them from polluting such stream to the injury of the ice which he is entitled to gather therefrom.<sup>7</sup>

**Owners of Land under Navigable Water.** — The grantee of lands under navigable water in front of his uplands cannot restrain the grantee of similar adjoining lands under water from erecting thereon dikes which will prevent the first-mentioned grantee from taking ice across them to his own premises.<sup>8</sup>

(Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 218, in which case it was held that the water in a running stream can never become the absolute property of a riparian proprietor, even though he owns both banks and the stream passes wholly through his lands; that all the property that he can acquire in flowing water is a right to its use; that the ice forming on the waters is not his absolute property so that he can sell or dispose of it as he could the trees and timber or the earth and minerals on his farm. See *infra*, this section, *Harvesting Ice as Affecting Rights of Other Riparian Owners*.

**It Is an Indictable Offense to Take Ice Without the Consent of the Owner of Land over Which It Is Found.** — *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224.

1. See *supra*, this section, *Under Common-law Rules as to Navigable Waters*.

2. **Where Land Is Described as Bounded by Low-water Mark the Grantee Cannot Cut Ice.** — *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51.

**Effect of Reservation of Use of Lands under Water.** — A reservation in a grant of land of "the right or use of the land adjoining the pond over which the waters may flow now or hereafter" gives to the grantor the possession of such lands when covered by the waters of the pond up to high-water mark, and enables him to maintain trespass against any one cutting ice on the overflowed lands at any time. *Swan v. Goff*, 39 N. Y. App. Div. 95.

3. **Where Title to Bed of Unnavigable River in General Government.** — *Brown v. Cunningham*, 21 L. ed. 2d 300, 40 Gr. 27, 100 U. S. 108.

**When Navigable River Declared Not Navigable, Riparian Proprietor's Boundaries Not Extended.** — The plaintiff owned land under patents from

the government which bounded the land by meandering lines, following the banks of a river. When the patents were issued the river was regarded as navigable, but afterwards Congress declared the river unnavigable. In an action against a person taking ice from the middle of the stream, the court held that the Act of Congress did not have the effect to extend the plaintiff's boundary to the middle of the stream, and hence that he could not recover the value of ice taken from the stream by the defendant. *Serrin v. Grefe*, 67 Iowa 144.

4. *Marsh v. McNider*, 88 Iowa 390, 45 Am. St. Rep. 240.

5. **Temporary Detention of Water for Pond.** — The detention of a nonnavigable stream for two or three days while a pond is filling in order that ice may be formed thereon is not an unreasonable detention which will constitute an actionable injury to the lower proprietors. *Gehlen v. Knorr*, 101 Iowa 700.

The using of a stream to harvest ice is a reasonable use. The riparian owner may dam the stream and make a pond for ice, and may drain it and hold back the waters for a reasonable time so as to cleanse the pond in order that the ice may be pure. *De Baun v. Bean*, 29 Hun (N. Y.) 236.

6. See the title **WATERS AND WATERCOURSES**.

7. **Pollution of Stream Enjoined at Suit of Lower Riparian Owner.** — *Finger v. Kingston*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 175. See the titles **WATERS AND WATERCOURSES**.

8. **Inability of One Owner of Land under Navigable Water to Restrain Another from Erecting Dikes.** — *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, *affirming* 41 Hun (N. Y.) 458.

**IV. RIGHT OF PUBLIC TO HARVEST ICE ON PUBLIC WATERS — 1. "Great Ponds" in the New England States.** — Under the laws of some of the New England States — for instance, *Maine*, *New Hampshire*, and *Massachusetts* — "great ponds" <sup>1</sup> are public property, the right of reasonably using and enjoying which is common to all; hence the privilege of harvesting ice upon such ponds for use or for sale is a common right which may be exercised by any citizen who can obtain access to such public bodies of water without trespassing upon the lands of other persons. <sup>2</sup> The sole advantages, therefore, which a person whose lands are bounded by such waters may have over others not so situated may in general be said to be limited to his ability to harvest ice without trespassing, and his right to erect stagings and platforms in front of his lot for use in filling his icehouses. <sup>3</sup> The title of the state in these ponds, and the consequent right of the public to harvest ice thereon, do not exist above low-water mark. The right to harvest ice forming between high-water and low-water marks belongs, therefore, exclusively to the property owner whose land the water may cover. <sup>4</sup>

The Remedy for an Unreasonable or Excessive Use of the Liberty of Ice Harvesting is by indictment. <sup>5</sup>

**What Constitutes Appropriation of Ice on Great Ponds.** — So long as it remains uncut, ice upon great ponds constitutes a part of the realty, <sup>6</sup> but any person, by appropriating and securing such ice in the exercise of the general public right, may acquire title to the portion so appropriated. What acts amount to a sufficient appropriation depends upon the facts of the case, <sup>7</sup> in the absence of

1. See the title *LAKES AND PONDS*; also the title *FISH AND FISHERIES*, vol. 13, p. 572.

2. **Right of Public to Harvest Ice on "Great Ponds"** — *Maine*. — *Brastow v. Rockport Ice Co.*, 77 Me. 100; *Barrett v. Rockport Ice Co.*, 84 Me. 155; *McFadden v. Haynes, etc.*, *Ice Co.*, 86 Me. 319.

*Massachusetts*. — *People's Ice Co. v. Davenport*, 149 Mass. 322, 14 Am. St. Rep. 425; *Tudor v. Cambridge Water Works*, 1 Allen (Mass.) 164; *Gage v. Steinkrauss*, 131 Mass. 222; *Rowell v. Doyle*, 131 Mass. 474; *Hittinger v. Eames*, 121 Mass. 539; *Slater v. Gunn*, 170 Mass. 509; *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Paine v. Woods*, 108 Mass. 160; *Fay v. Salem, etc., Aqueduct Co.*, 111 Mass. 27; *Com. v. Vincent*, 108 Mass. 441; *Rockport v. Webster*, (Mass. 1899) 54 N. E. Rep. 852.

*New Hampshire*. — *Concord Mfg. Co. v. Robertson*, 66 N. H. 1.

**Reasonable Use of Pond for Ice Harvesting.** — The total quantity of ice that may be taken by all persons from a "great pond" is, as to the owners of a mill on a stream flowing from the pond, limited to what will constitute a reasonable use of the pond, which is the extent of the water right attached to the soil and vested in the owner of the basin through which the water flows. *Concord Mfg. Co. v. Robertson*, 66 N. H. 1.

**Ponds Containing More than Ten Acres Public.** — In *Maine* and *Massachusetts* all ponds containing more than ten acres are public ponds, and the right to cut ice upon them is a public right free to all. *Brastow v. Rockport Ice Co.*, 77 Me. 100; *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158.

**A Person Whose Land Borders on a Great Pond Can Convey No Ice Privileges Therein.** — *Gage v. Steinkrauss*, 131 Mass. 222.

**Massachusetts Statutes Do Not Interfere with**

**Rights of Public in Ice on Great Ponds.** — Neither Gen. Stat. Mass., c. 61, § 1, authorizing the forming of corporations for the purpose of harvesting and selling ice, nor Gen. Stat. Mass., c. 161, § 73, punishing malicious injuries to "any ice upon any waters within this state, from which ice is or may be taken as an article of merchandise, whereby the taking thereof is hindered or the value thereof diminished for that purpose," restricted in any degree the common right of the public to the ice on great ponds, or conferred peculiar rights upon any corporations or individuals in respect thereto. *Hittinger v. Eames*, 121 Mass. 539.

**3. Right of Littoral Proprietor to Erect Stagings for Harvesting Ice.** — *Concord Mfg. Co. v. Robertson*, 66 N. H. 1.

**Statute Creating Great Ponds Does Not Give Right to Trespass.** — *Slater v. Gunn*, 170 Mass. 509.

**4. Right of Public to Harvest Ice Does Not Extend Above Low-water Mark.** — *McFadden v. Haynes, etc.*, *Ice Co.*, 86 Me. 319. See also *Fay v. Salem, etc., Aqueduct Co.*, 111 Mass. 27; *Paine v. Woods*, 108 Mass. 170.

**5. Remedy by Indictment for Unreasonable Harvesting of Ice.** — *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Hittinger v. Eames*, 121 Mass. 539.

**Bill in Equity.** — If a person has acquired title to a portion of the land under a great pond and to the right of cutting ice above such portion, an injury to his rights in the pond constitutes a nuisance and entitles him to relief in equity. *Tudor v. Cambridge Water Works*, 1 Allen (Mass.) 164. In this case the plaintiff's title was admitted by demurrer. As to the actual state of his title, see *Hittinger v. Eames*, 121 Mass. 539.

**6. People's Ice Co. v. Davenport, 149 Mass. 324, 14 Am. St. Rep. 425.**

**7. Insufficient Acts of Appropriation.** — It has



special legislation.<sup>1</sup>

**2. Canals in Illinois and Indiana.**—In Illinois and Indiana the states acquired the fee simple to the lands appropriated, respectively, for the Illinois and Michigan canal and for the Wabash and Erie canal; hence the right to harvest ice on such canals is a public right, subject only to the ability of the citizen to obtain access to such canals without trespassing upon the lands of other persons.<sup>2</sup> In the latter state it was held that ice forming on a large pond produced by the canal company in the exercise of the right to overflow belongs to the owner of the land on which it is formed.<sup>3</sup>

**V. RECOVERY OF DAMAGES FOR CONFISCATION OR DESTRUCTION OF ICE CROP.**—Where an ice crop belonging to one person is taken or destroyed by another, the former may maintain trespass for such removal<sup>4</sup> or an action sounding in damages for such destruction.<sup>5</sup>

**What Amounts to Appropriation of Ice on Public Waters.**—Since ice on public waters belongs to the first appropriator,<sup>6</sup> the right to maintain an action against one who destroys or removes ice from such waters depends on the sufficiency of previous acts of appropriation by the plaintiff. Upon this question the decisions are inharmonious. The result of some of the cases is that a person may acquire property in the ice on a public stream, provided the part taken is reasonable in extent and in all other respects, by indicating the portion appropriated and by expending money in operations preliminary to the actual harvesting or in measures looking to the proper preservation and disposal of the harvested ice.<sup>7</sup> Other authorities, holding that marking out on public waters the portion of ice designed to be cut and making preparations to cut the same gives no right of property, would appear to indicate that actual harvesting is necessary to defeat the right of the public in ice on public waters.<sup>8</sup>

**Measure of Damages.**—In an action to recover damages for the confiscation of a crop of ice, the measure of damages is the value of the ice after its conversion into a chattel.<sup>9</sup> Where, however, the action is one to recover damages

been held that a person cannot acquire title to the ice on a great pond by staking off a portion thereof, *Barrett v. Rockport Ice Co.*, 84 Me. 155; or by scraping the snow therefrom, *Rowell v. Doyle*, 131 Mass. 474; or by both, *People's Ice Co. v. Davenport*, 149 Mass. 324, 14 Am. St. Rep. 425.

1. In *Barrett v. Rockport Ice Co.*, 84 Me. 155, the court pointed out that "the legislature may regulate the essential acts of possession which shall constitute a legal appropriation of a given quantity of the ice," as in the case of fisheries. See the title FISH AND FISHERIES, vol. 13, pp. 567, 572.

2. **Right to Harvest Ice on Canals.**—*Card v. McCaleb*, 69 Ill. 314; *Water Works Co. v. Burkhart*, 41 Ind. 364, overruling *Edgerton v. Huff*, 26 Ind. 35; *Cromie v. Wabash, etc., Canal*, 71 Ind. 208. See also the title CANALS, vol. 5, p. 116.

3. **Ice Formed on Pond Made by Overflow from Canal—Ownership in Owner of Soil.**—*Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580.

4. **Right of Owner of Ice to Maintain Trespass for Removal.**—*Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Clute v. Fisher*, 65 Mich. 48; *Hickey v. Hazard*, 3 Mo. App. 480.

5. **Right of Owner of Ice to Maintain Action for Destruction.**—*Stauffer v. Miller Soap Co.*, 151 Pa. St. 330; *People's Ice Co. v. The Steamer Excelsior*, 43 Mich. 336, 44 Mich. 229, 38 Am. Rep. 246.

6. *Wood v. Fowler*, 26 Kan. 682; *Barrett v. Rockport Ice Co.*, 84 Me. 155.

7. **Appropriation Sufficient to Authorize Maintenance of Action for Destruction or Confiscation.**—*Brown v. Cunningham*, 82 Iowa 512; *Woodwan v. Pitman*, 79 Me. 465, 1 Am. St. Rep. 342 (*dictum*); *Hickey v. Hazard*, 3 Mo. App. 480.

A person who has surveyed, marked, and staked off ice, previously unappropriated, upon public waters; and has expended money to preserve it and make it valuable for use and as a commercial commodity, has a possession sufficient to support an action for trespass, *Hickey v. Hazard*, 3 Mo. App. 480.

8. See *supra*, this title, *Right of Public to Harvest Ice on Public Waters*—"Great Ponds" in the New England States.

In *People's Ice Co. v. Davenport*, 149 Mass. 322, 14 Am. St. Rep. 425, *Morton, C. J.*, said: "The case is not like one of capturing animals *fera natura*, or of taking possession of derelict property. It is more analogous to the case of a tenant in common attempting to take possession of a part of the common estate by staking it off and thus excluding his co-tenants."

9. **Measure of Damages Where Ice Crop Confiscated.**—Where a defendant appropriates unharvested ice belonging to another, the measure of damages for such wrongful taking is the value of the ice as soon as it is made a chattel—that is, when scraped, plowed, sawed, cut, and severed, ready for removal. The rule is analogous to that in cases where coal is wrongfully taken from the soil of



for the destruction of an immature crop of ice, it has been held that where there is no malice or wantonness on the part of the destroyer, actual compensation, taking into consideration all the circumstances of the particular case, is the proper measure.<sup>1</sup>

**VI. HARVESTING OF ICE AS INTERFERING WITH RIGHT OF TRAVEL OVER PUBLIC WATERS.** — Where waters are public highways, the public may exercise its right to travel over them when covered with ice, for its right to use such highways for the purpose of travel is not suspended in winter because the waters are impassable for boats.<sup>2</sup> But this right to travel is not paramount to the right to cut ice, and the exercise of each right must be had with a due consideration of the other; both the travelers and the ice gatherers are part-takers in a common right, and, being such, must exercise their right reasonably under all the circumstances of the case.<sup>3</sup>

**Criminal Prosecution for Obstruction of Travel.** — Such interference with the public right of passage along such public highway may be criminal, and a prosecution may be had therefor by indictment.<sup>4</sup>

**Civil Liability for Damage Inflicted.** — Since the public has a right to travel on the ice over a public river, any one who cuts a hole in such ice, in or near the

another. *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

**1. Actual Compensation Measure of Damages.** — Where there is no market for the ice at the time and place of destruction, the damage is the value of the ice in the nearest market, less the expense of harvesting and transportation and less the value of the ice which would be lost in handling and in such transportation; and to this end the defendant may show that the quality of the ice was inferior to that which brought a given price at such market, and that the cost of harvesting and housing it would have been greater than the amount claimed by the plaintiff. *Stauffer v. Miller Soap Co.*, 151 Pa. St. 330, 31 W. N. C. (Pa.) 13.

**Measure of Damages where Ice Wantonly Destroyed.** — Where the ice was wantonly destroyed, the measure of damages was held to be the value of so much as would probably have been saved for market, less the expense of storing it. When the full extent of the loss of ice can be estimated with reasonable correctness, in view of the uncertainty whether it would have reached maturity, the damages may be estimated accordingly, and need not be confined to the actual loss at the time of the destruction of the ice. *People's Ice Co. v. The Steamer Excelsior*, 44 Mich. 229, 38 Am. Rep. 246.

**2. Right of Public to Use Highways Covered with Ice for Public Travel.** — *State v. Wilson*, 42 Me. 9; *French v. Camp*, 18 Me. 433, 36 Am. Dec. 728; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342; *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Com. v. Christie*, 13 Pa. Co. Ct. 149; *Dinn v. Reg.*, 1 Has. & War. (P. E. Island) 361; *Cullerton v. Miller*, 26 Ont. 36.

He who appropriates to his use for ice fields a part of a public highway — *e. g.*, a part of the Penobscot river — should, after the ice has been cut into, so guard the tract occupied by him as not to be likely to expose to danger travelers who may innocently intrude thereon. *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342.

**3. Rights of Travelers and Ice Gatherers to Be**

**Exercised with Consideration for Opponent.** — *People's Ice Co. v. The Steamer Excelsior*, 44 Mich. 229, 38 Am. Rep. 246; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342.

**The Right of Navigation Being Paramount to the right to gather ice and to other private uses of navigable streams, no action lies for an incidental and necessary destruction of ice by the exercise of the right of navigation.** *McDonald v. Lake Simcoe Ice, etc., Co.*, 29 Ont. 247, *reversed* on the facts, 26 Ont. App. 411. *Aliter*, when the destruction is unnecessary and wanton. *People's Ice Co. v. The Steamer Excelsior*, 44 Mich. 229, 38 Am. Rep. 246, 43 Mich. 336.

**Where Destruction of Ice Unnecessary for Navigation.** — The plaintiff was the owner of a lot bounded by the edge of a lake, and also the owner of an adjoining lot covered by the waters of the same lake. He being entitled to the ice which formed on the water lot, and having the right to cut and make use of it for his profit, and no person being entitled to cut it except in the *bona fide* exercise of the public easement of navigation, the defendants were not, by cutting channels through it in which to float to the shore blocks of ice cut by them beyond the limits of the plaintiff's water lot, exercising that easement. *McDonald v. Lake Simcoe Ice, etc., Storage Co.*, 26 Ont. App. 411, *reversing* 29 Ont. 247.

**The Obstruction of a Navigable Water Way for the purpose of excluding salt water from a pond used for ice harvesting is a public nuisance, in the absence of the proper legal authority for creating the obstruction.** *Dyer v. Curtis*, 72 Me. 181.

**4. Such Obstruction Prosecuted by Indictment.** — *State v. Wilson*, 42 Me. 9; *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Dinn v. Reg.*, 1 Has. & War. (P. E. Island) 361.

In *Com. v. Christie*, 13 Pa. Co. Ct. 149, it was held that where a person cut ice in the river so as to obstruct and interfere with a winter way across the river, which had each winter been used by the public as a highway, it was an interference with the right of passage and was an indictable offense.

traveled way, is civilly liable for injuries thereby occasioned to a person passing over such way.<sup>1</sup>

## VII. RESPECTIVE RIGHTS OF MILL OWNER AND RIPARIAN PROPRIETORS —

**1. Right to Harvest Ice Is in Owner of Land.** — Where riparian owners, whether of the whole or the half of the bed of the stream, as the case may be, or their predecessors in title, grant to a mill owner the right to flow their land by means of a dam, in order to raise the water for the purpose of propelling his machinery, such mill owner acquires no title to the ice which may form on the water;<sup>2</sup> the right to harvest such ice, in the absence of special contract or of a prescriptive right on the part of the mill owner,<sup>3</sup> belongs exclusively to the riparian owner by virtue of his ownership of the land on which it formed.<sup>4</sup>

**Doctrine Denied.** — In two jurisdictions this doctrine has been denied, it having been held that the right to overflow land by means of a dam gives to the grantee mill owner the exclusive right to harvest ice which may be formed over such land.<sup>5</sup> Later decisions in the courts of the same states, however, would indicate that both decisions have been overruled.<sup>6</sup>

**2. Ice Harvesting as Affecting Mill Owner's Right of Flowage.** — Where ice is harvested on a millpond by a riparian owner, or is harvested by riparian owners above the pond on the same stream, the mill owner has no ground of complaint unless his water power is thereby substantially and injuriously lessened.<sup>7</sup> In the absence, therefore, of proof of facts from which such a conclusion may properly be reached, the mill owner may not recover in a suit for damages against the riparian proprietor for harvesting the ice;<sup>8</sup> nor may he maintain an action in equity restraining the riparian owner from continu-

**1. Civil Liability for Damages Inflicted by Cutting Hole in Ice on Public River.** — *French v. Camp*, 18 Me. 433, 36 Am. Dec. 728; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342; *Sowles v. Moore*, 65 Vt. 322.

**2. Right to Use Water for Mill Purposes Does Not Give Right to Harvest Ice** — *Connecticut*. — *Howe v. Andrews*, 62 Conn. 398.

*Indiana*. — *Julien v. Woodsmall*, 82 Ind. 568. *Maine*. — *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813.

*Nebraska*. — *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

*New York*. — *Dodge v. Berry*, 26 Hun (N. Y.) 246; *Hazleton v. Webster*, 20 N. Y. App. Div. 177.

*Pennsylvania*. — *Searle v. Gardner*, 22 W. N. C. (Pa.) 73, (Pa. 1888) 13 Atl. Rep. 835.

*Wisconsin*. — *Reysen v. Roate*, 92 Wis. 543.

**3. Prescriptive Right.** — *Hoag v. Place*, 93 Mich. 450.

**4. Right to Harvest Ice in Owner of Land on Which It Forms** — *Indiana*. — *Julien v. Woodsmall*, 82 Ind. 568.

*Maine*. — *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813.

*Michigan*. — *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902.

*New York*. — *Dodge v. Berry*, 26 Hun (N. Y.) 246; *Hazleton v. Webster*, 20 N. Y. App. Div. 177; *Swan v. Goff*, 39 N. Y. App. Div. 95.

*Pennsylvania*. — *Searle v. Gardner*, 22 W. N. C. (Pa.) 73, (Pa. 1888) 13 Atl. Rep. 835.

*Wisconsin*. — *Reysen v. Roate*, 92 Wis. 543.

**Mill Owner's Liability for Unnecessary Destruction of Ice Field.** — Where the owner of a mill-dam destroys the ice field by purposely and unnecessarily drawing the water from the pond, he is liable to the owner of the land

under the pond. *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

**5. Mill Owner Held Entitled to Ice Forming on Pond.** — In *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462, it was held that though the grantee of land bounded by an artificial millpond, and not expressly by the margin, takes to the middle of the stream from which such pond is formed, as if no pond existed, yet in such case the owner of the water of the millpond, and not the riparian owner as the owner of the soil, has the right to harvest ice formed on such pond.

In *Myer v. Whitaker*, (Supm. Ct. Spec. T.) 5 Abb. N. Cas. (N. Y.) 172, it was held that a grant by a riparian owner to a person contemplating the erection of a mill, of the right to flow his land by means of a dam on the stream below, gives to the grantee the exclusive right to harvest there the ice which may form over such land, on the waters of the pond thus made. See also *Marshall v. Peters*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 218.

**6.** See *Howe v. Andrews*, 62 Conn. 398, and *Dodge v. Berry*, 26 Hun (N. Y.) 246, heretofore cited; and see the following subdivision.

**7. Mill Owner Cannot Complain unless Water Power Injuriouly Interfered with.** — *Lathrop v. Haley*, 81 Iowa 649; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238; *Dodge v. Berry*, 26 Hun (N. Y.) 246; *Searle v. Gardner*, 22 W. N. C. (Pa.) 73, (Pa. 1888) 13 Atl. Rep. 835; *Reysen v. Roate*, 92 Wis. 543.

**8. May Not Maintain Action Against Riparian Owner.** — *Dodge v. Berry*, 26 Hun (N. Y.) 246; *Searle v. Gardner*, 22 W. N. C. (Pa.) 73, (Pa. 1888) 13 Atl. Rep. 835; *Reysen v. Roate*, 92 Wis. 543.



ing to harvest such ice.<sup>1</sup> But where such harvesting inflicts serious injury on the mill owner he may recover damages therefor.<sup>2</sup>

**Injunction Not Granted to Restrain Mill Owner from Destroying Ice by Venting Water.** — Since the owner of a millpond must vent the water for the use of the riparian proprietors and the mill owners below him,<sup>3</sup> an injunction at the suit of a riparian owner restraining him from so venting the water will not lie;<sup>4</sup> although if he wantonly and unnecessarily draws the water from or lowers the water in the pond, and by so doing injures or destroys the ice privilege of the owner of the land bordering on the pond, he renders himself liable in damages to such owner.<sup>5</sup>

**VIII. ICE-PRODUCING PROPERTY PASSING UNDER EMINENT DOMAIN PROCEEDINGS.** — Where eminent domain statutes authorize the taking of the whole fee for the public purpose, and the entire fee is acquired thereunder, the right to harvest ice which may form on such land passes from the owner to the person or corporation acquiring the fee by the eminent domain proceedings;<sup>6</sup> otherwise where by such proceedings a mere easement is acquired, with the exercise of which the taking of ice will not interfere.<sup>7</sup>

**Value of Property for Ice Harvesting Considered.** — In condemnation proceedings the value of the property for ice harvesting may form a material consideration in estimating its value.<sup>8</sup>

**IDEM SONANS.** — Names are said to be *idem sonans* if the attentive ear finds difficulty in distinguishing them when pronounced, or if common or long-continued usage has by corruption or abbreviation made them identical in

1. **May Not Enjoin Riparian Owner.** — Lathrop v. Haley, 81 Iowa 649.

2. **Right of Mill Owner to Recover where Harvesting Inflicts Damage.** — A riparian owner may use the water of a stream flowing over his land for domestic purposes, for watering his cattle, for irrigation, and for other purposes. He has not, however, as matter of law, the right to harvest ice for mercantile purposes where its removal would cause material injury to the mill owner. Where such removal does cause such injury, the mill owner may maintain an action for damages against such riparian owner. *Howe v. Andrews*, 62 Conn. 393. See also *Concord Mfg. Co. v. Robertson*, 66 N. H. 1.

If the formation of ice ponds and the harvesting of ice thereon by riparian owners should constitute such a diversion of the water as seriously and permanently to cripple the operation of the mills, the proprietors could maintain an action for damages against riparian owners, or, in proper cases, enjoin such diversion; otherwise if the operation of the mills is not seriously or permanently interfered with. *Gehlen v. Knorr*, 101 Iowa 700; *Cummings v. Barrett*, 10 Cush. (Mass.) 186; *De Baun v. Bean*, 29 Hun (N. Y.) 236, *affirmed* 101 N. Y. 620.

**Special Agreement Enlarging Rights of Riparian Owner.** — The mill owner may, of course, by special agreement, give to the riparian owners the right to cut and remove unlimited quantities of ice, and he may thus deprive himself of any right to relief though the amount cut is so great as to injure or destroy the mill privilege. *Hazleton v. Webster*, 20 N. Y. App. Div. 177.

3. **Right and Duty of Owner of Millpond to Vent Water for Benefit of Those Below Him.** — *Stevens*

*v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

4. **Injunction Not Granted to Restrain Mill Owner from Destroying Ice by Venting Water.** — *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

5. **Liability of Mill Owner for Wanton Destruction of Ice by Venting Water.** — *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

6. **When Fee Is Acquired.** — *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580. See also *Hyde Park v. Washington Ice Co.*, 117 Ill. 233; *Ham v. Salem*, 100 Mass. 350; and the title CANALS, vol. 5, p. 116.

So also where, under condemnation proceedings, a corporation acquires a right of exclusive occupation and all attending riparian rights for such time as the land is held under the charter. *Wright v. Woodcock*, 86 Me. 113.

7. **Easement Only Acquired.** — *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580. See also the title EMINENT DOMAIN, vol. 10, p. 1201.

**A Legislative Grant to a Town of the Right to Take Water from a Pond** does not put an end to a previously existing right in the public to take ice on such pond, where the cutting of ice thereon does not interfere with the quantity or purity of the water available for the use of the town; but the water right of the town is paramount, and if the taking of ice affects the purity of the water, it may be enjoined. *Rockport v. Webster*, (Mass. 1899) 54 N. E. Rep. 852. See also *Dwight Printing Co. v. Boston*, 122 Mass. 587. As to the rule of construction here applied, see the title EMINENT DOMAIN, vol. 10, p. 1100.

8. **Hyde Park v. Washington Ice Co.**, 117 Ill. 233. See also the title EMINENT DOMAIN, vol. 10, p. 1161.



pronunciation. Wrongly spelling names which are *idem sonans* is an immaterial variance.<sup>1</sup>

**IDENTICAL.** — See note 2.

**IDENTIFY.** — See note 3.

1. *Robson v. Thomas*, 55 Mo. 582; *Simonson v. Dolan*, 114 Mo. 179; *Whelen v. Weaver*, 93 Mo. 430; *Chamberlain v. Blodgett*, 96 Mo. 482. For a full treatment of the subject see the title NAMES.

2. **Identical — Similar.** — An action was brought for the infringement of a patent by making nails "in all respects *identical*" with those made by the patentee. The court construed "in all respects *identical*" to mean "in all respects similar," saying: "The words in their literal meaning import that they are the same nails. The word *identical*, when used with any approach to accuracy, has this import. But it seems improper to conclude, unless there be no alternative, that the respondents, who are manufacturers, are here sued only in respect of nails sold by them to a single trader. It is to be observed that the words 'in all respects' would not properly be used with the word *identical*, if that word is to be taken in its literal sense." *Empire State Nail Co. v. American Solid Leather Button Co.*, 71 Fed. Rep. 589. See generally the title PATENTS.

3. **Identify.** — The trial judge stated in his charge that the prosecuting witness *identified* the defendants. When his attention was called to his remarks, he said: "I was then depending upon my recollection. It is for you to say what the evidence is." It was held that the remarks did not reflect upon the credibility of the witness. The appellate court said: "It is not disputed that she testified without hesitation to her identification of the defendants as her assailants, and we think it clear that the judge used the word *identifies*, in reference to her testimony, in a colloquial sense, as meaning 'asserts their identity.' We do not think the jury could have been misled by the remark. Moreover, when his attention was directed to it, he said to the jury: 'I was then depending upon my recollection. It is for you to say what the evidence is.' It was plainly his purpose to have the jury understand that they were not to consider his opinion of the credibility of the witness, if he had seemed to express it." *Com. v. Flynn*, 165 Mass. 153.

# IDENTITY.

BY H. T. TIFFANY.

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**I. DEFINITION.** — Identity is defined as the state of being the same; absolute sameness; that relation which anything bears to itself.<sup>1</sup>

**II. PRESUMPTION FROM IDENTITY OF NAMES** — 1. *In General.* — Generally speaking, identity of names is *prima facie* evidence of identity of persons.<sup>2</sup>

1. Century Dict.

2. *Presumption of Identity of Persons from Identity of Names—England.* — Simpson *v.* Dismore, 9 M. & W. 47; Hennell *v.* Lyon, 1 B. & Ald. 185.

*Canada.* — Nicholson *v.* Burkholder, 21 U. C. Q. B. 108; Ross *v.* Portsmouth, 17 U. C. C. P. 195.

*Alabama.* — Moog *v.* Benedicks, 49 Ala. 512; Wilson *v.* Holt, 83 Ala. 528, 3 Am. St. Rep. 768; Garrett *v.* State, 76 Ala. 18.

*California.* — People *v.* Rolfe, 61 Cal. 541; Lee *v.* Murphy, 119 Cal. 369; Ward *v.* Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151.

*District of Columbia.* — Scott *v.* Hyde, (D. C.) 21 Wash. L. Rep. 163.

*Georgia.* — Mullery *v.* Hamilton, 71 Ga. 720.

*Kentucky.* — Cates *v.* Loftus, 3 A. K. Marsh. (Ky.) 202.

*Minnesota.* — Morris *v.* McClary, 43 Minn. 346.

*Missouri.* — Gitt *v.* Watson, 18 Mo. 274; State *v.* Moore, 61 Mo. 279; Phillips *v.* Evans, 64 Mo. 11; Long *v.* McDow, 87 Mo. 197; La Riviere *v.* La Riviere, 77 Mo. 512; Hoyt *v.* Davis, 21 Mo. App. 235.

*Montana.* — Stapleton *v.* Pease, 2 Mont. 550. *New York.* — Daby *v.* Ericsson, 45 N. Y. 786; Fink *v.* Manhattan R. Co., 15 Daly (N. Y.) 479.

*Ohio.* — Hazzard *v.* Nottingham, Tappan (Ohio) 192; Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318.

*Pennsylvania.* — Hamsher *v.* Kline, 57 Pa. St. 397; *Ex p.* Ackerman, (Pa. C. Pl. 1879) 9 Crim. L. Mag. 642.

*Tennessee.* — Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 674.

It seems, however, that the presumption is not applicable if the circumstances of the case or the common character of the name be such as to raise a doubt of the identity.<sup>1</sup>

**2. What Constitutes Identity of Name.** — The names must, of course, be identical,<sup>2</sup> and this involves, generally speaking, the identity of the Christian name, the identity of the initials thereof being insufficient.<sup>3</sup>

A Discrepancy in the Middle Initial has, however, been held to be insufficient to affect the presumption,<sup>4</sup> though a contrary decision has been made in reference to a matter of title.<sup>5</sup>

**3. Remote Transactions.** — It has been decided that such a presumption does not apply in the case of remote transactions.<sup>6</sup>

**4. Identity of Plaintiff and Defendant.** — It has been decided not to apply in case of the identity of the names of the plaintiff and defendant in an action.<sup>7</sup>

**5. As Affecting Judgment in Collateral Proceeding.** — The presumption will generally not apply if it would affect the validity of a judgment previously rendered in a collateral proceeding in a court of record.<sup>8</sup>

*Texas.* — McNeil v. O'Connor, 79 Tex. 229; Jester v. Steiner, 86 Tex. 415; Leland v. Eckert, 81 Tex. 226.

In Clark v. Pearson, 53 Ga. 496, it was held that the identity of the name and county of the person in whose name the action was brought with the name and county of one on whose estate administration had previously been granted constituted *prima facie* evidence that such plaintiff was dead.

Code Civ. Pro. *California*, § 1963, declares that certain presumptions are satisfactory, if uncontradicted, and subdiv. 25 enumerates among them "identity of person from identity of name."

**1. Circumstances Rendering Presumption Inapplicable.** — In Mode v. Beasley, 143 Ind. 306, it was held, upon a contest in regard to an election for the removal of the county-seat, that the general presumption of identity of person from identity of name did not apply in the case of a person testifying that he did not sign a petition for the relocation of the county-seat, so as to justify an inference that he was a person of the same name whose signature purported to be attached to the petition, since there were two or three thousand legal voters in the county, of whom a majority signed the petition, and these were not divided into township or voting precincts so as to reduce the probability of there being more than one person of the same name. See also Jones v. Jones, 9 M. & W. 75; Sewell v. Evans, 4 Q. B. 626, 45 E. C. L. 626; Sailor v. Hertzogg, 2 Pa. St. 182; Robertson v. DuBose, 76 Tex. 1; McNeil v. O'Connor, 79 Tex. 229; Fleming v. Giboney, 81 Tex. 427; Jester v. Steiner, 86 Tex. 415.

**Names of Jurymen.** — In Wickersham v. People, 2 Ill. 128, the fact that the names of two of the petit jurors were the same as those of two of the grand jurors was not regarded as showing that they were the same persons.

**2. Names Must Be Identical.** — For cases in which the presumption did not arise for want of identity of names, see McMinn v. Whelan, 27 Cal. 300; Kennedy v. Merriam, 70 Ill. 228; Clary v. O'Shea, 72 Minn. 105.

So it was held error to submit to the jury, without other proof, the question whether R. P. O'Neil, who executed a deed, was Rev. Patrick O'Neil, the owner of the land. Burford v. McCue, 53 Pa. St. 427.

**3. Identity of Initials of Christian Name Not Sufficient.** — Liddon v. Hodnett, 22 Fla. 442; Bennett v. Libhart, 27 Mich. 489.

In an action by Edward H. Andrews to foreclose a mortgage, the complaint alleged that the defendant executed the mortgage to E. H. Andrews, and it was held on demurrer that the complaint was insufficient. Andrews v. Wynn, 4 S. Dak. 40.

**Contrary Decision.** — In Sweetland v. Porter, 43 W. Va. 189, identity of person was presumed where the name appeared in one place as John S. Sweetland and in another as J. S. Sweetland.

**4. Discrepancy in Middle Initial Immaterial.** — Phillips v. Evans, 64 Mo. 17; Fink v. Manhattan R. Co., 15 Daly (N. Y.) 479.

So it was presumed that the payee and indorser of a promissory note were the same person, where the only difference in the names was the insertion of the initial of a middle name in the indorsement. Hunt v. Stewart, 7 Ala. 525.

**5. Except in Tracing Title.** — Ambs v. Chicago, etc., R. Co., 44 Minn. 270.

**6. Remote Transactions.** — In Sitler v. Gehr, 105 Pa. St. 577, 51 Am. Rep. 207, it was held that a mortgage given by a person of a certain name one hundred and forty years before the bringing of the suit was not admissible to show that a particular person of that name then resided in the same locality as that in which the mortgaged land was situated. To the same effect see Sewell v. Evans, 4 Q. B. 626, 45 E. C. L. 626.

**7. Plaintiff and Defendant.** — Wilson v. Benedict, 90 Mo. 209, approved in Bryan v. Kales, (Ariz. 1892) 31 Pac. Rep. 517.

To the Contrary, however, is Sweetland v. Porter, 43 W. Va. 189, where the identity of a plaintiff and of a defendant was presumed from identity of names, and it was held that consequently the action would not lie.

**8. Resulting Invalidity of Judgment.** — It was so decided when the names of the judgment plaintiff and defendant were the same, Bryan v. Kales, (Ariz. 1892) 31 Pac. Rep. 517, and when the names of the plaintiff and the officer serving the summons were similar, Howard v. Lock, (Ky. 1893) 22 S. W. Rep. 332.

**Recitals in Judgment.** — Where the record in proceedings to sell a decedent's land showed



6. As Affecting Written Instrument. — On the question whether this presumption will outweigh the presumption of the validity of an instrument, the cases are not in accord.<sup>1</sup>

7. Identity of Defendant with Person Liable — *a.* IN CIVIL ACTIONS. — It is now apparently the established rule that the fact that a person bearing the same name as the defendant did the act with which it is sought to affect the defendant is sufficient *prima facie* to show that the defendant did such act.<sup>2</sup> The question has generally arisen in connection with a suit on a written instrument, in which case it has been held that the identity of the person whose signature is proven with the defendant need not be shown if there exists identity of name, unless facts appear suggesting a question in this regard.<sup>3</sup>

*b.* IN CRIMINAL PROSECUTIONS. — The question has occasionally arisen in criminal cases in which the evidence of an incriminating act was of a documentary nature, and in such cases it has been decided that there is no presumption of identity.<sup>4</sup>

8. Questions of Title. — In tracing title to land, the identity of the name of a grantor with that of one to whom the title had previously passed is *prima facie* evidence that the grant was made by such owner, and no additional

that H. S., the administrator, filed the petition for an order to sell the land, and that on the hearing it appeared "to the satisfaction of the court, by the oaths of H. S. and A. L., disinterested witnesses," that the necessity for sale existed, it was held that any presumption that H. S. whose testimony was taken to support the petition was the same person as H. S. the administrator was overcome by the statement in the judgment that the witness was disinterested. *Stevenson v. Murray*, 87 Ala. 442.

1. Resulting Invalidity of Instrument. — In *Cooper v. Poston*, 1 Duv. (Ky.) 92, it was decided that it will not be presumed that the payer and the payee in a note are the same because the names are identical, the presumption being in favor of the validity of the contract. See also *Allin v. Shadburne*, 1 Dana (Ky.) 68, 25 Am. Dec. 121.

**Void Acknowledgment.** — But in *Lee v. Murphy*, 119 Cal. 364, where a mortgage between two residents of the same county was executed and acknowledged in that county, and the acknowledgment was made before a notary public having the same name as the mortgagee, it was held that presumably the notary and the mortgagee were the same person, and that consequently the acknowledgment was void.

2. Identity of Defendant. — 2 Phillipp's on Evidence 508; *Aultman v. Timm*, 93 Ind. 158. See also *Smith v. Cisson*, 1 Colo. 29.

3. Identity of Maker of Instrument Presumed. — *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *Grindle v. Stone*, 78 Me. 176; *Flournoy v. Warden*, 17 Mo. 435.

The English Cases have not always been in unison upon this question of the *prima facie* sufficiency of a showing that one of the same name as the defendant was liable, but in the latest decisions upon the question the identity of name was considered sufficient. *Sewell v. Evans*, 4 Q. B. 626, 45 E. C. L. 626; *Hamber v. Roberts*, 7 C. B. 861, 62 E. C. L. 861; *Rooker v. Rooker*, 9 Jur. N. S. 1329; *Harrington v. Fry*, R. & M. 90, 21 E. C. L. 388; *War-*

*ren v. Anderson*, 8 Scott 384; *Hennell v. Lyon*, 1 B. & Ald. 182; *Bulkeley v. Butler*, 2 B. & C. 434, 9 E. C. L. 133; *Greenshields v. Crawford*, 9 M. & W. 314. See *Jones v. Jones*, 9 M. & W. 75.

**Contrary Decisions.** — In *Robards v. Wolfe*, 1 Dana (Ky.) 155, in an action on an injunction bond, it was held that the plaintiff should introduce proof identifying the defendant, and that the defendant ought not to be required to prove that he was not the person who executed the bond. And in *Jones v. Parker*, 20 N. H. 31, it was held that where one of two parties having the same name was sued, the plaintiff's burden of showing that the one sued was the one that made the contract with him was supported by evidence that of the two parties one was in business and the other was not, and that the former had had transactions with the plaintiff.

4. In Criminal Prosecutions. — In *Wedgwood's Case*, 8 Me. 75, a prosecution for adultery, it was held that the record of a marriage of a person of the name of the defendant was not sufficient to show the defendant's marriage, the court saying that there must be "proof of identity of person, and not of name merely." Citing *Com. v. Norcross*, 9 Mass. 492, a similar case, in which the court said that witnesses "are necessary to prove the identity of the parties." So in *Bogue v. Bigelow*, 29 Vt. 179, *Redfield, C. J.*, said: "In tracing titles in the mode here attempted, it is always regarded as *prima facie* evidence of identity, while in cases involving a charge of crime, when presumptions of innocence are allowed to prevail over presumptions of identity from mere identity of names, some further proof is often required, as in cases of indictment for bigamy."

**Presumption Unnecessary.** — The question as to whether the identity of the defendant with the person of the same name who committed a certain act which is testified to orally may be presumed is not likely to arise, since the defendant is present in court and the witness can be asked to identify him. See 2 Phillipp's on Evidence 510.

evidence in that regard is necessary, in the absence of circumstances creating doubt.<sup>1</sup>

**9. Parties to Judgments** — *a.* IN CIVIL CASES. — In the case of a former judgment the identity of the name of a party thereto with that of the person sought to be affected thereby is generally *prima facie* evidence of identity of person, and accordingly one sued on a judgment may be presumed to be the defendant therein if he has the same name.<sup>2</sup> And likewise when a judgment is set up for the purpose of estoppel on the principle of *res judicata*, identity of the names of the parties thereto with those in the subsequent suit raises a presumption of identity of persons.<sup>3</sup>

*b.* IN CRIMINAL CASES. — Likewise the identity of the name of a witness with that of one previously convicted of a criminal offense has been held to create a presumption of identity of person.<sup>4</sup> But the presumption does not apply when the previous conviction is introduced for the purpose of the prose-

**1. Identity of Grantor in Deed with Owner of the Land Presumed** — *United States*. — *Stebbins v. Duncan*, 108 U. S. 32.

*California*. — *Mott v. Smith*, 16 Cal. 534.

*Illinois*. — *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277.

*Iowa*. — *Gilman v. Sheets*, 78 Iowa 499.

*Michigan*. — *Goodell v. Hibbard*, 32 Mich.

55.

*Minnesota*. — *Morris v. McClary*, 43 Minn. 346.

*Missouri*. — *Gitt v. Watson*, 18 Mo. 276; *Flournoy v. Warden*, 17 Mo. 435.

*Nebraska*. — *Rupert v. Penner*, 35 Neb. 587.

*New York*. — *People v. Snyder*, 41 N. Y. 403; *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468.

*Pennsylvania*. — *Atchison v. McCulloch*, 5 Watts (Pa.) 13.

*Texas*. — *Robertson v. Du Bose*, 76 Tex. 1; *Smith v. Gillum*, 80 Tex. 120; *Grant v. Searcy*, (Tex. Civ. App. 1896) 35 S. W. Rep. 861; *Clark v. Groce*, 16 Tex. Civ. App. 453.

*Vermont*. — *Bogue v. Bigelow*, 29 Vt. 179.

*Canada*. — *Brown v. Livingstone*, 29 U. C. Q. B. 520; *Thompson v. Bennett*, 12 U. C. C. P. 373.

**Different Recitals as to Residence** do not affect the application of the principle. *Geer v. Missouri Lumber, etc., Co.*, 134 Mo. 85, 56 Am. St. Rep. 489; *Lee v. Murphy*, 119 Cal. 368. So where land was conveyed to "Ashbel Green, of New York," and was subsequently conveyed by "Ashbel Green, of the township of Palisades, in the county of Bergen, and state of New Jersey," such grantee and grantor were presumed to be the same person. *Tillotson v. Webber*, 96 Mich. 144.

**Contrary Decisions.** — *Mooers v. Bunker*, 29 N. H. 420.

In *Freeman v. Loftis*, 6 Jones L. (51 N. Car.) 524, it was held that there was no presumption in law that one bearing the name Joseph Smith, which was that of a son of a person seized of land, was his heir and as such entitled to convey it, but the question of identity was one of fact for the jury. The court incidentally referred to the common character of the name.

**Identity of Christian Name.** — In *Chamblee v. Tarbox*, 27 Tex. 139, 84 Am. Dec. 614, the coincidence of the given name of a married woman with that of a single woman, to whom

land had been conveyed, in consideration of marriage, was held sufficient, in connection with possession of the original title papers, and with recitals in the deed of her marriage, to establish a chain of title dependent for its continuity upon the question whether the married and the single woman were one and the same person, there being no evidence tending to a different conclusion. See also *King v. Hyatt*, 51 Kan. 504, 37 Am. St. Rep. 304.

**Discrepancy in Name.** — In *Amb's v. Chicago, etc., R. Co.*, 44 Minn. 266, it was held that a discrepancy in the middle initial of the name rendered this presumption inapplicable. See *supra*, this section, *What Constitutes Identity of Name*.

**2. Judgments in Civil Cases.** — *Campbell v. Wallace*, 46 Mich. 320; *Thompson v. Manrow*, 1 Cal. 428; *Hatcher v. Rocheleau*, 18 N. Y. 87; *Ritchie v. Carpenter*, 2 Wash. 512.

But it seems that identity of the family name and initials does not raise a presumption of identity of person, and therefore *Henry V. Libhart* was held not entitled to recover upon a judgment in favor of *H. V. Libhart*, without any proof of his identity with the plaintiff in such judgment, and in the absence of any averment in his declaration to that effect. *Bennett v. Libhart*, 27 Mich. 489.

**Rebuttal of Presumption.** — In *Givens v. Tidmore*, 8 Ala. 745, it was held that in a suit to enjoin the enforcement of a judgment, the *prima facie* presumption, from the fact that the writ was served upon an individual of the complainant's name, that he had notice of the pendency of the suit in which the judgment was rendered was rebutted by the fact that he was not a party to the writing upon which such suit was brought, but that the writing was made by another person of the same name resident in the same county.

**3. For Purposes of Estoppel.** — *Garwood v. Garwood*, 29 Cal. 515.

In *Douglas v. Dakin*, 46 Cal. 40, it was held, where William J. Douglas was plaintiff in an action for rent, and the defendant set up a judgment obtained in another court against William J. Douglas, without averring identity, that the identity of the parties was to be presumed from the identity of names.

**4. Former Conviction of Witness.** — *State v. McGuire*, 87 Mo. 642; *Bayha v. Mumford*, 58 Kan. 445.



cution of one of the same name, since it is not allowable to indulge any presumptions against the accused.<sup>1</sup>

**III. DISPUTED AND DOUBTFUL IDENTITY.** — Cases have frequently arisen in which, owing to the changes in one's appearance, he has not been recognized, or in which, on the other hand, owing to the resemblance between individuals, one person has been enabled to impersonate another, or has been wrongly recognized as such.<sup>2</sup>

**IV. IDENTITY OF ACCUSED.** — The identification of the accused with the person who committed the crime is the basis of every conviction of crime and is most frequently the only question really at issue. The simplest means of determining this question is the testimony of persons who saw the crime committed.<sup>3</sup> This question is most frequently determined by evidence of a circumstantial character, such as the correspondence of fragments of garments or of other articles belonging to or found in the possession of the accused with articles discovered at the scene of the crime or connected therewith,<sup>4</sup> or

**1. Identity of Accused.** — In *Com. v. Briggs*, 5 Pick. (Mass.) 429, it was held that it was necessary for the state to show that the defendant was identical with a person of the same name previously convicted of a like offense, which previous conviction was introduced for the purpose of increasing the punishment under the statute, though the identity was not denied, the court saying that no presumptions are to be made against the prisoner, and every essential allegation must be proved.

In *State v. Robinson*, 39 Me. 150, a like case, it was held that any question of identity of the defendant with the defendant in the former trial was for the jury to determine.

**Accused as Witness.** — In *State v. Kelsoe*, 76 Mo. 507, the identity of the accused with one of the same name in a judgment of conviction of another crime was presumed, but such former conviction was there introduced merely to affect the credibility of the accused as a witness. See also *Dowdy v. McArthur*, 94 Ga. 577.

**2. Disputed and Doubtful Identity.** — The most famous case of this character is probably the Tichborne case, so called, in which eighty-five witnesses testified to the identity of the claimant with Sir Roger Tichborne, the heir to large estates, who had disappeared as a young man, and these witnesses included the baronet's mother and family solicitor and many people of education and station, but the cross-examination of the claimant proved that he could not possibly be the baronet, owing to his utter lack of the education and knowledge of various matters which the baronet possessed, and the discrepancy between them in various traits, mental, moral, and physical. For this and other cases of mistaken and doubtful identity see 3 Wharton and Stillé's *Medical Jurisprudence* (4th ed.), § 620; Ram on Facts (4th Am. ed.), appendix, p. 430.

**Identification of Decedent.** — The question of identity of one deceased sometimes arises in connection with claims to his property by persons asserting that they are his heirs or next of kin. In *Bryant's Estate*, 176 Pa. St. 309, which is fairly typical of this class of cases, there were five sets of heirs or next of kin claiming that the decedent was identical with their ancestor. Mitchell, J., after saying that questions of identity are among the most difficult questions with which courts have to deal,

proceeded as follows: "The carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question; and where they have not, there is the added obstacle of the inadequacy of language to describe the minute variations of feature and color which go to make up the individual personality. In the present case we have all these difficulties multiplied a hundredfold by the bias of interest under which even honest people so easily persuade themselves that they are the rightful heirs to a vacant fortune." For other cases of the same character see *Atty.-Gen. v. Kohler*, 9 H. L. Cas. 654; *Hardy v. Harbin*, 154 U. S. 598; *Cuddy v. Brown*, 78 Ill. 415; *Schooler v. Hutchins*, 66 Tex. 324; *Byers v. Wallace*, 87 Tex. 503; *Texas Land, etc., Co. v. Bridgeman*, 1 Tex. Civ. App. 383; *Red River Cattle Co. v. Wallace*, (Tex. Civ. App. 1895) 33 S. W. Rep. 301; *Green v. Fisher*, (Tex. Civ. App. 1898) 45 S. W. Rep. 429; *Adie v. Com.*, 25 Gratt. (Va.) 712.

**3. Identification of Accused.** — For this purpose, as stated *infra*, opinion evidence is admissible; in fact, the identification of one by a witness is in itself but an expression of opinion as to identity. See Wharton's *Crim. Ev.* (9th ed.), § 807; and see *infra*, this title, *Particular Classes of Evidence — Opinions*.

**Possibility of Mistake.** — Cases frequently arise in which one identified as the offender by one who saw the crime committed is shown to be innocent. For numerous cases of this character see *Wills on Circumstantial Evidence* (6th Am. ed.) 113 *et seq.*, and *Ram on Facts* (4th Am. ed.), appendix, p. 430. See also remarks of Cockburn, C. J., in the criminal prosecution of the Tichborne claimant (*Rex v. Orton*), quoted in 3 Wharton & Stillé's *Medical Jurisprudence* (4th ed.), § 661, note.

**Identification of Fugitive.** — Code Crim. Pro. Tex., art. 839, subd. 4, provides that upon the arrest of one who is supposed to be the same as one previously convicted, who escaped before sentence, an issue as to his identity shall be made and tried by a jury. See *Washington v. State*, 31 Tex. Crim. 84.

**4. Incriminating Articles** — *Alabama*. — *Mitch-*



by the possession by the accused of the fruits of the crime,<sup>1</sup> or by the comparison of footprints near the scene of the crime with those of the defendant.<sup>2</sup> Identification by one's voice has also been allowed.<sup>3</sup>

**V. IDENTITY OF DEAD BODY.** — In homicide cases the identity of a dead body is frequently a very important and difficult question, and is to be determined generally by the personal characteristics of the body, with regard to the changes in these respects consequent upon death and exposure of the body.<sup>4</sup>

**VI. PARTICULAR CLASSES OF EVIDENCE** — 1. **Photographs.** — Identity may be shown by photographs, provided they are proved to be genuine.<sup>5</sup>

2. **Handwriting.** — Handwriting is admissible for the purpose of showing the identity of the writer with another whose writing it resembles.<sup>6</sup>

*ell v. State*, 94 Ala. 68; *Thornton v. State*, 113 Ala. 43, 59 Am. St. Rep. 97; *Fuller v. State*, 117 Ala. 36.

*California*. — *People v. Ebanks*, 117 Cal. 652; *People v. Gibson*, 106 Cal. 458.

*Iowa*. — *State v. Jones*, 89 Iowa 182.

*Kentucky*. — *Jackson v. Com.*, (Ky. 1896) 38 S. W. Rep. 422.

*North Dakota*. — *State v. Campbell*, 7 N. Dak. 58.

*Oregon*. — *State v. Porter*, 32 Oregon 135.

*Texas*. — *Brooks v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 739.

*Virginia*. — *Nicholas v. Com.*, 91 Va. 741; *McBride v. Com.*, 95 Va. 818.

*Washington*. — *State v. Coella*, 8 Wash. 512; *State v. Craemer*, 12 Wash. 217.

1. **Possession of Fruits of Crime** — *United States*. — *Goldsby v. U. S.*, 160 U. S. 70; *Wilson v. U. S.*, 162 U. S. 613.

*California*. — *People v. Collins*, 64 Cal. 293. *Kentucky*. — *Reddick v. Com.*, (Ky. 1895) 33 S. W. Rep. 416.

*Massachusetts*. — *Com. v. Williams*, 171 Mass. 461; *Com. v. O'Neil*, 169 Mass. 394.

*New York*. — *People v. Rohl*, 138 N. Y. 616; *People v. Hampton*, 144 N. Y. 639.

*Pennsylvania*. — *Com. v. Roddy*, 184 Pa. St. 274.

*Texas*. — *Burleson v. State*, 33 Tex. Crim. 549; *Lancaster v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 515; *Garza v. State*, 39 Tex. Crim. 358.

2. **Comparison of Footprints** — *Alabama*. — *Riley v. State*, 88 Ala. 193; *Livingston v. State*, 105 Ala. 127; *Terry v. State*, 118 Ala. 79.

*California*. — *People v. McCurdy*, 68 Cal. 576; *People v. Myers*, 70 Cal. 582.

*Georgia*. — *Jones v. State*, 63 Ga. 395.

*Illinois*. — *Dunn v. People*, 158 Ill. 586.

*Iowa*. — *State v. Millmeier*, 102 Iowa 692.

*Kentucky*. — *Collins v. Com.*, (Ky. 1894) 25 S. W. Rep. 743.

*Missouri*. — *State v. Reed*, 89 Mo. 168.

*New York*. — *Murphy v. People*, 63 N. Y. 599.

*North Carolina*. — *State v. Graham*, 74 N. Car. 646, 21 Am. Rep. 493; *State v. England*, 78 N. Car. 552.

*South Carolina*. — *State v. Green*, 40 S. Car. 328, 42 Am. St. Rep. 872.

*Texas*. — *Bouldin v. State*, 8 Tex. App. 332; *Gibbs v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 919; *Goldsmith v. State*, 32 Tex. Crim. 112; *Newman v. State*, 32 Tex. Crim. 92; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595;

*Clark v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 68.

*Vermont*. — *State v. Ward*, 61 Vt. 153.

But see *contra*, *Stokes v. State*, 5 Baxt. (Tenn.) 621, 30 Am. Rep. 72. See generally the title EXPERIMENTS (IN EVIDENCE), vol. 12, p. 398.

3. **Identification by Voice.** — *Deal v. State*, 140 Ind. 354; *Com. v. Williams*, 105 Mass. 62; *Com. v. Hayes*, 138 Mass. 185; *Price v. State*, 35 Tex. Crim. 501; *Givens v. State*, 35 Tex. Crim. 563.

4. **Identity of Dead Body.** — In *Linsday v. People*, 63 N. Y. 143, it was decided that to identify a dead body as that of the person charged to have been murdered, evidence of similarity in color of the hair and whiskers, and in stature, and testimony by the dentist who had extracted teeth for the murdered man that the same teeth were absent and that those remaining had the same marks upon them, were admissible.

For other cases involving the identity of the body in homicide cases, see *Reg. v. Cheverton*, 2 F. & F. 833; *Hopt v. People*, 110 U. S. 574; *State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753; *Laughlin v. Com.*, (Ky. 1896) 37 S. W. Rep. 590; *Com. v. Webster*, 5 Cush. (Mass.) 295; *Linsday v. People*, 63 N. Y. 143; *Murphy v. People*, 63 N. Y. 599; *Foster v. People*, 63 N. Y. 619; *People v. Wilson*, (Oyer & T. Ct.) 3 Park Crim. (N. Y.) 199; *State v. Williams*, 7 Jones L. (52 N. Car.) 446, 78 Am. Dec. 248; *People v. Palmer*, 109 N. Y. 110; *Udderzook v. Com.*, 76 Pa. St. 340; *Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733; *Lancaster v. State*, 91 Tenn. 267; *Hamby v. State*, 36 Tex. 523; *Kugadt v. State*, 38 Tex. Crim. 681; *Taylor v. State*, 35 Tex. 97; *State v. Smith*, 9 Wash. 341. See also 3 Wharton & Stillé's Medical Jurisprudence (4th ed.), § 627.

5. **Photographs.** — *Udderzook v. Com.*, 76 Pa. St. 340. See also *Wilson v. U. S.*, 162 U. S. 613; *Luke v. Calhoun County*, 52 Ala. 115; *Malachi v. State*, 89 Ala. 134; *People v. Durrant*, 116 Cal. 179; *State v. Windahl*, 95 Iowa 470; *Com. v. Morgan*, 159 Mass. 375; *State v. Holden*, 42 Minn. 350; *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464; *Wilcox v. Wilcox*, 46 Hun (N. Y.) 32; *Com. v. Connors*, 156 Pa. St. 147; *State v. Ellwood*, 17 R. I. 703; *State v. McCoy*, 15 Utah 136.

And see the title, *Photographs*.

6. **Handwriting is Admissible.** — *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711;

3. **Opinions.**—Opinions may be given by a witness on the question of identity, this being one of the cases in which it is impossible for the witness to state all the facts on which his opinion is based.<sup>1</sup>

4. **Hearsay.**—When the question of identity resolves itself into a question of family relationship or pedigree, hearsay evidence is admissible.<sup>2</sup>

**IDIOT.** (See also the titles **INSANITY**; **TESTAMENTARY CAPACITY.**)—An idiot is one who has had no understanding from his nativity.<sup>3</sup>

**IDLE.**—See note 4.

**IF.** (See also the titles **CONDITIONS**, vol. 6, p. 499; **LEGACIES AND DEVISES**; **REMAINDERS AND EXECUTORY INTERESTS**; **WILLS.**)—The use of the word “if” implies a condition or contingency, and shows that the expectation of the fulfilment of the first clause is uncertain, and presupposes that it may not occur.<sup>5</sup>

Jackson v. Cody, 9 Cow. (N. Y.) 140; Bell v. Brewster, 44 Ohio St. 698; Sperry v. Tebbs, 10 Ohio Dec. (Reprint) 318.

See the title **HANDWRITING**, ante, p. 252.

1. **Opinion Evidence**—*England.*—Fryer v. Gathercole, 13 Jur. 542.

*United States.*—Templeton v. Luckett, 75 Fed. Rep. 254.

*Alabama.*—Yarbrough v. State, 105 Ala. 43; Thornton v. State, 113 Ala. 43, 59 Am. St. Rep. 97.

*California.*—People v. Rolfe, 61 Cal. 540.

*Illinois.*—Burton v. Perry, 146 Ill. 71.

*Iowa.*—State v. Seymour, 94 Iowa 699.

*Massachusetts.*—Com. v. Pope, 103 Mass. 440; Com. v. Williams, 105 Mass. 62; Com. v. O'Brien, 134 Mass. 198; Com. v. Kennedy, 170 Mass. 18.

*Missouri.*—State v. Dickson, 78 Mo. 438; State v. Powers, 130 Mo. 475.

*New Hampshire.*—State v. Pike, 49 N. H. 399.

*North Carolina.*—State v. Lytle, 117 N. Car. 799.

*Pennsylvania.*—Com. v. Roddy, 184 Pa. St. 274.

*Texas.*—Brooks v. State, (Tex. Crim. 1896) 37 S. W. Rep. 739.

*West Virginia.*—State v. Harr, 38 W. Va. 58.

2. **Hearsay Evidence.**—Shields v. Boucher, 1 De G. & Sm. 40; Doe v. Randall, 2 M. & P. 20, 17 E. C. L. 200; Cuddy v. Brown, 78 Ill. 415; Schott v. Pellerim, (Tex. Civ. App. 1897) 43 S. W. Rep. 944; Hintze v. Krabbenschmidt, (Tex. Civ. App. 1897) 44 S. W. Rep. 38; Taylor on Evidence, §§ 582, 583.

In Byers v. Wallace, 87 Tex. 503, on an issue as to whether one who was killed in the Texas war of independence and to whose heirs a certificate of land was granted was a person of that name from Georgia and was the plaintiff's ancestor, or was from Virginia and the defendant's ancestor, it was decided that evidence of the plaintiff that letters were written by a cousin of his ancestor, who was also in the Texas army, and that such ancestor was in that army at the place at which both were killed, was admissible.

But hearsay evidence is not ordinarily admissible for the purpose of identification. Hopt v. People, 110 U. S. 574; Mallory v. State, 37 Tex. Crim. 482. See the title **PEDIGREE**.

3. **Idiot.**—Battle v. State, 105 Ga. 708; Odell v. Buck, 21 Wend. (N. Y.) 143. See also

Somers v. Pumphrey, 24 Ind. 244; Blanchard v. Nestle, 3 Den. (N. Y.) 41; Hitt v. Shull, 36 W. Va. 565.

In Owings's Case, 1 Bland (Md.) 362, it was said: “*Idiocy* is that condition in which the human creature has never had, from birth, any the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind, but that of a total absence of all mind. Hence this state of fatuity can rarely or ever be mistaken by any, the most superficial, observer. The medical profession seem to regard it as a natural defect, not as a disease in itself, or as the result of any disorder. In law it is also considered as a defect, and as a permanent and hopeless incapacity.”

But in Delafield v. Parish, 25 N. Y. 103, it was said that the term *idiots* embraces not only congenital *idiots* or *idiots* from birth, but also such as have subsequently become mentally imbecile, from sickness or other causes.

**Idiot Distinguished from Madman.**—The difference between an *idiot* and a madman is that “madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them; but *idiots* make very few or no propositions, and reason scarcely at all.” Com. v. Haskell, 2 Brews. (Pa.) 497.

4. **Idle and Disorderly Person.** (See also the titles **BREACH OF THE PEACE**, vol. 4, p. 902; **DISORDERLY HOUSES**, vol. 9, p. 508; **VAGRANCY**; and see **DISORDERLY PERSONS**, vol. 9, p. 538.)—In Com. v. Tay, 170 Mass. 192, it was held that a married woman, although supported by her husband or somebody else, might be convicted of being an *idle* and disorderly person. The court said: “The neglect by a married woman of her duties as a wife, whether she is supported by her husband or by some other person, may constitute criminal idleness, as well as her neglect of the duty of earning her own living; and if such idleness is shown to concur with the mispending of her time by frequenting houses of ill fame and tippling shops, accompanying men to bawdy houses, and being boisterous and noisy upon the streets, she may, in our opinion, be found guilty under the statute although she was supported by her husband or by some other person.”

5. **Condition.**—Hodge v. Wilson, 12 Smed.

**IGNOMINY.** (See also the title WITNESSES.)—Ignominy means shame; disgrace; dishonor.<sup>1</sup>

**IGNORANCE.** (For a full treatment of the question whether ignorance or mistake of law or fact is a defense, see the title MISTAKE.)—Ignorance is want of knowledge or information.<sup>2</sup>

& M. (Miss.) 504. See also *Damon v. Damon*, 6 Allen (Mass.) 195; *Nelson v. Combs*, 18 N. J. L. 36; *Sutton v. West*, 77 N. Car. 431; *In re Rudy*, 185 Pa. St. 359; *Hoopes v. Dundas*, 10 Pa. St. 77; *Com. v. Lilly*, 1 Leigh (Va.) 531.

So the word may create a reservation. *Micklethwait v. Winter*, 6 Exch. 644.

**Same — If I Die on the Journey.** (See also the title WILLS.)—The opening clause of a will was as follows: "I this day start to Kentucky; I may never get back. *If* it should be my misfortune, I give my property," etc. It was held that the visit to Kentucky was not named merely as the occasion of making the will, as from its supposed risks reminding the testator of the necessity or propriety of the act, but that his death prior to his return from Kentucky was the condition on which the will depended for its efficacy, and in case of his return it became void. The court said: "*If* may be a small word, but all know its meaning, and instead of a more formal phrase it is used in common language to express condition or limitation; and in giving it this meaning I affirm every principle applicable to the construction of wills." *Robnett v. Ashlock*, 49 Mo. 175. Compare *Damon v. Damon*, 8 Allen (Mass.) 195.

**Condition Subsequent or Limitation.**—A deed granting water rights provided that "*if* by any reason the water should not be delivered in the main pipe, on the north side of the river, for the space of one whole year at one time, this indenture is to cease." In construing this provision the court said: "The last clause of the indenture should be construed, not as a condition subsequent, but as a limitation. The difference is quite material. 'A limitation' doth always determine the estate without entry or claim, and so doth not a condition.' Also 'a stranger may take advantage of an estate determined by limitation, and so he cannot upon a condition.' *Shep. Touch.* 121. 'The apt and proper words to make a limitation of an estate are *quamdum*, *dum*,' etc.; and in this case the word *if*, although used in the grant, is not sufficient of itself to render it a grant defeasible on condition subsequent. The substance of the clause is 'not the forfeiture of a right, but the termination of an onerous and unprofitable obligation.'" *Owen v. Field*, 102 Mass. 105.

**If Any.**—A testator bequeathed his female slaves and their increase, *if any*. It was held that the increase born in the testator's lifetime belonged to the respective legatees. The court said: "The expression '*if any*,' subjoined to the word 'increase,' cannot make any difference, because it only expresses what would, if omitted, be necessarily implied, and it may apply to increase born after the testator's death, as well as those born before." *Williamson v. Williamson*, 4 Jones Eq. (57 N. Car.) 286.

**If So.**—A testator stated that after the pay-

ment of his debts, it was his opinion that there would be a surplus; "*if so*, I desire that the same be divided between my legatees." In construing this provision the court said: "He states the ground of his opinion that there might be a surplus. He then says, '*if so*, I desire,' etc. What is the meaning of the words '*if so*?' They mean no more than this: '*if* there is a surplus.' They neither necessarily nor naturally make the previous fact, stated as the ground of the testator's opinion that there might be a surplus, a part of the contingency upon which the operation of the clause disposing of the surplus was to depend." *Yearnshaw's Appeal*, 25 Wis. 25.

**Charging a Fact with a Preceding If.**—In a suit for the conversion of mining stock, the court, in instructing the jury, used the language: "*If* the plaintiff consented to place his stock in the original pool, which pool was subsequently broken up," etc. It was objected that this was charging as a fact that the pool was broken up. It was held that the word "which" as there used was obviously dependent on an *if* to be supplied, and must be understood as though instead of "which" the words "and *if* that" had been employed. *Menzies v. Kennedy*, 9 Nev. 152. Compare *Chambers v. People*, 105 Ill. 418.

**If They Do the Work.**—A letter ordering smoke consumers contained the following among other clauses: "*If* we find they do the work \* \* \* we will take same and pay," etc.; and "*if* we do not take same you are to remove," etc. It was held, in a suit to collect the price of the consumers, that if they in fact did "the work" the defendant was bound so to find and to take and pay for them. *Garden City Wire, etc., Co. v. Kause*, 67 Ill. App. 108.

**If Necessary.**—See NECESSARY.

**If May Be Constructed When.**—See *Janney v. Sprigg*, 7 Gill (Md.) 202.

**When in the Sense of If.**—See *Hening v. Nelson*, 20 Ga. 584.

1. *Mahanke v. Cleland*, 76 Iowa 405; *Brown v. Kingsley*, 38 Iowa 221.

2. **Ignorance and Mistake Distinguished.**—*Lawrence v. Beaubien*, 2 Bailey L. (S. Car.) 644. In this case it was said: "Mistake is not ignorance alone. It is that and something more. The distinction has been decided, but it is obvious enough notwithstanding. *Ignorance* does not know and does not pretend to know. Mistake is ignorant but pretends to knowledge. A man knows neither gold nor silver, and that is *ignorance*; another knows both, and takes washed silver for gold; that is mistake. Not to know whether an alien can or cannot take by devise is *ignorance* on that point of law. To think that he cannot, that the devise is void, and that the lands go to the heir—this is mistake. It is to think that that is which is not. *Ignorance* is passive; mistake active. *Ignorance* does not know, and does not think it knows; mistake does



**ILLEGAL CONSIDERATION.** — See the title CONSIDERATION, vol. 6, p. 757.

not know, and yet thinks it does. The distinction, as has been well remarked, runs through all the decisions; it is the key to all, and reconciles the apparent discrepancies between some of them." See also as to the distinction between ignorance and mistake, *Hall v. Reed*, 2 Barb. Ch. (N. Y.) 505; *Champlin v. Laytin*, 18 Wend. (N. Y.) 423; *Fletcher v. Tollet*, 5 Ves. Jr. 14.

And in *Culbreath v. Culbreath*, 7 Ga. 70, the court said: "The distinction is a practical one in this, that mere *ignorance* of the law is not susceptible of proof. Proof cannot reach the convictions of the mind, undeveloped in action; whereas a mistake of the law, developed in overt acts, is capable of proof, like other facts."

**Ignorance and Insanity.** — In *Boylan v. Meeker*, 28 N. J. L. 279, it was said: "*Ignorance* is not a state of the mind in the sense that sanity and insanity are. When the mind is ignorant of a fact, its state still remains sound; the power of thinking, of judging, of willing, is just as complete before communication of the fact as after; the essence of the mind remains unaffected. But where insanity exists, its mysterious texture, so to speak, is impaired or for the time paralyzed; it is no

longer subject to the will; its operations cease to be voluntary, its perceptions are impaired. Insanity is a state, a condition of the mind itself. *Ignorance* of a particular fact consists in this, that the mind, although sound and capable of healthy action, has never acted upon that subject, because it has never been brought to the notice of the perceptive faculties. The one is an incapacity to act perfectly; the other is the never having acted, although perfectly capable of so doing." This was upon a question of testamentary capacity. See generally the titles INSANITY; TESTAMENTARY CAPACITY.

**Wilful Ignorance.** — In *Thiebaud v. Vevay* First Nat. Bank, 42 Ind. 222, it was said, *quoting* from 1 Platt on Leases, 759: "*Ignorance* is considered wilful where a person neglects the means of information which ordinary prudence would suggest; and it is clear that *ignorance* of a man's own rights, conferred by an instrument actually in his possession or power, where the other party is consequently innocent of concealment, or of any conduct contributing to keep him ignorant of its contents, cannot excuse the performance of any conditions imposed on the person claiming under the instrument."

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### CROSS-REFERENCES

*In addition to the cross references accompanying the article CONTRACTS, vol. 7, pp. 89-90, see the following titles: BROKERS, vol. 4, p. 959; COMPOUNDING OFFENSES, vol. 6, p. 399; DEFTY, vol. 9, p. 398; EFFECTUAS, vol.*



10, p. 552; *FACTORS OR COMMISSION MERCHANTS*, vol. 12, p. 625; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *INTOXICATING LIQUORS; JURISDICTION; LEASES; MASTER AND SERVANT; MONOPOLIES; MORTGAGES; NEGLIGENCE; RESTRAINTS ON ALIENATION; SEPARATION (HUSBAND AND WIFE); STOCK BROKERS*.

**I. DEFINITION.** — The term “illegal” sometimes means merely that which lacks authority of or support from law;<sup>1</sup> but when applied to contracts, the term, in its technical sense, imports a contract violative of common law or statute law, or of some rule of public policy.<sup>2</sup> Such contracts have been spoken of as contracts of “evil tendency.”<sup>3</sup>

**Not Strictly Contracts.** — Strictly, they are not contracts, but rather are unlawful agreements which are void in their inception.<sup>4</sup>

**II. STATUS OF ILLEGAL CONTRACTS — In General.** — Contracts which are illegal as against public policy are generally spoken of as being void.<sup>5</sup> The word “void,” when applied to such contracts, has been said to be used in reference to the question whether there can be any legal remedy upon such contract,<sup>6</sup> and this would seem to be the proper sense of the word when so used, since such a contract, when executed, may be capable of conferring actual rights to the same extent as a legal contract.

**Effect of Subsequent Illegal Contract upon Prior Contract.** — It has been held that an illegal contract entered into for the purpose of modifying or discharging a prior legal contract will not prevent the enforcement of the prior contract.<sup>7</sup>

**Release Based on Illegal Consideration.** — Thus, where a release from a prior legal obligation was based on an illegal consideration, it has been held that it would not have the effect of discharging such obligation.<sup>8</sup>

**Assignment of Illegal Contract as Consideration.** — It has also been held that the assignment of an illegal contract would not constitute a sufficient consideration for a promise by the assignee to the assignor.<sup>9</sup>

1. Abbott's L. Dict.

2. Black's L. Dict.

3. Bishop on Contracts, § 467.

4. Stanley v. Nelson, 28 Ala. 514; Ray v. Mackin, 100 Ill. 246; Cummings v. Saux, 30 La. Ann. 207; Odineal v. Barry, 24 Miss. 9.

5. **Illegal Contract Void.** — Drury v. Defontaine, 1 Taunt. 135; Santa Clara Valley Mill, etc., Co. v. Hayes, 76 Cal. 387; Harvey v. Merrill, 150 Mass. 1, 15 Am. St. Rep. 159; Bliss v. Brainard, 41 N. H. 256; Pearsoll v. Chapin, 44 Pa. St. 14.

Illegal contracts will generally be found characterized as void in the cases cited throughout this article.

As to the proper meaning of the terms “void” and “voidable” see the title VOID AND VOIDABLE.

6. **Void in the Sense of Inability to Support Remedy.** — Fennell v. Ridler, 5 B. & C. 406, 11 E. C. L. 261; Hartford F. Ins. Co. v. Chicago, etc., R. Co., 62 Fed. Rep. 904; Johns v. Bailey, 45 Iowa 241; Myers v. Meinrath, 101 Mass. 366; Smith v. Bean, 15 N. H. 577.

7. **Effect of Subsequent Illegal Contract on Prior Legal Contract — Alabama.** — Foreman v. Hardwick, 10 Ala. 316; Ware v. Curry, 67 Ala. 274. **Arkansas.** — Tucker v. West, 29 Ark. 386; Hawkins v. Campbell, 6 Ark. 513; Britt v. Aylett, 11 Ark. 475, 52 Am. Dec. 282.

**Illinois.** — Chicago, etc., R. Co. v. Lewis, 109 Ill. 120.

**New York.** — Ogden v. Barker, 18 Johns. (N. Y.) 87; Cook v. Barnes, 36 N. Y. 520.

**North Carolina.** — Wilcoxon v. Logan, 91 N. Car. 449.

**Texas.** — Scott v. Atchison, 38 Tex. 384.

See also Baird v. Boehner, 77 Iowa 622.

**Compare** Cate v. Blair, 6 Coldw. (Tenn.) 639; Harvey v. Tama County, 53 Iowa 228.

In Nichols v. Mudgett, 32 Vt. 546, it was also held that an illegal contract for the discharge of an existing debt was ineffectual and did not prevent the subsequent recovery of the debt. See also Manion v. Titsworth, 18 B. Mon. (Ky.) 582. And see the title RELEASE.

8. **Illegal Consideration.** — Best v. Higginbotham, 7 B. Mon. (Ky.) 124. See also Slaughter v. Hamm, 2 Ohio 271. **Compare** Eubanks v. Dobbs, 4 Ark. 173; Sickman v. Lapsley, 13 S. & R. (Pa.) 224, 15 Am. Dec. 596; Smith v. Davidson, 6 J. J. Marsh. (Ky.) 539; Schmitt v. Howell, 10 Daly (N. Y.) 290.

In Bailey v. Buck, 11 Vt. 252, it was held that a receipt in full of all demands, given upon consideration of stifling a criminal prosecution, was void and left the claim in force.

9. **Assignment of Illegal Contract as Consideration.** — Cummings v. Saux, 30 La. Ann. 207; Willis v. Hockaday, 1 Spears L. (S. Car.) 379, 40 Am. Dec. 606; Herd v. Vincent, 1 Overt. (Tenn.) 369. See Lake v. Gilchrist, 7 Ala. 955.

**Recovery of Consideration for Assignment.** — It has been held that where the assignee pays to

**III. CONSTRUCTION OF CONTRACT WITH RESPECT TO ILLEGALITY.** — Not only is the presumption of the law in favor of the legality of a contract, as against its illegality, but also the general rule for the interpretation of contracts, that a contract should be so construed as to give validity to it rather than to render it invalid,<sup>1</sup> applies to the construction of contracts which are claimed to be illegal, and therefore, when a contract is reasonably susceptible of two constructions, one of which will render it legal and the other illegal, that interpretation should be put upon it which will give validity to it.<sup>2</sup> If, however, it is once shown that it was the intention of the parties to enter into an illegal contract, it will not be presumed, for the purpose of giving validity to the contract, though the contract is capable of being sustained, that its object was without such illegal intention.<sup>3</sup>

**IV. PUBLIC POLICY IN GENERAL — 1. Contracts Prohibited by Public Policy Illegal.** — That principle of the law which holds that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the public good is well settled and may be termed the policy of the law or public policy in relation to the administration of the law.<sup>4</sup> And the courts have not hesitated to declare illegal and unenforceable contracts which they have considered to be against public policy.<sup>5</sup> Inasmuch as public policy is, in its nature, uncertain and incapable of being defined with exactness, it is necessary to examine the adjudged cases to determine its extent.<sup>6</sup>

**2. Public Policy — From What Determined.** — While the chief sources for determining the public policy of a nation are its constitution, laws, and judicial decisions,<sup>7</sup> still, however, these are not the sole criteria, and the courts

the assignor a consideration for the assignment of an illegal contract, he cannot afterwards recover the money so paid, in case of his inability to enforce the contract, where at the time of the assignment he had knowledge of its illegality. *Blattenberger v. Holman*, 103 Pa. St. 555.

1. See the title INTERPRETATION OF CONTRACTS.

2. **Construction in Favor of Legality of Contract** — *England*. — *Moss v. Bainbridge*, 18 Beav. 478; *Shore v. Atty.-Gen.*, 9 Cl. & F. 355; *Lewis v. Davison*, 4 M. & W. 654; *Mittelholzer v. Fullarton*, 6 Q. B. 989, 51 E. C. L. 989; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 82 E. C. L. 397.

*United States*. — *Hobbs v. McLean*, 117 U. S. 567.

*Arkansas*. — *Lincoln v. Field*, 54 Ark. 471.  
*California*. — *Saunders v. Clark*, 29 Cal. 299.  
*District of Columbia*. — *Manning v. Ellicott*, 9 App. Cas. (D. C.) 71.

*Illinois*. — *Paul v. Paul*, 71 Ill. App. 671; *Shreffler v. Nadelhoffer*, 133 Ill. 536.

*Indiana*. — *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298.

*Iowa*. — *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145, per Adams, J.

*Kentucky*. — *Bibb v. Miller*, 11 Bush (Ky.) 306.

*Louisiana*. — *Mandal v. Mandal*, 28 La. Ann. 556.

*Massachusetts*. — *Guernsey v. Cook*, 120 Mass. 501.

*Missouri*. — *Wiggins Ferry Co. v. Chicago*, etc., R. Co., 128 Mo. 224.

*New York*. — *Loitard v. Clyde*, 86 N. Y. 384; *Curtis v. Gokey*, 68 N. Y. 300, reversing 5 Hun (N. Y.) 555; *Standard Oil Co. v. Scofield*, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 372; *Powers v. Clarke*, 127 N. Y. 417.

*Tennessee*. — *Atlanta Guano Co. v. Phipps*, (Tenn. Ch. 1897) 41 S. W. Rep. 1087.

*Vermont*. — *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 632.

*Wisconsin*. — *Watters v. McGuigan*, 72 Wis. 155.

3. *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793; *Atlanta Guano Co. v. Phipps*, (Tenn. Ch. 1897) 41 S. W. Rep. 1087.

4. *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108; *Fearnley v. De Mainville*, 5 Colo. App. 441.

5. **Contracts Illegal as Against Public Policy** — *England*. — *Egerton v. Brownlow*, 4 H. L. Cas. 1.

*United States*. — *Teal v. Walker*, 111 U. S. 242.

*Colorado*. — *Fearnley v. De Mainville*, 5 Colo. App. 441.

*Indiana*. — *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593.

*Iowa*. — *Boardman v. Thompson*, 25 Iowa 487; *Merrill v. Packer*, 80 Iowa 542; *Shipley v. Reasoner*, 80 Iowa 548.

*Michigan*. — *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355; *Quirk v. Thomas*, 6 Mich. 76.

*Missouri*. — *Peltz v. Long*, 40 Mo. 532; *Turley v. Edwards*, 18 Mo. App. 676; *Kochler v. Feuerbacher*, 2 Mo. App. 11.

*North Carolina*. — *Griffin v. Hasty*, 94 N. Car. 438.

*Pennsylvania*. — *Enders v. Enders*, 164 Pa. St. 266, 44 Am. St. Rep. 598.

And see the cases throughout the article cited to the particular classes of contracts.

6. **Public Policy Incapable of Exact Definition.** — *Davies v. Davies*, 36 Ch. D. 364.

7. **Public Policy — How Determined** — *Constitutions, Statutes, and Decisions.* — U. S. v.



should not hesitate to declare a contract illegal merely because no statute or precedent prohibiting it can be found.<sup>1</sup>

**Value of Precedents.** — And also, while judicial decisions are undoubtedly of great value in determining the question of public policy, still they are not to be treated with too high a regard, as the public policy necessarily varies with the prevailing sentiments of the times.<sup>2</sup>

**3. Extension of Principle to Be Carefully Guarded.** — In some decisions the courts have characterized as judicial legislation or otherwise disapproved the power asserted by the courts to declare contracts to be illegal as against public policy, in the absence of legislation;<sup>3</sup> and while undoubtedly the power to contract should be left unrestricted as far as possible,<sup>4</sup> and contracts should not be adjudged illegal as against public policy unless clearly injurious to the public welfare,<sup>5</sup> still there can be no impropriety in judicial tribunals refusing to enforce contracts as injurious to the public welfare,<sup>6</sup> as the interest of individuals must always be subservient to the public good.<sup>7</sup>

**4. Public Policy as Viewed by Courts of Equity and of Law.** — The question of public policy as viewed by courts of equity and by courts of law should be the same.<sup>8</sup>

**5. Public Policy a Question of Law.** — The question whether a contract is contrary to public policy, when the circumstances raising the question are conceded, is one of law to be determined by the court.<sup>9</sup>

**6. Injurious Tendency of Contract the Test.** — Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result.<sup>10</sup>

**7. Legislative Sanction to Contract.** — Where the legislature, by a statute not objectionable as being unconstitutional, expressly authorizes the execution

Trans-Missouri Freight Assoc., 58 Fed. Rep. 58; Hartford F. Ins. Co. v. Chicago, etc., R. Co., 70 Fed. Rep. 201; Swann v. Swann, 21 Fed. Rep. 299; License Tax Cases, 5 Wall. (U. S.) 469; Lux v. Haggin, 69 Cal. 308; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17.

**Conflict Between State and Federal Decisions.** — In case there should be a divergence in the views of the federal and state courts on the question of national public policy the conclusion reached in the federal courts must be accepted as the best evidence of what the requirements of the national policy are, and the decisions of the state courts must be accepted as the best evidence of the public policy of the state. Hartford F. Ins. Co. v. Chicago, etc., R. Co., 62 Fed. Rep. 904. See the title UNITED STATES COURTS.

**1. Statute or Precedent Unnecessary.** — Teal v. Walker, 111 U. S. 242; Jones v. Randall, 1 Cowp. 37.

**2. Change of Public Policy with the Times.** — Davies v. Davies, 36 Ch. D. 364; Brooks v. Cooper, 50 N. J. Eq. 761, 35 Am. St. Rep. 793.

**3. Doctrine of Public Policy Disapproved.** — See Richardson v. Mellish, 2 Bing. 229, 9 E. C. L. 391.

**4. Power to Contract Unrestricted.** — Houlton v. Nichol, 93 Wis. 393, 57 Am. St. Rep. 928; Printing, etc., Co. v. Sampson, L. R. 19 Eq. 465.

**5. Public Injury Resulting Should Be Free from Doubt** — United States. — Hartford F. Ins. Co. v. Chicago, etc., R. Co., 70 Fed. Rep. 201. See also U. S. v. Trans-Missouri Freight Assoc., 58 Fed. Rep. 58.

Arkansas. — Edwards v. Randle, 63 Ark. 318, 58 Am. St. Rep. 108.

Georgia. — Smith v. Du Bose, 78 Ga. 413, 6 Am. St. Rep. 260.

Iowa. — Richmond v. Dubuque, etc., R. Co., 26 Iowa 191.

Maryland. — Matter of Woods, 52 Md. 520.

Minnesota. — Peterson v. Christensen, 26 Minn. 377.

New York. — Maloney v. Nelson, 12 N. Y. App. Div. 545.

Pennsylvania. — Enders v. Enders, 164 Pa. St. 266, 44 Am. St. Rep. 598.

Vermont. — Barrett v. Carden, 65 Vt. 431, 36 Am. St. Rep. 876.

Virginia. — Bier v. Dozier, 24 Gratt. (Va.) 1.

Wisconsin. — Kellogg v. Larkin, 3 Pin. (Wis.) 123, 56 Am. Dec. 164; Houlton v. Nichol, 93 Wis. 393, 57 Am. St. Rep. 928.

**6. Doctrine of Public Policy Approved.** — Boardman v. Thompson, 25 Iowa 487; Stanton v. Allen, 5 Den. (N. Y.) 434, 49 Am. Dec. 282.

**7. Interest of Individuals Subservient to Public Welfare.** — McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 355.

**8. Same in Courts of Equity as in Courts of Law.** — Boynton v. Hubbard, 7 Mass. 112.

**9. Public Policy a Question of Law.** — Tallis v. Tallis, 1 El. & Bl. 391, 72 E. C. L. 391; Smith v. Du Bose, 78 Ga. 413, 6 Am. St. Rep. 260.

**10. Evil Tendency of Contract the Test.** — Brown v. Columbus First Nat. Bank, 137 Ind. 655; Elkhart County Lodge v. Cray, 98 Ind. 242, 49 Am. Rep. 746; Firemen's Assoc. v. Berghaus, 13 La. Ann. 209; Drexler v. Tyrrell, 15 Nev. 114; Atcheson v. Mallon, 43 N.



of a particular contract or class of contracts, the courts are without power to declare such contracts illegal as against public policy, as when the government through its legislative branch has determined its public policy the judicial branch is bound thereby.<sup>1</sup>

**8. Legality of Contract as Affected by Character of Parties.** — As a general rule, the character of a contract, in this connection, is not affected by the character of the parties,<sup>2</sup> and such contracts will be held illegal irrespective of whether they are between citizens of the government or between aliens.<sup>3</sup>

**State as a Party.** — And though it has been held that contracts by a state were not subject to the allegation of being against the public policy of the state,<sup>4</sup> still, a contract which is against the policy of the federal government has been held illegal, and the assertion of the defense of illegality was allowed even against the state.<sup>5</sup>

**V. CONTRACTS IN VIOLATION OF POSITIVE LAW** — **1. In General.** — As a general rule, all contracts or agreements which involve or have for their object a violation of the law are illegal.<sup>6</sup> If the contract stands opposed to the

Y. 147, 3 Am. Rep. 678; *Richardson v. Crandall*, 48 N. Y. 348.

**1. Legislative Sanction to Contract** — *United States*. — U. S. v. Trans-Missouri Freight Assoc., 166 U. S. 290; *Winona v. Cowdrey*, 93 U. S. 612.

*Kentucky*. — *Brown v. Anderson*, 1 T. B. Mon. (Ky.) 200; *Baumeister v. Markham*, (Ky. 1897) 41 S. W. Rep. 816.

*Louisiana*. — *Lyman v. Townsend*, 24 La. Ann. 625.

*Massachusetts*. — *Davis v. Com.*, 164 Mass. 241.

*Missouri*. — *Theobald v. Supreme Lodge*, etc., 59 Mo. App. 87.

*New York*. — *Parfitt v. Kings County Gas, etc., Co.*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 278.

*Pennsylvania*. — *Enders v. Enders*, 164 Pa. St. 266, 44 Am. St. Rep. 598.

*South Carolina*. — *Denton v. English*, 3 Brev. (S. Car.) 147.

**2. Contract by Artificial Person.** — A contract made by an artificial person is void if the consideration is illegal or if the subject-matter is against public policy. In this respect a corporation stands on the same ground as a natural person. *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665.

**3. Aliens.** — Thus an alien who enters into a contract for the purpose of violating the law of the government of the forum cannot recover thereon. *Graves v. Delaplaine*, 14 Johns. (N. Y.) 146.

**4. State as a Party.** — *Brown v. Anderson*, 1 T. B. Mon. (Ky.) 200. See also *People v. Stephens*, 71 N. Y. 527.

**5. Federal Policy Infringed.** — *Craig v. Missouri*, 4 Pet. (U. S.) 410; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Linn v. State Bank*, 2 Ill. 87, 25 Am. Dec. 71; *State v. Louisiana State Bank*, 20 La. Ann. 468.

**6. Contracts in Violation of Law Illegal** — *England*. — *Collins v. Blanton*, 2 W. & A. 147; *Lightfoot v. Tenant*, 1 B. & P. 551; *Law v. Hodson*, 11 East 300; *Aubert v. Maze*, 2 B. & P. 371; *Little v. Poole*, 9 B. & C. 192, 17 E. C. L. 355; *Swan v. Bank of Scotland*, 1 Deac. 746, 38 E. C. L. 666; *Newington Local Board v. Cottingham Local Board*, 12 Ch. D. 725; *Ritchie v. Smith*, 6 C. B. 462, 60 E. C. L. 462.

*United States*. — *U. S. Bank v. Owens*, 2 Pet. (U. S.) 538; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; *Kansas Sav. Bank v. National Bank*, 38 Fed. Rep. 800; *Groves v. Slaughter*, 15 Pet. (U. S.) 449; *Brown v. Tarkington*, 3 Wall. (U. S.) 377; *Western Union Tel. Co. v. Burlington, etc., R. Co.*, 3 McCrary (U. S.) 130; *Davidson v. Lanier*, 4 Wall. (U. S.) 447; *Hanauer v. Doane*, 12 Wall. (U. S.) 342.

*Alabama*. — *Whetstone v. Montgomery Bank*, 9 Ala. 875; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 336.

*Arkansas*. — *Tatum v. Kelly*, 25 Ark. 209, 94 Am. Dec. 717; *Ruddell v. Landers*, 25 Ark. 238, 94 Am. Dec. 719.

*California*. — *McCullough v. Board of Education*, 51 Cal. 418.

*Connecticut*. — *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210.

*Georgia*. — *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 476; *Hill v. Mitchell*, 25 Ga. 704.

*Illinois*. — *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Linn v. State Bank*, 2 Ill. 87, 25 Am. Dec. 71; *Indianapolis, etc., R. Co. v. Ervin*, 118 Ill. 250, 59 Am. Rep. 369.

*Indiana*. — *State Bank v. Coquillard*, 6 Ind. 232; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506.

*Iowa*. — *McIntosh v. Wilson*, 81 Iowa 339; *Guenther v. Dewein*, 11 Iowa 133; *Reynolds v. Nichols*, 12 Iowa 398.

*Kentucky*. — *Steele v. Curle*, 4 Dana (Ky.) 384.

*Louisiana*. — *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294; *Fox v. New Orleans*, 12 La. Ann. 154, 68 Am. Dec. 766; *Reed v. Crocker*, 12 La. Ann. 436.

*Maryland*. — *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355; *Baltimore, etc., R. Co. v. Faunce*, 6 Gill (Md.) 68, 46 Am. Dec. 655; *Maryland Hospital v. Foreman*, 29 Md. 524.

*Massachusetts*. — *Wheeler v. Russell*, 17 Mass. 258; *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Roche v. Ladd*, 1 Allen (Mass.) 436.

*Michigan*. — *State Bank v. Niles*, 1 Douglass (Mich.) 401, 41 Am. Dec. 575; *Hannah v. Fife*, 27 Mich. 172.

common or statute law, it is equally void *ab initio* in the one case as in the other, and no action or suit will lie to enforce it.<sup>1</sup>

**Unconstitutional Law Authorizing Contract in Violation of General Law.** — And a contract in violation of the general laws of the state has been held illegal, though such contract was authorized by a special act, where such special act was unconstitutional.<sup>2</sup>

**Implied Contracts.** — The rule that a contract in violation of the common or statute law is illegal applies to implied contracts as well as to express contracts.<sup>3</sup>

**Intention of Parties to Contract.** — In order to render a contract in violation of law illegal it is not necessary that there shall exist any corrupt intention on the part of the contracting parties.<sup>4</sup> And on the other hand, the fact that it was the intention of the parties to a contract to violate a certain statute will not render the contract illegal if in fact the contract did not tend to violate such statute.<sup>5</sup>

**Ignorance of Law.** — It is a familiar rule that ignorance of the law excuses no one. So it has been held that the fact that the parties to a contract were ignorant of the existence of the law which was violated by their contract would not prevent the contract from being declared illegal.<sup>6</sup> But it has been held that where the parties, misapprehending the true meaning of a statute, contract for the performance of an act in a manner prohibited by the statute,

*Missouri.* — Haggerty *v.* St. Louis Ice Mfg., etc., Co., 143 Mo. 238; Jacobs *v.* North British, etc., Ins. Co., 61 Mo. App. 572; Prince *v.* Eighth St. Baptist Church, 20 Mo. App. 332.

*Nebraska.* — Wilson *v.* Parrish, 52 Neb. 6.

*New Hampshire.* — Jones *v.* Surprise, 64 N. H. 243; Udall *v.* Metcalf, 5 N. H. 396; Boultelle *v.* Melendy, 19 N. H. 196, 49 Am. Dec. 152.

*New Jersey.* — Brooks *v.* Cooper, 50 N. J. Eq. 761, 35 Am. St. Rep. 793 [citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 907]; Gulick *v.* Ward, 10 N. J. L. 87, 18 Am. Dec. 389; Cannon *v.* Cannon, 26 N. J. Eq. 316; Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479.

*New York.* — Cook *v.* Phillips, 56 N. Y. 310; Sanderson *v.* Goodrich, 46 Barb. (N. Y.) 616; Hunt *v.* Knickerbacker, 5 Johns. (N. Y.) 327; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 397.

*North Carolina.* — Futrell *v.* Vann, 8 Ired. L. (30 N. Car.) 402; Love *v.* Brindle, 7 Jones L. (52 N. Car.) 560; Ramsay *v.* Woodard, 3 Jones L. (48 N. Car.) 508; State *v.* Hyman, 1 Jones L. (46 N. Car.) 59.

*Ohio.* — Rossman *v.* McFarland, 9 Ohio St. 369.

*Pennsylvania.* — Mitchell *v.* Smith, 1 Binn. (Pa.) 110, 2 Am. Dec. 417; Balliet's Case, 1 Leg. Chron. (Pa.) 195; Seidenbender *v.* Charles, 4 S. & R. (Pa.) 151, 8 Am. Dec. 682; Thorne *v.* Travellers Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89; Columbia Bank, etc., Co. *v.* Haldeman, 7 W. & S. (Pa.) 233, 42 Am. Dec. 229; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

*South Carolina.* — Gilliland *v.* Phillips, 1 S. Car. 152.

*Tennessee.* — Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; Hale *v.* Henderson, 4 Humph. (Tenn.) 199.

*Texas.* — Hunt *v.* Robinson, 1 Tex. 748; Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 15 Am. St. Rep. 852.

*Vermont.* — Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

*Virginia.* — Wilson *v.* Spencer, 1 Rand. (Va.) 76, 10 Am. Dec. 491.

*West Virginia.* — Capehart *v.* Rankin, 3 W. Va. 571, 100 Am. Dec. 779.

*Wisconsin.* — Ætna Ins. Co. *v.* Harvey, 11 Wis. 394; Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605.

**Code Provision for Action by Real Party in Interest.** — In *Winegard v. Fanning*, 76 Hun (N. Y.) 170, it was held that Code Civ. Pro. N. Y., § 449, providing that "every action must be prosecuted in the name of the real party in interest," did not render illegal an agreement by the assignee of a mortgage for the foreclosure of such mortgage by the assignor, and therefore did not preclude the assignee, after foreclosure by the assignor, from recovering the amount received by the latter.

**1. Common Law and Legislative Acts on Same Footing.** — Collins *v.* Blantern, 2 Wils. C. Pl. 347.

**2. Unconstitutional Special Law Authorizing Contract in Violation of General Law.** — Houston County *v.* Killen, 76 Ga. 826.

**3. Implied Contract.** — Cope *v.* Rowlands, 2 M. & W. 149.

**4. Corrupt Intention Unnecessary.** — Seneca County Bank *v.* Lamb, 26 Barb. (N. Y.) 595.

If the purpose of a contract be unlawful, an open avowal of such purpose does not make it the less unlawful. *McGourkey v. Toledo, etc., R. Co.*, 146 U. S. 536.

**5.** Cannon *v.* Cannon, 26 N. J. Eq. 316.

**6. Ignorance of Law.** — Waugh *v.* Morris, L. R. 8 Q. B. 202; Lewis *v.* Headley, 36 Ill. 433, 87 Am. Dec. 227; Missouri, etc., R. Co. *v.* Bowles, (Indian Ter. 1897) 40 S. W. Rep. 899.

The rule stated in the text was announced in *Burger v. Koelsch*, 77 Hun (N. Y.) 44, and applied to a case where the contract in question violated an ordinance of the city of Buffalo.



they may nevertheless be bound by the contract, provided the manner of performance is not of the essence of the contract, and the object contemplated may be accomplished in a manner not violative of the statute.<sup>1</sup>

**Probability that the Law Will Be Violated.** — It has been held that contracts illegal from their tendency to promote unlawful acts are not affected by the question as to the probability of the unlawful act being done.<sup>2</sup>

**2. Contracts Violating Constitutions, Orders in Council, Treaties, and Municipal Ordinances.** — Constitutions are often spoken of as the supreme law of the land, and contracts violating constitutional provisions are illegal to the same extent as contracts violating statutory enactments.<sup>3</sup>

**Orders in Council.** — In *England* contracts violating orders in council are illegal to the same extent as contracts violating Acts of Parliament.<sup>4</sup>

**Treaties.** — Contracts have also been held illegal as in violation of treaties of the United States.<sup>5</sup>

**Municipal Ordinances.** — Contracts violating city ordinances are also held illegal to the same extent as contracts violating enactments of the legislature.<sup>6</sup>

**3. Contracts Contemplating Change of Law.** — A contract for an act prohibited by the existing law, but which is shown to have been made with reference to the contemplated procuring of a special statute making the act valid, the enactment of which was actually procured before the contract was performed, is not to be regarded as illegal.<sup>7</sup>

**4. Violation of Law in Execution of Contract.** — Where a contract based on a lawful consideration is for the performance of an act capable of being performed in a lawful manner, the fact that one of the contracting parties violates the law in the performance of the act contracted for will not necessarily render the contract illegal; the contract is good and may be made the subject of an action, notwithstanding the breach of the law which occurred in carrying it into effect.<sup>8</sup> And in order to render illegal a contract which can be legally

**1.** *Favor v. Philbrick*, 7 N. H. 326. See also *Fox v. Rogers*, 171 Mass. 546.

**2.** **Probability that Law Will Be Violated.** — *Egerton v. Brownlow*, 4 H. L. Cas. 1.

**3. Contracts Violative of Constitutions** — *United States*. — *Craig v. Missouri*, 4 Pet. (U. S.) 410; *Gandolfo v. Hartman*, 49 Fed. Rep. 181; *Byrne v. Missouri*, 8 Pet. (U. S.) 40; *Alienberg v. Grant*, 85 Fed. Rep. 345.

*Alabama*. — *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Williams v. Evans*, 87 Ala. 725.

*California*. — *Garms v. Jensen*, 103 Cal. 374; *Harralson v. Barrett*, 99 Cal. 607.

*Illinois*. — *Linn v. State Bank*, 2 Ill. 87, 25 Am. Dec. 71.

**Constitutional Provision Not Self-executing.** — An action was brought on a promissory note given in *Mississippi* in 1836 for slaves in that state who had been imported in 1835 and 1836. The constitution of *Mississippi* provided that "the introduction of slaves into this state, as merchandise or for sale, shall be prohibited from and after the first day of May, 1833." It was held that this prohibition did not invalidate the contract, but that legislative action was necessary to carry it into effect. *Groves v. Slaughter*, 15 Pet. (U. S.) 449.

**4. Orders in Council.** — *Inglis v. De Barnard*, 3 Moo. P. C. 425; *Holland v. Hall*, 1 B. & Ald. 53.

**5. Contracts Violating Treaties.** — *Gandolfo v. Hartman*, 49 Fed. Rep. 181; *Pettit v. Pettit*, 32 Ala. 288; *Lewis v. Love*, 1 Ala. 335; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415. See also *Kennett v. Chambers*, 14 How. (U. S.) 38.

**6. Contracts Violating City Ordinances.** — *Miller*

*v. Ammon*, 145 U. S. 421; *Richardson v. Brix*, 94 Iowa 626; *Yount v. Denning*, 52 Kan. 629; *Milne v. Davidson*, 5 Mart. N. S. (La.) 409, 16 Am. Dec. 189; *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637; *Brinkman v. Eisler*, (N. Y. City Ct. Tr. T.) 26 N. Y. St. Rep. 94, affirmed 16 N. Y. Supp. 154; *Burger v. Koelsch*, 77 Hun (N. Y.) 44; *Beman v. Tugnot*, 5 Sandf. (N. Y.) 153; *Ferdon v. Cunningham*, (C. Pl. Gen. T.) 20 How. Pr. (N. Y.) 154; *De Wit v. Lander*, 72 Wis. 120; *McMillan v. Walker*, 21 N. Bruns. 31, affirmed 6 Can. Sup. Ct. 241. Compare *Bick v. Seal*, 45 Mo. App. 475.

**7.** *Columbus, etc., R. Co. v. Indianapolis, etc., R. Co.*, 5 McLean (U. S.) 450. See *Pollock on Contracts* 237; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 82 E. C. L. 397.

**8. Violation of Law in Execution of Contract** — *England*. — *Wetherell v. Jones*, 3 B. & Ad. 221, 23 E. C. L. 58; *Frazer v. Hill*, 1 Macq. H. L. 392; *Wagh v. Morris*, L. R. 8 Q. B. 202; *Lea-royd v. Bracken*, (1894) 1 Q. B. 114; *Lewis v. Davidson*, 3 Jur. 387; *Porritt v. Baker*, 1 Jur. N. S. 336.

*Alabama*. — *Whetstone v. Montgomery Bank*, 9 Ala. 875; *Branch Bank v. Crocheron*, 5 Ala. 209.

*Indiana*. — *Pape v. Wright*, 116 Ind. 502.

*Kentucky*. — *Sawyer v. Taggart*, 14 Bush (Ky.) 174.

*Massachusetts*. — *Barry v. Capen*, 151 Mass. 99; *Fox v. Rogers*, 171 Mass. 546.

*Missouri*. — *Crane v. Whittemore*, 4 Mo. App. 510; *McDearmott v. Sedgwick*, 140 Mo. 172.



performed, on the ground that there was an intention to enforce it in an illegal manner, it has been said that it is necessary to show the existence of a wicked intention to break the law; <sup>1</sup> an intention to perform the contract in an illegal manner will not be presumed. <sup>2</sup>

**5. Contracts Involving Commission of Acts Mala in Se.** — All agreements involving the commission of acts which are *mala in se* are of course illegal. <sup>3</sup>

**Incentive to Commission of Crime.** — Where the parties to a contract do not contemplate the commission of any crime, the fact that the contract offers an incentive to do so will not render it illegal. This is well shown in contracts in which the benefit to accrue to one of the parties is conditioned on the death of the other party, thereby giving the former an interest in the death of the latter. <sup>4</sup>

**6. Agreements in Violation of Statutory Prohibitions — General Rules of Construction** — *a. INTENTION OF LEGISLATURE.* — The question in regard to the legality of contracts in violation of law has chiefly arisen in cases in which the contract involved or violated some statutory prohibition. In determining whether a contract which infringes such a statute is legal or illegal, the criterion is, of course, the intention of the legislature, which is to be determined from the construction of the entire statute. <sup>5</sup>

*New Hampshire.* — *Favor v. Philbrick*, 7 N. H. 326.

*New York.* — *Dowley v. Schiffer*, (C. Pl. Gen. T.) 13 N. Y. Supp. 552.

*Tennessee.* — *Jones v. Davidson*, 2 Sneed (Tenn.) 447; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

*Compare* *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145.

1. *Waugh v. Morris*, L. R. 8 Q. B. 202. See also *Favor v. Philbrick*, 7 N. H. 326.

2. *Dowley v. Schiffer*, (C. Pl. Gen. T.) 13 N. Y. Supp. 552.

**3. Contracts Involving Commission of Acts Mala in Se** — *England.* — *Everet v. Williams*, reported in 2 Pothier on Obl. 3, and also in 1 Lindley on Part. 183; *Allen v. Rescous*, 2 Lev. 174; *Gale v. Leckie*, 2 Stark. 107, 3 E. C. L. 337; *Poplett v. Stockdale, R. & M.* 337; *Sykes v. Beadon*, 11 Ch. D. 195.

*United States.* — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Arnold v. Clifford*, 2 Sumn. (U. S.) 238; *Anderson v. Carkins*, 135 U. S. 483.

*Arkansas.* — *Barker v. Parker*, 23 Ark. 390.

*California.* — *Eldorado County v. Davison*, 30 Cal. 520.

*Connecticut.* — *Treat v. Jones*, 28 Conn. 334.

*Illinois.* — *Munsell v. Temple*, 8 Ill. 93.

*Indiana.* — *Winchester Electric Light Co. v. Veal*, 145 Ind. 506.

*Kansas.* — *Fleming v. Greene*, 48 Kan. 646.

*Kentucky.* — *Hocker v. Gentry*, 3 Met. (Ky.) 469.

*Louisiana.* — *Merchants' Ins. Co. v. Addison*, 9 Rob. (La.) 486.

*Maine.* — *Dyer v. Curtis*, 72 Me. 181.

*Maryland.* — *Baltimore, etc., R. Co. v. Faunce*, 6 Gill (Md.) 68, 46 Am. Dec. 655.

*Minnesota.* — *Evans v. Folsom*, 5 Minn. 422.

*Missouri.* — *Bick v. Seal*, 45 Mo. App. 475; *Friend v. Porter*, 50 Mo. App. 89; *Keating v. Hyde*, 23 Mo. App. 555.

*New York.* — *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667.

*Pennsylvania.* — *Jenkins v. Fowler*, 24 Pa. St. 308.

*Tennessee.* — *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

*Vermont.* — *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68.

**Abduction.** — In *Barker v. Parker*, 23 Ark. 390, it was held that a bond executed for services rendered in the abduction of a person was illegal.

**Criminal Libel.** — In *Poplett v. Stockdale, R. & M.* 337, it was held that no right of action could arise for work done in printing a criminal libel. See also *Gale v. Leckie*, 2 Stark. 107, 3 E. C. L. 337.

**4. Incentive to Commission — Interest in Death of Person.** — *Cook v. Field*, 15 Q. B. 460, 69 E. C. L. 460; *Conyne v. Jones*, 51 Ill. App. 17; *Krell v. Codman*, 154 Mass. 454, 26 Am. St. Rep. 260.

In *Stone v. Pennock*, 31 Mo. App. 544, it was held that a provision that the entire compensation fixed by a contract for three years' service was to become due and payable on the death of the employer did not render the contract illegal as being against public policy.

**5. Intention of Legislature** — *England.* — *Williams v. Hedley*, 8 East 378; *Cope v. Rowlands*, 2 M. & W. 149; *Browning v. Morris*, 2 Cowp. 790.

*United States.* — *Harris v. Runnels*, 12 How. (U. S.) 80; *In re Pitcock*, 2 Sawy. (U. S.) 416; *Chapman v. Douglas County*, 107 U. S. 348; *Miller v. Ammon*, 145 U. S. 421.

*Alabama.* — *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538.

*Illinois.* — *Edwards v. School Trustees*, 30 Ill. App. 528.

*Indiana.* — *Wheeler v. Hawkins*, 116 Ind. 515.

*Iowa.* — *Pangborn v. Westlake*, 36 Iowa 546.

*Kansas.* — *Bemis v. Becker*, 1 Kan. 227.

*Maryland.* — *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211.

*Minnesota.* — *De Mers v. Daniels*, 39 Minn. 158.

*New Jersey.* — *Ruckman v. Bergholz*, 37 N. J. L. 437.

*b. MALUM PROHIBITUM AND MALUM IN SE.* — In some early cases a distinction was taken, in reference to the validity and enforcement of contracts, between acts *mala prohibita* and acts *mala in se*; but, in the words of an eminent jurist, this “has long since been exploded. It was not founded upon any sound principle, for it is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state.”<sup>1</sup>

*c. VIOLATION OF STATUTE MADE A MISDEMEANOR.* — Where the statute expressly provides that a violation thereof shall be a misdemeanor, it would seem clear that it was the intention of the legislature to render illegal contracts violating such statute.<sup>2</sup>

*d. EFFECT OF PROHIBITION AND PENALTY.* — Where the statute contains an express prohibition and also imposes a penalty for its violation, the rule has been laid down that a contract contravening such a statute would be illegal, unless a contrary intention on the part of the legislature appeared from the whole statute.<sup>3</sup> This rule has not, however, met with universal approval.<sup>4</sup>

*e. EFFECT OF IMPOSITION OF PENALTY OR FORFEITURE.* — Where a statute does not expressly prohibit the doing of a particular act, but merely imposes a penalty for the doing of such act, the imposition of the penalty *prima facie* implies a prohibition, and the general rule is that all contracts in violation of such statute are equally illegal as though the statute expressly prohibited the making of them and declared them void.<sup>5</sup> Still, the fact that

*New York.* — Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531.

*Ohio.* — Vining v. Bricker, 14 Ohio St. 331.

*Vermont.* — Aiken v. Blaisdell, 41 Vt. 655.

*Virginia.* — Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720.

*Wisconsin.* — Johnson v. Meeker, 1 Wis. 436.

1. *No Distinction Between Malum in Se and Malum Prohibitum — England.* — Bensley v. Bignold, 5 B. & Ald. 335, 7 E. C. L. 121, per Best, J.; Cannan v. Bryce, 3 B. & Ald. 179, 5 E. C. L. 255; Aubert v. Maze, 2 B. & P. 371; Watts v. Brooks, 3 Ves. Jr. 612; Webb v. Pritchett, 1 B. & P. 264; Morck v. Abel, 3 B. & P. 35.

*United States.* — U. S. Bank v. Owens, 2 Pet. (U. S.) 527; Gibbs v. Consolidated Gas Co., 130 U. S. 396.

*Arkansas.* — Lindsey v. Rottaken, 32 Ark. 619.

*California.* — Swanger v. Mayberry, 59 Cal. 91; Ladda v. Hawley, 57 Cal. 51; Gardner v. Tatum, 81 Cal. 370.

*Illinois.* — Penn v. Bornman, 102 Ill. 523.

*Indiana.* — Cooper v. Griffin, 13 Ind. App. 212.

*Iowa.* — Reynolds v. Nichols, 12 Iowa 398.

*Kentucky.* — Steele v. Curle, 4 Dana (Ky.) 384.

*Maine.* — Greenough v. Balch, 7 Me. 461.

*Maryland.* — Baltimore, etc., R. Co. v. Faunce, 6 Gill (Md.) 68, 46 Am. Dec. 655.

*Massachusetts.* — White v. Buss, 3 Cush. (Mass.) 450.

*Missouri.* — Friend v. Porter, 50 Mo. App. 89; Downing v. Ringer, 7 Mo. 585.

*New Hampshire.* — Lewis v. Welch, 14 N. H. 294.

*New York.* — Seneca County Bank v. Lamb, 26 Barb. (N. Y.) 595; Pennington v. Townsend, 7 Wend. (N. Y.) 276; Pepper v. Haight, 20 Barb. (N. Y.) 429; Pratt v. Adams, 7 Paige (N.

Y.) 615; De Groot v. Van Duzer, 20 Wend. (N. Y.) 390; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

*North Carolina.* — Puckett v. Alexander, 102 N. Car. 95; Sharp v. Farmer, 4 Dev. & B. L. (20 N. Car.) 122.

*Pennsylvania.* — Eberman v. Reitzel, 1 W. & S. (Pa.) 181; Holt v. Green, 73 Pa. St. 198, 13 Am. Rep. 737; Seidenbender v. Charles, 4 S. & R. (Pa.) 151, 8 Am. Dec. 682; Columbia Bank, etc., Co. v. Haldeman, 7 W. & S. (Pa.) 233, 42 Am. Dec. 229.

*Tennessee.* — Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

*Texas.* — See Clay v. Clay, 35 Tex. 509.

2. *Violation of Statute Made a Misdemeanor — Alabama.* — Youngblood v. Birmingham Trust, etc., Co., 95 Ala. 521, 36 Am. St. Rep. 245; Moog v. Hannon, 93 Ala. 503.

*Iowa.* — Dillon v. Allen, 46 Iowa 299, 26 Am. Rep. 145.

*Minnesota.* — Ingersoll v. Randall, 14 Minn. 400.

*New York.* — Fox v. Dixon, 58 Hun (N. Y.) 605, 12 N. Y. Supp. 267.

*Pennsylvania.* — Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Mitchell v. Smith, 4 Dall. (Pa.) 269.

*Tennessee.* — Snoddy v. American Nat. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918.

3. *Effect of Prohibition and Penalty.* — *In re* Pittock, 2 Sawy. (U. S.) 416; Dowell v. Applegate, 7 Fed. Rep. 881; Peirce v. U. S., 1 Ct. Cl. 270.

4. See Aiken v. Blaisdell, 41 Vt. 655.

5. *Rule Laid Down in Bartlett v. Vinor Re-affirmed.* — Bartlett v. Vinor, 102 Cal. 252; Cundell v. Dawson, 4 C. B. 376, 56 E. C. L. 376; D'Allex v. Jones, 2 Jur. N. S. 979; De Begnis v. Armistead, 10 Bing. 107, 25 E. C. L. 47; Swan v. Bank of Scotland, 1 Deac. 746, 38

the statute imposes a penalty for its violation does not necessarily render illegal a contract violating such statute, since the intention of the legislature is the controlling criterion, as heretofore stated,<sup>1</sup> and the following rule has also been laid down: "Where an act is absolutely prohibited by statute, or is contrary to public policy, all notes, etc., given in furtherance of that act are null and void; but where the statute fixes a mere penalty, contracts in relation to matters which subject the makers to that penalty are not on that account invalidated. Where not intrinsically wrong, the individual is permitted to perform the act upon the payment of the penalty. This is a species of license money, exacted for the privilege of doing a certain thing, but the act is not otherwise unlawful unless expressly declared so."<sup>2</sup>

**Forfeiture.** — Where the statute imposes a forfeiture of goods or merchandise for a violation thereof, such forfeiture is as strictly a penalty as a forfeit-

E. C. L. 666; *Cope v. Rowlands*, 2 M. & W. 149; *Fergusson v. Norman*, 5 Bing. N. Cas. 76, 35 E. C. L. 37.

*United States.* — *The Pioneer*, *Deady* (U. S.) 72; *Swann v. Swann*, 21 Fed. Rep. 299; *Groves v. Slaughter*, 15 Pet. (U. S.) 449; *Powhattan Steamboat Co. v. Appomattox R. Co.*, 4 Quart. L. J. 100, 19 Fed. Cas. No. 11,363; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

*Alabama.* — *Stanley v. Nelson*, 28 Ala. 514; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Dodson v. Harris*, 10 Ala. 566; *Gunter v. Leckey*, 30 Ala. 591; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 336; *Shippey v. Eastwood*, 9 Ala. 200; *Saltmarsh v. Tuthill*, 13 Ala. 406; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 336; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671.

*Arkansas.* — *Tucker v. West*, 29 Ark. 386; *Martin v. Hodge*, 47 Ark. 378, 58 Am. Rep. 763.

*Connecticut.* — *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210.

*Delaware.* — *Cook v. Pierce*, 2 Houst. (Del.) 499.

*Indiana.* — *Walter A. Wood Mowing, etc., Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165; *Madison Ins. Co. v. Forsythe*, 2 Ind. 483; *Siter v. Sheets*, 7 Ind. 132; *Deming v. State*, 23 Ind. 416; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536.

*Indian Territory.* — *Poplin v. Clausen*, (Indian Ter. 1897) 38 S. W. Rep. 974.

*Iowa.* — *Pangborn v. Westlake*, 36 Iowa 546; *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145.

*Kentucky.* — *Vanmeter v. Spurrier*, 94 Ky. 22.

*Maine.* — *Ellsworth v. Mitchell*, 31 Me. 247; *Durgin v. Dyer*, 68 Me. 143.

*Maryland.* — *Hall v. Mullin*, 5 Har. & J. (Md.) 193.

*Massachusetts.* — *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Wheeler v. Russell*, 17 Mass. 258; *Farrar v. Barton*, 5 Mass. 395; *Nourse v. Pope*, 13 Allen (Mass.) 87; *Allen v. Hawks*, 13 Pick. (Mass.) 79.

*Minnesota.* — *Solomon v. Dreschler*, 4 Minn. 278; *Ingersoll v. Randall*, 14 Minn. 400.

*Missouri.* — *Downing v. Ringer*, 7 Mo. 585.

*New Hampshire.* — *Brackett v. Hoyt*, 29 N. H. 264; *Coburn v. Odell*, 30 N. H. 540; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Carleton v. Whitcher*, 5 N. H. 196; *Pray v. Bur-*

*bank*, 10 N. H. 377; *Williams v. Tappan*, 23 N. H. 385; *Jones v. Surprise*, 64 N. H. 243.

*New Jersey.* — *Sharp v. Teese*, 9 N. J. L. 352, 17 Am. Dec. 479.

*New York.* — *Bell v. Quin*, 2 Sandf. (N. Y.) 146; *Griffith v. Wells*, 3 Den. (N. Y.) 226.

*North Carolina.* — *Covington v. Threadgill*, 88 N. Car. 186.

*Ohio.* — *Bloom v. Richards*, 2 Ohio St. 387.

*Pennsylvania.* — *Maybin v. Coulon*, 4 Dall. (Pa.) 298; *Biddis v. James*, 6 Binn. (Pa.) 321, 6 Am. Dec. 456; *Seidenbender v. Charles*, 4 S. & R. (Pa.) 159, 8 Am. Dec. 682; *Mitchell v. Smith*, 1 Binn. (Pa.) 118, 2 Am. Dec. 417, 4 Dall. (Pa.) 269; *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699; *Columbia Bank, etc., Co. v. Haldeman*, 7 W. & S. (Pa.) 233, 42 Am. Dec. 229; *Atherton v. City*, 3 Kulp (Pa.) 402; *Waugh v. Beck*, 114 Pa. St. 422, 60 Am. Rep. 354.

*South Carolina.* — *McConnell v. Kitchens*, 20 S. Car. 437.

*Tennessee.* — *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Hale v. Henderson*, 4 Humph. (Tenn.) 199.

*Vermont.* — *Rutland Bank v. Parsons*, 21 Vt. 109; *Bancroft v. Dumas*, 21 Vt. 456; *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68; *Territt v. Bartlett*, 21 Vt. 184; *Elkins v. Parkhurst*, 17 Vt. 105.

*Virginia.* — *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720; *Middleton v. Arnolds*, 13 Gratt. (Va.) 489.

**Statute for Protection of Public.** — Where a statute, with the view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits the act itself and renders it illegal. *D'Allex v. Jones*, 2 Jur. N. S. 979.

**1. Contracts Held Legal Though Violative of Statute Imposing Penalty.** — *Johnson v. Hudson*, 11 East 180; *Watrous v. Blair*, 32 Iowa 58; *Pangborn v. Westlake*, 36 Iowa 546; *Bemis v. Becker*, 1 Kan. 226; *De Mers v. Daniels*, 39 Minn. 158; *Strong v. Darling*, 9 Ohio 201; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720.

**2. Penalty Not Necessarily a Prohibition.** — In *Hill v. Smith*, 1 Morr. (Iowa) 70, the rule stated was laid down and applied to a contract for the sale of public lands of the United States in violation of the Act of 1807.



ure of money and equally implies a prohibition and renders illegal contracts in violation thereof.<sup>1</sup>

*f. PROHIBITION WITHOUT IMPOSITION OF PENALTY.* — An agreement in violation of a statute has been held unlawful, though the statute violated merely prohibited the doing of the act without the imposition of any penalty.<sup>2</sup> For, as it has been said, there is a moral obligation on the part of all citizens to obey the law, even in the absence of any penalty imposed for its violation, and courts being organized under the law and required to administer it, it would seem to be an anomaly were they so far to sanction its violation as to give effect to a contract forbidden by the very law that they are bound to respect and enforce.<sup>3</sup>

*g. FAILURE OF STATUTE TO DECLARE CONTRACT ILLEGAL.* — In order that a statute may render contracts in violation thereof illegal, it is not necessary that the statute should expressly so declare.<sup>4</sup>

*h. STATUTORY LIMITATION OF EFFECT OF CONTRACTS IN VIOLATION.* — Where a prohibitory statute expressly limits the effect of contracts in violation thereof, no other limitation can of course be imposed than that provided by the statute.<sup>5</sup> And thus where a statute prohibits a specific kind of contract, but also provides that contracts entered into in violation of the statute shall not be deemed void, the courts must, of course, enforce such contracts.<sup>6</sup>

*i. PURPOSE OF STATUTE ACCOMPLISHED WITHOUT RENDERING CONTRACT ILLEGAL.* — Where the purpose of the statute can be accomplished

1. *Forfeiture.* — *Williams v. Tappan*, 23 N. H. 385.

2. *Prohibition Without Imposition of Penalty.* — *Peirce v. U. S.*, 1 Ct. Cl. 270; *McGehee v. Lindsay*, 6 Ala. 16; *Robertson v. Hayes*, 83 Ala. 290; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38; *Walker v. Gregory*, 36 Ala. 180; *Buchanan v. Tilden*, 18 N. Y. App. Div. 123; *Waugh v. Beck*, 114 Pa. St. 422, 60 Am. Dec. 354; *Hunt v. Robinson*, 1 Tex. 748.

3. *Hunt v. Robinson*, 1 Tex. 748.

4. *Failure of Statute to Declare Violative Contracts Illegal* — *United States.* — *Harris v. Runnels*, 12 How. (U. S.) 79; *U. S. Bank v. Owens*, 2 Pet. (U. S.) 527; *The Pioneer*, *Deady* (U. S.) 72. *Alabama.* — *Youngblood v. Cunningham*, (Ala.) 12 So. 579.

*California.* — *Kreamer v. Earl*, 91 Cal. 112.

*Connecticut.* — *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210; *Preston v. Bacon*, 4 Conn. 480.

*Illinois.* — *Penn v. Bornman*, 102 Ill. 523.

*Iowa.* — *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145.

*Missouri.* — *Downing v. Ringer*, 7 Mo. 585; *Cherokee Strip Live Stock Assoc. v. Cass L.*, etc., Co., 138 Mo. 394.

*New York.* — *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397; *Griffith v. Wells*, 3 Den. (N. Y.) 226.

*Pennsylvania.* — *Columbia Bank, etc., Co. v. Haldeman*, 7 W. & S. (Pa.) 233, 42 Am. Dec. 229; *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699.

*Tennessee.* — *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918.

*Wisconsin.* — *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

5. *Statutory Limitation of Effect of Violative Contract* — *United States.* — *Harris v. Runnels*, 12 How. (U. S.) 80; *Oates v. National Bank*,

100 U. S. 250; *U. S. Bank v. Waggener*, 9 Pet. (U. S.) 399; *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 350.

*Connecticut.* — *Philadelphia Loan Co. v. Towner*, 13 Conn. 249.

*Maryland.* — *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355.

*Massachusetts.* — *Peterborough First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *Faneuil Hall Bank v. Brighton Bank*, 16 Gray (Mass.) 534.

*New Hampshire.* — *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295; *Connecticut Sav. Bank v. Fiske*, 60 N. H. 363.

*New York.* — *Taylor v. Empire State Sav. Bank*, 66 Hun (N. Y.) 538; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.) 20; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652.

*Ohio.* — *Smith v. Exchange Bank*, 26 Ohio St. 141; *Columbus First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492, 10 Am. Rep. 751; *Rossman v. McFarland*, 9 Ohio St. 369.

*Pennsylvania.* — *Turner v. Calvert*, 12 S. & R. (Pa.) 46; *Lucas v. Government Nat. Bank*, 78 Pa. St. 228, 21 Am. Rep. 17.

Where a Prohibitory Statute Points Out the Consequences of Its Violation, and it appears to have been the legislative intent to exclude any other penalty or forfeiture than such as is declared in the statute, no other will be enforced, and an action may be maintained upon the transaction of which the prohibited act was a part, if it can be done without sanctioning the illegality of the act. *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

6. *Express Provision that Contracts Shall Not Be Void.* — *Lewis v. Bright*, 4 El. & Bl. 917, 82 E. C. L. 917; *McMahon v. Boden*, 39 Conn. 316; *Connecticut River Mut. F. Ins. Co. v. Whipple*, 61 N. H. 61; *York County v. Small*, 1 W. & S. (Pa.) 315.

without declaring illegal contracts in violation thereof, it has been said that the inference is that it was not the intention of the legislature to render such contracts illegal.<sup>1</sup>

**7. Effect of Change of Law — Repeal of Statute Violated.** — A contract illegal at the time of its inception as in violation of a statutory prohibition is void *ab initio*, and will not be rendered valid by the subsequent repeal of the statute violated.<sup>2</sup> It has been said, however, that the objection that a contract is illegal and that therefore no judgment can be rendered upon it is not allowed from any consideration of favor to those who allege it, but the courts from public considerations refuse their aid to enforce obligations which contravene the laws of the state; therefore when the legislature relieves a contract from the imputation of illegality, neither of the parties to the contract is in a condition to insist on that objection.<sup>3</sup>

**Ratification of Contract After Repeal of Statute.** — Even after the repeal of the statute, the parties cannot ratify the contract so as to give validity to it from the beginning.<sup>4</sup>

**Subsequent Promise Based on Benefit Received.** — And where a person has received a benefit under an illegal contract, a promise by him to pay therefor, though made after the repeal of the statute which rendered the contract illegal, is not supported by a sufficient consideration.<sup>5</sup>

**1. Purpose of Statute Accomplished Without Rendering Violative Contracts Illegal.** — *Bowditch v. New England Mut. L. Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474.

**2. Repeal of Statute Violated Does Not Validate Contract — England.** — *Jaques v. Withy*, 1 H. Bl. 65; *Evans v. Richardson*, 3 Meriv. 469.

*Canada.* — *Dever v. Corcoran*, 8 N. Bruns. 338.

*United States.* — *Milne v. Huber*, 3 McLean (U. S.) 212.

*Alabama.* — *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Mays v. Williams*, 27 Ala. 267; *Richardson v. Dorman*, 28 Ala. 679.

*Florida.* — *Mitchell v. Doggett*, 1 Fla. 356.

*Maine.* — *Hathaway v. Moran*, 44 Me. 67; *Bancor v. Mansel*, 47 Me. 58; *Robinson v. Barrows*, 48 Me. 186.

*Massachusetts.* — *Springfield Bank v. Merrick*, 14 Mass. 322.

*Michigan.* — *Ludlow v. Hardy*, 38 Mich. 690; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590.

*Minnesota.* — *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

*Mississippi.* — *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435.

*New Hampshire.* — *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423.

*New York.* — *Bailey v. Mogg*, 4 Den. (N. Y.) 60.

*North Carolina.* — *Puckett v. Alexander*, 102 N. Car. 95.

*Ohio.* — *Nichols v. Poulson*, 6 Ohio 305.

*South Carolina.* — *Gilliland v. Phillips*, 1 S. Car. 152.

*Texas.* — *Clay v. Clay*, 35 Tex. 509; *Hunt v. Robinson*, 1 Tex. 748.

In *Springfield Bank v. Merrick*, 14 Mass. 322, wherein it was held that the subsequent repeal of the statute could give no validity to the contract, *Parker, C. J.*, said: "As well might a contract made for the purpose of trade with an enemy during a war be purged of its illegality by the return of peace."

**Sale of Fertilizer.** — In *Woods v. Armstrong*,

54 Ala. 150, 25 Am. Rep. 671, it was held that where the sale of fertilizer without official inspection, etc., was illegal, as in violation of the *Alabama* statute, the subsequent repeal of the statute would not give validity to the contract so as to enable the seller to recover the purchase price.

**Sale of Intoxicating Liquors.** — In *Hathaway v. Moran*, 44 Me. 67, it was held that the subsequent repeal of the Act of 1855, which prohibited the sale of intoxicating liquors, could give no validity to a contract of sale made while it was in force.

**Services by Physician.** — In *Puckett v. Alexander*, 102 N. Car. 95, it was held that a contract by an unqualified physician for services, illegal as in violation of Code N. Car. (1883), §§ 3122, 3132, was not rendered legal by the subsequent passage of the Act of 1885, c. 261, which entitled the physician to practice.

**Unlicensed Business.** — Contracts of sale made by a merchant in his business during the time when he is unlicensed are void, under Acts Miss. 1875, p. 10, and such contracts were not made valid by the subsequent repeal of the statute. *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 440; *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435.

**3. Minority Rule.** — *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414. See also *Andrews v. Russell*, 7 Blackf. (Ind.) 474; *Curtis v. Leavitt*, 15 N. Y. 9; *Washburn v. Franklin*, 35 Barb. (N. Y.) 600; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23.

**4. Ratification — Advertising in Sunday Newspaper.** — Thus, in *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695, it was held that a contract, illegal as in violation of Gen. Stat. Minnesota (1878), c. 100, § 20, relating to Sunday work, could not, after the repeal of such statute, be rendered valid by any ratification on the part of the parties.

**5. Subsequent Promise.** — *Puckett v. Alexander*, 102 N. Car. 95; *Dever v. Corcoran*, 8 N. Bruns. 338; *Ludlow v. Hardy*, 38 Mich. 690, in



**Renewal of Contract After Repeal.** — Of course the parties may, after the repeal of the statute which rendered the contract illegal, enter into a new contract to the same effect as the old one, in such way renewing the illegal contract.<sup>1</sup>

**Contract Contemplating Change of Law.** — As heretofore stated, a contract the performance of which is in violation of an existing law, but which contemplates a change of the law, is not illegal, and may be enforced when the law is changed so as to render its performance legal.<sup>2</sup>

**Subsequent Statutory Prohibition.** — Where a contract was legal at its inception the subsequent enactment of a statute prohibiting such a contract will not render it illegal,<sup>3</sup> though if it is unperformed and cannot be performed without a violation of the law, this will discharge it on the ground of impossibility of performance.<sup>4</sup>

**VI. CONTRACTS INVOLVING COMMISSION OF CIVIL INJURY TO THIRD PERSONS GENERALLY** — **1. General Principles.** — A contract will be held illegal though it does not involve the commission of an indictable offense, or the violation of a statutory prohibition, and though the formation of it does not amount to the offense of conspiracy, if it involves or contemplates the commission of a civil injury to or the perpetration of a fraud upon third persons.<sup>5</sup>

**Breach of Contractual Duties.** — And it has been held that a contract which involved, to the knowledge of the parties, a breach on the part of one of them of his contractual obligations to a third person, was illegal.<sup>6</sup>

**2. Commission of Trespass.** — A contract which contemplates the commis-

sion of which case it was held that a sale of liquors in violation of a prohibitory law would not support a new promise to pay therefor made after its repeal.

**1. Renewal of Contract.** — *Carr v. State Nat. Bank*, 29 La. Ann. 258; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

**2. Contract Contemplating Change of Law.** — *Taylor v. Chichester, etc., R. Co.*, L. R. 4 H. L. 628; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 82 E. C. L. 397. See *supra*, this section, *Contract Contemplating Change of Law*.

**3. Subsequent Statutory Prohibition.** — *Boyce v. Tabb*, 18 Wall. (U. S.) 546; *Anheuser-Busch Brewing Assoc. v. Bond*, 66 Fed. Rep. 653; *Bennett v. Woolfolk*, 15 Ga. 213; *Jump v. Johnson*, (Ky. 1890) 13 S. W. Rep. 843; *Newbold v. Sims*, 2 S. & R. (Pa.) 317.

If, under an agreement legal when entered into, but the performance of which is afterwards made illegal by statute, acts are done, some during the time for which the agreement remained legal, some afterwards, the acts done during the time for which the agreement remained legal are themselves legal. *Bennett v. Woolfolk*, 15 Ga. 213.

**4. Impossibility of Performance.** — *Odlin v. Insurance Co.*, 2 Wash. (U. S.) 312, 18 Fed. Cas. No. 10,433.

**5. Contemplated Civil Injury to Third Person Renders Contract Illegal** — *England*, — *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Jackson v. Duchaire*, 3 T. R. 551.

*Canada*. — *Kerr v. Brunton*, 24 U. C. Q. B. 390.

*Arkansas*. — *Stewart v. Scott*, 54 Ark. 187.

*California*. — *Moody v. Newmark*, 121 Cal. 446; *Mitchell v. Cline*, 84 Cal. 409.

*Connecticut*. — *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158.

*Illinois*. — *Ray v. Mackin*, 100 Ill. 246; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531.

*Iowa*. — *Gray v. McReynolds*, 65 Iowa 461, 54 Am. Rep. 16.

*Kansas*. — *Buchtella v. Stepanek*, 53 Kan. 373.

*Kentucky*. — *Bennett v. Tiernay*, 78 Ky. 580.

*Louisiana*. — *Gravier v. Carraby*, 17 La. 118.

*Massachusetts*. — *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459.

*Michigan*. — *Knight v. Linzey*, 80 Mich. 396.

*New Hampshire*. — *St. Mary's Benev. Assoc. v. Lynch*, 64 N. H. 213.

*New York*. — *Adams v. Outhouse*, 45 N. Y. 318.

*Ohio*. — *Piatt v. St. Clair*, 6 Ohio 227; *Cumpston v. Lambert*, 18 Ohio 81, 51 Am. Dec. 442.

*Pennsylvania*. — *Taylor v. Worrel*, 4 Leg. Gaz. (Pa.) 401; *Young v. Burtman*, 1 Phila. (Pa.) 203, 8 Leg. Int. (Pa.) 106.

*Texas*. — *Glenn v. Mathews*, 44 Tex. 400.

**6. Breach of Contractual Duties — Pledge.** — Thus where the purchaser of wheat pledged it as security for a loan, it was held that an agreement between the seller of the wheat, to whom a part of the purchase money was still owing, and the pledgee, that the pledgee should retain possession of the property until the payment of the amount due to the seller as well as the loan, was illegal; the pledgor was entitled to have all the wheat delivered to him as soon as he paid the claim of the pledgee, and any agreement on the part of the latter not to do so was void as against public policy, as it was an agreement on the part of the pledgee not to perform his obligation to the pledgor. *Moody v. Newmark*, 121 Cal. 446.



sion of a trespass upon the property <sup>1</sup> or the person <sup>2</sup> of a third person is illegal.

3. **Publication of Libel.** — An agreement contemplating the publication of a libel against a third person has been held illegal, on account of the contemplated commission of the civil injury against such third person arising out of the publication of the libel.<sup>3</sup>

4. **Infringement of Copyright or Patent Right.** — Contracts involving the infringement of the copyright or patent right secured to a third person have also been held illegal.<sup>4</sup>

5. **Perpetration of Fraud upon Public** — *a.* **IN GENERAL.** — A contract may be equally illegal where the object of the parties is to perpetrate a fraud upon the general public, as where the fraud is to be perpetrated upon a particular individual.<sup>5</sup>

*b.* **"BOHEMIAN OATS" CONTRACTS.** — A contract by which one person sells to another a quantity of seed oats at many times their value, and binds himself to sell for the latter a larger quantity of such oats at the same price, has been held illegal, because it could not be performed without working a fraud upon third persons who should be induced to purchase the oats to be sold by the contractor for the person contracted with.<sup>6</sup>

1. **Commission of Trespass—Upon Property of Third Person.** — *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Favor v. Philbrick*, 7 N. H. 326; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Ives v. Jones*, 3 Ired. L. (25 N. Car.) 538, 40 Am. Dec. 421; *McGreal v. Wilson*, 9 Tex. 426.

**A Contract to Clear an Unnavigable Stream and to Run Logs Through It** cannot be assumed to be void as against public policy on the ground that it involves trespassing on the lands of third persons, unless it also appears that the riparian owners object, or that an invasion of their rights is intended. *Fuller v. Rice*, 52 Mich. 435.

2. **Upon Person of Third Person.** — *Dittrich v. Gobey*, 119 Cal. 599, *Babcock v. Terry*, 97 Mass. 482; *Cumpston v. Lambert*, 18 Ohio 81, 51 Am. Dec. 442.

**Infringing Personal Liberty of Child.** — In *Dittrich v. Gobey*, 119 Cal. 599, a contract between divorced parents by which the custody of a female child was transferred to the father, containing a stipulation on the part of the father to return the child to her mother on her reaching the age of eighteen, was held illegal so far as it required the husband to return the child to the mother, irrespective of whether the child was willing or not to be so returned, as it was a contract to infringe the personal liberty of the child.

**Contract for Medical Services to Be Rendered Injured Employees.** — In *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172, a contract between a railway company and a physician for the rendition of services by the latter to employees of the former who should receive injuries in the operation of the railroad was held not to be illegal as an invasion of the rights of the injured employees. The court said that it would not presume that such a contract was intended to cut off the right of an injured employee to call in any surgeon he might choose.

3. **Publication of Libel.** — *Fores v. Johnes*, 4 Esp. 97; *Poplett v. Stockdale*, 2 C. & P. 198, 12

E. C. L. 87; *Shackell v. Rosier*, 2 Bing. N. Cas. 634, 29 E. C. L. 438; *Arnold v. Clifford*, 2 Sumn. (U. S.) 238; *Hayes v. Hayes*, 8 La. Ann. 468; *Ives v. Jones*, 3 Ired. L. (25 N. Car.) 538, 40 Am. Dec. 421; *Lea v. Collins*, 4 Sneed (Tenn.) 393; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260. See also *Colburn v. Patmore*, 1 C. M. & R. 73. And see generally the title **LIBEL AND SLANDER**.

4. **Copyright.** — A contract to reprint any literary work, the copyright to which has been secured to the author, is illegal unless it is entered into with the consent of the author or his assignee, and the printer who executes such a contract with a knowledge of the rights of the author can recover nothing for his labor. *Nichols v. Ruggles*, 3 Day (Conn.) 145, 3 Am. Dec. 262. See generally the title **COPYRIGHT**, vol. 7, p. 508.

**Patent.** — A plaintiff who makes and sells a machine, even without the right of using it, in violation of the patentee's rights, though he compromise with the latter for his damages, cannot recover the price from his vendee; nor can the latter, when from his vocation he must have known that he had no right to buy and use the machine, recover back any part of the price paid, nor an amount paid to the patentee for the use of the machine. *Bell v. Bonney*, 7 La. Ann. 170. See also the title **PATENTS**.

5. **Perpetration of Fraud upon Public.** — *Scott v. Brown*, (1892) 2 Q. B. 724; *Church v. Proctor*, 66 Fed. Rep. 240; *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597; *Nickerson v. English*, 142 Mass. 267; *McDonnell v. Rigney*, 108 Mich. 276; *Bloss v. Bloomer*, 23 Barb. (N. Y.) 604; *Materne v. Horwitz*, 101 N. Y. 469, *affirming* 50 N. Y. Super. Ct. 41; *McEwen v. Shannon*, 64 Vt. 583. See also the title **FRAUD AND DECEIT**, vol. 14, p. 12.

6. **Bohemian Oats Contract** — *Iowa*. — *Shipley v. Reasoner*, 80 Iowa 548; *Merrill v. Packer*, 80 Iowa 542; *Hanks v. Brown*, 79 Iowa 560.

*Michigan*. — *Davis v. Seeley*, 71 Mich. 209; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355; *Knight v. Linzey*, 80 Mich. 396.

**6. Agreements in Fraud of Creditors.** — Contracts entered into between an embarrassed or insolvent debtor on the one side and a third person on the other side, with the intention on the part of the parties to defraud the creditors of the former by placing his property beyond the reach of such creditors, are generally held to be illegal on account of the fraud to be practiced upon such creditors, and the court will not, as a general rule, enforce such contracts or grant relief in favor of either of the parties thereto.<sup>1</sup>

**7. Contracts Tending Towards Breach of Trust or Confidence** — *a.* **IN GENERAL.** — It may be laid down as a general rule that any contract which places one of the parties under direct inducement to violate the confidence and trust which a third person is authorized in reposing in him, and which places such party under wrongful influences and offers to him a temptation which may injuriously affect the rights of such third person, is illegal.<sup>2</sup>

**Necessity for Actual Injury to Third Person.** — And where the contract places such party under such influences the fact that the third person with respect to whom such party occupied the position of trust or confidence was not in fact injured by reason of the contract will not relieve it from its illegality,<sup>3</sup> as such party will not be allowed to allege that he was not in fact corrupted.

**Private Confidence.** — It is not essential that the confidence reposed by such third person in the party seeking to enforce the contract should arise out of any legal relation between them; it is sufficient that the confidence was

*Ohio.* — *Carter v. Lillie*, 2 Ohio Cir. Dec. 204, 3 Ohio Cir. Ct. 364; *Cowell v. Harris*, 1 Ohio Cir. Dec. 556, 2 Ohio Cir. Ct. 404; *Shirey v. Ullsh*, 1 Ohio Cir. Dec. 554, 2 Ohio Cir. Ct. 401.

*Canada.* — *Bonisteel v. Saylor*, 17 Ont. App. 505.

See, however, *Matson v. Blossom*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 551, 4 N. Y. Supp. 489.

**Gambling Contract.** — It has been held that such a contract was not illegal as a gambling contract. *Ebersole v. Morrison First Nat. Bank*, 36 Ill. App. 267; *Merrill v. Packer*, 80 Iowa 542; *Shiple v. Reasoner*, 80 Iowa 548; *Hanks v. Brown*, 79 Iowa 560; *Matson v. Blossom*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 551. *Compare Schmuckle v. Waters*, 125 Ind. 265; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355. See also the title GAMBLING CONTRACTS, vol. 14, p. 576.

1. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210. See also the titles COMPOSITION WITH CREDITORS, vol. 6, p. 376; INSOLVENCY AND BANKRUPTCY.

**2. Contracts Tending to Breach of Trust or Confidence** — *England.* — *Hughes v. Statham*, 4 B. & C. 187, 10 E. C. L. 308; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Arkwright v. Cantrell*, 7 Ad. & El. 565, 34 E. C. L. 164.

*United States.* — *Forsyth v. Woods*, 11 Wall. (U. S.) 484; *Cook v. Sherman*, 4 McCrary (U. S.) 20; *Meguire v. Corwine*, 101 U. S. 108; *Rice v. Williams*, 32 Fed. Rep. 439.

*Alabama.* — *Saltmarsh v. Beene*, 4 Port (Ala.) 283, 30 Am. Dec. 525; *McGehee v. Lindsay*, 6 Ala. 16.

*California.* — *Edwards v. Estell*, 48 Cal. 194; *Tappan v. Albany Brewing Co.*, 80 Cal. 570, 13 Am. St. Rep. 174.

*District of Columbia.* — *Weed v. Black*, 2 MacArthur (D. C.) 268.

*Illinois.* — *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442.

*Iowa.* — *Crittenden v. Armour*, 80 Iowa 221; *Gleason v. Chicago, etc., R. Co.*, (Iowa 1889) 43 N. W. Rep. 517.

*Kentucky.* — *Young v. Evans*, 8 Ky. L. Rep. 353; *Davezac v. Seiler*, 12 Ky. L. Rep. 599.

*Massachusetts.* — *Smith v. Townsend*, 109 Mass. 500; *Holcomb v. Weaver*, 136 Mass. 265; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459.

*Mississippi.* — *Spinks v. Davis*, 32 Miss. 152; *Whitley v. Hughes*, 53 Miss. 268.

*Missouri.* — *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385.

*New York.* — *Holloway v. Stephens*, 1 Hun (N. Y.) 308; *Munson v. Syracuse, etc., R. Co.*, 29 Hun (N. Y.) 76.

*North Carolina.* — *McDonald v. Haughton*, 70 N. Car. 393.

*Pennsylvania.* — *Ritter v. Railroad Co.*, 7 W. N. C. (Pa.) 122.

**Commissioners Appointed by Court for Sale of Land.** — An agreement between one of several commissioners appointed by the Orphans' Court to sell the real estate of a decedent, and a third person, that such third person should purchase said lands, and that a division of them should then be made between him and the commissioner, each paying for the lands according to the "purchase price," is void as contravening public policy. *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

**Landlord and Tenant.** — A contract by which a tenant is induced to desert his landlord is corrupt and void; and the person to whom the tenant has attorned cannot maintain an action upon it. *Byrne v. Beeson*, 1 Dougl. (Mich.) 179.

**3. Not Necessary that Third Person Be Actually Injured.** — *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Bollman v. Loomis*, 41 Conn. 581; *Lum v. McEwen*, 56 Minn. 278; *Everhart v. Searle*, 71 Pa. St. 256.



reposed in the latter by the former as a friend and that the latter was aware of such fact.<sup>1</sup>

**Existence of Position of Trust or Confidence Essential.** — But in order that a contract may be rendered illegal on the ground that it tends to induce one of the parties to violate a confidence reposed in him by a third person, it is essential that such party be under some legal duty or moral obligation to such third person, which authorized such third person in confiding in him.<sup>2</sup>

**Actual Tendency to Breach of Trust.** — And the contract must also be such that it will actually have a tendency to cause a breach of trust or confidence.<sup>3</sup>

**b. DUTY OWING BY EMPLOYEES TO EMPLOYERS — In General.** — The principle that contracts tending towards a breach of confidence or trust are illegal is well exemplified in contracts between an employee and a third person which place the employee under improper influences and are calculated to bias his mind and cause him to act to the prejudice of his employer.<sup>4</sup> This rule includes not only contracts tending to corrupt mere servants, but also those tending to corrupt agents who exercise a certain amount of discretion in the performance of their duties to their principal.<sup>5</sup>

**1. Private Confidence.** — *Wyburd v. Stanton*, 4 Esp. 179; *Bollman v. Loomis*, 41 Conn. 581; *Holcomb v. Weaver*, 136 Mass. 265; *Nash v. Kerr Murray Mfg. Co.*, 19 Mo. App. 1.

**Contracts for Commission on Custom Sustained.** — An agreement, however, by a merchant to pay a percentage upon the proceeds of a sale to one introducing a customer is not illegal as against good morals, if there was no position of confidence between the customer and the person introducing him. *Richard v. Quintard*, 51 N. Y. 636. See also *Gale v. Reed*, 8 East 80; *Ranney v. Donovan*, 78 Mich. 318; *Boydén v. Baldwin*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 103.

In *George v. East Tennessee Coal Co.*, 15 Lea (Tenn.) 455, 54 Am. Rep. 425, a contract by an employer to furnish to the plaintiff the trade of his miners and workmen, in consideration that the employer should receive eight per cent. on all such sales, was held legal.

**Commission to Physician on Prescriptions Sent to Druggist.** — An agreement by a druggist to pay a commission to a physician on all prescriptions sent by the latter to the former, to be filled for patients of the latter, has been sustained. *Davenport's Estate*, 4 Kulp (Pa.) 231.

And in *Ward v. Hogan*, (C. Pl. Spec. T.) 11 Abb. N. Cas. (N. Y.) 478, an agreement by a physician who was also a druggist, made as an inducement to the purchase of his drug store, to send all prescriptions made by him to the purchaser to be filled, was sustained.

**2. Booming Mining Company in Editorial Column of Newspaper.** — *Gade v. Robinson Consol. Min. Co.*, 26 Alb. L. J. 423, N. Y. Daily Reg., Nov. 15, 1882. Compare *Green v. Brooks*, 81 Cal. 328.

**Booming Railroad Project.** — In *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212, a contract by which a newspaper was to boom a railroad project and publish articles and communications commending such project was held not to be illegal, and the publisher of the newspaper was permitted to recover compensation for publishing such matter.

**3. Actual Tendency to Breach of Trust Essential.** — In an action to recover the purchase price of certain goods it appeared that the goods sold had been insured in certain insurance

companies, and having been damaged by fire, appraisers were appointed, one by the plaintiff and the other (the defendant) by the insurance companies; that the defendant purchased a portion of the damaged goods, in respect to which the appraisers could not agree, at cost price, agreeing to pay the purchase price to the companies, and the amount thereof to be included in the award as if the goods had been a total loss. It was held that the contract of sale was not illegal as tending to cause a breach of trust on the part of the defendant as an appraiser. *Goodman v. Cohen*, 132 N. Y. 205, affirming 16 Daly (N. Y.) 47.

**4. Duty of Employee to Employer.** — *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Woodstock Iron Co. v. Richmond, etc.*, Extension Co., 129 U. S. 643; *Lucas v. Allen*, 80 Ky. 681; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *Davenport v. Hulme*, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 521; *Place v. Greenman*, 6 Thomp. & C. (N. Y.) 681; *Holladay v. Patterson*, 5 Oregon 177. Compare *Richardson v. Welch*, 47 Mich. 309.

See generally the title AGENCY, vol. 1, p. 930.

**5. Agents — United States.** — *Findlay v. Pertz*, 31 U. S. App. 340; *St. Louis Electric Light, etc., Co. v. Edison General Electric Co.*, 64 Fed. Rep. 997.

*Arizona.* — *Jacobs v. George*, (Ariz. 1889) 20 Pac. Rep. 183.

*Arkansas.* — *Mendel v. Davies*, 46 Ark. 420.

*Colorado.* — *Levy v. Spencer*, 18 Colo. 532, 36 Am. St. Rep. 303.

*District of Columbia.* — *Sunderland v. Kilbourn*, 3 Mackey (D. C.) 506.

*Indiana.* — *Cleveland, etc., R. Co. v. Pattison*, 15 Ind. 70.

*Kentucky.* — *Lloyd v. Colston*, 5 Bush (Ky.) 587.

*Massachusetts.* — *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Smith v. Townsend*, 109 Mass. 500.

*Michigan.* — *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

*New York.* — *Goodell v. Hurlbut*, 5 N. Y. App. Div. 77.

*Ohio.* — *Bell v. McConnell*, 37 Ohio St. 399, 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203.



**Agent for Sale — Contract for Commissions from Buyer.** — Thus where an agent is employed for the sale of property, a contract between him and an intended buyer for the payment of a commission by the latter to the former, in case of a sale, is illegal on account of its tendency to cause the agent to violate his duty to the seller.<sup>1</sup>

**Agent to Purchase — Commissions from Seller.** — And of course the same principle would apply in the case where an agent to purchase contracts for a commission from the seller.<sup>2</sup>

**Consent of Employer to Contract.** — Where the employee acts, in entering into the contract which otherwise might tend to cause him to violate his duty to his employer with the consent of his employer, and there is no fraud in the transaction, the contract is relieved from illegality.<sup>3</sup>

**c. DUTY OF CORPORATE OFFICERS TOWARDS CORPORATION.** — The stockholders of a corporation have the right to demand the disinterested action of its officers in the transaction of the corporate business, and all contracts which tend to place such officers under an inducement to disregard their duties to the corporation and to decide questions affecting the action of the corporation from a standpoint other than that of the best interests of the corporation are illegal.<sup>4</sup> And this rule prevails though no direct pecuniary profit accrues to the officer by reason of the contract.<sup>5</sup>

*Rhode Island.* — *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458.

See generally the title AGENCY, vol. 1, p. 930.

**A Contract by Which an Agent Is to Induce His Principals to Discharge Their Attorney and Employ Another**, in consideration of which the person to be so employed is to pay to the agent one-half of his fees, has been held illegal. *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442.

**Agreement Between Agents Representing Different Principals for Division of Commissions.** — An agreement between two real-estate agents intrusted with the sale of land by different principals at a designated sum in cash to divide the commissions received from both principals on bringing about a trade between them, has been held illegal. *Levy v. Spencer*, 18 Colo. 532, 36 Am. St. Rep. 303.

**1. Agent for Sale — Commissions from Buyer.** — *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Smith v. Townsend*, 109 Mass. 500; *Watkins v. Cousall*, 1 E. D. Smith (N. Y.) 65; *Everhart v. Searle*, 71 Pa. St. 256. Compare *Ranney v. Donovan*, 78 Mich. 318. See the title AGENCY, vol. 1, p. 930.

**2. Agent to Purchase.** — *Bell v. McConnell*, 37 Ohio St. 399, 41 Am. Rep. 528.

**3. Consent of Employer to Contract.** — *Roysdon v. Carr*, 63 Cal. 191; *Shaw v. Andrews*, 9 Cal. 73; *Snow v. Penobscot River Ice Co.*, 77 Me. 55. See also *Gleason v. Chicago, etc., R. Co.*, 82 Iowa 745; *Morgan v. Woodruff*, 12 Daly (N. Y.) 207; *Shattuck v. Nellis*, 44 Vt. 262.

**4. Duty of Corporate Officers Towards Corporation — Contract by Which an Officer Is to Induce the Corporation to Purchase Property from Him.** — *U. S.* 507; *Woodstock Iron Co. v. Richmond, etc., Extension Co.*, 129 U. S. 643; *Jackson v. McLean*, 36 Fed. Rep. 213; *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 418; *Continental Trust Co. v. Toledo, etc., R. Co.*, 86 Fed. Rep. 929; *Cook v. Sherman*, 4 McCrary (U. S.) 20.

*California.* — *Forbes v. McDonald*, 54 Cal. 98. *Illinois.* — *Tobey v. Robinson*, 99 Ill. 222; *Barkley v. Williams*, 26 Ill. App. 213; *Bestor*

*v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309.

*Kansas.* — *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162.

*Kentucky.* — *Berryman v. Cincinnati Southern R. Co.*, 14 Bush (Ky.) 755.

*Massachusetts.* — *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Almy v. Orne*, 165 Mass. 126.

*Minnesota.* — *Lum v. McEwen*, 56 Minn. 278.

*Missouri.* — *Attaway v. St. Louis Third Nat. Bank*, 93 Mo. 485; *Jackson v. McLean*, 100 Mo. 130; *Green v. Corrigan*, 87 Mo. 359.

*New York.* — *Munson v. Syracuse, etc., R. Co.*, 29 Hun (N. Y.) 76; *Davison v. Seymour*, 1 Bosw. (N. Y.) 88; *Bliss v. Matteson*, 45 N. Y. 22. Compare *Barnes v. Brown*, 80 N. Y. 527.

*North Carolina.* — *McDonald v. Haughton*, 70 N. Car. 393.

*Oregon.* — *Holladay v. Patterson*, 5 Oregon 177.

*Pennsylvania.* — *Kauffman v. Keiper*, 5 Pa. Dist. 620.

Compare *Dexter v. McClellan*, 116 Ala. 37.

See also the title OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS).

In *Barkley v. Williams*, 26 Ill. App. 213, a contract between a railroad official and another to divide the profits of a contract by the latter to furnish materials for a public improvement, the only service rendered by the former being to allow to the latter lower freight rates than he demanded of others, was held illegal, and recovery by such officer of a share of the profits was denied.

**Withdrawal of Director's Opposition to Sale.** — In *Kauffman v. Keiper*, 18 Pa. Co. Ct. 181, a note given to a director in consideration of his withdrawing his opposition to a sale to the corporation was held illegal.

**5. Pecuniary Profit to Officer Immaterial.** — *West v. Camden*, 135 U. S. 507; *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568.

**Contracts for Appointment or Retention of Persons in Office.** — Thus, a contract by an officer of a corporation to secure to a third person an office in the corporation or to retain one in such office has been held illegal,<sup>1</sup> for, as has been said, the liability of the officer to damages for breach of such a contract is calculated to be a strong incentive to him to act contrary to the interests of the corporation, in case of the unfitness of such third person.<sup>2</sup>

**Contract to Induce Acceptance of Office.** — A contract, however, to induce a person to accept an office in a corporation is not necessarily illegal.<sup>3</sup>

**d. DUTY OF STOCKHOLDERS TOWARDS EACH OTHER.** — The stockholders of a corporation have also the right to demand of each other their disinterested judgment in selecting the officers of the corporation; in other words, they occupy a relation of trust and confidence towards each other which requires them to look only to the best interests of the whole, uninfluenced by private gain; and contracts which place stockholders under influences tending to induce them to ignore this duty and act from motives of private gain have been held illegal.<sup>4</sup> This rule has also been extended to contracts placing stockholders under improper influences in determining the administrative actions of the corporation.<sup>5</sup> It does not, however, render illegal *bona fide* arrangements between stockholders for securing the control of the corporation, where no direct pecuniary consideration is paid to each other, the object of the arrangement being merely to control the policy of the corporation.<sup>6</sup>

**e. DUTY OF FIDUCIARIES.** — In a number of cases contracts by fiduciaries incompatible with their duties to their *cestuis que trustent* have been held illegal.<sup>7</sup>

**1. Contracts for Appointment or Retention of Persons in Office.** — *West v. Camden*, 135 U. S. 507; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568; *Fennessy v. Ross*, 5 N. Y. App. Div. 342, *affirming* 90 Hun (N. Y.) 298.

**2.** *West v. Camden*, 135 U. S. 507.

**3. Contract to Induce Acceptance of Corporate Office.** — Thus a contract to give stock in a corporation to a certain person in consideration of his becoming a director is not illegal as against public policy, where the only inducement to make it lay in the local importance of such person and a legitimate expectation of his help in carrying out certain lawful plans, and no restriction upon his freedom as a director was contemplated. *Almy v. Orne*, 165 Mass. 126.

**4. Duty of Stockholders Towards Each Other — Election of Officers.** — *West v. Camden*, 135 U. S. 507; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Seymour v. Detroit Copper, etc.*, *Rolling Mills*, 56 Mich. 117; *Kitchen v. St. Louis, etc.*, R. Co., 69 Mo. 224; *Cone v. Russell*, 48 N. J. Eq. 208; *Gage v. Fisher*, 5 N. Dak. 297; *Fennessy v. Ross*, 90 Hun (N. Y.) 298, *affirmed* 5 N. Y. App. Div. 342; *Fremont v. Stone*, 42 Barb. (N. Y.) 169; *Jones v. Scudder*, 2 Cinc. Super. Ct. 178. See the title STOCKHOLDERS.

**Consent of Remaining Stockholders.** — A contract giving the right to manage a newspaper and control its policy for five years to a person employed as editor and manager is not contrary to public policy, though it is part of an agreement by which such person purchases a large quantity of stock from the controlling shareholder, if the agreement was approved and ratified by all the stockholders. *Jones v.*

*Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 6 Am. & Eng. Corp. Cas. N. S. 734.

**Seller of Stock Voting under Direction of Purchaser.** — An agreement for the sale of stock in a limited partnership is not rendered illegal by a stipulation that the seller should hold the stock until after a pending election for officers of the partnership, and vote on the stock as the purchaser desired. *Mobley v. Morgan*, (Pa. 1886) 5 Cent. Rep. 527.

**5. Administrative Action of Corporation.** — *Peck v. Levinger*, 6 Dak. 54; *Marie v. Garrison*, (N. Y. Super. Ct.) 13 Abb. N. Cas. (N. Y.) 210.

**6. Combinations Between Stockholders Held Legal.** — *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525; *Mobile, etc., R. Co. v. Nicholas*, 98 Ala. 92; *Hey v. Dolphin*, 92 Hun (N. Y.) 230; *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, 45 N. Y. Super. Ct. 464, 86 N. Y. 618; *Griffith v. Jewett*, 15 Cinc. L. Bul. 419, 9 Ohio Dec. (Reprint) 627. See also *Bolton v. Madden*, L. R. 9 Q. B. 55. See the title VOTING TRUSTS, where such questions are fully discussed.

**7. Contracts Incompatible with Duties of Trustees.** — *Hunt v. Frost*, 4 Cush. (Mass.) 54; *Miller's Appeals*, 30 Pa. St. 478; *Foot v. Emerson*, 10 Vt. 338, 33 Am. Dec. 205.

In *Danielwitz v. Sheppard*, 62 Cal. 339, the personal agreement of an administrator and an heir to pay to a broker all that might be obtained above a certain amount, for the broker's efforts in procuring bids at the administrator's sale of land of the estate, was held illegal.

**Receiver Becoming Interested in Property Sold.** — The agreement of a receiver to become interested in property to be sold by him is illegal. *Penzel Grocer Co. v. Williams*, 53 Ark. 81.



**Traffic in Offices of Trust.** — Public policy forbids traffic in trust offices the appointment to which is made by a court or public officer, and contracts the purpose of which is a traffic in such offices are held illegal,<sup>1</sup> as the trust which devolves upon such officers should have the same safeguards thrown around it as if it were a public office.<sup>2</sup>

**Renunciation of Trust for Consideration.** — And though a person who is entitled to an office of trust, such as an executor, for instance, may renounce his right to such appointment, still public policy forbids that he should use such right of renunciation for his individual gain, and it is held that agreements for the payment of money in consideration of the renunciation of a trust office are illegal.<sup>3</sup>

**Guardian.** — A contract by the guardian of a minor to institute and carry through proceedings for a sale of property owned in common by herself and such minor, from which the guardian will derive a benefit, is illegal. *Zander v. Feely*, 47 Ill. App. 659. See also *Worth v. Curtis*, 15 Me. 228.

An agreement by a father to compensate the guardian *ad litem* of his infant children for his services in proceedings before the surrogate, in which the father's interests are adverse to those of the infants, is illegal. *Thorn v. Beard*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 30, affirmed on this point (Ct. App.) 48 N. Y. St. Rep. 530.

**Executors and Administrators.** — *Wilson v. Jordan*, 3 Woods (U. S.) 642.

In *Myers v. Hodges*, 2 Watts (Pa.) 381, 27 Am. Dec. 319, a contract by an administrator to sell the real estate of his intestate for a certain sum and on certain terms of payment, and that he would make title through the Orphans' Court, was held illegal; and it was held that no action would lie for a breach. See also *Overseers of Poor v. Overseers of Poor*, 3 Cow. (N. Y.) 299; *Specht v. Collins*, 81 Tex. 213.

**Indemnity of Devastavit by Executors.** — In *Moss v. Cohen*, (C. Pl. Spec. T.) 11 Misc. (N. Y.) 184, a bond to indemnify executors personally, in consideration that they should by diverting the trust fund commit a breach of trust, that is, a devastavit in their offices, was held illegal. And in *Forsyth v. Woods*, 11 Wall. (U. S.) 484, a contract of indemnity running to the surety on an executor's bond was held illegal where such contract was entered into with the intention of the parties that the executors should commit a devastavit.

**Assignment by Executor of Future Fees.** — Assignments by executors or administrators of fees to be earned in the future have been held illegal as tending to a laxity on their part in the administration of the estate. *In re King*, 110 Mich. 203. See also *Matter of Worthington*, 141 N. Y. 9.

**Compromise of Suit by Executrix in Consideration of Promise of Marriage.** — An agreement, however, by an executrix to compromise a suit which she had instituted in her fiduciary character, in consideration of a promise of marriage made to her, has been held not to be illegal as against good morals or public policy. *Donalson v. Lennox*, 6 Dana (Ky.) 89.

For a Full Discussion of the duties of fiduciaries, see such titles as *EXECUTORS AND ADMINISTRATORS*, vol. II, p. 720; *GUARDIAN AND WARD*, *ante*, p. 16; *TRUSTS AND TRUSTEES*.

**1. Traffic in Offices of Trust.** — *Porter v. Jones*, 52 Mo. 399; *Aycock v. Braun*, 66 Tex. 201.

A promise to pay if the promisee will introduce the promisor to the widow and procure her to renounce her right to administer on her husband's estate and have the promisor appointed administrator is against public policy and void. *Swiggett v. White*, 8 Cinc. L. Bul. 22, 8 Ohio Dec. (Reprint) 452.

**Agreement to Furnish Sureties for Administrator.** — In *Aycock v. Braun*, 66 Tex. 201, an agreement whereby one agreed, for a certain sum of money, to furnish sureties so that the other party to the contract could be appointed an administrator was held illegal.

**Payment of Consideration for Acceptance of Office of Administrator.** — A contract to pay a consideration to induce the payee to administer upon the estate of the obligor's father and mother is not prohibited by law or public policy. The consideration is a good one and the contract enforceable. *Clark v. Constantine*, 3 Bush (Ky.) 652.

**Contract to Serve as Administrator Without Compensation.** — And so a contract by an administrator to serve as such without compensation has been held not to be against public policy. *Mott v. Fowler*, 85 Md. 676.

**Agreement by Administrator to Divide Commissions.** — In *Greer v. Nutt*, 54 Mo. App. 4, an agreement by an administrator to divide his commissions, made after his appointment, was sustained, though it was made with the person who had a prior right to letters of administration, where it did not appear that the latter was influenced in waiving her right to letters by anticipation that such an agreement would be made.

**2. Porter v. Jones**, 52 Mo. 399. See *infra*, this title, *Contracts Detrimental to Public Service — Traffic in Public Offices*.

**3. Renunciation of Trust for Consideration — England.** — *Hargreaves v. Wood*, 2 Sw. & Tr. 602.

*California.* — *Forbes v. McDonald*, 54 Cal. 98; *Matter of True*, 120 Cal. 352.

*Kentucky.* — *Cunningham v. Cunningham*, 18 B. Mon. (Ky.) 24, 68 Am. Dec. 718.

*New Jersey.* — *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327.

*New York.* — *Stanton v. Parker*, 19 Hun (N. Y.) 55.

*Ohio.* — *Withers v. Ewing*, 40 Ohio St. 400.

*Pennsylvania.* — *Bowers v. Bowers*, 26 Pa. St. 74, 67 Am. Dec. 398.

*Vermont.* — *Foote v. Emerson*, 10 Vt. 338, 33 Am. Dec. 205.

See also *Owings v. Owings*, 1 Har. & G.



**VII. CONTRACTS PUFFING OR SUPPRESSING COMPETITION AT SALES — 1. Public Sales — a. IN GENERAL.** — It is a matter of great public interest that all public sales of property should be free from undue influence controlling or suppressing competition thereat, and as a general rule all contracts which have for their object the suppression of competition at such sales, and the reduction of the price of the property below a fair price,<sup>1</sup> or the puffing of the bidding thereat,<sup>2</sup> are illegal.

**b. REASONS FOR RULE.** — The reasons for this rule are that such contracts, in the one case, work a fraud upon the owner of the property or other persons whose interest is that the property should bring a fair price, and in the other case work a fraud upon the purchasers.<sup>3</sup> And therefore it is immaterial whether the person contracting to refrain from bidding at such sale was or was not under any duty to bid.<sup>4</sup>

**c. WHAT SALES INCLUDED IN RULE.** — This rule includes contracts for the suppression of competition at all involuntary sales at public auction,<sup>5</sup> such

(Md.) 484. *Compare* Woodworth v. Wilson, 11 La. Ann. 402; Ohlendorf v. Kanne, 66 Md. 495; Bassett v. Miller, 8 Md. 551; Dolfield v. Kroh, 62 Md. xiii.

**1. Contracts for Suppression of Competition at Public Sales Held Illegal — United States.** — Atlas Nat. Bank v. Holm, 71 Fed. Rep. 489; Piatt v. Oliver, 1 McLean (U. S.) 295, 2 McLean (U. S.) 267, 19 Fed. Cas. Nos. 11,114, 11,115.

*Alabama.* — Carrington v. Caller, 2 Stew. (Ala.) 175.

*California.* — Swan v. Chorpenning, 20 Cal. 182.

*Indiana.* — Hunter v. Pfeiffer, 108 Ind. 197; Goldman v. Oppenheim, 118 Ind. 95.

*Kansas.* — Hallam v. Huffman, 5 Kan. App. 303.

*Louisiana.* — Merchants' Ins. Co. v. Addison, 9 Rob. (La.) 486.

*Maine.* — Smith v. Humphreys, 88 Me. 345; Gardiner v. Morse, 25 Me. 140.

*Massachusetts.* — Gibbs v. Smith, 115 Mass. 592; Phippen v. Stickney, 3 Met. (Mass.) 384.

*Minnesota.* — Boyle v. Adams, 50 Minn. 255.

*Missouri.* — Hook v. Turner, 22 Mo. 333; Lawnin v. Bradley, 13 Mo. App. 361; Wooton v. Hinkle, 20 Mo. 290.

*Nebraska.* — McCann v. McLennan, 3 Neb. 25.

*New Hampshire.* — Bellows v. Russell, 20 N. H. 427, 51 Am. Dec. 238.

*New Jersey.* — Gulick v. Ward, 10 N. J. L. 87, 18 Am. Dec. 389; De Baum v. Brand, 60 N. J. L. 283; Morris v. Woodward, 25 N. J. Eq. 32; National Bank of Metropolis v. Sprague, 20 N. J. Eq. 160.

*New York.* — Hopkins v. Ensign, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 85; Meech v. Bennett, Hill & D. Supp. (N. Y.) 191; Mills v. Mills, 40 N. Y. 546, 100 Am. Dec. 535; Thompson v. Davies, 13 Johns. (N. Y.) 112; Doolin v. Ward, 6 Johns. (N. Y.) 194; Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134; Brisbane v. Adams, 3 N. Y. 129; Wheeler v. Wheeler, 5 Lans. (N. Y.) 355; Wilbur v. How, 8 Johns. (N. Y.) 444; Hawley v. Cramer, 4 Cow. (N. Y.) 718; Sharp v. Wright, 35 Barb. (N. Y.) 236.

*North Carolina.* — Blythe v. Lovinggood, 2 Ired. L. (24 N. Car.) 20, 37 Am. Dec. 402; Ingram v. Ingram, 4 Jones L. (49 N. Car.) 188; Smith v. Greenlee, 2 Dev. L. (13 N. Car.) 126, 18 Am. Dec. 564.

*Oregon.* — Kine v. Turner, 27 Oregon 356.

*Pennsylvania.* — Barton v. Benson, 126 Pa. St. 431, 12 Am. St. Rep. 883; Slingluff v. Eckel, 24 Pa. St. 472; Hays's Estate, 159 Pa. St. 381. See also Maffet v. Ijams, 103 Pa. St. 266.

*South Carolina.* — Hamilton v. Hamilton, 2 Rich. Eq. (S. Car.) 355, 46 Am. Dec. 58; Baggett v. Sawyer, 25 S. Car. 405; Dudley v. Odom, 5 S. Car. 131, 22 Am. Rep. 6.

*Texas.* — Crozier v. Carr, 11 Tex. 376; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

*Vermont.* — Morrison v. Darling, 47 Vt. 71; Paige v. Hammond, 26 Vt. 375; Noyes v. Day, 14 Vt. 384; Missisquoi Bank v. Sabin, 48 Vt. 239.

**2. Puffing Bids.** — Bexwell v. Christie, 1 Cowp. 395; Howard v. Castle, 6 T. R. 642; De Baun v. Brand, 60 N. J. L. 283.

**3. Reasons for Rule.** — Gardiner v. Morse, 25 Me. 140; Bellows v. Russell, 20 N. H. 427, 51 Am. Dec. 238; De Baun v. Brand, 60 N. J. L. 283.

**4. Duty to Bid Immaterial.** — Thompson v. Davies, 13 Johns. (N. Y.) 112.

**5. Involuntary Sales at Auction — Sheriff's Sales.** — Thus agreements to refrain from bidding at sheriff's sales are illegal. Piatt v. Oliver, 1 McLean (U. S.) 295, 2 McLean (U. S.) 267, 19 Fed. Cas. Nos. 11,114, 11,115; Hallam v. Huffman, 5 Kan. App. 303; Lawnin v. Bradley, 13 Mo. App. 361; Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134; Thompson v. Davies, 13 Johns. (N. Y.) 112; Slingluff v. Eckel, 24 Pa. St. 472.

And an agreement entered into for the purpose of preventing competition at a sale of property under a distress for rent has been said to be illegal. Brisbane v. Adams, 3 N. Y. 129.

**Sale of Bankrupt's Effects.** — In Gardiner v. Morse, 25 Me. 140, a case where a bankrupt's effects were to be sold at auction, among which was included a note of the defendant, a contract between the plaintiff and the defendant, in consideration of the plaintiff's abstaining from bidding at the sale of such note, was held illegal.

**Agreement Between Creditors of Bankrupt.** — In Dudley v. Odom, 5 S. Car. 131, 22 Am. Rep. 6, an agreement between two creditors of a bankrupt, that one of them should not bid

as sales on execution or under decrees of courts of equity, as well as at voluntary sales at auction.<sup>1</sup>

*d. ACTUAL EFFECT OF SUCH CONTRACT HARMLESS.* — The fact that the contract in reality caused no injury to the person whose property was sold or other person interested therein will not relieve it from its illegality, as that which renders the contract illegal is not the injury that the parties to it have actually occasioned, but the purpose which they must have contemplated when it was made; that is, the contract is not tested by its actual results, but by its intended object as shown by its terms.<sup>2</sup>

*e. HONEST COMBINATIONS AMONG PURCHASERS HELD LEGAL.* — The rule rendering illegal contracts tending to suppress competition at public sales does not, however, prevent persons from combining for honest motives to purchase property at such sales, as where articles of great magnitude and value are to be sold, to purchase which would be beyond the means of many classes of buyers, or when such persons purpose to hold the property together or afterwards to divide it, neither desiring the whole.<sup>3</sup>

against the other at the sale of a bankrupt's effects, was held illegal.

**Sale by Statutory Assignee.** — In *Atlas Nat. Bank v. Holm*, 71 Fed. Rep. 489, a contract to refrain from bidding at a public sale of goods by a statutory assignee was held illegal.

**Administrator's Sale.** — In *Goldman v. Oppenheim*, 118 Ind. 95, a contract for the purpose of preventing competition at an administrator's sale was held illegal. See also to the same point *Hook v. Turner*, 22 Mo. 333; *De Baun v. Brand*, 60 N. J. L. 283; *Ingram v. Ingram*, 4 Jones L. (49 N. Car.) 189; *Barton v. Benson*, 126 Pa. St. 431, 12 Am. St. Rep. 883.

**Mortgage Sales.** — And so agreements to stifle competition at mortgage sales have likewise been held illegal. *Meech v. Bennett*, Hill & D. Supp. (N. Y.) 191; *Hays's Estate*, 159 Pa. St. 381; *Crozier v. Carr*, 11 Tex. 376.

Thus in *Morris v. Woodward*, 25 N. J. Eq. 32, an agreement with a mortgagee that if he would not bid, and would permit the intended purchaser to buy the mortgaged premises, the latter would pay to him his claim against the property, was held illegal.

**Partition Sales.** — The rule has also been applied to partition sales. *Wheeler v. Wheeler*, 5 Lans. (N. Y.) 355. Compare *Noble v. McGurk*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 461.

**1. Voluntary Sales at Auction.** — *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Wilbur v. How*, 8 Johns. (N. Y.) 444; *Thompson v. Davies*, 13 Johns. (N. Y.) 112; *Smith v. Greenlee*, 2 Dev. L. (13 N. Car.) 126, 18 Am. Dec. 564.

**Letting of Convict Labor.** — In *Gibbs v. Smith*, 115 Mass. 592, a contract the consideration of which was the promisee's agreement to abstain from bidding at the letting of convict labor at public auction was held illegal.

**Sale of State Property.** — In *Boyle v. Adams*, 50 Minn. 255, an agreement by which one person, under promise of benefit, agreed with another to withdraw an offer or bid for property of the state offered for sale, so as to enable the latter, by the removal of competition, to buy it cheaper than he otherwise could, was held illegal, although the person offering the property for sale had the right to reject all bids if unsatisfactory. And it was further held that it was immaterial whether the property was

offered at public auction or by inviting bids or proposals for its purchase at private sale. See also *Blythe v. Lovinggood*, 2 Ired. L. (24 N. Car.) 20, 37 Am. Dec. 402.

**Sale of Public Lands.** — In *Piatt v. Oliver*, 2 McLean (U. S.) 267, a contract to suppress biddings at the sale of public lands of the United States was held illegal. And in *McCann v. McLennan*, 3 Neb. 25, recovery on a note given to the payee in consideration of his refraining from bidding at a public sale of United States lands was denied on the ground that the contract was against public policy. See also *Carlington v. Caller*, 2 Stew. (Ala.) 175; *Kine v. Turner*, 27 Oregon 356; *Hale v. Henderson*, 4 Humph. (Tenn.) 199.

**Restriction of Competition at Sale of Municipal Franchise.** — In *Hyer v. Richmond Traction Co.*, 80 Fed. Rep. 839, rival applicants for a franchise for a street railway, to be sold by a city to the lowest and best bidder, entered into an agreement so as to secure the franchise for themselves on the best terms possible. The agreement was held illegal, and the franchise having been granted to one of them, the court refused to enforce the agreement at the instance of the other.

**2. Actual Effect of Contract Harmless.** — *Gibbs v. Smith*, 115 Mass. 592; *Barton v. Benson*, 126 Pa. St. 431, 12 Am. St. Rep. 883.

**3. Honest Combinations Among Purchasers Allowed.** — *Goldman v. Oppenheim*, 118 Ind. 95; *Jones v. North*, L. R. 19 Eq. 426; *In re Carew*, 26 Beav. 187.

*Canada.* — *Irving v. McWilliams*, 1 N. Bruns. Eq. Rep. 217; *Waddell v. McCabe*, 4 U. C. Q. B. O. S. 191.

*United States.* — *Terbell v. Lee*, 40 Fed. Rep. 40; *Kearney v. Taylor*, 15 How. (U. S.) 494; *Piatt v. Oliver*, 2 McLean (U. S.) 301; *Wicker v. Hoppock*, 6 Wall. (U. S.) 94; *Hyer v. Richmond Traction Co.*, 168 U. S. 471.

*California.* — *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134.

*Indiana.* — *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794.

*Maine.* — *Gardiner v. Morse*, 25 Me. 140.

*Maryland.* — *Smith v. Ullman*, 58 Md. 183, 42 Am. Rep. 329.

*Massachusetts.* — *Gibbs v. Smith*, 115 Mass. 592; *Phippen v. Stickney*, 3 Met. (Mass.) 388.



**f. KNOWLEDGE AND CONSENT OF PERSONS LIABLE TO BE INJURED.** — A contract tending to suppress competition in bidding at a public sale will be relieved of illegality if made with the knowledge and consent of all persons who could in any way be injured by it.<sup>1</sup>

**g. EFFECT OF SUCH CONTRACT ON SALE.** — The effect of a contract puffing the bids or suppressing the competition at a public sale is not to render the sale illegal, but is merely to authorize the purchaser in the one case to be relieved from the sale,<sup>2</sup> or in the other case to enable the vendor or other persons interested in securing a fair price to have the sale set aside.<sup>3</sup> This question will be found discussed in other places in this work.<sup>4</sup>

**2. Private Sales.** — There are cases holding that the rule rendering illegal contracts to suppress bidding at public sales does not apply to contracts suppressing competition at private sales.<sup>5</sup>

*Missouri.* — *Stillwell v. Glasscock*, 91 Mo. 658.

*New Jersey.* — *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 160.

*New York.* — *Myers v. Dean*, 16 Daly (N. Y.) 251; *Munson v. Magee*, 22 N. Y. App. Div. 333; *Hopkins v. Ensing*, 122 N. Y. 144, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 85; *Bradley v. Kingsley*, 43 N. Y. 534; *Cornell v. King*, 13 N. Y. Wkly. Dig. 327; *Myers v. Dorman*, 34 Hun (N. Y.) 115; *People v. Stephens*, 71 N. Y. 527; *Cornell v. Utica*, etc., R. Co., 61 How. Pr. (N. Y.) 184; *Marsh v. Russell*, 66 N. Y. 288; *Marie v. Garrison*, 83 N. Y. 14, reversing 45 N. Y. Super. Ct. 157.

*North Carolina.* — *Goode v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 397; *Smith v. Greenlee*, 2 Dev. L. (13 N. Car.) 129, 18 Am. Dec. 564.

*Pennsylvania.* — *Transportation Co. v. Railroad Co.*, 11 W. N. C. (Pa.) 35; *Smull v. Jones*, 1 W. & S. (Pa.) 128, 6 W. & S. (Pa.) 122.

*South Carolina.* — *Hamilton v. Hamilton*, 2 Rich. Eq. (S. Car.) 355, 46 Am. Dec. 58.

*Tennessee.* — *McMinn v. Phipps*, 3 Sneed (Tenn.) 196.

*Texas.* — *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Dawson v. Ward*, 71 Tex. 72.

*Vermont.* — *Missisquoi Bank v. Sabin*, 48 Vt. 239.

**Agreement Between Joint Mortgagees.** — In *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794, an agreement between joint mortgagees for the purchase of the mortgaged property, at the foreclosure sale, by one for their joint benefit, the other not attending the sale, was held not to be illegal.

**Agreement Between Stockholders and Bondholders of Railroad.** — In *Marie v. Garrison*, 83 N. Y. 14, an agreement between the stockholders and bondholders of a railroad company for the purchase of the railroad property on a judicial sale, entered into with honest motives for the preservation of their existing rights, was held legal though it might incidentally have restricted competition at the sale.

**Partnership to Purchase Land at Tax Sales.** — In *Dawson v. Ward*, 71 Tex. 72, a partnership formed to purchase land sold at tax sale was held not to be illegal where the object of the parties entering into the partnership was not to prevent competition at such sale.

**Sale of State Property at Auction.** — The rule which permits honest combinations by persons to purchase at public sales, when the object of the parties is not to chill the biddings, has

been applied to sales of property of the government at auction. *Piatt v. Oliver*, 2 McLean (U. S.) 301; *Pearsons v. Lee*, 2 Ill. 193; *Smith v. Ullman*, 58 Md. 183, 42 Am. Rep. 329; *Irving v. McWilliams*, 1 N. Bruns. Eq. Rep. 217.

**1. Knowledge and Consent of Person Liable to Be Injured.** — In *Maffet v. Ijams*, 103 Pa. St. 266, it was held that although a contract not to bid at a sheriff's sale, so as to defraud the defendant in the execution or his creditors, will be declared illegal, yet where an agreement between certain judgment creditors that one of their judgments shall be provided for if the holder thereof will not bid at the sheriff's sale is known and assented to by the defendant in the execution, and by his creditors who would be affected by the sheriff's sale, such agreement is not illegal. See also *Bame v. Drew*, 4 Den. (N. Y.) 287; *Mathews v. Starr*, 68 Ga. 521; *Neely v. McClure*, (Pa. 1885) 1 Atl. Rep. 719.

**2. Effect upon Sale — By Bidding.** — *Veazie v. Williams*, 8 How. (U. S.) 153; *Moncrieff v. Goldsborough*, 4 Har. & M. (Md.) 281; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492; *Pennock's Appeal*, 14 Pa. St. 449, 53 Am. Dec. 561; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398.

**3. Chilling Bidding.** — *Levi v. Levi*, 6 C. & P. 239, 25 E. C. L. 377; *Kearney v. Taylor*, 15 How. (U. S.) 494; *Devine v. Harkness*, 117 Ill. 145; *Ingalls v. Rowell*, 149 Ill. 163; *Loyd v. Malone*, 23 Ill. 43.

**Ineffectual Attempt to Suppress Bidding.** — The mere attempt of the purchaser of property at a public sale to prevent a person from bidding for it will not render the purchase invalid as against public policy; but to have this effect the attempt must have been successful. *Haynes v. Crutchfield*, 7 Ala. 189.

**4. See the titles AUCTIONS AND AUCTIONEERS**, vol. 3, p. 487; **JUDICIAL SALES; SHERIFF'S SALES; TAX SALES.**

**5. Suppressing Competition at Private Sale.** — In *McCallum v. Grossman*, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 423, an agreement whereby the defendant agreed that if the plaintiff would withdraw from the contemplated purchase of goods at a private sale, the defendant would, in case he bought them, pay the plaintiff seventy-five dollars, was held not to be within the rule rendering illegal agreements to suppress competition at a public sale.

In *Morrison v. Darling*, 47 Vt. 67, a contract



**Private Sale of Public Property.** — Contracts to suppress competition at the sale of public property have been held illegal, however, irrespective of whether the sale was public or private.<sup>1</sup>

**VIII. AGREEMENTS SUPPRESSING COMPETITION AT LETTING OF PUBLIC CONTRACTS** — 1. **In General.** — Where the government offers contracts for public works to the lowest bidder, the public is deeply interested in free competition in the bidding, and as a general rule any agreement among contractors to suppress the bidding and thereby to acquire the contract from the government at a higher figure than could otherwise be obtained if the competition was left untrammelled are held to be illegal.<sup>2</sup> The English courts do not, however, seem to have recognized this rule.<sup>3</sup>

2. **Bona Fide Agreements Between Prospective Bidders Permissible.** — The rule rendering illegal contracts suppressing competition in the letting of public contracts does not, however, render illegal *bona fide* partnership agreements for bidding for such contracts, or other *bona fide* arrangements between prospective bidders whereby a bid for the entire contract is put in and the parties to the agreement are each to do a part of the work, the object of the parties not being to suppress competition.<sup>4</sup>

to forbear purchasing certain land at a private sale, and to assist another in the purchase thereof, was held not to be illegal.

1. **Private Sale of Public Property.** — *Boyle v. Adams*, 50 Minn. 255.

2. **Suppression of Competition at Letting of Public Contracts** — *United States*. — *Hoffman v. McMullen*, 83 Fed. Rep. 372, reversing 75 Fed. Rep. 547, which reversed 69 Fed. Rep. 509.

*Arkansas*. — *Woodruff v. Berry*, 40 Ark. 251.  
*California*. — *Swan v. Chorpennings*, 20 Cal. 182.

*Delaware*. — *Kennedy v. Murdick*, 5 Harr. (Del.) 458.

*Georgia*. — *Longstreet v. Reeside*, Ga. Dec. (pt. i.) 39.

*Illinois*. — *Ray v. Mackin*, 100 Ill. 246.

*Indiana*. — *Hunter v. Pfeiffer*, 108 Ind. 197; *Jennings County v. Verbag*, 63 Ind. 107.

*Kentucky*. — *Edelen v. Newman*, 5 Ky. L. Rep. 120.

*Maine*. — *Weld v. Lancaster*, 56 Me. 453.

*Massachusetts*. — *Gibbs v. Smith*, 115 Mass. 592.

*Michigan*. — *Hannah v. Fife*, 27 Mich. 172.

*Missouri*. — *Engelman v. Skrainka*, 14 Mo. App. 438; *Lawnin v. Bradley*, 13 Mo. App. 361.

*Nebraska*. — *Whalen v. Brennan*, 34 Neb. 129.

*New Jersey*. — *Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389. See also *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793.

*New York*. — *Sharp v. Wright*, 35 Barb. (N. Y.) 236; *Kelly v. Devlin*, (Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 487; *People v. Stephens*, 71 N. Y. 527; *People v. Lord*, 6 Hun (N. Y.) 390; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Wilbur v. How*, 8 Johns. (N. Y.) 444; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706.

*North Carolina*. — *King v. Winants*, 71 N. Car. 469.

*Vermont*. — *Noyes v. Day*, 14 Vt. 384.

**Support of Paupers.** — The consideration of a promissory note was that the plaintiff would forbear to bid against the defendant for the support of the town paupers at a public auction. It was held that such contract was

illegal as tending to work injustice to the town. *Noyes v. Day*, 14 Vt. 384.

**Concocting Bids Among Bidders.** — In *Hoffman v. McMullen*, 83 Fed. Rep. 372, a secret agreement to share the profits of a public contract, if secured by one of the parties, was held illegal where, in pursuance of such agreement, the parties, with the intent of giving the impression that they were rival bidders, concocted their bids so that one would be for a much higher amount than the other.

**Withholding Bid.** — In *Hunter v. Pfeiffer*, 108 Ind. 197, an agreement to take a person into partnership in the execution of a contract for public work in consideration of the promisee's withholding a bid for the work was held illegal.

In *Kennedy v. Murdick*, 5 Harr. (Del.) 458, a note given by one of several bidders for a government contract to another to induce him to withdraw his bid was held to be based on an illegal consideration and unenforceable.

**Withdrawing from Contract.** — A promise to pay money to a mail contractor upon consideration that he will repudiate his contract for carrying the mail is void as contrary to public policy, even though the government holds security for the performance, and therefore will not be pecuniarily injured by the repudiation. *Weld v. Lancaster*, 56 Me. 453.

3. **English Rule.** — See *Stevenson v. Boyd*, 5 British Columbia 626; *Jones v. North*, L. R. 19 Eq. 426.

4. **Bona Fide Arrangements Between Bidders Sustained** — *United States*. — *Thompson v. U. S.*, 3 Ct. Cl. 434.

*Nebraska*. — *Whalen v. Brennan*, 34 Neb. 129.

*New Hampshire*. — *Bellows v. Russell*, 20 N. H. 427, 51 Am. Dec. 238; *Huntington v. Bardwell*, 46 N. H. 492.

*New York*. — *Myers v. Dean*, 16 Daly (N. Y.) 251; *Dutch v. Harrison*, 37 N. Y. Super. Ct. 306; *Marsh v. Russell*, 66 N. Y. 288; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678.

*Ohio*. — *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627.

3. **Actual Injury to Public Immaterial.** — The fact that the public has received no actual injury by reason of the contract will not relieve the contract of its illegality.<sup>1</sup>

4. **Effect upon Validity of Public Contract.** — The effect of such illegal agreements between bidders for a public contract is not to render the contract illegal, but merely to entitle the public body awarding the contract to have it set aside.<sup>2</sup>

**IX. CONTRACTS IN DEROGATION OF DOMESTIC RELATIONS — 1. Contracts Affecting the Marriage Relation — a. IN GENERAL.** — The preservation and encouragement of the marriage relation have always been considered matters of deep public interest, and the courts have not hesitated to hold illegal, as against public policy, contracts in derogation of such relation.

*b. RESTRAINT OF FREEDOM OF MARRIAGE.* — It is the policy of the law that the freedom of marriage should be left unrestricted, as any unreasonable restraint placed thereon militates against the interest of the public in the legitimate increase in its population and disappoints the claims of nature, thereby tending to encourage immorality; therefore the general rule may be laid down that all contracts in restraint of marriage are illegal as against the interests, both political and social, of the community.<sup>3</sup>

*c. MARRIAGE BROKERAGE CONTRACTS.* — At a very early date in *England* the policy of the law placing its ban upon marriage brokerage contracts was announced.<sup>4</sup> This case has been repeatedly followed both in *England* and in the *United States*, and the rule is now well settled that all contracts for payment for such services are illegal.<sup>5</sup>

*Compare Woodruff v. Berry*, 40 Ark. 251.

**Architects Agreeing Not to Urge Acceptance of Plans.** — Three architects had each submitted plans and specifications for a court house to the County Court. The architects agreed among themselves to abstain from further advocacy and to divide the proceeds should the plan of any one of them be received. The contract was held not to be against public policy so as to prevent competition. *Flanders v. Wood*, 83 Tex. 277. The court likened this case to that of *Briggs v. Tillotson*, 8 Johns. (N. Y.) 304, where a premium was offered for the best manufacture of cloth, and several competitors, after the cloth was made and submitted, agreed to share the bounty in case it was awarded to any of them.

**Intent a Question of Fact.** — In *Bellows v. Russell*, 20 N. H. 427, 51 Am. Dec. 238, an agreement by several that one of them, in behalf of all, should bid for a mail contract was held not to be void unless made for an illegal object; and whether it was so made was a question of fact for the jury.

1. **Actual Injury to Public Immaterial.** — *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678.

2. **Effect upon Public Contract.** — *People v. Stephens*, 71 N. Y. 527; *People v. Lord*, 6 Hun (N. Y.) 390. *Compare Jennings County v. Verburg*, 63 Ind. 107.

This question will be found fully discussed in the titles MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; STATES; UNITED STATES.

3. **Contracts in Restraint of Marriage Held Illegal — England.** — *Grace v. Webb*, 15 Sim. 384; *Baker v. White*, 2 Vern. 215; *Key v. Bradshaw*, 2 Vern. 102; *Morley v. Rennoldson*, 2 Hare 570; *Hartley v. Rice*, 10 East 22; *Woodhouse v. Shepley*, 2 Atk. 535; *Lowe v. Peers*, 4 Burr. 2225.

*Indiana.* — *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151.

*Maine.* — *State v. Towle*, 80 Me. 287.

*New Jersey.* — *Sterling v. Sinnickson*, 5 N. J. L. 871.

*New York.* — *Conrad v. Williams*, 6 Hill (N. Y.) 444.

For a Full Discussion of this matter, see the title MARRIAGE.

4. *Keene v. Potter*, 3 Lev. 412.

5. **Marriage Brokerage Contracts Held Illegal — England.** — *Arundel v. Trevillian*, 1 Ch. Cas. 87; *Debenham v. Ox*, 1 Ves. 276; *Cole v. Gibson*, 1 Ves. 503; *Scribblehill v. Brett*, 4 Bro. P. C. (Toml. ed.) 144; *Williamson v. Gihon*, 2 Sch. & Lef. 357; *King v. Burr*, 3 Meriv. 693; *Drury v. Hooke*, 1 Vern. 412; *Smith v. Aykwell*, 3 Atk. 566; *Smith v. Bruning*, 2 Vern. 392.

*California.* — *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95.

*Kentucky.* — *Johnson v. Hunt*, 81 Ky. 321.

*Massachusetts.* — *Boynton v. Hubbard*, 7 Mass. 112; *Fuller v. Dame*, 18 Pick. (Mass.) 472.

*Michigan.* — *Ancliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533.

*New York.* — *Crawford v. Russell*, 62 Barb. (N. Y.) 92; *Duval v. Wellman*, 14 Daly (N. Y.) 515, affirmed on this point 124 N. Y. 156; *Place v. Conklin*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 40.

See the title MARRIAGE.

**Expenses of Entertainments to Bring About Meeting Between Persons.** — In *King v. Burr*, 3 Meriv. 693, a demurrer was allowed in equity to a bill of discovery in support of an action to recover the expenses of entertainments given by the plaintiff under an agreement with the defendant to introduce him, with a view to his marriage, to a woman of fortune.

**Good Faith of Broker.** — The fact that the marriage broker acts in good faith, believing that the marriage sought to be brought about by him is for the best interests of both of the parties thereto, will not relieve of its illegality a contract to pay him for his services in bringing about the marriage.<sup>1</sup>

**d. AGREEMENTS FOR SEPARATION BETWEEN HUSBAND AND WIFE — Early English Doctrine.** — The English church always regarded the marriage relation as a sacrament and as one of the highest possible religious obligations; and from the influence of the church upon the early English law, all agreements having for their purpose the separation of the conjugal relations of husband and wife and their living apart were held illegal as *contra bonos mores*.<sup>2</sup>

**Modern Doctrine.** — After the Reformation, the ecclesiastical law became subordinated to the common law, and agreements for separation *in presenti* between husband and wife became of recognized validity in *England*; <sup>3</sup> and in the *United States* the rule that such agreements are not illegal as against public policy is well established.<sup>4</sup>

**Future Separations.** — Still, however, as the policy of the law is to preserve intact the marriage if possible, all requirements which have for their object, or which contemplate, a future separation between husband and wife are universally held illegal.<sup>5</sup> The distinction between such agreements rests on the ground that an agreement for an immediate separation is made to meet a

**Promotion of Existing Agreement to Marry.** — In *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95, a contract to pay for services in promoting the carrying out of an existing agreement to marry was held equally illegal with one providing for the rendition of services in bringing about a marriage between persons not previously known to each other.

**Promise After Marriage.** — Any promise to remunerate the broker for such services, though made after marriage, is also void. *Fuller v. Dame*, 18 Pick. (Mass.) 472.

**Bond Executed After Marriage Without Previous Agreement.** — In *Williamson v. Gihon*, 2 Sch. & Lef. 357, a bond given as remuneration to the obligee for having assisted the obligor in effecting an elopement and marriage, without the consent of the friends of the wife, was held illegal, though given voluntarily after the marriage and without any previous agreement for it.

**1. Good Faith of Broker Immaterial.** — In *Fuller v. Dame*, 18 Pick. (Mass.) 472, Shaw, C. J., said: "A man might entertain a very sincere opinion that a marriage between a certain gentleman of his acquaintance and a lady of considerable fortune would be highly beneficial and contribute to the happiness of both parties, and he might lawfully propose this to one or both. But any promise of reward made to him to induce him to do this, or any promise made afterwards in consideration of such service, would be void."

**2. Early English Doctrine.** — *Hunt v. Hunt*, 4 De G. F. & J. 226, wherein the history of the law is considered. See also *Legard v. Johnson*, 3 Ves. Jr. 358, *per* Lord Loughborough; *Beard v. Webb*, 2 B. & P. 93, *per* Lord Eldon; *St. John v. St. John*, 11 Ves. Jr. 526; *Rodney v. Chambers*, 2 East 288; *Mortimer v. Mortimer*, 2 Hag. Cons. 318, *per* Sir William Scott.

**3. Modern English Doctrine.** — *Hunt v. Hunt*, 4 De G. F. & J. 226; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Besant v. Wood*, 12 Ch. D. 623;

*Marshall v. Marshall*, 5 P. D. 19; *Charlesworth v. Holt*, L. R. 9 Exch. 38; *Compton v. Collinson*, 2 Bro. C. C. 377; *Worrall v. Jacob*, 3 Meriv. 266; *Jee v. Thurlow*, 2 B. & C. 547, 9 E. C. L. 174; *Webster v. Webster*, 23 Eng. L. & Eq. 216; *Wilson v. Mushett*, 3 B. & Ad. 743, 23 E. C. L. 175; *Randle v. Gould*, 8 El. & Bl. 457, 92 E. C. L. 457; *Fearon v. Aylesford*, 14 Q. B. D. 792.

**4. American Doctrine — United States.** — *Walker v. Walker*, 9 Wall. (U. S.) 743.

*California.* — *Wells v. Stout*, 9 Cal. 479.

*Connecticut.* — *Nichols v. Palmer*, 5 Day (Conn.) 47.

*Georgia.* — *Chapman v. Gray*, 8 Ga. 341.

*Kentucky.* — *Loud v. Loud*, 4 Bush (Ky.) 453.

*Maryland.* — *Helms v. Franciscus*, 2 Bland (Md.) 544, 20 Am. Dec. 402.

*Massachusetts.* — *Babcock v. Smith*, 22 Pick. (Mass.) 61; *Fox v. Davis*, 113 Mass. 255, 18 Am. Rep. 476.

*New York.* — *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; *Calkins v. Long*, 22 Barb. (N. Y.) 103; *Carson v. Murray*, 3 Paige (N. Y.) 483; *Allen v. Affleck*, (C. Pl. Gen. T.) 64 How. Pr. (N. Y.) 380.

*Ohio.* — *Bettle v. Wilson*, 14 Ohio 257.

*Pennsylvania.* — *Dillinger's Appeal*, 35 Pa. St. 357.

*South Carolina.* — *Bratton v. Massey*, 15 S. Car. 277.

*Compare* *Rogers v. Rogers*, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; *Friedman v. Bierman*, 43 Hun (N. Y.) 387.

See the title *SEPARATION*, for a full treatment of this topic.

**5. Future Separations.** — *Ruffles v. Alston*, L. R. 11 Q. B. 201; *Westmeath v. Westmeath*, 1 Dow. N. S. 519; *Westmeath v. Salisbury*, 5 Bligh. N. S. 339; *H— v. W—*, 3 K. & J. 382; *Cartwright v. Cartwright*, 3 De G. M. & G. 982; *Hindley v. Westmeath*, 6 B. & C. 200, 13 E. C. L. 141; *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653. See the title *SEPARATION* for a full discussion.



state of facts which, however undesirable in itself, has in fact become inevitable. Still that state of facts is abnormal and not to be contemplated beforehand.<sup>1</sup>

**4. AGREEMENTS RELATING TO DIVORCES** — (1) *Agreements Promotive of Divorces* — (a) *In General*. — It is the well-settled policy of the law to encourage and maintain the marriage relation when once formed, and its dissolution or determination is not to be left to depend upon the wishes of the parties, but it should be terminated only in accordance with some positive enactment of law and in due course of judicial proceedings. It is therefore the universal rule that all contracts having for their object the procurement or facilitating the procurement of a divorce are illegal.<sup>2</sup> Such contracts often take the form of agreements whereby one of the parties is to institute divorce proceedings and the other party agrees to abstain from interposing any defense.<sup>3</sup>

1. Pollock on Contracts 269. See also the title SEPARATION.

2. *Contracts for Promotion of Divorces Held Illegal* — *England*. — Hope v. Hope, 8 De G. M. & G. 731.

*United States*. — Hungerford v. Hungerford, 16 N. Y. App. Div. 612.

*Arkansas*. — Viser v. Bertrand, 14 Ark. 267.

*California*. — Loveren v. Loveren, 106 Cal. 509; Beard v. Beard, 65 Cal. 354.

*Colorado*. — Smutzer v. Stimson, 9 Colo. App. 326.

*Connecticut*. — Goodwin v. Goodwin, 4 Day (Conn.) 343; Seeley's Appeal, 56 Conn. 202; Stilson v. Stilson, 46 Conn. 21.

*Illinois*. — Hamilton v. Hamilton, 89 Ill. 349; Paul v. Paul, 71 Ill. App. 671.

*Indiana*. — Stokes v. Anderson, 118 Ind. 533; Everhart v. Puckett, 73 Ind. 409; Muckenbug v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Stokes v. Anderson, 118 Ind. 533; Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Moon v. Baum, 58 Ind. 194.

*Kansas*. — Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191.

*Massachusetts*. — Hardy v. Smith, 136 Mass. 328.

*Michigan*. — Owen v. Yale, 75 Mich. 256.

*Minnesota*. — Adams v. Adams, 25 Minn. 72; Belden v. Munger, 5 Minn. 211, 80 Am. Dec. 407.

*Missouri*. — Speck v. Dausman, 7 Mo. App. 165; Blank v. Nohl, 112 Mo. 159.

*Nebraska*. — Wilde v. Wilde, 37 Neb. 891.

*New Hampshire*. — Cross v. Cross, 58 N. H. 373; Weeks v. Hill, 38 N. H. 199; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208.

*New York*. — Whitney v. Whitney, 4 N. Y. App. Div. 597; Train v. Davidson, 20 N. Y. App. Div. 577; Daggett v. Daggett, 5 Paige (N. Y.) 509, 28 Am. Dec. 442.

*Ohio*. — Stoutenburg v. Lybrand, 13 Ohio St. 228.

*Oregon*. — Phillips v. Thorp, 10 Oregon 494.

*Pennsylvania*. — Irvin v. Irvin, 169 Pa. St. 529; Sampson v. Cresson, 6 Phila. (Pa.) 229, 24 Leg. Int. (Pa.) 132; Kilborn v. Field, 78 Pa. St. 194.

*Rhode Island*. — James v. Steere, 16 R. I. 367. **Agreement for Wife's Support Made Pending Divorce Proceedings**. — In Schmieding v. Doeliner, 10 Mo. App. 373, however, it was held that an agreement, made pending divorce proceedings, by a husband for his wife's support, if absolute and in nowise dependent upon the

result of the divorce suit, was not necessarily void.

**Husband Aiding Wife in Suit**. — In Train v. Davidson, 20 N. Y. App. Div. 577, a contract by a husband with his wife for the payment of a yearly sum for her support was held to be illegal where it was shown that it was a part of the agreement that the husband was to assist his wife to secure a divorce by furnishing to her proof of his past adultery.

**Contracting Through Trustees**. — Contracts between husband and wife promotive of a divorce cannot be relieved of illegality by contracting through trustees. Speck v. Dausman, 7 Mo. App. 165. See also Belden v. Munger, 5 Minn. 211, 80 Am. Dec. 407.

**Escrow**. — Nor can contracts promotive of a divorce be relieved of their illegality by placing the written agreements in escrow, the delivery by the third person, in whose hands they are placed, not to be made until a decree of divorce has been obtained, according to the terms of the agreement, as the delivery in such a case relates back to the date of the agreement, and the contract, therefore, is one made prior to the granting of the divorce, and not one made after it. Speck v. Dausman, 7 Mo. App. 165. See the title ESCROW, vol. 11, p. 346 *et seq.*, for discussion of the question as to the date from which an escrow operates.

**Agreement Not to Contest Wrongful Decree of Divorce**. — And where a decree of divorce has been wrongfully obtained, a subsequent agreement between the parties that it shall not be disturbed is illegal. Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191. See also Blank v. Nohl, 112 Mo. 159.

**Promises of Marriage Conditioned on Procurement of Divorce Void**. — See the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 883.

**Presumption in Favor of Legality of Contract**. — Where a contract attacked on the ground that it was entered into for the purpose of promoting a divorce is susceptible of two constructions, one legal, the other illegal, it should receive that interpretation which will support it and give validity to it. Paul v. Paul, 71 Ill. App. 671.

3. **Agreement Not to Defend Divorce Proceedings** — *Arkansas*. — Viser v. Bertrand, 14 Ark. 267.

*California*. — Beard v. Beard, 65 Cal. 354; Loveren v. Loveren, 106 Cal. 509.

*Colorado*. — Smutzer v. Stimson, 9 Colo. App. 326.

(b) **Effect of Other Considerations.** — The fact that such a contract is supported by other and valid considerations will not relieve it of illegality.<sup>1</sup>

(c) **Existence of Legal Grounds for Divorce.** — A contract between a husband and wife entered into for the object of promoting a divorce will not be relieved of its illegality by the fact that the party instituting the divorce proceedings had legal grounds for a divorce.<sup>2</sup>

(d) **Operation of Agreements Conditioned on Divorce.** — Contracts so framed as to have effect only on condition that a divorce between the parties should be granted are held illegal, as their object is to interest the party to be benefited in procuring or permitting a divorce.<sup>3</sup>

(e) **Concealment of True Cause of Divorce.** — An agreement having for its object the concealment of the true cause for divorce, which may be thought disgraceful to the parties, and the procurement of the divorce on other grounds, has been held illegal.<sup>4</sup>

(2) **Dismissal of Pending Divorce Proceedings.** — Where divorce proceedings have already been instituted between husband and wife, it has been held that contracts for the dismissal of such proceedings and the renewal of the conjugal relations are not against public policy.<sup>5</sup>

*Indiana.* — *Everhart v. Puckett*, 73 Ind. 409.

*Minnesota.* — *Belden v. Munger*, 5 Minn. 211, 80 Am. Dec. 407.

*New Hampshire.* — *Cross v. Cross*, 58 N. H. 373; *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208.

*Ohio.* — *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

*Oregon.* — *Phillips v. Thorp*, 10 Oregon 494.

*Pennsylvania.* — *Kilborn v. Field*, 78 Pa. St. 194; *Sampson v. Cresson*, 6 Phila. (Pa.) 229, 24 Leg. Int. (Pa.) 132.

**Contract Between Wife and Third Person.** — In *Viser v. Bertrand*, 14 Ark. 267, a contract between a wife and a third person by which such third person was to advance money to the husband in consideration of his making no opposition to divorce proceedings instituted by the wife was held to be illegal, and a recovery of such money against the wife on her express promise to pay was refused.

1. **Effect of Other Considerations.** — *Goodwin v. Goodwin*, 4 Day (Conn.) 343; *Hamilton v. Hamilton*, 89 Ill. 349; *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Cross v. Cross*, 58 N. H. 373.

2. **Effect of Legal Grounds for Divorce.** — *Goodwin v. Goodwin*, 4 Day (Conn.) 343; *Speck v. Dausman*, 7 Mo. App. 165.

3. **Operation of Agreements Conditioned on Divorce.** — *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Speck v. Dausman*, 7 Mo. App. 165.

**Defense in Good Faith.** — In *Speck v. Dausman*, 7 Mo. App. 165, wherein a contract the operation of which was conditioned upon a divorce being granted was held illegal, it was further held that it was immaterial whether suit was instituted and defended in good faith between the parties.

4. **Concealment of True Cause for Divorce.** — *Goodwin v. Goodwin*, 4 Day (Conn.) 343.

In *Irvin v. Irvin*, 169 Pa. St. 529, however, it was held that it was not against public policy for a wife who had been deserted by her husband to enter into a written contract with a third person, for a valuable consideration, that in any proceedings she might institute against

her husband for divorce, she would not assign any other reason therefor than the desertion of her by her husband.

5. **Contracts for Dismissal of Divorce Proceedings.** — *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675; *Barbour v. Barbour*, 49 N. J. Eq. 429. This latter case was reversed in 51 N. J. Eq. 267, on the ground that the parol agreement was not sufficiently proven; the legality of such a contract was not questioned. See also *Hart v. Hart*, 18 Ch. D. 670; *Newsome v. Newsome*, L. R. 2 P. & D. 306; *Jodrell v. Jodrell*, 9 Beav. 45; *Sterling v. Sterling*, 12 Ga. 201; *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295; *Friedman v. Bierman*, 43 Hun (N. Y.) 387; *Burkholder's Appeal*, 105 Pa. St. 31.

**Massachusetts Doctrine.** — In *Merrill v. Peaslee*, 146 Mass. 460, 4 Am. St. Rep. 334, the wife had separated from her husband because of his extreme cruelty (entitling her to a divorce), and had consulted counsel with a view to obtaining a divorce and alimony. The husband gave a note to a trustee for the benefit of the wife, the consideration for the note being that "she would not proceed against him for a divorce or alimony, and would return to him and live with him as his wife." It was held that the consideration of the note was illegal, *Holmes, Knowlton, and C. Allen, JJ.*, dissenting. In the majority opinion this language appears: "The consideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy."

*Holmes, Knowlton, and C. Allen, JJ.*, 146 Mass. 461, 57 Am. St. Rep. 452, where it was held that the fact that one of the considerations of a covenant between husband and wife was forbearance to bring a well-founded suit for divorce did not vitiate the covenant.

**Tennessee Rule.** — In *Copeland v. Baxt*, 92 Tenn. 223, 40 Am. Rep. 89, a note executed by the husband to a trustee for the



(3) *Contracts Relating to Alimony.* — This phase of the subject has received treatment in an earlier volume of this work.<sup>1</sup>

2. *Contracts Affecting Relation of Parent and Child.* — On the ground that the duties and relations of minor children and their parents towards each other are imposed by law, not merely in accordance with the mutual obligation, but from considerations of high public policy and the general welfare of the community, the general rule is that contracts by which parents release their right to the custody and care of their children are against public policy.<sup>2</sup>

This topic falls more appropriately under another title in this work, to which reference is made in the note below.<sup>3</sup>

3. *Contracts Relating to Slave Property.* — According to the decided weight of authority, the fact of the abolition of slavery after the making of contracts for the purchase or hire of slaves did not affect the validity of the contracts, nor impair the consideration upon which they were based. This was held notwithstanding the circumstance that the vendors had warranted the subjects of the contracts to be "slaves for life," such warranty being construed to relate to the then existing condition of the negroes, but not to the paramount power of government by which the property was lost to the owners.<sup>4</sup>

benefit of the wife, who was living separate and apart, as an inducement to her to return to him, was declared to be *nudum pactum*, contrary to public policy and not tolerable in law.

*Suit for Nullity of Marriage.* — An agreement to put an end to a suit for nullity of marriage on the ground of impotency is not illegal as against public policy. *Wilson v. Wilson*, 14 Sim. 405, *affirmed* 1 H. L. Cas. 538.

*Dismissal of Suit at Instance of Co-respondent.* — In *Gipps v. Hume*, 7 Jur. N. S. 1301, however, it was held under the statute 20 & 21 Vict., c. 85, that an agreement by a petitioner in a suit for dissolution of marriage to withdraw from the suit, in consideration of a sum of money paid and to be secured by the co-respondent, was a fraud and against public policy.

1. See the title *ALIMONY*, vol. 2, p. 127 *et seq.*  
2. *Parents' Surrender of Custody of Child—England.* — *Hope v. Hope*, 8 De G. M. & G. 744; *Walrond v. Walrond*, 4 Jur. N. S. 1099; *Reg. v. Smith*, 16 Eng. L. & Eq. 221; *Vansittart v. Vansittart*, 2 De G. & J. 255.

*Connecticut.* — *Johnson v. Terry*, 34 Conn. 259; *Torrington v. Norwich*, 21 Conn. 543.

*Indiana.* — *Wishard v. Medaris*, 34 Ind. 168.

*Kansas.* — *Chapsky v. Wood*, 26 Kan. 650.

*Louisiana.* — *Gates v. Renfro*, 7 La. Ann. 569.

*Maine.* — *Richardson v. Richardson*, 32 Me. 560; *Farnsworth v. Richardson*, 35 Me. 267.

*Missouri.* — *Matter of Scarritt*, 76 Mo. 565, 43 Am. Rep. 768.

*New Jersey.* — *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399.

*New York.* — *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; *Allen v. Affleck*, (C. Pl. Gen. T.) 64 How. Pr. (N. Y.) 380; *Adams v. Oaks*, 20 Johns. (N. Y.) 282.

*Pennsylvania.* — *In re Sleep*, 6 Pa. Dist. 256.

*Texas.* — *Byrne v. Love*, 14 Tex. 81.

*Compare Bently v. Terry*, 59 Ga. 555; *Du-main v. Gwynne*, 10 Allen (Mass.) 270; *Curtis v. Curtis*, 5 Gray (Mass.) 535; *People v. Erbert*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 395.

3. See for a full discussion the title *PARENT AND CHILD*. See also the title *HABEAS CORPUS*, *ante*.

4. *Majority Rule—United States.* — *Groves v. Slaughter*, 15 Pet. (U. S.) 449; *Rives v. Duke*, 105 U. S. 132; *Osborn v. Nicholson*, 13 Wall. (U. S.) 654, *reversing* 1 Dill. (U. S.) 219; *White v. Hart*, 13 Wall. (U. S.) 648; *Harris v. Runnels*, 12 How. (U. S.) 79.

*Arkansas.* — *Haskill v. Sevier*, 25 Ark. 152; *Atkins v. Busby*, 25 Ark. 176.

*Illinois.* — *Roundtree v. Baker*, 52 Ill. 241, 4 Am. Rep. 597; *Hone v. Ammons*, 14 Ill. 29.

*Mississippi.* — *Bradford v. Jenkins*, 41 Miss. 328.

*South Carolina.* — *Calhoun v. Calhoun*, 2 S. Car. 283.

*Tennessee.* — *Taylor v. Mayhew*, 11 Heisk. (Tenn.) 596.

*Virginia.* — *Rives v. Farish*, 24 Gratt. (Va.) 125; *Henderlite v. Thurman*, 22 Gratt. (Va.) 466, 12 Am. Rep. 526.

See also the titles *CONSIDERATION*, vol. 6, p. 667; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, *post*; *SLAVES*; *WARRANTY*.

*Contrary Doctrine.* — *Buckner v. Street*, 1 Dill. (U. S.) 248; *Wainwright v. Bridges*, 19 La. Ann. 234, *overruling* *Penn v. Carr*, 19 La. Ann. 106; *Austin v. Sandel*, 19 La. Ann. 309; *Halley v. Hoeffner*, 19 La. Ann. 518; *Lytle v. Whicher*, 21 La. Ann. 182; *Gosselin v. Womack*, 21 La. Ann. 193; *Satterfield v. Spurlock*, 21 La. Ann. 771; *Sandidge v. Sanderson*, 21 La. Ann. 757; *Haden v. Phillips*, 21 La. Ann. 517; *Bruin v. Sasser*, 25 La. Ann. 224; *Rodriguez v. Bienvenu*, 22 La. Ann. 300, 2 Am. Rep. 728.

*Care of Slaves.* — In *Powell v. Daniel*, 23 La. Ann. 289, payment for services rendered under a contract to carry slaves and other property into Texas, and to manage and take care of the same, entered into before the abolition of slavery, was enforced after the abolition of slavery.

*Prohibition of Importation of Slaves for Sale.* — Where slaves were imported into Mississippi for the purpose of sale in violation of the constitution of the state, contracts for the sale of such slaves were held illegal. *Cowen v. Boyce*, 5 How. (Miss.) 769; *Green v. Robinson*, 5 How. (Miss.) 80; *Brien v. Williamson*, 7



**X. IMMORAL CONTRACTS — 1. In General.** — The protection of public morals is a matter of vital interest, and the policy of the law is opposed to all immorality; accordingly the rule has been repeatedly laid down that all contracts of an immoral tendency or based on an immoral consideration are illegal.<sup>1</sup> While as a matter of fact the greater number of cases in which this rule has been announced are those involving sexual immorality, yet the principle has a wider application.

**Immoral Publications.** — Thus, contracts involving the sale or publication of immoral literature have been held illegal.<sup>2</sup>

**Christian Religion.** — In *England* a contract has been held illegal as in derogation of the Christian religion.<sup>3</sup>

**Public Decency.** — And a contract has also been held illegal as in violation of public decency.<sup>4</sup>

**Discreditable Act.** — “However discreditable an act may be in a moral point of view, or as a breach of confidence, it does not follow that the act is on that

How. (Miss.) 14; *Adams v. Rowan*, 8 Smed. & M. (Miss.) 624. See also *Yerger v. Rains*, 4 Humph. (Tenn.) 259.

**Enforcement of Contract in Nonslavery State.** — And the enforcement of the payment of the purchase price of slaves sold in a slavery state prior to the abolition of slavery has been enforced in a nonslavery state after such abolition. *Roundtree v. Baker*, 52 Ill. 241, 4 Am. Rep. 597; *Smith v. Brown*, 2 Salk. 666; *Com. v. Aves*, 18 Pick. (Mass.) 215. See also the title PRIVATE INTERNATIONAL LAW.

**1. Contracts Contra Bonos Mores — England.** — *Taylor v. Chester*, L. R. 4 Q. B. 309.

*United States.* — *Jackson v. McLean*, 36 Fed. Rep. 213; *Toler v. Armstrong*, 4 Wash. (U. S.) 297.

*Arkansas.* — *Jeffrey v. Ficklin*, 3 Ark. 227, 36 Am. Dec. 456.

*Indiana.* — *Dumont v. Dufore*, 27 Ind. 263.

*Kentucky.* — *Hanson v. Power*, 8 Dana (Ky.) 95.

*Louisiana.* — *Denton v. Willcox*, 2 La. Ann. 66; *Denton v. Erwin*, 6 La. Ann. 317.

*Maryland.* — *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59.

*Michigan.* — *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355.

*Missouri.* — *Buckingham v. Fitch*, 18 Mo. App. 91.

*North Carolina.* — *King v. Winants*, 71 N. Car. 469; *Sharp v. Farmer*, 4 Dev. & B. L. (20 N. Car.) 122.

*Ohio.* — *Forsythe v. State*, 6 Ohio 21.

*Pennsylvania.* — *Brua's Appeal*, 55 Pa. St. 291.

**Wine and Suppers Furnished for Debauch.** — In *Taylor v. Chester*, L. R. 4 Q. B. 309, a contract for the loan of money and the furnishing of wine and suppers for a debauch in a brothel was held illegal.

**Contracts Encouraging Disobedience by Children.** — Contracts encouraging children in disobedience of parental authority have also been held illegal. Thus, where the father had objected to his daughter's marriage with a certain individual, and she entered into a secret bond to forfeit six hundred pounds if she did not marry him in thirteen months after her father's death, on her application for relief against the bond it was decreed that it should be canceled, such a transaction being an encourage-

ment to disobedience and fraud on parents. *Woodhouse v. Shepley*, 2 Atk. 535.

Where two children, seeking to avoid the disherison of one of them, which was threatened by the father should a marriage contemplated by such child take place, entered into a verbal contract, during the father's life, by which they agreed to divide the property between them no matter what might be the parent's will, such contract was held illegal and unenforceable in equity on a bill for specific performance. *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694.

**Sale of Expectancies.** — See the title CATCHING BARGAIN, vol. 5, p. 764.

**2. Immoral Publications.** — *Gale v. Leckie*, 2 Stark 107, 3 E. C. L. 337; *Fores v. Johnes*, 4 Esp. 97; *Poplett v. Stockdale*, 2 C. & P. 198, 12 E. C. L. 87. Compare *Lara v. General Apothecaries Co.*, 26 L. J. Exch. 225.

**Sale of Books in Index Librorum Prohibitorum.** — The works of an author are not contrary to good morals, within the meaning of a statute providing that the consideration of a contract is unlawful when it is contrary to good morals, unless they are so immoral as to be punishable under the criminal law. The mere fact that a book has been placed in the *index librorum prohibitorum* by the Congregation de l'Index will not affect the validity of a contract made by a bookseller with an agent for procuring subscribers to such work. *Taché v. Derome*, 6 Montreal Super. Ct. 178.

**3. Contracts in Derogation of Christian Religion.** — In *Cowan v. Milbourn*, L. R. 2 Exch. 230, it was held that a contract for the renting of a hall for the delivery of lectures derogatory to the character of Christ was illegal. See the title COMMON LAW, vol. 6, p. 274.

**4. Public Decency — Removal of Corpses.** — Thus, an agreement to build houses on a disused, unconsecrated burial ground, necessitating the removal of some thousands of corpses, which removal would of necessity involve an outrage on public decency, has been held illegal. *Gibbons v. Chambers*, 1 Cab. & El.

**Marriage Between Negro and White Person.** — In *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38, a contract for the purchase of a slave, in which the purchaser agreed to set the slave free and make her his wife, was held to be illegal as in violation of public decency.

account to be held a corrupt one, within the meaning of the law, so as to avoid a contract. It must be corrupt as tainted by fraud, or illegal as in violation of some rule of law or some statute, to warrant such defense."<sup>1</sup>

**2. Sexual Immorality — a. IN GENERAL — FUTURE COHABITATION.** — Where future illicit intercourse enters into a contract as the consideration, wholly or partially, the contract is illegal.<sup>2</sup> This principle holding such contracts illegal is based on their immoral tendency, and not on the fact that the consent to the illicit intercourse on the part of one of the parties to such a contract is not a sufficient consideration to support it. Although a seal imports a consideration, yet if a contract under seal is made in consideration of future illicit intercourse, such consideration renders the contract illegal.<sup>3</sup>

**Contract with Third Person.** — A contract entered into for such an immoral purpose will not be rendered valid by the fact that the man contracts with a third person as trustee for the woman.<sup>4</sup>

**1. Discreditable Act.** — *Moore v. Remington*, 34 Barb. (N. Y.) 427, *per* Ingraham, J.

**2. Sexual Immorality — Future Cohabitation — England.** — *Benyon v. Nettlefold*, 17 Sim. 51; *Friend v. Harrison*, 2 C. & P. 584, 12 E. C. L. 276.

*Alabama.* — *Walker v. Gregory*, 36 Ala. 180.

*Georgia.* — *Smith v. Du Bose*, 78 Ga. 413, 6 Am. St. Rep. 260.

*Kentucky.* — *Brown v. Langford*, 3 Bibb (Ky.) 497; *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 35.

*Louisiana.* — *Cole v. Cole*, 7 Mart. N. S. (La.) 423.

*Maine.* — *Brown v. Tuttle*, 80 Me. 162.

*New Hampshire.* — *White v. Hunter*, 23 N. H. 128.

*New York.* — *Vincent v. Moriarty*, 31 N. Y. App. Div. 484; *Rhodes v. Stone*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 561.

*Ohio.* — *Crawford v. Gordon*, 11 Cinc. L. Bul. 121, 9 Ohio Dec. (Reprint) 160.

*South Carolina.* — *Cusack v. White*, 2 Mill (S. Car.) 279, 12 Am. Dec. 669; *Massey v. Wallace*, 32 S. Car. 149; *Denton v. English*, 2 Nott & M. (S. Car.) 581, 10 Am. Dec. 638.

*Tennessee.* — *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282.

**Partnership — Accounting.** — In *Vincent v. Moriarty*, 31 N. Y. App. Div. 484, an agreement between a man and woman, in view of their illicit cohabitation, that their earnings should be put into a partnership, was held illegal, and an accounting between them in regard to the alleged partnership property was denied.

**Note — Illicit Cohabitation.** — Concubinage is an illegal consideration for a note. *Cole v. Cole*, 7 Mart. N. S. (La.) 423.

**Settlement on Mistress.** — The rule that a contract made upon consideration of future illicit intercourse between the parties is illegal and void includes a settlement on a mistress, equally with a promise of payment for future illicit intercourse. *Walker v. Gregory*, 36 Ala. 180.

**Illicit Cohabitation under Pretense of Marriage.** — Where at the time of a marriage ceremony the woman knew that the man had been married and that his wife was living, there being no evidence that she had any reason to suppose that he had been divorced, and they went to another state merely to have the ceremony performed, the relationship between them,

though under the pretense of marriage, is illegal; and her promise to continue to live with him after commencing an action for divorce affords no valid consideration for a contract on his part. *Tyrrell v. York*, 57 Hun (N. Y.) 292.

**Recovery for Board of Prostitutes.** — A woman who keeps prostitutes cannot recover in an action against them for board and lodging. *Mackbee v. Griffith*, 2 Cranch (C. C.) 336.

**Contract Requiring Woman to Live Where Man Resides.** — A clause in a deed of assignment of stock from a married man to a married woman that she shall live where he resides, though suspicious, is not a sufficient ground to hold it *pro turpi causa*. *Colman v. Sarrel*, 1 Ves. Jr. 51.

**As to Promises to Marry in Consideration of Future Intercourse,** see the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 889.

**3. Contracts under Seal.** — *Benyon v. Nettlefold*, 17 Sim. 51; *Smyth v. Griffin*, 14 L. J. Ch. 28; *Friend v. Harrison*, 2 C. & P. 584, 12 E. C. L. 276; *Franco v. Bolton*, 3 Ves. Jr. 368; *Batty v. Chester*, 5 Beav. 103; *Gray v. Mathias*, 5 Ves. Jr. 286; *Priest v. Parrot*, 2 Ves. 160; *W — v. B —*, 32 Beav. 574; *Collins v. Blantern*, 2 Wils. C. Pl. 349; *Clarke v. Periam*, 2 Atk. 333; *Brown v. Langford*, 3 Bibb (Ky.) 497; *Sherman v. Barrett*, 1 McMull. L. (S. Car.) 147. Compare *Cox's Case*, 3 P. Wms. 339.

**Woman Seduced by Obligor.** — And the rule stated in the text holds true in the case of a bond given by the man to a woman whom he had seduced, the consideration of the bond not being the injury to her caused by the seduction, but to secure their future illegal cohabitation. *Walker v. Perkins*, 1 W. Bl. 517.

In *Priest v. Parrot*, 2 Ves. 160, a bill for the payment of a sum of money and an annuity secured by a deed poll to a young woman, who had been seduced by a married man in whose family she lived as companion to his wife, and who by continuing to live with him occasioned a separation, was dismissed, but without costs, on account of her previous good character.

**Assignment of Wife.** — In *Robinson v. Gee*, 1 Ves. 251, a bond given in consideration of the assignment by a husband of his wife to another was held illegal.

**4. Contracting Through Trustee.** — *Benyon v. Nettlefold*, 17 Sim. 51, 15 Jur. 209; *Smyth v. Griffin*, 14 L. J. Ch. 28.



**Contracts Between Persons Illegally Cohabiting.** — The mere fact that persons are cohabiting together will not disable them from contracting with each other, and when a contract has no reference to the meretricious connection, it is unobjectionable.<sup>1</sup>

**b. PAST COHABITATION** — (1) *In General.* — In some cases it has been said that a man is under a moral obligation to remunerate a woman for the injury caused to her by his having had illicit intercourse with her, and that this is a lawful and conscientious consideration for a contract to remunerate her on that account.<sup>2</sup> This obligation on the part of the man, however, cannot rise above a moral obligation on his part, and as a moral obligation is as a rule insufficient to support a contract,<sup>3</sup> it is therefore held by the weight of authority that past cohabitation alone is not a sufficient consideration for a promise, not under seal, by the man to remunerate the woman.<sup>4</sup> And this has been held true even though the illicit cohabitation was brought about by seduction.<sup>5</sup> This rule is based on the principle that the contract is a mere *nudum pactum*, and not that the consideration is illegal. And the cases in which the doctrine of moral obligation has been asserted have almost invariably been cases in which the contract was really supported by other considerations, such as a seal, which imports a consideration, and which would only allow the actual consideration to be shown in case it was illegal.

(2) *Exceptions to General Rule.* — It seems that the rule that the injury to a woman arising from her cohabiting with a man is not a valuable and legal consideration is subject to an exception in case the woman acted under the belief that she was lawfully married to the man.<sup>6</sup>

(3) *Contract Supported by Other Consideration.* — If a contract between a man and a woman is supported by other considerations, then the fact of their past illicit relations, though the man was induced to enter into the contract on account thereof, does not render the contract illegal.<sup>7</sup> This rule is chiefly

**1. Persons Illicitly Cohabiting May Contract Together.** — *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 35.

**Services Rendered by Woman Illicitly Cohabiting with Man.** — There is no implied promise on the part of a man to pay for household services rendered to him by a woman illicitly cohabiting with him. *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721; *Brown v. Tuttle*, 80 Me. 162.

And in *McDonald v. Fleming*, 12 B. Mon. (Ky.) 286, it was held that an action could not be maintained on an implied contract for services rendered in the character of a concubine. See the title IMPLIED CONTRACTS.

Still, however, such a relation between the parties does not render illegal an express contract for the performance of services or labor by the one for the other, when the illicit relations do not form any part of the contract. *Rhodes v. Stone*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 561. See also *Ogden v. McHugh*, 167 Mass. 276, 57 Am. St. Rep. 456; *Robbins v. Potter*, 11 Allen (Mass.) 588.

**2. Moral Obligation Doctrine.** — *Turner v. Vaughan*, 2 Wils. 339; *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583; *Shenk v. Mingle*, 13 S. & R. (Pa.) 29. See also *Gray v. Mathias*, 5 Ves. Jr. 291; *Nye v. Moseley*, 6 B. & C. 133, 13 E. C. L. 119; *Walker v. Gregory*, 36 Ala. 180; *People v. Hayes*, 70 Hun (N. Y.) 111, affirmed 140 N. Y. 484; *Brown v. Kinsey*, 81 N. Car. 245; *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282.

**3. Sufficiency of Moral Consideration.** — See the title CONSIDERATION, vol. 6, p. 679.

**4. Past Cohabitation — Insufficient Consideration** — *England*, — *Beaumont v. Reeve*, 8 Q. B. 483, 55 E. C. L. 483; *Binnington v. Wallis*, 4 B. & Ald. 650, 6 E. C. L. 639; *Lancaster v. Carter*, 2 W. R. 437.

*Illinois*. — *Drennan v. Douglas*, 102 Ill. 341, 40 Am. Rep. 595.

*Kentucky*. — *Clark v. Doke*, 6 Ky. L. Rep. 655.

*Louisiana*. — *Cole v. Cole*, 7 Mart. N. S. (La.) 417.

*South Carolina*. — *Singleton v. Bremar*, Harp. L. (S. Car.) 201.

**5. Illicit Relation Brought About by Seduction.** — A woman declared in assumpsit against a man, averring that the defendant had seduced and debauched her, and induced her to cohabit with him, whereby she had been injured in her character and deprived of the means of procuring an honest livelihood; that the two had agreed to discontinue the immoral connection and live apart; and that the defendant, as a compensation for the injury and in consideration of the premises, undertook to pay to the plaintiff a yearly sum towards her maintenance, which he had failed to do. The declaration was held bad as disclosing no legal consideration for the undertaking. *Beaumont v. Reeve*, 8 Q. B. 483, 55 E. C. L. 483.

**6. Woman Deceived into Marriage Which Proves Unlawful.** — See *Cox's Case*, 3 P. Wms. 339; *Gay v. Parpart*, 106 U. S. 679; *Ogden v. McHugh*, 167 Mass. 276, 57 Am. St. Rep. 456.

**7. Other Considerations** — *England*. — *In re Plaskett*, 30 L. J. Ch. 606; *Keenan v. Handley*, 2 De G. J. & S. 283; *Gibson v. Dickie*, 3 M. & S. 463.



exemplified by the cases which hold a contract under seal between the parties under such circumstances binding upon the man, as the seal itself imports a consideration.<sup>1</sup>

(4) *Continued Cohabitation*. — And when a contract to make compensation to the woman for past illegal cohabitation is under seal, the fact that the parties continued to cohabit illegally will not render the contract illegal if the continued existence of such relations was not the object and real consideration of the contract.<sup>2</sup>

**3. Immorality Licensed by Law.** — Where a certain species of immorality is licensed by law, it seems that persons may legally contract in regard thereto.<sup>3</sup>

*Kentucky*. — *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 35.

*North Carolina*. — *Self v. Clark*, 2 Jones Eq. (55 N. Car.) 309.

*Pennsylvania*. — *Wyant v. Leshar*, 23 Pa. St. 338.

**Illustrations of Other Considerations Held Sufficient** — *Father's Consent to Marriage*. — *Wyant v. Leshar*, 23 Pa. St. 338.

*Surrender of Possession of Illegitimate Child*. — *In re Plaskett*, 30 L. J. Ch. 606.

*Release of Promise of Marriage and Discontinuance of Cohabitation*. — *Keenan v. Handley*, 2 De G. J. & S. 283.

*Consideration of Woman Thereafter Living Sole and Chaste*. — *Gibson v. Dickie*, 3 M. & S. 463.

*Compromise of Bastardy Proceedings*. — *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583; *Wyant v. Leshar*, 23 Pa. St. 338; *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69; *Billingsley v. Clelland*, 41 W. Va. 234.

*Support of Bastard Child*. — An agreement by a putative father to support his illegitimate child, or to pay to its mother a sum of money in consideration of such support, is not illegal; and the obligation may be taken by the mother, payable to herself in her own right, or for the benefit of the child. *Hook v. Pratt*, 78 N. Y. 371, 34 Am. Rep. 539. See also *Flanagan v. Garrison*, 28 Ga. 136; *Benge v. Hiatt*, 82 Ky. 667, 56 Am. Rep. 912; *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583. And see the title *BASTARDY*, vol. 3, p. 890.

**Compensation by White Man to Colored Woman**. — A white man may make compensation to a colored woman with whom he has been illicitly cohabiting, to the same extent that he may make compensation to a white woman. *Smith v. Du Bose*, 78 Ga. 413, 6 Am. St. Rep. 260.

**1. Contracts under Seal Held Legal** — *England*. — *Friend v. Harrison*, 2 C. & P. 584, 12 E. C. L. 276; *Spicer v. Hayward*, Prec. Ch. 114; *Gray v. Mathias*, 5 Ves. Jr. 286; *Dillon v. Jones*, In Chanc. before Lord Bathurst; *Hill v. Spencer*, Ambl. 641; *Turner v. Vaughan*, 2 Wils. (C. Pl.) 339; *Hall v. Palmer*, 3 Hare 532; *Franco v. Bolton*, 3 Ves. Jr. 368; *Annandale v. Harris*, 2 P. Wms. 432; *Howell v. Price*, 1 Jur. N. S. 494; *Daniel v. Landen*, 1 F. & F. 289; *Nye v. Moseley*, 6 B. & C. 133, 13 E. C. L. 119; *Whaley v. Norton*, 1 Vern. 483; *In re Vallance*, 26 Ch. D. 353; *Knye v. Moore*, 2 Sim. & St. 260; *Robinson v. Cox*, 9 Mod. 263.

*New York*. — *Trovinger v. M'Burney*, 5 Cow. (N. Y.) 253.

*North Carolina*. — *Brown v. Kinsey*, 81 N. Car. 245.

*Pennsylvania*. — *Wyant v. Leshar*, 23 Pa. St. 338.

*South Carolina*. — *Cusack v. White*, 2 Mill (S. Car.) 279, 12 Am. Dec. 669; *Massey v. Wallace*, 32 S. Car. 149.

*Tennessee*. — *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282.

*Compare Clarke v. Periam*, 2 Atk. 333; *Priest v. Parrot*, 2 Ves. 160.

**Woman of Previous Loose Life**. — In *Gray v. Mathias*, 5 Ves. Jr. 286, a voluntary bond during cohabitation to a woman previously of a very loose life was upheld. See also *Hill v. Spencer*, Ambl. 641. *Compare Whaley v. Norton*, 1 Vern. 483.

**Bond Ranks as Voluntary Bond**. — A specialty in such a case, if supported by no other consideration than the seal, and though executed in consideration of past illegal cohabitation, ranks merely as a voluntary bond. *Howell v. Price*, 1 Jur. N. S. 494; *Cox's Case*, 3 P. Wms. 339; *Sherman v. Barrett*, 1 McMull. L. (S. Car.) 147.

**2. Continued Cohabitation Does Not Invalidate Contract**. — *Gray v. Mathias*, 5 Ves. Jr. 286; *Hall v. Palmer*, 3 Hare 532; *Howell v. Price*, 1 Jur. N. S. 494; *Smith v. Du Bose*, 78 Ga. 413, 6 Am. St. Rep. 260; *Trovinger v. M'Burney*, 5 Cow. (N. Y.) 253; *Brown v. Kinsey*, 81 N. Car. 245. See also *In re Vallance*, 26 Ch. D. 353.

**3. Immorality Licensed by Law — Stage Dancing**. — In *Baumeister v. Markham*, (Ky. 1897) 41 S. W. Rep. 816, *reaffirming* (Ky. 1897) 39 S. W. Rep. 844, an opera-house artist was allowed to recover for the breach of a contract of employment, though her employment required her to go upon the stage and exhibit her legs in an indecent manner. The court said that while such exhibitions are tolerated by law and patronized openly and freely by the public, the court cannot arbitrarily oust those who earn their livelihood in that way.

**Houses of Prostitution Licensed**. — In *Lyman v. Townsend*, 24 La. Ann. 625, *overruling* *Katham v. Walters*, 22 La. Ann. 54, it was held that the lease of a house to be used as a house of prostitution was not illegal where the keeping of such houses was licensed by a city ordinance, and a tax imposed upon the keepers. The court said: "Contracts for such purposes are repulsive to the moral sense; but when allowed by law what warrant is there for declaring them null, as being contrary to good morals?"

**Statutory Prohibition — Toleration of Bawdy Houses by City**. — Where the leasing of houses for the purpose of prostitution is made a mis-

4. **Contracts to Further Immoral Purposes.** — Though the subject-matter of a contract and the consideration be legal, still the contract may be rendered illegal by reason of the object of the parties in entering into it: and when their object was to further an immoral purpose the contract has been held illegal.<sup>1</sup> This question will be found fully discussed in another part of this title.<sup>2</sup>

5. **Rule Where Contract Is Executed.** — Though contracts based on immoral considerations create no right or liability on either side while executory, yet if executed they are to a certain extent rendered valid as between the parties. Thus, money paid on an immoral contract, or land or personal property conveyed or sold for an immoral consideration, cannot be recovered back by the payor or vendor.<sup>3</sup> This rule is based on the principle that the court will not interpose to aid either party to an illegal contract. This question will be more fully discussed in another portion of this article.<sup>4</sup>

**XI. CONTRACTS DETRIMENTAL TO PUBLIC SERVICE** — 1. **In General.** — The courts have always shown themselves very solicitous of the proper administration of the public service, and have not hesitated to hold illegal, as against public policy, contracts which they have considered detrimental thereto.

2. **Contracts Relating to Location of Public Offices or Buildings.** — When the general public is interested in the location of a public office, a contract to induce the location at a particular place for individual benefit or personal gain has been held to be against public policy.<sup>5</sup>

**Bonus to Public to Secure Location of Public Building.** — The propriety of any particular location for public buildings may properly depend, however, upon bonuses proposed to be given by the citizens of any particular locality, and the public interest obviously requires that the location of such buildings should be made with a view to all the circumstances, including the greater or less burden to the whole public. It has, therefore, been held that an agreement

demeanor by statute (Pen. Code Cal., § 316), the fact that the house leased is situated in a portion of the city in which such houses are tolerated by the city officials will not prevent a partnership formed for leasing houses for such purpose from being illegal. *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63.

**Adulterous Cohabitation Legalized.** — In *Denton v. English*, 3 Brev. (S. Car.) 147, it was held that the *South Carolina* statute of 1795, which provided that deeds by a married man to his mistress for a greater portion than one-fourth of his estate should be void for the excess over such one-fourth part, rendered legal a deed from such a man to his mistress for the conveyance of one-fourth part of his estate, even as the price of prostitution or future immoral intercourse. See, however, *Cusack v. White*, 2 Mill (S. Car.) 279, 12 Am. Dec. 669.

1. **Contracts to Further Immoral Purposes.** — *Smith v. White*, L. R. 1 Eq. 626; *Pearce v. Brooks*, L. R. 1 Exch. 213; *Bowry v. Bennet*, 1 Campb. 348; *Jennings v. Throgmorton*, R. & M. 251, 21 E. C. L. 439; *Girardy v. Richardson*, 1 B. & P. 341, note a; *Appleton v. Campbell*, 2 C. & P. 347, 12 E. C. L. 162; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63; *Trovinger v. M'Burney*, 5 Cow. (N. Y.) 253; *Reed v. Brewer*, 90 Tex. 144, affirming (Tex. Civ. App. 1896) 36 S. W. Rep. 99.

2. See *infra*, this title, *Contracts Indirectly Illegal*.

3. **Executed Contracts** — *England*. — *Taylor v. Chester*, L. R. 4 Q. B. 309; *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

*Kentucky*. — *Marksbury v. Taylor*, 10 Bush (Ky.) 519; *Clark v. Doke*, 6 Ky. L. Rep. 655.

*New Hampshire*. — *White v. Hunter*, 23 N. H. 128.

*New Jersey*. — *Brindley v. Lawton*, 53 N. J. Eq. 259.

*North Carolina*. — *Sparks v. Sparks*, 94 N. Car. 527.

*South Carolina*. — *Denton v. English*, 2 Nott & M. (S. Car.) 581, 10 Am. Dec. 638.

*Tennessee*. — *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282.

4. See *infra*, this title, *Enforcement of and Relief from Illegal Contracts*.

5. **Location of Public Offices for Individual Benefit.** — *Woodman v. Innes*, 47 Kan. 26, 27 Am. St. Rep. 274; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746.

In *Fearnley v. De Mainville*, 5 Colo. App. 441, however, where the location of the post office was left to the officials of the United States, an agreement among property owners to pay to the owner of the building in which they desired the post office to be located a monthly sum in consideration of his offering the building as the place for a post office at a nominal rent was held not to be illegal.

And in *Beal v. Polhemus*, 67 Mich. 130, an agreement to pay a certain amount on condition that the payee erect a building and secure the location of the post office therein was held not to be illegal if no undue influence was used upon the public officials having the selection of the location of the post office. See also *Bryan v. Dyer*, 28 Ill. 188.



by citizens to grant a bonus to the public in consideration of the selection by the authorized public officer of a particular place for the location of a public building was not against public policy.<sup>1</sup>

**Subscriptions.** — The validity of subscriptions to public, charitable, or other objects, as affected by the sufficiency of the consideration, etc., will be fully discussed in another place.<sup>2</sup>

**3. Contracts Relating to Compensation of Public Officers** — *a.* **ASSIGNMENT OF SALARIES OF PUBLIC OFFICERS.** — The law provides compensation for official services in order to enable the officer to be free from the cares of making other provision for his own support, that he may devote his time to the performance of his official duties, and also to sustain the dignity of his office. Therefore it is held that an assignment by a public officer of his unearned fees or salary is against public policy as detrimental to the public service.<sup>3</sup>

*b.* **CONTRACTS FOR COMPENSATION FOR PERFORMANCE OF OFFICIAL DUTY** — (1) *In General.* — It is a matter of public policy that public officers should perform their official duties for the compensation fixed by law, and it is universally held that all contracts to pay a public officer for doing a duty which the law requires him to do without payment, or, in cases where his compensation is fixed by law, to pay him a greater sum, are illegal as against public policy;<sup>4</sup> and this is true irrespective of whether the agreement was

**1. Bonus to Public to Secure Location of Public Building** — *Colorado.* — Fearnley v. De Mainville, 5 Colo. App. 441.

*Connecticut.* — Bull v. Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62.

*Illinois.* — Carpenter v. Mather, 4 Ill. 374; Thompson v. Mercer County, 40 Ill. 379. But see Randolph County v. Jones, 1 Ill. 237.

*Indiana.* — State v. Johnson, 52 Ind. 197; Stilson v. Lawrence County, 52 Ind. 213.

*Mississippi.* — Odineal v. Barry, 24 Miss. 9.

*New Hampshire.* — George v. Harris, 4 N. H. 533, 17 Am. Dec. 446.

*New York.* — Marsh v. Chamberlain, 2 Lans. (N. Y.) 287.

*Vermont.* — State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626.

*Washington.* — Island County v. Babcock, 17 Wash. 438.

See also Ford v. North Des Moines, 80 Iowa 626; Meddis v. Park Com'rs, (Ky. 1897) 42 S. W. Rep. 98; Kansas City School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576; Canal Fund Com'rs v. Perry, 5 Ohio 56.

**2. See the title SUBSCRIPTIONS.**

**3. Assignment of Salaries by Public Officers.** — See the title ASSIGNMENTS, vol. 2, p. 1033, for a full collection of authorities on this subject.

**4. Additional Compensation to Public Officers** — *England.* — Statesbury v. Smith, 2 Burr. 924; Morris v. Burdett, 1 Campb. 218; Lane v. Sewell, 1 Chit. 175, 18 E. C. L. 61.

*Canada.* — Robertson v. Broadfoot, 11 U. C. Q. B. 407.

*Alabama.* — Morrell v. Quarles, 35 Ala. 544.

*Arkansas.* — Crittenden County v. Crump, 25 Ark. 235.

*California.* — Buck v. Eureka, 109 Cal. 504.

*Connecticut.* — Townsend v. Hoyle, 20 Conn. 2;

Preston v. Bacon, 4 Conn. 471; Matter of Russell, 51 Conn. 577, 50 Am. Rep. 55.

*Georgia.* — Kennedy v. Hodges, 97 Ga. 753.

*Illinois.* — Randolph County v. Jones, 1 Ill. 237; Decatur v. Vermillion, 77 Ill. 315.

*Indiana.* — Vandercook v. Williams, 106 Ind.

345.

*Iowa.* — Ryce v. Osage, 88 Iowa 558; Fawcett v. Eberly, 58 Iowa 544; Adams County v. Hunter, 78 Iowa 328.

*Kentucky.* — Bates v. Foree, 4 Bush (Ky.) 431; Owens v. Gatewood, 4 Bibb (Ky.) 494; Mitchell v. Vance, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 96.

*Louisiana.* — Kernion v. Hills, 1 La. Ann. 419.

*Maine.* — State v. Edwards, 86 Me. 102, 41 Am. St. Rep. 528.

*Massachusetts.* — Churchill v. Perkins, 5 Mass. 541; New Haven, etc., Co. v. Hayden, 117 Mass. 433; Com. v. Cony, 2 Mass. 523; Pool v. Boston, 5 Cush. (Mass.) 219.

*Michigan.* — Foley v. Platt, 105 Mich. 635; Wilcoxon v. Andrews, 66 Mich. 553; Willeson v. Bateson, 63 Mich. 309; Burk v. Webb, 32 Mich. 173.

*Missouri.* — Kick v. Merry, 23 Mo. 72, 66 Am. Dec. 658; Thornton v. Missouri Pac. R. Co., 42 Mo. App. 58.

*New York.* — McCarthy v. Bonyng, 12 Daly (N. Y.) 356, affirmed 101 N. Y. 668; Ball v. Pratt, 36 Barb. (N. Y.) 402; Satterlee v. Jones, 3 Duer (N. Y.) 102; Downs v. McGlynn, 2 Hilt. (N. Y.) 14; Hatch v. Mann, 15 Wend. (N. Y.) 46.

*Ohio.* — Gilmore v. Lewis, 12 Ohio 281.

*Oregon.* — Jackson v. Siglin, 10 Oregon 93.

*Pennsylvania.* — Lancaster County v. Fulton, 128 Pa. St. 48; Hunter v. Nolf, 71 Pa. St. 282; Bussier v. Pray, 7 S. & R. (Pa.) 447.

*Texas.* — Wills v. Abbey, 27 Tex. 203.

*Vermont.* — Brown v. Godfrey, 33 Vt. 120.

*Wisconsin.* — Ring v. Devlin, 68 Wis. 384.

**Bond.** — In Mitchell v. Vance, 5 T. B. Mon. (Ky.) 528, 17 Am. Dec. 96, it was held that a bond executed for the purpose of inducing a constable to do that which, by the duties of his office, it was incumbent upon him to do was not binding.

**Assignee for Benefit of Creditors.** — In the Matter of Hulbert, (Ct. App.) 10 Abb. N. Cas. (N. Y.) 452, modifying (C. Pl. Gen. T.) 10 Abb. N. Cas. (N. Y.) 284, which reversed 9 Abb. N. Cas.



voluntarily entered into, as in case of rewards,<sup>1</sup> or whether the contract for additional payment was exacted by the officer as a condition for the performance of his duties and thereby partook of the nature of extortion;<sup>2</sup> for, as has been said, once allow an officer to contract for extra compensation for the discharge of his duty, and bribery would become the means alone by which the laws could be enforced.<sup>3</sup>

**De Facto Officer.** — And the fact that the officer is a *de facto* officer does not alter the rule.<sup>4</sup>

**Statutes Prohibiting Taking Excessive Fees.** — This rule of public policy is of course especially applicable where the statutes prohibit or punish the exaction or taking of excessive fees by public officers.<sup>5</sup>

**Accelerated Performance of Duties.** — And it has been held that the fact that the contract was entered into in consideration that the officer would perform his duties more expeditiously than he was legally required to do would not relieve the contract of illegality.<sup>6</sup>

**Want of Consideration.** — Agreements to pay public officers for the performance of their legal duties are also obviously unenforceable for want of consideration.<sup>7</sup>

(2) *Relinquishment of Right to Compensation.* — Where the compensation of an officer is fixed by fees, or otherwise, it has been held that an agreement by him prior to the rendition of official services to charge less than the legal compensation was also against public policy.<sup>8</sup>

(N. Y.) 132, the court said that when one consents to act as assignee for the benefit of creditors, he must take what the law gives him, or, where the rights of creditors are not concerned, what the assignor agrees to give him. The court said further that it did not intend, by this construction, to alter or affect the rules which have been laid down for computing the fees or commissions of sheriffs, etc.

**Pay Officer Retaining Money.** — Public policy forbids that an officer employed by the government to pay its creditor should, even with the assent of the creditor, retain any part of the money due. *Slaughter v. Hamm*, 2 Ohio 271.

**1. Voluntary Contracts — England.** — *Bent v. Wakefield*, etc., *Union Bank*, 4 C. P. D. 1.

*Arkansas.* — *St. Louis*, etc., *R. Co. v. Grafton*, 51 Ark. 504, 14 Am. St. Rep. 66.

*Connecticut.* — *Matter of Russell*, 51 Conn. 577, 50 Am. Rep. 55.

*Georgia.* — *Kennedy v. Hodges*, 97 Ga. 753.

*Indiana.* — *Hayden v. Sauter*, 56 Ind. 42, 26 Am. Rep. 1.

*Kentucky.* — *Marking v. Needy*, 8 Bush (Ky.) 22; *Harris v. Beaven*, 11 Bush (Ky.) 254.

*Massachusetts.* — *Pool v. Boston*, 5 Cush. (Mass.) 219; *Brophy v. Marble*, 118 Mass. 548; *Davies v. Burns*, 5 Allen (Mass.) 349.

*Minnesota.* — *Warner v. Grace*, 14 Minn. 487; *Day v. Putnam Ins. Co.*, 16 Minn. 408.

*Mississippi.* — *Ex p. Gore*, 57 Miss. 251.

*Missouri.* — *Thornton v. Missouri Pac. R. Co.*, 42 Mo. App. 58.

*New York.* — *Hatch v. Mann*, 15 Wend. (N. Y.) 44.

*Ohio.* — *Rea v. Smith*, 2 Handy (Ohio) 193; *Gilmore v. Lewis*, 12 Ohio 281.

*Oregon.* — *Jackson v. Siglin*, 10 Oregon 94.

*Pennsylvania.* — *Smith v. Whildin*, 10 Pa. St. 39, 49 Am. Dec. 572.

*Tennessee.* — *Stamper v. Temple*, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

*Wisconsin.* — *Ring v. Devlin*, 68 Wis. 384.

*Compare Bronnenberg v. Coburn*, 110 Ind. 169; *Means v. Hendershott*, 24 Iowa 78. See generally the titles PUBLIC OFFICERS; REWARDS.

**2. Agreement for Additional Compensation Exacted by Officer.** — *Firemen's Assoc. v. Berg-haus*, 13 La. Ann. 209; *Wilcoxson v. Andrews*, 66 Mich. 553; *Callagan v. Hallett*, 1 Cal. (N. Y.) 104. See generally the title EXTORTION, vol. 12, p. 576.

**3. Tending to Encourage Bribery.** — *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658.

**4. De Facto Officer.** — *Fawcett v. Eberly*, 58 Iowa 544. See also *Fawcett v. Woodbury County*, 55 Iowa 154.

**5. Statutory Prohibitions.** — *Keith v. Fountain*, 3 Tex. Civ. App. 391.

**6. Accelerating Performance of Services.** — Thus in *New York*, where the statute fixes the fees at which an official stenographer is required to furnish, with reasonable diligence, copies of his stenographic notes of testimony or other proceedings, it was held that an agreement to pay a greater rate for furnishing copies more expeditiously than would otherwise be done was not valid. *McCarthy v. Bonyng*, 12 Daly (N. Y.) 356, affirmed 101 N. Y. 668. See also the title STENOGRAPHERS.

**7. Want of Consideration.** — *Robertson v. Broadfoot*, 11 U. C. Q. B. 407; *Trundle v. Riley*, 17 B. Mon. (Ky.) 396. See the cases in the notes preceding, and see the title CONSIDERATION, vol. 6, p. 750 *et seq.*

**8. Relinquishment of Right to Compensation.** — *Ohio Nat. Bank v. Hopkins*, 8 App. Cas. (D. C.) 146; *Brown v. Columbus First Nat. Bank*, 137 Ind. 655; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa 130; *Peters v. Davenport*, 104 Iowa 625; *Gilman v. Des Moines Valley R. Co.*, 40 Iowa 200; *Willemin v. Bateson*, 63 Mich. 309. See, however, *Bloom v. Hazzard*, 104 Cal. 310, *wherein as stated by a dissenting opinion with an execution creditor to charge less than his legal fees for levying an execution and conducting*

(3) *Compensation Not Fixed by Law.* — Where the compensation of a public officer for particular services is not fixed by law, it has been held that the officer and the person for whom the services are to be rendered may legally contract as to the compensation to be paid therefor.<sup>1</sup>

(4) *Services Outside of Official Duty.* — And when services are performed by an officer outside of his official duty, no rule of public policy forbids a contract as to the compensation to be paid to him therefor.<sup>2</sup> This principle is well exemplified by the cases where rewards are offered by the public or by private individuals for the detection and conviction of criminals, and it is held that public officers whose official duties do not require them to render services in such matters may become entitled to recover such rewards to the same extent as private individuals.<sup>3</sup>

**4. Traffic in Public Offices** — *a. IN GENERAL.* — In England contracts for the sale of certain public offices were recognized as legal.<sup>4</sup> In the sixteenth and eighteenth centuries, however, statutes were passed which expressly prohibited traffic in a large class of offices.<sup>5</sup> And it has even been said that in the absence of a statutory provision contracts for the sale of public offices

a sale thereunder was held not to be contrary to public policy. And see also *Gould v. New-Portland*, 15 Me. 28, wherein a contract by a person to collect the taxes in a town for a fixed compensation, on being chosen sole collector and constable, was held a legal and valid contract.

**1. Compensation Not Fixed by Law.** — Thus, in *Maguin v. Rosenthal*, (C. Pl. Gen. T.) 62 How. Pr. (N. Y.) 504, an agreement between a defendant in execution and the city marshal to allow a keeper to remain in charge of the property levied upon and to pay the marshal for such service was held valid if not illegally extorted; the keeper's fees not being a service for which any fee or compensation is fixed or allowed by law.

**2. Services Outside of Official Duty** — *United States.* — U. S. v. Brindle, 110 U. S. 688.

*California.* — *Harris v. More*, 70 Cal. 502.

*Illinois.* — *People v. Rainey*, 89 Ill. 34.

*Indiana.* — *Tippecanoe County v. Mitchell*, 131 Ind. 370.

*Kentucky.* — *Trundle v. Riley*, 17 B. Mon. (Ky.) 396.

*Louisiana.* — *Pilie v. New Orleans*, 19 La. Ann. 274.

*Michigan.* — *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *McBride v. Grand Rapids*, 47 Mich. 236.

*Mississippi.* — *Fairley v. Western Union Tel. Co.*, 73 Miss. 6.

*Montana.* — *Sullivan v. Utah, etc.*, R. Co., 11 Mont. 236.

*New York.* — *Nicoll v. Sands*, 131 N. Y. 19; *Murtagh v. Conner*, 15 Hun (N. Y.) 488. *Compare Hatch v. Mann*, 15 Wend. (N. Y.) 44.

*Pennsylvania.* — *McCandless v. Allegheny Bessemer Steel Co.*, 152 Pa. St. 139.

*Texas.* — *Ellis v. Stone*, 4 Tex. Civ. App. 157; *Morris v. Kasling*, 79 Tex. 141.

*Vermont.* — *Brown v. Godfrey*, 33 Vt. 120; *Russell v. Stewart*, 44 Vt. 170.

**Compensation to Sheriff for Procuring Evidence.** — An agreement to compensate a deputy sheriff for procuring evidence which would lead to the conviction of a person implicated in a certain crime is not contrary to public policy if the crime was committed and the trial had in a county other than that in which the

deputy sheriff was an officer. *Harris v. More*, 70 Cal. 502.

**Extraordinary Attentions of Jailer to Prisoner.** — In *Trundle v. Riley*, 17 B. Mon. (Ky.) 396, a contract between a jailer and a prisoner in regard to the compensation to be paid to the former for extraordinary attentions and services to the latter during sickness, such services not being a part of the official duty of the jailer, was held not to be against public policy.

**3. See the title REWARDS.**

**4. Traffic in Offices Recognized as Legal.** — *Godbolt's Case*, 4 Leon. 33; *Ellis v. Ruddle*, 2 Lev. 151; *Harrington v. Klopogge*, 2 Chit. 475, 18 E. C. L. 396; *Aston v. Gwinnell*, 3 Y. & J. 136; *Hartwell v. Hartwell*, 4 Ves. Jr. 815.

**Pledge of Commission in Army.** — Though a commissioned officer may legally sell his commission, still he cannot make a valid pledge of the instrument which shows his appointment. *Collyer v. Fallon*, T. & R. 459.

**5. English Statutory Provisions.** — See 5 & 6 Edw. VI., c. 16, §§ 1-4; 49 Geo. III., c. 126, §§ 1, 3, 8, 9.

**Construction of Statutes.** — The following classes of offices have been held to come within these statutes:

*Chancellorship of a Diocese.* — *Trevor's Case*, 12 Coke 78.

*Archdeacon's Registership.* — *Woodward v. Fexly*, 3 Lev. 289.

*Supervisorship of Excise.* — *Law v. Law*, 3 P. Wms. 391.

*Commission in the Marines.* — *Morris v. M'Culloch*, Ambl. 432.

*Subdistributor of Stamps and Collector of Assessed Taxes.* — *Hopkins v. Prescott*, 4 C. B. 578, 56 E. C. L. 578.

*Commission in East India Company.* — *Graeme v. Wroughton*, 11 Exch. 146.

*Cadetship in East India Company.* — *Reg. v. Charretie*, 13 Q. B. 447, 66 E. C. L. 447.

*Surveyor of Baggage of Port of London.* — *Stackpole v. Earle*, 2 Wils. C. Pl. 133.

**Offices Not Within Statute.** — The following classes of offices have been held not to fall within the statutes:

*Private Secretaryship.* — *Harrington v. Klopogge*, 2 Chit. 475, 18 E. C. L. 396.



which affect intimately public affairs, or the administration of public justice, would be illegal as against public policy.<sup>1</sup>

In the United States the courts have universally recognized that the only element entering into the appointment of persons to public offices should be the qualifications of the aspirant, and they hold illegal all contracts which involve traffic in public offices.<sup>2</sup>

*b.* RESIGNATION OF OFFICE. — Contracts for the payment of money to a public officer in consideration of his resigning his office have been held illegal.<sup>3</sup>

*c.* WITHDRAWAL OF APPLICATION FOR OFFICE. — Also, a contract between two applicants for an office for the payment of a consideration by one to the other for the withdrawal of the latter's application for the office, so as to increase the former's chance of acquiring it, has been held illegal.<sup>4</sup>

*d.* OFFICE BROKERAGE. — All contracts that embrace stipulations or are based upon an understanding that one of the parties thereto is to exert his personal influence upon public officers to secure the appointment of the other party to a public office are held illegal, on the ground that they place the former under wrongful influences and offer to him a temptation that might injuriously affect the public interest.<sup>5</sup> And such a transaction is not in any

*Commission in Army.* — *Hartwell v. Hartwell*, 4 Ves. Jr. 815; *Prec. Ch.* 99.

*Clerk to Deputy-Registrar in Prerogative Court of Canterbury.* — *Aston v. Gwinnell*, 3 Y. & J. 136.

*Numerous Offices Held by One Person — Control of Partnership Held Valid.* — *Sterry v. Clifton*, 9 C. B. 110, 67 E. C. L. 110.

*Office of Bailiff of a Hundred.* — *Godbolt's Case*, 4 Leon. 33.

*Office Held in Fee.* — *Ellis v. Ruddle*, 2 Lev. 151.

**Construction of Condition to Assign "All Offices."** — A condition to assign all offices is valid, as it will be taken to apply only to such offices as are by law assignable. *Harrington v. Klop-rogge*, 2 Chit. 475, 18 E. C. L. 396.

**Force of Statute in United States.** — See the title *DEPUTY*, vol. 9, p. 376, where the question is discussed.

1. *Hanington v. Du Chastel*, cited in 2 Swanst. 159, note; *Hopkins v. Prescott*, 4 C. B. 578, 56 E. C. L. 578, *per* Colman, J.; *Parsons v. Thompson*, 1 H. Bl. 322; *Graeme v. Wroughton*, 32 Eng. L. & Eq. 561; *Blachford v. Preston*, 8 T. R. 89; *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391; *Osborne v. Williams*, 18 Ves. Jr. 379; *Hartwell v. Hartwell*, 4 Ves. Jr. 811.

2. *Delaware.* — *Stroud v. Smith*, 4 Houst. (Del.) 448.

*Kentucky.* — *Oldham v. Hume*, 4 Ky. L. Rep. 355; *Lewis v. Knox*, 2 Bibb (Ky.) 453; *Love v. Buckner*, 4 Bibb (Ky.) 506; *Outon v. Rhodes*, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193.

*Louisiana.* — *Glover v. Taylor*, 38 La. Ann. 631.

*Maine.* — *Groton v. Waldoborough*, 11 Me. 306, 26 Am. Dec. 530.

*North Carolina.* — *Basket v. Moss*, 115 N. Car. 448, 44 Am. St. Rep. 463.

*Rhode Island.* — *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541.

*Texas.* — *Santleben v. Froboese*, 17 Tex. Civ. App. 626.

**Emoluments of Office as Partnership Assets.** — In *Santleben v. Froboese*, 17 Tex. Civ. App. 626, it was held that a contract by a county

treasurer, if elected, to put into a firm of which he was a member, as partnership assets, the emoluments of his office, was illegal.

In *Thurston v. Fairman*, 9 Hun (N. Y.) 584, however, an agreement between partners that all salaries, perquisites, and earnings received by either partner from his employment as a public officer should as soon as received be paid into the funds of the firm as firm property was held not to be against public policy. See *supra*, this section, *Assignment of Salaries of Public Officers*.

**Exchange of Offices by Post-office Employees.** — In *Stroud v. Smith*, 4 Houst. (Del.) 448, a promissory note given by one employee of the post-office department to another employee in consideration of the latter's exchange of positions with the former was held to be illegal.

**Mail Contract.** — A person having a contract to carry the United States mail is not a public officer within the rule prohibiting traffic in public offices, and therefore an agreement for the assignment of a mail contract is not illegal *per se*. *Whitehouse v. Langdon*, 10 N. H. 331.

3. **Resignation of Office Illegal Consideration.** — *Parsons v. Thompson*, 1 H. Bl. 322; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108; *Basket v. Moss*, 115 N. Car. 448, 44 Am. St. Rep. 463; *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541; *Meacham v. Dow*, 32 Vt. 721.

4. **Withdrawal of Application for Office.** — An agreement by an applicant for a United States assessorship to divide the receipts, in consideration that a rival applicant would withdraw, has been held to be against public policy. *Hunter v. Nolf*, 71 Pa. St. 282. And this is of course especially true when the applicant withdrawing agrees to use his influence to secure the appointment of the other. *Gray v. Hook*, 4 N. Y. 449. See *infra*, this section, *Office Brokerage*.

5. **Sale of Personal Influence in Securing Appointments to Office — England.** — *Clarke v. Harvey*, 1 Stark. 92, 2 E. C. L. 44; *Parsons v. Thompson*, 1 H. Bl. 322; *Graeme v. Wroughton*, 32 Eng. L. & Eq. 569; *Hopkins v. Prescott*, 4 C. B. 578, 56 E. C. L. 578; *Waldo v. Martin*, 4 B. & C. 319, 10 E. C. L. 341; *Pickard*



way changed because the inducement is an advantageous contract instead of the payment of money.<sup>1</sup>

*c. CONSIDERATION MOVING TO APPOINTING POWER.*—(1) *In General.*—Public policy also requires that all public officers having the power to appoint other public officers should act in regard to such appointments solely from the standpoint of the public interests, and all contracts for payment to such officers in consideration of their appointment of particular persons are held illegal, as a temptation to them to appoint improper persons;<sup>2</sup> and this is true though the consideration moves to a third person.<sup>3</sup>

*Reduction of Emoluments of Office.*—Public policy also requires that public officers should receive all the legal emoluments of their office, and all contracts with the appointing power by which an applicant for office agrees to give up a part of the emoluments of his office in consideration of his appointment are illegal, irrespective of the use to which the share of the emoluments thus carved out is applied.<sup>4</sup>

(2) *Appointment of Deputies.*—The law as to the appointment of deputies, the sale of deputations, etc., has already been stated.<sup>5</sup>

*f. DELEGATION OF PUBLIC OFFICE.*—Contracts between third persons and public officers have also been held illegal as involving a general delegation of the powers and authority of such officers.<sup>6</sup>

*g. CONTRACTS AS TO FUTURE APPOINTMENTS.*—It has been held to be

*v. Bonner*, Peake N. P. (ed. 1795) 221; *Garrforth v. Fearon*, 1 H. Bl. 327.

*United States.*—*Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Meguire v. Corwine*, 101 U. S. 108, *affirming* 3 MacArthur (D. C.) 81. *Arkansas.*—*Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108.

*Indiana.*—*State v. Johnson*, 52 Ind. 197.

*Kansas.*—*Haas v. Fenlon*, 8 Kan. 601.

*Kentucky.*—*Outon v. Rodes*, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193.

*Louisiana.*—*Faurie v. Morin*, 4 Mart. (La.) 39, 6 Am. Dec. 701.

*New York.*—*Gray v. Hook*, 4 N. Y. 449; *Hager v. Catlin*, 18 Hun (N. Y.) 448.

*North Carolina.*—*Basket v. Moss*, 115 N. Car. 448, 44 Am. St. Rep. 463.

*Pennsylvania.*—*Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422.

*Vermont.*—*Nichols v. Mudgett*, 32 Vt. 546; *Meacham v. Dow*, 32 Vt. 721.

*Wisconsin.*—*Morse v. Ryan*, 26 Wis. 356.

*Appointment to Salable Office.*—If a covenant is entered into that if the plaintiff will procure the defendant to be appointed to an office, he will pay to the plaintiff a share of the emoluments, and this is without the knowledge of the person who has the right of appointing to the office, it is such a fraud on the latter as will avoid the covenant, whether the office is lawfully salable or not. *Waldo v. Martin*, 4 B. & C. 319, 10 E. C. L. 341.

*Special Counsel for United States.*—In *Meguire v. Corwine*, 101 U. S. 108, a contract by a person desiring to be appointed special counsel of the United States in certain lawsuits, to pay to a third person a portion of the fees that he might receive from the government, in consideration of such third person procuring his appointment, was held to be against public policy.

1. *Conditional Sale of Post Sutler's Store.*—In *Haas v. Fenlon*, 8 Kan. 601, a contract for the sale of a post sutler's store, on condition that the seller secure the appointment of the buyer

to the office of post sutler, was held to be illegal.

*Sale of Post-office Fixtures.*—In *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108, a contract for the sale of the fixtures of a post office, in which the vendor, who was the postmaster, agreed to resign his office and recommend the appointment of the vendee as his successor, was held to be against public policy.

*Sale of Stock of Goods—Appointment to Office.*—And in an anonymous case reported in *Lewis Cr. L. (Pa.)* 126, an agreement for the sale of a store of goods, with a stipulation that the vendor would procure the purchaser to be appointed postmaster of the village, was held to be against public policy.

2. *Consideration to Appointing Power.*—*Hanington v. Du Chastel*, cited in 2 Swanst. 159, note; *Blachford v. Preston*, 8 T. R. 89; *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17.

3. *Consideration Moving to Third Person.*—*Hanington v. Du Chastel*, cited in 2 Swanst. 159, note.

4. *Reductions of Emoluments of Office.*—*Faurie v. Morin*, 4 Mart. (La.) 39, 6 Am. Dec. 701; *Johnson County v. Mullikin*, 7 Blackf. (Ind.) 301; *Montgomery County Ct. v. Mitchell*, 5 Ky. L. Rep. 249; *Groton v. Waldborough*, 11 Me. 306, 26 Am. Dec. 530. See also *Meredith v. Ladd*, 2 N. H. 517.

5. See the title *DEPUTY*, vol. 9, p. 376, where the cases are collected.

6. *Delegation of Public Office.*—*Gould v. Kendall*, 15 Neb. 549.

In *Engle v. Chipman*, 51 Mich. 524, a contract for the rendition of legal services in the prosecuting of criminal cases between the prosecution attorney and another lawyer was held illegal as a delegation of the powers of the former to the latter, and a recovery for the services rendered was denied. See also *Cobbs v. Hixson*, 75 Mich. 260. And see the title *PROSECUTING OR DISTRICT ATTORNEYS*.

the duty of an officer having a power of appointment to make the best appointment in his power, according to his judgment, at the time when he makes the appointment, and therefore that an agreement by him to appoint a certain person to office at a future time was against public policy.<sup>1</sup>

*h. ELECTIVE OFFICES.* — The legality of contracts entered into to secure the support of voters in favor of particular candidates will be discussed in another place.<sup>2</sup>

**5. Contracts to Influence Legislation (Lobbying Contracts)** — *a. IN GENERAL.* — Public policy requires that all legislators should act solely from high considerations of public duty, and with an eye single to the public interest, and the courts universally hold illegal all contracts for services which involve the use of secret means or the exercise of sinister or personal influences upon the legislators to secure their votes in favor of a legislative act.<sup>3</sup>

**Inferior Legislative Bodies.** — This principle is equally true whether the act is to be passed by the state legislature, or by Congress, or by an inferior legislative body such as the common council or other legislative body of a municipal corporation.<sup>4</sup>

**1. Agreements for Future Appointments Illegal.** — *Conner v. Canter*, 15 Ind. App. 690; *Hager v. Catlin*, 18 Hun (N. Y.) 448. *Compare Stout v. Ennis*, 28 Kan. 706.

**2. See *infra*, this title. *Agreements Affecting Public Duties of Citizens* — *Contracts Affecting Purity of Public Elections*.**

**3. Lobbying Contracts Held Illegal** — *United States*, — *Marshall v. Baltimore, etc.*, R. Co., 16 How. (U. S.) 314, *affirming Taney* (U. S.) 204; *Usher v. McBratney* 3 Dill. (U. S.) 385; *Trist v. Child*, 21 Wall. (U. S.) 441; *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 4; *Hillyer v. Travers*, (N. Y. C. Pl. 1838) 1 Am. L. R. 146.

*Alabama*, — *Boyd v. Barclay*, 1 Ala. 34, 34 Am. Dec. 762; *Hunt v. Test*, 8 Ala. 719, 42 Am. Dec. 659.

*California*, — *Martin v. Wade*, 37 Cal. 168.

*District of Columbia*, — *Weed v. Black*, 2 MacArthur (D. C.) 268.

*Illinois*, — *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459; *Cook v. Shipman*, 24 Ill. 614.

*Indiana*, — *Judah v. Vincennes University*, 23 Ind. 272.

*Kansas*, — *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Kansas Pac. R. Co. v. McCoy*, 8 Kan. 543.

*Kentucky*, — *Wood v. McCann*, 6 Dana (Ky.) 366.

*Louisiana*, — *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Burney v. Ludeling*, 47 La. Ann. 73.

*Massachusetts*, — *Fuller v. Dame*, 18 Pick. (Mass.) 472.

*Michigan*, — *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384.

*Minnesota*, — *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493.

*New Jersey*, — *Everson v. Pitney*, 40 N. J. Eq. 543.

*New York*, — *Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454; *Brown v. Brown*, 34 Barb. (N. Y.) 533; *McKee v. Clency*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 144; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535, *affirming* 36 Barb. (N. Y.) 474; *Chesebrough v. Con-*

*over*, 140 N. Y. 382; *Harris v. Simonson*, 28 Hun (N. Y.) 318; *Cary v. Western Union Tel. Co.*, 47 Hun (N. Y.) 610; *Gray v. Hook*, 4 N. Y. 449; *Russell v. Burton*, 66 Barb. (N. Y.) 539; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Sedgwick v. Stanton*, 14 N. Y. 289; *Harris v. Roof*, 10 Barb. (N. Y.) 489.

*Oregon*, — *Sweeney v. McLeod*, 15 Oregon 330.

*Pennsylvania*, — *Hunter v. Nolf*, 71 Pa. St. 284; *Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 32 Am. Dec. 750; *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519; *Spalding v. Ewing*, 149 Pa. St. 375, 34 Am. St. Rep. 608.

*Vermont*, — *Powers v. Skinner*, 34 Vt. 281, 80 Am. Dec. 677; *Barron v. Tucker*, 53 Vt. 340, 38 Am. Rep. 684.

*Virginia*, — *Com. v. Callaghan*, 2 Va. Cas. 460.

*Wisconsin*, — *Houlton v. Nichol*, 93 Wis. 393, 37 Am. St. Rep. 928; *Chippewa Valley, etc.*, R. Co. v. Chicago, etc., R. Co., 75 Wis. 224; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

*Canada*, — *Cameron v. Heward*, 11 Quebec Super. Ct. 392.

See also *Macgregor v. Dover, etc.*, R. Co., 18 Q. B. 618, 82 E. C. L. 618; *East Anglian R. Co. v. Eastern Counties R. Co.*, 16 Jur. 249.

**4. Subordinate Legislative Bodies.** — *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 4; *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221; *Wilbur v. New York Electric Constr. Co.*, 58 N. Y. Super. Ct. 539. *Compare Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454.

**Consideration for Signing Petition for Street Paving.** — An agreement for a consideration to sign a petition as one of the owners of property fronting on a street, the consent of such signer being necessary to the granting of permission by the common council for the laying of a street-railway track therein, is an agreement to influence the common council and for that reason is unlawful. *Doane v. Chicago City R. Co.*, 160 Ill. 22.

**Influencing Directors of Corporation.** — In *Davis v. Seymour*, 1 Bosw. (N. Y.) 88, a contract



**Character of Legislation.** — The character of the act to be passed is immaterial; that is, a contract for the rendition of lobbying services is equally illegal whether the act to be passed is a public or a private act.<sup>1</sup>

**Prevention of Legislation.** — And a contract for the rendition of such services in preventing the passage of an act by a legislative body is equally illegal as a contract for the rendition of such services to secure the passage of an act.<sup>2</sup>

**b. WHAT SERVICES NOT IMPROPER — Drafting and Explaining Proposed Bills, etc.** — It is, however, the right of every citizen who is interested in any proposed legislation to employ a paid agent to collect evidence and facts, to draft his bill and explain it to any committee, or to any member thereof or of the legislature, fairly and openly, and ask to have it introduced; and contracts which do not provide for more, and services which do not go farther, violate no principle of law or rule of public policy.<sup>3</sup> And in such a case it has been held immaterial that the person rendering such services was not a member of the legal profession.<sup>4</sup>

**Secret Agents.** — Where, however, agents are employed to render services otherwise proper in advocating the passage of legislative acts, it has been held necessary, to prevent the contract from being illegal, that they disclose their agency and appear in their true character.<sup>5</sup>

**c. PRIVATE SOLICITATION OF LEGISLATORS.** — It has been held that contracts to labor in any form privately with legislators out of the legislative halls, in order to influence their action in regard to proposed legislation, are illegal.<sup>6</sup>

for the use of the personal influence of the promisee in influencing the action of the directors of a corporation was said to be on the same footing as such contracts for influencing the action of legislators.

**1. Character of Legislation.** — *Trist v. Child*, 21 Wall. (U. S.) 441; *Wood v. McCann*, 6 Dana (Ky.) 366; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Spalding v. Ewing*, 149 Pa. St. 375, 34 Am. St. Rep. 608; *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677.

In *Sweeney v. McLeod*, 15 Oregon 330, a contract for lobbying services in preventing the passage of an act prohibiting the catching of fish in a certain manner was held to be illegal.

**Act Incorporating Municipality.** — In *Frost v. Belmont*, 6 Allen (Mass.) 152, a contract for the rendition of lobbying services in securing the passage of an act for the incorporation of a municipality was held illegal.

**Act Legalizing Divorce and Remarriage.** — In *Wood v. McCann*, 6 Dana (Ky.) 366, a contract for the rendition of lobbying services in securing the passage of a legislative act legalizing the promisor's divorce from a former wife and his subsequent remarriage was held illegal.

**2. Prevention of Legislation.** — *Usher v. McBratney*, 3 Dill. (U. S.) 385.

**3. Drafting and Explaining Proposed Bills, etc.** — *United States*. — *Marshall v. Baltimore, etc.*, R. Co., 16 How. (U. S.) 314; *Usher v. McBratney*, 3 Dill. (U. S.) 385; *Trist v. Child*, 21 Wall. (U. S.) 441.

*Alabama*. — *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659.

*California*. — *Foltz v. Cogswell*, 86 Cal. 542; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.

*District of Columbia*. — *Weed v. Black*, 2 MacArthur (D. C.) 268.

*Indiana*. — *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362.

*Kansas*. — *Barber Asphalt Paving Co. v. Botsford*, 56 Kan. 532; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213.

*Kentucky*. — *Arthur v. Dayton*, 4 Ky. L. Rep. 831; *Wood v. McCann*, 6 Dana (Ky.) 366.

*Maryland*. — *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

*Massachusetts*. — *Barry v. Capen*, 151 Mass. 99.

*Missouri*. — *Strathmann v. Gorla*, 14 Mo. App. 1.

*New York*. — *Russell v. Burton*, 66 Barb. (N. Y.) 539; *Sedgwick v. Stanton*, 14 N. Y. 289; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Chesebrough v. Conover*, 140 N. Y. 382; *Jenkins v. Hooker*, 19 Barb. (N. Y.) 435; *Brown v. Brown*, 34 Barb. (N. Y.) 533; *Hendrickson v. Bender*, 5 N. Y. Wkly. Dig. 466; *Cary v. Western Union Tel. Co.*, 47 Hun (N. Y.) 610; *Hillyer v. Travers*, (N. Y. C. Pl. 1838) 1 Am. L. R. 146. See also *Wintermute v. Cooke*, 7 Hun (N. Y.) 476.

*Pennsylvania*. — *Spalding v. Ewing*, 9 Pa. Co. Ct. 471, reversed 149 Pa. St. 375, 34 Am. St. Rep. 608.

*Vermont*. — *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677.

*Virginia*. — *Yates v. Robertson*, 80 Va. 475.

*Wisconsin*. — *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

**4. Person Not Member of Legal Profession.** — *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928.

**5. Duty to Disclose Agency.** — *Marshall v. Baltimore, etc.*, R. Co., 16 How. (U. S.) 314, affirming *Taney (U. S.)* 204, 16 Fed. Cas. No. 9,124.

**6. Private Solicitation of Legislators.** — *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Sedgwick v. Stanton*, 14 N. Y. 289; *McKee v. Cheney*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 144. See, however, *Foltz v. Cogswell*, 86 Cal. 542; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.



*d. CONTINGENT COMPENSATION.* — Contracts for a contingent compensation in procuring the passage of a legislative act have been held illegal, even though the parties did not contemplate the rendition of improper services, and though no improper services were in fact rendered.<sup>1</sup> The reason for such rule obviously is the tendency of the contract to place the person rendering the services under an incentive to use improper influences in securing the passage of the act.<sup>2</sup>

*e. SERVICES PARTLY ILLEGAL.* — Where an entire contract provides for the rendition of services before a legislative body, part of which are proper and part of which are improper, the whole contract is illegal, and recovery cannot be had for the value of the services which were proper.<sup>3</sup>

*f. PRESUMPTION AS TO LEGALITY OF SERVICES.* — Where the contract does not show on its face the character of the services to be rendered, it seems that the better doctrine is that it will not be presumed that the services were improper.<sup>4</sup> Still, it has been held that services in procuring legislation should clearly appear to be legal or they cannot be recognized as the basis of a legal claim.<sup>5</sup>

**6. Contracts Tending to Dereliction of Duty on Part of Public Officers** — *a. IN GENERAL.* — It is a general rule that contracts which place the individual interests of public officers in conflict with their duty to the public, or otherwise place them under an inducement to act in violation of such duty, are illegal.<sup>6</sup>

**1. Contingent Compensation** — *United States.* — *Trist v. Child*, 21 Wall. (U. S.) 441; *Marshall v. Baltimore, etc., R. Co.*, 16 How. (U. S.) 314.

*District of Columbia.* — *Weed v. Black*, 2 MacArthur (D. C.) 268.

*Illinois.* — *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221.

*Indiana.* — *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362.

*Kentucky.* — *Wood v. McCann*, 6 Dana (Ky.) 367.

*Louisiana.* — *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767.

*New York.* — *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Mills v. Mills*, 36 Barb. (N. Y.) 474, affirmed 40 N. Y. 543, 100 Am. Dec. 535.

*Pennsylvania.* — *Spalding v. Ewing*, 149 Pa. St. 375, 34 Am. St. Rep. 608, reversing 9 Pa. Co. Ct. 471; *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519.

*Wisconsin.* — *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Chippewa Valley, etc., R. Co. v. Chicago, etc., R. Co.*, 75 Wis. 224.

*Canada.* — *Cameron v. Heward*, 11 Quebec Super. Ct. 392.

But compare *Denison v. Crawford County*, 48 Iowa 211; *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928.

**"All Reasonable and Proper Assistance."** — In *Chippewa Valley, etc., R. Co. v. Chicago, etc., R. Co.*, 75 Wis. 224, a contract between two railway companies, by which one agreed to render "all reasonable and proper assistance" which it might be able to give in procuring a legislative grant of lands to the other railway company, in which the consideration to be paid to the former was contingent upon securing the grant, was held to be illegal.

**2. Reasons for Doctrine.** — See *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519.

**Champertous Agreement.** — In *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362, it was

held that an agreement to prosecute a claim before the legislature and to bear the expenses thereof was illegal as a champertous agreement. See the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 815.

**3. Services Partly Legal.** — *Trist v. Child*, 21 Wall. (U. S.) 441; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Brown v. Brown*, 34 Barb. (N. Y.) 533; *Cary v. Western Union Tel. Co.*, 47 Hun (N. Y.) 610. See *infra*, this title, *Entire and Divisible Contracts as Affected by Partial Illegality*.

**4. Legality of Services Presumed.** — *Salinas v. Stillman*, 66 Fed. Rep. 677; *Barker v. Cairo, etc., R. Co.*, 3 Thomp. & C. (N. Y.) 328. See also *Chesebrough v. Conover*, 66 Hun (N. Y.) 634, 21 N. Y. Supp. 566; *Barry v. Capen*, 151 Mass. 99.

**5. Powers v. Skinner**, 34 Vt. 274, 80 Am. Dec. 677. See also *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659; *Harris v. Simonson*, 28 Hun (N. Y.) 318.

**Where the Contract Required the Agent to "Do All in His Power"** to secure the passage of a private act, it was held that it must be affirmatively shown that the services contemplated were those which could be properly rendered. *Hunt v. Test*, 8 Ala. 715, 42 Am. Dec. 659.

**6. Contracts Tending to Dereliction of Official Duty** — *England.* — *Stotesbury v. Smith*, 2 Burr. 924.

*United States.* — *Brown v. Tarkington*, 3 Wall. (U. S.) 377; *Bartle v. Nutt*, 4 Pet. (U. S.) 184; *Meguire v. Corwine*, 101 U. S. 108; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

*California.* — *Valentine v. Stewart*, 15 Cal. 387; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Edwards v. Estell*, 48 Cal. 194.

*Illinois.* — *Cook v. Shipman*, 51 Ill. 316, 24 Ill. 614; *Kimball v. Yates*, 14 Ill. 464.

*Indiana.* — *Brown v. Ewing*, 19 Ind. 373;

**Officers of Foreign Government.** — This rule is equally applicable to contracts tending to a breach of a duty on the part of foreign officers to their governments.<sup>1</sup>

**Officer Occupying Purely Honorary Position — Customs of Foreign Government.** — Nor is the rule altered by the fact that the official occupies a position purely honorary, nor by the fact that the contract does not contravene the policy or laws of his country. Contracts permissible by other countries are not enforceable in the courts of the United States if they violate the laws, morality, or policy of the latter.<sup>2</sup>

**Officer Not Actually Corrupted.** — In determining the validity of the contract, its actual effect upon the officer is immaterial, and therefore the fact that the contract did not actually have any corrupting influence upon the officer will not relieve it of illegality.<sup>3</sup>

**Contract Must Affect Official Duties.** — A contract, to be illegal within this rule, must, generally speaking, pertain to the performance of the official duties of the officer.<sup>4</sup> But though the official duties of the officer are not directly involved, yet if the contract places the officer under an inducement not to give impartial advice to his government, where the government is authorized in relying on his fidelity to its interest, the contract has been held illegal though the giving of the advice in question was not strictly within the officer's official duties.<sup>5</sup>

*b. CONSIDERATION OF CONTRACT BREACH OF OFFICIAL DUTY — (1) In General.* — A contract the consideration of which is an express engagement on the part of a public officer to perform an unlawful act or otherwise commit a breach of his official duty is of course illegal.<sup>6</sup>

*Stropes v. Greene County*, 72 Ind. 42; *Brown v. Columbus First Nat. Bank*, 137 Ind. 655; *Root v. Stevenson*, 24 Ind. 115.

*Kentucky.* — *Lucas v. Allen*, 80 Ky. 681.

*Louisiana.* — *Cummings v. Saux*, 30 La. Ann. 207.

*Massachusetts.* — *New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56.

*Michigan.* — *O'Hara v. Carpenter*, 23 Mich. 410, 9 Am. Rep. 89; *Eberts v. Selover*, 44 Mich. 519, 38 Am. Rep. 278; *Weber v. Weber*, 47 Mich. 569; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369; *Snyder v. Willey*, 33 Mich. 483; *Robinson v. Patterson*, 71 Mich. 141.

*Mississippi.* — *Meridian Waterworks Co. v. Schulherr*, (Miss. 1892) 17 So. Rep. 167; *Ordineal v. Barry*, 24 Miss. 9.

*New Hampshire.* — *Hovey v. Blanchard*, 13 N. H. 145.

*New Jersey.* — *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 627, 55 Am. St. Rep. 614.

*New York.* — *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. 534; *Richardson v. Crandall*, 48 N. Y. 348; *Gray v. Hook*, 4 N. Y. 449; *Satterlee v. Jones*, 3 Duer (N. Y.) 102; *Whitaker v. Cone*, 2 Johns. Cas. (N. Y.) 58; *Webbers v. Blunt*, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445; *Winter v. Kinney*, 1 N. Y. 365.

*Ohio.* — *Cincinnati, etc., R. Co. v. Morris*, 3 Ohio Dec. 479; *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758.

*Pennsylvania.* — *Goodyear v. Brown*, 155 Pa. St. 514, 35 Am. St. Rep. 903.

**Use of "Go-between."** — The fact that a contract executed for the purpose of influencing an officer in the discharge of his duty was not directly entered into with the officer, but instead a "go-between" was used, does not relieve the contract of its illegality. *Cook v. Shipman*, 51 Ill. 316.

**Benefit to Wife of Officer.** — The rule of the text has been applied to a case where the benefit was to inure to the wife of such officer. Thus, where a local commissioner on a state road made a contract in his wife's name with the contractor, providing for the conveyance to the wife of certain lands reserved on the state road contract, when they should be patented by the state, such contract was held to be illegal. *Robinson v. Patterson*, 71 Mich. 141.

**Contract Between Distiller and United States Storekeeper.** — An agreement between a proprietor of a distillery and an officer of the internal revenue service charged with watching the distillery, that the officer will pay to the proprietor a monthly sum so long as the latter carries on the distillery, is void as against public policy, as tending to corrupt the officer. *Caton v. Stewart*, 76 N. Car. 357.

**1. Consul-General of Foreign Government — Commissions on Sales.** — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, affirming 15 Blatchf. (U. S.) 79.

**2. Honorary Position — Consent or Custom of Foreign Country.** — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

**3. Actual Effect of Contract Immaterial.** — *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Elkhart County Lodge v. Crary*, 98 Ind. 242, 49 Am. Rep. 746; *Brown v. Columbus First Nat. Bank*, 137 Ind. 655; *Cincinnati, etc., R. Co. v. Morris*, 3 Ohio Dec. 479.

**4. Contract Must Affect Official Duties.** — *Watkins v. State*, 151 Ind. 123; *Edmunds v. Bullett*, 59 N. J. L. 312.

**5. Oscanyan v. Winchester Repeating Arms Co.**, 103 U. S. 261.

**6. Consideration of Contract Breach of Official Duty — England.** — *Stotesbury v. Smith*, 2 Burr. 924.

*Alabama.* — *James v. Hendree*, 34 Ala. 488.



(2) *Indemnity Contracts.* — The question as to the validity of contracts the consideration of which is the commission of a known unlawful act by a public officer, or the omission to perform an official duty, has chiefly arisen in the case of contracts indemnifying the officer against liability arising therefrom; and such contracts have as a rule been held illegal.<sup>1</sup>

**Past Neglect of Duty.** — A distinction has been taken as to contracts to indemnify an officer from liability for past neglect of duty, and such contracts have been held legal.<sup>2</sup>

**Officer Acting in Good Faith.** — And if the action of the officer is taken in good faith and under the belief that it is lawful, there being a *bona fide* dispute in regard to his official duty, he may legally receive indemnity against liability therefor.<sup>3</sup>

c. **SALE OF PERSONAL INFLUENCE WITH PUBLIC OFFICERS.** — Public policy forbids that personal influence with public officers, to induce them to grant favors or privileges, should be made a subject of sale, and all contracts for compensation for the use of such influence with such officers are held

*Illinois.* — Lake Fork Special Drainage Dist. v. People, 138 Ill. 87.

*Indiana.* — Kenworthy v. Stringer, 27 Ind. 498.

*Iowa.* — Cass County v. Beck, 76 Iowa 487; Cole v. Parker, 7 Iowa 168, 71 Am. Dec. 439.

*Maine.* — Hodsdon v. Wilkins, 7 Me. 113, 20 Am. Dec. 347.

*Massachusetts.* — Denny v. Lincoln, 5 Mass. 385; Bills v. Comstock, 12 Met. (Mass.) 468; Kingsbury v. Ellis, 4 Cush. (Mass.) 578; Foster v. Clark, 19 Pick. (Mass.) 329.

*Missouri.* — Parsons v. Randolph, 21 Mo. App. 353; Harrington v. Crawford, 136 Mo. 467, 58 Am. St. Rep. 653.

*Tennessee.* — Barnes v. Jackson, 2 Sneed (Tenn.) 416.

*Vermont.* — Gleason v. Briggs, 28 Vt. 135; Hopkinson v. Holmes, 18 Vt. 18; Stevens v. Webb, 2 Vt. 344.

*Compare* U. S. v. Windom, 137 U. S. 636.

**Payment of Taxes by Services to Sheriff.** — A collector of taxes can receive nothing but money in payment of taxes, and therefore a contract between a sheriff and a taxpayer, by which the taxpayer is to act as the sheriff's attorney at a fixed sum, to be applied on the taxpayer's taxes, is against public policy, and a court will not apply it as payment on the taxes. Miller v. Wisener, 45 W. Va. 59. See the title TAXATION.

**Holding Up Execution.** — In Barnes v. Jackson, 2 Sneed (Tenn.) 416, a contract between the officer and an execution debtor that the officer should hold up the execution beyond the return day, upon the condition that the debtor would pay his commissions, was held illegal.

1. **Indemnification of Public Officers** — *England.* — Martyn v. Blithman, Yelv. 197.

*Alabama.* — Prewitt v. Garrett, 6 Ala. 128, 41 Am. Dec. 40.

*California.* — Stark v. Raney, 18 Cal. 622.

*Iowa.* — Cole v. Parker, 7 Iowa 167, 71 Am. Dec. 439.

*Kentucky.* — Wright v. Gardner, 98 Ky. 454.

*Maine.* — Hodsdon v. Wilkins, 7 Me. 113, 20 Am. Dec. 347.

*Massachusetts.* — Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Churchill v. Perkins, 5

Mass. 541; Barnes v. Greenleaf, Quincy (Mass.) 41; Denny v. Lincoln, 5 Mass. 385.

*Missouri.* — McCartney v. Shepard, 21 Mo. 573, 64 Am. Dec. 250; Harrington v. Crawford, 61 Mo. App. 221, affirmed 136 Mo. 467, 58 Am. St. Rep. 653.

*New York.* — Webbers v. Blunt, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445; Winter v. Kinney, 1 N. Y. 365.

*Pennsylvania.* — Weckerly v. German Lutheran Congregation, 3 Rawle (Pa.) 172.

*Tennessee.* — Hunter v. Agee, 5 Humph. (Tenn.) 57.

**Forbearance to Levy Attachment.** — In Foster v. Clark, 19 Pick. (Mass.) 329, a promissory note given to an officer in consideration of his forbearance to levy an attachment upon personal property of a third person on a writ against such third person was held not to be illegal as a contract given to induce the officer to neglect his duty. In this case the court sustained the contract as one in the nature of a receipt given by the receptor in case of property attached. This case, however, seems to go to the extreme, and was expressly *disapproved* in Harrington v. Crawford, 136 Mo. 467, 58 Am. St. Rep. 653, wherein a bond to indemnify a sheriff for his omission to execute a final process of restitution was held to be illegal.

2. **Past Neglect of Duty.** — Hall v. Huntoon, 17 Vt. 244, 44 Am. Dec. 332.

3. **Officer Acting in Good Faith** — **Disputed Right** — *California.* — Stark v. Raney, 18 Cal. 622.

*Massachusetts.* — Marsh v. Gold, 2 Pick. (Mass.) 285; Train v. Gold, 5 Pick. (Mass.) 380.

*Mississippi.* — Shotwell v. Hamblin, 23 Miss. 156, 55 Am. Dec. 83.

*Missouri.* — McCartney v. Shepard, 21 Mo. 573, 64 Am. Dec. 250.

*New Hampshire.* — Pike v. Middleton, 12 N. H. 278.

*Ohio.* — Miller v. Rhoades, 20 Ohio St. 494.

*Canada.* — Ballard v. Pope, 3 U. C. Q. B. 317; Robertson v. Broadfoot, 11 U. C. Q. B. 407.

For a Full Discussion of the legality of indemnity contracts, see the title INDEMNITY.



illegal;<sup>1</sup> and this is especially true where such influence is to be used for the purpose of inducing an officer to violate his official duty.<sup>2</sup> If, however, the contract was entered into for the influence of the promisee in inducing the officer to grant to the promisor merely his legal rights, and not a privilege or favor, it has been held that such contract is not illegal.<sup>3</sup>

*d. EMPLOYMENT OF AGENTS TO NEGOTIATE SALES TO OR CONTRACTS WITH GOVERNMENT* — (1) *In General*. — Contracts for the employment of agents to negotiate sales to or to procure contracts with the government, where the accomplishment of such object is to be brought about by the use of personal influence with an officer of the government, are universally held to be illegal;<sup>4</sup> and the Supreme Court of the United States held in an early case that all agreements for compensation to agents to procure contracts with the government were illegal, irrespective of the means to be used by the agent to secure the contract, as the tendency of such contracts was to introduce the element of personal solicitation of the public officer.<sup>5</sup>

*Employment of Legitimate Agents Allowed*. — This extreme doctrine, however, has not been followed, and the right of all persons to be heard before any officer or department of the government through agents has been affirmed, and the legality of contracts for the employment of legitimate agents for the negotiating of business with the government has been sustained, where no corrupting influences were to be used by the agent.<sup>6</sup>

1. *Sale of Personal Influence with Officers Prohibited* — *United States*. — *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, *affirming* 15 Blatchf. (U. S.) 79.

*Illinois*. — *Cook v. Shipman*, 24 Ill. 614; *Doane v. Chicago City R. Co.*, 160 Ill. 22.

*Indiana*. — *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746.

*Kentucky*. — *Hutchen v. Gibson*, 1 Bush (Ky.) 271.

*Michigan*. — *Hannah v. Fife*, 27 Mich. 172; *Beal v. Polhemus*, 67 Mich. 130.

*Minnesota*. — *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493.

*New York*. — *Wall v. Charlick*, 8 N. Y. Leg. Obs. 230; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Pease v. Walsh*, 39 N. Y. Super. Ct. 514.

*Washington*. — *Boyd v. Cochrane*, 18 Wash. 281.

*Wisconsin*. — *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928.

See also *Bowman v. Coffroth*, 59 Pa. St. 19.

*Appointments to Office*. — The rule prohibiting the sale of personal influence with public officers is chiefly exemplified in the cases where such influence is to be used to secure an appointment to office. See *supra*, this section, *Traffic in Public Offices* — *Office Brokerage*.

2. *Influence to Induce Breach of Official Duty*. — *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Devlin v. Brady*, 36 N. Y. 531, *affirming* 32 Barb. (N. Y.) 518; *Moher v. O'Grady*, 4 L. R. Ir. 54.

3. *Personal Influence to Preserve Legal Rights*. — *Rau v. Boyle*, 5 Bush (Ky.) 265; *Costar v. Brush*, 25 Wend. (N. Y.) 628; *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928. Compare *Hutchen v. Gibson*, 1 Bush (Ky.) 270; *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493.

4. *Employment of Agent to Negotiate with Government* — *Use of Personal Influence* — *United*

*States*. — *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 4.

*District of Columbia*. — *Carman v. Maloney*, (D. C. 1887) 9 Cent. Rep. 520.

*Illinois*. — *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221.

*Michigan*. — *Hannah v. Fife*, 27 Mich. 172.

*Missouri*. — *Nash v. Kerr Murray Mfg. Co.*, 19 Mo. App. 1.

*New York*. — *Wilbur v. New York Electric Constr. Co.*, 58 N. Y. Super. Ct. 539.

5. *Early Doctrine of United States*. — See *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, *per Mr. Justice Field*.

6. *Employment of Legitimate Agents Allowed* — *United States*. — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

*Kansas*. — *Barber Asphalt Paving Co. v. Botsford*, 56 Kan. 532.

*Michigan*. — *Beal v. Polhemus*, 67 Mich. 130.

*New York*. — *Howland v. Coffin*, 47 Barb. (N. Y.) 653; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502 (*disapproving* *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45); *Southard v. Boyd*, 51 N. Y. 177; *Russell v. Burton*, 66 Barb. (N. Y.) 543; *McKee v. Cheney*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 145; *Wilbur v. New York Electric Constr. Co.*, 58 N. Y. Super. Ct. 539.

*Ohio*. — *Winpenny v. French*, 18 Ohio St. 469.

See also *Hovey v. Storer*, 63 Me. 486; *Ashburner v. Parrish*, 81 Pa. St. 52; *Newman v. Davenport*, (Tenn.), decided at Nashville, 1877.

*Agent Related to Government Officer*. — In *Southard v. Boyd*, 51 N. Y. 177, the defendant, after a failure upon his part to charter his vessel to the United States government, employed the plaintiffs, who were related to one of the government agents, to effect a charter, which was accomplished by them. In an action to recover the stipulated commission, it was held that the plaintiffs' relationship and the probable influence they could exert in consequence

(2) *Secret Agency.* — The agency must, however, as in case of contracts to influence legislation, be disclosed so as to enable the public officers to determine the motives of the agent in advocating the claims of his principal.<sup>1</sup>

(3) *Contingent Compensation.* — And where the compensation to be paid to the agent negotiating with the government is made contingent upon his success in securing the contract for his principal, this has been held an additional reason for holding the contract illegal, as it placed the agent under an inducement to resort to corrupt means.<sup>2</sup>

**Brokerage Commissions.** — The fact, however, that the compensation is fixed by brokerage commissions and is therefore in a certain sense contingent does not render the compensation contingent within the meaning of this rule.<sup>3</sup>

(4) *Effect of Corruption of Officer upon Contract Secured.* — Where a public contract is secured by the bribery of a public officer, or by the use of improper influences upon him, it would seem that this is merely a fraud which renders the contract so secured voidable at the option of the government, and not illegal; and therefore, in case the contract is not rescinded, but the contractor is allowed to perform it, he should be allowed to recover thereon or on a *quantum meruit*.<sup>4</sup> Still, it has been held that the illegality of the transaction with the officer enters into the contract with the government and renders it illegal.<sup>5</sup>

*c. PUBLIC CONTRACTS IN WHICH PUBLIC OFFICERS ARE INTERESTED.* — (1) *In General.* — The rule of public policy which prohibits a public officer from placing himself in a position whereby his individual interest is in opposition to his official duty has often been applied to cases where public officers, empowered to contract for services, or the performance of other work, or the furnishing of supplies, contract with themselves therefor. In such a case the contract is held to be illegal.<sup>6</sup> And where the procurement of services to be performed for a

did not forbid their employment or render the contract illegal.

**Contract with Reference to Political Faith of Agent.** — In *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502, it was held that a contract to employ an agent to procure a sale to the government was not rendered illegal because it was entered into by the parties on account of the political faith of the agent, who was a member of the political party in control of the government.

**Presumption as to Propriety of Services.** — And where an agent is employed to negotiate with the government, it has been held that it would be presumed that it was the contemplation of the parties that he should use only proper methods in transacting the business. *Howland v. Coffin*, 47 Barb. (N. Y.) 653.

1. **Secret Agents.** — *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 4; *Nash v. Kerr Murray Mfg. Co.*, 19 Mo. App. 1.

2. **Contingent Compensation.** — *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Hovey v. Storer*, 63 Me. 486; *Winpenny v. French*, 18 Ohio St. 469. *Compare Barber Asphalt Paving Co. v. Botsford*, 56 Kan. 532.

3. **Brokerage Commissions.** — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Southard v. Boyd*, 51 N. Y. 177; *Howland v. Coffin*, 47 Barb. (N. Y.) 653.

4. **Effect of Corruption of Officer upon Contract Secured.** — *Devlin v. New York*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 106; *Baird v. New York*, 96 N. Y. 567. *Compare Nelson v. New York*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 688.

5. *State v. Cross*, 38 Kan. 696; *Honaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847. See also *Brewster v. Hatch*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 375; *Lindsey v. Philadelphia*, 2 Phila. (Pa.) 212, 14 Leg. Int. (Pa.) 5.

6. **Public Officers Interested in Public Contract.** — *United States.* — *Wardell v. Union Pac. R. Co.*, 103 U. S. 658.

*Georgia.* — *Macon v. Huff*, 60 Ga. 221.

*Illinois.* — *Dwight v. Palmer*, 74 Ill. 295.

*Indiana.* — *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Waymire v. Powell*, 105 Ind. 328; *Stropes v. Greene County*, 72 Ind. 42; *McGregor v. Logansport*, 79 Ind. 166; *Pratt v. Luther*, 45 Ind. 250; *Wingate v. Harrison School Tp.*, 59 Ind. 520.

*Iowa.* — *Weitz v. Independent Dist.*, 87 Iowa 81; *Moore v. Independent Dist.*, 55 Iowa 654.

*Kansas.* — *Concordia v. Hagaman*, 1 Kan. App. 35.

*Michigan.* — *People v. Township Board*, 11 Mich. 222; *Kinyon v. Duchene*, 21 Mich. 498.

*Nebraska.* — *Grand Island Gas Co. v. West*, 28 Neb. 852.

*New Jersey.* — *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422.

*New York.* — *Matter of Taxpayers, etc.*, 27 N. Y. App. Div. 353; *Beebe v. Sullivan County*, 64 Hun (N. Y.) 377; *Bell v. Quin*, 2 Sandf. (N. Y.) 146; *Smith v. Albany*, 61 N. Y. 444.

*Pennsylvania.* — *Trainer v. Wolfe*, 140 Pa. St. 279; *Washington Tp. v. Shoop*, 2 Pa. Dist. 639; *Funk v. Washington Tp.*, 13 Pa. Co. Ct.



public corporation is intrusted to several officers, it is equally against public policy to permit one of such officers to contract therefor, though he takes no action as an officer on the question of his employment.<sup>1</sup>

(2) *Statutory Prohibitions.* — In many jurisdictions statutes declaratory of the common-law rule have been passed, expressly prohibiting public officers from being interested in any contract for the furnishing of supplies, etc., to the corporation of which they are officers, and contracts entered into by them in violation of such a statutory provision are *a fortiori* illegal.<sup>2</sup>

(3) *Sufficiency of Interest of Officer.* — The rule prohibiting a public officer from being personally interested in a contract under his supervision or control has been extended so as to prevent him from letting such a contract to a corporation of which he was an officer or stockholder.<sup>3</sup>

(4) *Services Outside of Official Employment.* — The fact, however, that a person contracting for services to be rendered to a municipality was an officer thereof does not render the contract illegal, provided the procurement or rendition or supervision of such services was outside of the officer's official duties.<sup>4</sup>

*Wisconsin.* — Pickett v. School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105.

*Compare* Willis v. Baker, (Ky. 1895) 29 S. W. Rep. 872; Anderson's Appeal, 9 Pa. Co. Ct. 567.

1. *Officer Interested Not Voting on Question of Contract.* — Wood v. Elliott, 26 Pittsb. Leg. J. N. S. (Pa.) 334; Beebe v. Sullivan County, 64 Hun (N. Y.) 377.

And a contract in which a public officer was interested, entered into in violation of a statutory prohibition, has been held illegal though the officer interested therein voted against the letting of the contract. Kennett Electric Light Co. v. Kennett Square, 4 Pa. Dist. 707.

2. *Statutory Prohibitions — England.* — Mellis v. Shirley, etc., Local Board of Health, 16 Q. B. D. 446.

*United States.* — Santa Ana Water Co. v. San Buenaventura, 65 Fed. Rep. 323; Findlay v. Pretz, 66 Fed. Rep. 427.

*California.* — Capron v. Hitchcock, 98 Cal. 427.

*Georgia.* — West v. Berry, 98 Ga. 402.

*Kansas.* — Concordia v. Hagaman, 1 Kan. App. 35.

*Kentucky.* — Nunemacher v. Louisville, 98 Ky. 334.

*Louisiana.* — Cummings v. Saux, 30 La. Ann. 207.

*Maine.* — Goodrich v. Waterville, 88 Me. 39.

*Minnesota.* — Macy v. Duluth, 68 Minn. 452.

*Nebraska.* — McElhinney v. Superior, 32 Neb. 744.

*New Jersey.* — Stroud v. Consumers' Water Co., 56 N. J. L. 422; Foster v. Cape May, 60 N. J. L. 78.

*New York.* — Beebe v. Sullivan County, 64 Hun (N. Y.) 377; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Smith v. Albany, 7 Lans. (N. Y.) 14, affirmed 61 N. Y. 444.

*Ohio.* — Marsh v. Hartwell, 2 Ohio N. P. 389, 4 Ohio Dec. 64; Grant v. Brouse, 1 Ohio N. P. 145, 2 Ohio Dec. 24.

*Pennsylvania.* — Com. v. De Camp, 177 Pa. St. 112; Trainer v. Wolfe, 140 Pa. St. 279; Milford v. Milford Water Co., 124 Pa. St. 610; Com. v. Philadelphia County, 2 S. & R. (Pa.) 193.

*Texas.* — Read v. Smith, 60 Tex. 379.

*Wisconsin.* — Land, etc., Co. v. McIntyre, 100 Wis. 245.

**A Physician Who, While He Is a Member of a City Council,** is employed by the city overseers of the poor to render medical treatment to its paupers, cannot recover for such services in *Maine*, as Rev. Stat. Me. (1883), c. 3, § 36, provides that "no member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof." Goodrich v. Waterville, 88 Me. 39.

**Public Officer One of Several Co-contractees.** — In *England*, a contract by a local board of health made with two persons, one of whom is the surveyor of the board at a yearly salary, and who, as an officer appointed by the local authority, is required by section 193 of the Public Health Act, 1875, not to be interested in any contract made with such authority, is illegal. Mellis v. Shirley, etc., Local Board of Health, 16 Q. B. D. 446.

3. **Sufficiency of Interest of Officer in Contract — Nebraska.** — McElhinney v. Superior, 32 Neb. 744; Grand Island Gas Co. v. West, 28 Neb. 852.

*New Jersey.* — Stroud v. Consumers' Water Co., 56 N. J. L. 422.

*New York.* — Terry v. Gleason, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 368.

*Ohio.* — Bellaire Goblet Co. v. Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205; Daltzell, etc., Co. v. Findlay, 5 Ohio Cir. Ct. 435, 3 Ohio Cir. Dec. 214; Cincinnati, etc., R. Co. v. Morris, 3 Ohio Dec. 479.

*Pennsylvania.* — Milford v. Milford Water Co., 124 Pa. St. 610; Jolly v. Pittsburg, etc., R. Co., 16 Pa. Co. Ct. 1; Kennett Electric Light Co. v. Kennett Square, 4 Pa. Dist. 707.

**Pledge of Stock.** — In Foster v. Cape May, 60 N. J. L. 78, the rule was held to include an officer holding as security stock in the corporation contracting with the city.

4. **Employment Outside of Official Duty.** — An ordinance prohibiting a municipal officer from being interested in any city contract, or receiving any compensation, except his salary, for services rendered to the city, will not prevent him from recovering for services rendered altogether outside the line of his official employment, under a contract made with the city, and for a compensation fixed therein. Klemm v. Newark, 61 N. J. L. 112.



(5) *Recovery on Quantum Meruit or Valebat.* — In some jurisdictions it is held, where such an illegal contract is entered into, that there can be no recovery on the part of the officer on a *quantum meruit* or *quantum valebat* for what his services or the property was reasonably worth, upon the ground that there can be no implied contract where the contract is for any reason illegal.<sup>1</sup> On the other hand, there are decisions which permit a recovery on a *quantum meruit*, when such contracts are not prohibited by a statutory enactment, and when the goods or services contracted for and actually delivered were proper and necessary, and no unfairness was used or undue advantage taken by the public officer in obtaining the contract.<sup>2</sup> If, however, the services rendered by the public officer, and for which a recovery is sought by him upon a *quantum meruit*, conferred no benefit upon the public corporation which it could have rejected, and by retaining which it could be said to have ratified the contract, it would seem that the rule permitting a recovery on a *quantum meruit* should not prevail.<sup>3</sup>

*Case of Necessity.* — It seems that where the public necessity demands the immediate performance of services for the public, a public officer having power to procure such services to be rendered may render them himself and recover on a *quantum meruit* therefor.<sup>4</sup>

7. *Contracts Affecting Service of Quasi-public Corporations.* — The power of corporations of a *quasi*-public nature to make contracts which tend to disable them to perform their public functions, and the validity, etc., of such contracts, are questions falling more appropriately under another title, to which reference is made in the note below.<sup>5</sup>

**XII. AGREEMENTS INTERFERING WITH THE COURSE OF PUBLIC JUSTICE — 1. In General.** — The courts have not hesitated to declare illegal as against public policy all contracts which involve anything inconsistent with the impartial course of the administration of public justice, regardless of the good faith or intent of the parties at the time when the contract was entered into or the fact that no evil resulted by or through the contract.<sup>6</sup>

*Contracts Tending Towards Judicial Corruption.* — A contract entered into between an intended litigant and the judge before whom the litigation was to be had, which made it to the pecuniary advantage of the judge to decide in favor of such litigant, has been held illegal as tending towards judicial corruption.<sup>7</sup>

2. *Contracts Relating to Suppression or Procurement of Evidence* — *a. SUPPRESSION OF EVIDENCE.* — A contract having for its object the suppression of evidence is illegal, irrespective of whether the evidence relates to a

1. *Recovery on Quantum Meruit Denied.* — San Diego *v.* San Diego, etc., R. Co., 44 Cal. 112; Strope *v.* Greene County, 72 Ind. 42; Smith *v.* Albany, 61 N. Y. 444; Washington Tp. *v.* Shoop, 2 Pa. Dist. 639. Compare Anderson's Appeal, 9 Pa. Co. Ct. 567.

2. *Recovery on Quantum Meruit Permitted* — Arkansas. — Spearman *v.* Texarkana, 58 Ark. 318.

Kansas. — Concordia *v.* Hagaman, 1 Kan. App. 35.

Minnesota. — Curren *v.* School Dist. No. 26, 35 Minn. 163.

Nebraska. — Call Pub. Co. *v.* Lincoln, 29 Neb. 149; Grand Island Gas Co. *v.* West, 28 Neb. 852.

New Jersey. — Gardner *v.* Butler, 30 N. J. Eq. 702.

Wisconsin. — Pickett *v.* School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105.

See also Buck *v.* Eureka, 109 Cal. 504; Capital Gas Co. *v.* Young, 109 Cal. 140; Macon *v.* Haff, 60 Ga. 222.

3. *Benefits Not Capable of Rejection.* — Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

4. *Case of Necessity.* — Rush Tp. Overseers *v.* Lynn 4 Pa. Dist. 651.

5. See the title *ULTRA VIRES*.

6. *Contracts Interfering with Public Justice.* — Selz *v.* Unna, 6 Wall. (U. S.) 327; Goodrich *v.* Tenney, 144 Ill. 422, 36 Am. St. Rep. 459; Boehmer *v.* Foval, 55 Ill. App. 71 citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 879 *et seq.*; Brown *v.* Columbus First Nat. Bank, 137 Ind. 655; Bates *v.* Cain, 70 Vt. 144.

7. *Contracts Tending Towards Judicial Corruption.* — A contract whereby a justice of the peace agreed to charge smaller fees in suits to be brought before him by a certain corporation than were prescribed by statute, and that such fees should be paid by the corporation, and that the defendants to the corporation, has been held contrary to public policy. Willemijn *v.* Bateson, 63 Mich. 309. See also Brown *v.* Columbus First Nat. Bank, 137 Ind. 655; Hawkeye

criminal prosecution<sup>1</sup> or to a civil proceeding.<sup>2</sup>

*b. CORRUPTION OF WITNESSES* — (1) *Contracts with Witnesses.* — Where a witness simply consents to disclose the truth and has no inducement to produce any special result upon the litigation, an agreement to reward him for testifying has been sustained.<sup>3</sup> If, however, the witness secured his knowledge solely by reason of some illegal transaction, an agreement to pay him therefor has been held illegal, as otherwise the witness would be making a profit out of the illegal transaction.<sup>4</sup> In *Illinois* it has been held that if the consideration for a reward for the recovery of money alleged to have been embezzled from the promisor is that the promisee should testify in behalf of the promisor, the contract is illegal and void.<sup>5</sup>

*Want of Consideration.* — Where a witness has been subpoenaed and is legally bound to attend at court and testify, a promise to pay him extra fees for his attendance has been held unenforceable for want of consideration, as the performance of a legal duty is not a sufficient consideration to support a promise.<sup>6</sup> Such an agreement, however, is supported by a sufficient consideration where the witness engages to do more than his legal duty.<sup>7</sup>

*Compensation Contingent.* — If the right of the witness to compensation is contingent upon the character of his testimony, or that his testimony shall lead to a result favorable to the party calling him, the contract is universally held to be against public policy.<sup>8</sup>

*Ins. Co. v. Brainard*, 72 Iowa 130. See *supra*, this title, *Contracts Detrimental to Public Service* — *Contracts Relating to Compensation of Public Officers.*

1. *Suppression of Evidence — Criminal Prosecution* — *England.* — *Collins v. Blantern*, 2 Wils. C. Pl. 343.

*United States.* — *Bierbauer v. Wirth*, 10 Biss. (U. S.) 60.

*Iowa.* — *Haines v. Lewis*, 54 Iowa 301, 37 Am. Rep. 202.

*Kansas.* — *Friend v. Miller*, 52 Kan. 139, 39 Am. St. Rep. 340.

*Michigan.* — *Crisup v. Grosslight*, 79 Mich. 380.

*New York.* — *Nickelson v. Wilson*, 60 N. Y. 362, reversing 1 Hun (N. Y.) 615.

*North Carolina.* — *Thompson v. Whitman*, 4 Jones L. (49 N. Car.) 47.

*South Carolina.* — *Kirkpatrick v. Lockhart*, 2 Brev. (S. Car.) 276.

*Vermont.* — *Badger v. Williams*, 1 D. Chip. (Vt.) 137.

2. *Civil Proceedings.* — *Valentine v. Stewart*, 15 Cal. 387; *Hoyt v. Macon*, 2 Colo. 502; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

3. *Agreement for Fixed Compensation to Witness Sustained.* — *Yeatman v. Dempsey*, 7 C. B. N. S. 628, 97 E. C. L. 628; *Nickelson v. Wilson*, 60 N. Y. 362, reversing 1 Hun (N. Y.) 615. See also *Dawkins v. Gill*, 10 Ala. 206.

*Expert Witnesses.* — The rule would apply particularly to expert witnesses. *Yeatman v. Dempsey*, 7 C. B. N. S. 628, 97 E. C. L. 628; *Barrus v. Phaneuf*, 166 Mass. 123; *Brown v. Travelers' L., etc., Ins. Co.*, 26 N. Y. App. Div. 544. See also *Webb v. Page*, 1 C. & K. 23, 47 E. C. L. 23; *Harrison v. New Orleans*, 40 La. Ann. 509.

4. *Knowledge of Witness Secured in Illegal Transaction.* — W. entered into a fraudulent conspiracy with K. to defraud the government, and incidentally to defraud H., and then agreed with H., for a sum of money to be paid by him, to furnish the evidence of

such fraudulent conspiracy in a land-contest trial. It was held that the contract to furnish the testimony under such circumstances was against public policy, and a note given in consideration thereof was void. *Hagan v. Wellington*, 7 Kan. App. 74.

5. *Boehmer v. Foval*, 55 Ill. App. 71.

6. *Want of Consideration.* — *Collins v. Godefroy*, 1 B. & Ad. 950, 20 E. C. L. 514; *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171; *Walker v. Cook*, 33 Ill. App. 561; *Pool v. Boston*, 5 Cush. (Mass.) 219; *Wimer v. Overseers of Poor*, 104 Pa. St. 317. See the title *CONSIDERATION*, vol. 6, p. 750 *et seq.*

In *Dodge v. Stiles*, 26 Conn. 463, the plaintiff was subpoenaed as a witness for the defendant and received his legal fees. Before he was summoned the defendant agreed with him to pay him as much per day for attending court as he could earn at his trade, in addition to his legal fees. Suit was brought to recover upon the agreement, but the court held that to enforce the contract would be against the policy of the law.

7. See the opinion in *Dodge v. Stiles*, 26 Conn. 463.

8. *Compensation to Witness Contingent.* — *Sprye v. Porter*, 7 El. & Bl. 58, 90 E. C. L. 58; *Dawkins v. Gill*, 10 Ala. 206; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369; *Nickelson v. Wilson*, 60 N. Y. 362; *Pollak v. Gregory*, 9 Bosw. (N. Y.) 116. See also *Haines v. Lewis*, 54 Iowa 301, 37 Am. Rep. 202. Compare *Perry v. Dicken*, 105 Pa. St. 83, 51 Am. Rep. 181; *Grove v. McCalla*, 21 Pa. St. 44.

*Expert Testimony.* — In *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, an agreement whereby a physician was to explain to a railroad company the injuries received by A at the hands of the company, and the physician's compensation was to vary according to the sum which the company should pay to A, was held to be against public policy. See also *Pollak v. Gregory*, 9 Bosw. (N. Y.) 116.



(2) *Agreements to Procure Testimony.* — Agreements to pay for collecting and procuring testimony in a particular suit are valid.<sup>1</sup>

**Compensation Contingent.** — But if the contractee's right to compensation is made to depend upon the character of the evidence secured or upon the result of the suit, the same inducement is offered to the procurement of false testimony as where the compensation to a witness is contingent, and such agreements are held illegal.<sup>2</sup> In a *New York* case, however, it was said that not every agreement made by a third person to furnish evidence in a litigation for a compensation contingent upon the result of the litigation was illegal, and such a contract was sustained where the person furnishing the evidence, which was chiefly of a documentary nature, was otherwise interested in the litigation.<sup>3</sup>

(3) *Rewards for Apprehension and Conviction of Criminals.* — The legality of agreements to pay rewards for the apprehension and conviction of criminals, whether by individuals or by the government, has been repeatedly sustained, though attacked on the ground that they tend to the perpetration of perjury.<sup>4</sup>

3. **Agreements in Respect to Compounding Offenses.** — A class of contracts which are held illegal as interfering with the course of public justice comprises those involving the compounding of offenses. This subject has been treated in a separate title.<sup>5</sup>

4. **Contracts Tending to Suppress Criminal Justice.** — Agreements which tend to suppress legal investigation concerning criminal offenses, or the imposition of the due punishment therefor, are illegal, though they do not amount to compounding an offense.<sup>6</sup> Thus agreements to render services to prevent

1. **Agreements to Procure Testimony Sustained.** — *Yeatman v. Dempsey*, 7 C. B. N. S. 628, 97 E. C. L. 628; *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

In *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370, services by one not bound in law to render them in aiding a party in interest in his preparation for trial, by disclosing who were informed upon the material points, and what they would testify to, were held to constitute a sufficient consideration to support a contract to pay therefor.

2. **Contingent Compensation** — *England*. — *Stanley v. Jones*, 7 Bing. 369, 20 E. C. L. 165; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

*California*. — *Patterson v. Donner*, 48 Cal. 369.

*Illinois*. — *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, affirming 44 Ill. App. 331; *Gillett v. Logan County*, 67 Ill. 256.

*Montana*. — *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647.

*New York*. — *Garfield v. Blair*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 340; *Lyon v. Hussey*, 82 Hun (N. Y.) 15.

*Ohio*. — *Getchell v. Welday*, 4 Ohio Dec. 65, 113.

*Pennsylvania*. — *Perry v. Dicken*, 105 Pa. St. 83, 51 Am. Rep. 181.

In *Stanley v. Jones*, 7 Bing. 369, 20 E. C. L. 165, it was held that an agreement made by a third person to communicate to a person claiming to have been defrauded such information as would enable him to recover damages for the fraud, and to exert his influence to procure evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal.

**Actual Effect of Contract Immaterial.** — In *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647, the court, in speaking of such a contract, said: "We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury, but the contract had the tendency and opened the very strong temptation to the procurement of perjury."

3. *Wellington v. Kelly*, 84 N. Y. 543.

4. See the title **REWARDS**, where the subject is treated.

5. See the title **COMPOUNDING OFFENSES**, vol. 6, p. 309.

6. **Agreements Tending to Suppress Legal Investigation.** — *Collins v. Blantern*, 2 Wils. C. Pl. 341; *Ricketts v. Harvey*, 78 Ind. 152, 106 Ind. 564; *Crowder v. Reed*, 80 Ind. 1; *Guilford County v. March*, 89 N. Car. 268; *Arrington v. Sneed*, 18 Tex. 135; *Wight v. Rindskopf*, 43 Wis. 344. In this last case it was held that an agreement to compensate an attorney for services outside the legitimate scope of a professional retainer, in making arrangements with a prosecuting officer as to the testimony to be produced and the punishment to be inflicted on his clients, was against public morality and void.

The relative of a criminal who had been convicted of embezzlement agreed to execute a note to the person from whom the money had been embezzled, in consideration of the latter's petitioning the court to mitigate the punishment of the criminal. It was held that the contract was illegal. *Buck v. Paw Paw First Nat. Bank*, 27 Mich. 203, 15 Am. Rep. 189.

**Agreements to Enable Escape of Criminals.** — In *Dodson v. Swan*, 2 W. Va. 511, 98 Am. Dec. 787, a contract for the sale of property which



the finding of an indictment against one accused or suspected of a crime have been held illegal;<sup>1</sup> and also agreements for services in securing the entry of a *nolle prosequi* to indictments already found.<sup>2</sup>

**5. Agreements to Secure Pardons — In General.** — A contract for the payment for services in securing a pardon for one convicted of a crime is held illegal where it contemplates a resort to any means or influences of a dishonest or illegal character to accomplish such object.<sup>3</sup>

**Services Not Improper.** — It has also been held that any contract for the payment of a consideration for services in securing a pardon was illegal, since where a person interposes his interest and good offices to procure a pardon it ought to be done gratuitously and not from the motive of gain;<sup>4</sup> still, however, by the weight of authority such a contract is held legal where it con-

was entered into between the parties for the purpose of securing funds to the vendor (a criminal) to enable him to escape was held to be illegal, and in an action by the vendor for breach thereof a recovery was denied. See also *Dunkin v. Hodge*, 46 Ala. 523; *Ratcliffe v. Smith*, 13 Bush (Ky.) 173; *Baehr v. Wolf*, 59 Ill. 470.

**1. Services in Preventing Finding of Indictment.** — *Weber v. Shay*, 56 Ohio St. 116, 60 Am. St. Rep. 743; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684. See also *Wildey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

**2. Influence in Securing Dismissal of Criminal Proceedings — England.** — *Edgcombe v. Rodd*, 5 East 294; *Couture v. Marois*, 5 Quebec 96.

*Georgia.* — *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93.

*Indiana.* — *Ricketts v. Harvey*, 78 Ind. 152.

*Kentucky.* — *Averbeck v. Hall*, 14 Bush (Ky.) 505.

*Maine.* — *Shaw v. Reed*, 30 Me. 105.

*Maryland.* — *Wildey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

*Pennsylvania.* — *Ormerod v. Dearman*, 100 Pa. St. 563, 45 Am. Rep. 391.

*Tennessee.* — *Simmons v. Kincaid*, 5 Sneed (Tenn.) 450.

*Vermont.* — *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684.

**Use of "Every Legal and Proper Means."** — In *Averbeck v. Hall*, 14 Bush (Ky.) 505, a contract to "use every legal and proper endeavor to have the criminal prosecutions dismissed" was held to be against public policy.

**Contingent Fee — Settlement of Criminal Charge.** — In *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391, a contract by an attorney at law for a contingent fee to procure the settlement of a criminal charge of fornication was held to be against public policy.

**3. Use of Sinister Means to Secure Pardons.** — *Kribben v. Haycraft*, 26 Mo. 396; *Adams Express Co. v. Reno*, 48 Mo. 264; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 32 Am. Dec. 750. See also *Haines v. Lewis*, 54 Iowa 301, 37 Am. Rep. 202; *O'Reilly v. Cleary*, 3 Mo. App. 186.

**Securing Signatures to Petition for Pardon.** — In *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 32 Am. Dec. 750, a contract for the payment of a consideration for services in obtaining a pardon from the government was held illegal where a portion of the services rendered was the pro-

curing of signatures to a petition for the pardon.

**Contingent Compensation.** — Where the right to compensation for services in procuring a pardon or commutation of sentence is contingent upon the securing of such pardon or commutation, the contract has been held illegal as tending to encourage the use of improper means to accomplish the object, and therefore in conflict with the intelligent and proper exercise of the pardoning power. *Kribben v. Haycraft*, 26 Mo. 396.

In *Moyer v. Cantieny*, 41 Minn. 242, however, a contract with an attorney at law that the latter should endeavor to secure a pardon, and that if successful a stipulated sum should be paid for his services, was held not to be in itself illegal. See also *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172.

**Duty to Disclose Agency.** — It seems that it is the duty of the person attempting to secure executive clemency to disclose his true relation to the subject. *Wildey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

**Commutation of Sentence.** — A contract to obtain a commutation of a sentence stands on the same footing as a contract to secure a pardon. *Kribben v. Haycraft*, 26 Mo. 396.

**4. Use of Proper Means to Secure Pardon — Minority Rule.** — *Norman v. Cole*, 3 Esp. 253; *McGill v. Burnett*, 7 J. J. Marsh. (Ky.) 640; *Brown v. Young*, 7 Ky. L. Rep. 664.

In *Lamplough v. Braithwaite*, Hob. 106, it was held that if A requests B to endeavor to procure for A a pardon, and after B has made such endeavor, A, in consideration thereof, promises to pay a certain sum of money, this is a good consideration. In this case, however, the point before the court was merely whether an executed consideration was sufficient to support a subsequent promise for payment therefor. See the title *CONSIDERATION*, vol. 6, p. 690 *et seq.*

**Where Court Without Jurisdiction.** — In *Thompson v. Wharton*, 7 Bush (Ky.) 563, 3 Am. Rep. 306, an attorney undertook by the use of his personal influence with the military commander to save from impending danger of threatened execution or unauthorized and illegal imprisonment one who had been convicted by a military court which was without authority in the case, and it was held that the object contemplated, as well as the means to be resorted to, was entirely defensible, whether regarded from a legal or a moral standpoint.

templates a resort only to legal and proper measures.<sup>1</sup> And where only proper means are to be used the contract is not rendered illegal because the services are to be performed by one not an attorney at law.<sup>2</sup>

**6. Agreements Relating to Bail in Criminal Cases — In General.** — The policy of the law is rather in favor of the giving of bail in criminal cases, and it has been held that an agreement to secure bail for an accused,<sup>3</sup> or an agreement by an accused to pay a third person for becoming his bail, was not against public policy.<sup>4</sup>

**Indemnification of Sureties.** — The law as to agreements for the indemnification of sureties has already been stated.<sup>5</sup>

**7. Agreements Ousting Jurisdiction of Courts.** — The validity and effect of agreements tending to oust the courts of jurisdiction will be found fully treated under more appropriate titles, to which reference is made in the note below.<sup>6</sup>

**XIII. AGREEMENTS ENCOURAGING LITIGATION — 1. In General.** — The policy of the law may be said to discourage litigation rather than to encourage it, and the courts have not hesitated to hold illegal, as against public policy, contracts in encouragement of litigation.<sup>7</sup>

**1. Contracts to Secure Pardons Upheld — General Rule — Georgia.** — *Bird v. Meadows*, 25 Ga. 251; *Formby v. Pryor*, 15 Ga. 258.

*Massachusetts.* — *Timothy v. Wright*, 8 Gray (Mass.) 522.

*Minnesota.* — *Moyer v. Cantieny*, 41 Minn. 242.

*New Hampshire.* — *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329.

*New York.* — *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172.

**Attorney to Do "What He Can" — Presumption as to Character of Services.** — An attorney may lawfully agree to do what he can to procure a pardon, and can recover for services rendered accordingly. It is to be presumed that proper acts only were contemplated. *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172.

**Use of Copies of Testimony — Pardon by Legislature.** — An agreement for compensation for services in endeavoring to obtain from the legislature the pardon of a prisoner, by the use of authenticated copies of the testimony given by the witnesses for and against him, is not illegal. *Bird v. Breedlove*, 24 Ga. 623, 25 Ga. 251.

**Release of Claim of Damages Against Officer Arising Out of Prosecution.** — See *Timothy v. Wright*, 8 Gray (Mass.) 522.

**2. Services by Other than Attorney.** — *Bird v. Breedlove*, 24 Ga. 623.

**3. Agreement to Secure Bail.** — *Hewlett v. Cincinnati*, etc., R. Co., 65 Miss. 463; *Lehndorf v. Shields*, 13 Mo. App. 486.

**4. Pay for Becoming Bail.** — *Lehndorf v. Shields*, 13 Mo. App. 486; *Fitch v. Vanderveer*, 6 N. Y. Wkly. Dig. 243.

**Recovery of Money Deposited to Procure Bail.** — A contract to go upon a bail bond for a pecuniary consideration is not against public policy, and upon a refusal to justify, the sureties being excepted to, the money so paid may be recovered. *Fitch v. Vanderveer*, 6 N. Y. Wkly. Dig. 243.

**5. The title BAIL AND RECOGNIZANCE (IN CRIMINAL CASES)**, vol. 3, p. 684.

**6. For a general discussion of this topic see the title JURISDICTION.** See also the titles **ARBITRATION AND AWARD**, vol. 2, p. 570 *et seq.*

**LIMITATION OF ACTIONS.** Questions of this kind frequently arise in connection with the by-laws of benevolent or fraternal societies, and policies of insurance. For these phases of the subject see the titles **ACCIDENT INSURANCE**, vol. 1, pp. 325, 327; **BENEFICIARIES (IN INSURANCE)**, vol. 3, p. 1015; **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, vol. 3, p. 1075; **BUILDING AND LOAN ASSOCIATIONS**, vol. 4, pp. 1036, 1053; **FIRE INSURANCE**, vol. 13, pp. 359, 385; **FREEMASONS**, vol. 14, p. 544; **LIFE INSURANCE**; **LIMITATION OF ACTIONS**; **RELIGIOUS SOCIETIES**; **SOCIETIES AND CLUBS**.

**7. Compromise of Litigation.** — Thus the policy of the law favors the compromise of litigation, and agreements entered into for the purpose of preventing such compromises are held to be illegal. *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100; *Boardman v. Thompson*, 25 Iowa 487; *Ellwood v. Wilson*, 21 Iowa 523; *Ford v. Gregson*, 7 Mont. 89; *Lewis v. Lewis*, 15 Ohio 715; *Murray's Estate*, 2 Pa. Dist. 681.

The fact that the object of one of the parties to an assignment of part of a chose in action was to prevent the compromise of the claim will not render the assignment illegal where the other party acted in good faith. *Rucker v. Bolles*, 80 Fed. Rep. 504.

**Runner for Attorneys — Commission on Business Brought.** — *In Vocke v. Peters*, 58 Ill. App. 338, a contract by an attorney to pay to a third person a commission on all legal business brought to the former by the latter was held not to be against public policy. It would seem from the opinion of the court that this contract was attacked solely on the ground, however, that it was for the payment of a contingent fee.

**New York Statute.** — Code Civ. Pro. N. Y., § 74, expressly enacts that an attorney or counselor shall not, either before or after action brought, promise or give a valuable consideration to any person as an inducement to placing, or in consideration for having placed, in his hands a demand of any kind, for the purpose of bringing suit; provided that this section does not apply to an agreement between attorneys and counselors, or either, to divide between themselves a compensation to be received. It has been held under this stat-



2. **Champertous Contracts.** — The validity of contracts in which champerty enters as a consideration has been treated under another title.<sup>1</sup>

3. **Assignments of Choses in Action.** — The common-law rule prohibiting the assignment of choses in action was partly based on the ground that to allow a man to make over to a stranger his right of going to law would be a great encouragement to litigation. This question has been fully treated in another place.<sup>2</sup>

4. **Contracts Relating to Attorney's Fees and Costs.** — The validity and effect of contracts between attorneys and their clients in relation to fees and costs have already been treated.<sup>3</sup>

**Provisions in Instruments of Indebtedness for Attorney Fees in Case of Suit.** — The authorities as to the validity of provisions in instruments of indebtedness for the payment by the debtor of attorney fees or costs of collection in case the indebtedness is collected by suit are presented elsewhere in this work.<sup>4</sup>

**XIV. AGREEMENTS AFFECTING PUBLIC DUTIES OF CITIZENS — 1. In General.** — Certain of the political or *quasi*-political rights of citizens are conferred solely with a view to the public good, and contracts entered into to induce them to act from motives of individual interest instead of from the motive of the public interest have been held to be illegal.<sup>5</sup>

2. **Opposition to Legislation.** — Thus, citizens in petitioning for legislation or in opposing legislation should act solely from the motive of the public interest, and agreements to induce them to act in regard thereto from individual interest have been held illegal.<sup>6</sup> If, however, the opposition is to the passage of a private act and is based solely on the injury to the person agreeing to withdraw his opposition, an agreement to compensate him for such injury in consideration of his withdrawal of opposition may be sustained.<sup>7</sup>

3. **Public Enterprises and Improvements.** — An agreement having for its object the defeat of a public enterprise has been held illegal,<sup>8</sup> and it has also

ute that a contract by an attorney to pay to a third person a compensation for legal business brought to him was illegal, and that no recovery could be had thereon. The court held also that the burden of proof was upon a person seeking to recover on such a contract to show that he was within the exception of the statute. *Hirshbach v. Ketchum*, 5 N. Y. App. Div. 324.

**Bond to Indemnify Defendant in Contemplated Action.** — In *Bundy v. Newton*, (Supm. Ct. Gen. T.) 29 Abb. N. Cas. (N. Y.) 66, a bond given to secure a person living in Illinois from the expense he might incur as defendant in a contemplated libel suit, provided judgment was not recovered against him, in consideration of his coming into New York state so as to enable him to be there sued, was held not to be against public policy.

1. See the title **CHAMPERTY AND MAINTENANCE**, vol. 5, p. 822.

2. See the title **ASSIGNMENTS**, vol. 2, p. 1007.

3. See the titles **ATTORNEY AND CLIENT**, vol. 3, p. 278; **CHAMPERTY AND MAINTENANCE**, vol. 5, p. 815.

4. See the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 98 *et seq.*; **MORTGAGES**.

5. **Contesting Elections.** — Thus, where a person had instituted proceedings to contest the election of a member of parliament, on the ground of bribery, an agreement by the candidate returned as elected for the payment of a consideration in consideration of the withdrawal of the contest was held to be illegal. *Coppock v. Bower*, 4 M. & W. 361.

6. **Forbearance to Obtain Repeal of Law.** — In *Reed v. Pepper Tobacco Warehouse Co.*, 2 Mo. App. 82, an agreement by which an officer agreed to share his fees with a third person in consideration of the latter's forbearance to obtain a repeal of the law creating the office was held illegal. See also *Usher v. McBratney*, 3 Dill. (U. S.) 385.

**Withdrawal of Opposition to Legislation.** — *Martin v. Second, etc.*, St. Pass. R. Co., 3 Phila. (Pa.) 316, 15 Leg. Int. (Pa.) 405; *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676. See also *Low v. Connecticut, etc.*, *Rivers R. Co.*, 45 N. H. 370; *Chippewa Valley, etc.*, R. Co. *v. Chicago, etc.*, R. Co., 75 Wis. 224.

In *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676, an agreement on the part of a corporation to grant to individuals certain privileges in consideration that they would withdraw their opposition to the passage of a legislative act touching the interests of the corporation was held to be against public policy and illegal.

7. **Opposition to Private Act — Compensation for Injury.** — *Taylor v. Chichester, etc.*, R. Co., L. R. 4 H. L. 628, *reversing* 16 W. R. 147. See also *Simpson v. Howden*, 9 Cl. & F. 61; *Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. 593; *Edwards v. Grand Junction R. Co.*, 7 Sim. 337; *Vauxhall Bridge Co. v. Spencer*, Jac. 64.

8. **Agreements to Defeat Public Enterprise.** — Thus, where A conveyed land to B, for the purpose of enabling B, who was a man of



been held illegal for a person to agree, for a consideration to be paid to him, to withdraw his opposition to such an enterprise when he would not have been injured by the carrying out thereof.<sup>1</sup>

**Buying Consent of Property Owners to Petition for Improvements.** — Where the consent of a certain proportion of the property owners is necessary to the making of a public improvement, the expense of which is to be borne by the public in general, or by the property owners benefited by the improvement, it has been held that an agreement for the payment of a consideration to a property owner in consideration of his consent to the improvement was against public policy.<sup>2</sup>

**4. Contracts Affecting Purity of Public Elections** — *a.* **ELECTION OF OFFICERS.** — In the exercise of the right of suffrage in the election of public officers all citizens should be governed solely by a regard for the public welfare, and the courts universally hold illegal contracts for the payment of a consideration to a voter for his support of a candidate, or which otherwise induce a voter to cast his vote from motives of individual interest.<sup>3</sup>

**Contracts for Support During Elections.** — Thus, a contract by a candidate for office to employ a voter or appoint him his deputy in consideration of the latter's support has been held illegal,<sup>4</sup> and also a contract to pay money to a voter in consideration of his services in inducing other voters to vote for the promisor.<sup>5</sup>

influence, to oppose the opening of a street through the land, it was held that equity, on grounds of public policy, would not enforce B's promise to reconvey. *Slocum v. Wooley*, 43 N. J. Eq. 451.

And a proceeding to establish a public highway being in its nature for the benefit of the whole public, a contract made by the party who has commenced such proceeding, for its abandonment, in consideration of money to be paid to him, is contrary to public policy. *Jacobs v. Tobiason*, 65 Iowa 245, 54 Am. Rep. 9.

The people of a county, being anxious to have a railroad built thereto, started a movement for a charter in order to build the road. Subsequently they entered into an agreement with a railway company for the construction of the road by such company, and the latter transferred a portion of its stock for the protection of the county, which voted aid to the construction of the road. It was held that the agreement was not illegal as against public policy on account of its preventing the county from seeking the incorporation of another railroad. *Greene v. Nash*, 85 Me. 148.

**1. Withdrawal of Opposition to Public Enterprise.** — Thus a contract on the part of a caveator to withdraw his opposition to the laying out of a highway, in consideration of money to be paid to him, is against the policy of the law. *Smith v. Applegate*, 23 N. J. L. 352.

**Rule Otherwise Where Opposition Is on Account of Injury to Be Suffered by Opposer.** — *Weeks v. Lippencott*, 42 Pa. St. 474. See also *Makemson v. Kauffman*, 35 Ohio St. 444; *Corns v. Corns*, 137 Ind. 201; *Hill v. Hill*, 100 N. Y. 148; *R. Co.*, 149 N. Y. 154.

**2. Buying Consent of Property Owners for Improvement.** — *Doane v. Chicago City R. Co.*, 160 Ill. 22, reversing 51 Ill. App. 353; *Maguire v. Smock*, 42 Ind. 1, 13 Am. Rep. 353; *Miller v. Rice*, 9 Ky. L. Rep. 620; *Howard v. First Independent Church*, 18 Md. 451; *Dean v. Clark*, 80 Hun (N. Y.) 80.

**3. Contracts to Influence Voters** — *Alabama.* — *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17.

*Illinois.* — *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153.

*Nevada.* — *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548.

*Pennsylvania.* — *Howard v. Jacoby*, 3 Pa. Co. Ct. 436.

*Vermont.* — *Nichols v. Mudgett*, 32 Vt. 546.

**As to the Effect of Such Contracts on the Election**, see the title **ELECTIONS**, vol. 10, p. 780.

**Wagers on Elections.** — See as to this matter the title **GAMBLING CONTRACTS**, vol. 14, p. 597.

**Illustrations of Rule** — **Loan of Money to Bribe Voters.** — See *Deskins v. Phillips*, 11 Ky. L. Rep. 485.

**Furnishing Liquor on Request to Influence Voters.** — See *Duke v. Asbee*, 11 Ired. L. (33 N. Car.) 112.

**Agreement Between Rival Candidates for Division of Fees of Office.** — *Glover v. Taylor*, 38 La. Ann. 634.

**Agreement by Candidate to Divide Emoluments with Another for His Influence in Securing Former's Election.** — *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548.

**Agreement for Withdrawal of Candidacy for Personal Gain.** — *Robinson v. Kalbfleisch*, 5 Thomp. & C. (N. Y.) 212. See also *Benedict v. Ehler*, *Lewis Cr. L.* 126; *Ham v. Smith*, 87 Pa. St. 63.

**4. Contracts to Appoint in Consideration of Support.** — *Benedict v. Ehler*, *Lewis Cr. L.* 126; *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17; *Stout v. Ennis*, 28 Kan. 706.

**Election in Foreign State.** — It is immaterial whether the contract relates to an election in the state in which the contract is sought to be enforced or in another state. *Stout v. Ennis*, 28 Kan. 706.

**5. Pay for Services in Support of Candidates** — *California.* — *Martin v. Wade*, 37 Cal. 168.

*Nevada.* — *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548.

**Support to Secure Nomination.** — And a contract for the payment of money for the support of the promisee in securing the nomination of the promisor as a candidate for office has been held illegal.<sup>1</sup>

**Proper Services in the Conduct of Elections.** — The policy of the law for the preservation of the purity of elections does not, however, prohibit all contracts for services in relation to elections. Thus, it has been held that it was not illegal to agree to compensate a speaker for making speeches and openly advocating the election of the promisor to the office of Vice-President of the United States;<sup>2</sup> and also it has been held lawful to employ a person to look after the general organization of a political party.<sup>3</sup>

**Statutory Provisions Relating to Election Expenditures.** — In some jurisdictions there are statutes which expressly prohibit certain contracts in regard to elections, and of course contracts in violation thereof are illegal.<sup>4</sup>

**b. ELECTIONS SUBMITTING QUESTIONS TO VOTERS.** — Where the election does not involve the incumbency of a public office, but instead is for the submission of some question to the voters, such as the removal of a county-seat, or whether municipal aid shall be voted to the construction of a railroad, etc., public policy requires that the voters should be actuated solely by the question of the public welfare, and contracts for special benefit to particular voters to influence their votes are held illegal.<sup>5</sup> The rule is otherwise where the advantages offered are for the benefit of the public and not for that of the individual voter.<sup>6</sup>

**XV. CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE.** — The law upon this subject falls more appropriately under other titles in this work, to which reference is made in the note below.<sup>7</sup>

**XVI. EFFECT OF EXISTENCE OF WAR UPON CONTRACTS — 1. War Between Nations — Trading with Enemies.** — It is the universal rule that the existence of a state of war places an entire restraint upon the commerce and friendly intercourse between the citizens of the belligerent governments, and contracts arising out of intercourse between them are held illegal.<sup>8</sup>

*New Jersey.* — *Swayze v. Hull*, 8 N. J. L. 54, 14 Am. Dec. 399.

*Tennessee.* — *Whitman v. Ewin*, (Tenn. Ch. 1897) 39 S. W. Rep. 742, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 879.

*Vermont.* — *Nichols v. Mudgett*, 32 Vt. 546.

**1. Support for Nomination.** — *Liness v. Hesling*, 44 Ill. 113, 92 Am. Dec. 153; *Keating v. Hyde*, 23 Mo. App. 555.

**2. Hiring Speakers.** — *Murphy v. English*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 362. See also *Keating v. Hyde*, 23 Mo. App. 555; *Howard v. Jacoby*, 3 Pa. Co. Ct. 436.

**3. Organization of Party.** — *Sizer v. Daniels*, 66 Barb. (N. Y.) 426; *Smith v. Babcock*, 3 N. Y. App. Div. 6.

**4. English Statute.** — See *Ribbans v. Crickett*, 1 B. & P. 264; *Ward v. Nanney*, 3 C. & P. 399, 14 E. C. L. 369; *Richardson v. Webster*, 3 C. & P. 128, 14 E. C. L. 238.

**Quebec Election Acts.** — See *Dansereau v. St. Louis*, 18 Can. Sup. Ct. 587.

**New York Statute.** — See *Jackson v. Walker*, 5 Hill (N. Y.) 27, 7 Hill (N. Y.) 387; *Hurley v. Van Wagner*, 28 Barb. (N. Y.) 109; *Sizer v. Daniels*, 66 Barb. (N. Y.) 426; *Foley v. Speir*, 100 N. Y. 553; *Murphy v. English*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 362; *Smith v. Babcock*, 3 N. Y. App. Div. 6.

**Pennsylvania Statute.** — See *Howard v. Jacoby*, 3 Pa. Co. Ct. 436. See also *Wilkes Barre v. Rockafellow*, 171 Pa. St. 177, 50 Am. St. Rep. 795; *Ham v. Smith*, 87 Pa. St. 63.

**5. Submission of Propositions to Voters — Municipal Aid.** — *Wilcox v. Puryear*, 12 Ky. L. Rep. 556; *Dean v. Clark*, 80 Hnn (N. Y.) 80. See also *Burden Bank v. Phelps*, 5 Kan. App. 685.

**Removal of County-seat.** — Upon this point, see the title COUNTY-SEAT, vol. 7, p. 1041.

**Location of Park.** — In *Merchants' Sav., etc., Co. v. Goodrich*, 75 Ill. 554, a contract for the sale of land dependent upon the result of an election upon the question of locating a public park was held void upon the ground of public policy, the result of the election being an essential part of the consideration.

**6.** This question, so far as it concerns the location or removal of county-seats, is fully treated under the title COUNTY-SEAT, vol. 7, p. 1041. See also the title MUNICIPAL AID, for that phase of the subject.

**7.** See generally the title NEGLIGENCE. And for specific applications see such titles as CARRIERS OF GOODS, vol. 5, p. 288; CARRIERS OF LIVE STOCK, vol. 5, p. 443; CARRIERS OF PASSENGERS, vol. 5, p. 615; FELLOW SERVANTS, vol. 12, p. 977; MASTER AND SERVANT; TELEGRAPH AND TELEPHONE COMPANIES.

**8. Trading with Enemies Illegal — England.** — *Potts v. Bell*, 8 T. R. 548.

*Connecticut.* — *Bulkley v. Derby Fishing Co.*, 1 Conn. 571.

*Iowa.* — *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193.

*Massachusetts.* — *Musson v. Fales*, 16 Mass.



**Trade under License of Government.** — The principle rendering illegal contracts arising out of trade with the enemy being based on the injury which would result from supplying the enemy thereby with the sinews of war, it therefore follows that the government to which a citizen owes allegiance may license such trade, when it is considered beneficial to such government, and contracts arising out of a trade so licensed will be enforced in the courts of the government from which the license emanates.<sup>1</sup>

**Ignorance of Nationality of Party.** — Where an enemy trading with a citizen of the government of the forum dealt with him in good faith, relying upon the representations of the latter that he was a citizen of a neutral power, the enemy was allowed after the return of peace to recover on the contract in a court of the government with which he was at war.<sup>2</sup>

**Trade with Neutrals.** — It is equally clear that the mere existence of war does not affect the right of citizens of one of the belligerent powers to trade with neutrals, though the enemy may incidentally derive benefit from such trade,<sup>3</sup> unless it is carried on in connection with or subservient to the interests of the enemy.<sup>4</sup>

**License from Enemy.** — And the fact that the trade to a neutral port is carried on under a license from the enemy will not render the trade illegal so as to invalidate contracts arising out of such trade.<sup>5</sup>

**2. Insurrection.** — All contracts in aid of an insurrection are of course illegal.<sup>6</sup> In the United States the civil war of 1861-1865 gave rise to many

332. See also *Coolidge v. Inglee*, 13 Mass. 26. *New Hampshire*. — *Chauncey v. Yeaton*, 1 N. H. 151; *Beach v. Kezar*, 1 N. H. 184.

**Purchase of Enemy's Real Estate.** — The purchase of an enemy's real estate, situated within the territorial limits of the government with which he is at war, by a citizen of the latter government, is unlawful because it furnishes to the enemy the sinews of war and may embarrass the enforcement of any acts of confiscation to which it may be found expedient to resort. *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193.

**Services in Aid of Trade.** — Trading with the enemy being illegal, one who knowingly renders services in aid of such a trade cannot recover therefor. This rule was applied to a case where a person sought to recover for the keep of cattle which he knew were to be sold by the owner to the enemy during the war of 1812. *Beach v. Kezar*, 1 N. H. 184.

1. **Trade under License of Government.** — *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193.

2. **Ignorance of Nationality of Party.** — *Musson v. Fales*, 16 Mass. 332. See *infra*, this title, *Enforcement of and Relief from Illegal Contracts*.

3. **Trade with Neutrals.** — *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; *The Liverpool Packet*, 1 Gall. (U. S.) 513, 15 Fed. Cas. No. 8,406.

**Seizures of Vessels.** — The question of the legality of trade to a neutral port has chiefly arisen in cases of the seizure by the government of the vessels by which the trade is carried on. The cases will be found collected in their proper place under the title INTERNATIONAL LAW.

4. **Trade with Neutral Subservient to Interest of Enemy.** — *The Julia*, 1 Gall. (U. S.) 594, 14 Fed. Cas. No. 7,575; *The Liverpool Packet*, 1 Gall. (U. S.) 513, 15 Fed. Cas. No. 8,406.

5. **Insurance on Vessel Trading to Neutral Port**

— **License from Enemy.** — *Bulkley v. Derby Fishing Co.*, 1 Conn. 571.

In *U. S. v. Schooner Matilda*, 5 Hughes (U. S.) 44, 26 Fed. Cas. No. 15,741, 4 Am. L. J. (Hall.) 478, it was decided by the chief justice of the United States that a license from a public enemy did not of itself render the voyage illegal. The question in this case as to the legality of the voyage arose, however, in proceedings for the confiscation of the vessel.

In *The Julia*, 1 Gall. (U. S.) 594, 14 Fed. Cas. No. 7,575, there is a dictum by Judge Story to the effect that such a license would render the voyage illegal, and the vessel subject to confiscation. See the title INTERNATIONAL LAW.

**Sale of License from Enemy for Trade with Neutral.** — In *Patton v. Nicholson*, 3 Wheat. (U. S.) 204, however, it was held that, as the use of a license or pass from an enemy to trade with a neutral was unlawful, a contract for the sale of such a license between citizens owing allegiance to the government of the forum was also illegal, and a recovery could not be had for the purchase price agreed to be paid therefor.

But in *Coolidge v. Inglee*, 13 Mass. 26, a license which was to protect a ship from capture and condemnation by the enemy while engaged in a trade with a neutral power was held to be a sufficient legal consideration for a promissory note given in payment therefor.

6. **Contracts in Aid of Insurrection Held Illegal** — *Radich v. Hutchins*, 95 U. S. 210; *Texas v. White*, 7 Wall. (U. S.) 700; *Taylor v. Thomas*, 22 Wall. (U. S.) 479.

*Alabama*. — *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Oxford Iron Co. v. Quinchett*, 44 Ala. 489.

*Louisiana*. — *Glasscock v. Wells*, 23 La. Ann. 517.



decisions in which the effect of such war upon contracts was called in question. Under the plan of this work this topic falls more properly to another title.<sup>1</sup>

**XVII. RESTRAINT OF TRADE.** — The question of the legality of contracts as being in restraint of trade will be found treated in another place.<sup>2</sup>

**XVIII. TRADE COMBINATIONS, MONOPOLIES, ETC.** — The question as to the effect of contracts in furtherance of trade combinations, monopolies, and corporate trusts will be found treated in another part of this work.<sup>3</sup>

**XIX. RESTRAINTS UPON ALIENATION.** — The law concerning restraints on the alienation of property will be presented under another title.<sup>4</sup>

**XX. RESTRAINTS UPON FREEDOM OF TESTAMENTARY DISPOSITION.** — The question of the validity of contracts involving restraints upon the freedom of testamentary disposition has been treated in another place.<sup>5</sup>

**XXI. CONTRACTS INDIRECTLY ILLEGAL** — 1. **General Principles.** — Though the subject-matter of a contract and the consideration be legal, still the contract may be rendered illegal by reason of the object of the parties in entering into the contract. The decisions in regard to this question are not in accord, but the following rules may be said to be established by the weight of authority.

*a. MUTUALITY OF INTENT.* — To render a contract, innocent in itself, illegal on the ground that it was entered into to further an illegal purpose, it is held that such intent must have been mutual.<sup>6</sup> Where the party who is ignorant of the illegal purpose of the other party discovers such purpose

*Missouri.* — State *v.* Hays, 49 Mo. 604.

*New York.* — Clements *v.* Yturria, 81 N. Y. 285; Waitzfelder *v.* Kahnweiler, 56 Barb. (N. Y.) 300.

*North Carolina.* — Brickell *v.* Halifax County, 81 N. Car. 240; Martin *v.* McMillan, 63 N. Car. 486; Lance *v.* Hunter, 72 N. Car. 178, 21 Am. Rep. 454; Cronly *v.* Hall, 67 N. Car. 9, 12 Am. Rep. 597.

*Tennessee.* — Wood *v.* Stone, 2 Coldw. (Tenn.) 369, 88 Am. Dec. 601; Gardner *v.* Barger, 4 Heisk. (Tenn.) 668.

**Contract for Substitute in Confederate Army.** — A contract to convey land in consideration that one of the parties should serve in the Confederate army as a substitute during the war was in aid of the rebellion, and as such against public policy, and not enforceable. Lance *v.* Hunter, 72 N. Car. 178, 21 Am. Rep. 454.

1. See the title WAR.

2. See the title RESTRAINT OF TRADE.

3. See the title MONOPOLIES.

4. See the title RESTRAINTS ON ALIENATION.

5. See the title DEBTS OF DECEDENTS, vol. 8, p. 1017 *et seq.* See also the title WILLS.

6. **Necessity for Mutuality of Illegal Intent** — *United States.* — Roundtree *v.* Smith, 108 U. S. 269; Irwin *v.* Williar, 110 U. S. 499; Bartlett *v.* Smith, 13 Fed. Rep. 263; Carter-Crume Co. *v.* Peurrung, 86 Fed. Rep. 439.

*Illinois.* — Pixley *v.* Boynton, 79 Ill. 351.

*Indiana.* — Wright *v.* Crabbs, 78 Ind. 487.

*Iowa.* — Brunswick *v.* Valteau, 50 Iowa 120, 32 Am. Rep. 119; Dorsey *v.* Langworthy, 3 Greene (Iowa) 341; Louisville Second Nat. Bank *v.* Curren, 36 Iowa 555.

*Kansas.* — Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730.

*Kentucky.* — Steele *v.* Curle, 4 Dana (Ky.) 381.

*Louisiana.* — Fee *v.* Gonegal, 19 La. Ann. 263.

*Massachusetts.* — Adams *v.* Coulliard, 102 Mass. 167.

*Michigan.* — Gregory *v.* Wendell, 40 Mich. 432; Niagara Falls Brewing Co. *v.* Wall, 98 Mich. 159; Quirk *v.* Thomas, 6 Mich. 76.

*New Hampshire.* — Holden *v.* Brooks, 66 N. H. 184.

*New York.* — Donovan *v.* Compagnie Generale Trans-Atlantique, 39 N. Y. Super. Ct. 519.

*Tennessee.* — Atlanta Guano Co. *v.* Phipps, (Tenn. Ch. 1897) 41 S. W. Rep. 1087.

*Texas.* — Gerhard *v.* Neese, 36 Tex. 635; Kottwitz *v.* Alexander, 34 Tex. 689; House *v.* Soder, 36 Tex. 629.

**Dealings in Futures.** — Thus, a transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood it and meant it. Bibb *v.* Allen, 149 U. S. 481. See the title GAMBLING CONTRACTS, vol. 14, p. 576.

**Purchases to Create Monopoly.** — In Carter-Crume Co. *v.* Peurrung, 86 Fed. Rep. 439, it was held that a vendor could recover for goods sold though the sale was one step in an illegal scheme by the vendee for monopolizing the trade in a commodity sold, where the vendor was ignorant of such purpose on the part of the vendee.

**Shipment of Goods to Be Smuggled** — **Action by Shipper.** — In an action against a carrier for the loss of goods shipped, it was held that it was no defense that the shipper intended to smuggle the goods on their arrival in the United States, where the carrier was not aware, at the time of shipment, of such intent on the part of the shipper. Donovan *v.* Compagnie Generale Trans-Atlantique, 39 N. Y. Super. Ct. 519.

before the contract has been executed, it has been held that he may rescind the contract without liability in damages as for a breach.<sup>1</sup>

*b. MERE KNOWLEDGE OF ILLEGAL OBJECT OF ONE PARTY.* — The decisions are in conflict as to the effect of the mere knowledge by one of the parties to an otherwise innocent contract, of the unlawful purpose of the other party in entering into the contract.

**General Rule.** — The rule laid down by the weight of authority, especially in the *United States*, is that though the contract is entered into by one of the parties for the furtherance of an illegal purpose, the contract will not be rendered illegal as to the other party, though he had knowledge of such illegal purpose, provided he does nothing in furtherance thereof.<sup>2</sup>

**Minority Rule.** — In many decisions, however, the mere knowledge of the illegal purpose of the other party has been held to render the contract illegal.<sup>3</sup>

*c. ACTS IN FURTHERANCE OF ILLEGAL PURPOSE.* — If, however, the party having knowledge of the illegal purpose of the other party does anything in furtherance of such purpose, the decisions all agree that the contract will be rendered illegal.<sup>4</sup>

*d. COMPLETION OF ILLEGAL PURPOSE A PART OF CONTRACT.* — And the same is true where the completion of the illegal purpose is a part of the contract.<sup>5</sup>

*e. ILLEGAL PURPOSE COMMISSION OF CRIME OF GREAT MAGNITUDE.* — And it seems that when the illegal purpose of the party is the commission

**1. Rescission** — *United States*. — *Church v. Proctor*, 66 Fed. Rep. 240.

*Michigan*. — *Niagara Falls Brewing Co. v. Wall*, 98 Mich. 158.

*Pennsylvania*. — *Kountz v. Citizens' Oil Refining Co.*, 72 Pa. St. 392; *Brintnal v. Springer*, 1 Lanc. Bar (Pa.) Feb. 19, 1870.

*Texas*. — *Anheuser-Busch Brewing Assoc. v. Houck*, (Tex. Civ. App. 1894) 27 S. W. Rep. 692.

*Canada*. — *Pringle v. Napanee*, 43 U. C. Q. B. 285.

**2. Knowledge of Other Party's Illegal Object** — **Majority Rule** — *England*. — *Hodgson v. Temple*, 5 Taunt. 181, 1 E. C. L. 67; *Pellecat v. Angell*, 2 C. M. & R. 311; *Holman v. Johnson*, 1 Cowp. 341; *Faikney v. Reynous*, 4 Burr. 2069.

*United States*. — *Green v. Collins*, 3 Cliff. (U. S.) 494.

*Kentucky*. — *Steele v. Curle*, 4 Dana (Ky.) 389.

*Maryland*. — *Cheney v. Duke*, 10 Gill & J. (Md.) 11.

*Michigan*. — *Webber v. Donnelly*, 33 Mich. 469.

*Missouri*. — *Curran v. Downs*, 3 Mo. App. 468; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 135.

*New Hampshire*. — *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

*New York*. — *Tracy v. Talmage*, 14 N. Y. 102.

*Tennessee*. — *McGavock v. Puryear*, 6 Coldw. (Tenn.) 35.

*Texas*. — *Bishop v. Honey*, 34 Tex. 245.

*Vermont*. — *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156; *Tuttle v. Holland*, 43 Vt. 542. Compare *Territt v. Bartlett*, 21 Vt. 184.

*Langton v. Hughes*, 1 M. & S. 593, is undoubtedly in conflict with the cases above cited. In this case a druggist sold to a brewer drugs which he knew that the brewer intended

using in the manufacture of his beer, contrary to the statutes 42 Geo. III. and 51 Geo. III., and it was held that the druggist could not recover the purchase price.

**3. Minority Rule** — *United States*. — *Hanauer v. Doane*, 12 Wall. (U. S.) 342.

*Alabama*. — *Milner v. Patton*, 49 Ala. 423 (*overruling* *Thedford v. McClintock*, 47 Ala. 647); *Shepherd v. Reese*, 42 Ala. 329.

*Indiana*. — *Woodford v. Hamilton*, 139 Ind. 481; *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596. Compare *Bickel v. Sheets*, 24 Ind. 1; *Cummings v. Henry*, 10 Ind. 109.

*Iowa*. — *Tolman v. Johnson*, 43 Iowa 127; *Louisville Second Nat. Bank v. Curren*, 36 Iowa 555.

*Maine*. — *Wilson v. Stratton*, 47 Me. 120.

*Massachusetts*. — *Suit v. Woodhall*, 113 Mass. 391; *Adams v. Coulliard*, 102 Mass. 167; *Webster v. Munger*, 8 Gray (Mass.) 584; *Graves v. Johnson*, 156 Mass. 211, 32 Am. St. Rep. 446; *Finch v. Mansfield*, 97 Mass. 89; *Weil v. Golden*, 141 Mass. 364. Compare *M'Intyre v. Parks*, 3 Met. (Mass.) 207; *Dater v. Earl*, 3 Gray (Mass.) 483.

*Nebraska*. — *Storz v. Finklestein*, 46 Neb. 577.

*Ohio*. — *Burns v. Seep*, 4 Cinc. L. Bul. 1067, 7 Ohio Dec. (Reprint) 708; *Spurgeon v. McElwain*, 6 Ohio 442, 27 Am. Dec. 266; *Kusworm v. Hess*, 1 Cinc. L. Bul. 315, 7 Ohio Dec. (Reprint) 224.

*Canada*. — *Furlong v. Russell*, 24 N. Bruns. 478. Compare *Gosline v. Dunbar*, 32 N. Bruns.

**4. Aid in Furtherance of Illegal Object.** — *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Reed*, 5 T. R. 509.

**5. Contract Contemplating Carrying Out of Illegal Object.** — *Lightfoot v. Tenant*, 1 B. & P. 551; *Cannan v. Bryce*, 3 B. & Ald. 170, 5 E. C. L. 255; *M'Kinnell v. Robinson*, 3 M. & W. 434; *Talmage v. Pell*, 7 N. Y. 328.



of a crime of great magnitude as distinguished from an act *malum prohibitum* or a crime of inferior grade, then the mere knowledge on the part of the other party of such purpose will render the contract illegal.<sup>1</sup>

2. **Application of Principles — Scope of Section.** — The rules set forth above have been applied in a great variety of transactions, but it would be manifestly inappropriate in a general article, such as this, to present a treatment of them in detail. In this section, as throughout the article, indeed, the purpose is to present as far as practicable general principles, leaving the exceptions, modifications, and special applications to titles dealing with the special branches of the subject. For example, many cases have arisen in connection with loans, leases, sales of personality and realty, contracts to evade payment of taxes, contracts of agency, etc., all of which will be found adequately discussed elsewhere in this work.<sup>2</sup>

**XXII. ENTIRE AND DIVISIBLE CONTRACTS AS AFFECTED BY PARTIAL ILLEGALITY** — 1. **Entire and Divisible Contracts Defined.** — A contract may be said to be entire when, by its terms, nature, and purposes, it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor intended by the parties to be so.<sup>3</sup>

2. **Effect of Partial Illegality in Entire Contract** — *a.* **IN GENERAL.** — Where a contract which is entire contains a stipulation or agreement which is illegal, and which therefore is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and the other provisions of the contract enforced; the illegal stipulation or agreement in such a case penetrates and corrupts the whole contract and vitiates it as an entirety.<sup>4</sup>

1. **Object Commission of Crime of Great Magnitude.** — *Hanauer v. Doane*, 12 Wall. (U. S.) 342, *distinguishing* *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Tatum v. Kelly*, 25 Ark. 209, 94 Am. Dec. 717. See also *Green v. Collins*, 3 Cliff. (U. S.) 494; *Milner v. Patton*, 49 Ala. 423; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana (Ky.) 381; *Anheuser-Busch Brewing Assoc. v. Mason*, 44 Minn. 318, 20 Am. St. Rep. 580; *Lewis v. Latham*, 74 N. Car. 283.

2. See such titles as AGENCY, vol. 1, p. 1114; BROKERS, vol. 4, p. 981; FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 671; GAMBLING CONTRACTS, vol. 14, p. 576; INTOXICATING LIQUORS; LEASES; MONOPOLIES; REVENUE LAWS; SALES; STOCKBROKERS; TAXATION; VENDOR AND PURCHASER.

3. **Separable and Divisible Contracts.** — See the title CONTRACTS, vol. 7, p. 95. See also the title INTERPRETATION AND CONSTRUCTION.

4. **Partial Illegality in Entire Contract** — *California*. — *Prost v. More*, 40 Cal. 347; *Santa Clara Valley Mill, etc., Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211; *Norris v. Harris*, 15 Cal. 226; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

*Colorado*. — *Brown v. Kennedy*, 12 Colo. 235. *Indiana*. — *Schmueckle v. Waters*, 125 Ind. 265; *Kain v. Bare*, 4 Ind. App. 440.

*Iowa*. — *Osgood v. Bauder*, 75 Iowa 550; *Dillon v. Allen*, 46 Iowa 300, 26 Am. Rep. 145; *Baird v. Boehner*, 77 Iowa 622; *Gipps Brewing Co. v. De France*, 91 Iowa 108, 51 Am. St. Rep. 329; *Casady v. Woodbury County*, 13 Iowa 113.

*Massachusetts*. — *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339; *Holt v. O'Brien*, 15 Gray (Mass.) 311.

*Michigan*. — *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355.

*Minnesota*. — *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

*Montana*. — *Ford v. Gregson*, 7 Mont. 89.

*New Hampshire*. — *Bliss v. Brainard*, 41 N. H. 256; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423.

*New York*. — *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Brown v. Treat*, 1 Hill (N. Y.) 225; *Suydam v. Smith*, 7 Hill (N. Y.) 182; *Miller v. Scherder*, 2 N. Y. 262; *Lambert v. Snow*, (C. Pl. Gen. T.) 17 How. Pr. (N. Y.) 517; *McGovern v. Payn*, 32 Barb. (N. Y.) 91; *Brown v. Brown*, 34 Barb. (N. Y.) 533; *Dicker v. Morton*, 1 Redf. (N. Y.) 477; *Foley v. Speir*, 100 N. Y. 552, *affirming* 11 Daly (N. Y.) 254.

*Ohio*. — *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103. *Compare* *Lange v. Werk*, 2 Ohio St. 519.

*Pennsylvania*. — *Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422.

*Texas*. — *Kottwitz v. Alexander*, 34 Tex. 689; *Arrington v. Sneed*, 18 Tex. 135.

**Entire Contract for Services.** — A plaintiff cannot recover for his personal services, portions of which were rendered in the employment of selling liquors unlawfully, the contract of service being an entirety. *Goodwin v. Clark*, 65 Me. 280.

**Contracts for Lobbying Services.** — An agreement to pay for services as lobby agent cannot be sifted, and the legal services rendered



**b. CUMULATIVE CONSIDERATIONS WITHOUT APPORTIONMENT.** — Where the consideration of a contract consists of several different elements, and no apportionment or separate valuation, or means of apportionment or valuation, of the different elements of the consideration is made by the parties, the entire contract will be held illegal, if one of the elements of the consideration is immoral or against public policy.<sup>1</sup>

under or in pursuit of it separated from the illegal, and a recovery had therefor. Where an entire contract contains an element which is legal and one which is void as against public policy, an action cannot be maintained on the legal consideration. *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Brown v. Brown*, 34 Barb. (N. Y.) 533.

**Sunday Laws.** — An action cannot be maintained to recover any compensation for labor and services, not of necessity or mercy, performed on Saturday, Sunday, and Monday, under an entire contract made in contemplation of part performance on Sunday in violation of the *New Hampshire* Sunday laws. *Williams v. Hastings*, 59 N. H. 373.

**1. Cumulative Considerations Without Apportionment — England.** — *Walrond v. Walrond*, 4 Jur. N. S. 1099; *Bridge v. Cage*, Cro. Jac. 103; *Scott v. Gillmore*, 3 Taunt. 226; *Featherston v. Hutchinson*, Cro. Eliz. 199; *Rex v. Northwingtonfield*, 1 B. & Ad. 912, 20 E. C. L. 508; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 235; *Waite v. Jones*, 1 Scott 730, 1 Bing. N. Cas. 656, 27 E. C. L. 532; *Willyams v. Bullmore*, 32 Beav. 574; *Card v. Hope*, 2 B. & C. 661, 9 E. C. L. 209; *Parkin v. Dick*, 11 East 502; *Hopkins v. Prescott*, 4 C. B. 579, 56 E. C. L. 579.

*United States.* — *Trist v. Child*, 21 Wall. (U. S.) 441.

*Alabama.* — *Pettit v. Pettit*, 32 Ala. 288; *Wynne v. Whisenant*, 37 Ala. 46; *Dawkins v. Gill*, 10 Ala. 206.

*California.* — *Valentine v. Stewart*, 15 Cal. 387.

*Colorado.* — *Hoyt v. Macon*, 2 Colo. 502; *Pueblo, etc., R. Co. v. Taylor*, 6 Colo. 1, cited in *Brown v. Kennedy*, 12 Colo. 241.

*Georgia.* — *Chandler v. Johnson*, 39 Ga. 85; *Allen v. Pearce*, 84 Ga. 606.

*Illinois.* — *Halhaus v. Kuntz*, 17 Ill. App. 434; *Wolf v. Fletemeyer*, 83 Ill. 418; *Paton v. Stewart*, 78 Ill. 481; *St. Louis, etc., R. Co. v. Mathers*, 104 Ill. 257; *Tobey v. Robinson*, 99 Ill. 222; *Miles v. Andrews*, 40 Ill. App. 155; *Boehmer v. Foval*, 55 Ill. App. 71, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 887; *Tenney v. Foote*, 95 Ill. 99; *Webster v. Sturges*, 7 Ill. App. 560; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117.

*Indiana.* — *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *Ricketts v. Harvey*, 106 Ind. 541; *Leather v. Picketts Lodge*, 106 Ind. 541; *Leather v. Picketts Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Ricketts v. Harvey*, 106 Ind. 564; *Saxon v. Wood*, 4 Ind. App. 242; *Madison Ins. Co. v. Forsythe*, 2 Ind. 483.

*Iowa.* — *Koster v. Seney*, 99 Iowa 584; *Taylor v. Pickett*, 52 Iowa 467; *Baird v. Bochner*, 77 Iowa 622.

*Kansas.* — *McBratney v. Chandler*, 2 Kan. 692, 31 Am. Rep. 213; *Gerlach v. Skinner*, 34 Kan. 86; *Flersheim v. Cary*, 39 Kan. 178.

*Kentucky.* — *Ft. Worth First Nat. Bank v. Payne*, (Ky. 1897) 42 S. W. Rep. 736; *Donallen v. Lennox*, 6 Dana (Ky.) 991; *Collins v. Merrell*, 2 Met. (Ky.) 164; *Swan v. Chandler*, 8 B. Mon. (Ky.) 98; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583; *Brown v. Langford*, 3 Bibb (Ky.) 497; *Kimbrough v. Lane*, 11 Bush (Ky.) 556.

*Louisiana.* — *Ozanne v. Haber*, 30 La. Ann. 1384.

*Massachusetts.* — *Coolidge v. Blake*, 15 Mass. 429; *Perkins v. Cummings*, 2 Gray (Mass.) 258; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339; *Robinson v. Green*, 3 Met. (Mass.) 159; *Bliss v. Negus*, 8 Mass. 46.

*Michigan.* — *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355; *Wisner v. Bardwell*, 38 Mich. 278; *Snyder v. Willey*, 33 Mich. 483.

*Missouri.* — *Friend v. Porter*, 50 Mo. A. p. 89; *Bick v. Seal*, 45 Mo. App. 475; *Peltz v. Long*, 40 Mo. 532; *Sumner v. Summers*, 54 Mo. 340.

*Nebraska.* — *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644.

*New Hampshire.* — *Hinds v. Chamberlin*, 6 N. H. 225; *Bixby v. Moor*, 51 N. H. 402; *Clark v. Ricker*, 14 N. H. 44.

*New York.* — *Steinfeld v. Levy*, (Brooklyn City Ct. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 26; *Brown v. Brown*, 34 Barb. (N. Y.) 533; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397; *Pepper v. Haight*, 20 Barb. (N. Y.) 429; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815; *Saratoga County Bank v. King*, 44 N. Y. 87; *Foley v. Speir*, 100 N. Y. 552; *Crawford v. Morrell*, 8 Johns. (N. Y.) 253; *Burt v. Place*, 6 Cow. (N. Y.) 431; *Sanderson v. Goodrich*, 46 Barb. (N. Y.) 616; *Mills v. Mills*, 36 Barb. (N. Y.) 474; *Saratoga County Bank v. King*, 44 N. Y. 87; *Bigelow v. Law*, (Brooklyn City Ct.) 5 Abb. Pr. (N. Y.) 455.

*Ohio.* — *Widoe v. Webb*, 20 Ohio St. 434, 5 Am. Rep. 664; *Ohio v. Board of Education*, 35 Ohio St. 519; *Raguet v. Roll*, 7 Ohio 77; *McQuade v. Rosecrans*, 36 Ohio St. 442.

*Pennsylvania.* — *Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422; *Bredin's Appeal*, 92 Pa. St. 241, 37 Am. Rep. 677; *Lancaster County v. Fulton*, 128 Pa. St. 48; *Moss v. Jones*, 1 W. N. C. (Pa.) 96.

*Rhode Island.* — *Sullivan v. Horgan*, 17 R. I. 109.

*South Carolina.* — *Massey v. Wallace*, 32 S. Car. 149.

*Tennessee.* — *Potts v. Gray*, 3 Coldw. (Tenn.) 468, 91 Am. Dec. 294.

*Texas.* — *Wegner v. Biering*, 65 Tex. 506; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Reed v. Brewer*, 90 Tex. 144; *Edwards County v. Jennings*, 89 Tex. 618, affirming (Tex. Civ. App. 1895) 33 S. W. Rep. 585; *Kottwitz v. Alexander*, 34 Tex. 689; *Rayner Cattle Co. v. Bedford*, 91 Tex. 642.

*Vermont.* — *Powers v. Skinner*, 34 Vt. 274, 80

c. RENUNCIATION OF ILLEGAL PORTION. — And when an entire contract is illegal in part, a recovery cannot be had thereon by a renunciation of the illegal part.<sup>1</sup>

3. Effect of Partial Illegality in Severable Contract — *a.* IN GENERAL. — Where a contract is in part illegal, and the illegal part is severable from the balance, the effect of such illegality is not to render the whole contract illegal, but the courts will recognize and enforce the legal part;<sup>2</sup> and this is true though the illegality arises out of the violation of a statutory prohibition.<sup>3</sup>

Am. Dec. 677; *Badger v. Williams*, 1 D. Chip. (Vt.) 137; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Hinesburgh v. Sumner*, 9 Vt. 23, 31 Am. Dec. 599; *Bowen v. Buck*, 28 Vt. 308.

*Wisconsin.* — *Swartz v. Gillett*, 1 Chand. (Wis.) 207.

*Compare* *Wilcox v. Daniels*, 15 R. I. 261; *Pierce v. Pierce*, 17 Ind. App. 107.

**Smallness of Illegal Part.** — If any part, however small, of the entire consideration of a contract is illegal, the whole contract is illegal. *Kimbrough v. Lane*, 11 Bush (Ky.) 556; *Wegner v. Biering*, 65 Tex. 506.

**Applications of Principle — Breach of Duty of Quasi-public Corporation.** — *Pueblo, etc., R. Co. v. Taylor*, 6 Colo. 1, cited in *Brown v. Kennedy*, 12 Colo. 241.

**Sexual Immorality — Bond for Annuity.** — *Brown v. Langford*, 3 Bibb (Ky.) 500. See *supra*, this title, *Immoral Contracts*.

**Gaming.** — *Tenney v. Foote*, 95 Ill. 99. See the title GAMBLING CONTRACTS, vol. 14, p. 576.

**Compounding Offenses.** — *Baird v. Boehmer*, 77 Iowa 622. See also *Ft. Worth First Nat. Bank v. Payne*, (Ky. 1897) 42 S. W. Rep. 736; *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644. And see the title COMPOUNDING OFFENSES, vol. 6, p. 409 *et seq.*

**Public Lands Included in Conveyance for Single Consideration.** — *Rayner Cattle Co. v. Bedford*, 91 Tex. 642.

**Maintenance.** — *Burt v. Place*, 6 Cow. (N. Y.) 431. See the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 822 *et seq.*

**Statutory Provisions.** — In some states the statutes expressly provide that if the consideration of a contract be illegal in whole or in part the entire contract is illegal. *Small v. Williams*, 87 Ga. 681; *Koster v. Seney*, 99 Iowa 584.

1. **Renunciation of Illegal Part.** — *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, reversing 2 Hun (N. Y.) 591; *Inter-Ocean Pub. Co. v. Associated Press*, (Cir. Ct. 1888) 3 Chicago L. J. N. S. 96.

2. **Partial Illegality in Severable Contracts — England.** — *Desjardins v. Roy*, 7 Quebec Q. B. 325; *Baines v. Geary*, 35 Ch. D. 154; *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 250; *Baker v. Hedgecock*, 39 Ch. D. 520; *Davies v. Lowen*, 64 L. T. N. S. 655; *Sheerman v. Thompson*, 11 Ad. & El. 1027, 39 E. C. L. 313; *Gaskell v. King*, 11 East 165; *Chesman v. Nainby*, 2 Ld. Raym. 1456; *Pigot's Case*, 11 Coke 266; *Chester v. Freland*, Ley 79; *Price v. Green*, 16 M. & W. 346; *M'Allen v. Churchill*, 11 Moo. 483, 22 E. C. L. 418; *Nicholls v. Stretton*, 7 Beav. 42; *Australasia Bank v. Australia Bank*, 12

Jur. 189, *sub nom.* *Australasia Bank v. Breillat*, 6 Moo. P. C. 152.

*United States.* — *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 222; *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64; *Western Union Tel. Co. v. Burlington, etc., R. Co.*, 3 McCrary (U. S.) 130.

*Arkansas.* — *St. Louis, etc., R. Co. v. Matthews*, 64 Ark. 398.

*California.* — *Granger v. Original Empire Mill, etc., Co.*, 59 Cal. 678; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Jackson v. Shawl*, 29 Cal. 267.

*District of Columbia.* — *Manning v. Ellicott*, 9 App. Cas. (D. C.) 71; *Sunderland v. Kilbourn*, 3 Mackey (D. C.) 506.

*Illinois.* — *Whitbeck v. Ramsay*, 74 Ill. App. 524; *Wolsey v. Neeley*, 62 Ill. App. 141; *Corcoran v. Lehigh, etc., Coal Co.*, 138 Ill. 390.

*Indiana.* — *Hynds v. Hays*, 25 Ind. 31; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380; *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395.

*Iowa.* — *Casady v. Woodbury County*, 13 Iowa 113; *Smith v. Smith*, (Iowa 1891) 50 N. W. Rep. 64.

*Kansas.* — *Fackler v. Ford*, *McCahon* (Kan.) 21.

*Massachusetts.* — *Dean v. Emerson*, 102 Mass. 480.

*Missouri.* — *Peltz v. Eichele*, 62 Mo. 171.

*New Jersey.* — *Erie R. Co. v. Union Locomotive, etc., Co.*, 35 N. J. L. 240.

*New York.* — *Ogden v. Barker*, 18 Johns. (N. Y.) 87; *Curtis v. Leavitt*, 15 N. Y. 9.

*Ohio.* — *Doty v. Knox County Bank*, 16 Ohio St. 142; *Widoe v. Webb*, 20 Ohio St. 435, 5 Am. Rep. 664.

*Oregon.* — *Southwell v. Beezley*, 5 Oregon 458; *Murray v. Oliver*, 3 Oregon 539.

*Pennsylvania.* — *Smith's Appeal*, 113 Pa. St. 579; *Foreman v. Ahl*, 55 Pa. St. 325.

**Pigot's Case.** — In *Pigot's Case*, 11 Coke 266, which is the leading case upon this subject, the rule is broadly stated that if any part of a contract void by statute or common law be mixed up with good matter which is entirely independent of it, the good part stands and the rest is void.

**Malum in Se.** — It has been assumed in some cases that if the illegality entering into one part of a severable contract is *malum in se* it would pervade the entire contract and make it illegal. *Curtis v. Leavitt*, 15 N. Y. 9; *State v. Findley*, 10 Ohio 51.

3. **Partial Illegality Arising Out of Violation of Statute — England.** — *In re Burdett*, 20 Q. B. D. 314; *Desjardins v. Roy*, 7 Quebec Q. B. 325. *Illinois.* — *Corcoran v. Lehigh, etc., Coal Co.*, 138 Ill. 390, reversing 37 Ill. App. 577.

*b.* CONSIDERATION APPORTIONED TO DIFFERENT STIPULATIONS. — Where the contract contains several independent agreements on the part of one of the parties, and the consideration moving from the other party is apportioned to each agreement, the contract as to such agreements will be held severable, and in case one is illegal as against public policy the others may still be enforced.<sup>1</sup>

*c.* SEVERAL PROMISES BASED ON ONE LAWFUL CONSIDERATION — **General Rule.** — And it has been held that where the consideration moving from the plaintiff contains no element of illegality, but one of several promises on the part of the defendant is illegal as against public policy, the illegality of that which is bad does not communicate itself to or contaminate that which is good,<sup>2</sup> except when in consequence of some peculiarity in the contract its parts are inseparable or interdependent so that to sustain it in part would be practically to sustain it altogether.<sup>3</sup>

**Minority Rule.** — It has been held, however, that if the consideration moving from the plaintiff was lawful but entire, still if the promises on the part of the defendant are one legal and the other illegal, neither can be enforced, as the consideration cannot be divided and enough of it assigned to support the legal promise.<sup>4</sup>

*d.* CONTRACT SEVERED IN PERFORMANCE. — It has been held that a contract which at its inception was entire may still be severed in its

*Indiana.* — *Hynds v. Hays*, 25 Ind. 31.

*Iowa.* — *Osgood v. Bauder*, 75 Iowa 550.

*Massachusetts.* — *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131.

*Ohio.* — *State v. Findley*, 10 Ohio 51.

In *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 235, Willes, J., stated the rule as follows: "The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

If the statute expressly declared that all contracts containing certain prohibited stipulations should be void, it would seem that such a prohibited stipulation contained in a contract would render it void irrespective of whether it was or was not severable from the balance of the contract. *Darling v. Rogers*, 22 Wend. (N. Y.) 483. See also *Rand v. Mather*, 11 Cush. (Mass. 1, 59 Am. Dec. 131; *Curtis v. Leavitt*, 15 N. Y. 9.

**1. Apportionment of Consideration to Different Items.** — *Desjardins v. Roy*, 7 Quebec Q. B. 325; *Osgood v. Bauder*, 75 Iowa 550; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Carleton v. Woods*, 28 N. H. 299; *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837.

In *More v. Bonnet*, 40 Cal. 257, 6 Am. Rep. 621, wherein the question as to the severability of stipulations in restraint of trade, one of which was reasonable and the other unreasonable, was involved, the court said, in regard to the question of the severability of contracts: "No precise rule can be laid down for the solution of the question whether a contract is entire or separable, but it must be solved by considering both the language and the subject-matter of the contract. \* \* \* When the price is expressly apportioned by the contract, or the apportionment may be implied by law, to each item to be performed, the contract will generally be held to be severable."

**Sale of Different Items — Consideration Apportioned to Each.** — Where in a single contract a vendor entered into an agreement for the sale of property owned by her and also for the sale of property which she expected to receive under a future succession, and the consideration was apportioned to each class of property, it was held that the fact that the agreement for the sale of her interest in the future succession was illegal by statute, did not render the entire contract illegal, as each of the stipulations could exist without the other, and they were therefore divisible. *Desjardins v. Roy*, 7 Quebec Q. B. 325.

**2. Independent Stipulations Based on Entire Lawful Consideration.** — *United States.* — *Western Union Tel. Co. v. Burlington, etc.*, R. Co., 3 McCrary (U. S.) 130.

*Arkansas.* — *Hanauer v. Gray*, 25 Ark. 350, 99 Am. Dec. 226; *St. Louis, etc., R. Co. v. Matthews*, 64 Ark. 398.

*California.* — *Jackson v. Shawl*, 29 Cal. 272.

*Illinois.* — *Whitbeck v. Ramsay*, 74 Ill. App. 524.

*Indiana.* — *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380.

*Kentucky.* — *Brown v. Langford*, 3 Bibb (Ky.) 497.

*New York.* — *Arnot v. Pittston, etc.*, Coal Co., 2 Hun (N. Y.) 594; *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333.

*Ohio.* — *Ohio v. Board of Education*, 35 Ohio St. 519; *Widoe v. Webb*, 20 Ohio St. 435, 5 Am. Rep. 664.

**3. Burlington, etc., R. Co. v. Northwestern Fuel Co.**, 31 Fed. Rep. 652.

**4. Minority Rule.** — *Lindsay v. Smith*, 78 N. Car. 328, 24 Am. Rep. 463.

In *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103, it was held that if in a lease the lessee covenants to pay rent and also to do something against public policy, the entire lease is illegal and the lessor cannot recover rent.



performance and part of it legalized thereby.<sup>1</sup>

4. **Action on Account.** — Where a running account is made of several items, part of which arise out of legal contracts and a part out of illegal contracts, it is held that in an action on the account a recovery may be had for the legal items.<sup>2</sup>

### XXIII. CONTRACTS GROWING OUT OF OR CONNECTED WITH ILLEGAL CONTRACT

—1. **In General.** — Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract and render it illegal.<sup>3</sup> And the rule has been broadly laid down that if the connection between the original illegal contract and the new contract can be traced, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery; repeating a void promise cannot give validity to it.<sup>4</sup> But if the new contract is not connected with the illegal contract or transaction, but is founded on a new consideration, it is not affected by such prior illegal contract or transaction, though the latter may have indirectly given rise to it.<sup>5</sup>

2. **Abandonment of Illegal Contract.** — Thus after entering into an illegal

1. **Contract Severed in Performance.** — *Foreman v. Ahl*, 55 Pa. St. 325.

2. **Action on Account Including Illegal Items.** — *Wadsworth v. Dunnam*, 117 Ala. 661; *Goodwin v. Clark*, 65 Me. 280; *Badger v. Titcomb*, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; *Robinson v. Green*, 3 Met. (Mass.) 159; *Rundlett v. Weeber*, 3 Gray (Mass.) 263; *Bick v. Seal*, 45 Mo. App. 475.

**Account Rendered.** — In *Chase v. Burkholder*, 18 Pa. St. 48, the keeper of a boarding house was allowed to recover on his claim for boarding a person and his family, though during the same period of time he illegally sold liquor to such person and charged it to his account. It was also held that the claim for boarding was not prejudiced or barred by the fact that the entire claim, including that for board and for liquor, had been previously presented.

**Account Stated.** — In *Dunbar v. Johnson*, 108 Mass. 519, it was held, in an action on an account stated, that the defendant might plead and prove that the whole claim was founded on illegal transactions. It seems, however, from the opinion of Justice Gray, that he was of the opinion that if the account had included lawful items a recovery could have been had therefor. He said: "In the present case it is found as a fact that the account stated was founded upon sales of intoxicating liquors made in this commonwealth in violation of law, and it does not appear that the account included any lawful items. It was therefore rightly ruled that the plaintiff could not recover."

**Illegal Items Struck Out by Amendment.** — In *Towle v. Blake*, 38 Me. 528, it was held that where the objectionable items were struck out by an amendment no objection was left. See also *Boyd v. Eaton*, 44 Me. 51, 69 Am. Dec. 83.

**Account Including Items Arising from Illegal Sale of Liquors.** — The question as to the enforcement of accounts including items for the illegal sale of liquors will be found fully discussed in the title INTOXICATING LIQUORS.

3. **Contracts Arising Out of Illegal Contracts — England.** — *De Begnis v. Armistead*, 10 Bing. 107, 25 E. C. L. 47; *Aubert v. Maze*, 2 B. & P. 371.

*United States.* — *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

*Connecticut.* — *Sturges v. Bush*, 5 Day (Conn.) 452.

*Illinois.* — *Webster v. Sturges*, 7 Ill. App. 560; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Nash v. Monheimer*, 20 Ill. 215.

*Kansas.* — *Cox v. Grubb*, 47 Kan. 435, 27 Am. St. Rep. 303.

*Louisiana.* — *Davis v. Holbrook*, 1 La. Ann. 178; *Cummings v. Saux*, 30 La. Ann. 207.

*Massachusetts.* — *Wheeler v. Russell*, 17 Mass. 258.

*Michigan.* — *Comstock v. Draper*, 1 Mich. 481, 53 Am. Dec. 78.

*Missouri.* — *Buckingham v. Fitch*, 18 Mo. App. 91.

*New Hampshire.* — *Jones v. Surprise*, 64 N. H. 243.

*New York.* — *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Rose v. Truax*, 21 Barb. (N. Y.) 361.

*Pennsylvania.* — *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131.

*Texas.* — *Shelton v. Marshall*, 16 Tex. 344.

**Offer of Reward on Back of Lottery Ticket.** — Where an organization issuing a lottery ticket put on the back of it an offer of a reward to any person producing any such ticket which had not been promptly cashed by it on presentation, such offer of reward was held to be founded on and made in affirmance of the illegal contract represented by the face of the ticket and to secure the performance of that contract, and therefore itself illegal. *Dieckhoff v. Fox*, 56 Minn. 438.

4. *Comstock v. Draper*, 1 Mich. 481, 53 Am. Dec. 78.

5. **Independent Contracts — United States.** — *Jackson v. Dwight*, 78 Fed. Rep. 896; *Dent v. Ferguson*, 132 U. S. 50; *Ocean Ins. Co. v. Polleys*, 13 Pet. (U. S.) 157; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Hoffman v. McMullen*, 83 Fed. Rep. 372; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433.

*Alabama.* — *Branch Bank v. Crocheron*, 5 Ala. 250; *Whetstone v. Montgomery Bank*, 9 Ala. 875; *Scheible v. Bacho*, 41 Ala. 423.

contract the parties may mutually abandon it and enter into a new and valid contract upon a new consideration.<sup>1</sup> The old contract must, however, be utterly abandoned, so that neither its terms nor its consideration nor any claim of right springing out of it shall enter into the new; otherwise the latter is illegal also.<sup>2</sup>

**3. Aid Required from Illegal Contract to Establish Case.** — In determining whether a new contract is so connected with an illegal contract or transaction as to render it also illegal, the test has been announced to be whether the plaintiff in establishing his case is or is not required to resort to the illegal contract; in the former case the contract is held to be illegal,<sup>3</sup> while in the

*Arkansas.* — *Barker v. Parker*, 23 Ark. 390.

*Colorado.* — *Fearnley v. De Mainville*, 5 Colo. App. 441.

*Connecticut.* — *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253.

*Georgia.* — *Gullatt v. Thrasher*, 42 Ga. 429.

*Illinois.* — *Guilfoil v. Arthur*, 158 Ill. 600; *Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642.

*Indiana.* — *Daniels v. Barney*, 22 Ind. 207.

*Iowa.* — *Green v. Schoenhofen Brewing Co.*, 103 Iowa 252.

*Michigan.* — *Stanley v. Nye*, 51 Mich. 232; *Smith v. Barstow*, 2 Dougl. (Mich.) 155.

*Minnesota.* — *Gunnaldson v. Nyhus*, 27 Minn. 441.

*Missouri.* — *Hutchinson v. Dornin*, 23 Mo. App. 575.

*New Hampshire.* — *Scott v. Scott*, (N. H. 1894) 38 Atl. Rep. 567.

*New York.* — *Thalimer v. Brinkerhoff*, 20 Johns. (N. Y.) 386.

*Pennsylvania.* — *Bly v. Titusville Second Nat. Bank*, 79 Pa. St. 453; *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131.

*South Carolina.* — *Sawyer v. Macaulay*, 18 S. Car. 548.

*Tennessee.* — *Torbett v. Worthy*, 1 Heisk. (Tenn.) 107.

*Texas.* — *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101; *Floyd v. Patterson*, (Tex. 1891) 18 S. W. Rep. 654, *affirming* 72 Tex. 202, 13 Am. St. Rep. 787.

*Vermont.* — *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564.

*Virginia.* — *Bier v. Dozier*, 24 Gratt. (Va.) 1.

**Growing Out of Executed Illegal Contract.** — If an act in violation of law be already committed, a subsequent agreement founded thereon is valid, provided it constituted no part of the original inducement or consideration of the illegal act. *Martin v. Richardson*, 94 Ky. 183, 42 Am. St. Rep. 353.

**Sale by Unlicensed Auctioneer — Recovery on Note Given by Purchaser to Seller.** — In *Gunnaldson v. Nyhus*, 27 Minn. 440, it was held that, though a sale by an unlicensed auctioneer was illegal, still, if the purchaser executes a note to the owner of the goods for the purchase price, a recovery may be had on the note, as in such a case the action is brought upon the new promise of payment arising out of the execution of the note, and not upon the illegal contract of sale made by the auctioneer.

**Addition of New Consideration.** — Where a contract is void, as made in violation of law, the fact that a second promise is made into which a new consideration, lawful in its character, enters and is mingled with the unlawful con-

sideration does not render such second contract valid. *Gwinn v. Simes*, 61 Mo. 335; *Bick v. Seal*, 45 Mo. App. 475; *Gray v. Hook*, 4 N. Y. 440.

**1. Abandonment of Illegal Contract.** — *Barnes v. Hedley*, 2 Taunt. 184; *Faikney v. Reynolds*, 4 Burr. 2069; *Mitchell v. Lyman*, 77 Ill. 525; *Stout v. Ennis*, 28 Kan. 706; *Chadbourn v. Watts*, 10 Mass. 124; *Clark v. Phelps*, 6 Met. (Mass.) 296.

**2. Webster v. Sturges**, 7 Ill. App. 560; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

**Change of Contract.** — In *Webster v. Sturges*, 7 Ill. App. 560, it was held that while undoubtedly parties, after having made an illegal contract, are at liberty to enter into another contract in relation to the same subject-matter, still the new contract must in no sense be a continuation or modification of the old.

**3. Resort to Illegal Contract Required to Establish Case — England.** — *Smith v. Mawhood*, 14 M. & W. 452; *Simpson v. Bloss*, 2 Marsh. 542, 7 Taunt. 246, 2 E. C. L. 246; *Fivaz v. Nicholls*, 2 C. B. 501, 52 E. C. L. 501; *Farmer v. Russell*, 1 B. & P. 296; *Taylor v. Bowers*, 1 Q. B. 291.

*United States.* — *Hoffman v. McMullen*, 83 Fed. Rep. 372; *Catts v. Phalen*, 2 How. (U. S.) 376; *Harris v. Rannels*, 12 How. (U. S.) 79.

*Alabama.* — *Gunter v. Leckey*, 30 Ala. 591; *McGehee v. Lindsay*, 6 Ala. 16; *Walker v. Gregory*, 36 Ala. 180.

*Arkansas.* — *Martin v. Hodge*, 47 Ark. 378, 58 Am. Rep. 763.

*Connecticut.* — *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253.

*Georgia.* — *Clarke v. Brown*, 77 Ga. 606; *Ingram v. Mitchell*, 30 Ga. 547.

*Massachusetts.* — *Welch v. Wesson*, 6 Gray (Mass.) 505.

*Mississippi.* — *Gilliam v. Brown*, 43 Miss. 441.

*Missouri.* — *Parsons v. Randolph*, 21 Mo. App. 353; *Harrison v. McCluney*, 32 Mo. App. 481; *Tyler v. Larimore*, 19 Mo. App. 445; *Suits v. Taylor*, 20 Mo. App. 166; *Kitchen v. Greenbaum*, 61 Mo. 110.

*New Hampshire.* — *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310.

*New York.* — *Thalimer v. Brinkerhoff*, 20 Johns. (N. Y.) 386; *Woodworth v. Bennett*, 43 N. Y. 275, 3 Am. Rep. 706.

*Pennsylvania.* — *Swain v. Scott*, 11 S. & R. (Pa.) 164; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737; *Eberman v. Reitzel*, 1 W. & S. (Pa.) 181; *Thomas v. Brady*, 10 Pa. St. 164; *Hipple v. Rice*, 28 Pa. St. 406.



latter case it is held to be legal.<sup>1</sup>

4. **Contract with Parties to Illegal Combinations.** — The fact that one of the parties to a contract is a member of a so-called illegal "trust" or "trade combination" will not render illegal a contract by such party with a third person with respect to the commodity sought to be controlled by such combination, the illegality of the combination being entirely collateral to the transaction in question.<sup>2</sup>

5. **Loans to Settle Obligation of Illegal Contract.** — While liabilities arising out of illegal contracts are not enforceable, still public policy does not prohibit the voluntary settlement of such liabilities, and therefore an agreement to repay money borrowed to settle such liabilities is not illegal, as, for instance, an agreement to repay a loan of money to settle a gambling debt already incurred.<sup>3</sup>

6. **Subsequent Contract in Furtherance of Illegal Contract.** — A new agreement entered into for the purpose of carrying into effect any of the unexecuted provisions of an illegal contract is likewise illegal.<sup>4</sup>

7. **Ratification of Illegal Contract.** — Of course a contract which is illegal as against public policy cannot be rendered valid by ratification, as the principle which prohibits the execution of such a contract equally prohibits its subsequent ratification;<sup>5</sup> nor will any subsequent promise to perform provisions of

*Tennessee.* — *Booth v. Hodgson*, 6 T. R. 405.

*Texas.* — *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. Rep. 363; *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787.

*Vermont.* — *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564.

*Wisconsin.* — *Hardy v. Stonebraker*, 31 Wis. 647.

1. **Resort to Illegal Contract Not Required.** — *Hoffman v. McMullen*, 83 Fed. Rep. 372; *Frost v. Plumb*, 40 Conn. 111; *Hatch v. Hanson*, 46 Mo. App. 323; *Roselle v. Beckmeir*, 134 Mo. 380; *State v. Bevers*, 86 N. Car. 588.

**Prima Facie Case.** — It is not sufficient, however, that the plaintiff may establish a *prima facie* case without resorting to the illegal contract. Thus, a note may import a consideration and thereby make out of itself a *prima facie* case so as to entitle the payee to recover thereon; still, if the consideration of the note is really based upon a preceding illegal contract, no recovery can be had thereon. *Parsons v. Randolph*, 21 Mo. App. 353. See also *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 627, 55 Am. St. Rep. 614.

2. **Contract with Parties to Illegal Combinations** — **Whiskey Trust.** — The fact that the vendor of whiskey was at the time of the sale a member of the whiskey trust would not, though such trust was illegal, render illegal a sale by him of whiskey so as to prevent his recovery of the purchase price, as the cause of action therefor is in no sense dependent upon or affected by the illegality of the trust. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 39 Am. St. Rep. 902.

**Warehouse Trust.** — A tobacco warehouse company executed a bond for the protection of persons consigning tobacco to it. It was held that the fact that such company was a member of the tobacco exchange, which was illegal as being a combination in restraint of trade, would not render the bond illegal. *Globe Tobacco Warehouse Co. v. Leach*, (Ky. 1897) 43 S. W. Rep. 423.

**Association to Regulate Towing.** — In *The Charles E. Wisewall*, 74 Fed. Rep. 802, it was held that the fact that the owners of a tug were members of an association formed for the purpose of regulating the price of towage, and therefore illegal under Act Cong. July 2, 1890, did not render illegal a contract by the former for the towage of a vessel.

**Mail Contract with Railroad Operating Lines under Illegal Leases.** — In *Southern Pac. Co. v. U. S.*, 28 Ct. Cl. 77, it was held that the fact that a railroad company having a contract for transportation of the mails was operating portions of its lines under illegal leases, entered into to prevent competition, would not render illegal the contract for the transportation of the mails, and therefore would not prevent it from recovering for services thereunder.

3. See the title GAMBLING CONTRACTS, vol. 14, p. 642.

4. **Subsequent Contract in Furtherance of Illegal Contract.** — *McBlair v. Gibbes*, 17 How. (U. S.) 232; *Webster v. Sturges*, 7 Ill. App. 560; *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397; *Gray v. Hook*, 4 N. Y. 449; *Robinson v. Kalbfleisch*, 5 Thomp. & C. (N. Y.) 212.

5. **Illegal Contract Incapable of Ratification** — *United States.* — *Hoffman v. McMullen*, 83 Fed. Rep. 372.

*Alabama.* — *Swann v. Miller*, 82 Ala. 530; *Moog v. Hannon*, 93 Ala. 503; *Rainey v. Capps*, 22 Ala. 288; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Shippey v. Eastwood*, 9 Ala. 198; *Pettit v. Pettit*, 32 Ala. 288.

*Arkansas.* — *Tucker v. West*, 29 Ark. 386.

*Georgia.* — *Meriwether v. Smith*, 44 Ga. 541; *Calhoun v. Phillips*, 87 Ga. 482.

*Kentucky.* — *Thompson v. Warren*, 8 B. Mon. (Ky.) 488.

*Maine.* — *Pope v. Linn*, 50 Me. 85; *Plaisted v. Palmer*, 63 Me. 576.

*Massachusetts.* — *Ladd v. Rogers*, 11 Allen (Mass.) 211; *Day v. McAllister*, 15 Gray (Mass.) 434.

*Michigan.* — *Tucker v. Mowrey*, 12 Mich.



the illegal contract be enforceable.

**8. Promise to Pay Money Owning on Illegal Contract** — *a. IN GENERAL.* — The rule that all subsequent contracts based on and growing out of an illegal contract are also illegal is well shown in the case of a subsequent contract to pay money owing on an illegal contract. In such a case the consideration of such a contract is based on the illegal contract and is also illegal.<sup>2</sup> This rule applies equally though a new consideration also enters into the new contract.<sup>3</sup>

**Contract under Seal.** — Thus a subsequent contract to pay money owing on an illegal contract is unenforceable though under seal, and therefore importing a consideration.<sup>4</sup>

379; *Winfield v. Dodge*, 45 Mich. 355, 40 Am. Rep. 476.

*Minnesota.* — *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

*Mississippi.* — *Kountz v. Price*, 40 Miss. 341.

*Missouri.* — *Gwinn v. Simes*, 61 Mo. 338; *Bick v. Seal*, 45 Mo. App. 475.

*Nebraska.* — *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644.

*New Hampshire.* — *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Boutelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 152.

*New Jersey.* — *Reeves v. Butcher*, 31 N. J. L. 224; *Neibert v. Baghurst*, (N. J. 1892) 25 Atl. Rep. 474; *Steffens v. Earl*, 40 N. J. L. 137, 29 Am. Rep. 214; *Ryno v. Darby*, 20 N. J. Eq. 231.

*New York.* — *Robinson v. Kalbfleisch*, 5 Thomp. & C. (N. Y.) 212; *McKee v. Cheney*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 144; *Gray v. Hook*, 4 N. Y. 449; *Wheeler v. Wheeler*, 5 Lans. (N. Y.) 355.

*Pennsylvania.* — *Henry Christian Bldg., etc., Assoc. v. Walton*, 181 Pa. St. 201, 59 Am. St. Rep. 636; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702; *Hunter v. Nolf*, 71 Pa. St. 282; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Negley v. Lindsay*, 67 Pa. St. 217, 5 Am. Rep. 427.

*Texas.* — *Rue v. Missouri Pac. R. Co.*, 74 Tex. 474, 15 Am. St. Rep. 852.

*Wisconsin.* — *Binz v. Beatty*, 61 Wis. 648.

**1. Subsequent Promise.** — *Brown v. Tarkington*, 3 Wall. (U. S.) 377; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Boutelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 152; *Eyre v. Eyre*, 19 N. J. Eq. 42.

**2. Contracts to Pay Money Owning on Illegal Contract** — *England.* — *Crawley v. White*, 78 L. T. N. S. 167; *Young v. Timmins*, 1 Tyrw. 226; *Clay v. Ray*, 17 C. B. N. S. 188, 112 E. C. L. 188; *Geere v. Mare*, 2 H. & C. 339.

*United States.* — *Brown v. Tarkington*, 3 Wall. (U. S.) 377.

*Alabama.* — *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288.

*Georgia.* — *Chancely v. Bailey*, 37 Ga. 532, 95 Am. Dec. 350.

*Indiana.* — *Hall v. Gavitt*, 18 Ind. 390.

*Louisiana.* — *Firemen's Assoc. v. Berghaus*, 13 La. Ann. 209.

*Massachusetts.* — *Howe v. Litchfield*, 3 Allen (Mass.) 443.

*Mississippi.* — *Coulter v. Robertson*, 14 Smed. & M. (Miss.) 18.

*Missouri.* — *Clafin v. Torlina*, 56 Mo. 369; *Bick v. Seal*, 45 Mo. App. 475.

*New Jersey.* — *Crossley v. Moore*, 40 N. J. L. 27.

*New York.* — *Stanton v. Allen*, 5 Den. (N. Y.) 434, 49 Am. Dec. 282; *Payne v. Eden*, 3 Cal. (N. Y.) 213.

*Pennsylvania.* — *Bly v. Titusville Second Nat. Bank*, 79 Pa. St. 456; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159. *Compare* *York County v. Small*, 1 W. & S. (Pa.) 315.

*Tennessee.* — *Mechanics' Sav. Bank, etc., Co. v. Duncan*, (Tenn. Ch. 1896) 36 S. W. Rep. 887.

*Texas.* — *Bogges v. Lilly*, 18 Tex. 200; *Shelton v. Marshall*, 16 Tex. 344; *Robertson v. Marsh*, 42 Tex. 149; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Reed v. Brewer*, (Tex. Civ. App. 1896) 36 S. W. Rep. 99; *Wegner v. Biering*, 65 Tex. 506.

*Vermont.* — *Pierce v. Kibbee*, 51 Vt. 559.

**Illustrations.** — There can be no recovery upon a draft drawn in execution of an illegal contract — as where certain coal companies illegally combine to regulate the production and sale of coal, and one of them draws upon another for an amount to equalize prices — though accepted. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159.

A promissory note given for a debt arising in whole or in part out of an illegal transaction is, as between the parties, void for want of consideration. *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593.

A note and mortgage given in lieu of other notes and mortgage, which first were given in part to suppress a prosecution for forgery, are not enforceable by an assignee, though he took them for value, but with notice of the illegality of the original consideration. *Pierce v. Kibbee*, 51 Vt. 559.

**3. New Consideration.** — *Clay v. Ray*, 17 C. B. N. S. 188, 112 E. C. L. 188.

**Dismissal of Action on Illegal Notes.** — In *Reed v. Brewer*, 90 Tex. 145, the plaintiff, who had brought an action on several promissory notes which were based on an illegal consideration, agreed to dismiss the action in consideration of the defendant's promise to pay the amount of the notes in weekly instalments. It was held that the illegality of the original notes entered into the new promise and rendered it illegal also.

**4. Contract under Seal.** — In *Fisher v. Bridges*, 3 El. & Bl. 642, 77 E. C. L. 642, an action was brought on a covenant to pay money; the obligation of the covenant arose out of an illegal contract for the sale of land. It was held that as the covenant sprang from and was the creature of an illegal contract, it was also illegal.

*b. COMPROMISE OF CLAIMS ARISING OUT OF ILLEGAL CONTRACTS.* — And no compromise by the parties of differences in respect to an illegal contract can purge it of illegality and produce a valid claim upon which a recovery may be had.<sup>1</sup>

*c. RENEWAL OR SUBSTITUTED NOTES.* — So a note given in renewal of or in substitution for a note made for an illegal consideration is open to the same defense of illegality.<sup>2</sup>

*d. PROMISE TO PAY FOR BENEFIT RECEIVED UNDER ILLEGAL CONTRACT.* — Where services are rendered under an illegal contract, an express promise to pay for such services made after their rendition is unenforceable.<sup>3</sup>

*e. AGREEMENT TO PAY JUDGMENT RECOVERED ON ILLEGAL CONTRACT.* — The illegality of a contract does not affect a judgment which may be recovered thereon on failure of the defendant to set up the defense of illegality, and therefore a contract to pay such judgment would not be affected by the illegality in the original contract.<sup>4</sup>

**9. Securities for Performance of Illegal Contracts.** — The general rule is that the illegality of the principal contract enters into and renders invalid contracts executed as security for the performance of such contract.<sup>5</sup>

**1. Compromise of Claims Arising Out of Illegal Contracts.** — *Young v. Timmins*, 1 Tyrw. 226; *Martin v. Wade*, 37 Cal. 168; *Tompkins v. Compton*, 93 Ga. 520; *Bick v. Seal*, 45 Mo. App. 475; *Oregon, etc., R. Co. v. Potter*, 5 Oregon 228; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

**Compromise of Gaming Contract.** — In *Everingham v. Meighan*, 55 Wis. 354, the rule that no compromise by the parties of differences in respect to clearly illegal contracts and transactions purges them and produces a valid claim was applied where the original contract was one for the purchase and sale of grain by the plaintiff for the defendant, in form for future delivery, but where in fact no grain was intended to be, or ever was, received or delivered, and where, a difference having arisen between the parties as to who should bear the losses incurred in such speculation and paid by the plaintiff, it was agreed that a part of such losses so paid should be borne by the latter and that the balance thereof should be paid to him by the defendant.

**Relinquishing Claim for Breach of Illegal Contract.** — The relinquishment of a claim of damages for the breach of a contract void as against public policy cannot constitute a consideration for a new contract. *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103.

**2. Renewal or Substituted Notes.** — As to the law in regard to notes given in renewal of instruments tainted with illegality, see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 340.

**3. Subsequent Promise to Pay for Benefit Received under Illegal Contract.** — *Puckett v. Alexander*, 102 N. Car. 95. Compare *Chouteau v. Allen*, 70 Mo. 290.

In *Wennall v. Adney*, 3 B. & P. 252, note, the rule is laid down that "if a contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived a benefit from the contract."

**Services Rendered by Unlicensed Physician.** — A contract by an unlicensed physician for the rendition of services being illegal, an express

promise subsequently made to pay for the services so rendered is also illegal, and no recovery can be had thereon. *Puckett v. Alexander*, 102 N. Car. 95.

**Lobbying Services.** — Where a contract for the rendition of services before a legislative body is illegal as a lobbying contract, a promise after the rendition of such services to pay therefor is also illegal. *McKee v. Cheney*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 144.

**Mistake.** — If, through mistake of law or fact, parties make an illegal contract, upon which neither could have maintained a suit, a subsequent agreement to pay for services performed under the contract may yet be legal and equitable. *Young v. Beardsley*, 11 Paige (N. Y.) 93, in which case the contract under consideration was made by an agent of a state prison for services of convicts.

**4. Contract to Pay Judgment Recovered on Illegal Contract.** — *Clay v. Ray*, 17 C. B. N. S. 188, 112 E. C. L. 188; *Swain v. Scott*, 11 S. & R. (Pa.) 155. Compare *Comstock v. Draper*, 1 Mich. 481, 53 Am. Dec. 78.

**5. Securities for Performance of Illegal Contract** — *England.* — *Fisher v. Bridges*, 3 El. & Bl. 642, 77 E. C. L. 642.

*Canada.* — *Dansereau v. St. Louis*, 18 Can. Sup. Ct. 587.

*Iowa.* — *Reynolds v. Nichols*, 12 Iowa 398.

*Massachusetts.* — *Nourse v. Pope*, 13 Allen (Mass.) 87.

*Michigan.* — *Denison v. Gibson*, 24 Mich. 187.

*New York.* — *Swift v. Beers*, 3 Den. (N. Y.) 70; *Tylee v. Yates*, 3 Barb. (N. Y.) 222.

*Texas.* — *Howard v. Smith*, 91 Tex. 8.

In the article **GAMBLING CONTRACTS**, vol. 14, p. 644 *et seq.*, will be found a full treatment of the law in regard to securities for debts incurred in gambling contracts, with a review of the legislation on the subject as well. In this connection, see also such titles as **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 189 *et seq.*; **MORTGAGES**, etc.

**An Assignment of Securities**, as collateral to an illegal obligation of the assignor, is void. *Tylee v. Yates*, 3 Barb. (N. Y.) 222; *Dewitt v. Brisbane*, 16 N. Y. 508.

**XXIV. ENFORCEMENT OF AND RELIEF FROM ILLEGAL CONTRACTS—1. In General.**—The general rule that no action can be maintained on an illegal contract is well settled.<sup>1</sup> This principle is expressed by the maxim *ex dolo malo*.

**Trust Deed to Secure Loan of Illegal Notes.**—Where a statute expressly prohibited the issuing of paper to circulate as money, it was held that a trust deed to secure a loan of post notes, which were within the statutory prohibition, could not be enforced. *Reynolds v. Nichols*, 12 Iowa 398.

**Guaranty of Illegal Notes.**—Under the provision of the *New York* Act of 1840 which rendered illegal all promissory notes made by a banking association, unless made payable on demand and without interest, a guaranty of such notes was also illegal. *Swift v. Beers*, 3 Den. (N. Y.) 70.

**Accommodation Maker of Note for Illegal Purpose—Reimbursement.**—The maker of a note for the accommodation of another cannot recover upon the latter's promise to indemnify him, where the note was made for the purpose of using its proceeds as a part of a provincial election fund, since under the *Quebec* statute any contract, promise, or undertaking in any way relating to an election thereunder is void. *Dansereau v. St. Louis*, 18 Can. Sup. Ct. 587.

**Surety on Note.**—No action can be maintained against a surety upon a promissory note given in part for the price of liquor illegally sold, although such surety received from the principal a full indemnity for signing the note. *Nourse v. Pope*, 13 Allen (Mass.) 87.

**1. No Action Maintainable on Illegal Contracts—England.**—*Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 499; *Barclay v. Pearson*, [1893] 2 Ch. 154; *Scott v. Brown*, [1892] 2 Q. B. 724; *Sykes v. Beadon*, 11 Ch. D. 170; *Collins v. Blantern*, 2 Wils. C. Pl. 341; *Holman v. Johnson*, 1 Cowp. 341.

**United States.**—*Hoffman v. McMullen*, 48 U. S. App. 596; *Bartle v. Nutt*, 4 Pet. (U. S.) 184; *U. S. Bank v. Owens*, 2 Pet. (U. S.) 527; *Church v. Proctor*, 66 Fed. Rep. 243; *Holmead v. Maddox*, 2 Cranch (C. C.) 161.

**Alabama.**—*Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48.

**California.**—*Mitchell v. Cline*, 84 Cal. 409; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242; *Martin v. Wade*, 37 Cal. 168; *Santa Clara Valley Mill, etc., Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211.

**Connecticut.**—*Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210.

**Georgia.**—*Thompson v. Cummings*, 68 Ga. 124; *White v. Crew*, 16 Ga. 416.

**Illinois.**—*Skeels v. Phillips*, 54 Ill. 309; *Canton Masonic Mut. Benev. Soc. v. Rockhold*, 26 Ill. App. 141, affirmed 129 Ill. 440; *Riedle v. Mulhausen*, 20 Ill. App. 68; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, affirming 63 Ill. App. 593; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531.

**Iowa.**—*Steever v. Illinois Cent. R. Co.*, 62 Iowa 371; *Caldwell v. Bridal*, 48 Iowa 15; *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145; *Williamson v. Chicago, etc., R. Co.*, 53 Iowa 126, 36 Am. Rep. 206; *Harvey v. Tama County*, 53 Iowa 228; *Peters v. Davenport*, 104 Iowa 625.

**Kansas.**—*Korman v. Henry*, 32 Kan. 49; *Bowman v. Phillips*, 41 Kan. 369, 13 Am. St. Rep. 292, citing 3 AM. AND ENG. ENCYC. OF LAW 869, 875, 886.

**Kentucky.**—*Wright v. Gardner*, 98 Ky. 454; *Todd v. Caplinger*, 4 Bush (Ky.) 144; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127; *Ratcliffe v. Smith*, 13 Bush. (Ky.) 173.

**Louisiana.**—*Jenkins v. Gibson*, 3 La. Ann. 203; *Wood v. Lyle*, 4 La. Ann. 145; *Hollon v. Sapp*, 4 La. Ann. 519; *Fabacher v. Bryant*, 46 La. Ann. 820.

**Maine.**—*Smith v. Hubbs*, 10 Me. 71.

**Maryland.**—*Gotwalt v. Neal*, 25 Md. 434; *Roman v. Mali*, 42 Md. 513; *Shoemaker v. National Mechanics' Bank*, 31 Md. 402; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59; *Freeman v. Sedwick*, 6 Gill (Md.) 29; *Chappell v. Wysham*, 4 Har. & J. (Md.) 560.

**Massachusetts.**—*Worcester v. Eaton*, 11 Mass. 378; *Myers v. Meinrath*, 101 Mass. 368, 3 Am. Rep. 368; *Frost v. Gage*, 3 Allen (Mass.) 560.

**Mississippi.**—*McWilliams v. Phillips*, 51 Miss. 196.

**Missouri.**—*Parsons v. Randolph*, 21 Mo. App. 353; *State Bank v. Merchants Bank*, 10 Mo. 123; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713; *Attaway v. St. Louis Third Nat. Bank*, 93 Mo. 485; *Roselle v. Beckemeir*, 134 Mo. 380; *Connor v. Black*, 119 Mo. 126; *Harrison v. McCluney*, 32 Mo. App. 481.

**Nebraska.**—*Gould v. Kendall*, 15 Neb. 549; *Hobbie v. Zaepffel*, 17 Neb. 536.

**New Hampshire.**—*White v. Hunter*, 23 N. H. 128; *Johnson v. Ferris*, 49 N. H. 66.

**New Jersey.**—*Brooks v. Cooper*, 50 N. J. Eq. 761; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; *Shallcross v. Deats*, 43 N. J. L. 177; *Marlatt v. Warwick*, 19 N. J. Eq. 454; *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 627, 55 Am. St. Rep. 614; *Den v. Shotwell*, 23 N. J. L. 465; *Church v. Muir*, 33 N. J. L. 320; *Price v. Polluck*, 37 N. J. L. 44.

**New York.**—*Hunt v. Knickerbacker*, 5 Johns. (N. Y.) 327; *Nellis v. Clark*, 4 Hill (N. Y.) 424, affirming 20 Wend. (N. Y.) 24; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815; *Moseley v. Moseley*, 15 N. Y. 334; *Westfall v. Jones*, 23 Barb. (N. Y.) 9; *Bolt v. Rogers*, 3 Paige (N. Y.) 154; *Belding v. Pitkin*, 2 Cai. (N. Y.) 147; *Phenix Bridge Co. v. Keystone Bridge Co.*, (Supm. Ct. Gen. T.) 23 N. Y. Supp. 109, affirmed 142 N. Y. 425; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46; *Pepper v. Haight*, 20 Barb. (N. Y.) 429; *Gray v. Oxnard Brothers' Co.*, 59 Hun (N. Y.) 387; *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706.

**North Carolina.**—*Webb v. Fulchire*, 3 Ired. L. (25 N. Car.) 485, 40 Am. Dec. 419.

**Ohio.**—*Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819; *Goshen Tp. v. Springfield, etc., R. Co.*, 12 Ohio St. 624, 80 Am. Dec. 386.



(or *ex turpi causa*) *non oritur actio*, and the kindred maxim *in pari delicto potior est conditio defendentis*; that is, no court will lend its aid to one who founds his cause of action upon an immoral or illegal act, and when the parties are in equal fault the position of the defendant is the better.<sup>1</sup> Thus a court will not only refuse to enforce an executory illegal contract,<sup>2</sup> but it also will decline to permit a party thereto to recover damages for a breach thereof by the other party.<sup>3</sup>

**2. Performance by Plaintiff** — *a. IN GENERAL.* — The fact that the party seeking to enforce executory provisions of an illegal contract, though they consist only of promises to pay money, has performed the contract on his part, and that, unless the other party is compelled to perform, he will derive a benefit therefrom, will not induce the court to enforce such provisions.<sup>4</sup>

*Pennsylvania.* — *Rhodes v. Sparks*, 6 Pa. St. 473; *Eberman v. Reitzel*, 1 W. & S. (Pa.) 181. *South Carolina.* — *Bostick v. McClaren*, 2 Brev. (S. Car.) 275.

*Tennessee.* — *Ohio L. Ins., etc., Co. v. Merchant's Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Allen v. Dodd*, 4 Humph. (Tenn.) 131, 40 Am. Dec. 632; *Rhodes v. Summerhill*, 4 Heisk. (Tenn.) 204; *Yerger v. Rains*, 4 Humph. (Tenn.) 259; *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594.

*Texas.* — *Donley v. Tindall*, 32 Tex. 43, 5 Am. Rep. 234.

*Vermont.* — *Miller v. Lamery*, 62 Vt. 116.

*Virginia.* — *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491.

*West Virginia.* — *Dodson v. Swan*, 2 W. Va. 511, 98 Am. Dec. 787; *McClintock v. Loiseau*, 31 W. Va. 865.

**1. Ex Dolo Malo Non Oritur Actio** — *England.* — *Holman v. Johnson*, 1 Cowp. 341.

*United States.* — *Hoffman v. McMullen*, 48 U. S. App. 596; *Church v. Proctor*, 66 Fed. Rep. 240.

*Alabama.* — *Clark v. Colbert*, 67 Ala. 92.

*California.* — *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242.

*Georgia.* — *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415.

*Illinois.* — *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531.

*Louisiana.* — *Copley v. Berry*, 12 Rob. (La.) 79.

*New Jersey.* — *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 527, 55 Am. St. Rep. 614.

**2. Enforcement of Executory Contracts Denied** — *England.* — *Gas Light, etc., Co. v. Turner*, 5 Bing. N. Cas. 666, 35 E. C. L. 264; *Ottley v. Brown*, 1 Ball & B. 360.

*United States.* — *Chicago, etc., R. Co. v. Wabash, etc., R. Co.*, 61 Fed. Rep. 993; *Anderson v. Carkins*, 135 U. S. 483.

*Arkansas.* — *Mendel v. Davies*, 46 Ark. 420.

*California.* — *McGregor v. Donnelly*, 67 Cal. 149.

*Illinois.* — *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459.

*Indiana.* — *Kahn v. Gumberts*, 9 Ind. 430.

*Kansas.* — *Korman v. Henry*, 32 Kan. 52; *Setter v. Alvey*, 15 Kan. 157; *Buchtella v. Stepanek*, 53 Kan. 373.

*Louisiana.* — *Antoine v. Smith*, 40 La. Ann. 560.

*Michigan.* — *Bagg v. Jerome*, 7 Mich. 145.

*Missouri.* — *Buckingham v. Fitch*, 18 Mo. App. 91; *Howell v. Stewart*, 54 Mo. 400.

*Nevada.* — *Drexler v. Tyrrell*, 15 Nev. 114; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781.

*New York.* — *Pease v. Walsh*, 39 N. Y. Super. Ct. 514.

*North Carolina.* — *Sharp v. Farmer*, 4 Dev. & B. L. (20 N. Car.) 122; *York v. Merritt*, 77 N. Car. 213.

*Wisconsin.* — *Wight v. Rindskopf*, 43 Wis. 344.

**Illegal Contract to Convey Land Unenforceable.** — In *Dodson v. Swan*, 2 W. Va. 511, 98 Am. Dec. 787, it was held that where the owner of land enters into a contract for its sale for the purpose of enabling him to secure money to flee the state and avoid a criminal prosecution, a court of equity will not decree the specific performance of such contract at the suit of the vendee, though he has paid the purchase price.

**Mortgage of Intoxicating Liquors.** — In *Kansas* where a mortgage of intoxicating liquors is held illegal as a conveyance of the liquors, the court will not aid the mortgagee by enabling him to recover possession of the liquors. *Korman v. Henry*, 32 Kan. 49.

**3. Damages for Breach of Illegal Contract Denied** — *United States.* — *Jackson v. McLean*, 36 Fed. Rep. 213.

*California.* — *Santa Clara Valley Mill, etc., Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211.

*Iowa.* — *Williamson v. Chicago, etc., R. Co.*, 53 Iowa 126, 36 Am. Rep. 206.

*Kansas.* — *Setter v. Alvey*, 15 Kan. 157.

*Michigan.* — *Bagg v. Jerome*, 7 Mich. 145.

*Missouri.* — *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347.

**4. Performance by Plaintiff** — *England.* — *Holman v. Johnson*, 1 Cowp. 341; *Alexander v. Owen*, 1 T. R. 225.

*United States.* — *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 60; *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Chicago, etc., R. Co. v. Wabash, etc., R. Co.*, 61 Fed. Rep. 993, *disapproving* *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306.

*California.* — *Los Angeles v. City Bank*, 100 Cal. 18.

*Connecticut.* — *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210.

*Kansas.* — *Bowman v. Phillips*, 41 Kan. 364, 13 Am. St. Rep. 292.

*Illinois.* — *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, *affirming* 44 Ill. App. 331.

b. IMPLIED CONTRACT. — Nor can the party performing, on his part, the provisions of an illegal contract recover on the ground of an implied promise on the part of the party receiving the benefits therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract by reason of the performance thereof by the other party.<sup>1</sup>

3. Executed Contracts — a. IN GENERAL. — Where illegal contracts are executed by the parties, then the same principle of public policy which leads courts to refuse to act when called upon to enforce them will prevent the court from acting to relieve either party from the consequences of the illegal transactions.<sup>2</sup> In such cases, the defense of illegality prevails, not as a pro-

*Indiana.* — *Hutchins v. Weldin*, 114 Ind. 80.  
*Iowa.* — *Caldwell v. Bridal*, 48 Iowa 15; *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145; *Gleason v. Chicago, etc., R. Co.*, (Iowa 1889) 43 N. W. Rep. 517.

*Massachusetts.* — *Myers v. Meinrath*, 101 Mass. 368, 3 Am. Rep. 368; *Dexter v. Snow*, 12 Cush. (Mass.) 594, 59 Am. Dec. 206; *Fuller v. Dame*, 18 Pick. (Mass.) 472.

*Michigan.* — *Richardson v. Buhl*, 77 Mich. 632.

*Missouri.* — *Tyler v. Larimore*, 19 Mo. App. 445.

*Nevada.* — *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781.

*New York.* — *Briggs v. Merrill*, 58 Barb. (N. Y.) 389; *Belding v. Pitkin*, 2 Cai. (N. Y.) 147; *Kountze v. Flannagan*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 33; *Arnot v. Pitston, etc., Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, *reversing* 2 Hun (N. Y.) 591; *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. 518; *Beman v. Tugnot*, 5 Sandf. (N. Y.) 153; *Gray v. Hook*, 4 N. Y. 449; *Rose v. Truax*, 21 Barb. (N. Y.) 361.

*Ohio.* — *Hooker v. De Palos*, 28 Ohio St. 251.

*Pennsylvania.* — *Badgeley v. Beale*, 3 Watts (Pa.) 263; *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519.

*South Carolina.* — *Harvin v. Weeks*, 11 Rich. L. (S. Car.) 601.

*Tennessee.* — *Buckeye Marble, etc., Co. v. Harvey*, 92 Tenn. 115.

*Texas.* — *Davis v. Sittig*, 65 Tex. 497.

*Vermont.* — *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677.

*West Virginia.* — *Capehart v. Rankin*, 3 W. Va. 571, 100 Am. Dec. 779.

**Illegal Contract for Sale of Goods — Effect of Delivery.** — Where the contract for the sale of goods is illegal, the purchaser cannot recover the price though the goods are delivered. *Holman v. Johnson*, 1 Cowp. 341.

**Contract in Restraint of Trade.** — Where a contract restraining one of the parties from engaging in a particular business is illegal, the fact that the contract is fully performed by the party so restrained does not entitle him to recover the consideration agreed to be paid by the other party. *Oliver v. Gilmore*, 52 Fed. Rep. 562.

1. Implied Contract — *Illinois.* — *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502.

*Iowa.* — *Gleason v. Chicago, etc., R. Co.*, (Iowa 1889) 43 N. W. Rep. 517.

*Kansas.* — *Bowman v. Phillips*, 41 Kan. 364, 13 Am. St. Rep. 292.

*Kentucky.* — *Todd v. Caplinger*, 4 Bush (Ky.) 139; *Bull v. Harragan*, 17 B. Mon. (Ky.) 352; *Miller v. Porter*, 8 B. Mon. (Ky.) 283.

*Missouri.* — *Ashbrook v. Dale*, 27 Mo. App. 649.

*New York.* — *Peck v. Burr*, 10 N. Y. 294.

See also the title IMPLIED OR QUASI CONTRACTS.

**Illegal Lease — Action for Use and Occupation.** — Where a lease is illegal, no recovery can be had for use and occupation of the premises. *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502.

2. Executed Contracts — *England.* — *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Rider v. Kidder*, 10 Ves. Jr. 366; *Matthew v. Hanbury*, 2 Vern. 187; *Taylor v. Chester*, L. R. 4 Q. B. 309.

*United States.* — *National Harrow Co. v. Hench*, 76 Fed. Rep. 667.

*Alabama.* — *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38; *Walker v. Gregory*, 36 Ala. 180.

*Arkansas.* — *Payne v. Bruton*, 10 Ark. 53; *Britt v. Aylett*, 11 Ark. 475, 52 Am. Dec. 282; *Kerr v. Birnie*, 25 Ark. 225.

*Georgia.* — *Garrison v. Burns*, 98 Ga. 762; *Adams v. Barrett*, 5 Ga. 404; *White v. Crew*, 16 Ga. 420; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415.

*Illinois.* — *Riedle v. Mulhausen*, 20 Ill. App. 68.

*Kentucky.* — *Clark v. Doke*, 6 Ky. L. Rep. 655; *Jennings v. Flanagan*, 5 Dana (Ky.) 217, 30 Am. Dec. 683; *Ratcliffe v. Smith*, 13 Bush (Ky.) 173; *Gray v. Roberts*, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 383.

*Louisiana.* — *Davis v. Holbrook*, 1 La. Ann. 178; *Levet v. His Creditors*, 22 La. Ann. 105; *Hertz v. Wilder*, 10 La. Ann. 199; *Summerlin v. Livingston*, 15 La. Ann. 519; *Denton v. Erwin*, 6 La. Ann. 317.

*Maine.* — *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713; *Greene v. Godfrey*, 44 Me. 25; *Ellis v. Higgins*, 32 Me. 34; *Marks v. Hapgood*, 24 Me. 407.

*Maryland.* — *Stewart v. Iglehart*, 7 Gill & J. (Md.) 132, 28 Am. Dec. 202; *Cushwa v. Cushwa*, 5 Md. 45.

*Massachusetts.* — *Faxon v. Folvey* 110 Mass. 392; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Traders' Nat. Bank v. Stere*, 165 Mass. 389; *Babcock v. Thompson*, 3 Pick. (Mass.) 449; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368.

*Michigan.* — *Bagg v. Jerome*, 7 Mich. 145; *Smith v. Barstow*, 2 Dougl. (Mich.) 155.

*Minnesota.* — *Leveroos v. Reis*, 52 Minn. 259.

*Mississippi.* — *Walton v. Tusten*, 49 Miss.

*Missouri.* — *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 293.

*New Hampshire.* — *Gage v. Whittier*, 17 N. H. 312; *Smith v. Foster*, 41 N. H. 215.

*New Jersey.* — *Brindley v. Lawton*, 53 N. J.



tection to the defendant, but as a disability in the plaintiff. The court does not give effect to the contract, but merely refuses its aid to undo what the parties have already done.<sup>1</sup>

*b. LAND CONVEYED.* — Where land is conveyed for an illegal consideration or object, or in pursuance of an illegal contract, and possession is given to the grantee, the courts will not aid the grantor to recover the possession;<sup>2</sup> but if the grantee is not put in possession, it has been held that the courts will not aid him to gain possession, and in ejectment by the grantee to recover possession the grantor may show as a defense the illegality of the deed.<sup>3</sup> In some cases, however, it has been held that deeds conveying land were to be considered as executed contracts, though possession was not given the grantee, and in an action by the latter to recover possession the court has refused to allow the grantor to show that the deed was illegal.<sup>4</sup>

Eq. 259; *Hendricks v. Mount*, 5 N. J. L. 850; *Evans v. Herring*, 27 N. J. L. 243.

*North Carolina.* — *Sparks v. Sparks*, 94 N. Car. 527; *Wright v. Cain*, 93 N. Car. 296.

*Pennsylvania.* — *Stewart v. Kearney*, 6 Watts (Pa.) 453, 31 Am. Dec. 482; *Sickman v. Lapsley*, 13 S. & R. (Pa.) 224, 15 Am. Dec. 596; *Huey's Appeal*, 29 Pa. St. 220; *Murphy v. Hubert*, 16 Pa. St. 57.

*South Carolina.* — *Denton v. English*, 2 Nott & M. (S. Car.) 581, 10 Am. Dec. 638; *Jenkins v. Clement*, Harp. Eq. (S. Car.) 72, 14 Am. Dec. 698; *Broughton v. Broughton*, 4 Rich. L. (S. Car.) 491.

*Tennessee.* — *Williams v. Lowe*, 4 Humph. (Tenn.) 62; *Matthews v. Thompson*, 2 Heisk. (Tenn.) 595; *Henly v. Franklin*, 3 Coldw. (Tenn.) 472, 91 Am. Dec. 296; *Allen v. Dodd*, 4 Humph. (Tenn.) 131, 40 Am. Dec. 632; *Smith v. Stephens*, 5 Sneed (Tenn.) 253.

*Texas.* — *Jones v. Williams*, 41 Tex. 390.

*Virginia.* — *James v. Bird*, 8 Leigh (Va.) 510, 31 Am. Dec. 668.

**No Recovery of Property Pledged under Illegal Contract.** — *Taylor v. Chester*, L. R. 4 Q. B. 309.

**Recovery of Money Lost at Gaming.** — Where gaming contracts are illegal as against public policy, or in violation of statute, the loser cannot recover money lost; and this is true even though the winner cheated. *Babcock v. Thompson*, 3 Pick. (Mass.) 449.

In many of the states, however, statutes expressly provide for the recovery of money lost at gaming. See the title GAMBLING CONTRACTS, vol. 14, p. 624.

1. *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368.

2. **Land Conveyed Not Recoverable** — *United States.* — *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

*Alabama.* — *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48.

*Arkansas.* — *Kerr v. Birnie*, 25 Ark. 225.

*Georgia.* — *Ellis v. Hammond*, 57 Ga. 179.

*Indiana.* — *Swain v. Busell*, 10 Ind. 438.

*Kansas.* — *Setter v. Alvey*, 15 Kan. 157; *Tucker v. Allen*, 16 Kan. 324.

*Kentucky.* — *Ford v. Lewis*, 10 B. Mon. (Ky.) 127; *Marksbury v. Taylor*, 10 Bush (Ky.) 519.

*Louisiana.* — *Terrel v. Cropper*, 9 Mart. (La.) 350, 13 Am. Dec. 309.

*Maryland.* — *Gotwalt v. Neal*, 25 Md. 434.

*Massachusetts.* — *Worcester v. Eaton*, 11 Mass. 368.

*New Hampshire.* — *White v. Hunter*, 23 N. H. 128.

*New York.* — *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; *Moseley v. Moseley*, 15 N. Y. 336.

*North Carolina.* — *Jackson v. Marshall*, 1 Murph. (5 N. Car.) 323, 3 Am. Dec. 695.

*Ohio.* — *Thomas v. Cronise*, 16 Ohio 54.

*Pennsylvania.* — *Reichart v. Castator*, 5 Binn. (Pa.) 109, 6 Am. Dec. 402; *Allebach v. Hunsicker*, 132 Pa. St. 349; *Gisaf v. Neval*, 81 Pa. St. 354.

*Tennessee.* — *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282; *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594; *Stipe v. Stipe*, 2 Head (Tenn.) 169; *Montgomery v. Kerr*, 6 Coldw. (Tenn.) 199, 98 Am. Dec. 450.

*Texas.* — *Donley v. Tindall*, 32 Tex. 43, 5 Am. Rep. 234.

*Vermont.* — *Peaslee v. Barney*, 1 D. Chip. (Vt.) 331, 6 Am. Dec. 743.

**Deed — Immoral Consideration.** — In *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48, it was held that a deed executed and delivered, though on an immoral consideration, the grantees being in possession, vests title, and the grantor cannot recover possession of the land. See also *White v. Hunter*, 23 N. H. 128.

**Consideration of Deed Confederate Money.** — And the same has been held true of a deed the consideration of which was Confederate money. And when such a deed had been lost it was held that a suit in equity would lie to establish it. *Montgomery v. Kerr*, 6 Coldw. (Tenn.) 199, 98 Am. Dec. 450.

**Deed Made on Sunday.** — Where a deed to land is made on Sunday, and the money is paid, the possession of the land having been previously given to the vendee, the law will leave the parties where it finds them; both being *in pari delicto*, although the contract consummated on Sunday be illegal, the courts will not interfere. *Ellis v. Hammond*, 57 Ga. 179.

3. **Recovery of Possession by Grantee Denied.** — *Harrison v. Hatcher*, 44 Ga. 638; *Southern Express Co. v. Duffey*, 48 Ga. 358; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531.

In *Southern Express Co. v. Duffey*, 48 Ga. 358, where the deed was executed in consideration of the compounding of a felony by the grantee, a recovery of the possession of the land from the grantor was denied to the grantee.

4. **Deed Without Possession Given Treated as Executed Contract.** — Thus, in *Moseley v.*



c. **RECOVERY OF CONSIDERATION PARTED WITH.** — And so when money is paid on an illegal contract, or personal property is transferred, the aid of the law cannot, as a rule, be invoked for its recovery,<sup>1</sup> though the other party refuses to perform his part of the contract.<sup>2</sup>

4. **In Equity** — a. **IN GENERAL.** — Courts of equity follow the rule of law as to the enforcement of and relief from illegal contracts, and, as a general rule, refuse either to enforce illegal contracts or to grant any relief to the parties thereto, merely leaving them in the position in which they have placed themselves.<sup>3</sup> This is in pursuance of the well-settled and practical principle

Moseley, 15 N. Y. 334, the owner of land executed a deed thereto for the purpose of defrauding his creditors, and subsequently conveyed the land to the defendant, and it was held, in an action by the first grantee to recover possession of the land from the defendant, that the defendant could not attack the deed to the former on the ground of illegality.

**Ejectment on Mortgage to Compound Felony.** — In an action by the mortgagee against the mortgagor, under the *Ohio* statute (Civ. Code, § 558; Bates's Annot. Stat. 1897, § 5781), to recover possession of the lands mortgaged, it was held that the fact that such mortgage was given to compound a felony was not available as a defense. *Williams v. Englebrecht*, 37 Ohio St. 383.

1. **No Recovery of Consideration Parted With — England.** — *Collins v. Blantern*, 2 Wils. C. Pl. 341.

*United States.* — *White v. Barber*, 123 U. S. 392.

*Alabama.* — *Walker v. Gregory*, 36 Ala. 180.

*Arkansas.* — *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108.

*California.* — *Hartin v. Wade*, 37 Cal. 168.

*Illinois.* — *Schubart v. Chicago Gas Light, etc., Co.*, 41 Ill. App. 181; *Griffin v. Piper*, 55 Ill. App. 213.

*Indiana.* — *State v. Sims*, 76 Ind. 328; *Nudd v. Burnett*, 74 Ind. 25; *Davis v. Leonard*, 69 Ind. 213; *Huichins v. Weldin*, 114 Ind. 80; *Budd v. Rutherford*, 4 Ind. App. 386.

*Iowa.* — *Kinney v. McDermott*, 55 Iowa 674, 39 Am. Rep. 191; *Pike v. King*, 16 Iowa 49.

*Kansas.* — *Hallan v. Huffman*, 5 Kan. App. 393.

*Kentucky.* — *Davezac v. Seiler*, 12 Ky. L. Rep. 599; *Kimbrough v. Lane*, 11 Bush (Ky.) 564; *Gray v. Roberts*, 2 A. K. Marsh (Ky.) 208, 12 Am. Dec. 383.

*Louisiana.* — *Copley v. Berry*, 12 Rob. (La.) 79.

*Maine.* — *Waite v. Merrill*, 4 Mc. 102, 16 Am. Dec. 238.

*Maryland.* — *Gotwalt v. Neal*, 25 Md. 434.

*Massachusetts.* — *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159.

*Michigan.* — *Richardson v. Buhl*, 77 Mich. 632; *Reed v. Bond*, 96 Mich. 134.

*New Hampshire.* — *Welsh v. Cutler*, 44 N. H. 561; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Weeks v. Hill*, 38 N. H. 199; *White v. Hunter*, 23 N. H. 129; *Johnson v. Ferris*, 49 N. H. 66.

*New Jersey.* — *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 627, 55 Am. St. Rep. 614; *Brindley v. Lawton*, 53 N. J. Eq. 259; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604.

*New York.* — *People v. Stephens*, 71 N. Y.

527; *Peck v. Burr*, 10 N. Y. 294; *Phoenix Bridge Co. v. Keystone Bridge Co.*, 142 N. Y. 425; *Knowlton v. Congress, etc.*, *Spring Co.*, 57 N. Y. 518; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.*, 16 Daly (N. Y.) 529; *Haynes v. Rudd*, 83 N. Y. 251.

*North Carolina.* — *Webb v. Fulchire*, 3 Ired. L. (25 N. Car.) 485, 40 Am. Dec. 419.

*Ohio.* — *Hoss v. Layton*, 3 Ohio St. 352; *Hooker v. De Palos*, 28 Ohio St. 251; *Kahn v. Walton*, 46 Ohio St. 195.

*Pennsylvania.* — *Lutz v. Weidner*, 1 Woodw. (Pa.) 428; *Stewart v. Parnell*, 29 W. N. C. (Pa.) 537.

*South Carolina.* — *Touro v. Cassin*, 1 Nott. & M. (S. Car.) 173, 9 Am. Dec. 680.

*Texas.* — *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593, *overruling Boggess v. Lilly*, 18 Tex. 200; *Davis v. Sittig*, 65 Tex. 497. *Compare Rayner Cattle Co. v. Bedford*, 91 Tex. 642.

*Vermont.* — *Foote v. Emerson*, 10 Vt. 338; *McEwen v. Shannon*, 64 Vt. 583; *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629; *Barnard v. Crane*, 1 Tyler (Vt.) 457.

*Virginia.* — *Johnson v. Jennings*, 10 Gratt. (Va.) 1, 60 Am. Dec. 323.

*West Virginia.* — *McClintock v. Loisseau*, 31 W. Va. 865.

**A Candidate for Office** received from another person money to aid him in securing his election, and in consideration thereof agreed to share with such other person a portion of the proceeds and emoluments of the office when elected. It was held that no action to recover back the money would lie. *Martin v. Wade*, 37 Cal. 168.

**Illegal Combination.** — Where persons form an association to prevent competition in a certain business, and pay dues to an officer thereof, none of them can recover the money. *Griffin v. Piper*, 55 Ill. App. 213.

2. **Failure of Seller to Deliver Goods.** — Where a contract for the sale of personal property is illegal on account of part of the inducement therefor being the promise of the seller to resign a public office and use his influence to secure the appointment of the buyer, the buyer cannot recover money paid thereon on refusal of the seller to deliver the property. *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108.

3. **Equity Follows the Law — England.** — *Benyon v. Nettleford*, 3 Macn. & G. 102; *Thomson v. Thomson*, 7 Ves. Jr. 470; *Cooth v. Jackson*, 6 Ves. Jr. 12; *In re Cork, etc.*, R. Co., 39 L. J. Ch. 277; *Ayerst v. Jenkins*, L. R. 16 Eq. 283.

*United States.* — *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *Congress, etc.*, *Spring Co. v. Knowlton*, 103 U. S. 49; *Hedges v. Dixon*

which controls courts of equity in their administration of justice, that he who invokes their aid must come with clean hands — that he who has committed iniquity shall not have equity.<sup>1</sup>

*b. FORECLOSURE OF ILLEGAL MORTGAGE.* — As to the question of illegality of a mortgage as a defense to a suit to foreclose, reference is made to another title in this work.<sup>2</sup>

*c. CANCELLATION OF INSTRUMENTS.* — By the weight of authority it seems that a court of equity will interpose its active aid by decreeing the cancellation of instruments arising out of illegal contracts.<sup>3</sup>

County, 37 Fed. Rep. 304; St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 407.

*Alabama.* — Saltmarsh v. Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525. Compare Roberts v. Taylor, 7 Port. (Ala.) 251.

*Arkansas.* — Shattuck v. Watson, 53 Ark. 147.

*Georgia.* — Garrison v. Burns, 98 Ga. 762.

*Illinois.* — Miller v. Marckle, 21 Ill. 152; Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147.

*Indiana.* — Mattox v. Hightshue, 39 Ind. 95.

*Maryland.* — Cronise v. Clark, 4 Md. Ch. 404.

*Massachusetts.* — Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124.

*New Jersey.* — Ownes v. Ownes, 23 N. J. Eq. 60.

*New York.* — Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438.

*North Carolina.* — McRae v. Atlantic, etc., R. Co., 5 Jones Eq. (58 N. Car.) 395.

*Ohio.* — Thomas v. Cronise, 16 Ohio 54.

*Tennessee.* — Stipe v. Stipe, 2 Head (Tenn.) 169; Porter v. Jones, 6 Coldw. (Tenn.) 313; Simmons v. Kincaid, 5 Sneed (Tenn.) 450.

*Texas.* — Cordova v. Lee, (Tex. 1890) 14 S. W. Rep. 208.

*West Virginia.* — Brown v. Wylie, 2 W. Va. 502.

See generally the title EQUITY, vol. II, p. 174 *et seq.*

**Injunction Against Payment of Check.** — A person having lost in illegal speculations on the markets, gave his check for the differences and sought to enjoin the bank from paying it to the drawee. The injunction was denied on the ground that a plaintiff who founds his cause of action on an illegal or immoral act has no standing in a court of equity; and where both parties have been engaged in an unlawful transaction, the court will neither lend its active aid to the one party to get rid of the securities taken upon such transaction, nor assist the other party in retaining them, but will leave both to their strict legal rights. Kahn v. Walton, 46 Ohio St. 195.

1. **Equitable Maxim.** — Shattuck v. Watson, 53 Ark. 147; Porter v. Jones, 6 Coldw. (Tenn.) 313. See the title EQUITY, vol. II, p. 162.

2. See the title FORECLOSURE OF MORTGAGES, vol. 13, p. 816.

3. **Cancellation of Instruments Decreed.** — *England.* — St. John v. St. John, 11 Ves. Jr. 526; Hanington v. Du Chastel, 2 Swanst. 158, note; Whaley v. Norton, 1 Vern. 483; Willems v. Bullmore, 33 L. J. Ch. 461; Matthew v. Hanbury, 2 Vern. 187; Sismey v. Eley, 17 Sim. 1; Willems v. Bullmore, 32 Beav. 574; Smyth

v. Griffin, 13 Sim. 245; Williams v. Bayley, L. R. 1 H. L. 200; Winchester v. Fournier, 2 Ves. 445.

*United States.* — McCutcheon v. Merz Capsule Co., 71 Fed. Rep. 787; St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 407.

*Kansas.* — Ainsworth v. Miller, 20 Kan. 220. *Tennessee.* — Johnson v. Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502; Porter v. Jones, 6 Coldw. (Tenn.) 313.

But see Miller v. Marckle, 21 Ill. 152; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Weakley v. Watkins, 7 Humph. (Tenn.) 356.

See generally the title REFORMATION AND CANCELLATION.

**Cloud on Title.** — In Johnson v. Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502, a bill was brought to have a deed to land, executed for an illegal consideration, decreed canceled as a cloud on the title of the grantor who had remained in possession of the land. This relief was granted.

**Surrender of Instrument into Court.** — In Winchester v. Fournier, 2 Ves. 445, a promissory note, suspicious in itself under the circumstances, and the admitted object of it being an improper one even if the note were actually genuine, was decreed, at the instance of the person alleged to have given it, to be deposited with the registrar of the court, in the first instance, with a declaration that the plaintiff was entitled to be relieved against it without preventing the defendant from bringing an action on it within a reasonable time; and in case of delay in doing so, then to be delivered up.

**Illegality Appearing on Face of Instrument.** — **Adequate Legal Remedy.** — There is no jurisdiction in equity to order an instrument to be delivered up on the ground of illegality which appears upon the face of the instrument itself. This rule is based on the principle that the remedy at law is adequate. Simpson v. Howden, 3 Myl. & C. 97, reversing 1 Keen 583. See also Gray v. Mathias, 5 Ves. Jr. 286; O'Connell v. Noonan, 1 App. Cas. (D. C.) 332.

**Effect of Verdict at Law on Illegal Bond.** — In Franco v. Bolton, 3 Ves. Jr. 368, Lord Loughborough allowed a demurrer to a bill to set aside a bond alleged to have been given *pro turpi causa*, after a verdict in an action at law for the obligee.

**Gaming Security.** — In Rucker v. Wynne, 2 Head (Tenn.) 618, a bill was filed to have a gaming security delivered up and canceled. The security had been obtained from the complainant by the grossest fraud and imposition in connection with the gambling transaction. McKinney, J., delivered the opinion of the court in a careful and deliberate manner,



*d. BILL OF DISCOVERY.* — It has also been held in *England* that a court of equity would entertain a bill for discovery and to perpetuate evidence in aid of a defense to an action at law on a contract, though the discovery and evidence were for the purpose of showing that the contract was illegal as against public policy.<sup>1</sup>

*e. INJUNCTION TO RESTRAIN ACTION ON ILLEGAL CONTRACT.* — But it has been held that a court of equity would not grant an injunction to restrain the bringing of an action at law on an illegal contract.<sup>2</sup>

**5. Relief from Judgments Recovered on Illegal Contracts.** — Where after due trial a judgment has been recovered by one party to an illegal contract against the other for an indebtedness arising out of such contract, the defendant having failed to set up the defense of illegality, the instrument on which the judgment was recovered being valid on its face, the illegal contract is treated as executed or merged in the judgment, and no relief therefrom will be granted to the defendant.<sup>3</sup>

**Judgment Entered on Warrant of Attorney.** — But when the judgment was entered on a warrant of attorney, as in case of judgment notes, no opportunity to set up the defense of illegality being given to the defendant, it has been held in *Pennsylvania* that the defendant was entitled to have the judgment opened, so as to enable him to avail himself of the defense of illegality,<sup>4</sup> or a court of equity may grant relief therefrom.<sup>5</sup>

**6. Relief in Interest of Creditors or Heir of Party** — *a. IN INTEREST OF CREDITOR.* — As a general rule, a contract which is illegal should not be enforced, nor should relief be granted therefrom in the interest of creditors of one of the parties thereto any more than in the interest of such party.<sup>6</sup>

holding that, on the grounds of public policy, the court would interfere to set aside the security. *Weakley v. Watkins*, 7 *Humph.* (Tenn.) 356, was commented upon and expressly *disapproved*, Judge McKinney saying that that case was hastily considered, and that though it might be distinguished from the case then before the court by the element of most atrocious fraud which characterized the latter, yet he was inclined to rest the decision on the distinct principle announced in *Johnson v. Cooper*, 2 *Yerg.* (Tenn.) 524, 24 *Am. Dec.* 502, where public policy required that contracts of that nature should be canceled by the courts.

**1. Bill of Discovery.** — *Longfield v. Audrey*, 1 *Hog.* 300; *Benyon v. Nettlefold*, 3 *Macn. & G.* 94, *reversing* 17 *Sim.* 51.

**2. Injunction to Restrain Action at Law.** — *Woodworth v. Janes*, 2 *Johns. Cas.* (N. Y.) 417. See also *Albertson v. Laughlin*, 173 *Pa. St.* 525, 51 *Am. St. Rep.* 777. See generally the title *INJUNCTIONS*.

**Ejectment.** — In *Adams v. Barrett*, 5 *Ga.* 404, it was held that a court of equity would not enjoin a grantee in a deed based on an illegal consideration from bringing an action of ejectment thereon.

**3. Relief from Judgment Recovered on Illegal Contract.** — *Bonney v. Bowman*, 63 *Miss.* 166; *Shumaker v. Reed*, 3 *Pa. Dist.* 45; *Blystone v. Blystone*, 51 *Pa. St.* 373; *Weakley v. Watkins*, 7 *Humph.* (Tenn.) 356; *Giddens v. Lea*, 3 *Humph.* (Tenn.) 133; *Barnett v. Barnett*, 83 *Va.* 504. See also *Swain v. Scott*, 11 *S. & R.* (Pa.) 155. Compare *George v. Stanley*, 4 *Taunt.* 683.

**Recovery of Verdict.** — In *Franco v. Bolton*, 3 *Ves. Jr.* 368, it was held that a court of equity

would not decree the cancellation of a bond after a verdict had been recovered thereon by the obligee in an action at law.

**4. Judgment Entered on Warrant of Attorney.** — *Griffith's Appeal*, 42 *Leg. Int.* (Pa.) 277; *Hall v. Law*, 1 *Pa. Co. Ct.* 477; *Ham v. Smith*, 87 *Pa. St.* 63; *Bredin's Appeal*, 92 *Pa. St.* 241, 37 *Am. Rep.* 677; *Kearney v. Smith*, 2 *Luz. Leg. Reg.* (Pa.) 170; *Collins v. Nevin*, 30 *Pittsb. Leg. J.* (Pa.) 238. Compare *Baker v. Lukens*, 35 *Pa. St.* 146; *Shumaker v. Reed*, 3 *Pa. Dist.* 45; *McDonald v. Campbell*, 3 *Pittsb.* (Pa.) 554; *Chambers v. Brew*, 18 *Pa. Co. Ct.* 399; *Lee v. Drake*, 10 *Pa. Co. Ct.* 276; *Glass v. Morey*, 12 *W. N. C.* (Pa.) 436; *Adams v. Grey*, 154 *Pa. St.* 258.

**5. Restraining Enforcement of Judgment Entered on Warrant of Attorney.** — *Given's Appeal*, 121 *Pa. St.* 260, 6 *Am. St. Rep.* 795.

**6. Relief in Interest of Creditors** — *England.* — *In re Mapleback*, 4 *Ch. D.* 150.

*Louisiana.* — *Gravier v. Carraby*, 17 *La.* 118, 36 *Am. Dec.* 608.

*Maine.* — *Marks v. Hapgood*, 24 *Me.* 407.

*Massachusetts.* — *Traders' Nat. Bank v. Steere*, 165 *Mass.* 389.

*New Hampshire.* — *Clark v. Gibson*, 12 *N. H.* 387.

*New York.* — *Gray v. Oxnard Brothers' Co.*, 59 *Hun* (N. Y.) 387.

*Pennsylvania.* — *Speise v. M'Coy*, 6 *W. & S.* (Pa.) 485, 40 *Am. Dec.* 579; *Chestnut v. Harbaugh*, 78 *Pa. St.* 473.

*Tennessee.* — *Robertson* (Tenn.) decided at Jackson, 1875.

**Winner of Money as Garnishee in Action Against Loser.** — In *Speise v. M'Coy*, 6 *W. & S.* (Pa.) 485, 40 *Am. Dec.* 579, it was held that money lost by a wager upon an election, and paid



But if the illegal contract partakes of the nature of an agreement in fraud of the rights of the creditors of one of the parties thereto, relief therefrom may be granted in the interest of the creditors of such party.<sup>1</sup>

*b. IN INTEREST OF HEIR.* — It has also been held that the heir or personal representative of one of the parties to an illegal contract has no greater right to be relieved from the contract or to enforce it than his decedent had.<sup>2</sup>

**7. Parties Not in Equal Fault (Not in *Pari Delicto*)** — *a. IN GENERAL.* — In a number of cases the courts have recognized the difference in the degrees of guilt between parties to illegal contracts and have granted relief to one of the parties and allowed him to recover property or money parted with, where he was not in equal fault, or as the courts generally express it, *in pari delicto*, with the other party.<sup>3</sup>

*b. STATUTE FOR PROTECTION OF PARTY SEEKING RELIEF.* — Where con-

over to the winner, cannot be recovered back from him by means of a foreign attachment at the suit of a creditor of the loser.

And in *Clark v. Gibson*, 12 N. H. 387, it was held that a creditor of one of the parties to a gambling contract cannot reach the deposit, although in the hands of a stakeholder, unless the party is insolvent or in embarrassed circumstances.

**1. Fraudulent Conveyances.** — *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46; *Weeks v. Hill*, 38 N. H. 199.

**2. In Interest of Heir.** — *Ayerst v. Jenkins*, L. R. 16 Eq. 275, *overruling dicta* in *Matthew v. Hanbury*, 2 Vern. 187; *Marksbury v. Taylor*, 10 Bush (Ky.) 519; *Gravier v. Carraby*, 17 La. 118, 36 Am. Dec. 608; *White v. Hunter*, 23 N. H. 128.

In *Marksbury v. Taylor*, 10 Bush (Ky.) 519, it was held that an executed contract for the sale of land, based upon the consideration of future illicit sexual commerce, could not be set aside at the instance of the heirs at law of the grantor. *White v. Hunter*, 23 N. H. 128, is to the same effect.

**3. Parties Not in *Pari Delicto*** — *England.* — *Jaques v. Golightly*, 2 W. Bl. 1073; *Smith v. Bromley*, 2 Dougl. 696, note; *Reynell v. Sprye*, 8 Hare 275, *affirmed* 1 De G. M. & G. 660; *Pinckston v. Brown*, 3 Jones Eq. (56 N. Car.) 494; *Browning v. Morris*, 2 Cowp. 790; *Williams v. Hedley*, 8 East 378; *Osborne v. Williams*, 18 Ves. Jr. 379; *Morris v. McCulloch*, Amb. 432; *Goldsmith v. Bruning*, 1 Eq. Cas. Abr. 90, par. 4.

*United States.* — *Farmers' L. & T. Co. v. St. Joseph, etc., R. Co.*, 1 McCrary (U. S.) 247; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Parkersburg v. Brown*, 106 U. S. 487; *Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49.

*Alabama.* — *Mobile, etc., R. Co. v. Dismukes*, 94 Ala. 131.

*Arkansas.* — *Whitney v. Peay*, 24 Ark. 22.

*California.* — *Foulke v. San Diego, etc., R. Co.*, 51 Cal. 365.

*Connecticut.* — *Philadelphia Loan Co. v. Towne*, 13 Conn. 249.

*Florida.* — *Bellamy v. Sheriff*, 6 Fla. 62.

*Indiana.* — *U. S. Express Co. v. Lucas*, 36 Ind. 361; *Berry v. Makepeace*, 3 Ind. 154.

*Kentucky.* — *Anderson v. Merideth*, 82 Ky. 564; *Gray v. Roberts*, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 383.

*Maine.* — *Concord v. Delaney*, 58 Me. 309.

*Maryland.* — *Roman v. Mali*, 42 Md. 513; *Scott v. Leary*, 34 Md. 389.

*Massachusetts.* — *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Atlas Bank v. Nahant Bank*, 3 Met. (Mass.) 581; *Dill v. Wareham*, 7 Met. (Mass.) 438; *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. (Mass.) 373; *Adams v. Goodnow*, 101 Mass. 81; *Worcester v. Eaton*, 11 Mass. 368; *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33.

*Michigan.* — *Quirk v. Thomas*, 6 Mich. 77.

*Mississippi.* — *Bond v. Jones*, 8 Smed. & M. (Miss.) 368.

*Missouri.* — *Green v. Corrigan*, 87 Mo. 359; *Poston v. Balch*, 69 Mo. 115; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

*New Hampshire.* — *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100, 49 Am. St. Rep. 582; *Willie v. Green*, 2 N. H. 333; *Cross v. Bell*, 34 N. H. 82.

*New York.* — *Excise Com'rs v. Backus*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 40; *Sistare v. Best*, 16 Hun (N. Y.) 615; *City Bank v. Perkins*, 4 Bosw. (N. Y.) 446, 29 N. Y. 554, 86 Am. Dec. 332; *Curtis v. Leavitt*, 15 N. Y. 45; *Sacketts Harbor Bank v. Codd*, 18 N. Y. 240; *Ganson v. Tift*, 71 N. Y. 57; *Freelove v. Cole*, 41 N. Y. 619, 41 Barb. (N. Y.) 326; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Duval v. Wellman*, 124 N. Y. 156, *reversing* 14 Daly (N. Y.) 515; *Bailey v. Belmont*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 270; *Tracy v. Talmage*, 14 N. Y. 181; *Wheaton v. Hibbard*, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; *Mount v. Waite*, 7 Johns. (N. Y.) 434; *Schermerhorn v. Talman*, 14 N. Y. 93.

*North Carolina.* — *Wright v. Cain*, 93 N. Car. 296.

*Ohio.* — *Vanatta v. State Bank*, 9 Ohio St. 27.

*Tennessee.* — *Tally v. Smith*, 1 Coldw. (Tenn.) 290; *Davis v. McNalley*, 5 Sneed (Tenn.) 583, *Tagg v. State Nat. Bank*, 9 Heisk. (Tenn.) 479.

*Vermont.* — *Harrington v. Grant*, 54 Vt. 236. In *Goldsmith v. Bruning*, 1 Eq. Cas. Abr. 90, par. 4, a marriage-brokerage case, the party obtaining money by the sale of her influence was decreed first at the rolls and afterwards upon appeal to refund the money which she had received. See also *Smith v. Bruning*, 2 Vern. 392.

tracts or transactions are prohibited by a positive statute enacted for the sake of protecting one set of men from another set of men (the one from their situation and condition being liable to be imposed on by the other), the parties have been held not to be *in pari delicto*, and in furtherance of such a statute the person for whose protection the statute was enacted has been permitted after the transaction is finished to recover the money or property parted with by him.<sup>1</sup>

c. **PENALTY IMPOSED ON ONE PARTY.**—And when a contract is prohibited by statute and a penalty is imposed on only one of the parties for a violation of the statute the parties are not necessarily *in pari delicto*, and when equity requires it the court may afford relief to the party upon whom no penalty is imposed.<sup>2</sup>

d. **IGNORANCE OF ILLEGALITY OF CONTRACT.**—Where the contract is illegal for other reasons than that it involves moral turpitude, ignorance of the illegality of the contract on the part of the party seeking relief has been considered as strong ground for granting relief to him.<sup>3</sup>

1. **Statute for Protection of Party Seeking Relief**—*England*.—*Vandyck v. Hewitt*, 1 East 96; *Smith v. Bromley*, 2 Dougl. 696, note; *Williams v. Hedley*, 8 East 378; *Jaques v. Golightly*, 2 W. Bl. 1073; *Howson v. Hancock*, 8 T. R. 575; *Browning v. Morris*, 2 Cowp. 790.

*United States*.—*Nashville v. Ray*, 19 Wall. (U. S.) 484.

*California*.—*Babcock v. Goodrich*, 47 Cal. 509; *Savings Bank v. Burns*, 104 Cal. 473.

*Illinois*.—*Ferguson v. Sutphen*, 8 Ill. 547.

*Indiana*.—*Deming v. State*, 23 Ind. 416; *Scotten v. State*, 51 Ind. 52.

*Kansas*.—*Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327.

*Kentucky*.—*Gray v. Roberts*, 2 A. K. Marsh. (Ky.) 203, 12 Am Dec. 383.

*Maryland*.—*Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211.

*Massachusetts*.—*Worcester v. Eaton*, 11 Mass. 368; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33.

*Ohio*.—*Goshen Tp. v. Springfield, etc., R. Co.*, 12 Ohio St. 624, 80 Am. Dec. 386.

*Tennessee*.—*Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

**Vendees of Patent Rights** for whose protection a statute is enacted imposing duties upon a vendor are not *in pari delicto* so as to prevent them from obtaining relief from their contract on account of the vendor's failure to obey the statute. *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327.

**Statutes Relating to the Lending of Public Funds.**—So also where a statute prohibited the lending of public funds, except on specific kinds of securities, it was held that one who borrowed such funds and gave a prohibited security for their repayment could not resist the enforcement of the repayment of the money borrowed, as the law was designed for the protection of the public and not for that of the borrower. *Deming v. State*, 23 Ind. 416, *overruling State v. State Bank*, 5 Ind. 353; *Scotten v. State*, 51 Ind. 52.

2. **Penalty Imposed on One Party**—*England*.—*Barclay v. Pearson*, (1893) 2 Ch. 154; *Jaques v. Golightly*, 2 W. Bl. 1073; *Browning v. Morris*, 2 Cowp. 790; *Williams v. Hedley*, 8 East 378.

*Massachusetts*.—*Atlas Bank v. Nahant Bank*, 3 Met. (Mass.) 581; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Bowditch v. New England Mut. L. Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474; *Holden v. Upton*, 134 Mass. 177.

*Nebraska*.—*Carkins v. Anderson*, 21 Neb. 364; *Simmons v. Yurann*, 11 Neb. 516; *Bateman v. Robinson*, 12 Neb. 508; *Blanchard v. Jamison*, 14 Neb. 244.

*New Hampshire*.—*Ladd v. Barton*, 64 N. H. 613; *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100, 49 Am. St. Rep. 582.

*New York*.—*Mount v. Waite*, 7 Johns. (N. Y.) 434; *Tracy v. Talmage*, 14 N. Y. 162; *Schermerhorn v. Talman*, 14 N. Y. 93; *Curtis v. Leavitt*, 15 N. Y. 45; *Buffalo City Bank v. Codd*, 25 N. Y. 163.

3. **Ignorance of Illegality of Contract**—*England*.—*Hotchkiss v. Dickinson*, 2 Bligh 348.

*United States*.—*Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49; *Pullman Palace Car Co. v. Central Transp. Co.*, 65 Fed. Rep. 158.

*Alabama*.—*Mobile, etc., R. Co. v. Dismukes*, 94 Ala. 131.

*Massachusetts*.—*Musson v. Fales*, 16 Mass. 332; *Roys v. Johnson*, 7 Gray (Mass.) 162.

*Missouri*.—*Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

*New York*.—*Beram v. Kruscal*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 479.

*Oregon*.—*Miller v. Hirschberg*, (Oregon 1894) 37 Pac. Rep. 85.

*Pennsylvania*.—*Burkholder v. Beetem*, 65 Pa. St. 496.

In *Beram v. Kruscal*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 479, it was held that the fact that a contract for the lease of a soda-water stand was illegal on account of its being maintained in a street without permission from the city authorities, would not prevent the lessee from recovering the amount paid for the lease, where he was induced by the lessor to believe that he had the permission of the city to maintain the stand.

Though a sale of stocks by the cashier of a bank is illegal under Act Pa. April 15, 1850, § 10, art. 5 (P. L. 482), which prohibits a bank cashier under penalty from engaging in the purchase and sale of stocks, still the purchaser, if ignorant, at the time, of the cashier's owner-



**c. FRAUD, UNDUE INFLUENCE, OR DURESS EXERCISED ON PARTY — Fraud.** — Where one party to a contract was induced by fraud on the part of the other party to the contract to enter it, it has been held that the principle *in pari delicto* did not apply as regards the latter, and he has been relieved of the effect of his part performance.<sup>1</sup>

**Undue Influence.** — And where a person is induced by undue influence to enter into an illegal contract, it has been held that the principle *in pari delicto* did not prevent the courts from granting to him relief therefrom.<sup>2</sup>

**Duress or Oppression.** — And relief has been granted when the party seeking it acted under duress or oppression exercised over him by the other party.<sup>3</sup>

**f. PERSONS NON SUI JURIS.** — Where a person seeking relief from an illegal contract was not *sui juris*, and therefore did not have legal capacity to enter into the contract, the illegality of the contract will not prevent the courts from granting relief to him to recover property parted with by him in execution of the contract.<sup>4</sup>

ship, may recover back the purchase money. *Burkholder v. Beetem*, 65 Pa. St. 496.

**Action by Father for Services Rendered by Son — Ignorance of Illegality of Services Rendered.** — In *Emery v. Kempton*, 2 Gray (Mass.) 257, a father was allowed to recover the value of services rendered by his minor son in the illegal sale of liquors, where the father was ignorant of the character of the services performed by his son at the time of such performance.

**1. Fraud — England.** — *Reynell v. Sprye*, 1 De G. M. & G. 660.

*Michigan.* — *Hess v. Culver*, 77 Mich. 598, 18 Am. St. Rep. 421; *Pearl v. Walter*, 80 Mich. 317; *Knight v. Linzey*, 80 Mich. 396; *Timmerman v. Bidwell*, 62 Mich. 205.

*New York.* — *Shedd v. Montgomery*, 61 Barb. (N. Y.) 507.

*Vermont.* — *Hinsdill v. White*, 34 Vt. 558.

*Virginia.* — *Austin v. Winston*, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

See also the title FRAUD AND DECEIT, vol. 14, p. 12.

**Compounding Offenses.** — In *Hinsdill v. White*, 34 Vt. 558, the defendant, by fraudulent means, induced the plaintiff to pay money to him for the purpose of compounding a felony, and it was held that the plaintiff could recover the money so paid.

**Scheme to Cheat Public.** — In *Timmerman v. Bidwell*, 62 Mich. 205, it was held that where the plaintiff was induced by the fraud of the defendant to enter into the scheme of the latter to defraud the public, and paid to the latter money in pursuance thereof, he could recover the money so paid.

**Fraud on Creditors.** — And in *Davis v. McNalley*, 5 Sneed (Tenn.) 583, relief was granted in a case where a weak and illiterate old man was induced, by the false and fraudulent representations of his son-in-law, to enter into a contract for the supposed purpose of defrauding his creditors. *Tally v. Smith*, 1 Coldw. (Tenn.) 290.

**2. Undue Influence — England.** — *Osborne v. Williams*, 18 Ves. Jr. 379.

*Iowa.* — *Davidson v. Carter*, 55 Iowa 117.

*Maine.* — *Ellsworth v. Mitchell*, 31 Me. 247.

*Massachusetts.* — *Watkins v. Goodall*, 138 Mass. 533.

*Missouri.* — *Bell v. Campbell*, 123 Mo. 1, 45

Am. St. Rep. 505; *Holliway v. Holliway*, 77 Mo. 392.

*Nebraska.* — *Kleeman v. Peltzer*, 17 Neb. 381.

*New York.* — *Place v. Hayward*, 117 N. Y. 487; *Ford v. Harrington*, 16 N. Y. 285; *Duval v. Wellman*, 124 N. Y. 156; *Boyd v. De La Montagnie*, 73 N. Y. 498.

*North Carolina.* — *Pinckston v. Brown*, 3 Jones Eq. (56 N. Car.) 494; *Wright v. Cain*, 93 N. Car. 296.

*Rhode Island.* — *James v. Steere*, 16 R. I. 367.

*Tennessee.* — *Davis v. McNalley*, 5 Sneed (Tenn.) 583; *Tally v. Smith*, 1 Coldw. (Tenn.) 290.

See generally the title UNDUE INFLUENCE.

**3. Duress — England.** — *Smith v. Bromley*, 2 Dougl. 696, note; *Horton v. Riley*, 11 M. & W. 492; *Smith v. Cuff*, 6 M. & S. 160; *Williams v. Bayley*, 4 Giff. 638, affirmed L. R. 1 H. L. 200; *Davies v. London, etc., Marine Ins. Co.*, 8 Ch. D. 477; *Claridge v. Hoare*, 14 Ves. Jr. 59.

*Canada.* — *Shorey v. Jones*, 15 Can. Sup. Ct. 398.

*Connecticut.* — *Sharon v. Gager*, 46 Conn. 189.

*Illinois.* — *Baehr v. Wolf*, 59 Ill. 470.

*Maine.* — *Concord v. Delaney*, 58 Me. 309.

*Massachusetts.* — *Bryant v. Peck, etc., Co.*, 154 Mass. 461.

*Michigan.* — *Meech v. Lee*, 82 Mich. 274.

*New Jersey.* — *Crossley v. Moore*, 40 N. J. L. 27.

*New York.* — *Richardson v. Crandall*, 48 N. Y. 348; *Schoener v. Lissauer*, 107 N. Y. 111.

*Pennsylvania.* — *Davenger v. Everett*, 7 Leg. Gaz. (Pa.) 222.

*Rhode Island.* — *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

*Tennessee.* — *Coffman v. Lookout Bank*, 5 Lea (Tenn.) 232, 40 Am. Rep. 31; *Porter v. Jones*, 6 Coldw. (Tenn.) 313.

In *Porter v. Jones*, 6 Coldw. (Tenn.) 313, Andrews, J., in delivering the opinion of the court, said that in his opinion the principle that a court would grant relief to a party to an illegal contract, where he acted under oppression or was compelled by hardship or necessity, and therefore was not *in pari delicto*, had often been pushed farther than justice or the facts would warrant.

**4. Persons Non Sui Juris.** — *Mills v. Hudgins*, 97 Ga. 417; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Simmons v. Kincaid*, 5 Sneed (Tenn.) 450.



g. **OPPORTUNITY OF WITHDRAWING (LOCUS PŒNITENTIÆ).** — On the ground that the law encourages the repudiation of an illegal contract, even by a guilty participant, as long as it remains an executory contract or the illegal purpose has not been put in operation, a number of decisions have recognized the right of one party to an illegal contract who has paid money or delivered property to the other party to repudiate the contract before there has been any performance of the illegal purpose or object, and to recover the money or property parted with. This right is spoken of as the right of repentance or *locus pœnitentiæ*.<sup>1</sup> It seems, however, that the cases in which the principle that a party can avail himself of a *locus pœnitentiæ* to retrace his steps has been recognized fall more properly under the principle that the courts will grant relief from illegal contracts where the party seeking relief was not *in pari delicto*.<sup>2</sup>

**Part Execution.** — To deprive a party of the right to repudiate an illegal contract and recover money paid thereon, it is not necessary that the illegal object should have been fully executed; it is sufficient if there has been a partial execution of such illegal object.<sup>3</sup>

8. **Public Policy Advanced by Granting Relief.** — Again, even though the parties may be said to be *in pari delicto*, it has been held that the courts may grant relief to one of the parties when public policy requires such intervention. In such case the guilt of the respective parties is not considered by the court, which looks only to the public interest, the guilty party to whom relief is granted being only the instrument by which the public is served.<sup>4</sup>

9. **Recovery of Money Paid to Third Person for Use of Party to Illegal Contract.** — Where, in execution or satisfaction of an illegal contract, one of the parties thereto pays money or delivers property to a third person, for the use of the other party to the contract, upon his promise, express or implied, to

1. **Locus Pœnitentiæ — England.** — *Sismey v. Eley*, 17 Sim. 1; *Bone v. Ekless*, 5 H. & N. 925; *Taylor v. Bowers*, 1 Q. B. D. 291; *Symes v. Hughes*, L. R. 9 Eq. 475; *Hastelow v. Jackson*, 8 B. & C. 221, 15 E. C. L. 204.

**United States.** — Congress, etc., *Spring Co. v. Knowlton*, 103 U. S. 49; *McCutcheon v. Merz Capsule Co.*, 71 Fed. Rep. 787; *Pullman Palace-Car Co. v. Central Transp. Co.*, 65 Fed. Rep. 158.

**California.** — *Wassermann v. Sloss*, 117 Cal. 425, 59 Am. St. Rep. 209.

**Maine.** — *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301; *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755.

**Missouri.** — *Skinner v. Henderson*, 10 Mo. 205; *Adams Express Co. v. Reno*, 48 Mo. 264.

**New Hampshire.** — *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24.

**New York.** — *Strait v. National Harrow Co.*, (Supm. Ct. Spec. T.) 18 N. Y. Supp. 224.

**Ohio.** — *Hooker v. De Palos*, 2 Cinc. Super. Ct. 369, 28 Ohio St. 251.

**Oregon.** — *Bernard v. Taylor*, 23 Oregon 416, 37 Am. St. Rep. 693.

**Pennsylvania.** — *McAllister v. Hoffman*, 16 S. & R. (Pa.) 147, 16 Am. Dec. 556; *Peters v. Grim*, 149 Pa. St. 163, 34 Am. St. Rep. 599.

**Wisconsin.** — *Douville v. Merrick*, 25 Wis. 688.

In *Hastelow v. Jackson*, 8 B. & C. 221, 15 E. C. L. 204, *Littledale, J.*, said: "If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract."

2. **Doctrine of Locus Pœnitentiæ Disapproved.** — *Knowlton v. Congress, etc.*, *Spring Co.*, 57 N. Y. 518, *per Lott, C. Com.*

3. **Partial Execution of Illegal Object.** — *Herman v. Jeuchner*, 15 Q. B. D. 561; *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616; *Alexander v. Owen*, 1 T. R. 225; *Shattuck v. Watson*, 53 Ark. 147; *Adams v. Barrett*, 5 Ga. 404; *Hooker v. De Palos*, 28 Ohio St. 251.

4. **Public Policy Advanced by Granting Relief — England.** — *Dashwood v. Peyton*, 18 Ves. Jr. 27; *St. John v. St. John*, 11 Ves. Jr. 536; *M'Neill v. Cahill*, 2 Bligh 229; *Hatch v. Hatch*, 9 Ves. Jr. 292; *Jackman v. Mitchell*, 13 Ves. Jr. 581; *Morris v. McCulloch*, 2 Eden 190; *Law v. Law*, 3 P. Wms. 391.

**Arkansas.** — *Cox v. Donnelly*, 34 Ark. 762.

**Georgia.** — *White v. Crew*, 16 Ga. 416.

**Mississippi.** — *O'Conner v. Ward*, 60 Miss. 1025.

**New York.** — *Duval v. Wellman*, 124 N. Y. 156.

**Ohio.** — *Goshen Tp. v. Springfield, etc.*, R. Co., 12 Ohio St. 624, 80 Am. Dec. 386.

**Rhode Island.** — *James v. Steere*, 16 R. I. 367.

**Tennessee.** — *Porter v. Jones*, 6 Coldw. (Tenn.) 313; *Hale v. Sharp*, 4 Coldw. (Tenn.) 275; *Johnson v. Cooper*, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502.

**Virginia.** — *Austin v. Winston*, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

In *O'Conner v. Ward*, 60 Miss. 1025, *Cooper, J.*, in speaking of the power of the court to grant relief under this principle, said that the courts "should act only where it is evident that some greater public good can be subserved by action than by inaction."

deliver such property to such other party, such third person cannot defend an action by the latter for such property on account of the illegality of the contract in pursuance of which it was delivered to him. In such a case the action is not based on the illegal contract, but instead upon the independent contract of such third person to deliver over the property received by him.<sup>1</sup>

**Countermanding Payment.** — Where money is paid by one party to an illegal contract to a third person to be paid over to the other party, it seems, however, that the former may countermand the payment; and if this is done, the latter cannot recover the money from such third person.<sup>2</sup>

**10. Actions Between Coparties to Illegal Contracts** — In General. — Where several persons as coparties enter into an illegal contract, which is executed, and one of such coparties receives the profits of the contract, or a fund raised by such contract, it has been held that the courts will not compel him to account to the other coparties for their share of such profits, as their right to share therein is undoubtedly based upon the illegal contract, and permitting the recovery of their shares would be an enforcement of a part of such contract.<sup>3</sup>

**1. Money Paid to Third Person for Benefit of Party to Illegal Contract** — *England.* — Farmer v. Russell, 1 B. & P. 296; Thomson v. Thomson, 7 Ves. Jr. 471; Tenant v. Elliott, 1 B. & P. 3.

*Arkansas.* — Barker v. Parker, 23 Ark. 390.  
*Massachusetts.* — Fairbanks v. Blackington, 9 Pick. (Mass.) 93.

*Missouri.* — Hatch v. Hanson, 46 Mo. App. 323; Roselle v. Beckemeir, 134 Mo. 380.

*New York.* — Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706, reversing 53 Barb. (N. Y.) 361; Merritt v. Millard, 4 Keyes (N. Y.) 208.

*South Carolina.* — Owen v. Davis, 1 Bailey L. (S. Car.) 315.

*Wisconsin.* — Lemon v. Grosskopf, 22 Wis. 447, 99 Am. Dec. 58; Kiewert v. Rindskopf, 46 Wis. 481, 32 Am. Rep. 731.

See also Sharp v. Taylor, 2 Phil. 801; Brooks v. Martin, 2 Wall. (U. S.) 79; Gilliam v. Brown, 43 Miss. 642; Leveroos v. Reis, 52 Minn. 259; Floyd v. Patterson, 72 Tex. 202, 13 Am. St. Rep. 787. Compare Belding v. Pitkin, 2 Cai. (N. Y.) 147; Eberman v. Reitzel, 1 W. & S. (Pa.) 181. See the title GAMBLING CONTRACTS, vol. 14, p. 636.

**Proceeds of Illegal Insurance Policy.** — In Tenant v. Elliott, 1 B. & P. 3, insurance brokers effected an insurance policy on property carried on an illegal voyage. It was held that, though the policy was illegal, still, if the insurer, in case of a loss, paid over the money to the broker, with directions to him to pay it to the insured, the broker could not defend an action by the insured for such money on the ground that the policy was illegal.

**Contract to Chill Biddings at Auction Sale.** — In Merritt v. Millard, 4 Keyes (N. Y.) 208, two persons entered into a contract whereby the one was to pay to the other five hundred dollars in consideration of his refraining from bidding at an auction sale. This contract was, of course, illegal. Subsequently one of the parties paid the money to a third person to deliver to the other party, and it was held that the latter could recover the money from such third person on his refusal to pay it over.

**Carrier Receiving Price of Counterfeit Money Sent C. O. D.** — In Farmer v. Russell, 1 B. & P. 296, it was held that, though a contract for

the sale of counterfeit money is illegal, still, if the money is sent by the seller, through a carrier, C. O. D., and the buyer pays over the purchase price to the carrier, the carrier cannot defend an action for money had and received on the ground of the illegality of the contract of sale.

**Illegal Bond — Payment to Surety.** — In Barker v. Parker, 23 Ark. 390, it was held that where the surety in a bond based on an illegal consideration receives from the principal obligor the amount of the bond, under an agreement to pay it over to the obligee, the obligee may maintain an action against the surety for the money so received, as such an action is based on a new undertaking which the surety is legally bound to perform.

**2. Countermanding Payment.** — Edgar v. Fowler, 3 East 222.

**3. Division of Profits of Illegal Contract Between Coparties** — *California.* — Mitchell v. Cline, 84 Cal. 409; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Am. St. Rep. 242.

*Louisiana.* — Boatner v. Yarborough, 12 La. Ann. 249; Texas, etc., R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970, 17 Am. St. Rep. 445.

*Maryland.* — Chappell v. Wysham, 4 Har. & J. (Md.) 560.

*Missouri.* — Jackson v. McLean, 100 Mo. 130.

*New Jersey.* — Gregory v. Wilson, 36 N. J. L. 315, 13 Am. Rep. 448.

*New York.* — Judd v. Harrington, (C. Pl. Gen. T.) 46 N. Y. St. Rep. 925; Belding v. Pitkin, 2 Cai. (N. Y.) 147; Phenix Bridge Co. v. Keystone Bridge Co., (Supm. Ct. Gen. T.) 23 N. Y. Supp. 109; Goodrich v. Houghton, 134 N. Y. 115; Leonard v. Poole, 114 N. Y. 371, 11 Am. St. Rep. 667; Hooker v. Vandewater, 4 Den. (N. Y.) 349, 47 Am. Dec. 258.

*Texas.* — Texas Standard Oil Co. v. Odoue, 83 Tex. 650, 29 Am. St. Rep. 690.

In Goodrich v. Houghton, 134 N. Y. 115, it was held that where persons jointly purchased lottery tickets in the Louisiana state lottery, and the money drawn by such tickets was received by one of the purchasers, his copurchaser could not recover his share. Compare Glock v. Hartdegen, 23 Cinc. L. Bul. 283,



**After Accounting Between the Parties.** — If, however, after one of the coparties has received funds created by the contract, an accounting is had between the parties and the share of each is determined, but the whole fund is left in the hands of one party, it has been held that the other parties may recover their shares.<sup>1</sup>

**11. Accounting Between Principal and Agent** — *a. COMPELLING AGENT TO ACCOUNT* — (1) *Accounting with Respect to Property Received from Principal.* — The broad rule has been laid down that when money or property is delivered by a principal to his agent for an illegal purpose or for the purpose of carrying into execution an illegal contract, the agent cannot set up such illegal object to prevent a recovery by the principal from the agent of such money or property so long as it remains in his hands.<sup>2</sup>

(2) *Accounting with Respect to Property Received for Principal* — (a) **Agent Not Participant in Illegal Contract.** — Where an agent, in the course of his agency, receives from a third person for his principal the proceeds or profits of an illegal contract, in the execution or performance of which the agent was in no way a participant, the agent, of course, cannot defend an action by his principal for the property so received on the ground of the illegality of the contract out of which it arose.<sup>3</sup>

(b) **Agent Participant in Illegal Contract.** — In a number of cases it has been held

10 Ohio Dec. (Reprint) 760; *Roselle v. Beckemeir*, 134 Mo. 380; *Hatch v. Hanson*, 46 Mo. App. 323.

1. **After Accounting.** — *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101; *Wells v. McGeoch*, 71 Wis. 196.

2. **Agent Compelled to Account for Property Received from Principal** — *England.* — *Bone v. Ekless*, 5 H. & N. 925.

*United States.* — Congress, etc., *Spring Co. v. Knowlton*, 103 U. S. 49.

*Arkansas.* — *Perkins v. Clemm*, 23 Ark. 221; *McLain v. Huffman*, 30 Ark. 428; *O'Bryan v. Fitzgerald*, 48 Ark. 487.

*California.* — *Wassermann v. Sloss*, 117 Cal. 425, 59 Am. St. Rep. 209.

*Georgia.* — *Ingram v. Mitchell*, 30 Ga. 547; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98.

*Massachusetts.* — *Sampson v. Shaw*, 101 Mass. 145.

*Missouri.* — *Adams Express Co. v. Reno*, 48 Mo. 264.

*New Hampshire.* — *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24.

*New York.* — *Morgan v. Groff*, 4 Barb. (N. Y.) 524.

*Ohio.* — *Norton v. Blinn*, 39 Ohio St. 145, 22 Am. L. Reg. N. S. 783.

*Pennsylvania.* — *Dauler v. Hartley*, 178 Pa. St. 23; *Peters v. Grim*, 149 Pa. St. 164, 34 Am. St. Rep. 599; *Repplier v. Jacobs*, 149 Pa. St. 167; *Davenger v. Everett*, 7 Leg. Gaz. (Pa.) 222.

*South Carolina.* — *Tate v. Pegues*, 28 S. Car. 463.

*Virginia.* — *Berkshire v. Evans*, 4 Leigh (Va.) 223.

*Wisconsin.* — *Kiewert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731; *Douville v. Merrick*, 25 Wis. 688.

See also *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253.

Compare *Boyd v. Barclay*, 1 Ala. 34, 34 Am. Dec. 762; *Rocco v. Frapoli*, 50 Neb. 665; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Hunt v.*

*Knickerbacker*, 5 Johns. (N. Y.) 327; *Rolfe v. Delmar*, 7 Robt. (N. Y.) 80; *Staples v. Gould*, 9 N. Y. 520; *Morgan v. Groff*, 5 Den. (N. Y.) 364, 49 Am. Dec. 273; *Rogers v. Corre*, 3 Ohio Dec. 414.

**Securing Pardon.** — In *Adams Express Co. v. Reno*, 48 Mo. 264, it was held that where one deposited money in a bank, to be paid to a sheriff when he secured the pardon of the depositor's brother, who was then in the penitentiary, convicted of a felony, the depositor could recover the money so long as it remained in the possession of the bank.

**Encouraging Divorce.** — In *Douville v. Merrick*, 25 Wis. 688, a husband deposited with an attorney a sum of money under an agreement that the attorney should bring an action for divorce in behalf of his wife, and that the money should be paid by the attorney to the wife as alimony. The action was not in fact brought, and it was held that the husband could recover the money so deposited.

3. **Property Received for Principal** — **Agent Not Participant in Illegal Contract** — *England.* — *Betteley v. Reed*, 4 Q. B. 511, 45 E. C. L. 511. See also *Bousfield v. Wilson*, 16 M. & W. 185. *Connecticut.* — *Owen v. Dixon*, 17 Conn. 492. *Indiana.* — *Daniels v. Barney*, 22 Ind. 207. *Louisiana.* — *Chinn v. Chinn*, 22 La. Ann. 599.

*Maine.* — *Hovey v. Storer*, 63 Me. 486.

*Maryland.* — *Newton v. Douglass*, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317; *Haacke v. Knights of Liberty Social, etc., Club*, 76 Md. 429.

*Massachusetts.* — *Laubanks v. Blackington*, 9 Pick. (Mass.) 93.

*Michigan.* — *Wilson v. Owen*, 30 Mich. 474.

*New York.* — *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

*South Carolina.* — *Andersons v. Moncrieff*, 3 Desaus. (S. Car.) 124.

*Wisconsin.* — *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149; *Hurd v. Doty*, 86 Wis. 1.



that although the agent negotiates the illegal contract, or is otherwise a participant therein, he cannot set up the illegality of the contract to defeat an action by his principal to recover the proceeds of the contract paid to the agent by the other party to the contract for the use of his principal.<sup>1</sup> In other cases, however, it has been held that if the agent was an active participant in the execution of the illegal contract or business, he could defend on the ground of illegality an action by his principal to recover property received in the course thereof.<sup>2</sup>

**Agent Transacting Business as Principal.** — It has been held that if the agent transacts the illegal business without disclosing the fact of his agency, and the money is paid to him in his own right, and not as an intermediary or agent, he cannot be compelled to account therefor to his principal, for the reason that the principal could not show his title to the property except through the illegal contract.<sup>3</sup>

(3) *Reimbursement of Agent.* — Where the agent makes advances in the execution of an illegal contract or transaction for his principal, knowing such

**1. Agent a Participant in Illegal Contract** — *England.* — *Bridger v. Savage*, 15 Q. B. D. 363; *overruling Beyer v. Adams*, 26 L. J. Ch. 841; *Bone v. Exless*, 5 H. & N. 925; *Beeston v. Beeston*, 1 Ex. D. 13.

*United States.* — *Planters' Bank v. Union Bank*, 16 Wall. (U. S.) 483.

*Arkansas.* — *O'Bryan v. Fitzgerald*, 48 Ark. 487.

*Connecticut.* — *Washington County Ins. Co. v. Colton*, 26 Conn. 42.

*Illinois.* — *Snell v. Pells*, 113 Ill. 145.

*Minnesota.* — *Eagle Roller-Mill Co. v. Dillman*, 67 Minn. 232.

*Mississippi.* — *Andrews v. New Orleans Brewing Assoc.*, 74 Miss. 362, 60 Am. St. Rep. 509; *Howe v. Jolly*, 68 Miss. 323; *Gilliam v. Brown*, 43 Miss. 641.

*New Jersey.* — *Evans v. Trenton*, 24 N. J. L. 764.

*New York.* — *Auburn v. Draper*, 23 Barb. (N. Y.) 425.

*Ohio.* — *Norton v. Blinn*, 39 Ohio St. 145.

*South Carolina.* — *Tate v. Pegues*, 28 S. Car. 463.

*Tennessee.* — *Pointer v. Smith*, 7 Heisk. (Tenn.) 137.

*Texas.* — *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787.

*Vermont.* — *Baldwin v. Potter*, 46 Vt. 402.

**Illegal Sales Conducted by Agent.** — In *Baldwin v. Potter*, 46 Vt. 402, it was held that an agent was bound to account to his principal for money received in the course of his agency for goods sold by his principal on orders obtained by the agent, as such, on commission, although such sales, as between the principal and the purchaser, were illegal.

In *Gilliam v. Brown*, 43 Miss. 641, the testator of the defendant, as the agent of the plaintiff, took the latter's cotton to Memphis during the war, and sold it there, in violation of law, and received the proceeds. It was held that the defendant was bound to account to the plaintiff for such proceeds.

**Agent Selling Confederate Bonds.** — In *Planters' Bank v. Union Bank*, 16 Wall. (U. S.) 483, a bank which, as agent, had sold Confederate bonds for its principal was held liable to him for the proceeds received, which were credited

to the account of the principal, though the sale of the bonds was illegal.

**Agent for Foreign Corporation Illegally Transacting Business.** — In *Penn. Mut. L. Ins. Co. v. Bradley*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 876, *affirmed* 142 N. Y. 660, it was held that a foreign life-insurance company which was illegally transacting business in the city of New York, through an agent, could still compel the agent to account for moneys received during such agency. See also *Daniels v. Barney*, 22 Ind. 227; *U. S. Express Co. v. Lucas*, 36 Ind. 361.

In *State v. O'Brien*, 94 Tenn. 79, the agent of a foreign insurance company which failed to comply with the statute of *Tennessee*, so as to entitle it to do business in the state, was convicted of embezzlement for the appropriation of funds received by him for the corporation during the course of his agency.

**2. Accounting Refused** — *United States.* — *Fales v. Mayberry*, 2 Gall. (U. S.) 560.

*Georgia.* — *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98.

*Illinois.* — *Samuels v. Oliver*, 130 Ill. 73.

*Louisiana.* — *West Tennessee Bank v. Citizens' Bank*, 21 La. Ann. 18; *Burch v. Willis*, 21 La. Ann. 493.

*Maryland.* — *Stewart v. M'Intosh*, 4 Har. & J. (Md.) 233.

*New Hampshire.* — *Udall v. Metcalf*, 5 N. H. 396.

*Utah.* — *Mexican International Banking Co. v. Lichtenstein*, 10 Utah 338.

See also *Chauncey v. Yeaton*, 1 N. H. 151.

**Agent for Sale of Lottery Tickets.** — In *Udall v. Metcalf*, 5 N. H. 396, where a person sent lottery tickets to an agent for sale, such sale being illegal, it was held that the principal could maintain no action against the agent to recover the proceeds of such tickets. See also *Negley v. Devlin*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 210; *Mexican International Banking Co. v. Lichtenstein*, 10 Utah 338; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58.

**3. Agent Transacting Business as Principal.** — *Wooten v. Miller*, 7 Smed. & M. (Miss.) 380; *Maybin v. Coulon*, 4 Dall. (Pa.) 298; *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787.

illegality, he cannot compel his principal to reimburse him therefor.<sup>1</sup> It is otherwise, however, if the contract was not *prima facie* illegal and the agent was not aware of its illegality.<sup>2</sup>

**12. Accounting Between Partners** — *a. ACCOUNTING WITH RESPECT TO PROFITS* — (1) *In General*. — Where an illegal contract entered into by a partnership as party of the one part is fully executed, and profits arising therefrom come into the hands of one of the partners, the general rule seems to be that he will not be compelled to account to his copartners for their share of such profits;<sup>3</sup> and where the agreement of partnership is illegal on account of the consideration moving between the partners, or the character of the business to be transacted, the courts will not, after business has been transacted, and the profits of the transaction have been received by one partner, compel him to account to the others for his share of such profits.<sup>4</sup> In some cases, however, the proposition has been advanced that if the illegal purpose of the partnership has been accomplished the courts may direct a division of the proceeds.<sup>5</sup>

See also *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667.

**1. Reimbursement of Agent.** — *Bibb v. Allen*, 149 U. S. 481; *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667; *Smith v. Kammerer*, 152 Pa. St. 98; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. Rep. 363.

**2. Rumsey v. Berry**, 65 Me. 570.

**3. Accounting Between Partners with Respect to Illegal Executed Contracts.** — *Watts v. Brooks*, 3 Ves. Jr. 612; *Knowles v. Haughton*, 11 Ves. Jr. 168; *Barrow v. Pike*, 21 La. Ann. 14; *Jackson v. McLean*, 100 Mo. 130. See generally the title **PARTNERSHIP**.

**4. Purpose of Business of Partnership Illegal** — *England*. — *Evans v. Richardson*, 3 Meriv. 469; *Battersby v. Smyth*, 3 Madd. 110; *Sykes v. Beadon*, 11 Ch. D. 170.

*United States*. — *Hoffman v. McMullen*, 83 Fed. Rep. 372, reversing 75 Fed. Rep. 547, which reversed 69 Fed. Rep. 509; *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675; *Bartle v. Nutt*, 4 Pet. (U. S.) 184.

*California*. — *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63; *Meyers v. Merillion*, 118 Cal. 352.

*Illinois*. — *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, affirming 30 Ill. App. 355; *Craft v. McConougby*, 79 Ill. 346.

*Indiana*. — *Root v. Stevenson*, 24 Ind. 115; *Hunter v. Pfeiffer*, 108 Ind. 197.

*Iowa*. — *Anderson v. Powell*, 44 Iowa 20.

*Maryland*. — *Stewart v. M'Intosh*, 4 Har. & J. (Md.) 233.

*Massachusetts*. — *Dunham v. Presby*, 120 Mass. 285.

*Montana*. — *Morrison v. Bennett*, 20 Mont. 560.

*Nebraska*. — *Gould v. Kendall*, 15 Neb. 549.

*New Jersey*. — *Watson v. Murray*, 23 N. J. Eq. 257; *Todd v. Rafferty*, 30 N. J. Eq. 254.

*New York*. — *Vincent v. Moriarty*, 31 N. Y. App. Div. 484; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Gray v. Oxnard Brothers' Co.*, 59 Hun (N. Y.) 387; *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667; *Lynch v. Dowling*, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 163.

*North Carolina*. — *King v. Winants*, 71 N. Car. 469, 17 Am. Rep. 11.

*Pennsylvania*. — *Lessig v. Langton*, Bright. (Pa.) 191; *Maybin v. Coulon*, 4 Dall. (Pa.) 298.

*Texas*. — *Lane v. Thomas*, 37 Tex. 157; *Read v. Smith*, 60 Tex. 379, distinguishing *De Leon v. Trevino*, 49 Tex. 91, 30 Am. Rep. 101.

*Virginia*. — *Watson v. Fletcher*, 7 Gratt. (Va.) 1.

*Wisconsin*. — *Fairbank v. Leary*, 40 Wis. 637.

**Partnership for Transacting Gaming Business.** — Thus, where persons enter into a partnership for the purpose of transacting the illegal business of gaming, the courts will not compel one of the parties to account to the other for profits of the business withheld by him. *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, affirming 30 Ill. App. 355; *Lessig v. Langton*, Bright. (Pa.) 192; *Watson v. Fletcher*, 7 Gratt. (Va.) 1. See also the title **GAMBLING CONTRACTS**, vol. 14, p. 629.

In *Watson v. Murray*, 23 N. J. Eq. 257, an accounting between partners engaging in the business of conducting an illegal lottery was denied.

**Illegal Liquor Business.** — In *Lynch v. Dowling*, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 163, it was held that where partners carry on the liquor business without a license, one of such partners cannot recover from the other his share of the profits of the business. See the title **INTOXICATING LIQUORS**.

**5. Accounting Between Partners Allowed.** — *Sharp v. Taylor*, 2 Phil. 801; *Watts v. Brooks*, 3 Ves. Jr. 612; *Brooks v. Martin*, 2 Wall. (U. S.) 70; *Burke v. Flood*, 1 Fed. Rep. 541; *Wann v. Kelly*, 5 Fed. Rep. 584; *Crescent Ins. Co. v. Bear*, 23 Fla. 50, 11 Am. St. Rep. 331. See also *McBlair v. Gibbes*, 17 How. (U. S.) 232; *Anderson v. Whitlock*, 2 Bush (Ky.) 398, 92 Am. Dec. 489; *Willson v. Owen*, 30 Mich. 474; *Belcher v. Conner*, 1 S. Car. 88; *Lewis v. Alexander*, 51 Tex. 578. Compare *Sykes v. Beadon*, 11 Ch. D. 170.

**Voyage Becoming Illegal After Commencement.** — Where a contract for a voyage became illegal after its commencement, in consequence of which goods imported into the United States were seized, but the forfeiture was afterwards remitted on certain conditions, and the cargo was returned to the consignee who was also a part owner, it was held that an action of ac-



(2) *Partial Illegality of Business Transacted.* — Where the profits with respect to which one partner seeks an accounting arose partly out of legal and partly out of illegal business, the court may order an accounting with respect to the funds arising out of the legal business.<sup>1</sup> Even this, however, will not be decreed if the funds are not capable of being separated.<sup>2</sup>

(3) *Action Based on Accounting Between Partners.* — In some cases it has been held that if, after the illegal business carried on by the partnership has been completed, an accounting is had between the partners, and one of them, in whose hands there is a greater share of the profits than he was entitled to, promises to pay to the other his share of such profits, then an action on such promise may be maintained.<sup>3</sup>

*b. REIMBURSEMENT FOR LOSSES.* — Where the illegal business transacted by the partnership results in losses, and one of the partners has advanced more than his proportion, he cannot force the other partners to reimburse him.<sup>4</sup>

**XXV. ASSIGNEES OF ILLEGAL CONTRACTS** — *Nonnegotiable and Past-due Securities.* — The assignee of a nonnegotiable chose in action stands exactly in the place of his assignor, has no greater rights than his assignor in the thing assigned, and takes it subject to all the defenses, such as illegality in its inception, which arose out of the original transaction.<sup>5</sup> The same rule applies to the assignee or transferee after maturity of negotiable paper,<sup>6</sup> and such an assignee holds it subject to the defense of illegality as between the original parties.<sup>7</sup>

*With Respect to Negotiable Bills and Notes Negotiated Before Maturity* the rule is different, and, according to a familiar principle of the law merchant, one who in the regular course of business has received negotiable paper for value in good faith, before maturity, and without notice of illegality attaching to the instrument, takes it free from a defense based upon such illegality,<sup>8</sup> unless

count for the money received from the sale of the cargo might be maintained against him by the other part owners. *Newbold v. Sims*, 2 S. & R. (Pa.) 317.

1. *Partial Illegality of Business Transacted.* — *Bennett v. Woolfolk*, 15 Ga. 213; *Anderson v. Powell*, 44 Iowa 20; *Todd v. Rafferty*, 30 N. J. Eq. 254.

In *Anderson v. Powell*, 44 Iowa 20, wherein the partnership was engaged in the illegal transaction of a gaming business and the illegal sale of liquor, and also in the legal sale of cigars, an accounting was directed with regard to the cigar business.

2. *Impossibility of Separation.* — *Northrup v. Phillips*, 99 Ill. 449; *Lane v. Thomas*, 37 Tex. 157.

3. *Effect of Accounting Between Partners* — *England.* — *Petrie v. Hannay*, 3 T. R. 418. *United States.* — *Cook v. Sherman*, 20 Fed. Rep. 167.

*Georgia.* — *Gullatt v. Thrasher*, 42 Ga. 429. *Texas.* — *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101.

*Washington.* — *McDonald v. Lund*, 13 Wash. 412.

See however *Root v. Stevenson*, 24 Ind. 115; *Patterson's Appeal*, 13 W. N. C. (Pa.) 154; and cases cited in preceding notes.

4. *Reimbursement for Losses.* — *Bartle v. Nutt*, 4 Pet. (U. S.) 184; *Watson v. Fletcher*, 7 Gratt. (Va.) 1. Compare *Anderson v. Whitlock*, 2 Bush (Ky.) 398, 92 Am. Dec. 489.

5. *Nonnegotiable Securities.* — See *Riddle v. Hall*, 99 Pa. St. 116, and the title *ASSIGNMENTS*, vol. 2, p. 1079 *et seq.* See also *Saratoga County Bank v. King*, 44 N. Y. 87, where, however,

the assignee was fixed with notice of the illegality by the face of the assigned security.

But the rights of an assignee cannot be affected by an illegal arrangement subsequently entered into between his assignor and another. *Kountz v. Kirkpatrick*, 72 Pa. St. 376, 13 Am. Rep. 687.

*Estoppel.* — The obligor in a bond, although the instrument is tainted with illegality which renders it void by statute, has been held to be estopped by express representations, made to and inducing the assignee to take the bond, to set up the defense of illegality against the assignee. *Pettit v. Jennings*, 2 Rob. (Va.) 676. See also *Buckner v. Smith*, 1 Wash. (Va.) 296; *Hoomes v. Smock*, 1 Wash. (Va.) 389. *Contra*, *Pace v. Martin*, 2 Duv. (Ky.) 522. But such a representation creates no estoppel where the assignee has actual notice. *Spray v. Burk*, 123 Ind. 565. See further the title *GAMBLING CONTRACTS*, vol. 14, p. 651.

6. See the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 312.

7. *Paper Assigned After Maturity.* — *Brown v. Turner*, 7 T. R. 626; *Tucker v. Smith*, 4 Me. 415; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; *McGavock v. Puryear*, 6 Coldw. (Tenn.) 34. And see the reference given in the last note *supra*.

8. *Bona Fide Holder of Negotiable Paper Not Affected by Illegality in Inception.* — *Hay v. Ayling*, 16 Q. B. 431, 71 E. C. L. 431; *Goodman v. Simonds*, 20 How. (U. S.) 345; *Bozeman v. Allen*, 48 Ala. 512; *Johnston v. Dickson*, 1 Blackf. (Ind.) 256; *Knox v. White*, 20 La. Ann. 326; *Smith v. Livingston*, 111 Mass. 342; *Grimes v. Hillenbrand*, 6 Thomp.



the instrument is illegal by reason of a statute which renders it absolutely void in whosoever hands it may come.<sup>1</sup> If the assignee takes with notice of the illegality in the inception of the instrument, he of course cannot recover.<sup>2</sup>

**XXVI. THE DEFENSE OF ILLEGALITY — 1. Right of Party to Allege Illegality.** — It has been attempted to apply the maxim *nemo allegans suam turpitudinem audiendus est*, that is, that no one ought to be heard to allege his own turpitude, so as to preclude a defendant in an action on an illegal contract, the illegality of which does not appear on the face of the contract, from alleging in defense the illegality. An exception to this maxim has been made, however, in some cases, for the reason that the defense is permitted on the ground of the public interest, and therefore the defendant may himself set up the defense of illegality.<sup>3</sup>

& C. (N. Y.) 620; Glenn v. Farmer's Bank, 70 N. Car. 191. See also the English Bills of Exchange Act, § 38 (2), § 29, and the Negotiable Instrument Act of New York and other states, §§ 91-96. And see further the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 282 *et seq.*, especially p. 302.

**Illustrations of this principle are found in:**  
**"Bohemian Outs" Notes.** — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 192, note.

**Gambling Contracts.** — See the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 190; **GAMBLING CONTRACTS**, vol. 14, p. 646. **Notes, etc., for Liquors Illegally Sold.** — See the title **INTOXICATING LIQUORS**.

**Patent-right Notes.** — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 136, note.

**Instruments Not Properly Stamped.** — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 162.

**Sunday Contracts.** — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 129; **SUNDAY**.

**Notes of a Corporation Given in Excess of Its Powers.** — See the titles **ACCOMMODATION PAPER**, vol. 1, p. 348; **ULTRA VIRES**.

**The National Bankruptcy Law of 1867, Declaring Void Contracts on Certain Considerations specified, did not prevent the enforcement of such contracts in the hands of a bona fide holder.** Rhodes v. Beall, 73 Ga. 641. See also Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70; and further the title **INSOLVENCY AND BANKRUPTCY**.

**A Note Given to Stifle Bidding at a Public Sale may be enforced only by a holder in due course.** Atlas Nat. Bank v. Holm, 34 U. S. App. 472, 71 Fed. Rep. 489.

**A Note Given to Corrupt a Public Officer is valid in the hands of a holder in due course, but there can be no recovery upon it by an assignee with notice of its character.** Devlin v. Brady, 36 N. Y. 531, affirming 32 Barb. (N. Y.) 518.

1. See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 192.

**Illustrations of this class of securities are found in:**

**Gambling Contracts.** — See the title **GAMBLING CONTRACTS**, vol. 14, p. 646.

**Securities Tainted with Usury.** — See the title **USURY**.

**A Note Founded on the Composition of a Felony has been held absolutely void at common law, even in the hands of an indorsee.** Bell v.

Wood, 1 Bay (S. Car.) 249, where though the rule is thus stated the note was actually transferred overdue. But that a *bona fide* holder may recover on such a paper, see Clark v. Ricker, 14 N. H. 44; Wentworth v. Blaisdell, 17 N. H. 275; Hill v. Northrup, 1 Hun (N. Y.) 612.

**A Note Given for Property to Be Used in Aid of a Rebellion has been held to be absolutely void even in the hands of a holder in due course.** Roquemore v. Alloway, 33 Tex. 461. But compare Hatch v. Burroughs, 1 Woods (U. S.) 439; McGavock v. Puryear, 6 Coldw. (Tenn.) 34.

**Notes Given in Consideration of Confederate Money, Notes, or Bonds were void even in the hands of a bona fide holder under article 127 of the Louisiana Constitution of 1868.** Barrow v. Pike, 21 La. Ann. 14; Coco v. Callihan, 21 La. Ann. 624; Baldwin v. Sewell, 23 La. Ann. 444.

**Notes Given for the Purchase of a Slave were, by article 128 of the Louisiana Constitution of 1868, absolutely void.** Groves v. Clark, 21 La. Ann. 567.

**A Note Given for the Purchase of Fertilizers Not Tagged is absolutely void under the Alabama statute.** Hanover Nat. Bank v. Johnson, 90 Ala. 549.

**2. Holder with Notice Cannot Recover.** — Brisbane v. Lestajette, 1 Bay (S. Car.) 113. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 302 *et seq.*

Even an express representation by the maker of a note of its validity will not avail a transferee who takes it with notice of illegality in its consideration. Givens v. Rogers, 11 Ala. 543.

**3. Right of Defendant to Set up Defense of Illegality — England.** — Lightfoot v. Tenant, 1 B. & P. 551; Holman v. Johnson, 1 Cowp. 341; Collins v. Blantern, 2 Wils. C. Pl. 341.

**United States.** — Hanauer v. Doane, 12 Wall (U. S.) 342.

**California.** — Eldorado County v. Davison, 30 Cal. 521.

**Georgia.** — Harrison v. Hatcher, 44 Ga. 638. **Louisiana.** — Hertz v. Wilder, 10 La. Ann. 199; Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; Puckett v. Clarke, 3 Rob. (La.) 81; First Cong. Church v. Henderson, 4 Rob. (La.) 209.

**Maine.** — Ellsworth v. Mitchell, 31 Me. 247; Smith v. Hubbs, 10 Me. 71.

**Massachusetts.** — Worcester v. Eaton, 11 Mass. 368.

**Michigan.** — Mutual Ben. Assoc. v. Hoyt, 46 Mich. 473; Lyon v. Waldo, 36 Mich. 345.

2. **Waiver or Estoppel to Assert Defense** — *a. WAIVER* — (1) *In General*. — The nonenforcement of illegal contracts being a matter of public interest, a party thereto cannot, by stipulations either at the time of the execution of the contract or afterwards, waive his right to set up the defense of illegality in any action thereon by the other party. The same rule of public policy which forbids the execution of the contract forbids the giving of a *quasi* validity thereto by the waiver of such defense.<sup>1</sup>

(2) *Failure to Rely on Illegality as a Defense*. — In pursuance of this rule the defendant, when sued upon an illegal contract, may set up the defense of illegality though such defense was not specifically pleaded.<sup>2</sup> Some statutes, however, expressly require the defense of illegality to be specially pleaded.<sup>3</sup>

*Missouri*. — *McDearmott v. Sedgwick*, 140 Mo. 172; *Sprague v. Rooney*, 104 Mo. 349, *overruling* 82 Mo. 493.

*New Hampshire*. — *Beach v. Kezar*, 1 N. H. 185; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

*New Jersey*. — *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 627, 55 Am. St. Rep. 614; *Smith v. Applegate*, 23 N. J. L. 352.

*New York*. — *Nellis v. Clark*, 20 Wend. (N. Y.) 24; *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397; *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667; *National Harrow Co. v. Bement*, 21 N. Y. App. Div. 290.

*Ohio*. — *Jacobs v. Mitchell*, 46 Ohio St. 601.

*Oregon*. — *Phillips v. Thorp*, 10 Oregon 494.

*Pennsylvania*. — *Ham v. Smith*, 87 Pa. St. 63; *Bredin's Appeal*, 92 Pa. St. 241, 37 Am. Rep. 677; *Irvin v. Irvin*, 169 Pa. St. 529; *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157, 32 Am. Rep. 438.

*Tennessee*. — *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

*Virginia*. — *Harris v. Harris*, 23 Gratt. (Va.) 737.

*Compare* *Dyer v. Homer*, 22 Pick. (Mass.) 253; *Hendrickson v. Evans*, 25 Pa. St. 441; *Evans v. Dravo*, 24 Pa. St. 62, 62 Am. Dec. 359; *Sickman v. Lapsley*, 13 S. & R. (Pa.) 224, 15 Am. Dec. 596; *Irvin v. Irvin*, 169 Pa. St. 529.

**Prima Facie Case Made by Plaintiff**. — In *Hope v. Linden Park Blood Horse Assoc.*, 58 N. J. L. 627, 55 Am. St. Rep. 614, it was held that where the plaintiff makes out a *prima facie* case without disclosing the illegality of the contract, the defendant's participation, though equally corrupt with that of the plaintiff, will not preclude him from showing the illegality of the contract.

**Illegality of Note**. — In *Smith v. Applegate*, 23 N. J. L. 352, which was a suit upon a promissory note, the defendants were permitted to show the illegality of the transaction of which the giving of the note was a part. And so in *Nellis v. Clark*, 20 Wend. (N. Y.) 24, in a suit upon a note, it was held that the defendant might produce proof of like character.

1. **Cannot Waive Defense of Illegality** — *England*. — *Ribbans v. Crickett*, 1 B. & P. 264.

*United States*. — *Embrey v. Jemison*, 131 U. S. 336; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Coppell v. Hall*, 7 Wall. (U. S.) 542.

*Georgia*. — *Faircloth v. De Leon*, 81 Ga. 161.

*Illinois*. — *Shenk v. Phelps*, 6 Ill. App. 612.

*Louisiana*. — *State v. Vion*, 12 La. Ann. 688.

*Massachusetts*. — *Cardoze v. Swift*, 113 Mass. 250; *Dunham v. Presby*, 120 Mass. 285.

*Nebraska*. — *Wilde v. Wilde*, 37 Neb. 891.

*New York*. — *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397.

*Compare* *Pepper v. Haight*, 20 Barb. (N. Y.) 429.

2. **Illegality Need Not Be Specially Pleaded in Defense** — *England*. — *Potts v. Sparrow*, 1 Bing. N. Cas. 594, 27 E. C. L. 502; *Irving v. McWilliams*, 1 N. Bruns. Eq. Rep. 217.

*United States*. — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 266; *Craig v. Missouri*, 4 Pet. (U. S.) 426.

*Kansas*. — *Sheldon v. Pruessner*, 52 Kan. 579.

*Massachusetts*. — *Libby v. Downey*, 5 Allen (Mass.) 299; *Hulet v. Stratton*, 5 Cush. (Mass.) 539; *Dixie v. Abbott*, 7 Cush. (Mass.) 610.

*Michigan*. — *Myers v. Carr*, 12 Mich. 63; *Snyder v. Willey*, 33 Mich. 483.

*Missouri*. — *Tyler v. Larimore*, 19 Mo. App. 445.

*New York*. — *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Young v. Rummell*, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; *Sill v. Rood*, 15 Johns. (N. Y.) 230.

*Pennsylvania*. — *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131.

*Wisconsin*. — *Wight v. Rindskopf*, 43 Wis. 344.

See, however, *Kleckley v. Leyden*, 63 Ga. 215; *Riech v. Bolch*, 68 Iowa 526; *Lee v. Lee*, 83 Iowa 565; *McDearmott v. Sedgwick*, 140 Mo. 172, *overruling* *Sprague v. Rooney*, 104 Mo. 360; *St. Louis Agricultural, etc., Assoc. v. Delano*, 108 Mo. 220; *Musser v. Adler*, 86 Mo. 443; *Atchison, etc., R. Co. v. Miller*, 16 Neb. 661; *Wilde v. Wilde*, 37 Neb. 891; *May v. Burras*, (N. Y. City Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 384; *Pepper v. Haight*, 20 Barb. (N. Y.) 429; *Barnes v. Barnes*, 104 N. Car. 613; *Mathews v. Leaman*, 24 Ohio St. 615.

3. **Statutory Provisions** — *England*. — *Potts v. Sparrow*, 1 Bing. N. Cas. 594, 27 E. C. L. 502; *Triebner v. Duer*, 1 Bing. N. Cas. 266, 27 E. C. L. 383; *Boulton v. Coghlan*, 1 Bing. N. Cas. 640, 27 E. C. L. 525; *Martin v. Smith*, 4 Bing. N. Cas. 436, 33 E. C. L. 402; *Macnab v. Johnson*, 2 F. & F. 293.

*Canada*. — *Clark v. Hagar*, 22 Can. Sup. Ct. 510.

*Alabama*. — *Collier v. Davis*, 94 Ala. 456; *Phoenix Ins. Co. v. Moog*, 78 Ala. 301; *Clay v. Dennis*, 3 Ala. 375; *McKeagg v. Collehan*, 13 Ala. 828.

*Arkansas*. — *Dickson v. Burk*, 6 Ark. 412,



(3) *Duty of Court Sua Sponte to Take Notice of Illegality.* — And when the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court *sua sponte* to refuse to entertain the action.<sup>1</sup>

b. *ESTOPPEL.* — So, also, validity cannot be given to an illegal contract through any principle of estoppel, or the defendant, in an action thereon, precluded under such principle from setting up the defense of illegality.<sup>2</sup> A party must first be in a position to assert a right before he can maintain it by estoppel.<sup>3</sup>

3. *Evidence* — a. *ADMISSIBILITY OF PAROL EVIDENCE TO SHOW ILLEGALITY OF WRITTEN CONTRACT.* — It seems that the general rule that parol evidence is inadmissible to contradict, vary, or add to a written contract<sup>4</sup> does not preclude the admissibility of such evidence to show the illegality of a contract. In such a case the evidence is not admitted to vary or control the contract, but to show that in contemplation of law, in consequence of the proven illegality, no contract at all ever had any existence; that it was void *ab initio*.<sup>5</sup>

44 Am. Dec. 521; *Cheney v. Higginbotham*, 10 Ark. 273.

*Iowa.* — *Levi v. McCraney*, 1 Morr. (Iowa) 91.

*Kentucky.* — *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 472; *Coleman v. Harper*, 1 A. K. Marsh. (Ky.) 602; *Harrison v. Wilson*, 2 A. K. Marsh. (Ky.) 547.

*Massachusetts.* — *Cardoze v. Swift*, 113 Mass. 250; *Cook v. Coyle*, 113 Mass. 252; *Cassidy v. Farrell*, 109 Mass. 397; *Granger v. Ilsley*, 2 Gray (Mass.) 521; *Bradford v. Tinkham*, 6 Gray (Mass.) 494; *Libby v. Downey*, 5 Allen (Mass.) 299; *Goss v. Austin*, 11 Allen (Mass.) 525.

1. *Duty of Court to Dismiss Action on Illegal Contract* — *England.* — *Scott v. Brown*, (1892) 2 Q. B. 724; *Ribbans v. Crickett*, 1 B. & P. 264; *Evans v. Richardson*, 3 Meriv. 469.

*United States.* — *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

*California.* — *Prost v. More*, 40 Cal. 347; *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207; *Kreamer v. Earl*, 91 Cal. 112.

*Louisiana.* — *Fabacher v. Bryant*, 46 La. Ann. 820; *Schmidt v. Barker*, 17 La. Ann. 261, 87 Am. Dec. 527; *Bowman v. Gonegal*, 19 La. Ann. 328, 92 Am. Dec. 537; *Davis v. Caldwell*, 2 Rob. (La.) 271.

*Massachusetts.* — *Dunham v. Presby*, 120 Mass. 285; *Cook v. Coyle*, 113 Mass. 252; *Cardoze v. Swift*, 113 Mass. 250; *Claflin v. U. S. Credit System Co.*, 165 Mass. 501, 52 Am. St. Rep. 528.

*Michigan.* — *Richardson v. Buhl*, 77 Mich. 632.

*Nebraska.* — *Wilde v. Wilde*, 37 Neb. 891; *Wilson v. Parrish*, 52 Neb. 6.

*Pennsylvania.* — *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699.

*Texas.* — *Keith v. Fountain*, 3 Tex. Civ. App. 391.

*Wisconsin.* — *Wight v. Rindskopf*, 43 Wis. 344.

*Consent of Parties to Enforcement of Illegal Contract.* — In *Wilde v. Wilde*, 37 Neb. 891, it was held that whenever it appears from the evidence that the cause of action rested upon an agreement *contra bonos mores*, the court will, of its own motion, refuse to enforce the agreement, even though both parties should assent to its enforcement.

*Payment into Court.* — In *Ribbans v. Crickett*, 1 B. & P. 264, the court took notice of the illegality of the contract on which the action was brought, although the defendant paid into court an amount which he acknowledged was owing by him in the contract. *Eyre, C. J.*, said: "With regard to the money paid into court, it is to be observed that such payment is only an admission of a legal demand, and we cannot allow it to be applied to an illegal account."

*Investigation Ordered by Court as to Illegality of Contract.* — In *Kreamer v. Earl*, 91 Cal. 112, it was held that though neither party to an action on a contract objects to the illegality of the contract, still, if, in the introduction of evidence in the case, a fact is disclosed which indicates that the contract is against public policy, the court should, of its own motion, instigate an inquiry in regard thereto.

2. *Estoppel* — *United States.* — *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138.

*California.* — *Matter of True*, 120 Cal. 352.

*Illinois.* — *Durkee v. People*, 155 Ill. 354, affirming 53 Ill. App. 396.

*Indiana.* — *Brown v. Columbus First Nat. Bank*, 137 Ind. 655.

*Iowa.* — *Langan v. Sankey*, 55 Iowa 52.

*Kansas.* — *Flersheim v. Cary*, 39 Kan. 178.

*Massachusetts.* — *Hardy v. Smith*, 136 Mass. 328.

*Michigan.* — *Robinson v. Patterson*, 71 Mich. 141.

*New York.* — *Wheeler v. Wheeler*, 5 Lans. (N. Y.) 355.

See also the title GAMBLING CONTRACTS, vol. 11, p. 11.

3. See the title ESTOPPEL, vol. 11, p. 385.

4. See the title PAROL EVIDENCE.

5. *Parol Evidence Held Admissible to Prove Illegality in Written Contract.* — *Paxton v. Popham*, 9 East 416; *Collins v. Blantern*, 2 Wils. C. Pl. 341; *Cooper v. Southgate*, 63 L. J. Q. B. 670.

*Georgia.* — *Dixon v. Edwards*, 48 Ga. 142.

*Iowa.* — *Lyons First Nat. Bank v. Oskaloosa Parking Co.*, 66 Iowa 41.

*Kentucky.* — *Murphy v. Trigg*, 1 T. B. Mon. (Ky.) 73; *Kentucky Flour Co. v. Smith*, 14 Ky. L. Rep. 237; *Beadles v. McElrath*, 85 Ky. 230; *Fenwick v. Ratliff*, 6 T. B. Mon. (Ky.) 154.



*b.* PRESUMPTION AND BURDEN AND QUANTUM OF PROOF. — Where a contract is fair on its face, the presumption of course is in favor of its legality,<sup>1</sup> and the burden of proving that the consideration thereof was illegal, or that the contract was illegal for any other reason, is upon the party asserting such illegality;<sup>2</sup> and to sustain such a defense it has been held that the illegality must be clearly shown.<sup>3</sup>

**ILLEGAL FEES.** — See the title EXTORTION, vol. 12, p. 576, and the references there given.

**ILLEGAL GAMING.** — See the titles GAMBLING CONTRACTS, vol. 14, p. 576; GAMING, vol. 14, p. 664.

**ILLEGAL, ILLEGALITY, ILLEGALLY.** — See note 4.

*Louisiana.* — Lazare *v.* Jacques, 15 La. Ann. 599; Fletcher's Succession, 11 La. Ann. 59.

*Maryland.* — Stewart *v.* Schall, 65 Md. 289, 57 Am. Rep. 327.

*Massachusetts.* — Russell *v.* De Grand, 15 Mass. 35.

*Mississippi.* — Newsom *v.* Thighen, 30 Miss. 414.

*Missouri.* — Sumner *v.* Summers, 54 Mo. 340; Bick *v.* Seal, 45 Mo. App. 475; Kent *v.* Miltenberger, 13 Mo. App. 503; Jones *v.* Shale, 34 Mo. App. 302; Buckingham *v.* Fitch, 18 Mo. App. 91; Sprague *v.* Rooney, 104 Mo. 349, *overruling* Sprague *v.* Rooney, 82 Mo. 493, 52 Am. Rep. 383.

*New York.* — Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8; Bell *v.* Leggett, 7 N. Y. 176; Gray *v.* Hook, 4 N. Y. 449; Brown *v.* Brown, 34 Barb. (N. Y.) 533.

*Pennsylvania.* — Chamberlain *v.* M'Clurg, 8 W. & S. (Pa.) 31; Sampson *v.* Cresson, 6 Phila. (Pa.) 229, 24 Leg. Int. (Pa.) 132.

*Rhode Island.* — Martin *v.* Clarke, 8 R. I. 389.

*Texas.* — Donley *v.* Tindall, 32 Tex. 43, 5 Am. Rep. 234; Glenn *v.* Mathews, 44 Tex. 400.

*Compare* Irvin *v.* Irvin, 169 Pa. St. 529.

See the titles CONSIDERATION, vol. 6, p. 765; GAMBLING CONTRACTS, vol. 14, p. 617.

**1. Presumption in Favor of Legality—England.** — Sissons *v.* Dixon, 5 B. & C. 758, 12 E. C. L. 371; Lightbone *v.* Weeden, 1 Eq. Cas. Abr. 24, par. 7.

*United States.* — Joy *v.* Glidden Varnish Co., 83 Fed. Rep. 90.

*Connecticut.* — Smith *v.* Delaney, 64 Conn. 264, 42 Am. St. Rep. 181.

*Kansas.* — McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213; Craft *v.* Bent, 8 Kan. 328.

*Kentucky.* — Martin *v.* Richardson, 94 Ky. 183, 42 Am. St. Rep. 353; Bibb *v.* Miller, 11 Bush (Ky.) 306.

*Maine.* — Farnum *v.* Bartlett, 52 Me. 574; Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

*Minnesota.* — White *v.* Western Assur. Co., 52 Minn. 352.

*Mississippi.* — Clay *v.* Allen, 63 Miss. 426.

*New Hampshire.* — Williams *v.* Tappan, 23 N. H. 385.

*New York.* — Dowley *v.* Schiffer, (C. Pl. Gen. T.) 13 N. Y. Supp. 552.

*Tennessee.* — Rankin *v.* Craft, 1 Heisk. (Tenn.) 711.

*Texas.* — Tucker *v.* Streetman, 38 Tex. 71.

**2. Burden of Proof—England.** — Sissons *v.* Dixon, 5 B. & C. 758, 12 E. C. L. 371.

*United States.* — U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. Rep. 58.

*Kansas.* — Craft *v.* Bent, 8 Kan. 328; McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213.

*Massachusetts.* — Bayley *v.* Taber, 6 Mass. 451.

*New York.* — Harris *v.* White, 81 N. Y. 532.

*North Carolina.* — Brown *v.* Kinsey, 81 N. Car. 245.

**Immoral Consideration of Bond.** — In Brown *v.* Kinsey, 81 N. Car. 245, it was held, in an action on a bond, the consideration of which was not expressed, that the burden of proving that it was based on an immoral consideration was upon the obligor.

**3. Quantum of Proof.** — Hertz *v.* Wilder, 10 La. Ann. 199, *per* Buchanan, J.

In Brown *v.* Kinsey, 81 N. Car. 245, an action was brought upon a bond, and the defendant set up the defense that it was based on an immoral consideration. In regard to this defense the court said that the plaintiff was entitled to recover "unless the defendant showed the immoral consideration alleged, by evidence full and complete, or by proof of such facts and circumstances as would reasonably warrant a jury to find it as a fact."

**Sale of Adulterated Liquors.** — Where a statute prohibited the sale of adulterated liquors, it was held, in an action upon a note given for the price of liquors, that to constitute a defense the proof of adulteration must be clear and convincing. Rothschild *v.* McGrath, 29 Pittsb. Leg. J. (Pa.) 466.

**Rule in Equity.** — In order to deprive a plaintiff of his right to relief in equity, on the ground of illegality in the transaction in respect of which such relief is sought, there must be such a degree of illegality as is free from all doubt. Barton *v.* Muir, L. R. 6 P. C. 134.

**4. Illegally and Unlawfully.** — A statute of Tennessee declared that "persons *illegally* voting" for candidates for certain offices should be "liable to indictment or presentment," etc. The indictment in a prosecution under the act charged that the defendant "did unlawfully vote," etc. It was held that the fact that "unlawfully" was substituted for *illegally* was no ground of objection, "as the words are synonymous—of precisely the same legal signification." State *v.* Haynorth, 3 Sneed (Tenn.) 64.

**ILLEGAL IMPRISONMENT.** — See the titles *FALSE IMPRISONMENT*, vol. 12, p. 719; *HABEAS CORPUS*, *ante*, p. 125.

**ILLEGAL MARRIAGE.** — See the title *MARRIAGE*.

**ILLEGAL SALES.** — See the titles *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *ILLEGAL CONTRACTS*, *ante*; *INTOXICATING LIQUORS; SALES; STATUTE OF FRAUDS*.

**ILLEGITIMATES.** (See also the titles *BASTARDY*, vol. 3, p. 871; *LEGITIMACY*.) — Illegitimates are persons who are begotten and born out of lawful wedlock.<sup>1</sup>

**Highways.** (See generally the title *HIGHWAYS*, *ante*, p. 343.) — The *New Jersey* "act concerning roads," passed Feb. 9, 1818, enacted that the Court of Common Pleas should not set aside the proceedings of the surveyors, by whom the view was made and the necessity of the road determined, "for *illegality* or irregularity." In a case arising under this statute, the court said, in regard to this provision, that "it was intended that mere informality and irregularities not touching the substance of the thing should not stand in the way of a fair execution of the law. But, in order to express this, terms are used which, in their strict sense, would not only be contradictory to one another, but also subversive of the whole scope of the act itself. \* \* \* The term *illegality*, therefore, in this place, must necessarily be restrained in its general sense, and be taken to mean *illegality* in matter of form only, and not in matter of substance." *State v. Conover*, 7 N. J. L. 216.

**Illegal Conduct.** — A statute provided that the plaintiff in trover should give a bond to be answerable for all damages which the defendant might sustain by any *illegal* conduct. It was held that the mere fact that the defendant in trover had a verdict did not constitute a breach of the condition of the bond. *Illegal* conduct in this case means something which the law prohibits, and the plaintiff's conduct is not *illegal* because he fails to establish his right of action. *Brown v. Spann*, 3 Hill L. (S. Car.) 324.

**Illegally and Unjustly.** — A statute required the execution of a bond upon the issuance of a distress warrant for payment of damages sustained in case the warrant had been *illegally* and unjustly sued out. It was held that the words *illegally* and "unjustly" do not mean the same thing, and that they must both be found in the bond or the warrant will be quashed. *Slay v. Milton*, 64 Tex. 426; *Riggins v. Ford*, (Tex.) 1 Law Rep. 354. So in *McTeer v. Young*, (Tex. Civ. App. 1893) 44 S. W. Rep. 196, it was said: "*Illegally* and 'unjustly' are not convertible terms. They are not synonymous, in a legal sense. Mr. Bouvier defines *illegally* to mean 'contrary to law,' and 'unjustly' as 'that which is against the established law; that which is opposed to a law which is the test of right and wrong.'"

**Illegal Elections.** (See also the title *ELECTIONS*, vol. 10, pp. 766, 770.) — A statute provided that an election contest should set out wherein it was claimed that the election was illegal. It was contended that the election of a disqualified candidate did not make the election *illegal*, but the court held that both the terms "contested elections" and "undue and *illegal* elections" were broad enough to

cover such a case. *Auchenbach's Case*, 5 Pa. Co. Ct. 153.

**Illegal Assessments.** (See also the title *TAXATION*.) — In *Matter of New York Catholic Protectors*, 8 Hun (N. Y.) 96, it was said: "The distinction is between an erroneous and *illegal* assessment. The former is when the officers have power to act, and err in the exercise of the power. The latter is where they have no power to act at all, and it does not aid them to decide that they have." See also *Chemung Nat. Bank v. Elmira*, 53 N. Y. 58.

**Illegally Dealing — Intoxicating Liquors.** — In *McKenzie v. Day*, (1893) 1 Q. B. 289, it was held that the term "*illegally* dealing," as used in a statute regulating the sale of intoxicating liquors, included both buying and selling. See generally the title *INTOXICATING LIQUORS*.

**Unfair, Fraudulent, and Illegal as Synonyms.** — See *Eldridge v. Phillipson*, 58 Miss. 281. This case was upon a question of unfair preferences by a debtor.

**Illegal Importations.** (See also the title *REVENUE LAWS*.) — A *United States* statute imposed a forfeiture of double the value of goods *illegally* imported upon any one knowingly receiving them. It was held that the act of entering goods by false invoice came within the definition of an *illegal* importation. *U. S. v. Jordan*, 2 Lowell (U. S.) 537.

**Illegal and Improper Conduct.** — A statute relieved a town or city of liability for damages for the destruction of a person's property by a mob where such destruction was caused by his *illegal* or improper conduct. It was held that *illegal* in this sense meant something unlawful or contrary to law. *Chadbourn v. Newcastle*, 48 N. H. 196; *Underhill v. Manchester*, 45 N. H. 214.

**Illegality** means that which lacks authority of or support from law. *People v. Kelly*, 1 Abb. Pr. N. S. (N. Y.) 432; *Thompson v. Doty*, 72 Ind. 338.

**Illegality** is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguishable from mere rules of procedure. It denotes a complete defect in the proceedings. *Ex p. Kellogg*, 6 Vt. 509; *Ex p. Mooney*, 26 W. Va. 40; *Ex p. McKivett*, 55 Ala. 236.

1. **Illegitimates.** — 2 Kent's Com. 208; *Miller v. Miller*, 18 Hun (N. Y.) 507; *Miller v. Anderson*, 43 Ohio St. 476.

**Illegitimate** is not a term confined to any particular class of bastards. It includes every child born out of lawful wedlock, irrespective of the character of the connection to which it owes its birth. For example, a child owing its birth to an adulterous intercourse is just as properly denominated *illegitimate* as a child begotten by an unmarried man upon an



**ILL FAME.** — See the title DISORDERLY HOUSES, vol. 9, p. 508.

**ILLCIT.** — The word "illicit" means that which is unlawful or forbidden by law.<sup>1</sup>

**ILLCIT COHABITATION.** — See the titles ADULTERY (AS A CRIME), vol. 1, p. 746; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT.

**ILLITERATE.** — Illiterate means unlettered; ignorant of letters or books; untaught; unlearned; uninstructed in science.<sup>2</sup>

**ILLNESS.** — See note 3.

**ILL REPUTE.** — See note 4.

unmarried woman. *Gera v. Ciantar*, 57 L. T. N. S. 818.

In *Brown v. Belmarde*, 3 Kan. 52, it was said: "All the books say that children born out of lawful wedlock are *illegitimate*; and it was wholly immaterial whether the parents had sought to unite themselves in a marriage which was void [as where one of the parties had a spouse living] or had wholly ignored every pretense of marriage."

By a statute of *New York* it was enacted that "children and relatives who are *illegitimate* shall not be entitled to inherit" real estate. A and B had a bastard child. Subsequently to the birth of the child, while they were domiciled in Pennsylvania, the child being a minor and residing with them, they were married. By this marriage, according to the laws of Pennsylvania, the bastard became entitled to all the rights and privileges of children begotten and born in lawful wedlock. Afterwards the parents and child removed to New York, where they continued to reside up to the time of the father's death. He died, seized of real estate in the state of New York, intestate. In an action of ejectment brought by the child to recover the said real estate, it was held that, having been born out of lawful wedlock, he was *illegitimate* within the meaning of the statute above quoted; and that, therefore, he had no title to the land in dispute. *Miller v. Miller*, 18 Hun (N. Y.) 507. See also the title SUCCESSION.

1. *Rex v. Kalailoa*, 4 Hawaii 41; *State v. Miller*, 60 Vt. 92.

**Illicit Connection.** — In *State v. King*, 9 S. Dak. 628, it was held that the words "*illicit connection*" as employed in a statute defining seduction were equivalent to "sexual intercourse." See also the title SEDUCTION.

**Illicit Trade.** (See also the title MARINE INSURANCE.) — A condition was annexed to a marine insurance policy freeing the assurer from any loss which might arise in consequence of the vessel having been engaged in an *illicit* trade. It was held that *illicit* trade is that which is made unlawful by the laws of a country where it is to be carried on, and that trade which the officers of the government may choose to designate as *illicit* to suit their own purposes cannot be recognized as such by the tribunals of other countries. *Thompson v. Mississippi M. & F. Ins. Co.*, 2 La. 237.

2. *Carroll's Succession*, 28 La. Ann. 390.

**Nuncupative Wills.** — A statute provided that a testator must sign his name unless he declares that he knows not how, or is not able to sign it. It was held that the statement that the testatrix, being *illiterate*, had made her mark, was not sufficient. The court said:

"We meet every day with persons who are *illiterate* and who can sign their names. See the example cited by Bouvier under the *verbo illiterate*. 'To induce an *illiterate* man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat.' " *Carroll's Succession*, 28 La. Ann. 390. See also the title NUNCUPATIVE WILLS.

3. **Illness** — **Temporary Indisposition** — **Life Insurance.** (See also the title LIFE INSURANCE.) — In *Billings v. Metropolitan L. Ins. Co.*, 70 Vt. 482, it was said: "*Illness*, as used, means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition, which does not tend to undermine and weaken the constitution of the insured. The evidence tended to show that 'acute gastritis' might mean 'bellyache,' caused by slight indigestion resulting from overeating, and was of short duration, and in no sense dangerous." See also *Goucher v. Northwestern Traveling Men's Assoc.*, 20 Fed. Rep. 596.

*Illness* is a word which may include properly an attack of a less grave and serious character than disease. An *illness* may be slight or severe. In either case it is an *illness*. *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 259.

**Pregnancy.** — The statute 11 & 12 Vict., c. 42, § 17, provides that if, upon the trial of any person accused of an indictable offense, "it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken" in a certain prescribed way by the justice of the peace upon the commitment of the prisoner is "so ill as not to be able to travel, \* \* \* then \* \* \* it shall be lawful to read such deposition as evidence in such prosecution." In *Reg. v. Wellings*, 3 Q. B. D. 426, it was held that pregnancy may be an *illness*, within the statute. It was contended by counsel for the prisoner that pregnancy is not an *illness* or disease, but a natural condition; and that, therefore, although the witness might have been, in fact, unable to travel, such inability was not within the statute. See also the title DEPOSITIONS, vol. 9, p. 355.

**Paralysis** — **Nervousness.** — Under the above statute paralysis of speech has been held to constitute an *illness*. *Reg. v. Cockburn*, 26 L. J. M. C. 136. But mere nervousness is not an *illness*. *R. v. Farrell*, 38 J. P. 390.

4. **Ill Repute.** (See the title LIBEL AND SLANDER.) — Charging a woman with being a woman of *ill repute* merely has been held not actionable *per se*. *Burke v. Stewart*, 81 Ill. App. 507.



**ILLUMINATING OIL.**— See OIL and the references there given.

**ILLUSION.**— See the title INSANITY.

**ILLUSIVE.**— See note 1.

**ILLUSORY APPOINTMENT.**— See the title APPOINTMENT, vol. 2, p. 475.

**ILL WILL.**— See the titles MALICE; MURDER AND MANSLAUGHTER.

**IMAGE.**— See note 2.

**IMBECILE — IMBECILITY.** (See the titles INSANITY; TESTAMENTARY CAPACITY.)—An imbecile is defined as one destitute of strength, either of body or mind; one who is weak, feeble, impotent, decrepit. Imbecility is defined as the quality of being imbecile; feebleness of body or mind.<sup>3</sup>

**IMBED.**— The word "imbed" does not necessarily imply entire inclosure or complete immersion. It is defined as meaning to sink or lay as in a bed; to deposit as in a partly inclosing mass, as of earth.<sup>4</sup>

**IMITATION.**— See the title PATENTS.

**IMITATION BUTTER.**— See OLEOMARGARINE, and the title ADULTERATION, vol. 1, p. 740.

**IMMATERIAL.**— See note 5.

1. **Illusive.**— The legislature may, without infringing upon the constitutional interdict against special laws, subdivide cities for the purposes of legislation, either by creating the subdivision in the same law that declares the legislative will with respect to it, or by referring for that purpose to a general legislative classification previously made. Whether, in either case, the legislation presents a subject for judicial control, depends upon whether the classification be substantial or *illusive*. "Substantial," in this sense, means that the limitation is incidentally consequent upon the character of the legislative provision; *illusive*, that the selection is extraneous from it. Such illusiveness results equally when a classification is created with "a view of escaping the constitutional restriction" and when one is adopted that has a like result. *Foley v. Hoboken*, 61 N. J. L. 478. See generally the titles MUNICIPAL CORPORATIONS; STATUTES.

2. **Image.**— *Image* means "anything made, framed, figured, or fashioned, graven, carved, or painted in imitation, likeness, or representation; a semblance or resemblance, picture, or copy; a figure, statue, or effigy." *Boyd v. Phillips*, L. R. 4 A. & E. 361.

3. **Imbecility.**— Webster's Dict.; *Campbell v. Campbell*, 130 Ill. 477.

In *Messenger v. Bliss*, 35 Ohio St. 592, it was said that "infirmity of mind, termed *imbecility*, as distinguished from idiocy or lunacy, is usually incident to extreme age, and is generally the result of a gradual decay of the mental faculties."

The word "insanity" will include *imbecility*. *Ross v. Todd*, 4 Ohio Cir. Ct. 1, 2 Ohio Cir. Dec. 385.

**Corporal Imbecility.**— A wife's petition for divorce alleged that at the time of the marriage the respondent was, "ever since has been, and still is, laboring under a corporal *imbecility*, and never has had, or attempted to have, sexual intercourse with the petitioner, although," etc. It was held that, in order for a wife to get a divorce on the ground of impotency to consummate the marriage in the husband, it is necessary to show an impotency confirmed and incurable; that the term "corporal *imbecility*" does not, *per se*, mean,

import such an impotency; and that, therefore, the petition was insufficient. *Ferris v. Ferris*, 8 Conn. 166. See the title MARRIAGE.

4. *Palmer Pneumatic Tire Co. v. Lozier*, 84 Fed. Rep. 667. This was a patent case.

5. **Immaterial Issue.** (See ENCYC. OF PL. AND PR., titles SCANDAL AND IMPERTINENCE; SHAM AND FRIVOLOUS PLEADINGS.)—An *immaterial* issue is one that will not determine the controversy. *Garrard v. Willet*, 4 J. J. Marsh. (Ky.) 629.

In *Thompson v. People*, 23 Wend. (N. Y.) 598, it was said: "According to repeated and unshaken decisions from early times, and often recognized in our courts, 'an *immaterial* issue is when, upon verdict, the court cannot know how to give judgment, whether for plaintiff or defendant.' 1 Lev. 22."

**Immaterial Averments.** (See also ENCYC. OF PL. AND PR., titles SCANDAL AND IMPERTINENCE; SURPLUSAGE.)—In *Thrasher v. Ely*, 2 Smed. & M. (Miss.) 150, it was said. "An *immaterial* averment is a statement of unnecessary particulars in connection with, and as descriptive of, what is material." See also *Pharr v. Beck*, 3 Ala. 245.

**Immaterial and Impertinent Distinguished.**— In *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 305, it was said: "But though the courts have followed the established rule, they have recognized a distinction between *immaterial* and *impertinent* averments which has greatly narrowed the circle of its operation. *Immaterial* matter, which must be proved, is that which enters into the foundation of the action though the plaintiff might have succeeded without stating it. As, for instance, where occupancy is sufficient to sustain the action, and the plaintiff falsely avers a particular estate or interest in the land; or where he needlessly undertakes to recite part of a deed on which the action is founded, and misrecites it; and, again, if he set forth a judgment on which a *fi. fa.* is founded, although it would have been sufficient to set forth the *fi. fa.* alone, he shall be held to prove the judgment. *Bristow v. Wright*, 2 Dougl. 667; *Winn v. White*, 2 W. Bl. 842; *Savage v. Smith*, 2 W. Bl. 1101. But if the matter introduced have no necessary connection with the action, and

**IMMEDIATE — IMMEDIATELY.** (See also the titles REASONABLE TIME; SAME.) — The word “immediate” means having nothing intervening, either as to place, time, or action. The word “immediately” means instantly; directly; without delay; forthwith; just now.<sup>1</sup> Immediate signifies that

would be stricken out on motion, it is deemed impertinent and need not be proved. It is sometimes difficult to distinguish between what is *immaterial* and that which is merely impertinent. Yet, as the modern inclination of courts is not to insist stringently upon rules which are not founded in some reason or some overruling policy, I think it may be safely assumed that where there is doubt of the character of an averment, it is best to class it with those subject to rejection as surplusage.”

1. **Instantly, Directly, etc.**—*Streeter v. Streeter*, 43 Ill. 165; *Bailey v. Com.*, 11 Bush (Ky.) 690; *Elliott v. Keith*, 32 Mo. App. 585; *Missouri, etc., R. Co. v. Lyons*, (Tex. Civ. App. 1899) 53 S. W. Rep. 97.

*Immediately* means without the intervention of any other cause or event; instantly. *Bondurant v. Sibley*, 29 Ala. 571, in which case it was held that an averment that the purchaser *immediately* thereafter, with the consent of the vendor, took possession of the land was a sufficient averment that the vendor delivered possession to the purchaser without suit.

“Worcester \* \* \* defines *immediately*, first, without the intervention of any other cause or event—opposed to ‘mediately,’ second, instantly, directly, without delay, forthwith, just now. *Immediately* implies without any interposition of other occupation; instantly, or instantaneously, in an instant, or without any intervention of time; directly, without any division of attention.” *Streeter v. Streeter*, 43 Ill. 165.

**Directly.**—The statute 9 Geo. IV., c. 31, empowers the justices to commit, upon a conviction for an assault, if the fine and costs shall not be paid, either *immediately* after the conviction or within such period as the justices shall at the time of the conviction appoint. In *Arnold v. Dimsdale*, 2 El. & Bl. 580, 75 E. C. L. 580, Coleridge, J., said: “Here the justices have ordered *immediate* payment; that must mean ‘directly.’ If not, we should be holding that the word *immediate* necessarily means ‘within some limited time.’”

**Immediately and Practicably.**—A agreed to deliver up certain premises to B *immediately*. The trial court told the jury that the word *immediately* as used in this contract meant as soon as could practicably be done. It was held that the instruction was erroneous; that “practicably” contemplates action much less speedy than *immediately*, and the intervention of many things not contemplated, it would seem, by the use of the latter word. “They are not convertible words,” said the court, “for while *immediately* includes ‘practicably,’ the latter does not include the former, and they are not synonymous.” *Streeter v. Streeter*, 43 Ill. 165.

**Immediately and Forthwith.** (See also FORTHWITH, vol. 13, p. 1157.)—In *Reg. v. Justices*, 4 Q. B. D. 471, Cockburn, C. J., said: “The words ‘forthwith’ and *immediately* have the same meaning. They are stronger than the

expression ‘within a reasonable time,’ and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.” See also *Rex v. Justices*, 5 Dowl. & R. 588, 16 E. C. L. 243; *Reg. v. Aston*, 19 L. J. M. C. 236; *State v. Ripley Co.*, 9 Ind. 312; *Gates v. Knosby*, 107 Iowa 239.

**Contract.**—In *Woods v. Miller*, 55 Iowa 168, it was held that where a contract was to be performed *immediately*, evidence to excuse delay in performance was inadmissible. See also *Streeter v. Streeter*, 43 Ill. 165.

“About to remove” from the state, in an attachment statute, is not synonymous with an intention to make “an *immediate* removal.” *Elliott v. Keith*, 32 Mo. App. 579.

**Immediate in the Sense of Without Anything Intermediate.**—*Ferguson v. State*, 49 Ind. 34. This was upon an instruction in a homicide case, as to cooling time, where the trial court said that the fatal blow must follow the provocation *immediately*, to reduce murder to manslaughter. The appellate court held the instruction to be error. This case was approved in *State v. Yarborough*, 39 Kan. 581. See also the title MURDER AND MANSLAUGHTER.

**Immediate Payment in Contract for Sale of Real Estate.**—A contract for the sale of land that provides that a certain portion of the purchase money shall be paid *immediately* imports only that such payment shall be prompt in contradistinction to a credit payment. A tender of such portion of the purchase money, therefore, without any unreasonable delay, is sufficient under the contract. *Fitzhugh v. Jones*, 6 Munf. (Va.) 83. But see *Bruner v. Wheaton*, 46 Mo. 367, where *immediate* payment or payment down in such a contract was held to mean payment at the time when the deed is made out and executed. See generally the titles PAYMENT; VENDOR AND PURCHASER.

**Next Day.**—A statute required an affidavit on appeal to be filed *immediately* upon rendition of judgment. It was held that an affidavit filed on the next day was too late. *St. Louis v. R. J. Gunning Co.*, 138 Mo. 347, citing *Waggett v. Shaw*, 3 Campb. 316. See also *Worley v. Shong*, 35 Neb. 311.

Where a statute required that a justice of the peace must immediately render judgment, it was held error to delay the rendition until the next day. *Austin v. Brock*, 16 Neb. 646. Compare *Huff v. Babbott*, 14 Neb. 150.

A statute of *Missouri* provided that “any person convicted before a justice of the peace may appeal, if he shall, *immediately* after judgment is rendered, file an affidavit,” etc., and give bond. It was held that an appeal perfected within the next succeeding day after the judgment was rendered *prima facie* satisfied the statute, and that the burden of proof was with the state to show that it was not taken with all convenient speed. *State v. Clevenger*, 20 Mo. App. 626.

**Twenty-four Hours.**—A statute enacted that



which is produced directly by the act to which it is ascribed, without the intervention or agency of any distinct intermediate cause.<sup>1</sup> The term is, however, a relative one, and must be taken in connection with the subject to which it is applied.<sup>2</sup> Thus, although in strictness the term "excludes all mean times, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing,"<sup>3</sup> or within a

process should be executed *immediately*. It was held that twenty-four hours might be deemed a fair construction of the word *immediately*. *Pausch v. Guerrard*, 67 Ga. 325.

**Notice of Appeal — Seven Days.** — A notice of appeal after a lapse of seven days was held not to be *immediately* notice. *Rex v. Justices*, 5 Dowl. & R. 588, 16 E. C. L. 243.

**Nine Days.** — The vendees telegraphed to the vendor to ship *immediately* a cargo which the vendor had offered to sell them. The vendor did not begin to load for nine days. It was held that the vendees were not obliged to receive the goods. *Rommel v. Wingate*, 103 Mass. 327.

**Immediately Afterwards — Ten Days.** — A statute provided that in actions for trespass, if the plaintiff did not recover more than forty shillings, he should not be entitled to costs, unless the judge *immediately* afterwards certified that the trespass was wilful and malicious. It was held that a certificate made ten days after the verdict was too late. *Forsdike v. Stone*, L. R. 3 C. P. 607.

1. *Bouvier's L. Dict.*, quoted in *Fitch v. Bates*, 11 Barb. (N. Y.) 473. This case was upon the immediate interest which will disqualify witnesses. See also the title *WITNESSES*.

**Immediate and Proximate Cause.** (See also *PROXIMATE CAUSE*.) — In speaking of the contributory negligence of a plaintiff as a cause of injury which will relieve a defendant from liability, the words "*immediate* cause" and "*proximate* cause" are indiscriminately used to express the same meaning. *Longabaugh v. Virginia City*, etc., R. Co., 9 Nev. 272. See also *Jordan v. Wyatt*, 4 Gratt. (Va.) 154; *Blaine v. Chesapeake*, etc., R. Co., 9 W. Va. 267.

2. **Relative Term.** — *McLure v. Colclough*, 17 Ala. 100; *Judah v. Brothers*, 72 Miss. 616; *St. Louis v. R. J. Gunning Co.*, 138 Mo. 347.

In *Gaddis v. Howell*, 31 N. J. L. 316, it was said: "The word *immediately* does not, in legal proceedings necessarily import the exclusion of any interval of time. It is a word of no very definite signification, and it is much in subjection to its grammatical connections."

3. **Followed in** *Kentzler v. American Mut. Acc. Assoc.*, 88 Wis. 589; *Gates v. Knosby*, 107 Iowa 239, following 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 931. To the same effect see the following cases:

*England.* — *Grace v. Clinch*, 4 Q. B. 606, 45 E. C. L. 606; *Snowball v. Dixon*, 4 Y. & C. Exch. 511; *Matter of Blues*, 5 El. & Bl. 291, 85 E. C. L. 291; *Toms v. Wilson*, 4 B. & S. 442, 116 E. C. L. 442; *Pybus v. Mitford*, 2 Lev. 75; *Rex v. Francis*, Lee t. Hardw. 113; *Thompson v. Gibson*, 8 M. & W. 281; *Burgess v. Boeteleur*, 7 M. & G. 481, 49 E. C. L. 481; *Page v. Pearce*, 8 M. & W. 677; *Christie v. Richardson*, 10 M. & W. 688; *Hoggins v. Gor-*

*don*, 3 Q. B. 466, 43 E. C. L. 822; *Forsdike v. Stone*, L. R. 3 C. P. 607; *Shuttleworth v. Cocker*, 10 L. J. C. Pl. 1.

*United States.* — *U. S. v. Baldrige*, 11 Fed. Rep. 552.

*Alabama.* — *McLure v. Colclough*, 17 Ala. 89.

*California.* — *Anderson v. Goff*, 72 Cal. 73.

*Indiana.* — *Martin v. Pifer*, 96 Ind. 248; *Hartford R. Pass. Assur. Co. v. Burwell*, 44 Ind. 460.

*Maryland.* — *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323.

*Missouri.* — *State v. Clevenger*, 20 Mo. App. 626; *St. Louis v. R. J. Gunning Co.*, 138 Mo. 347.

*New Jersey.* — *Gaddis v. Howell*, 31 N. J. L. 313.

*New York.* — *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Sheldon v. Wright*, 7 Barb. (N. Y.) 46, affirmed 5 N. Y. 497.

*Pennsylvania.* — *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198.

*Wisconsin.* — *Richardson v. End*, 43 Wis. 316; *Stevens v. Breen*, 75 Wis. 599.

**Immediately Held Too Indefinite in Indictments.** — Where, on an indictment for highway robbery, the special verdict found the forcible assault, and then in a distinct sentence that the prisoners "then and there *immediately*" took up the prosecutor's money, this was held to be insufficient to fix the prisoners with the offense of robbery, because the word *immediately* has great latitude, and is not of any determinate signification, and is frequently used to import "as soon as it conveniently could be done." 1 Chitty's Crim. Law 220, citing *Rex v. Frances*, 2 Comyns 478, 2 Stra. 1015.

**Same — Murder.** — An indictment for murder alleged that the deceased, as a result of the wounds inflicted by the defendant, the state of which was specified, "*immediately* died." It was held that it did not sufficiently charge the time of death. *State v. Reakey*, 1 Mo. App. 3, following *Lester v. State*, 9 Mo. 666, where an allegation that the deceased "did instantly die" was held insufficient. See also *State v. Sides*, 64 Mo. 383.

**Suit.** — A gave to B his note for a certain sum, part of the consideration therefor being a note against a third person, which it was agreed should be *immediately* sued on by B. It was held that the word *immediately* should be construed to mean within a reasonable time or as soon thereafter as could be conveniently done. *Decorah First Nat. Bank v. Hildreth*, 111 Iowa 111.

**Chattel Mortgage.** — A statute provided that unless the mortgagee took possession or recorded his mortgage *immediately*, his mortgage should be postponed as to all creditors. It was held that *immediate* possession or *immediate* recording meant as soon as might



reasonable time.<sup>1</sup>

be by reasonable diligence and dispatch under the circumstances of the case. *Roe v. Meding*, 53 N. J. L. 350. See also the title CHATTEL MORTGAGES, vol. 5, p. 1002.

**1. Reasonable Time.** — *Griffith v. Taylor*, 2 C. P. D. 194; *Re Cartier*, 4 Manitoba 317; *McClellan v. Brown*, 12 U. C. C. P. 542; *Hartford R. Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *State v. Clevenger*, 20 Mo. App. 626; *State v. Herman*, 20 Mo. App. 548; *State v. Bonsfield*, 24 Neb. 519; *Lydick v. Korner*, 13 Neb. 10; *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 160; *McClellan v. Brown*, 12 U. C. C. P. 542.

**A Statute Required that an Injunction to Restrain Foreclosure** by advertisement should be applied for *immediately* on receiving notice of the publication of the notice of sale. It was held that *immediately* could not be taken to mean 'without any delay;' for while the statute undoubtedly required promptness in action, some time would necessarily elapse after notice before application could be made. *O'Brien v. Oswald*, 45 Minn. 61.

**Immediately on Demand.** — In *Toms v. Wilson*, 4 B. & S. 442, 116 E. C. L. 442, it was held that if a condition is to be performed *immediately* upon demand, this means that a reasonable time must be given, according to the nature of the thing to be done. See also *Brightly v. Norton*, 32 L. J. Q. B. 38; *Massey v. Sladen*, 38 L. J. Exch. 34. And see the title PAYMENTS.

**Immediate Delivery — Fraudulent Sales.** (See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 382.) — A statute required that in order to constitute a valid sale of personal property against creditors, there must be an *immediate* delivery. It was held that *immediate* delivery meant delivery not *instantly*, but within a reasonable time, taking into consideration the character of the property sold, the situation, and all the circumstances. *Samuels v. Gorham*, 5 Cal. 226. See also *Richardson v. End*, 43 Wis. 316.

Where a bill of sale of personal property twenty-three miles away was made at nine o'clock in the evening, and possession was delivered at four o'clock in the morning of the next day, it was held that this was an *immediate* delivery of possession, under a statute of *Montana*, making sales of personal property, unless accompanied by "*immediate* delivery," etc., conclusive evidence of fraud as against creditors. *Kleinschmidt v. McAndrews*, 117 U. S. 282.

**Sale of Coal — Custom between Dealers.** — A contract for the sale of coal, dated July 28, made between dealers, which provides for "*immediate* delivery" would, it seems, be complied with by a delivery in the following August. *Neldon v. Smith*, 36 N. J. L. 148, where the court said "The words '*immediate* delivery' in ordinary language mean to deliver forthwith; but this expression is explained in the testimony as having a trade meaning among coal shippers and dealers, to which latter class the plaintiff and defendant belong. It means a delivery during the current month in which the offer is made and accepted, unless the contract is made on the last

day of the month, or within such limited time that it cannot be shipped, and then the whole of the following month may be given."

**Fire Insurance.** (See also the title FIRE INSURANCE, vol. 13, p. 330.) — A requirement of *immediate* notice of loss in a policy of insurance is equivalent to a requirement of reasonable notice — reasonable in all the circumstances of the case — and what is reasonable is a question for the jury. *Chamberlain v. New Hampshire F. Ins. Co.*, 55 N. H. 265. See also *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 566; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644; *Rokes v. Amazon Ins. Co.*, 51 Md. 519; *Solomon v. Continental F. Ins. Co.*, 28 N. Y. App. Div. 214; *Carey v. Farmers' Ins. Co.*, 27 Oregon 146.

And so of a notice of vacancy. *Strunk v. Firemen's Ins. Co.*, 160 Pa. St. 345.

**In Accident Insurance.** (See also the title ACCIDENT INSURANCE, vol. 1, p. 323.) — The same construction is given to a similar clause in *People's Mut. Acc. Assoc. v. Smith*, 24 W. N. C. (Pa.) 33. See also *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa 631; *Konrad v. Union Casualty, etc., Co.*, 49 La. Ann. 636; *Mandell v. Fidelity, etc., Co.*, 170 Mass. 173; *McFarland v. U. S. Mutual Acc. Assoc.*, 124 Mo. 204; *Crane v. Standard L., etc., Ins. Co.*, 6 Ohio Dec. 118; *People's Mut. Acc. Assoc. v. Smith*, 126 Pa. St. 325; *Foster v. Fidelity, etc., Co.*, 99 Wis. 447; *Kentzler v. American Mut. Acc. Assoc.*, 88 Wis. 589.

**Same — Proximately or Presently.** — Accident policies insured the plaintiff against loss of time resulting from bodily injury through accidental means which should, independently of all other causes, *immediately* and wholly disable him. The question arose whether the word *immediately* referred to proximity of time with the injury, and was used in the sense of "presently, without lapse of time or material delay," or whether it meant proximately in the sense of causation, and that the accidental injuries of the plaintiff were the proximate cause whereby he was wholly disabled, and without reference to the time when such disability ensued. In holding that the term was used in the former sense the court said: "We think that the word *immediately* was used \* \* \* as meaning that the disability contemplated in order to give the plaintiff a claim for compensation under the policies must have ensued so closely upon the accident that he was wholly disabled from proceeding and transacting the business of his occupation regularly and in its due and proper course." *Merrill v. Travelers' Ins. Co.*, 91 Wis. 329. See also *Williams v. Preferred Mut. Acc. Assoc.*, 91 Ga. 700.

**Immediate Danger.** — A *Kentucky* statute provided that the carrying of deadly weapons should be lawful when one had reasonable grounds to believe his person to be in *immediate* danger. It was held that the statute could not be literally construed, and that a reasonable ground to apprehend danger from the presence of particular persons would justify carrying weapons. *Bailey v. Com.*, 11 Bush (Ky.) 688. See this case more fully set

out under CARRYING WEAPONS, vol. 5, p. 740, note.

**Death by Wrongful Act.** — A statute giving a remedy for death by wrongful act was limited to cases where a person injured died *immediately*. In construing this statute the court said: "While other courts and some writers of text-books have used indiscriminately the words 'instantaneous' and *immediate* and the adverbs 'instantaneously' and *immediately*, we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words *immediate* and *immediately* as being more comprehensive and elastic in their meaning than the words 'instantaneous' and 'instantaneously,' and better calculated to convey the idea which we wish to express. Of course an instantaneous death is an *immediate* death; but we have not supposed that an *immediate* death is necessarily and in all cases an instantaneous death." *Sawyer v. Perry*, 88 Me. 42. See also the title DEATH BY WRONGFUL ACT, vol. 8, p. 864.

**Immediately Question for Jury.** — *Griffith v. Taylor*, 2 C. P. D. 194; *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa 556; *Chamberlain v. New Hampshire F. Ins. Co.*, 55 N. H. 265. See also the titles QUESTIONS OF LAW AND FACT; REASONABLE TIME.

**Immediate Pursuit.** (See also the titles ARREST, vol. 2, pp. 876, 884; ESCAPE, vol. 11, p. 258.) — A statute of *California* provided that when an officer should arrest a person without a warrant, he must inform such person of his authority and the cause of arrest, except when he was in the actual commission of a public offense, or when he was pursued *immediately* after an escape. *Immediate* pursuit in this statute was held to be substantially the same as fresh pursuit, so frequently used in common-law phrase in criminal cases. *People v. Pool*, 27 Cal. 579.

**Same — Immediately Apprehended.** — The statute 7 & 8 Geo. IV., c. 30, § 28, against malicious and wilful injuries to property, provides as follows: "Any person found committing any offense against this act \* \* \* may be *immediately* apprehended, without a warrant, by any peace officer," etc. It was held that under this section a person "found committing" an offense against the act, might, upon *immediate* pursuit, be apprehended and taken before a magistrate, although he had gone off to the distance of a mile. *Tindal, C. J.*, said: "The words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and *immediate* and fresh pursuit to be made, I think that would be sufficient. So in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required, and that being the case, I think it must be treated as an '*immediate* apprehension.'" *Hanway v. Boulthce*, 4 C. & P. 350, 19 E. C. L. 415, 1 M. & Rob. 15. See also 1 Chitty's Gen. Pr. 625; *Griffith v. Taylor*, 2 C. P. D. 194.

**Immediate Descent.** (See also the title SUCCESSION.) — "Descents are, as is well known,

of two sorts: lineal, as from father or grandfather to son or grandson, and collateral, as from brother to brother and cousin to cousin, etc. They are also distinguished into mediate and *immediate* descents. But here the terms are susceptible of different interpretations, which circumstance has introduced some confusion into legal discussions, since different judges have used them in different senses. A descent may be said to be mediate or *immediate* in regard to the mediate or *immediate* descent of the estate of right; or it may be said to be mediate or *immediate* in regard to the mediateness or *immediateness* of the pedigree, or degrees of consanguinity. Thus, a descent from the grandfather who dies in possession, to the grandchild (the father being then dead), or from the uncle to the nephew (the brother being dead), is in the former sense in law an *immediate* descent, although the one is collateral and the other lineal, for the heir is in the *per*, and not in the *per* and *cui*. And this, in the opinion of Lord Chief Justice Bridgman, *Collingwood v. Pace*, Bann. Br. 410, 418, is the true meaning and appreciation of the terms. So they are used by Lord Coke in his first Institute, Co. Litt. 10b. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be *immediate* when the ancestor from whom the party derives his blood is *immediate*, and without any intervening link or degrees, and mediate when the kindred is derived from him *mediate altero*, another ancestor intervening between them. Thus, a descent in lineals from father to son is, in this sense, *immediate*; but a descent from grandfather to grandson (the father being dead), or from uncle to nephew (the brother being dead), is deemed mediate; the father and the brother being in these latter cases the *medium deferens*, as it is called, of the descent or consanguinity. And this is the sense in which Lord Hale uses the words, assigning as a reason that he calls it a mediate descent because the father or brother is the medium through or by whom the son or nephew derives his title to the grandfather or uncle. *Collingwood v. Pace*, 1 Vent. 413, 415, 1 Keb. 671." *Per* Story, J., in *Levy v. M'Cartee*, 6 Pet. (U. S.) 112.

**Immediate Descendants.** — By a statute of *Ohio* it was provided that "no estate in fee simple, fee tail, or any lesser estate in lands or tenements lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the *immediate* issue or descendants of such as are in being, at the time of making such deed or will." A testator seized of lands in Ohio devised real estate to his daughter F. for life, with remainder over at her death to "her child or children living, and the descendants of those who may be dead, equally, to be divided *per stirpes*; if none living, then" over, etc. At the time of the making of the will F. was unmarried; but subsequently she married and had children, two of whom died in her lifetime leaving children. It was contended that these great-grandchildren of the testator could not take on the death of F., despite the provisions of the will, because they were not, within the meaning of the act (as interpreted), "*immediate* issue or descendants."

## IMMEMORIAL USE. — See note 1.

ants" of F. But the court held that while they were not "*immediate* issue," that term properly signifying "children," they were "*immediate* descendants," which includes all those upon whom a descent would be immediately cast by the statute of distributions, and that, therefore, they were entitled to take under the will. The court said: "The superadded word *immediate* merely requires that the person entitled to take must be one to whom, in case of intestacy, the estate would immediately descend, and this a statute designed to prevent perpetuity should very properly require." *Turley v. Turley*, 11 Ohio St. 173.

**Immediate Neighborhood.** — The defendant agreed on a valuable consideration that he would not construct any flats in the plaintiff's *immediate* neighborhood. Upon this contract the court said, in *Lewis v. Gollner*, 129 N. Y. 233: "The phrase '*immediate* neighborhood,' taken in connection with the subject-matter of the contract, is not so indefinite as to be incapable of just and natural boundaries, but in any event covers and includes the locality of the construction in progress. The court has so found, and there is no reason for doubting its correctness." See also NEIGHBORHOOD.

**Immediately Adjoining Owners.** — By the English Lands Clauses Consolidation Act, 1845, it was provided that before the promoters of an undertaking might dispose of any land which had been acquired for the purposes of the undertaking, but which was not required for such purposes, they should, under certain conditions, offer to sell the land "to the person or to the several persons whose lands shall *immediately* adjoin the lands so proposed to be sold." It was held that lessees of lands separated from such superfluous land by a private road, of which they had the exclusive right of user during their tenancies, were owners of

*immediately* adjoining land, within the above provision. *Coventry v. London, etc., R. Co.*, L. R. 5 Eq. 104.

**Statutes.** (See also the title STATUTES.) — Where a *New York* statute declared that it was to take effect *immediately*, it was held that it took effect *immediately* upon its approval by the governor and not before. *Matter of Kemeys*, 56 Hun (N. Y.) 117.

**Same — Without Interval of Time.** — A statute required railroad companies, under certain penalties, to perform certain acts, and provided that compliance with its provisions should begin *immediately* after the taking effect of the act. In construing this provision the court said: "The question being one of intention and not of power, and the word *immediately* ordinarily signifying 'without interval of time,' we must conclude that the legislature omitted the emergency clause, and provided that compliance should follow '*immediately* after (the) taking effect of' the act, thereby intending to give to railway companies the period extending from the passage of the act to the proclamation of the governor in which to prepare for compliance without penalties." *Pennsylvania Co. v. State*, 142 Ind. 428. See also the title STATUTES.

**Same — Publication.** — A statute provided that a general law must be furnished to the state printer within one week after its passage, and he was required to publish the same *immediately* in the newspapers. It was held that such statute was not complied with by publication several months after the passage of the law and after the time for publication of the law in the bound volume had expired. *State v. Lean*, 9 Wis. 279.

**1. Immemorial Use** is a use time out of mind, or from a time whereof the memory of man is not to the contrary. *Miller v. Garlock*, 8 Barb. (N. Y.) 154. See also the title PRESCRIPTION.



# IMMIGRATION.

## I. DEFINITION, 1025.

## II. POWER OF CONGRESS, 1025.

## III. REGULATION OF IMMIGRATION, 1026.

### CROSS-REFERENCES.

See the titles *ALIENS*, vol. 2, p. 64; *CHINESE EXCLUSION ACTS*, vol. 5, p. 1101; *CITIZENSHIP*, vol. 6, p. 14; *CONTRACT LABOR LAW*, vol. 7, p. 83; *HABEAS CORPUS*, *ante*, p. —; *PUBLIC LANDS*.

**I. DEFINITION.** — Immigration is moving into one place from another. In law it is the moving of a person into a country to reside therein. The term ordinarily implies a voluntary migration, distinguishing it from "importation," which has reference to goods or to persons involuntarily brought, such as slaves, prisoners, and insane persons.<sup>1</sup>

**II. POWER OF CONGRESS.** — Congress has power to exclude from the United States foreigners who have not been naturalized, to prevent their return when they have left, or to deport them when on United States territory, and this though they are the subjects of a friendly power.<sup>2</sup>

**Immigrant Fund.** — A duty of one dollar is levied for every foreign passenger coming by steam or sail vessel to the United States from any foreign port. It must be paid by the master, owner, agent, or consignee of the vessel to the collector of the port at which it arrives with such passenger. In default of payment, the sum due becomes a debt operating as a lien upon the vessel. The object of the duty is the creation of an "immigrant fund," to be expended in caring for destitute immigrants and in carrying out the act to regulate immigration.<sup>3</sup>

**1. Immigration.** — "The removing into one place from another." Bouvier's L. Dict.

"The act of immigrating; the passing or coming into a country for the purpose of permanent residence." Webster's Dict.

The distinction between "immigration" and "importation," suggested in the text, was made in argument before the United States Supreme Court in *Smith v. Turner*, 7 How. (U. S.) 283.

**2. Power of Congress.** — *Chinese Exclusion Case*, 130 U. S. 591; *Fong Yue Ting v. U. S.*, 149 U. S. 698; *Legal Tender Cases*, 12 Wall. (U. S.) 457; *Nishimura Ekiu v. U. S.*, 142 U. S. 651; *Lem Moon Sing v. U. S.*, 158 U. S. 538.

**Exclusion After Admission.** — In *In re Liferi*, 52 Fed. Rep. 293, it was held that even though an alien had been passed and allowed to land, yet if he landed in violation of the law he might, under the Act of 1888, be arrested by the superintendent or inspector of immigration, under a treasury regulation, at any time within one year after his landing, and returned to the country from which he came.

**Treaty.** (See also the title *TREATIES*). — The provisions of the immigration acts if in conflict with a pre-existing treaty, must prevail. *Thingvall Line v. U. S.*, 24 Ct. Cl. 255; *Head Money Cases*, 112 U. S. 580.

**British Territory.** — In *Musgrove v. Chun Teeong Toy*, (1891) A. C. 272, it was held that an alien had no legal right enforceable by action to enter British territory.

**3. Act Cong.** Aug. 18, 1894, c. 301, 28 U. S. Stat. at L. 391.

**Constitutionality of Head-money Provision.** — The Act of Aug. 3, 1882, "to regulate immigration," which imposed upon owners of vessels fifty cents for each foreign passenger imported, was a valid exercise of the power to regulate commerce with foreign nations. The contribution is designed to mitigate the evils of immigration by providing a fund; it is not a tax subject to the limitations imposed by the Constitution on the general taxing power of Congress. *Head Money Cases*, 112 U. S. 580.

**Excluded Persons.** — The head tax may be exacted from convicts, lunatics, etc., although by the terms of the statute they are not permitted to land and are required to be returned to the place whence they came. *Head Tax*, 18 Op. Atty.-Gen. 135.

**Tourists.** — The act applies to tourists. *Head-Money Tax*, 18 Op. Atty.-Gen. 185, 196.

**State Duty on Passengers.** (See also the title *TAXATION*). — The provision in the Constitution of the United States conferring on Congress power to regulate commerce includes

**III. REGULATION OF IMMIGRATION.** — Congress has provided that all idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and persons assisted by others to immigrate shall be excluded from the United States. The statute further provides for the regulation of transportation companies, the appointment of inspectors, and the retransportation of aliens entering in defiance of the act. The statute also makes several exceptions from its provisions.<sup>1</sup>

persons in relation to commerce, as well as property. *Lin Sing v. Washburn*, 20 Cal. 534. A state has no authority to impose a tax *per capita* on foreign passengers. *Smith v. Turner*, 7 How. (U. S. 283, 349; *People v. Raymond*, 34 Cal. 492; *State v. Steamship Constitution*, 42 Cal. 589; *Henderson v. New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275. Such statute imposing a dollar on each alien passenger to execute the state inspection laws is unconstitutional. *People v. Compagnie Générale Transatlantique*, 10 Fed. Rep. 357, 107 U. S. 59.

**Penalties — Bond.** — A bond given by the master or owner of a vessel arriving within the state of Massachusetts with alien passengers on board, to the boarding officer duly appointed by the city of Boston under Act 1837, c. 238, § 1, in the penal sum of sixty-five thousand dollars, reciting that sixty-five of such alien passengers named therein have been landed and now reside in the city of Boston, who, in the opinion of the overseers of the poor of the city, are likely to become chargeable to the commonwealth for their support, and conditioned to indemnify the city and commonwealth from all charge and expense which may arise from such passengers for the term of ten years, does not conform to Act 1837, c. 238, § 2: (1) because it is in the sum of as many thousand dollars as there are passengers, and not in the sum of one thousand dollars for each passenger; (2) because it does not show that the boarding officer made the examination required by the statute, to ascertain whether any of the passengers came within the description of persons for whom he had a right to exact a bond; and (3) because it does not show that the passengers named were lunatic or indigent persons, incompetent in the opinion of the boarding officer to maintain themselves, or who had been paupers in any other country; and if it is not proved, in an action brought on such bond, that there were in fact passengers for whom he could legally exact a bond, the bond is void. *Boston v. Capen*, 7 Cush. (Mass.) 116.

1. Act Cong. March 3, 1891, c. 551, 26 U. S. Stat. at L. 1084. And by the Act of March 3, 1893, c. 206, 27 U. S. Stat. at L. 569, further regulations are made as to the conduct of transportation companies and masters of vessels engaged in the transportation of immigrants.

**Who Is an Alien Immigrant.** — The petitioners alleged that they were not alien immigrants, but were residents of the United States, where they had acquired a domicile, and that when returning to their respective homes from a voyage to Italy, undertaken by them with the

intention of returning to the United States, they were unlawfully detained and directed to be sent back to Italy by the superintendent of immigration. The court said: "From the testimony it appears in respect to each petitioner that he is not an alien immigrant, but a resident of the United States; that when detained by order of the superintendent of immigration he was on his way from Italy to his place of abode in the United States; and that his voyage to Italy was undertaken with intent to return to the United States, where he resided. Upon this testimony it must be held to have been shown in regard to each petitioner that he was not an alien immigrant; and that fact appearing, even if it be assumed that the petitioner was born in Italy, and had never been naturalized, it must nevertheless be held that the order of the superintendent of immigration set up in the master's return is void for want of jurisdiction." *In re Panzara*, 51 Fed. Rep. 275. See also *In re Martorelli*, 63 Fed. Rep. 437; *In re Maiola*, 67 Fed. Rep. 114.

**Stowaways.** — Where a stowaway was regularly enrolled as a member of the crew, it was held that he could not be regarded as an alien immigrant. *U. S. v. Sandrey*, 48 Fed. Rep. 550.

**Liable to Become Public Charge.** — Where the only evidence that immigrants were liable to become a public charge was that their passage money had been paid by a foreign government, it was held that while the fact was important and one to be considered in determining the question, it alone did not constitute inability in the immigrants to take care of themselves, nor was it conclusive evidence thereof. *In re O'Sullivan*, 31 Fed. Rep. 447.

In *In re Feinknopf*, 47 Fed. Rep. 447, it was held that before an immigrant could be excluded there must be some evidence that he was likely to become a public charge, in contradiction to his affidavit that he was a mechanic and that his baggage was worth twenty dollars.

**Liable to Become Public Charge — Insanity.** — Where the government exacted a bond that an immigrant would not become a public charge, it was held that on her becoming insane the government was entitled to recover on the bond. *U. S. v. Lipkis*, 56 Fed. Rep. 427.

**Convicts — Assault with Deadly Weapon.** — In *In re Aliano*, 43 Fed. Rep. 517, it was said: "The relators, by their own admission, were found guilty in the country from which they came, of an assault with a deadly weapon. They were sentenced to two and four months' imprisonment, respectively, and have served their terms. They are clearly convicts, within

**Conclusiveness of Officer's Decision.** — Congress has power to vest in immigration officers the final authority to determine whether a person not a citizen or inhabitant of the United States should be excluded; and when it has done so, proceedings before such officers are not reviewable in the United States Courts.<sup>1</sup> Statutes have also been passed by Congress against kidnapping

the meaning of the act regulating immigration."

**Landing.** — In *In re Palagano*, 38 Fed. Rep. 580, it was held that removal from the ship and detention by the immigration officers for the purpose of examination did not constitute a landing. See also *Nishimura Ekiu v. U. S.*, 142 U. S. 651.

**Appointment of Inspectors.** — In *Nishimura Ekiu v. U. S.*, 142 U. S. 651, it was held that under Act Cong. March 3, 1891, c. 551, inspectors of immigration were to be appointed by the secretary of the treasury, and not by the superintendent of immigration.

**Power of Collector.** — A treasury regulation provided that the superintendent of immigration at the port of New York should examine aliens entering the country and report to the collector whether they were within the prohibition of the Act of 1885. By the Act of 1887 it was provided that if on examination by the superintendent any person should be found to be within the prohibition of the act, and this was reported to the collector, such person should not be permitted to land. It was held that the superintendent of immigration, and not the collector, had the power to determine whether an alien should land. *In re Bucciarelli*, 45 Fed. Rep. 463.

**Taking Testimony by Inspectors.** — Where the statute empowered inspectors to administer oaths and to take and consider testimony, and to enter such testimony of record, it was held that the statute did not require the inspectors to take any testimony at all, but allowed them to decide on their own judgment the question of the right of the immigrant to land. *Nishimura Ekiu v. U. S.*, 142 U. S. 651.

**Delegation of Power by Officers.** — In *In re Murnane*, 39 Fed. Rep. 99, it was held that a board of commissioners who by Act of Congress were required to examine immigrants could not delegate their authority to a committee.

**Liability of State Officers.** — The commissioner of immigration of the port of San Francisco cannot justify his refusal to pay into the state treasury the fees collected by him under Pol. Code Cal., § 2955, for the inspection of passengers on vessels arriving in that port from foreign ports, on the ground that the section is unconstitutional and the collections illegal, or because the board of supervisors of the city and county of San Francisco had failed to establish a lazaretto or lepers' quarters as required by the section. In an action by the controller against the commissioner to recover the fees so collected, the defendant is not entitled to credit for items alleged by him to be due for unpaid deputies' salaries and attorneys' fees in an action against him as commissioner. *People v. Board of Supervisors*, 117 Cal. 117.

The salary and office expenses of the commissioner of immigration can be paid only out of the money received into the state treasury after the passage of Act Cal. March 15,

1883, relative to immigration, if he took his office subsequently to that date. *Forrester v. Dunn*, 65 Cal. 562.

Under Pol. Code Cal., § 2955, the commissioner of immigration was required to pay into the state treasury all the fees collected by him, less four thousand dollars a year and office expenses, which payments were to be used by the state for the maintenance of lepers' quarters when required for that purpose. A cause of action to recover for fees unlawfully retained by the commissioner accrued in favor of the state upon the expiration of his term of office, without any demand being made therefor, and under Code Civ. Pro. Cal., § 338, subdiv. 1, became barred by the statute of limitations after the lapse of three years. A demand made by the controller on the commissioner, under Pol. Code, § 437, for an accounting for the fees collected by him, does not create a new cause of action in favor of the state. *People v. Van Ness*, 76 Cal. 121.

**Same — Baggage.** — S., an emigrant, on arriving in New York was, under the rules of the commissioners of emigration, placed on board a barge with his baggage, for the purpose of being landed. The barge belonged to and was in the custody of certain railroad companies, who had ticket offices in Castle Garden, the premises of the commissioners of emigration. Upon landing, the baggage was transferred to the wharf by the employees of the railroad companies, in whose charge it was left for the purpose of being weighed and marked, while S. was required to enter Castle Garden in order to have his name registered, pursuant to the rules of the commissioners. During S.'s absence for this purpose, his baggage was lost. It was held that the commissioners of emigration were not liable therefor. The baggage was not in their charge, nor in the charge of any one in their employ. The remedy of S., if any, was against the persons in charge of the baggage, or their employers, the railroad companies. *Semler v. Emigration Com'rs*, 1 Hilt. (N. Y.) 244.

So in *Murphy v. Emigration Com'rs*, 28 N. Y. 134, it was held that licensing steamboat men to land passengers and their baggage did not make the parties licensed the agents of the commissioners of emigration so as to render the latter liable for the loss of a passenger's baggage.

**1. Conclusiveness.** — The courts have no power to review the action of an inspector of immigration in refusing to allow an alien to land. *U. S. v. Rogers*, 65 Fed. Rep. 787; *U. S. v. Arteago*, 68 Fed. Rep. 883; *In re Cummings*, 32 Fed. Rep. 75; *In re Vito Rullo*, 43 Fed. Rep. 62; *In re Berjanski*, 47 Fed. Rep. 445; *In re Didirri*, 48 Fed. Rep. 168; *In re Howard*, 63 Fed. Rep. 263.

In *Nishimura Ekiu v. U. S.*, 142 U. S. 651, it was held that the decision of the inspector of immigration that an alien was within one of the classes excluded by Act Cong. March 3,



aliens<sup>1</sup> and the importation of women for purposes of prostitution.<sup>2</sup>

**IMMINENT.** — “Imminent” denotes something which is ready to fall or happen on the instant; as, imminent danger to one’s life.<sup>3</sup>

**IMMORAL CONSIDERATION.** — See the titles *CONSIDERATION*, vol. 6, pp. 673, 757; *ILLEGAL CONTRACTS*, *ante*.

**IMMORAL CONTRACTS.** — See the title *ILLEGAL CONTRACTS*, *ante*.

**IMMORALITY.** — See the titles *ADULTERY (AS A CRIME)*, vol. 1, p. 746; *BASTARDY*, vol. 3, p. 871; *DISORDERLY HOUSES*, vol. 9, p. 508; *DIVORCE*, vol. 9, p. 723; *FORNICATION*, vol. 13, p. 1118; *LEWD AND LASCIVIOUS COHABITATION AND CONDUCT*; *SEDUCTION*.

**IMMOVABLE.** — See note 4.

**IMMUNITY.** (See also the titles *CIVIL RIGHTS*, vol. 6, p. 68; *CONSTITUTIONAL LAW*, vol. 6, pp. 958, 966.) — Immunity is freedom from that which otherwise would be a burden.<sup>5</sup>

1891, c. 55, was subject only to appeal to the commissioner of immigration and the secretary of the treasury, and could not be reviewed by habeas corpus, though it did not appear that the inspector took or recorded any evidence.

In *In re Day*, 27 Fed. Rep. 678, it was held that immigration officers might reconsider their decision at any time before the deportation of aliens.

**Immigrant.** — In *In re Moses*, 83 Fed. Rep. 995, it was held that it was not necessary, since the Act of Congress making the decision of immigration officers final, for the respondent in habeas corpus in behalf of an alien excluded to show that such person was an immigrant.

**Right to Enter.** — In *In re Li Foon*, 80 Fed. Rep. 881, it was held that under Act Cong. Aug. 13, 1894, the decision of a collector of customs in favor of the right of a Chinese alien to enter was not final, but was subject to review in the courts.

**Collector.** — In *In re Palagano*, 38 Fed. Rep. 580, it was held that the decision of the commissioners of immigration as to indigent immigrants could not be reversed by the collector.

**Whether an Alien.** — In *In re Panzara*, 51 Fed. Rep. 275, it was held that the question whether the party to be excluded was or was not an alien was jurisdictional and might be determined by the courts. See also *In re Tom Yum*, 64 Fed. Rep. 485.

**1. Inveigling and Kidnapping.** (See also the title *KIDNAPPING*.) — Act Cong. June 23, 1874, 18 Stat. at L. 251, provided that whoever should knowingly and wilfully bring in the United States any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary service, should be guilty of a felony. It was held that the word “inveigled” as here used included an arrangement made in Italy which contemplated the delivery of a child to the defendant and the bringing of him by the defendant to the United States for the purpose of being employed there as a beggar or street musician, the child being induced in Italy to consent to such an arrangement. *U. S. v. Aucarola*, 17 Blatchf. (U. S.) 423.

**2. Prostitution.** — In *U. S. v. Pagliano*, 53 Fed. Rep. 1002, it was held that evidence that defendant kept a house of prostitution was

admissible as showing the intent of the importation.

Under Act Cong. March 3, 1875, § 3, 18 U. S. Stat. at L. 477, the importation of women for the purposes of prostitution from all countries is forbidden, and not merely the importation of them for such purposes from China, Japan and other Oriental countries. *U. S. v. Johnson*, 19 Blatchf. (U. S.) 257, holding further that evidence as to acts done, after the importation, at a house kept by the defendant, where she and the imported woman lived, it being the place named in the indictment as that where the purpose of prostitution was to be carried out, is proper to show such purpose.

**3. Eckhardt v. Buffalo**, 19 N. Y. App. Div. 12. This case was upon the construction of a city charter empowering the health commissioner, in the presence of great and imminent peril to the public health, to take such protective measures as he might deem the public safety and health to demand. See also the title *BOARD OF HEALTH*, vol. 4, p. 596.

**4. Immovable.** (See also the titles *TAXATION*; *WILLS*. And see *MOVABLE*.) — A Hawaiian statute provided that a wife should be entitled to receive by way of dower a life estate in one-third part of all immovable and fixed property owned by her husband. The court said, in construing this statute: “We understand ‘immovable and fixed property,’ as here used, to mean lands and tenements, in contradistinction to money, goods, wares, furniture, or any other species of movable property, not fixed, without necessarily implying that such lands and tenements must be held in fee simple or by any other freehold tenure.” *Matter of Vida*, 1 Hawaii 64.

**Immovable Property Includes Land and Chattels Real.** — *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

**5. Lonas v. State**, 3 Heisk. (Tenn.) 306.

A Constitution prohibited the legislature from enacting any special or private law granting any special or exclusive privileges, immunities, or franchises. It was held that the three terms were intended to refer to things of the same general nature. The court said: “An immunity has been defined as an exemption from any charge, duty, office, tax, or imposition.” *Dike v. State*, 38 Minn. 367.

By the Federal Constitution the citizens of each state are entitled to all privileges and

**IMPAIR.** (See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, *post.*) — To impair means to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.<sup>1</sup>

**IMPAIRMENT OF HEALTH.** — See the title LIFE INSURANCE.

*Immunities* of citizens in the several states. In *Campbell v. Morris*, 3 Har. & M. (Md.) 535, it was said that the terms "privilege" and *immunity* are synonymous, or nearly so; "privilege" signifies a peculiar advantage, exemption, immunity; *immunity* signifies exemption, privilege. A particular and limited operation is to be given to the words "*immunities* and *privileges*." *Wiley v. Parmer*, 14 Ala. 632. See also *Ward v. Maryland*, 12 Wall. (U. S.) 430; *U. S. v. Petersburg Judges*, 1 Hughes (U. S.) 507; *Van Valkenburg v. Brown*, 43 Cal. 49; *In re Lowrie*, 8 Colo. 514; *Douglass v. Stephens*, 1 Del. Ch. 476; *Buffington v. Grosvenor*, 46 Kan. 736; *Corfield v. Coryell*, 4 Wash. (U. S.) 371.

**Immunities — Exemption from Taxation.** (See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 295.) — A statute granted to the D. insurance company "all the rights, privileges, and *immunities*" of the B. insurance company. A later act granted to the W. insurance company "all the rights and privileges" of the D. company. It was held that the exemption from taxation did not pass. The court said: "The word *immunities* is omitted. Is

there any meaning to be attached to that omission? And if so, what? We think some meaning is to be attached to it. The word *immunity* expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an *immunity* than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption." *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174.

The term *immunity* is an apt one to describe an exemption from taxation. *Buchanan v. Knoxville, etc., R. Co.*, 71 Fed. Rep. 334.

1. **Impair.** — *Edwards v. Kearzey*, 96 U. S. 600, 79 N. Car. 665; *Holland v. Dickerson*, 41 Iowa 371. To the same effect are *State v. Carew*, 13 Rich. L. (S. Car.) 541; *Swinburne v. Mills*, 17 Wash. 611.

To impair means to diminish; to injure; to make worse. *Blair v. Williams*, 4 Litt. (Ky.) 69.

**Affect in the Sense of Impair.** — See *Tyler v. Wells*, 2 Mo. App. 539.

# IMPAIRMENT OF OBLIGATION OF CONTRACTS.

BY GEORGE MCKAY.

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**CROSS-REFERENCES.**

*In addition to the references given under the title CONTRACTS, vol. 7, p. 89, see the following: CONSTITUTIONAL LAW, vol. 6, p. 882; DUE PROCESS OF LAW, vol. 10, p. 287; EMINENT DOMAIN, vol. 10, p. 1043; EXEMPTIONS (FROM EXECUTION), vol. 12, p. 74; EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; HOMESTEAD, ante, p. 516; IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS; INSOLVENCY AND BANKRUPTCY; INTEREST; INTERSTATE COMMERCE; JUDGMENTS AND DECREES; JUDICIAL SALES; LIMITATION OF ACTIONS; MONOPOLIES; MUNICIPAL CORPORATIONS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; ORDINANCES; POLICE POWER; PUBLIC OFFICERS; RECORDING ACTS; SHERIFF'S SALES; STATES; STATUTES; STOCK; STOCKHOLDERS; TAXATION; TAX SALES; TAX TITLES.*

**I. SCOPE OF TITLE.**—To arrive at the meaning of the term "contract," as used in the contract clause of the Federal Constitution, does not require a general treatise on the law of contracts, but does require a special statement of what are contracts in the constitutional sense. To arrive at the meaning of the term "contract" in its constitutional sense there must be subtracted from the term as it is sometimes employed all those obligations imposed by the law, but not based on the actual meeting of minds and a consent to be

bound; and on the other hand, there must be added to the term all those rights which rest upon an actual meeting of minds, even though such rights cannot be vindicated in an action counting upon a contract between the parties and alleging a breach of it. Such matters as contracts generally, corporations, constitutional law, the police power, taxation, eminent domain, and interstate commerce are treated elsewhere, and are here mentioned only so far as necessary in order to treat the matter in hand.<sup>1</sup>

**II. HISTORY OF CONTRACT CLAUSE.** — The history of the contract clause is a brief one. This provision passed almost unnoticed in the debates of the convention, and it was mentioned but twice in the *Federalist*.<sup>2</sup> While the Constitution was under consideration by the convention, a provision similar in character was incorporated by Congress into the ordinance for the government of the Northwest Territory.<sup>3</sup> "Since its adoption no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy."<sup>4</sup>

**III. WHAT ARE CONTRACTS IN THE CONSTITUTIONAL SENSE — 1. In General.** — Assent to be bound is of the very essence of the obligation protected by the Constitution. The contract clause was designed to secure good faith in the performance of contracts, by protecting their obligations against the passage, by a state, of laws which in their effect would relieve either party from what he had voluntarily pledged his faith to do or not to do.<sup>5</sup>

**2. Obligations Imposed by Law.** — Obligations imposed by the law without the assent of the party bound are not contracts in the constitutional sense, even though by a legal fiction they may be enforced in an action in form *ex contractu*.<sup>6</sup>

**Quasi Contracts** is a term quite generally applied to obligations of this character; but the use of the term has been purposely avoided in this article, for the reason that obligations contractual in character are often placed under this classification,<sup>7</sup> and for the further reason that the line of demarcation between true contracts and *quasi* contracts has never been accurately drawn, with reference to the contract clause.<sup>8</sup>

**3. Implied Contracts.** — It may be proven that a contract has been made by words, either oral or written, or by the acts of the parties. The words in the one case and the acts in the other tend to the same end, proof of an agreement to do or not to do a particular thing.<sup>9</sup> A contract proven by the acts of the parties is just as much within the protection of the contract clause as a contract proven by the most solemn and formal instrument.<sup>10</sup>

1. See the titles CONSTITUTIONAL LAW, vol. 6, p. 882; CONTRACTS, vol. 7, p. 88; CORPORATIONS (PRIVATE), vol. 7, p. 620; EMINENT DOMAIN, vol. 10, p. 1043; INTERSTATE COMMERCE; POLICE POWER; TAXATION.

2. Cooley's Const. Lim. (6th ed.) 328; *Federalist*, Nos. 7 and 44.

3. *Hepburn v. Griswold*, 8 Wall. (U. S.) 603.

4. Cooley's Const. Lim. (6th ed.) 328.

5. **Object of Contract Clause.** — *Louisiana v. New Orleans*, 109 U. S. 285; *Garrison v. New York*, 21 Wall. (U. S.) 196; *Freeland v. Williams*, 131 U. S. 405. See also *infra*, this section, *Obligations Imposed by Law*.

6. **Obligations Imposed by Law.** — *Louisiana v. New Orleans*, 109 U. S. 285; *Garrison v. New York*, 21 Wall. (U. S.) 196; *Freeland v. Williams*, 131 U. S. 405; *State v. New Orleans*, 38 La. Ann. 119, 58 Am. Rep. 168.

In each of the cases cited *supra* the point of the decision is that an obligation imposed on the party by the law, without his assent, is not contractual in the constitutional sense. The fiction of a promise does not change the essential nature of the obligation.

**Money Paid under Mistake.** — In *Louisiana* it has been held that the obligation to repay money paid under a mistake is not contractual, but *quasi* contractual, and is therefore not within the protection of the contract clause. The obligation is imposed, so the court held, by the law, and is not consensual in character. *State v. New Orleans*, 38 La. Ann. 119, 58 Am. Rep. 168.

7. See Keener on *Quasi Contracts*, 300.

8. See the preceding notes to this subdivision; and see *infra*, this section, *Implied Contracts*.

An examination of the cases will show that no attempt has ever been made to properly classify contracts with reference to the contract clause. The principle stated *supra* may serve as the basis for a correct classification, but the work has never been completed. See *infra*, this section, *Implied Contracts*.

9. See the title CONTRACTS, vol. 7, p. 91 *et seq.* See also the title IMPLIED OR QUASI CONTRACTS, *post*.

10. *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *Hawthorne v. Calef*, 2 Wall. (U. S.) 10.

A Trustee, by accepting a trust, binds himself by a contractual obligation to carry out the terms and purposes of the trust.<sup>1</sup>

4. **Executory Contracts.**—It has never been doubted or questioned that executory contracts are protected by the contract clause.<sup>2</sup>

5. **Executed Contracts.**—It took argument and precedent to establish the doctrine that after performance of a contract there remained an obligation of a contract, in the constitutional sense. At first blush it would seem that the obligation is discharged by the performance of the contract; but in the execution of a contract rights are created or transferred; these rights grow out of — are the fruit of — the obligation of a contract. The state cannot, by a legislative act, arrest performance by impairing the obligation to perform, nor can it wait until after performance, and then, by legislation, undo and rescind the contract and restore to the parties the rights transferred by the act of performance. After performance there remains the implied contract, to which both parties have assented, that neither shall retake and that each shall enjoy the right transferred in the execution of their contract.<sup>3</sup>

6. **Contracts of State or Municipality.**—The contracts of a state or municipality are within the contract clause, the same as the contracts of individuals or private corporations.<sup>4</sup>

7. **Grants of Exclusive Privileges.**—The grant of an exclusive privilege, if valid, implies a contract not to revoke the grant<sup>5</sup> and a further contract not to grant the same privilege to another.<sup>6</sup> But the mere grant of a privilege not exclusive does not imply a contract not to grant a competing privilege or right to another.<sup>7</sup>

1. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684; *Cary Library v. Bliss*, 151 Mass. 364. See generally the title TRUSTS AND TRUSTEES.

2. **Executory Contracts.**—In all the discussions by the courts and text writers it has been assumed that executory contracts are protected by the contract clause. See *infra*, this section, *Executed Contracts*.

In *Black on Constitutional Limitations*, p. 31, § 22, the writer seems to state that executory contracts are not protected from impairment, but an examination of the text will clearly show that the writer had in mind not executory contracts properly so called, but mere proposals not accepted. Here something remains to be done before the contract is closed — before it is a contract.

See the title CONTRACTS, vol. 7, p. 125.

3. **Executed Contracts.**—*Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Terrett v. Taylor*, 9 Cranch (U. S.) 52; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Hamilton v. Brown*, 161 U. S. 256; *Baltimore Trust, etc., Co. v. Baltimore*, 64 Fed. Rep. 153; *People v. Platt*, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; *Houston, etc., R. Co. v. Texas, etc., R. Co.*, 70 Tex. 649; *Franklin County Grammar School v. Bailey*, 62 Vt. 467. See also the cases cited *infra*, this section, *Grants of Exclusive Privileges; Charters of Private Corporations*.

4. See the succeeding divisions of this article; and see the titles MUNICIPAL CORPORATIONS; STATES.

5. **Grants of Exclusive Privileges.**—See the cases cited to the subsection *Executed Contracts, supra*.

6. *St. Tammany Water Works Co. v. New Orleans Water Works Co.*, 120 U. S. 64; *New*

*Orleans Water-Works Co. v. Rivers*, 115 U. S. 674; *Binghamton Bridge Co.*, 3 Wall. (U. S.) 51; *Bridge Proprietors v. Hoboken Land, etc., Co.*, 1 Wall. (U. S.) 116. See the title MONOPOLIES.

7. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67; *Bridge Proprietors v. Hoboken Land, etc., Co.*, 1 Wall. (U. S.) 116; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Matter of Brooklyn*, 143 N. Y. 596; *Auburn, etc., Plank-road Co. v. Douglass*, 9 N. Y. 444; *Power v. Athens*, 99 N. Y. 592; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Hydes Ferry Turnpike Co. v. Davidson County*, 91 Tenn. 291.

The Celebrated "Charles River Bridge Case" (*Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420), arose out of the following state of facts: The state of Massachusetts first granted to the Charles River Bridge Company the franchise to construct a bridge across the Charles river and to collect tolls. Subsequently the state granted a franchise to another company to construct another bridge near to the first. The ends of the two bridges were only sixteen rods apart on one side of the river and fifty rods apart on the other, and both bridges were on the line of travel from Boston to Charlestown. The franchise first granted was not exclusive in terms. The court held that the grant of the franchise must be strictly construed, and that the court could not, by construction, import into the franchise a contract that no other bridge should be built to compete with the first bridge.

In *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, it was held that an exclusive franchise to supply water to a city from a designated stream did not include a contract not to grant the right to others to supply the city with water from another source.



Exemptions from Taxation may, for a valuable consideration, be granted by contract with the state.<sup>1</sup>

8. **Charters of Private Corporations** — *a.* IN GENERAL. — It is often said that the charter of a private corporation becomes after acceptance a contract between the state and the corporation.<sup>2</sup> This form of statement, while convenient, and sufficiently accurate for most purposes, is liable to mislead if taken literally, and it is open to the further objection that it obscures the real contract protected by the Constitution.<sup>3</sup> Generally speaking, a charter or act of incorporation, however special or limited in its terms, is not, in its entirety, a contract, nor are all its provisions protected by contract from amendment or repeal.<sup>4</sup>

*b.* CLASSIFICATION OF PROVISIONS OF CHARTER. — The provisions of the charter or act of incorporation are either matters of contract<sup>5</sup> or matters of law.<sup>6</sup>

*c.* TEST OF CLASSIFICATION. — No decided case furnishes any certain test whereby to determine in every instance whether a particular provision is matter of contract or matter of law.

(1) *Matters of Contract.* — Every valuable right granted by the charter or act of incorporation, and which by a fair construction may be said to be the consideration, in whole or in part, for the acceptance of the charter and the organization under it,<sup>7</sup> or for the conveyance to the corporation by third parties of valuable property rights,<sup>8</sup> is protected by a contract that the state will

In *Bridge Proprietors v. Hoboken Land, etc., Co.*, 1 Wall. (U. S.) 116, the grant of an exclusive franchise to maintain a tollbridge for public travel was held not to imply a contract not to grant a franchise to construct a railroad bridge for railroad traffic.

See such titles as *BRIDGES*, vol. 4, p. 946; *FERRIES*, vol. 12, p. 1101; *GAS COMPANIES*, vol. 14, pp. 921, 922; *TURNPIKES*; *WATERWORKS AND WATER COMPANIES*.

1. **Exemptions from Taxation.** — Home of the *Friendless v. Rouse*, 8 Wall. (U. S.) 432; *Washington University v. Rouse*, 8 Wall. (U. S.) 439; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *Armstrong v. Treasurer*, 16 Pet. (U. S.) 281; *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436; *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *Osborne v. Humphrey*, 7 Conn. 335; *Landon v. Litchfield*, 11 Conn. 251; *Armstrong v. Athens County*, 10 Ohio 235. See *infra*, this section, *Necessity for Consideration*.

For a full treatment, see the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 385.

2. **Corporate Charters.** — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 669.

3. For a statement of the terms of the contract protected by the Constitution, see *infra*, this section, *Terms of Contract*.

"The statement that a charter of incorporation is a contract conveys no definite idea to the mind unless the parties to the supposed contract and the terms of their agreement are understood." 2 Morawetz on Private Corporations (2d ed.), § 1046.

4. "In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal." *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609. This language was quoted with approval in *People v. Cook*, 148 U. S. 397. In

the latter case a railroad company had given a mortgage on its property and franchises. The law in force when the mortgage was given authorized the purchasers of the property at foreclosure sale to organize another corporation to hold and manage the property; and at that time no tax was imposed on the filing of the articles of incorporation. After the giving of the mortgage, but before the purchase at foreclosure sale, a tax, graduated according to the capital stock, was imposed by a statute of the state. It was held that the law authorizing the formation of the new corporation was not a contract, and that, therefore, the purchasers must comply with the law in force when they attempted the formation of the new corporation. Substantially the same question was involved in the case first cited.

5. See *infra*, this section, *Matters of Contract*.

6. See *infra*, this section, *Matters of Law*.

7. **Matters of Contract.** — *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369. In this case the court used this language: "Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise and necessary to the business of the bank cannot, without its consent, become a subject for legislative action." This was a case of a tax exemption contained in the charter, and in reliance on which the corporation had been organized and the stock subscribed and paid for.

8. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Washington University v. Rouse*, 8 Wall. (U. S.) 439; *Cary Library v. Bliss*, 151 Mass. 364.

not revoke or impair the right or privilege granted.<sup>1</sup>

(2) *Terms of Contract.* — The contract protected by the Constitution is the same in terms, character, and obligation as in a grant of real or personal property. This is an extension to the grant of corporate franchises of the rule announced in *Fletcher v. Peck*,<sup>2</sup> and since followed, that a grant implies a contract not to revoke or impair the grant.<sup>3</sup>

(3) *Matters of Law.* — The matters of law contained in the charter or act of incorporation are the following:

**Regulation.** — Those provisions which relate to and "regulate the manner in which the franchises are to be exercised."<sup>4</sup>

**Powers.** — Those "powers" conferred by the charter or act of incorporation which, while having a value in certain future contingencies, are so remote from the main purpose of the corporation that by a fair construction of the charter and the circumstances surrounding its acceptance it cannot be said that the grant of these powers constituted in whole or in part the consideration for the acceptance of the charter, the organization under it, or the grant to the corporation by third parties of valuable property rights.<sup>5</sup>

In none of the cases cited in this note was the court called upon to differentiate the provisions of the charter and determine which were matters of contract and which matters of law, but the principle running through all of them is this: A consideration is necessary to the contract which protects the charter from amendment or repeal, and it would logically follow that a provision which does not come within the range of the consideration is not protected. See *infra*, this section, *Necessity for Consideration*.

Justice Brown, after a critical review of the cases relating to the franchises and privileges of corporations, used this language: "In each of the above cases, however, the title to property had either become vested in the grantee by operation of law, or the exercise of the power granted was so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions by, the fact that the corporation was endowed with those privileges during the continuance of the charter." *Pearsall v. Great Northern R. Co.*, 161 U. S. 664. At pp. 660, 661, Mr. Justice Brown gives a very clear statement of the real question decided in the celebrated *Dartmouth College* case.

1. See *infra*, this section, *Terms of Contract*; and see the next note but one, *infra*.

2. 6 Cranch (U. S.) 87.

3. *Greenwood v. Union Freight R. Co.*, 105 U. S. 13. In this case the court, in speaking of the *Dartmouth College* case, said: "The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 6 Cranch (U. S.) 87, and the preceding cases, and held that it applied not only to contracts between individuals and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts

which the state could not impair." The court in this opinion evidently uses the term "contract" in reference to a charter, in the same sense that the court in *Fletcher v. Peck*, 6 Cranch (U. S.) 137, used the same term in reference to an executed contract or a grant, viz., "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right." This implied contract has its legal obligation; this construction of an executed contract creates a continuing obligation to be protected, and brings the obligation within the protection of the contract clause. See the language of Story, J., in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 682, 683.

This construction obviates the difficulty pointed out by Mr. Morawetz in 2 *Morawetz on Private Corporations* (2d ed.), § 1046. See also *supra*, this section, *Executed Contracts*.

4. *Regulation of Franchises.* — *Pearsall v. Great Northern R. Co.*, 161 U. S. 665.

5. *Powers.* — *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *Bank of Commerce v. Tennessee*, 161 U. S. 134; *Galveston, etc., R. Co. v. State*, 81 Tex. 572. See also the cases cited in the next note *infra*.

In the case last cited the doctrine of the two previous cases was approved and applied to the grant of authority — a franchise — to construct a certain line of railroad, in aid of which a land grant was made. Afterwards the state forbade by law further grants in aid of railroads, and after the latter law was passed the company was authorized to construct a different line of road. It was held that the right to a grant was not a vested right as to the new and different line.

**Consideration.** — The subscriber to the stock of a corporation would not rely, as a consideration for his contract of subscription, on the power of the company to buy or build a parallel line, *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; nor on the power of a corporate corporation to issue stock, *Bank of Commerce v. Tennessee*, 161 U. S. 134; nor on the power of the company to build another line and thereby earn a land grant not mentioned in the charter, *Galveston, etc., R. Co. v. State*, 81 Tex. 572. In none of these mat-



**Municipal Aid to Railroads.** — A law, even though written in a railroad charter, authorizing municipal aid to railroads, is not a corporate franchise in the sense that it cannot be repealed. It is regarded as a mere regulation of the powers of municipalities, and until, in pursuance of the power, the aid is actually given, or a binding contract is made to give it, no vested right is disturbed by a repeal, even though the expectations of the company may be disappointed. The railroad company has no vested right in the continuance of a municipal power to confer a benefit; the existence of such a power is not necessary, in a legal sense, to the corporate purpose of a railroad, though it may be valuable in the contingency that the municipality continues willing to confer the benefit, and the continued willingness of the municipality could not be said to have formed a part of the consideration for the acceptance of the charter or the organization under it.<sup>1</sup>

**9. Contract Between Corporation and Its Stockholders.** — The contract between the corporation and a stockholder that the latter will pay for his stock, according to an original subscription or according to the contract which he assumes when he takes unpaid shares, needs no special treatment. In either case the obligation to pay is contractual and is protected by the Constitution.<sup>2</sup>

**10. Contract Between Stockholders Themselves.** — Distinct from the contract on the stockholder's part to pay for his stock, there is a contract relating to the nature of the corporate venture, which is said to exist between the stockholders themselves<sup>3</sup> or between the corporation and its stockholders.<sup>4</sup> In the present state of the adjudications it cannot be safely affirmed that this contract extends further than this: The stockholder's funds, which are represented by his stock, shall not be (a) devoted to a wholly different purpose,<sup>5</sup> (b) or subjected to a wholly different method of management, from that stated in the charter or other articles of incorporation.<sup>6</sup> The very foundation of the corporate venture cannot be shifted, nor can a stockholder be practically deprived of his voice in the management. A greater particularity in definition is at present impossible. The charter or act of incorporation or other articles of association may be of controlling importance.<sup>7</sup> In addition, the state of the decisions renders precision difficult. The charter may be subject to a reserved power to amend or repeal, and though not subject to such a reserved power, a majority of the stockholders may accept an amendment to the charter not fundamental in character;<sup>8</sup> the by-laws may generally be amended

ters could the subscriber urge that his subscription was based on them as a consideration, as well might he urge that the general laws of the state formed in part the consideration of his contract.

The "Power" to Consolidate is a mere license, and not a contract, even though conferred by a corporate charter. *Adams v. Yazoo, etc., R. Co.*, (Miss. 1898) 24 So. Rep. 200, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802; *Pearsall v. Great Northern R. Co.*, 161 U. S. 667; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 695; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 312.

As to the Effect of Consolidation, see the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 810 *et seq.*

**1. Municipal Aid.** — *Norton v. Taxing Dist.*, 129 U. S. 479; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Wadsworth v. Eau Claire County*, 102 U. S. 534; *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *Wilson v. Polk County*, 112 Mo. 126; *Falconer v. Buffalo, etc., R. Co.*, 69 N. Y. 491.

**2.** See the titles STOCK; STOCKHOLDERS.

**3. Contract Between Stockholders.** — *Kean v. Johnson*, 9 N. J. Eq. 407; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685.

**4.** *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

**5. Extent of This Contract.** — *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, and cases cited in the last two notes.

**6.** *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.

**7.** See *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.

**A Consolidation with Another Corporation** without the consent of a stockholder has been held a violation of the contract under consideration. *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

But though he cannot be forced into the consolidated corporation, consolidation may be effected without his consent if compensation is made to him. *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 46, 72 Am. Dec. 685. See also the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 805.

**8.** See the title CORPORATIONS (PRIVATE), vol. 7, p. 680.



or repealed by a majority of the stockholders;<sup>1</sup> so that these fluctuating terms are uncertain materials out of which to construct a contract, which by its very nature implies a denial of the right of the other party to alter its provisions.

**11. Statutory Liability of Stockholders.** — The statutory liability of stockholders, at first blush, seems more like a liability imposed by the law merely than a contractual liability; but a closer examination will disclose two entirely sufficient grounds for treating this as a contractual liability in the constitutional sense: 1. The stockholder is bound to know of the liability imposed on him for the debts of the company, if any be contracted; the holding of the stock is a voluntary act, by which he pledges his faith to corporate creditors. 2. The legislature, by subjecting the stockholders to this liability, thereby removes the protection usually given to stockholders by the law of corporations, and makes them liable as *quasi* partners to the extent of the liability imposed.<sup>2</sup>

Statutory Liabilities Penal in Character are not, however, contracts, and are not protected by the contract clause.<sup>3</sup>

**12. Salaries and Compensation of Public Officials — Already Earned.** — The salaries and compensation of public officials, so far as they are already earned, cannot be taken away by legislative action. The right is vested, and there is an implied contract protected by the Constitution that they shall be paid.<sup>4</sup>

Future Salaries and Compensation rest on a different ground. Election or appointment to a public office and the acceptance thereof do not imply a contract that the office shall be continued, or that the compensation fixed by law shall be paid for the entire term.<sup>5</sup>

1. See the title BY-LAWS, vol. 5, p. 90.

2. **Statutory Liability of Stockholders Is Contractual.** — *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *New Orleans, etc., R. Co. v. Harris*, 27 Miss. 517; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87. See further the title STOCKHOLDERS.

**Future Debts.** — The stockholders of a corporation may, by a statute subsequent to the charter, be relieved from the double or statutory liability to corporate creditors whose debts are contracted after the statute. *Ochiltree v. Iowa R. Contracting Co.*, 21 Wall. (U. S.) 249.

3. **Statutory Liabilities Which Are Penal.** — See *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Breitung v. Lindauer*, 37 Mich. 217. See also the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STATUTES.

Liabilities penal in character may be repealed even as to existing creditors. *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Breitung v. Lindauer*, 37 Mich. 217.

4. **Salaries of Public Officers.** — *Butler v. Com.*, 10 How. (U. S.) 416; *Ex p. Lawrence*, 1 Ohio St. 431. See also *Patton's Case*, 7 Ct. Cl. 362; *People v. McCall*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 442; *Barker v. Pittsburgh*, cited in *Koontz v. Franklin County*, 76 Pa. St. 157; and the title PUBLIC OFFICERS.

5. **Status of Public Officials as to Future Salary.** — *Butler v. Com.*, 10 How. (U. S.) 402; *Benford v. Gibson*, 15 Ala. 521; *Coffin v. State*, 7 Ind. 157; *Taft v. Adams*, 3 Gray (Mass.) 126; *Russell v. Howe*, 12 Gray (Mass.) 147; *Opinion of Justices*, 117 Mass. 603; *Hoboken v. Gear*, 27 N. J. L. 265; *Conner v. New York*, 2 Sandf. (N. Y.) 355; *Warner v. People*, 2 Den. (N. Y.)

272, 43 Am. Dec. 740; *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603; *Barker v. Pittsburgh*, 4 Pa. St. 49; *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Koontz v. Franklin County*, 76 Pa. St. 154. See also the title PUBLIC OFFICERS.

"The only contract which arises upon a statute establishing a salary is to pay the incumbent of the office that salary while the law remains in force and unchanged. When the statute is repealed, superseded, or amended so as to alter the amount of the salary for the time being, the contract from that time forward is correspondingly changed." *Richardson, J.*, in *Fisher's Case*, 15 Ct. Cl. 329.

**State Contracts Are to Be Distinguished from Offices**, and the salary of one who, not a public officer, has contracted with the state for the performance of certain duties for a specified time cannot be taken from him by an act passed before the expiration of such time and repealing the statute under which he was appointed. *Hall v. Wisconsin*, 103 U. S. 5.

In North Carolina public office is considered as property, and "the incumbent has the same right in it as he has to any other property except that he cannot sell or assign it." *Montgomery, J.*, in *State Prison v. Day*, 124 N. Car. 366 [citing *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677; *Cotten v. Ellis*, 7 Jones L. (52 N. Car.) 545; *King v. Hunter*, 65 N. Car. 603, 6 Am. Rep. 754; *Wood v. Bellamy*, 120 N. Car. 212]. Even in this state, the legislature may abolish an office created by the legislature, or may abolish some of its duties and make an equitable corresponding reduction in salary; but it may not take the entire salary away from the officer and thereby starve him, nor can it select a particular officer and by a special law applicable to him alone deprive him of any material part of his duties

**13. Bounties Offered by Statute.** — There is no contract on the part of the state that it will not repeal and so discontinue a bounty which it may offer by statute to those who may do the act or engage in the business for which the bounty is offered. As to bounties already earned at the time of the repeal, the rule is different; these the state has promised to pay, and they were earned under the state's promise, and it is bound by its contract to pay them; but the law may be repealed as to all bounties to be earned in the future, and those who may have changed their business arrangements and made investments in property so as to comply with the law and earn its promised bounty are not protected by a contract with the state that the bounty law shall continue in force.<sup>1</sup>

**14. Licenses.** — A license to engage in a business or do a thing is not a contract in the constitutional sense, and the law authorizing the license may be repealed.<sup>2</sup>

**15. Contract with Purchaser at Public Sale.** — The Purchaser of Either Lands or Chattels at a Public Sale (when the conditions and formalities of the sale have been complied with) acquires an estate or right resting in contract and protected by the contract clause from impairment by subsequent legislative action.<sup>3</sup> This contract springs into being at the time of sale, not sooner, and generally the law then in force controls the rights of the purchaser.<sup>4</sup>

But the Rights of a Purchaser at a Judicial or Other Sale, Made to Enforce Prior Contractual Obligations, will not in all respects be controlled by the law in force at the time of the sale. It is the constitutional right of the creditor that the obligation of his contract with his debtor shall not be impaired, and it would be impaired by an increase of exemptions, or, what is the same in principle, by an increase of the estate which the debtor may hold in spite of the creditor's right under his contract.<sup>5</sup>

**16. Judgments.** — A Judgment Is Not a Contract in the constitutional sense.<sup>6</sup> The

and emoluments. See the opinion of Montgomery, J., in *State Prison v. Day*, 124 N. Car. 362. See also the cases last cited, and *McDonald v. Morrow*, 119 N. Car. 666; *Ward v. Elizabeth City*, 121 N. Car. 1; *Caldwell v. Wilson*, 121 N. Car. 468. See generally on the subject of this note the title PUBLIC OFFICERS.

**1. Bounties.** — *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. (U. S.) 373, *affirming* 19 Mich. 259. See BOUNTIES, vol. 4, p. 869 *et seq.*; and see the titles CONSIDERATION, vol. 6, pp. 689, 690; REWARDS.

**2. Licenses Not Contracts.** — *Phalen v. Com.*, 8 How. (U. S.) 163; *Calder v. Kurby*, 5 Gray (Mass.) 597; *Com. v. Brennan*, 103 Mass. 71; *Com. v. Kinsley*, 133 Mass. 579; *State v. Holmes*, 38 N. H. 225; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Hirn v. State*, 1 Ohio St. 15. See the titles INTOXICATING LIQUORS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; STATUTES.

**3. Hull v. State**, 29 Fla. 79, 30 Am. St. Rep. 95; *Goenen v. Schroeder*, 8 Minn. 387.

**Extending Period of Redemption from Tax Sale.** — Hence the time for redemption under a tax sale cannot thereafter be extended. *Wolfe v. Henderson*, 28 Ark. 304; *Hull v. State*, 29 Fla. 79, 30 Am. St. Rep. 95; *Merrill v. Dearing*, 32 Minn. 479; *Dikeman v. Dikeman*, 11 Paige (N. Y.) 484; *Robinson v. Howe*, 13 Wis. 341. See also the titles JUDICIAL SALES; SHERIFF'S SALES; TAX SALES.

**4. Connecticut Mut. L. Ins. Co. v. Cushman**, 108 U. S. 51; *Hull v. State*, 29 Fla. 79, 30 Am. St. Rep. 95. See also the references in the preceding note.

**5. Stay of Execution.** — A statute authorizing a stay of execution for an unreasonable or indefinite time on judgments recovered on contracts made before the passage of the statute is unconstitutional as impairing the obligation of a contract. *McCracken v. Hayward*, 2 How. (U. S.) 608; *Johnson v. Duncan*, 3 Mart. (La.) 530, 6 Am. Dec. 675; *Webster v. Rose*, 6 Heisk. (Tenn.) 93, 19 Am. Rep. 583. See the title STAY LAWS.

**Homestead and Exemption Laws.** — Exemption laws increasing the amount of property which the debtor may claim as exempt impair the obligation of a contract. See the titles EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 74, 166; HOMESTEAD, *ante*, section IV. 2. *d.* and section V. 1. *a.*

**Redemption of Property Sold on Execution.** — A statute giving to the mortgagor after foreclosure sale a new right to redeem, or extending his right, or prohibiting the sale for less than a large percentage of the appraised value, cannot constitutionally apply to a sale under a mortgage executed before its passage. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Howard v. Bugbee*, 24 How. (U. S.) 464; *Barnitz v. Beverly*, 163 U. S. 118; *Fisher v. Green*, 142 Ill. 80; *Scobey v. Gibson*, 17 Ind. 572, 79 Am. Dec. 490; *State v. Sears*, 29 Oregon 580, 54 Am. St. Rep. 808; *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932. But see *Wilson v. Wold*, (Wash. 1899) 58 Pac. Rep. 223.

And See Generally on the subject of this paragraph section VII. of this title.

**6. See *supra***, this section, *Obligations Imposed by Law*.

rendition of a judgment on a cause of action arising *ex delicto* does not convert the noncontractual duty into a contractual obligation, even though an action in form *ex contractu* may be maintained on the judgment.<sup>1</sup>

A Judgment Rendered for the Breach of a Contractual Obligation is not a contract, but to impair the remedies for its enforcement would impair the obligation to enforce which it was rendered.<sup>2</sup>

**17. Interest.** — An express or implied contract for a specific rate of interest is, of course, protected by the contract clause of the Constitution.<sup>3</sup> Interest on damages for breach of contract or for tort is not a matter of contract, and a change of the statutory rate after the cause of action has accrued takes effect from date.<sup>4</sup> The rule as to interest on judgments is not uniform in the different jurisdictions.<sup>5</sup>

**18. Marriage.** — Marriage, while sometimes said to be a contract, is more properly a status or relation created by contract, regulated, when formed, by law.<sup>6</sup> It is well settled that it is not a contract within the contract clause of the Constitution, and the status or relation of marriage may be dissolved by legislative action (if not prohibited by the state constitution), or the legislature may commit the whole matter to the courts and authorize the dissolution of the marriage relation for reasons deemed sufficient by the legislature, even though such causes of divorce did not exist at the time of the marriage in question.<sup>7</sup>

**19. Necessity for Consideration.** — A contract unsupported by a consideration is not within the protection of the contract clause.<sup>8</sup>

An Executed Contract, it is said, needs no consideration to support it so as to be within the protection of this clause.<sup>9</sup>

1. *Louisiana v. New Orleans*, 109 U. S. 285.

2. See *infra*, this title, *How Obligation May Be Impaired—Corporate Charters; Changing Restraints*.

An Award of Damages Against a City for Injury Caused by Taking Property for a public purpose, when such award has been confirmed by an order of court, has all the force and effect of a judgment under which an absolute right has vested, and a statute abridging the right to enforce the award is unconstitutional. *People v. Buffalo*, 140 N. Y. 300, 37 Am. St. Rep. 563.

3. *Morley v. Lake Shore, etc.*, R. Co., 146 U. S. 162. For a full discussion of this matter see the title INTEREST.

4. **Interest on Damages for Tort or Breach of Contract.** — *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51; *Morley v. Lake Shore, etc.*, R. Co., 146 U. S. 162; *Jersey City v. O'Callaghan*, 41 N. J. L. 349. For full discussion, see the title INTEREST.

5. **Judgments.** — That the rate of interest on a judgment varies with subsequent statutes changing the rate, see *Morley v. Lake Shore, etc.*, R. Co., 146 U. S. 162.

That a judgment partakes of the nature of a contract, to the extent, at least, that the liability for interest at the rate provided by statute at the date of the judgment cannot be changed by subsequent legislation, see *Butler v. Rockwell*, 17 Colo. 290.

For discussion of authorities, see the titles *INTEREST*; *INTEREST*; *AMOUNT*.

6. **Marriage Not Within Contract Clause.** — *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928. See the title DIVORCE, vol. 9, p. 727; *MARRIAGE*.

7. **General Laws Providing for the Dissolution of Existing Marriages.** It is settled that laws passed subsequent to their passage, are not with the

contract clause of the constitution. *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; *Clark v. Clark*, 10 N. H. 380, 34 Am. Dec. 165. See also *McCraney v. McCraney*, 5 Iowa 232, 68 Am. Dec. 702; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928.

It has been affirmed that the legislature may authorize divorces for causes happening before the passage of the act. *Carson v. Carson*, 40 Miss. 349.

But whether open to the contract clause or no, such a statute has been held void as an *ex post facto* law, *Dickinson v. Dickinson*, 3 Murph. (7 N. Car.) 327, 9 Am. Dec. 608; or as retrospective within a constitutional prohibition, *Clark v. Clark*, 10 N. H. 380, 34 Am. Dec. 165. Compare *Jones v. Jones*, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645.

And when possible a prospective, not a retrospective, operation will be given to divorce statutes. See the title DIVORCE, vol. 9, p. 730.

**Legislative Divorces** do not impair the obligation of a contract. See the title DIVORCE, vol. 9, p. 732.

8. **Consideration Necessary to Bring Contract Within the Protection of the Clause.** — *Farrington v. Tennessee*, 95 U. S. 685; *Louisiana v. New Orleans*, 109 U. S. 285; *Tucker v. Ferguson*, 22 Wall. (U. S.) 574; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595; *Christ Church v. Philadelphia County*, 24 How. (U. S.) 301; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 432; *Washington University v. Rouse*, 8 Wall. (U. S.) 439; *Lord v. Litchfield*, 36 Conn. 124; *Grand Lodge, etc., v. New Orleans*, 44 La. Ann. 659; *Hardy v. Waltham*, 7 Pick. (Mass.) 100; *Dupier v. Dupier*, 120 Mo. 375, 8 Mo.

9. *Bishop's Fund v. Rider*, 13 Conn. 87.



20. **Contract or No Contract a Federal Question.** — The law of the state in force when a contract is entered into may be said to be the law of the contract.<sup>1</sup> Whether under that law a valid contract has or has not been formed by the parties is a federal question, and the courts of the United States will not accept as binding the opinions of the state courts.<sup>2</sup>

**IV. OBLIGATION OF CONTRACT — NATURE AND CHARACTERISTICS.** — The obligation of a contract consists of the duty imposed by the law on the parties to perform their agreement.<sup>3</sup> The making of the agreement is a voluntary act: the law supplements the act of the parties by imposing the obligation. This obligation the law enforces through its remedies. The courts have not at all times been agreed on a definition of the term "obligation of a contract."<sup>4</sup>

**Remedy and Obligation.** — The chief point of controversy has been whether the remedy came within the range of the obligation, and if so, to what extent the remedy might be impaired without impairing the obligation. Certain dicta in early opinions<sup>5</sup> gave rise to a doctrine, long followed in some of the state courts,<sup>6</sup> that remedies may be changed at the will of the state legislature, even though the change may impair the creditor's final remedy; but this doctrine has been overruled.<sup>7</sup>

1. See *Bronson v. Kinzie*, 1 How. (U. S.) 311; *McCracken v. Hayward*, 2 How. (U. S.) 608; *Edwards v. Kearzey*, 96 U. S. 601; U. S. *v. Murphy*, 82 Fed. Rep. 898; *Lawrence v. Miller*, 2 N. Y. 252; *Goodale v. Fennell*, 27 Ohio St. 432, 22 Am. Rep. 325. See also *infra*, this title, *Obligation of Contract — Nature and Characteristics*, the first paragraph and notes.

2. **The Formation of the Contract under the Law Is a Federal Question.** — *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636; *Douglas v. Kentucky*, 168 U. S. 488; *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416; *Wright v. Nagle*, 101 U. S. 791; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665; *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Bryan v. Board of Education*, 151 U. S. 639; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486; *Bacon v. Texas*, 163 U. S. 207.

3. **Obligation of Contracts Defined.** — *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 197; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Bronson v. Kinzie*, 1 How. (U. S.) 311; *McCracken v. Hayward*, 2 How. (U. S.) 608; *Edwards v. Kearzey*, 96 U. S. 595. See also *Lapsley v. Brashears*, 4 Litt. (Ky.) 54.

4. **Definition Further Considered.** — In *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 197, *Marshall, C. J.*, said: "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." See also *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, where the nature of the obligation of a contract is discussed by the judges speaking *seriatim*, and where *Marshall, C. J.*, distinguished the obligation and the remedy of contracts — the former protected by the constitution, the latter left to the state governments — a distinction previously stated by the same judge in the case last cited, and subsequently declared by *Taney, C. J.*, in *Bronson v. Kinzie*, 1 How. (U. S.) 311.

Later cases have cut into this distinction.

In *McCracken v. Hayward*, 2 How. (U. S.) 608, *Baldwin, J.*, said: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming [form] a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other, \* \* \* If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

Again in *Edwards v. Kearzey*, 96 U. S. 595, *Swayne, J.*, defined the obligation of a contract as follows: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable."

These decisions, however, leave the states free to change the form of procedure in the courts, so long as the change does not substantially lessen the coercive power of the remedy. See *infra*, this title, *passim*; also the titles *CONSTITUTIONAL LAW*, vol. 6, p. 946 *et seq.*; *EX POST FACTO LAWS*, vol. 12, p. 533.

5. See the preceding note.

6. **Decisions in State Courts.** — *Thayer v. Seavey*, 11 Me. 284; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701; *Read v. Frankfort Bank*, 23 Me. 318; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *James v. Stull*, 9 Barb. (N. Y.) 482; *Evans v. Montgomery*, 4 W. & S. (Pa.) 218.

7. See the last note but two *supra*.

**The Contract of a State.**—The law imposes on a state the legal obligation to perform its contracts.<sup>1</sup> It has sometimes been argued that a sovereign state cannot be bound by a legal obligation,<sup>2</sup> but it is the settled law of the *United States* that by entering into a contract the state surrenders its sovereignty, to the extent of the obligation imposed by the law to perform its contracts.<sup>3</sup> Nevertheless, as the state cannot be sued without its consent, and its consent to be sued given prior to its contract may be withdrawn subsequently,<sup>4</sup> it follows that though its obligation to perform its contract is recognized as a legal obligation, difficulty may be experienced in the want of power to compel the state to respond to the court's process.

But in a Case Where the Court Has Jurisdiction over the Parties, the obligation of a state to perform its contracts is recognized and may be enforced. Such a case may arise in a suit to which the state is not a party, and in which either party to the suit may set up against the other a right acquired by contract with the state. Such a right the state cannot impair by a law passed subsequent to its contract.<sup>5</sup> But a distinction must be made between a legislative act which merely amounts to a breach of the state's contract, and an act which attempts to impair the obligation of an existing contract of the state.<sup>6</sup>

In *Barnitz v. Beverly*, 163 U. S. 122, Shiras, J., delivering the opinion of the court, said: "The decisions of this court are numerous in which it has been held that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation." This case reversed *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257, which itself reversed, on a rehearing, 55 Kan. 451.

1. See the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 669, especially the cases cited in note 2 on that page. These cases relate to the charters of private corporations, but in all of them the doctrine is recognized that the state is bound by its contract. See also the cases cited in the next note but one, *infra*.

2. **Sovereignty Cannot Be Bound by Contract.**—Austin's Jurisprudence, § 6. The basis of this theory is that the state, as sovereign, is the author and source of law, that legal obligation results from the command of the law, and therefore the lawgiver cannot bind itself by a command to itself. Whatever favors it may concede to its subjects are matters of grace merely, not matters of strict legal right. This theory has some color given to it by that rule of our law that a state cannot be sued without its consent, but the theory is not applied except to the extent of protecting the state from suit directly.

3. **State Bound by Contract—Relinquishment of Sovereignty.**—*New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Wolff v. New Orleans*, 103 U. S. 358; *Pennoyer v. McConnaughy*, 140 U. S. 1. See also *infra*, this title, *How Obligation May Be Impaired—Contracts of State*; and the title *STATES*.

4. **Actions Against States.**—*Beers v. Arkansas*, 20 How. (U. S.) 527. See the matter fully discussed under the title *STATES*.

5. **State Not Directly a Party—Contracts En-**

**forced Against It.**—*Pennoyer v. McConnaughy*, 140 U. S. 1, affirming 43 Fed. Rep. 339, 106; *Allen v. Baltimore*, etc., R. Co., 114 U. S. 311; *Poindexter v. Greenhow*, 114 U. S. 270; *Litchfield v. Webster County*, 101 U. S. 773; *Board of Liquidation v. McComb*, 92 U. S. 531; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738.

In the first case cited in this note the rights secured by contract with the state came up for consideration in a case to which the state, as the court held, was not sued, so that the court had jurisdiction over the parties. These rights were vindicated in spite of a subsequent act impairing the contract with the state. The other cases cited illustrate the same doctrine.

6. **Mere Breach of Contract on Part of State Distinguished.**—*Lord v. Thomas*, 64 N. Y. 107; *Brown v. Colorado*, 106 U. S. 95. In the last case cited the plaintiff in error had conveyed to the territory of Colorado certain lands with a covenant that a capitol should be erected on the lands. He claimed that the state of Colorado had impaired the obligation of this covenant by a legislative act refusing to build. The court said: "The claim is that the territory of Colorado contracted with Brown to erect a capitol and other public buildings on the premises conveyed; but if that were so, the constitution of the state and the statutes relied on did not impair the obligation of such a contract. The most that can be said of them is that in this way the contract was violated by the state. The question is not whether the constitutional provisions and the statutes in question are valid, but whether, by the adoption of the constitution by the people, and the passage of the statutes by the legislature, any condition attached to the conveyance has been broken which authorized him to revoke his deed and take possession of the property he conveyed. The decision of this question by the state court [see *Brown v. State*, 5 Colo. 406] is not reviewable here. All the obligations of the original contract remain, and the state has not attempted to impair them. If the contract is all that he claims it to be, and the constitu-



The Authorized Contract of a Municipality creates a valid legal obligation, though the remedies for its enforcement may be exceptional.<sup>1</sup>

But the State May Wholly Annul a Municipal Corporation, and take back into the body of the state all that once constituted the legal entity known as the corporation. This seems like an extremely arbitrary exercise of legislative power, but the courts are powerless to prevent it, and all remedy being taken away, the legal obligation of the corporation falls back into the rank of mere moral obligations, without any remedy for their enforcement.<sup>2</sup>

**V. LEGISLATIVE CONTROL OVER CONTRACTS—1. Police Power.**—While the police power is incapable of exact delimitation,<sup>3</sup> it is now settled law that such part of this power as relates to the public health, safety, or morals cannot be bargained away for any consideration, however valuable, nor can the full exercise of this part of the power be abridged by any contract between individuals, nor between the state or one of its municipal subdivisions and any person, natural or artificial. All property, including the obligations of contracts, is subject to this power. Neither party can insist upon enforcing the obligation of a contract in defiance of a subsequent statute enacted to protect the public health, safety, or morals.<sup>4</sup>

**2. Power to Tax.**—The power of taxation is, like the police power, one of the sovereign powers of government, without which, in some form, the state could not exist; but it is now settled that a state or one of its municipal subdivisions (if authorized) may by contract, for a consideration, exempt property from taxation. The state is thereby, to the extent of the contract, shorn of its power to tax. A subsequent statute attempting to exercise the power of taxation in violation of the contract is void.<sup>5</sup>

tion and statutes are just what he says they are, the most that can be contended for is that the state has refused to do what the territory agreed should be done. This may violate the contract, but it does not in any way impair its obligation."

**1. Municipal Contracts.**—Nelson *v.* Police Jury, 111 U. S. 716. See cases cited *infra*, this title, *How Obligation May Be Impaired*. See also the title MUNICIPAL CORPORATIONS.

**2. Meriwether *v.* Garrett,** 102 U. S. 472; Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130; Wallace *v.* Sharon Tp., 84 N. Car. 164; Luehrman *v.* Taxing Dist., 2 Lea (Tenn.) 425. See also the references given in the preceding note.

**3. Police Power.**—See the title POLICE POWER.

**4. United States.**—Stone *v.* Mississippi, 101 U. S. 814; Butchers' Union Slaughter-House, etc., Landing Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746; Barbier *v.* Connolly, 113 U. S. 27; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574; People *v.* Squire, 145 U. S. 175, *affirming* 107 N. Y. 593, 1 Am. St. Rep. 893; Minneapolis, etc., R. Co. *v.* Emmons, 149 U. S. 364; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556; Eagle Ins. Co. *v.* Ohio, 153 U. S. 446; Douglas *v.* Kentucky, 168 U. S. 488; Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57.

*Connecticut.*—Barlow *v.* Gregory, 31 Conn. 261.

*Iowa.*—Drady *v.* Des Moines, etc., R. Co., 57 Iowa 393; Goodrel *v.* Kreichbaum, 70 Iowa 362.

*Louisiana.*—Crescent City Live Stock Landing, etc., Co. *v.* New Orleans, 33 La. Ann. 934.

*Maine.*—Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 57 Am. Rep. 784.

*Massachusetts.*—Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

*Michigan.*—Carver *v.* Detroit, etc., Plank-road Co., 69 Mich. 616.

*New York.*—Buffalo East Side R. Co. *v.* Buffalo St. R. Co., 111 N. Y. 132; Brick Presb. Church *v.* New York, 5 Cow. (N. Y.) 538; Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349; Coates *v.* New York, 7 Cow. (N. Y.) 585.

*Tennessee.*—Knoxville *v.* Bird, 12 Lea (Tenn.) 121, 47 Am. Rep. 326.

*Texas.*—Rowland *v.* State, 12 Tex. App. 418.

*Virginia.*—Justice *v.* Com., 81 Va. 209; Dismal Swamp Canal Co. *v.* Com., 81 Va. 220; Com. *v.* Larkin, 84 Va. 517; Com. *v.* Plunkett, 84 Va. 519.

Barlow *v.* Gregory, 31 Conn. 261, presents a curious interference with a contract under the police power. By the law in force when a note was given, days of grace were allowed, the last day falling on a day that, by statute subsequent to the note, was made a public holiday. The court held that the note thereby became due a day earlier, and that the statute was valid as an exercise of the police power.

**5. Taxation.**—Memphis, etc., R. Co. *v.* Loftin, 105 U. S. 260; McGee *v.* Mathis, 4 Wall. (U. S.) 143; Tucker *v.* Ferguson, 22 Wall. (U. S.) 574; West Wisconsin R. Co. *v.* Trempealeau County, 93 U. S. 595; Christ Church *v.* Philadelphia County, 24 How. (U. S.) 301; Home of the Friendless *v.* Rouse, 8 Wall. (U. S.) 432; Washington University *v.* Rouse, 8 Wall. (U. S.) 439; Farrington *v.* Tennessee, 95 U. S. 679; Branson *v.* Philadelphia, 47 Pa. St. 329; Rerick *v.* Kern, 14 S. & R. (Pa.) 267, 16 Am. Dec. 497. See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 271 *et seq.*



**3. Power of Eminent Domain.** — Under the sovereign power of eminent domain all property, including the obligations of contracts, may be taken for a public use.<sup>1</sup> Where property which is the subject-matter of a contract between private persons is taken under a valid exercise of this power, the obligation of the contract is annulled to the extent that the enforcement of the contract would interfere with the right to hold property for a public use.<sup>2</sup>

**4. Power to Regulate Commerce.** — The contracts of individuals or corporations clearly cannot interfere with the exercise by Congress of the power to regulate commerce with foreign nations, Indian tribes, and between the states. All contracts must yield to the superior power of Congress to regulate commerce.<sup>3</sup> But contracts the enforcement of which does not interfere with commerce are not affected.<sup>4</sup>

**5. Reserved Power to Amend or Repeal Corporate Charters.** — Under the Rule Announced in the *Dartmouth College Case*, and since followed, the charter or act of incorporation, when accepted, is protected by a contract from amendment or repeal.<sup>5</sup> To avoid this rule, acting upon a suggestion of Judge Story,<sup>6</sup> it has become the almost universal legislative practice to reserve the power to amend or repeal the charter or act of incorporation.<sup>7</sup> This reservation changes the entire relation between the state and the corporation,<sup>8</sup> and the franchises, rights, and privileges, granted by the state in the charter or act of incorporation, may be recalled, repealed, or amended,<sup>9</sup> according to the extent of the reservation.

**1. Eminent Domain.** — *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Eastern R. Co. v. Boston, etc., R. Co.*, 111 Mass. 125, 15 Am. Rep. 13. See the title EMINENT DOMAIN, vol. 10, p. 1043.

**2.** Where property contracted to be sold is afterwards appropriated under the power of eminent domain, the vendor is, of course, disabled to perform his contract by the exercise of a sovereign power of government, and is not liable in damages for a failure caused by such means. See the title EMINENT DOMAIN, vol. 10, p. 1089.

**3. The Commerce Clause.** — *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169. See the title INTERSTATE COMMERCE.

**4. Dubuque, etc., R. Co. v. Richmond, 19 Wall. (U. S.) 584. In this case a contract was entered into between a railroad company and another whereby the latter agreed to build an elevator at a certain point for the handling of the grain shipped over the company's road, for which a price was fixed to be paid by the company, and the company agreed not to build a company elevator and not to lease grounds for such a purpose. It was claimed that the contract was invalidated by a subsequent congressional regulation of interstate commerce. The court said: "The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."**

**5. Reserved Power to Amend or Repeal Corporate Charters.** — See the title CORPORATIONS (PRIVATE), vol. 7, p. 669.

**6. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 712.**

**7.** See the title CORPORATIONS (PRIVATE), vol. 7, p. 671.

**8.** *Tomlinson v. Jessup*, 15 Wall. (U. S.) 459.

**9.** In the following cases the point is distinctly made that under a power to repeal or amend the charter the only rights of the corporation that can be taken away or interfered with are those rights, privileges, and franchises conferred on the corporation by the state in the charter: *Tomlinson v. Jessup*, 15 Wall. (U. S.) 459; *Maine Cent. R. Co. v. Maine*, 96 U. S. 510.

And even as to these rights, privileges, and franchises, property already acquired by their use cannot be divested. *Sinking-Fund Cases*, 99 U. S. 700.

Nor can property granted by the state to the corporation be retaken under a power to amend or repeal the charter. "By the reservation \* \* \* the state retained the power to alter it [the charter] in all particulars constituting the grant to the new company formed under it of corporate rights, privileges, and immunities." *Maine Cent. R. Co. v. Maine*, 96 U. S. 510, quoted with approval in *Sinking-Fund Cases*, 99 U. S. 700.

If the state, after granting a repealable charter, should see fit to enter into a contract with the corporation, this contract cannot be annulled by the state through an exercise of its reserved power to repeal the charter. *New Jersey v. Yard*, 95 U. S. 104.

The state may, of course, reserve not only the power to amend or repeal the charter, but also all the other franchises or rights conferred on the corporation by the state or one of its municipal subdivisions, as, for instance, the franchise to operate a street railroad. The latter franchise may by a reservation be made subject to the right to repeal or amend. *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, affirming 78 Iowa 367, 742.

But Contracts Between the Corporation and Third Persons cannot be impaired,<sup>1</sup> nor can property actually acquired by the corporation be divested,<sup>2</sup> under the reservation of the power to amend or repeal. The amendment or repeal applies merely to the future operations of the corporation, and not to past transactions. What has been done cannot be undone.<sup>3</sup>

**Statutory Liability of Stockholders.** — The liability of stockholders beyond their shares of stock, commonly called the statutory liability, is contractual in character.<sup>4</sup> It would follow as a necessary consequence that this liability cannot, constitutionally, be either imposed or repealed as to the past contracts of the corporation;<sup>5</sup> but there are opinions to the contrary.<sup>6</sup>

**Future Contracts.** — As to future contracts a different question is presented. There can be no doubt of the right of the state to enact, as a condition of the contracting of future debts, that the statutory liability shall be imposed on corporate stockholders.<sup>7</sup> But how stands the case as between a dissenting stockholder and his associates, if he takes active steps to make his dissent effectual? Can the state, under the reserved power to amend or repeal, impose the statutory liability as to future debts and thus enable a majority of the stockholders, through the amendment to the charter, to impose upon a dissenting minority a liability in addition to what they assumed at the time of becoming stockholders? The authorities do not furnish an entirely satisfactory answer to this question.<sup>8</sup>

**VI. SOURCES OF LAWS AFFECTING CONTRACTS — 1. In General.** — The contract clause of the Constitution is a prohibition against the passage by a state, of laws impairing the obligations of contracts.<sup>9</sup> By the term "state" is meant one of the members of that family of states which together constitute the United States.<sup>10</sup>

**2. Laws Enacted by State Before Adoption of Constitution.** — Laws enacted by a state before it had become a member of the family of states, by the adoption of the Constitution, are not obnoxious to the contract clause, even though they impair the obligations of contracts. Such laws must be tested by the legislative power of the state, without regard to the Federal Constitution

1. *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; *Curran v. Arkansas*, 15 How. (U. S.) 304; *Shields v. Ohio*, 95 U. S. 319; *Allen v. McKeen*, 1 Sumn. (U. S.) 276; *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571; *Com. v. Essex Co.*, 13 Gray (Mass.) 239; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *White v. Syracuse, etc., R. Co.*, 14 Barb. (N. Y.) 559; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Miller v. New York, etc., R. Co.*, 21 Barb. (N. Y.) 513.

2. *Com. v. New Bedford Bridge*, 2 Gray (Mass.) 339.

3. *Sinking Fund Cases*, 99 U. S. 700.

4. See *supra*, this title, III. 11. *Statutory Liability of Stockholders*.

5. *Com. v. Cochituate Bank*, 3 Allen (Mass.) 42.

6. *Stanley v. Stanley*, 26 Me. 191; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559. In these cases there was no reserved right to amend or repeal. Their reasoning would apply with greater force where such a right is reserved, but they are believed to be against both principle and authority.

7. **Future Contracts.** — *Sherman v. Smith*, 1 Black (U. S.) 587, *affirming* Matter of Oliver Lee, etc., Bank, 21 N. Y. 9; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199; *Matter of Reciprocity Bank*, 22 N. Y. 9; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149; *Bissell v. Heath*, 98 Mich. 472.

8. See the cases cited in the preceding note.

An examination of these cases will disclose that the stockholder who was subjected to the additional liability through an amendment imposed on the corporation by the legislature, under the reserved power to amend or repeal, made no timely objection. In every instance there was acquiescence, sometimes for years; and in no instance was there any attempt by a stockholder to prevent the exercise by the corporation of its power to contract debts. To hold that the legislature may impose the liability in spite of the prompt dissent of a stockholder who follows up his dissent by an action to prevent the corporation doing what will subject him to the additional liability not assented to by him, practically amounts to saying that the majority may accept such a radical amendment and thereby bind the minority. See the title CORPORATIONS (PRIVATE), vol. 7, p. 679, note 6, where the opinion in *Yeaton v. Old Dominion Bank*, 21 Gratt. (Va.) 593, is set out. See also *Orr v. Bracken County*, 81 Ky. 593; *Ireland v. Palestine, etc., Turnpike Co.*, 19 Ohio St. 369. In the case first cited the court held that the legislature could not compel the acceptance by the corporation of an amendment to the charter which changed the voting power of the stockholders.

9. **Contract Clause.** — "No state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts." Const. U. S., art. I, § 10.

10. See the title STATES.



afterwards adopted.<sup>1</sup>

**3. Laws Enacted by Independent State Before Admission into Union.** — Independent states admitted into the Union after the adoption of the Constitution are not bound by the Constitution nor subject to its prohibitions until they are incorporated into the Union. Prior to admission, their legislative powers are not curtailed by the terms of the Federal Constitution, which was not, before their admission, their supreme law.<sup>2</sup>

**4. Laws Enacted by State While in Rebellion.** — Laws enacted by a state while in rebellion against federal authority, and enforced by it, are void, if they impair the obligations of contracts. Its rebellion and attempted secession will not relieve it from the limitation imposed by the Federal Constitution on its legislative power. The state could gain no increased measure of legislative power by an attempt to sever the ties which bound it to the Union.<sup>3</sup>

**5. Laws Enacted by Congress.** — The United States is a government of limited powers, and no express authority has been granted to it to pass laws impairing the obligations of contracts; but certain sovereign powers have been conferred, the exercise of which is not necessarily restrained because the practical effect of their exercise may be incidentally to impair or annul contracts. In the exercise of these sovereign powers of government conferred by the Constitution on the United States, Congress may pass laws which not only impair but actually annul all obligations of contracts the performance of which conflicts with a valid Act of Congress.<sup>4</sup>

**6. Laws Enacted by Territorial Legislature.** — Laws enacted by a territorial legislature, under the legislative power delegated to it by Congress, are not state laws and therefore are not within the terms of the prohibition contained in the contract clause.<sup>5</sup> But while Congress may, in the exercise of the sovereign powers conferred on the United States, pass laws impairing the obligations of contracts,<sup>6</sup> it seems incredible that Congress can delegate these sovereign powers, or their exercise, to a territorial legislature; and it is believed that the legislative power of a territory is subject to those restraints imposed for the protection of personal and property rights.<sup>7</sup> A territory would not have the power to take property without due process of law.<sup>8</sup> A law which impairs the obligation of a contract takes the property of the obligee, and that, too, without due process of law.<sup>9</sup> But it may not be amiss to point out the possibility that a law which is void under the contract clause because it so impairs the remedy as to impair the obligation might not be void under the Fifth Amendment.<sup>10</sup>

**1. Laws Passed by Adoption of Constitution.** — *Owings v. Speed*, 5 Wheat. (U. S.) 420.

**2. Independent States Prior to Admission to Union.** — *League v. De Young*, 11 How. (U. S.) 185; *Herman v. Phalen*, 14 How. (U. S.) 79.

**3. States in Rebellion.** — *Old Dominion Bank v. McVeigh*, 20 Gratt. (Va.) 457; *Williams v. Bruffy*, 96 U. S. 176. In this case the Confederate states had enacted a statute sequestering debts due from the citizens of the Confederacy to persons in the other states of the Union, and requiring the payment by the debtor into the treasury of the Confederacy. The statute provided that on such payment the debtor should be released. Pursuant to this statute a debtor living in Virginia paid the debt into the treasury of the Confederacy. After peace had been restored suit was brought on the debt, and the courts of the state of Virginia held such payment to be a defense, in this way practically enforcing a statute of the late Confederacy. The Supreme Court of the United States held such enforcement to be in violation of the contract clause.

**Laws Enacted During Reconstruction and before the complete restoration of a state into the Union after its attempted secession are void and in conflict with the contract clause, if they impair the obligations of contracts valid under prior laws.** *White v. Hart*, 13 Wall. (U. S.) 646. The consideration for the contract sued upon in this case was the sale of slaves.

**4. Laws Passed by Congress.** — *Legal Tender Cases*, 12 Wall. (U. S.) 457; *Mitchell v. Clark*, 110 U. S. 633; *Sinking Fund Cases*, 99 U. S. 700, 727.

**5. See *supra***, this section, the first note to the subdivision *In General*.

**6. See *supra***, this section, *Laws Enacted by Congress*.

**7. Territorial Legislatures.** — See the title TERRITORIES.

**8. See the title TERRITORIES.**

**9. *Hepburn v. Griswold***, 8 Wall. (U. S.) 603.

**10. *Louisiana v. New Orleans***, 109 U. S. 285. In this case a judgment for a tort had been recovered against the city of New Orleans. After the recovery of the judgment the city's



**7. Laws of State Within Contract Clause.** — The laws of a state which may be obnoxious to the contract clause, and therefore void, to the extent that they impair the obligation of existing contracts, may be in any one of the forms following:

*a.* **CONSTITUTIONS.** — State constitutions, though the highest form of state laws, are state laws nevertheless, and the state has no power to pass a law in the solemn form of a state constitution which impairs the obligations of contracts.<sup>1</sup>

*b.* **STATUTES.** — Statutes, though enacted in the proper form and otherwise unobjectionable, are void if they impair the obligations of contracts.<sup>2</sup>

*c.* **ORDINANCES.** — Ordinances passed by the municipal subdivisions of the state in pursuance of delegated legislative authority of the state are void if they impair the obligations of contracts.<sup>3</sup>

*d.* **JUDICIAL DECISIONS.** — While, ordinarily, judicial decisions are not laws of the state, as that term is used in the constitutional provision under consideration, yet judicial decisions construing constitutional provisions, statutes, and ordinances are, in a practical sense, a part thereof, and a change of decision may have all the practical effect of the adoption of a new constitutional provision, statute, or ordinance; and if the last construction has the effect of impairing the obligation of a contract entered into while the prior decision was regarded as having established the law, the last decision must be disregarded in adjudicating the rights of the parties.<sup>4</sup>

**VII. HOW OBLIGATION MAY BE IMPAIRED — 1. In General — Direct Impairment.** — It is now well settled that a law in force when the contract is entered into

power to tax was, by statute, so reduced that the city was left without the means to pay the judgment. The court, after holding that the judgment was not a contract, said: "The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired." This suggests a distinction between depriving a person of property, forbidden to the states by the Fourteenth Amendment, and to the United States by the Fifth Amendment, and the impairment of the obligation of a contract, forbidden to the states by the contract clause. To impair the remedy impairs the obligation under the contract clause, but does not deprive a person of property without due process of law.

**1. State Constitution.** — Ohio, etc., *R. Co. v. McClure*, 10 Wall. (U. S.) 511; *Mechanics', etc., Bank v. Thomas*, 18 How. (U. S.) 384; *White v. Hart*, 13 Wall. (U. S.) 646; *Delmas v. Merchants' Mut. Ins. Co.*, 14 Wall. (U. S.) 661; *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *Edwards v. Kearzey*, 96 U. S. 595; *Bier v. McGehee*, 148 U. S. 137.

**2. Statutes.** — It has never been disputed or questioned that statutes are laws of a state within the meaning of the contract clause. See the title **STATUTES**.

**3. Municipal Ordinances.** — *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258. See the title **ORDINANCES**.

**But, on the Contrary, if There Is No Legislative**

**Authority to Pass the Ordinance**, it is not a law of the state, within the meaning of the contract clause. *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258; *Murray v. Charleston*, 96 U. S. 432; *Williams v. Bruffy*, 96 U. S. 176; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18.

**4. Judicial Decisions.** — *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 294; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678.

**Distinction Between Judicial Decisions Construing Constitution and Statutes.** — It has been attempted to draw a distinction between decisions construing the constitution of the state and decisions construing statutes. The reason for the distinction is stated by the court in a recent case as follows: "If the people are dissatisfied with the construction of a statute, the frequently recurring sessions of the legislature afford easy opportunity to repeal, alter, or modify the statute; while the constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations, and if a decision construes the constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote. Moreover, no set of judges ought to have the right to tie the hands of their successors on constitutional questions, any more than one General Assembly should those of its successors on legislative matters." *Mountain Grove Bank v. Douglas County*, 146 Mo. 42.

It is very doubtful whether the distinction is warranted by the authorities. See *Taylor v. Ypsilanti*, 105 U. S. 60.

does not impair its obligation.<sup>1</sup> But a law subsequent to the contract, directly annulling it,<sup>2</sup> or changing its terms by adding<sup>3</sup> or releasing<sup>4</sup> material conditions, provisions, or stipulations, presents a clear case of the direct impairment of the obligation.

## 2. Contracts of State. — The obligation of a state to perform its contract

**1. Laws in Force at Making of Contract.** — *United States.* — Ohio, etc., *R. Co. v. McClure*, 10 Wall. (U. S.) 511; *Moore v. Fowler*, Hempst. (U. S.) 536; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Denny v. Bennett*, 128 U. S. 489; *Brown v. Smart*, 145 U. S. 454.

*Indiana.* — *Churchman v. Martin*, 54 Ind. 380.

*Louisiana.* — *Guillotte v. New Orleans*, 12 La. Ann. 432; *Weaver v. Maillot*, 15 La. Ann. 395.

*New York.* — *Barnes v. Arnold*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 197.

*North Dakota.* — *Garr v. Clements*, 4 N. Dak. 559.

*Pennsylvania.* — *Felts's Appeal*, (Pa. 1889) 17 Atl. Rep. 195.

*Rhode Island.* — *People's Sav. Bank v. Tripp*, 13 R. I. 621.

*Washington.* — *Woodward v. Winehill*, 14 Wash. 394; *Sitton v. Dubois*, 14 Wash. 624.

**2. Subsequent Law Annulling Contract.** — *Clay County v. Savings Soc.*, 104 U. S. 579; *Red Rock v. Henry*, 106 U. S. 596; *White v. Hart*, 13 Wall. (U. S.) 646; *Louisiana v. Taylor*, 105 U. S. 454; *Korn v. Mutual Assur. Soc.*, 6 Cranch (U. S.) 192; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450; *McCracken v. Moody*, 33 Ark. 81; *Habersham, etc., Turnpike Co. v. Taylor*, 73 Ga. 552.

**Repeal of Act Authorizing Bond Issue.** — It would be an unconstitutional exercise of legislative authority to repeal an act authorizing the issue of bonds, after the right to the bonds had vested under a contract. *Red Rock v. Henry*, 106 U. S. 604.

**A Lien upon Earnings Secured by Mortgage** cannot be divested by a subsequent law diverting the earnings to the payment of other claims against the mortgagor. *Giles v. Stanton*, 86 Tex. 620.

**3. Adding Material Conditions.** — *Bronson v. Kinzie*, 1 How. (U. S.) 311, the court saying: "This law [the subsequent statute] gives to the mortgagor and to the judgment creditor an equitable estate in the premises which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligation, and is prohibited by the constitution."

**Repealing Right to Name Arbitrator.** — A law attempting to repeal the right of a party to a contract to name an arbitrator to act with others in fixing the rate or basis of compensation to be paid under the contract is void. *State v. McPeak*, 31 Neb. 139; *State v. Thayer*, 16 Neb. 17.

**Requiring Pavement by Street-railway Company.** — An ordinance granting the right to construct a street railroad and providing for

pavement between the rails becomes, when accepted, a contract, and a condition cannot subsequently be imposed requiring the grantees of the franchise to pave for three feet on each side of the tracks. *Coast-Line R. Co. v. Savannah*, 30 Fed. Rep. 646.

**Requiring Assent of Stockholders.** — A valid contract to execute a mortgage cannot be impaired by a subsequent statute requiring the assent of a certain number of the stockholders to be given as a condition precedent to the execution of the mortgage. *The Vigilancia*, 73 Fed. Rep. 452, 38 U. S. App. 563.

**The Legal Relations Between Debtor and Creditor** cannot be changed except by the consent of both. *Louisville Bank v. Board of Trustees*, 83 Ky. 219, (Ky. 1887) 5 S. W. Rep. 742; *Louisville School Board v. State Bank*, 86 Ky. 150.

**4. Releasing Material Conditions.** — *O'Brien v. Krenz*, 36 Minn. 136; *Heyward v. Judd*, 4 Minn. 483; *Goenen v. Schroeder*, 8 Minn. 387; *Carroll v. Rossiter*, 10 Minn. 174; *Hillebert v. Porter*, 28 Minn. 496; *Hall v. Banks*, 79 Wis. 229.

**Indorser of Negotiable Instrument.** — A law attempting to provide that an indorser of a promissory note shall remain liable notwithstanding omissions releasing him, is void. *Farmers Bank v. Gunnell*, 26 Gratt. (Va.) 131.

**Warrant of Attorney to Confess Judgment.** — A statute subsequent to a note containing a valid warrant to confess judgment is void if it impairs the creditor's right to proceed on his warrant to enter judgment. *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250.

**Laws Attempting to Take from Mortgagees the Right to Possession** which they had under the law at the time when their mortgages were given are void. *Mundy v. Monroe*, 1 Mich. 68; *Blackwood v. Van Vleet*, 11 Mich. 252.

The right given by contract to the mortgagee of chattels, to take possession at any time when he deems himself unsecured, cannot be taken away by a subsequent statute. *Boice v. Boice*, 27 Minn. 371. See cases cited in the first two notes to this section.

**Giving Precedence over Prior Mortgage.** — A law subsequent to the mortgage attempting to subordinate the lien of the mortgage to other claims is void; it impairs the obligation of the mortgage contract. *Yeatman v. King*, 2 N. Dak. 421; *Crowther v. Fidelity Ins., etc., Co.*, 85 Fed. Rep. 41.

**Act Relieving Officials from Liability.** — A statute relieving the obligors on a county treasurer's bond from liability for the loss of money deposited in a bank that failed is void. *Johnson v. Randolph County*, 140 Ind. 152; *McClelland v. State*, 138 Ind. 321.

**Right of Subrogation.** — For a statute which was held not to impair the obligation of a contract in the matter of the right of subrogation, see *Leavitt v. Canadian Pac. R. Co.*, 90 Me. 153. See also the title SUBROGATION.



cannot always be enforced by the same certain and direct remedies as are applicable in the case of individuals.<sup>1</sup> It cannot be sued without its consent; and even though its consent to be sued may have been given before, and been in force at, the time of the making of a contract, yet it may constitutionally withdraw this consent. The withdrawal, it is held, does not impair the obligation of its contract.<sup>2</sup> But in so far as the court has the power it will uphold and enforce the rights secured by contracts with a state. In the following instances the courts have such power. 1. Where the state or one of its officers comes into court asking judicial relief on behalf of the state.<sup>3</sup> 2. Where an official attempts to act under the authority of a statute which is subsequent to the contract and which impairs its obligation and is therefore void; in this case the official, having no justification except the void statute, is wholly without legal justification, and his act will be adjudged to be illegal.<sup>4</sup> 3. Where a right secured by contract with the state comes in controversy in an action to which the state itself is not necessarily a party, and a statute subsequent to the contract, impairing its obligation, is pleaded as the basis of a claim by the other party.<sup>5</sup>

**3. Contracts of Municipality.** — By impairing the Power of a Municipality the obligations of its prior contracts may be impaired. While the rights of municipal creditors are, in some degree at least, at the mercy not only of the legislature, which may destroy the corporation,<sup>6</sup> but also of the municipality itself, which may, by a neglect of its public duties, fail to keep in office any one vested by law with the power to levy, assess, and collect taxes,<sup>7</sup> yet the courts will not, unless driven to it, presume a legislative intent to destroy a municipal corporation.<sup>8</sup> While the courts cannot levy, assess, and collect a tax, nor perform the public duty of keeping in office some one who can perform these municipal functions,<sup>9</sup> yet they will, so far as they can, coerce against the municipality, through its officials, the levy of a tax sufficient to pay its debts, in spite of a legislative impairment of its powers subsequent to its contracts.<sup>10</sup>

**1. Contracts of a State.** — See the following notes to this subdivision. But a state, by entering into a contract, surrenders its sovereignty to the extent of binding itself by a legal obligation. *Davis v. Gray*, 16 Wall. (U. S.) 203. See the title STATES.

**2. Withdrawal of Consent to Be Sued.** — *Beers v. Arkansas*, 20 How. (U. S.) 527; *Washington Bank v. Arkansas*, 20 How. (U. S.) 530; *Baltzer v. North Carolina*, 161 U. S. 240; *South, etc., Alabama R. Co. v. Alabama*, 101 U. S. 832; *Memphis, etc., R. Co. v. Tennessee*, 101 U. S. 337; *Horne v. State*, 84 N. Car. 362; *Baltzer v. State*, 109 N. Car. 187; *Wilson v. Jenkins*, 72 N. Car. 5; *Shaffer v. Jenkins*, 72 N. Car. 275.

**3. McGahey v. Virginia**, 135 U. S. 662.

**4. Pennoyer v. McConaughy**, 140 U. S. 1; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 378; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Antoni v. Greenhow*, 107 U. S. 769.

**5.** See the cases cited in the title CORPORATIONS (PRIVATE), vol. 7, p. 669, notes 1 and 2. In most of these cases the contract was held to be with the state, and the obligation was violated by subsequent legislative action, but the suit arose between private parties, one claiming rights secured by the contract with the state, the other denying such right and claiming under the right attempted to be conferred by the subsequent statute. See also the cases cited in the note preceding this.

**The State Cannot, under the Guise of Taxing Its**

**Own Obligations**, relieve itself from what it has agreed to pay. *Murray v. Charleston*, 96 U. S. 432.

**Taxation of State Bonds in Another State.** — The obligations of a state evidenced by its bonds will not be impaired by the laws of another state taxing the bonds as the property of a resident of the latter state. *Bonaparte v. Tax Ct.*, 104 U. S. 592. See the title TAXATION.

**6. Contracts of Municipality.** — The state may wholly annul a municipal corporation. *Meriwether v. Garrett*, 102 U. S. 472. See also *supra*, this title, *Obligation of Contract — Nature and Characteristics*.

**7. Rees v. Watertown**, 19 Wall. (U. S.) 107; *Thompson v. Allen County*, 115 U. S. 550.

**8. Mobile v. Watson**, 116 U. S. 289; *Dev- eraux v. Brownsville*, 29 Fed. Rep. 742; *Hill v. Kahoka*, 35 Fed. Rep. 32.

**9.** See the preceding notes to this subdivision.

**10.** See the first three notes to this subdivision and the following cases: *Lee County v. Rogers*, 7 Wall. (U. S.) 175; *Walkley v. Muscatine*, 6 Wall. (U. S.) 481; *Knox County v. Aspinwall*, 24 How. (U. S.) 376; *Rogers v. Keokuk*, 18 U. S. (L. ed.) 74; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Weber v. Lee County*, 6 Wall. (U. S.) 210; *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *Benbow v. Iowa City*, 7 Wall. (U. S.) 313; *Washington County v. U. S.*, 9 Wall. (U. S.) 415; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Cass County v. Johnston*, 95 U. S. 360; *U. S.*



**4. Grants Generally.** — The obligation of the contract implied in a grant will be impaired by a legislative attempt to revoke the grant <sup>1</sup> or by the imposition of subsequent burdens or conditions on the use or enjoyment of the property, right, or franchise granted.<sup>2</sup> This rule, however, is subject to the limitation that all property is held subject to the valid exercise of the police power,<sup>3</sup> the power of eminent domain,<sup>4</sup> and, when not restrained by a valid contract, to the power of taxation.<sup>5</sup>

**5. Corporate Charters.** — The obligation of the contract implied in the grant of a corporate charter will be impaired by a law passed subsequent to the acceptance of the charter, annulling the corporation, that is, taking its corporate life;<sup>6</sup> taking away any of the franchises conferred by the charter;<sup>7</sup> imposing burdens on the corporation itself as a condition to the further exercise of its corporate rights;<sup>8</sup> or imposing additional burdens on corporate stockholders either as to business before <sup>9</sup> or afterwards <sup>10</sup> transacted.

*v. New Orleans*, 98 U. S. 381; *Lower v. U. S.*, 91 U. S. 536; *East St. Louis v. Amy*, 120 U. S. 600; *Scotland County Ct. v. U. S.*, 140 U. S. 41; *U. S. v. Justices*, 5 Dill. (U. S.) 184; *U. S. v. Johnson County*, 5 Dill. (U. S.) 207; *Bunch v. Wolerstein*, 62 Miss. 56; *Assessors v. State*, 44 N. J. L. 395.

**Diversion of Funds.** — The obligation of a contract with a municipality may be impaired by a diversion of funds. *Eidemiller v. Tacoma*, 14 Wash. 376. But see *Esser v. Spaulding*, 17 Nev. 289; *U. S. v. Knox County*, 51 Fed. Rep. 880.

**Abatement of Taxes** leaving insufficient funds to meet prior municipal obligations is void. *Bunch v. Wolerstein*, 62 Miss. 56.

**Impairment of the Remedy to Collect a Tax Impairs the Obligation of the Contracts to Pay Which the Tax Was Levied.** — *Edwards v. Williamson*, 70 Ala. 145.

**1. Grants Generally.** — *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Baltimore Trust, etc., Co. v. Baltimore*, 64 Fed. Rep. 153; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Shields v. Ohio*, 95 U. S. 319; *New Jersey v. Yard*, 95 U. S. 104; *Richmond, etc., R. Co. v. Richmond*, 96 U. S. 521; *Wright v. Nagle*, 101 U. S. 791; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; *New Orleans, etc., R. Co. v. Delamare*, 114 U. S. 501; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Coast-Line R. Co. v. Savannah*, 30 Fed. Rep. 646; *Citizens' St. R. Co. v. Memphis*, 53 Fed. Rep. 715; *Burlington v. Burlington St. R. Co.*, 49 Iowa 144, 31 Am. Rep. 145; *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 263, 55 Am. Rep. 361.

**2. Winter v. Jones**, 10 Ga. 190, 54 Am. Dec. 379; *People v. Platt*, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382. In this case the court made an extreme application of the doctrine stated in the text, but the imposition of burdens on or conditions to the use of granted property, not in the exercise of the sovereign powers of taxation or police, might be said to be a revocation, *pro tanto*, of the grant. See the cases cited in the preceding note.

**3. See supra**, this title, *Legislative Control over Contracts — Police Power*, and see the title **POLICE POWER**.

**4. See supra**, this title, *Legislative Control over Contracts — Power of Eminent Domain*, and see the title **EMINENT DOMAIN**, vol. 10, p. 1043.

**5. See supra**, this title, *Legislative Control over Contracts — Power to Tax*, and see the title **TAXATION**.

**6. Corporate Charters.** — *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Downing v. Indiana State Board of Agriculture*, 129 Ind. 443. See also the cases cited in the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 669, note 2.

**7. See the cases cited and referred to in the preceding note.**

**8. Com. v. New Bedford Bridge, 2 Gray (Mass.) 339; *Washington Bridge Co. v. State*, 18 Conn. 53; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474.**

Where a corporation is chartered to build a bridge with a draw of a certain width a subsequent requirement that it shall increase the width of the draw is an impairment of the chartered rights of the corporation, and is void. *Washington Bridge Co. v. State*, 18 Conn. 53; *Com. v. New Bedford Bridge*, 2 Gray (Mass.) 339, is to the same effect.

**9. Wheeler v. Frontier Bank, 23 Me. 308; *Com. v. Cochituate Bank*, 3 Allen (Mass.) 42.**

**10. Ireland v. Palestine, etc., Turnpike Co.**, 19 Ohio St. 369. *Contra*, *Stanley v. Stanley*, 26 Me. 191; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559.

**What Rights May Not Be Revoked Without Reservation to Amend or Repeal — Rate of Interest.** — The right conferred by the charter of a bank to charge a certain rate of interest cannot be taken away and the rate lowered. *Hazen v. Union Bank*, 1 Sneed (Tenn.) 115. See dictum in *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 380. *Contra*, *Opinion of Justices*, 9 Cush. (Mass.) 604.

**The Right to Condemn Land** under the power of eminent domain, conferred by the charter, cannot be taken away. *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1.

It may well be questioned whether the legislature can make an irrevocable grant of the power of eminent domain. See the title **EMINENT DOMAIN**, vol. 10, p. 1043.

**The Right to Regulate Tolls**, when conferred by the charter on the corporation, cannot, it has been held, be abrogated in whole or in part. *Philadelphia, etc., R. Co. v. Bowers*, 4 How. (U. S.) 380. *Hamilton Keith's Bank*

**6. Changing Rules of Evidence** — *a.* **GENERAL RULE** — **NO VESTED RIGHT IN RULES OF EVIDENCE.** — Generally speaking, there is no vested right in the rules of evidence, at least in such as relate merely to the competency of witnesses, the order or burden of proof, and matters of a like character.<sup>1</sup>

(Ky.) 458; *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 425.

But it is now settled that the state may regulate the rate of tolls to be charged for the use of property affected with a public interest, unless restrained by contract with the corporation. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Shields v. Ohio*, 95 U. S. 319.

*The Power to Consolidate* with another company, it has been held, cannot be taken away. *Zimmer v. State*, 30 Ark. 680. *Contra*, *Pearsall v. Great Northern R. Co.*, 161 U. S. 646. See the title **CONSOLIDATION OF CORPORATIONS**, vol. 6, p. 800.

*Exclusive Rights and Privileges* may be granted in a charter and made irrevocable. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Binghamton Bridge Co.*, 3 Wall. (U. S.) 51; *Boston, etc., R. Corp. v. Salem, etc., R. Co.* 2 Gray (Mass.) 1; *Atlantic City Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367.

*The Right to "Cumulative Voting"* cannot be conferred by a subsequent act so as to permit a minority of stockholders to elect part of the board of directors. *Smith v. Atchison, etc., R. Co.*, 64 Fed. Rep. 272; *State v. Greer*, 78 Mo. 188.

**Without a Reservation to Amend or Repeal, the Legislature May Change Remedies** provided in the charter and create others, or may leave the corporation to other remedies provided by the general law, such as the following:

*A Change in the Manner of Making Service* on the corporation. *Cairo, etc., R. Co. v. Hecht*, 95 U. S. 168.

*The Procedure to Condemn Land* under the power of eminent domain. *Chattaroi R. Co. v. Kinner*, 81 Ky. 221; *Long's Appeal*, 87 Pa. St. 114.

*Changes in the Remedy Against Defaulting Stockholders.* — *Ex p.* *North-East, etc., Alabama R. Co.*, 37 Ala. 679; *Ochiltree v. Iowa R. Contracting Co.*, 21 Wall. (U. S.) 249.

*Changes in the Place Where an Insurance Company May Be Sued.* — *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

*Sale of Corporate Property.* — The legislature may subject the entire property of a corporation, including its franchises, to a sale for payment of its debts. *Louisville, etc., Turnpike Road Co. v. Ballard*, 2 Met. (Ky.) 165.

*Confer a Right of Action* for injuries resulting in death. *South-Western R. Co. v. Paulk*, 24 Ga. 356.

*Extend the Existence of a Corporation*, not for the purpose of doing business, but for the purpose of suing and being sued and winding up its affairs. *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135. See also the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 544.

*Security for Payment of Wages of Employees.* — The legislature may require a corporation to secure the payment of the wages due from a contractor with it. *Branin v. Connecticut, etc., R. Co.*, 31 Vt. 214; *Grannahan v. Hanni-*

*bal, etc., R. Co.*, 30 Mo. 546; *Peters v. St. Louis, etc., R. Co.*, 23 Mo. 107.

*Under the Police Power* (which title see) the legislature may, without a reservation of the power to amend or repeal:

*Forbid grade crossings.* *New York, etc., R. Co. v. Bristol*, 151 U. S. 556.

*Require signals at crossings to be given.* *Portland, etc., R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784; *Galena, etc., R. Co. v. Appleby*, 28 Ill. 283; *Galena, etc., R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471.

*Require track of railroad to be fenced.* *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364.

*Require reports from corporations showing their financial strength.* *State v. Eagle Ins. Co.*, 50 Ohio St. 252; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574.

*Forbid the burial of the dead in grounds where the public health is thereby endangered.* *Brick Presb. Church v. New York*, 5 Cow. (N. Y.) 538; *Coates v. New York*, 7 Cow. (N. Y.) 585; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349.

*Forbid the working up of refuse animal and other matter which creates a nuisance.* *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 663.

*Forbid lotteries.* *Douglas v. Kentucky*, 168 U. S. 488; *Stone v. Mississippi*, 101 U. S. 814.

*Forbid the making and selling of intoxicating liquors.* *Boston Beer Co. v. Massachusetts*, 97 U. S. 25.

*Require a corporation having a franchise to use the streets, which use requires the occasional tearing up of the pavement, etc., to conform in so doing to the regulations of a municipal board.* *Com. v. Larkin*, 84 Va. 517; *People v. Squire*, 145 U. S. 175, 107 N. Y. 593, 1 Am. St. Rep. 893.

**1. No Vested Right in Rules of Evidence.** — *Ralston v. Lothain*, 18 Ind. 303; *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595; *Rich v. Flanders*, 39 N. H. 304; *Neass v. Mercer*, 15 Barb. (N. Y.) 318; *Howard v. Moot*, 64 N. Y. 262. Consult also the following cases, where the question, though not decided, is discussed: *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Bronson v. Kinzie*, 1 How. (U. S.) 311; *McCracken v. Hayward*, 2 How. (U. S.) 608; *Curtis v. Whitney*, 13 Wall. (U. S.) 68. See *infra*, the next note but one, and the case there set out.

**Change of Conclusive Presumption to Rebuttable Presumption.** — Under the law in force at the time of a tax sale the deed was conclusive evidence of certain facts; after the sale, but before the period of redemption had expired, a statute changed this presumption and made the deed only *prima facie* evidence of these facts. It was held that the statute impaired the obligation of the tax purchaser's contract. *Marx v. Hanthorn*, 12 Sawy. (U. S.) 377, 30 Fed. Rep. 579; *Tracy v. Reed*, 38 Fed. Rep. 69. To the same effect see *Smith v. Cleve-*



**b. CHANGES RENDERING PRIOR CONTRACTS IMPOSSIBLE OF LEGAL PROOF** — (1) *In General*. — But where the contract is valid when entered into, a subsequent change in the rules of evidence, requiring such proof of the contract as makes it impossible of legal proof,<sup>1</sup> or (what is not so clear) so burdens the party in making proof as to render the contract practically impossible of proof, and worthless in a legal tribunal, will impair the obligation.<sup>2</sup> This form of impairment may be accomplished by a law enacted subsequent to the making of the contract, requiring written or other formal proof, or formalities not required when the contract was made.<sup>3</sup> This rule, of course, assumes that the contract was valid under the prior law, which necessarily assumes that the contract was capable of legal proof according to the then existing rules of evidence.

(2) *Competency of Witnesses*. — If a contract is susceptible of proof only by certain persons, or in any other limited way, a subsequent statute arbitrarily denying the admissibility of the testimony of these persons or the other limited proof available to the party will impair the obligation of the contract. The word "arbitrarily" is a necessary qualifying word in this rule. The rule itself, even with this qualification, is dangerously near the boundary line between what the state may legally do and may not do in the way of changing rules of evidence and the course and form of procedure in its courts. But if the plain purpose of the statute changing the rules of evidence as to the competency of witnesses is so to affect a single case, or a limited class of cases, as practically to render these prior contracts impossible of legal proof, the obligation is impaired and the statute is obnoxious to the contract clause. This result would seem to depend upon the evident purpose and the practical effect upon the contract of the subsequent statute.<sup>4</sup>

land, 17 Wis. 556. *Contra*, *Strode v. Washer*, 17 Oregon 50, citing *Hickox v. Tallman*, 38 Barb. (N. Y.) 608.

**A Law Admitting the Defense of Want of Consideration** to a sealed instrument has been upheld. *Williams v. Haines*, 27 Iowa 251. This case proceeds on the theory that the state has complete control over remedies and may therefore permit defenses not allowed when the obligation was contracted. But if the fact that the instrument is sealed imposes an obligation, without the necessity for a consideration, it may be doubted whether a subsequent law permitting the defense of want of consideration is not prohibited. See 1 Hare's American Constitutional Law 590-594.

**A Presumption Made Conclusive by Lapse of Time** against the assertion of a right not asserted or recognized during the prescribed time does not impair the obligation of a contract. *Biddle v. Hooven*, 120 Pa. St. 221. See *infra*, this section, *Statutes of Limitation*; also the title *LIMITATION OF ACTIONS*.

**1. Change Making Legal Proof Impossible**. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213 (see opinions of Washington, J., pp. 261, 262, and Trimble, J., pp. 326 and 327); *Marx v. Hanthorn*, 12 Sawy. (U. S.) 377, 30 Fed. Rep. 579; *Tracy v. Reed*, 38 Fed. Rep. 69; *Texas Mexican R. Co. v. Locke*, 74 Tex. 370; *Texas Mexican R. Co. v. Carr*, (Tex. 1889) 12 S. W. Rep. 90.

**2. Virginia Coupon Cases**. — *McGahey v. Virginia*, 135 U. S. 662. In this case the state of Virginia had issued its bonds with interest coupons detachable and forming a separate obligation from the principal bond, though of course resting on the same consideration.

After the bonds with the coupons attached had been issued, the state passed an act requiring the production of the original bond in order to establish the genuineness of the coupon. This act the court held to be unconstitutional, saying (at p. 694): "We have no hesitation in saying that the duty imposed upon the taxpayer of producing the bond from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, in many cases impossible to be performed. If enforced it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. It would make them fixed appendages to the bond itself. \* \* \* It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional."

**3.** See the preceding note.

**4.** *McGahey v. Virginia*, 135 U. S. 662. The coupons in suit in this case were the same referred to in the second note *supra*. By an act subsequent to the issuing of the bonds and coupons the state of Virginia forbade expert testimony to prove the genuineness of the coupons. The coupons and bonds were made by impression on metallic plates, and from the report of the case it would seem that there was no actual manual signature to the bonds and coupons, so that proof of the signature could not be made by proof of handwriting. It was held that the prohibition of expert testimony



**7. Changing Remedies.**—*a. IN GENERAL.*—The obligation may be impaired by a change in the remedy in force at the time when the contract was entered into. If the subsequent law subtracts from the effectiveness of the remedy and provides no substitute substantially equivalent to the former remedy, it is obnoxious to the contract clause.<sup>1</sup> The obligee is not entitled to a remedy of the same form as that in force when the obligation was contracted; the form of the remedy does not enter into his right,<sup>2</sup> which inheres merely in the effectiveness of his remedy,<sup>3</sup> but he is entitled to some

in establishing the genuineness of the coupons was unconstitutional. It would hardly be proper to cite this case in support of the broad proposition that an act forbidding expert or opinion evidence generally will impair the obligation of a contract. The act in question was one of a series of acts all tending to one end, viz., to hinder and obstruct the enforcement of the rights of coupon holders—rights which had been conferred by legislative act in reliance on which the coupons were taken and placed in circulation. This series of acts was arbitrary and seemed to aim at placing in the way of the coupon holders every obstacle possible. The forbidding of expert testimony was one of these obstacles. Its purpose was plainly to affect these securities alone, and the practical effect was equally plain, viz., to make this enforcement practically impossible, under the guise of changing the rules of evidence. The history of this famous controversy may be traced in the following cases: *Antoni v. Wright*, 22 Gratt. (Va.) 833; *Wise v. Rogers*, 24 Gratt. (Va.) 169; *Clarke v. Tyler*, 30 Gratt. (Va.) 134; *Cornwall v. Com.*, 82 Va. 644, 3 Am. St. Rep. 121; *Newton v. Com.*, 82 Va. 647; *Com. v. Weller*, 82 Va. 721; *McGahey v. Com.*, 85 Va. 519; *Laube v. Com.*, 85 Va. 530; *Hartman v. Greenhow*, 102 U. S. 672; *Poindexter v. Greenhow*, 114 U. S. 270; *Moore v. Greenhow*, 114 U. S. 338; *Parsons v. Marye*, 23 Fed. Rep. 113; *McGahey v. Virginia*, 135 U. S. 662.

In *Com. v. Weller*, 82 Va. 721, the Supreme Court of Virginia upheld the right of a state to enact a statute forbidding expert evidence in the proof of a coupon. This rule was followed in *McGahey v. Com.*, 85 Va. 519, and in *Laube v. Com.*, 85 Va. 530. The doctrine of these cases was overruled in *McGahey v. Virginia*, 135 U. S. 662.

1. See the notes following.

**2. Form of Remedy Not Material.**—*Memphis v. U. S.*, 97 U. S. 293; *New Orleans City, etc., R. Co. v. Louisiana*, 157 U. S. 219; *McCreary v. State*, 27 Ark. 425; *Lockett v. Usry*, 28 Ga. 345; *Brace v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Carnes v. Red River Parish*, 29 La. An. 608.

**A Statute Subsequent to the Mortgage, Taking Away the Right to a Deficiency Judgment in an equitable foreclosure, is valid, provided the legal remedy on the debt is left unimpaired.** *Toffey v. Atcheson*, 42 N. J. Eq. 182; *Newark Sav. Inst. v. Forman*, 33 N. J. Eq. 436; *Allen v. Allen*, 34 N. J. Eq. 493.

But an act subsequent to the mortgage, providing that a suit on the mortgage debt shall not be brought until after foreclosure of the mortgage, is in conflict with the contract clause and is therefore void. *Baldwin v. Flagg*, 43 N. J. L. 495, followed in *Wilkinson v. Rutherford*, 49 N. J. L. 241.

**A Change in the Remedy from Law to Equity or Vice Versa may be made without impairing the obligations of contracts.** *Paschall v. Whitsett*, 11 Ala. 472; *Story v. Furman*, 25 N. Y. 214.

**Substituting Suit by Attorney-General for Suit by Insured in His Own Name.**—A statute subsequent to a contract of insurance, taking from the insured the right to proceed in his own name and authorizing a suit by the attorney-general, was upheld for the reason that it merely changed the form of the remedy. The opinion is by three judges, with two dissenting. *Swan v. Mutual Reserve Fund L. Assoc.*, 20 N. Y. App. Div. 255.

**3. Effectiveness of Remedy.**—*Free v. Haworth*, 19 Ind. 404; *Morton v. Valentine*, 15 La. Ann. 150; *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Wintermute v. Carner*, 8 Wash. 585.

**Set-off May Be Given or Taken Away as to existing contracts without impairing their obligation.** This involves a mere change in the form of the remedy. *Blount v. Windley*, 95 U. S. 173; *Amy v. Shelby County Taxing Dist.*, 114 U. S. 388; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79.

A law subsequent to a contract, compelling a judgment creditor to accept in payment of his judgment the amounts due on his own obligations held by the judgment debtor, is valid. So, for example, a bank may be compelled to accept its own bills in payment of a judgment rendered in its favor. This is only an extension of the doctrine of set-off. *Charlotte Bank v. Hart*, 67 N. Car. 264.

**State's Unlimited Control over Remedies Asserted.**—In the following cases the state's right to control remedies, not only by changing the mere form, but also to the extent of subtracting from their effectiveness, has been asserted. *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701; *Thayer v. Seavey*, 11 Me. 284; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *James v. Stull*, 9 Barb. (N. Y.) 482; *Evans v. Montgomery*, 4 W. & S. (Pa.) 218; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283. But these cases do not rest on sound principles. See the next note but one, *infra*.

**Distraint for Rent, even when provided for by contract, it has been held, may be abolished, if other remedies remain to the lessor.** *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Conkey v. Hart*, 14 N. Y. 22. The ground of decision in these two cases is reducible to the uncontrolled power of the legislature over remedies. While this doctrine is now obsolete, yet to abolish one remedy does not impair the obligation, if another sufficient remedy remains. But perhaps enough attention was not paid to the fact that by the terms of the lease a power to distraint was conferred by contract. See *Black on Constitutional Prohibitions* 183, note.

remedy,<sup>1</sup> and that remedy must be substantially equivalent, in coercive force, to that provided by law when the obligation was contracted.<sup>2</sup>

**b. INCREASE OF EFFECTIVENESS OF REMEDIES NOT FORBIDDEN.** — What is forbidden is the impairment of the obligation. To increase the effectiveness of the remedy impairs the obligation of neither party to the contract. It does not rest with the obligor to urge that he has a vested right in the less efficient remedy. His obligation is to perform his contract, and that obligation may be impaired by a decrease, but not by an increase, of the coercive power of the law, which can be exercised only through legal remedies.<sup>3</sup> Of

**Change of Practice.** — "By the uniform course of decision on the question as to how far legislative power is restrained by this provision of the Constitution [the contract clause], it has been held that it is entirely competent for the legislature to change the practice of the courts, and that any legislation which merely affects the pursuit of remedies for enforcing existing contracts is not within the prohibition of this provision." *Toffey v. Atcheson*, 42 N. J. Eq. 184, citing *Potts v. New Jersey Arms, etc.*, Co., 17 N. J. Eq. 395; *Rader v. Southeastern Road Dist.*, 36 N. J. L. 273; *Newark Sav. Inst. v. Forman*, 33 N. J. Eq. 436.

**1. Obligor May Not Be Left Wholly Without Remedy.** — *Memphis v. U. S.*, 97 U. S. 293; *Johnson v. Bond, Hempst.* (U. S.) 533; *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638; *Lockett v. Usry*, 28 Ga. 345; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447. See also the next preceding note.

**Requiring Leave of Court to Sue on a Judgment** does not impair the obligation of the contract merged in the judgment, if the judgment creditor has still remaining another sufficient remedy. *Watts v. Everett*, 47 Iowa 271.

**2. Remedy Available Must Be of Equal Coercive Force with One Existing at Time of Contract.** — *Memphis v. U. S.*, 97 U. S. 293; *Fullerton v. U. S. Bank, 1 Pet.* (U. S.) 604; *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Walker v. Whitehead*, 16 Wall. (U. S.) 314. See the preceding note.

**Some Latitude of Discretion Must Be Allowed to the Legislature** in the change of remedies and the substitution of one for another. This discretion cannot be overruled by the courts merely because they may be of the opinion that the substituted remedy is less convenient, if a remedy substantially equal is provided by the subsequent act. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Penrose v. Erie Canal Co.*, 56 Pa. St. 48, 93 Am. Dec. 778; *Thompson v. Wiley*, 46 N. J. L. 476; *James v. Stull*, 9 Barb. (N. Y.) 482; *Lightfoot v. Cole*, 1 Wis. 26. But this latitude of discretion will not authorize the legislature to impair the obligations of existing contracts. *Smith v. Morse*, 2 Cal. 524; *Chesapeake, etc., Canal Co. v. Baltimore, etc.*, R. Co., 4 Gill & J. (Md.) 1; *Johnson v. Winslow*, 64 N. Car. 27; *Huntzinger v. Brock*, 3 Grant Cas. (Pa.) 243; *Oatman v. Bond*, 15 Wis. 20.

**Impairment of Remedy Against Estate of Deceased Person.** — A statute subsequent to the contract requiring a claimant against the estate of a deceased person to make oath in open court to his claim, and that all offsets had been credited, and to prove the claim by other

competent proof, was held to be void because it so encumbered the remedy as to impair the right. *Riggs v. Martin*, 5 Ark. 506, 41 Am. Dec. 103.

**Transfer of Causes.** — The obligation of a contract is not impaired by a law providing for the transfer of causes from one court to another. *United R., etc., Co. v. Weldon*, 47 N. J. L. 59, 54 Am. Rep. 114.

**Bonds, etc., in Judicial Proceedings.** — Nor will bonds or stipulations given by the parties in a cause in one court be released by a transfer to another court. The statute providing for such transfer neither releases the sureties nor impairs the obligations of their contract. *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708.

**Suit in Federal Court.** — Depriving a party of his right to sue in a federal court impairs the obligation of a contract. *National Bank v. Sebastian County*, 5 Dill. (U. S.) 414.

**Form of Proceedings.** — Statutes which merely relate to the form and course of procedure in court, but which do not subtract from the effectiveness of the remedy, are unobjectionable. *Morton v. Valentine*, 15 La. Ann. 150. See also *Edwards v. Kearzey*, 96 U. S. 595.

**Breach of Pre-existing Contract Made Criminal.** — Where the breach of a pre-existing contract may be prejudicial to the public good, a statute punishing as a crime the act which constitutes the breach does not impair the obligation of a contract. *Blann v. State*, 39 Ala. 553, 84 Am. Dec. 788; *Brown v. Penobscot Bank*, 8 Mass. 445. *Contra*, *Meyer v. Berlandi*, 39 Minn. 438, 12 Am. St. Rep. 663, where such a statute was held to amount to imprisonment for debt. See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

**3. Effectiveness of Remedy May Be Increased.** — *Moore v. Moore*, 10 Ind. 110; *Webb v. Moore*, 25 Ind. 4; *Holland v. Dickerson*, 41 Iowa 367; *Grubbs v. Harris*, 1 Bibb (Ky.) 567; *Lapsley v. Brashears*, 4 Litt. (Ky.) 60; *Schoenheit v. Nelson*, 16 Neb. 235; *Potts v. Trenton Water Power Co.*, 9 N. J. Eq. 592; *Potts v. New Jersey Arms, etc., Co.*, 17 N. J. Eq. 395; *Stoddart v. Smith*, 5 Binn. (Pa.) 355. See also *State v. New Orleans, etc., R. Co.*, 42 La. Ann. 550; *State v. New Orleans, etc., R. Co.*, 42 La. Ann. 11.

**A More Expeditious and Effective Remedy** may be provided by statute to enforce an existing obligation which when constructed was enforceable only by suit in equity. *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515.

**A Defense Resting upon a Mere Inability to Enforce a Contract** as made, because of the existing law, may be taken away and the contract, as in fact made, validated. This illustrates an extreme case of the increase of the effective-



course nothing can be added to the terms of the contract.<sup>1</sup>

c. **PROVISIONAL REMEDIES**—(1) *Attachment and Garnishment*. — It has been held that the remedy by attachment against the debtor's property prior to judgment may be taken away without impairing the obligations of contracts in force at the time of the repeal.<sup>2</sup> And the reason for this ruling would lead to the same result in the case of garnishment.

(2) *Supplementary Proceedings*. — The remedy by supplementary proceedings might doubtless be taken away, if a remedy remained to reach the same class of property, even though the remaining remedy might be less convenient.<sup>3</sup>

(3) *Mandamus*. — This remedy, if one of several provided by law, may be taken away as to prior contracts, but not if it is the sole remedy and no other is provided.<sup>4</sup>

d. **CERTAIN INSTANCES OF OBNOXIOUS CHANGES**—(1) *Creation or Increase of Exemptions*. — If the effect of the statute is to withdraw from

ness of the remedies to enforce a contract actually made. *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Ewell v. Daggs*, 108 U. S. 151; *Gross v. U. S. Mortgage Co.*, 108 U. S. 488. See *infra*, this section, *Curative Statutes*.

Where by the Legal Effect of His Contract the Mortgagor Has an Estate Extending to a Certain Period, this right is a contract right, and cannot be taken from him by a subsequent law, even though purporting merely to increase the efficiency of the creditor's remedy. *Cargill v. Power*, 1 Mich. 369.

1. See *supra*, this section, *In General—Direct Impairment*.

2. **Remedy by Attachment**. — *Day v. Madden*, 9 Colo. App. 464.

**Repeal of Attachment Law**. — Where, when the debt was contracted, the creditor had the right on certain defined conditions to sue out an attachment against the debtor's property, a law subsequent to the contract, taking away this right, was held to be unconstitutional. The line of argument pursued by the court proceeded on the broad ground that remedies "cannot be changed at all so as to affect materially the value of existing contract obligations." *Peninsular Lead, etc., Works v. Union Oil, etc., Co.*, 100 Wis. 488. See also *Heath, etc., Mfg. Co. v. Union Oil, etc., Co.*, 83 Fed. Rep. 776; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250.

The remedy by attachment or garnishment, if merely a means of impounding the debtor's property, in advance of the adjudication of the fact of indebtedness, by a final judgment, in a case where personal service and a general judgment are obtainable, might seem to be at the mercy of the state legislature. The constitution does not require the preservation of all remedies available to the creditor at the time when the debt was incurred. (See *supra*, the preceding subdivisions of this subsection.) A remedy must be preserved; but it need not necessarily be so speedy, provided delay is not purposely ingrafted upon the remedy. Mere incidental delays and inconveniences will not render the change void. *Antoni v. Greenhow*, 107 U. S. 769.

And according to this line of authority, the preservation of an efficient remedy to enforce a final adjudication in favor of the creditor is

all that he can constitutionally demand. But where the debtor resides in one state, and all or the greater part of his property has an actual situs in another, and no personal service on the debtor can be obtained in the state where his property is actually situated, and where, accordingly, the property must first be seized in some form to give to the court jurisdiction (*Pennoyer v. Neff*, 95 U. S. 714) to render any judgment, to deny to the creditor a right to seize provisionally the debtor's property and so give to the court jurisdiction to determine the fact of indebtedness, and make an appropriation of the seized property to the debt, would deny to the creditor the only remedy available to him. There are no adjudications exactly in point.

**Decrease or Repeal of Exemptions** may be made applicable to past contracts. This rests upon the clear principle that the debtor has no vested right in an exemption as against his creditor; the debtor's obligation is to pay his debt, and certainly his obligation is not impaired by a law which merely gives to the creditor the right to reach what the debtor has no vested right to withhold. No obligation is impaired by increasing the effectiveness of remedies, provided nothing is added to the terms of the contract itself. *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641; *Olmstead v. Kellogg*, 47 Iowa 460; *Holland v. Dickerson*, 41 Iowa 367; *Babcock v. Gurney*, 42 Iowa 154; *Fonda v. Clark*, 43 Iowa 300; *Bull v. Conroe*, 13 Wis. 233.

3. See the title **SUPPLEMENTARY PROCEEDINGS**; and see the cases cited in the preceding subdivision.

4. **Mandamus**. — To take away the remedy by mandamus does not impair the obligation of prior contracts, if a legal remedy still remains. *Tennessee v. Sneed*, 96 U. S. 69. In this case the remedy by mandamus was taken away and the party was left to a remedy at law by ordinary suit, confessedly not so speedy. See also *Antoni v. Greenhow*, 107 U. S. 769.

Nor does the extension of the remedy by mandamus impair contract rights, as, for instance, to authorize the specific enforcement of a contract by mandamus. *State v. New Orleans, etc., R. Co.*, 42 La. Ann. 550; *State v. New Orleans, etc., R. Co.*, 42 La. Ann. 11.



execution or other final process the property of the debtor liable to execution or other process when the debt was contracted, leaving insufficient for the payment of his prior debts, the statute is in violation of the Constitution. It impairs the effectiveness of the creditor's remedy to the extent of the property attempted to be withdrawn, and to that extent impairs the legal obligation of the debtor's contract.<sup>1</sup>

(2) *Stay Laws*. — Laws staying execution or other final process extend the period of payment and thereby the debtor's obligation to pay at the stipulated time. The validity of such legislation does not depend upon the reasonableness of the stay; any stay is void as to existing contracts.<sup>2</sup> Stays accomplished by laws extending the return day of the process by which the suit is commenced, or by laws clearly authorizing unnecessary delays in legal proceedings, present questions of more difficulty. The state has the right to regulate the form and course of procedure in its courts, but in doing so it must not impair the obligations of existing contracts.<sup>3</sup> Delays merely incident to a change in the form or course of procedure, or to the transfer of causes from a court which it is proposed to abolish to another created to try the same cause, it is believed, are not objectionable.<sup>4</sup> But if the law extending the return day of process, or otherwise delaying proceedings, is clearly intended to work a stay, a different question is presented. The stay ought

**1. Creating or Increasing Exemptions of Property from Final Process.** — *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Edwards v. Kearzey*, 96 U. S. 595; *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Foster v. Byrne*, 76 Iowa 295; *Willard v. Sturm*, 96 Iowa 555; *Dunn v. Stevens*, 62 Minn. 380; *Lessley v. Phipps*, 49 Miss. 790; *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Patton v. Asheville*, 109 N. Car. 685; *Skinner v. Holt*, 9 S. Dak. 427; *Homestead Cases*, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; *Matter of Heilbron*, 14 Wash. 536.

**Contrary View.** — In the following cases it has been held that the legislature has the power to create or increase exemption, even as against prior contract obligations, and this upon the ground that the exemption is a part of the remedy within the control of the state. *Sneider v. Heidelberg*, 45 Ala. 126; *Harde-man v. Downer*, 39 Ga. 425; *Pulliam v. Sewell*, 40 Ga. 73; *Gunn v. Barry*, 44 Ga. 35 [expressly overruled on appeal, 15 Wall. (U. S.) 610]; *Taylor v. Stockwell*, 66 Ind. 505; *Bigelow v. Pritchard*, 21 Pick. (Mass.) 169; *Rockwell v. Hubbell*, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103; *Dean v. King*, 13 Ired. L. (35 N. Car.) 20; *Hill v. Kessler*, 63 N. Car. 437; *In re Kennedy*, 2 S. Car. 216; *Adams v. Smith*, 2 S. Car. 228; *Howze v. Howze*, 2 S. Car. 229. But these cases are not in line with later cases nor with the settled law.

**Exemption of After-acquired Property.** — It is said that the creditor may look to the after-acquired property of the debtor, as well as to his present possessions. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, *per* Marshall, C. J. And it has therefore been held that a statute creating an exemption out of after-acquired property is void as to existing creditors. *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388.

**Release of Dower.** — An act subsequent to the contract releasing (exempting) the wife's inchoate right of dower from the demands of the

creditor has been upheld as against the purchaser at the execution sale, on the ground that the purchaser takes what the law in force at the time of his purchase gives to him, and no more. *Currier v. Elliott*, 141 Ind. 394. See also *Davis v. Rupe*, 114 Ind. 588. And see *infra*, this section, *Contract of Purchaser at Public Sale*.

But such a release or exemption has been denied as against a demand secured by a specific lien. *Buser v. Shepard*, 107 Ind. 417. And in *North Carolina* it is denied as against contract debts previously incurred. This is the better doctrine. *Patton v. Asheville*, 109 N. Car. 685.

**2. Stay Laws — United States.** — *Edwards v. Kearzey*, 96 U. S. 595.

*Alabama.* — *Hudspeth v. Davis*, 41 Ala. 379.

*Indiana.* — *Strong v. Daniel*, 5 Ind. 348.

*Louisiana.* — *Johnson v. Duncan*, 3 Mart. (La.) 530, 6 Am. Dec. 675.

*Mississippi.* — *Coffman v. Kentucky Bank*, 40 Miss. 29, 90 Am. Dec. 311; *Hill v. Boyland*, 40 Miss. 618.

*North Carolina.* — *Jacobs v. Smallwood*, 63 N. Car. 112.

*South Carolina.* — *State v. Carew*, 13 Rich. L. (S. Car.) 498, 91 Am. Dec. 245; *Wood v. Wood*, 14 Rich. L. (S. Car.) 148; *Goggans v. Turnipseed*, 1 S. Car. 80, 98 Am. Dec. 397.

*Tennessee.* — *Webster v. Rose*, 6 Heisk. (Tenn.) 29, 19 Am. Rep. 583.

*Texas.* — *Luter v. Hunter*, 30 Tex. 688, 98 Am. Dec. 494; *Canfield v. Hunter*, 30 Tex. 712; *Culbreath v. Hunter*, 30 Tex. 713; *Levison v. Krohne*, 30 Tex. 714; *Jones v. McMahan*, *cited* in *Earle v. Johnson*, 31 Tex. 165.

**Contra.** — *Ex p. Pollard*, 40 Ala. 77; *Grimball v. Ross*, T. U. P. Charlt. (Ga.) 175; *Holloway v. Sherman*, 12 Iowa 282, 79 Am. Dec. 537; *Barkley v. Glover*, 4 Met. (Ky.) 44; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283.

**3.** See *supra*, this section, *Changing Remedies*

**4.** *Newkirk v. Chapron*, 17 Ill. 344.

not to be permitted under the thin disguise of extending the return day of process, or providing for other proceedings clearly introduced for mere purposes of delay. If the time within which the defendant is to answer is clearly so long as to leave no doubt as to the purpose to accomplish a stay, the law ought to be held unconstitutional as to existing contracts.<sup>1</sup> And the same rule ought to apply to any other mere delay authorized by a statute subsequent to the contract.<sup>2</sup>

(3) *Suspending Hearing of Suits.* — Laws suspending the hearing of suits without abolishing the courts, but by merely enacting that actions to recover debts shall not be heard for a period fixed by the statute, do not, it has been held, impair the obligations of contracts entered into prior to the act.<sup>3</sup> But the reasons assigned for these rulings can scarcely be maintained; it is a legislative stay of proceedings, not merely incident to the transaction of the business of the courts, but arbitrarily denying all remedy during the period fixed by the statute. If stay laws be void as to existing contracts, and an impairment of the remedy be held to impair the obligation, it is difficult to see how the legislature may deny all remedy for a period fixed by its good pleasure.<sup>4</sup>

(4) *Extending Period of Redemption.* — Laws extending the period of redemption from sales on execution and other process, if made applicable to judgments recovered or to be recovered on prior debts, have the legal effect of withdrawing from the creditor a part of what was available to him when the debt was contracted, and are void.<sup>5</sup> The extension of the right to redeem enlarges the estate which the debtor may hold in spite of the execution, and by so much lessens the property available to the creditor. The thing sold is the debtor's estate in the property, and if that estate is less under the new law than what was authorized to be sold when the debt was contracted, the legal effect is really the same as if some other definite article of property were exempted from forced sale.<sup>6</sup> The contract that is violated is the contract upon which the judgment is rendered,<sup>7</sup> not the new one with the purchaser at the sale, which springs into existence at the time of sale.<sup>8</sup> The creditor, by his sale, may transfer all the debtor's estate liable to execution when his debt was contracted, and this enables the purchaser to insist legally that the estate which he purchases shall be determined by the prior law.<sup>9</sup>

1. *Johnson v. Winslow*, 64 N. Car. 27; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Oatman v. Bond*, 15 Wis. 21.

2. *Oatman v. Bond*, 15 Wis. 21.

*Stays During Military Service* of the defendant in the United States army have been upheld in *Iowa*, on the theory that the state controls the remedy, *McCormick v. Rusch*, 15 Iowa 127, 83 Am. Dec. 401; and in *Pennsylvania*, when the term of service was definite, and, as the court held, not unreasonable in duration, *Coxe v. Martin*, 44 Pa. St. 322; *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442.

*Contra in Wisconsin*, *Hasbrouck v. Shipman*, 16 Wis. 296.

But a stay during service where the enlistment was "during the war" was indefinite, and a law providing for such a stay was held void. *Clark v. Martin*, 3 Grant Cas. (Pa.) 393.

3. *Laws Suspending Hearing of Suits.* — *Ex p.* *Pollard*, 40 Ala. 77; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *Barkley v. Glover*, 4 Met. (Ky.) 44.

4. *Coffman v. Kentucky Bank*, 40 Miss. 29, 90 Am. Dec. 311, where the reasoning of the court is to the effect that such a law impairs the obligation by denying a remedy during the period fixed by the statute, and is therefore void.

5. *Extending Time of Redemption from Sales on Execution, etc.* — *Barnitz v. Beverly*, 163 U. S. 118 [*overruling* *Beverly v. Barnitz*, 55 Kan. 451-466, 49 Am. St. Rep. 257]; *Howard v. Bugbee*, 24 How. (U. S.) 461; *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627; *Phinney v. Phinney*, 81 Me. 450, 10 Am. St. Rep. 266; *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932.

The cases of *State v. Sears*, 29 Oregon 580, 54 Am. St. Rep. 808, and *State v. Gilliam*, 18 Mont. 94, *followed* *Beverly v. Barnitz*, 55 Kan. 451, and are in conflict with *Barnitz v. Beverly*, 163 U. S. 118, *supra*, and are therefore in effect *overruled* by the case last named; and in *State v. Gilliam*, 18 Mont. 94, after the announcement of the decision by the Supreme Court of the United States, a rehearing was granted and a judgment rendered in accordance therewith. See *State v. Gilliam*, 18 Mont. 109.

6. The transfer of a lesser right or estate does not meet the constitutional requirement. See *Bronson v. Kinzie*, 1 How. (U. S.) 320.

7. See the next note but one *infra*, and see also *Barnitz v. Beverly*, 163 U. S. 118.

8. See *infra*, this section, *Contract of Purchaser at Public Sale*.

9. *Hillebert v. Porter*, 28 Minn. 496. See also *infra*, this section, *Contract of Purchaser at Public Sale*.



(5) *Appraisement Laws.* — Appraisement laws made applicable to prior debts and requiring a valuation of property prior to a forced sale, and forbidding a sale except for a fixed percentage of the valuation, while they do not withdraw from forced sale property otherwise available for the satisfaction of debts, yet so embarrass and encumber the creditor's remedy with conditions as to impair it and thereby the obligation of the contract.<sup>1</sup> Such laws may indirectly compel the acceptance by the creditor of property at a fixed valuation in payment of a debt stipulated to be paid in money. This result would quite frequently be accomplished when the percentage of the valuation at which the sale may be made is so high as to exclude bidders.<sup>2</sup>

(6) *Change in Measure of Damages.* — By a legislative change in the measure of damages subsequent to the contract the obligation may be impaired. If by the law in force when the contract is entered into either party is entitled to recover substantial damages for a breach, a subsequent attempt to take away the right to recover any damages, or the full measure of damages, would clearly impair the obligation. And when the damages are unliquidated, that is, require computation upon the basis of certain legal footings, to change the basis of these legal footings by a legislative act subsequent to the contract impairs its obligation.<sup>3</sup>

(7) *Change in Rate of Interest.* — Interest, when its payment is provided for by the terms of the contract itself, is a part of the obligation, and a subsequent law changing the rate will impair the obligation. When the contract is silent as to interest, the law, after payment is due, fixes the rate as the measure of damages for the continued default. In this case the law supplements the agreement of the parties and incorporates into it the obligation to pay the legal rate, and this obligation cannot, as to past-due interest, be impaired by a legislative act.<sup>4</sup>

Interest on a Judgment is generally a matter of statutory regulation. When the creditor proceeds in court and elects to take a judgment, he takes it subject to the statutory rate allowed by law on judgments.<sup>5</sup>

Interest Required of Redemptioners. — It is settled that the legislature may reduce the rate of interest required to be paid by redemptioners, without impairing the obligation of the contract merged in the judgment on which the sale was made.<sup>6</sup> It has been suggested, but not decided, that the legislature could not

1. *Appraisement Laws.* — *McCracken v. Hayward*, 2 How. (U. S.) 608; *Olmstead v. Kellogg*, 47 Iowa 460; *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932.

2. See the preceding note.

3. *Changing Measure of Damages.* — *Eitinger v. Kenney*, 115 U. S. 566; *Wilmington, etc., R. Co. v. King*, 91 U. S. 3. See also *Rives v. Duke*, 105 U. S. 132; *Thorington v. Smith*, 8 Wall. (U. S.) 1; *Confederate Note Case*, 19 Wall. (U. S.) 548; *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Kirtland v. Molton*, 41 Ala. 548; *Roach v. Gunter*, 44 Ala. 209, 4 Am. Rep. 132; *McNealy v. Gregory*, 13 Fla. 417.

4. *Interest.* — *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51; *Butler v. Rockwell*, 17 Colo. 290; *Goggans v. Turnipseed*, 1 S. Car. 80, 98 Am. Dec. 397; *Hannum v. State Bank*, 1 Coldw. (Tenn.) 398. See also *Robertson v. Van Cleave*, 129 Ind. 217.

Many of the cases seem to proceed on the theory that if the law in force at the time when the contract is entered into provides a certain rate for the forbearance of money, this rate enters into the obligation and has the same force as though written into the contract.

This view is consistent with the general rule that contracts are made in reference to the law then in force. The rule holds good, probably, where there is an implied agreement, proven by the acts of the parties, for a forbearance of the payment of money, and the law fixing the rate furnishes one of the elements of the contract. *Butler v. Rockwell*, 17 Colo. 290; *Black on Constitutional Prohibitions*, § 106.

But where a contract, however it may be proven, is for the payment of money at a fixed time, the parties contemplate payment then, and their agreement is silent, that is, there is no agreement, as to further forbearance, the rule stated in *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, applies.

5. See the titles INTEREST; JUDGMENTS AND DECREES; 2 *Freeman on Judgments* (4th ed.), § 441, citing *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454. The author's conclusion that a statute changing the rate of interest cannot be made to apply to prior judgments, so far as interest accrues after the statute takes effect, is in direct conflict with *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, where it was distinctly ruled that such a statute regulated the future rate of interest on a prior judgment.

6. *Interest Required of Redemptioners.* — *Con-*



reduce the rate below that of the debt merged in the judgment.<sup>1</sup>

8. **Contract of Purchaser at Public Sale.** — Any act subsequent to a purchase at public sale which deprives the purchaser of a right secured to him by the law of the sale impairs the obligation of his contract;<sup>2</sup> but a law merely requiring him to give notice of the time of the expiration of a period of redemption impairs none of his rights; it secures the just rights of all.<sup>3</sup>

9. **Insolvent Laws.** — An insolvent law passed by a state subsequent to a contract, and authorizing a discharge of the debtor from his obligation to pay the debt, is void as to such debt, though it may be valid as to contracts executed after the law takes effect.<sup>4</sup>

10. **Recording Acts.** — Registration and recording laws requiring deeds, patents, mortgages, and contracts to be recorded, and in default thereof making them void,<sup>5</sup> as against subsequent *bona fide* purchasers, incumbrancers, etc., do not impair the obligations of contracts. Such laws are calculated to insure good faith.

11. **Curative Statutes.** — Curative acts, properly so called, do not impair the obligations of contracts.<sup>6</sup>

12. **Statutes of Limitation.** — Statutes of limitation, though made to apply to existing contracts, do not impair their obligations if a reasonable time is given by the statute to begin suit to recover.<sup>7</sup>

13. **Abolition of Imprisonment for Debt.** — Imprisonment for debt may be abolished as to existing contracts without impairing their obligations. The

necticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51; Robertson v. Van Cleave, 129 Ind. 217.

1. Robertson v. Van Cleave, 129 Ind. 217.

2. **Purchase at Public Sale.** — Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; State v. Foley, 30 Minn. 350; Hillebert v. Porter, 28 Minn. 496; Fleming v. Roverud, 30 Minn. 273; Dikeman v. Dikeman, 11 Paige (N. Y.) 484; Robinson v. Howe, 13 Wis. 341.

3. Curtis v. Whitney, 13 Wall. (U. S.) 68; Coulter v. Stafford, 56 Fed. Rep. 564, 15 U. S. App. 118; Oullahan v. Sweeney, 79 Cal. 537, 12 Am. St. Rep. 172; Gage v. Stewart, 127 Ill. 207, 11 Am. St. Rep. 116; Herrick v. Niesz, 16 Wash. 74; State v. Hundhausen, 24 Wis. 196; Curtis v. Morrow, 24 Wis. 664. See also the title TAX TITLES.

4. **State Insolvent Laws.** — Sturges v. Crowninshield, 4 Wheat. (U. S.) 132; M'Millan v. M'Neill, 4 Wheat. (U. S.) 209; Farmers', etc., Bank v. Smith, 6 Wheat. (U. S.) 131; Ogden v. Saunders, 12 Wheat. (U. S.) 213; Hempstead v. Reed, 6 Conn. 480; Betts v. Bagley, 12 Pick. (Mass.) 572; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Mather v. Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; Matter of Wendell, 19 Johns. (N. Y.) 153; Conway v. Seamons, 55 Vt. 8, 45 Am. Rep. 579.

**A Discharge under a Law Subsequent to the Debt** will be valid if when the debt was contracted a discharge was authorized under a law then in force and the subsequent law is in legal effect a mere continuance of the prior law and does not release the debtor on terms less favorable to the creditor. Hundley v. Chaney, 65 Cal. 363; Pomeroy v. Gregory, 66 Cal. 574; Porter v. Imus, 79 Cal. 183; Bryar v. Willcocks, 3 Cow. (N. Y.) 159; Mather v. Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; Matter of Wendell, 19 Johns. (N. Y.) 153. In this last case it was held that a discharge under a law authorizing it, on the consent of two-thirds of the creditors, was not valid when the law in force at the

time when the debt was contracted required the consent of three-fourths of the creditors.

**For a Full Treatment of this topic see the title INSOLVENCY AND BANKRUPTCY.**

5. **Recording Laws.** — Vance v. Vance, 108 U. S. 514; Louisiana v. New Orleans, 102 U. S. 203. See the title RECORDING ACTS.

6. Ewell v. Daggs, 108 U. S. 143.

"A party has no vested right in a defense based upon an informality not affecting his substantial equities." Cooley's Const. Lim. (6th ed.) 454. See also the title STATUTES.

**Insurance Contract — Validation of Contract as Written by Repeal of Statute Preventing Enforcement of Some of the Provisions of the Contract.** — The *New York* law of 1877 provided in substance that no policy of life insurance should become lapsed and void for the nonpayment of a premium merely, but a notice of nonpayment was required to be given before the contract of insurance could be canceled. This law was repealed after the contract of insurance in suit was made. The contract, though written while the law of 1877 was in force, provided that the policy should lapse for the nonpayment of a premium. This stipulation for a forfeiture was simply unenforceable in the face of the statute, but it was held that the obligation of the insurance contract was not impaired by this repeal, which in effect merely validated the actual contract made by the parties. "Hence the repeal of the statute only operated to restore the stipulations of the agreement as made between the parties themselves." *Rosenplaenter v. Provident Sav. L. Assur. Soc.*, 91 Fed. Rep. 728.

7. **Limitation of Actions.** — Mitchell v. Clark, 110 U. S. 633; Koshkonong v. Burton, 104 U. S. 668; Terry v. Anderson, 95 U. S. 628; Sohn v. Waterson, 17 Wall. (U. S.) 596; Gilfillan v. Union Canal Co., 109 U. S. 401; Kennetec Purchase v. Laboree, 2 Me. 275, 11 Am. Dec. 79; Call v. Hagger, 8 Mass. 423. See the title LIMITATION OF ACTIONS.

purpose of such imprisonment is twofold — to compel the debtor to use his property to pay the debt, and to punish him for his default. If the debtor's property may be reached by other process, the creditor cannot complain, and he has no right to insist upon the debtor's punishment.<sup>1</sup>

**14. Impairment a Federal Question.** — Whether the obligation of a contract has or has not been impaired is a federal question. The ruling of the state courts on this question will not conclude the courts of the United States.<sup>2</sup>

**15. Who May Complain of Impairment.** — No one may complain of a law impairing the obligation unless he has an interest in the contract the obligation of which is said to be impaired.<sup>3</sup>

**IMPANEL.** (See also the title JURY AND JURY TRIAL.) — To impanel means to write or enter, as the names of a jury in a list, or upon a piece of parchment called a panel,<sup>4</sup> which in English practice is an oblong piece of parchment annexed by the sheriff to a writ of venire, and returned with it. In American practice the term is applied not only to the general list of jurors returned by the sheriff, but sometimes also to the list of jurors drawn by the clerk for the trial of a particular cause.<sup>5</sup>

**IMPARLANCE.** (See also ENCYC. OF PL. AND PR., title TIME TO PLEAD.) — An indulgence formerly granted to a defendant to defer pleading to the action until a subsequent term. It is said that the reason of allowing an

**1. Imprisonment for Debt.** — Penniman's Case, 103 U. S. 714; Mason v. Haile, 12 Wheat. (U. S.) 370; Beers v. Haughton, 9 Pet. (U. S.) 329; Fisher v. Lacky, 6 Blackf. (Ind.) 373; Oriental Bank v. Freese, 18 Me. 109, 36 Am. Dec. 701; Bronson v. Newberry, 2 Dougl. (Mich.) 38; Donnelly v. Corbett, 7 N. Y. 500. See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

**2.** See *supra*, this title, *What Are Contracts in the Constitutional Sense — Contract or No Contract a Federal Question.*

**3. Who May Complain.** — Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; Williams v. Eggleston, 170 U. S. 304; New Orleans Nav. Co. v. New Orleans, 12 La. Ann. 364; Moore v. New Orleans, 32 La. Ann. 726; People v. Brooklyn, etc., R. Co., 89 N. Y. 75.

**Acquiescence** in an act may prevent complaint that the act impairs the obligation of a contract. State v. Montgomery Light Co., 102 Ala. 594.

**4. Impanel.** — Co. Litt. 158b; State v. Potter, 18 Conn. 175; Rich v. State, 1 Tex. App. 210.

**5. Burrill's L. Dict.**

**Impaneled.** — A jury may be said to be impaneled when the names of the jurors are entered by the sheriff in his return of jurors summoned. State v. Pritchard, 15 Nev. 88.

A statute provided that the defendant should not file a motion to set aside an indictment on the ground that the grand jury was not impaneled and sworn as prescribed by law. The court said: "With us, and as used in this connection, the word *impaneled* means the final formation, by the court, of the jury. It is the act that precedes the swearing of the jury, and which ascertains who are to be sworn." State v. Ostrander, 18 Iowa 446.

**Drawing, Selecting, Swearing.** — In Zapf v. State, 11 Fla. 210, it was said: "*Impanelling* has nothing to do with drawing, selecting, or swearing jurors, but means simply making the list of those who have been selected." Citing Black's L. Dict.; Porter v. People, (Supm. Ct. Gen. T.) 7 How. Pr. (N. Y.) 441; 6

AM. AND ENG. ENCYC. OF LAW (1st ed.) 635; State v. Potter, 18 Conn. 175. And in that case it was held that where the record showed that the jury was *impaneled*, and nothing more, it was defective in not showing that it was sworn. To the same effect see Rich v. State, 1 Tex. App. 210; Lyman v. People, 7 Ill. App. 345.

In State v. Potter, 18 Conn. 175, the court held that it was not true that the jury is not *impaneled* until it is sworn. See also State v. Pritchard, 15 Nev. 88.

A statute of New York required a county judge, upon traverse being made in a cause, to issue a precept to the sheriff or constable, commanding him to summon twelve qualified jurors to come before him at a time and place therein to be specified, "to try the same traverse." It further provided that the jurors should "be summoned, returned, and impaneled in the same manner as provided by law in civil actions before justices of the peace, and shall be sworn by such judge," etc. By the statute here referred to it was enacted that a justice should draw six jurors from those summoned by the constable and swear them as the jury to try the cause for which they were summoned. In a case arising under the statute first quoted it was contended that *impanelling* "in the same manner as provided by law in civil actions before justices of the peace" meant drawing six from the list returned to constitute the jury to try the traverse. This the court refused to allow, saying: "The act of *impanelling* has nothing to do with that of drawing, selecting, or swearing those who are to serve as jurors, but simply making the list of those who have been selected." Porter v. People, (Supm. Ct. Gen. T.) 7 How. Pr. (N. Y.) 441.

But in Brewer v. Jacobs, 22 Fed. Rep. 242, it was said. "So, strictly speaking, and at common law, a jury is *impaneled* only when they have been elected and are ready to be sworn, though the more modern use of the



imparlance was to give to the plaintiff an opportunity of settling the matter amicably with the defendant without further prosecuting his suit; and the court is in the habit, in a proper case, of allowing to the parties time to consider about a compromise of the action.<sup>1</sup> In the sense of time to plead, imparlances have not been recognized in American practice; time, when necessary, being usually obtained in another way.

**IMPARTIAL.** (See also the title JURY AND JURY TRIAL.)—Impartial signifies not partial, not favoring one party more than another; unprejudiced; disinterested; equitable; just; reasonable.<sup>2</sup>

**IMPEACH.** (See also the title IMPEACHMENT, *post*; and see 10 ENCYC. OF PL. AND PR. 279, title IMPEACHMENT AND CORROBORATION OF WITNESSES.)—To impeach, as applied to a person, is to accuse, to blame, to censure. It includes the imputation of wrong doing. To impeach his official report or conduct is to show that it was occasioned by some partiality, bias, prejudice, inattention to or unfaithfulness in the discharge of that duty; or that it was based upon such error that the existence of such influences may be justly inferred from the extraordinary character or grossness of that error.<sup>3</sup>

term often indicates the jury as sworn in a particular case." *Quoted in Clough v. U. S.*, 55 Fed. Rep. 928.

1. Stephen on Pleading (Tyler's ed.) 104. By the statute 2 Wm. IV., c. 39, *imparlances* as such were abolished.

2. **Impartial.**—Webster's Dict., *followed in Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 498. See also *Eason v. State*, 6 Baxt. (Tenn.) 469.

**Impartial Juror.** (See also the title JURY AND JURY TRIAL.)—In *Smith v. Eames*, 4 Ill. 82, it was said: "What is meant by an *impartial* jury? Evidently one that shall be as free from impressions unfavorable to the party's rights, as from malice or ill will towards his person. I cannot regard him as an *impartial* juror who has formed and expressed his opinion upon those rights, although he should have done so upon such light testimony as rumor, unless he will, at the time, disavow a belief in the truth of that rumor."

In *Coughlin v. People*, 144 Ill. 163, it was said: "In the legal and constitutional history of England the term '*impartial* jury' has received a fixed and definite meaning, and the term having been borrowed from the common law as it had existed there for ages, it must be deemed to have been adopted in view of the recognized and well-understood meaning which had thus been fixed upon it. *Eason v. State*, 6 Baxt. (Tenn.) 466. The Constitution must be construed as guaranteeing to every defendant in a criminal prosecution a trial by an '*impartial* jury' as that term was understood at common law." See also *Spies v. People*, 122 Ill. 1.

**Impartiality** means freedom from bias, prejudice, passion, or interest. *Bales v. State*, 63 Ala. 35.

**Faithfully.**—An official bond stipulating "for the faithful performance" of the duties of an officer does not, in legal effect, differ from one stipulating that the incumbent shall "well and truly, faithfully, firmly, and *impartially* execute and perform the duties of his said office during his continuance therein." The words "well," "truly," "firmly," and *impartially* are simply redundant, and are comprised in their legal signification in the

word "faithfully." *Hoboken v. Evans*, 31 N. J. L. 342.

But in *Den v. Thompson*, 16 N. J. L. 72, where the statute required that commissioners to take depositions in a foreign state must be sworn "faithfully, fairly, and *impartially*" to execute their commission, an oath "faithfully" to execute, etc., omitting the other terms, was held insufficient.

In *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 498, the trial court charged the jury as follows: "Now probable cause is the existence of such facts and circumstances as would excite in a reasonable mind a belief of the guilt of the person charged, of the offense with which he is charged." This charge was complained of on the ground that it omitted the word *impartial* in connection with the word "reasonable." The court refused to sustain this contention, holding that the words in this sense were practically synonymous. See also *Stone v. Stevens*, 12 Conn. 219.

**Independent in the Sense of Impartial.**—*Neal v. Black*, 177 Pa. St. 83.

3. *Bryant v. Glidden*, 36 Me. 36. This case was upon a statute providing for the *impeachment* of the report of county commissioners under certain circumstances.

**To Impeach a Witness.** (See also the title WITNESSES.)—"The word *impeach* [as applied to witnesses] is capable of two significations: one is the charge or accusation of want of veracity, the other is the establishment of the charge. The last sense is shown in the common phrases 'attempt to impeach' or a 'failure to *impeach*,' which imply that, though the charge has been made, it has not reached a result." *White v. McLean*, 47 How. Pr. (N. Y.) 193.

In *Baker v. Robinson*, 49 Ill. 299, the plaintiff requested the court to charge the jury that if any of the defendant's witnesses had been successfully *impeached*, the jury was at liberty to disregard their testimony unless corroborated by other testimony. It was held that, although there was great conflict of evidence, there was no evidence in the case upon which to base this instruction, conflict of evidence not being what is called *impeaching* evidence.



# IMPEACHMENT.

BY WALTER CARRINGTON.

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## CROSS-REFERENCES.

*See also the title CONSTITUTIONAL LAW, vol. 6, p. 882, and references there given.*

**I. DEFINITION.** — In *England* impeachment is the prosecution of a peer or commoner by the House of Commons at the bar of the House of Lords, for treason, high crimes, or misdemeanors.<sup>1</sup> Under the Constitution of the *United States* and under many of the state constitutions, impeachment is a written accusation by the House of Representatives of the *United States* or of a state, to the Senate of the *United States* or of the state, against an officer.<sup>2</sup> But under some of the state constitutions, impeachments are not

1. Definition of Impeachment in England. — 6 Encyc. of Laws of Eng. 318.

In England Articles of Impeachment are a kind of bill of indictment found by the Commons and tried by the Lords. 4 Black. Com. 260; Story on the Constitution, § 683; Bouv. L. Dict.

2. Definition of Impeachment in the United States. — Bouv. L. Dict.; Black's L. Dict.; Matter of Marks, 45 Cal. 199; Matter of Exec-

utive Communication, 12 Fla. 653; State v. Hillyer, 2 Kan. 17; Opinion of Justices, 167 Mass. 599; State v. O'Driscoll, 3 Brev. (S. Car.) 526. And see the constitutions of the several states.

To constitute an Impeachment there must be not merely the adoption by the House of a resolution declaring that a party be impeached, but the articles of impeachment must be presented to and received by a constitu-

brought by the House of Representatives, and under some they are not tried by the Senate.<sup>1</sup>

**II. HISTORY.** — In *England* the earliest recorded instance of impeachment was about the close of the reign of Edward III.<sup>2</sup> It was frequently resorted to during the next four reigns, but between 1449 and 1620 there were no impeachments.<sup>3</sup> There was a revival of the practice during the reign of James I., and from this time until the final overthrow of the Stuart dynasty impeachments were of frequent occurrence. During this period the process was often adopted as an instrument of faction, and it was through its use that Parliament finally triumphed over the executive, and parliamentary government with ministers responsible to the Commons for executive acts was formed. During the eighteenth century there were only twelve cases of impeachment, and in this century only one case has occurred.<sup>4</sup>

In the *United States* impeachment in a modified form was incorporated into the Federal Constitution and into the constitutions of most of the states.

**III. OBJECT, NATURE, AND CHARACTERISTICS** — 1. **In General.** — The object of impeachment, both in *England* and in the *United States*, is to reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence or from the imperfect organization and powers of those tribunals.<sup>5</sup> It is in the nature of an indictment by a grand jury,<sup>6</sup> and it has been said that like an indictment it is a method of procedure in criminal cases, and nothing more;<sup>7</sup> that the trial differs not in essentials from criminal prosecutions before inferior courts, and that the principles of the common law, so far as the jurisdiction is to be exercised, are of primary obligation and government.<sup>8</sup> On the other hand, it is contended that while in *England* impeachment may to some extent be regarded as a mode of trial designed, *inter alia*, to punish crimes, it is not entirely so, since a judgment on an impeachment is no answer to an indictment in the King's Bench, and that in the *United States* the process is not a mode of procedure for the punishment of crimes, but is only designed to remove unfit persons from office.<sup>9</sup>

2. **Distinguished from Other Proceedings** — **Bills of Attainder and of Pains and Penalties.** — Impeachments should be distinguished from bills of attainder and of pains and penalties. The former are purely judicial proceedings, while the latter are legislative acts and are in violation of true constitutional government, as they confound legislative with judicial power.<sup>10</sup>

tional quorum of the Senate. Matter of Executive Communication, 12 Fla. 653.

1. See *infra*, this title, *By Whom Brought and by Whom Tried*.

2. **History of Impeachment in England.** — Pike's Const. Hist. House of Lords 205; Crabb's Hist. Eng. Law 263.

3. The institution had fallen into disuse, partly from the loss of that control which the Commons had obtained under Richard II. and the Lancastrian kings, and partly from the preference which the Tudor princes had given to bills of attainder or of pains and penalties, when they wished to turn the arm of Parliament against an obnoxious subject. 1 Hallam's Const. Hist. 357.

4. May on Parliament 49; Ingersoll's Speech on Blount's Trial, Whart. St. Tr. 285; Prof. Dwight in 6 Am. L. Reg. N. S. 263.

5. Story on the Constitution, § 688; 2 Wooddeson's Lect. 611; State v. Buckley, 54 Ala. 599. See also article by Prof. Dwight, 6 Am. L. Reg. N. S. 263.

6. *Per Finch*, in 6 How. St. Tr. 354; State v. Leese, 37 Neb. 94, 40 Am. St. Rep. 474.

7. Prof. Dwight in 6 Am. L. Reg. N. S. 261; 15 How. St. Tr. 68.

8. 2 Wooddeson's Lect. 611; Story on the Constitution, §§ 688, 798; Cushing's Law and Practice of Legislative Assemblies, § 2569; State v. Buckley, 54 Ala. 599.

**Alabama.** — Trials of impeachments by the courts under the Constitution of Alabama, art. 7, are strictly judicial proceedings. They are criminal in their nature and are governed by the rules of law applicable to criminal cases. State v. Robinson, 111 Ala. 482; State v. Tally, 102 Ala. 25.

9. Judge Lawrence, in 6 Am. L. Reg. N. S. 644.

"Impeachment [under the Constitution of the United States] is a proceeding purely of a political nature. It is not so much designed to punish the offender as to secure the state. It touches neither his person nor his property, but simply divests him of his political capacity." Bayard's Speech on Blount's Trial, Whart. St. Tr. 263.

10. **Distinguished from Bills of Attainder and of Pains and Penalties.** — Prof. Dwight in 6 Am. L. Reg. N. S. 261.

**Trials Before the "Court of the Lord High Steward."** — It is also important to distinguish an impeachment from a trial before the "Court of the Lord High Steward," especially as the president of the court of impeachment in case of the trial of a peer is called the "lord high steward."<sup>1</sup>

**3. No Constitutional Right to Trial by Jury.** — The provision of Magna Charta that no freeman shall be deprived of his life, liberty, or property, except by the judgment of his peers and the law of the land, applies only to criminal proceedings in ordinary courts of justice, and has nothing to do with, and does not affect, the process of impeachment.<sup>2</sup> The Constitution of the United States, following the same idea, provides that the trial of all crimes except in cases of impeachment shall be by jury.<sup>3</sup>

**IV. BY WHOM BROUGHT AND BY WHOM TRIED** — **1. In England** — By Whom Brought. — In England impeachment is usually brought by the House of Commons,<sup>4</sup> but a peer, or the attorney-general, at the suit of the sovereign, may prefer articles of impeachment.<sup>5</sup>

By Whom Tried. — The House of Lords alone has jurisdiction to try impeachments.<sup>6</sup> The peers are judges of law as well as of fact.<sup>7</sup> On the trial of a misdemeanor the lords spiritual as well as the lords temporal are entitled to vote on the verdict, but in capital cases the lords temporal only are judges.<sup>8</sup>

The High Steward. — When a peer is tried it is usual for the sovereign to appoint a peer to preside. This officer is known as the high steward. But the appointment of a high steward is not essential to the existence of the court of impeachment, and the trial may be had though such officer be not appointed.<sup>9</sup>

**2. In the United States.** — Under the Constitution of the United States the House of Representatives has the sole power of impeachment and the Senate the sole power to try impeachments.<sup>10</sup> Most of the states have adopted constitutional provisions upon this subject substantially similar to those contained

1. See *infra*, this title, *By Whom Brought and by Whom Tried — In England*.

It is therefore easy to confound cases in the two courts. The "Court of the Lord High Steward" is a court organized for the purpose of trying a peer who has been indicted by the grand jury of a county. The king commissions a particular peer to act as judge (lord high steward), and names other peers, not less than twelve in number, to act as jurors. It is substantially a court of commission of oyer and terminer, and differs from a court of impeachment not only in the fact that it only tries an indictment found by a grand jury in a county, but also in the further facts that it may be held during a recess of Parliament and that it may, at common law, consist of a number less than the whole House of Peers. 4 Hatsell's Prec. 278; Foster's Crown Law 142; Prof. Dwight in 6 Am. L. Reg. N. S. 262; Morley's Case, 7 St. Tr. 422.

2. **Constitutional Right to Trial by Jury Not Applicable to Impeachment.** — 2 Hallam's Const. Hist. 445.

3. Const. U. S., art. 3, § 2, cl. 3; Prof. Dwight in 6 Am. L. Reg. N. S. 259.

In Alabama impeachment is a criminal prosecution, but not one in which the accused has a constitutional right to a jury trial. *State v. Buckley*, 54 Ala. 599.

4. **Impeachment Usually Brought by House of Commons.** — Black's L. Dict.; Story on the Constitution, § 688; 4 Black. Com. 260; Bouv. L. Dict.

5. **Peer or Attorney-General May Impeach.** — Com. Dig., tit. Parliament, L 19; *State v. Hillyer*, 2 Kan. 21.

6. **House of Lords Alone Can Try Impeachments.** — Story on the Constitution, § 688; 4 Black. Com. 260; Black's L. Dict.; Bouv. L. Dict.; Prof. Dwight in 6 Am. L. Reg. N. S. 261; Flood's Case, 2 How. St. Tr. 1156.

7. **Peers Judges of Law as Well as of Fact.** — Com. Dig., tit. Parliament, L 16.

8. **In Capital Cases Lords Temporal Only Are Judges.** — Com. Dig., tit. Parliament, L 41.

The lords spiritual usually absent themselves from the House when a capital offense is tried, but their absence from the House is not necessary. Com. Dig., tit. Parliament, L 41.

9. **Functions of High Steward — Appointment Not Essential to Existence of Court.** — Com. Dig., tit. Parliament, L 16; Foster's Crown Law, 143, 145, 147.

10. Const. U. S., art. 1, § 2, cl. 5; art. 1, § 3, cl. 6.

**When President Is Tried, Chief Justice Presides.** — For the trial of an impeachment of the President, the court must be constituted of the members of the Senate, with the chief justice presiding. Const. U. S., art. 1, § 3, cl. 6; Letter of Chief Justice Chase to the Senate on the trial of President Johnson, Johnson's Trial, 2 Am. L. Rev. 556.

**The Chief Justice Is Not Entitled to a Vote,** except in case of a tie. Johnson's Trial, 2 Am. L. Rev. 548, 748.



in the Federal Constitution.<sup>1</sup> The Senate, when organized for the trial of an impeachment, is a court of exclusive, original, and final jurisdiction; its judgment cannot be reversed by any other tribunal;<sup>2</sup> and it seems doubtful whether the Senate itself can reverse its judgment once pronounced.<sup>3</sup>

The Constitutions of a Few of the States contain somewhat peculiar provisions relative to the institution or trial of impeachments.<sup>4</sup>

**V. WHAT PERSONS LIABLE TO IMPEACHMENT** — 1. In England. — In England all subjects of the realm, whether in or out of office, are liable to impeachment,<sup>5</sup> but the proceeding has been most frequently resorted to for the prosecution of high officers of government for abuse of the trust reposed in them.<sup>6</sup>

2. In the United States — None but Public Officers Liable. — Under the Constitution of the United States and under the several state constitutions none but public officers are liable to impeachment.<sup>7</sup>

1. Impeachment under State Constitutions. — Matter of Marks, 45 Cal. 199; State v. Hillyer, 2 Kan. 17; Opinion of Justices, 167 Mass. 599; State v. O'Driscoll, 3 Brev. (S. Car.) 526. And see the constitutions of the several states.

In South Carolina a concurrence of two-thirds of the house of representatives is necessary to an impeachment. State v. O'Driscoll, 3 Brev. (S. Car.) 526.

A Member of the House Voting for the Prosecution of an Impeachment is not thereby rendered disqualified, if subsequently elected to the Senate, from sitting on the trial thereof. Addison's Trial (Pa.) 21-8; Porter's Trial (Pa.) 53.

2. The Senate a Court of Exclusive, Original, and Final Jurisdiction. — Prof. Dwight in 6 Am. L. Reg. N. S. 258; Letter of Chief Justice Chase to the Senate, Johnson's Trial, 2 Am. L. Rev. 556.

Under the Constitution of Florida, which declares (art. 3, § 29) that "all impeachments shall be tried by the Senate," the Senate has the sole and exclusive jurisdiction to try all impeachments, and the Supreme Court has no jurisdiction to decide questions arising in the course of the trial of an impeachment or while an impeachment is pending, and no appellate power to reverse the judgment of the Senate. Matter of Executive Communication, 14 Fla. 289.

In South Carolina it was held that the Constitutional Court could not review or rectify the proceedings and judgment of the Senate in cases of impeachment. State v. O'Driscoll, 3 Brev. (S. Car.) 526.

3. See the article by Prof. Dwight, 6 Am. L. Reg. N. S. 258.

4. Alabama. — See Const. 1875, art. 7, §§ 1-3. It was held that after the adoption of this constitution, impeachment, save as therein provided for, ceased to be a part of the jurisprudence of the state. State v. Buckley, 54 Ala. 599; State v. Seawell, 64 Ala. 225.

In this state, in cases where the Supreme Court has original jurisdiction to try impeachments, and in cases where the County Courts have original jurisdiction to try them, the attorney-general in the former, and the solicitor of the circuit in the latter case, are required (Code 1896, § 4887) to institute the impeachment proceedings when the court shall so order, or when the governor shall in writing direct the same, or when it appears from the report of the grand jury that an officer ought to be removed from office for any cause men-

tioned in section 4864 of the code. Whether such proceedings shall be instituted is not rested on the discretion of the prosecuting officer; authorization in one of the statutory modes is essential to uphold the proceedings. State v. Savage, 89 Ala. 1; State v. Seawell, 64 Ala. 225.

And by section 4868 of the Code of 1896 it is essential to the authority of the prosecuting officer, when instituting proceedings upon the report of a grand jury, that the report shall set forth the facts constituting the misconduct with which the defendant is charged. State v. Savage, 89 Ala. 1; State v. Seawell, 64 Ala. 225.

But when the official misconduct charged is a fact in itself, and not a conclusion of law from facts, the report conforms to the statutory requirement if it describes the offense in the words of the statute by which such act is declared a cause of impeachment. State v. Savage, 89 Ala. 1.

Under the Constitution of Nebraska, art. 3, § 14, the Senate and House of Representatives in joint convention have the sole power of impeachment, and the power to try impeachments is in the Supreme Court, except in the case of the impeachment of a justice of the Supreme Court, which is required to be tried by the District Court. State v. Hastings, 37 Neb. 96; State v. Leese, 37 Neb. 92, 40 Am. St. Rep. 474.

Under the Constitution of New York, art. 6, § 13, the court for the trial of impeachments is composed of the president of the Senate (who is the lieutenant-governor), the senators, or the major part of them, and the judges of the Court of Appeals, or the major part of them.

The lieutenant-governor, acting as president of the Senate, has a right to vote upon every question before the court. Utica Bank v. Wagar, 8 Cow. (N. Y.) 398; Anonymous, 8 Cow. (N. Y.) 761; Lieutenant-Governor's Case, 2 Wend. (N. Y.) 213.

But on the trial of an impeachment against the governor or lieutenant-governor, the lieutenant-governor cannot act as a member of the court. Const. N. Y., art. 6, § 13.

5. In England All Subjects of the Realm Liable to Impeachment. — 2 Wooddeson's Lectures 602; May's Parl. Pr., c. 23; Bouv. L. Dict. See State v. Hill, 37 Neb. 84, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 953.

6. Story on the Constitution, § 790.

7. In the United States None But Public Officers Liable. — Story on the Constitution, § 790. See

**Under the Federal Constitution Only Civil Officers Liable.** — Under the Federal Constitution only the President, Vice-President, and civil officers of the United States are liable to impeachment.<sup>1</sup>

Some of the State Constitutions Resemble the Federal Constitution in this respect, and subject none but civil officers of the state to impeachment.<sup>2</sup>

**Who Are Civil Officers.** — It has been held that a senator is not a civil officer of the United States within the meaning of the Federal Constitution.<sup>3</sup> While the reasoning by which this construction was given to the Constitution does not appear, it was probably held that by "civil officers of the United States" were meant such officers as derived their appointment from and under the national government, and not those persons who, though members of the government, derived their appointment from the states or the people of the states.<sup>4</sup> This definition will, of course, exclude members of both houses of Congress.<sup>5</sup>

**"State Officers."** — The constitutions of a number of the states provide that "state officers" shall be subject to impeachment.<sup>6</sup> County and municipal officers are not state officers,<sup>7</sup> nor, it would seem, is a trustee of a state college,<sup>8</sup> or a member of a board created for the purpose of erecting a state capitol building;<sup>9</sup> and it has been held that the speaker of the House of Representatives of a state is not a state officer.<sup>10</sup>

**Whether Persons Who Have Ceased to Be Officers Are Liable to Impeachment.** — The question whether, under the Constitution of the United States, a person who has been a civil officer of the United States is amenable to impeachment after he has ceased to hold office, for acts done while in office, seems still to be unsettled.<sup>11</sup> In *Nebraska*, under a constitutional provision substantially

*State v. Hill*, 37 Neb. 84, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 953.

1. **Liability to Impeachment under Federal Constitution.** — Story on the Constitution; Blount's Trial, Whart. St. Tr. 200.

2. **Under the Constitution and Statutes of Nebraska** all civil officers of the state, but no other persons, are liable to impeachment. *State v. Hill*, 37 Neb. 80; *State v. Leese*, 37 Neb. 92, 40 Am. St. Rep. 474.

**Under the Constitution of California**, art. 4, § 18, the governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, justices of the Supreme Court, and judges of the Superior Courts are liable to impeachment for any misdemeanor in office, and all other civil officers are to be tried for misdemeanors in office in such manner as the legislature may provide. See *Matter of Marks*, 45 Cal. 199.

3. Blount's Trial, Whart. St. Tr. 200.

4. Story on the Constitution, § 793.

5. **Liability of Legislators.** — *State v. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189; 1 Kent's Com. 235, note; 1 Bishop's New Crim. Law, § 461; Story on the Constitution, §§ 793, 794, 802. See Wharton's note on Blount's Trial, Whart. St. Tr. 317.

Mr. Justice Story was of the opinion that on general principles a legislator is not liable to impeachment. Story on the Constitution, § 795. But see Bishop on Non-Contract Law, § 778, and the opinion of Shankland, J., in *People v. Draper*, 15 N. Y. 532. See also the opinion of Shaw, C. J., in *Hiss v. Bartlett*, 3 Gray (Mass.) 473, 63 Am. Dec. 768.

**The Phrase "All Civil Officers" in a State Constitution** declaring that "all civil officers shall be liable to impeachment for any misdemeanor

in office," was held to mean all public officers holding civil offices of any grade of honor, trust, or profit under the state. *State v. O'Driscoll*, 3 Brev. (S. Car.) 526.

6. **The Constitution of Indiana**, art. 6, §§ 7, 8, makes state, county, township, and town officers subject to impeachment. *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135.

**In Massachusetts Only "Officers of the Commonwealth" Are Subject to Impeachment.** — Opinion of Justices, 167 Mass. 599.

7. **County Officers Not State Officers.** — *Ex p. Wiley*, 54 Ala. 226; *Donahue v. Will County*, 100 Ill. 94.

**The Term "Officers of the Commonwealth,"** in the provision of the *Massachusetts* Constitution relating to impeachment, includes all officers elected by the people at large or provided for in the constitution for the administration of matters of general or state concern, but does not include officers of cities or towns or county commissioners; consequently a county commissioner is not liable to impeachment under the Constitution of Massachusetts. Opinion of Justices, 167 Mass. 599.

8. **Trustee of State College Not a State Officer.** — *State v. Hewitt*, 3 S. Dak. 187.

9. **Member of Board for Erecting State Capitol Building Not a State Officer.** — *State v. Smith*, 6 Wash. 496; *State v. Burke*, 8 Wash. 412.

10. **Speaker of Colorado House of Representatives.** — *In re Speakership*, 15 Colo. 520.

11. **Whether a Person May Be Impeached After He Has Ceased to Hold Office.** — William Blount, a United States senator from Tennessee, was expelled by the Senate for official misdemeanor, and was subsequently impeached by the House of Representatives for the same act. He pleaded that a senator is not a civil officer



similar to that of the Federal Constitution, it has been held that a public officer can be impeached only while in office.<sup>1</sup> In other jurisdictions the question seems never to have arisen.

**Impeachment for Offenses Committed During a Previous Term.** — An officer may be impeached for offenses committed during a previous term of the same office.<sup>2</sup>

**VI. FOR WHAT OFFENSES IMPEACHMENT MAY BE RESORTED TO — 1. In England.** — In England impeachment has been resorted to for a great variety of offenses; sometimes for crimes indictable under the common or statute law,<sup>3</sup> but more frequently for offenses of a political nature not indictable at common law nor in violation of any statute.<sup>4</sup> It is by no means easy, from these precedents, to define, with any degree of assurance, the offenses for which impeachment may be brought. It has been maintained by very respectable authority that there are cases in which the House of Lords has been impelled by faction or overawed by fear; that such cases should not be considered as authoritative precedents; that the best-considered cases,<sup>5</sup> by a decided preponderance, establish the rule that no impeachment will lie except for a breach of the common or statute law which, if committed within any county of England, would be the subject of indictment or information.<sup>6</sup> There are, unquestionably, cases which seem to sanction this rule.<sup>7</sup> On the other hand, it has been maintained by authorities of equal eminence that impeachment will lie against public officers for gross abuses or betrayals of trust, or for inexcusable neglects of duty, although no crime indictable either at common law or under any statute be committed.<sup>8</sup>

**2. In the United States.** — The Constitution of the United States provides

within the meaning of the Constitution, and also that he was not a senator when the articles of impeachment were adopted. His plea was sustained upon the first ground alone, and therefore the case is not an authority either way upon this question. Blount's Trial, Whart. St. Tr. 200.

A case more in point is that of Belknap, who was secretary of war, and was impeached after he had resigned his office. The Senate held, but by a majority of less than two-thirds, that he was, notwithstanding his resignation, amenable to impeachment, and therefore that it had jurisdiction to try the impeachment against him, and ordered that the trial proceed on its merits, notwithstanding the objection of the defense that the question of jurisdiction could not be determined against the accused by a majority of less than two-thirds. Belknap was acquitted, and twenty-five senators who voted not guilty explained that they so voted because they were of opinion that the Senate was without jurisdiction. Belknap's Trial, 3 Cent. L. J. 300, 363, 507.

**1. Rule in Nebraska.** — State v. Hill, 37 Neb. 80; State v. Leese, 37 Neb. 92, 40 Am. St. Rep. 474.

But under the Constitution and statutes of Nebraska, an officer who is impeached while in office may be tried, though after the impeachment and before trial he resigns, or his term of office expires. State v. Hill, 37 Neb. 80.

**2. Officers May Be Impeached for Offenses Committed During a Previous Term.** — Trials of Judge Barnard of New York, Judge Hubbell of Wisconsin, and Governor Butler of Nebraska, cited in State v. Hill, 37 Neb. 89.

**3. Impeachment for Indictable Offenses.** — Thus Lord Bacon was impeached for bribery, Com. Dig., tit. Parliament, L 37; and high treason has been a frequent cause for impeachment,

Com. Dig., tit. Parliament, L 28; 6 How. St. Tr. 346; 12 How. St. Tr. 1213.

**Commoner May Be Impeached for Capital Offense.** — It was formerly believed that a commoner could not be impeached for any capital offense, but only for high misdemeanors. 4 Black. Com. 259; Fitzharris's Case, 13 L. J. 755; 8 St. Tr. 231. But it is now well settled that a commoner may be impeached for high treason, and it would seem for any other capital offense. May's Parl. Prac., c. 23; 4 Hatsell 428, 14 L. J. 260; 2 Hallam's Const. Hist. 445.

**4.** See Com. Dig., tit. Parliament, L 30-39.

The Duke of Richmond was impeached for proposing an adjournment of the House of Lords. Richmond's Trial, 4 How. St. Tr. 120.

In several cases judges have been impeached for having given extra-judicial opinions and misinterpreting the law. 4 Hatsell 76.

Dr. Sacheverell was impeached for preaching an improper sermon. Harper's Speech. Blount's Trial, Whart. St. Tr. 301.

**5.** "It were better to examine this matter according to the rules and foundations of this House than to rest upon scattered instances." Selden in Ratcliffe's Trial, 4 How. St. Tr. 47.

**6. Doctrine that Impeachment Will Lie Only for Indictable Offenses.** — Prof. Dwight in 6 Am. L. Reg. N. S. 263 *et seq.* See also Cushing's Law and Practice of Legislative Assemblies, § 2569.

**7.** 6 How. St. Tr. 346; 12 How. St. Tr. 1213; Jones's Case, 4 Hatsell's Prec. 132; Macclesfield's Case, 16 How. St. Tr. 823, 4 Campbell's Lord Chan. 536; Melville's Case, 29 How. St. Tr. 1470; Clarendon's Case, 4 Hatsell's Prec. 153. See also the opinion in Danby's Case, 4 Hatsell's Prec. 180.

**8. Doctrine that Impeachment Will Lie for Political Offenses that Are Not Indictable.** — Cooley on Const. Law 159; article by Judge Lawrence, 6 Am. L. Reg. N. S. 641; Opinion of the Court



that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.<sup>1</sup> If impeachment in England be regarded merely as a mode of trial for the punishment of common-law or statutory crimes,<sup>2</sup> and if the Constitution has adopted it only as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law, then, as it is well settled that in regard to the national government there are no common-law crimes,<sup>3</sup> it would seem necessarily to follow that impeachment can be instituted only for crimes specifically named in the Constitution or for offenses declared to be crimes by federal statute. This view has been maintained by very eminent authority.<sup>4</sup> But the cases of impeachment that have been brought under the Constitution would seem to give to the remedy a much wider scope than the above rule would indicate. In each of the only two cases of impeachment tried by the Senate in which a conviction resulted, the defendant was found guilty of offenses not indictable either at common law or under any federal statute;<sup>5</sup> and in almost every case brought, offenses were charged in the articles of impeachment which were not indictable under any federal statute, and in several cases they were such as constituted neither a statutory nor a common-law crime.<sup>6</sup> The impeachability of the offenses charged in the articles was, in most of the cases, not denied.<sup>7</sup> In one case, however, counsel for the defendant insisted that impeachment would not lie for any but an indictable offense, but after exhaustive argument on both sides this defense was practically abandoned.<sup>8</sup> The cases, then, seem to establish that impeachment is not a

in *Matter of Marks*, 45 Cal. 217; 2 Wooddeson's Lect. 596, 602.

1. Const. U. S., art. 2, § 4.

2. See *supra*, this title, *Object, Nature, and Characteristics*; and *supra*, this section, *In England*.

3. **No Common-law Crimes Against the United States.**—See the title *COMMON LAW*, vol. 6, p. 289.

4. **Doctrine that Impeachment Lies Only for Statutory Crimes.**—See the able article by Prof. Dwight in 6 Am. L. Reg. N. S. 257.

Two of the ablest of the early commentators on the Constitution, Justice Story and Mr. Rawle, asserted that under it impeachment would lie for any common-law crime, but rested their opinion on the ground that common-law crimes existed under the general government and were subject to indictment and trial in the federal courts. Both admitted that if there was no federal jurisdiction over common-law crimes, impeachment would not lie except for offenses declared to be crimes by the Constitution or by statute. Story on the Constitution, §§ 798, 799; Rawle on the Constitution, 273.

5. **Impeachment and Conviction for Offenses Not Indictable.**—See *Trial of Judge Pickens*, Annals of Congress; 2 Hildreth's Hist. 518. See the comments on this case by Buchanan in Peck's Trial, at p. 428, and of Nicholson and Harper in 2 Chase's Trial 255, 341, 400.

Among the charges preferred at the impeachment of West W. Humphreys, also a United States district judge, were those of advocating secession and neglecting and refusing to hold the District Court of the United States. He was convicted on both charges. Congressional Globe, vols. 47, 48, 49, 37th Congress, 2d Session.

6. **Articles Charging Offenses Not Indictable.**—See Blount's Trial, Whart. St. Tr. 200.

Samuel Chase, an associate justice of the Supreme Court of the United States, was impeached for improper and arbitrary conduct in the trial of cases, but he was not charged with any indictable offense. Chase's Trial, by Smith and Lloyd.

James H. Peck, a United States district judge, was impeached for wrongfully imprisoning and suspending from practice an attorney of his court, for an alleged contempt. Peck's Trial, by Stansbury.

See articles of impeachment against President Johnson, 2 Am. L. Rev. 551.

7. **Impeachability of Offenses Charged Not Denied.**—In Blount's Case, Whart. St. Tr. 200, it was held that Blount was not a civil officer of the United States, and therefore was not subject to impeachment, but no objection was made to the articles of impeachment on the ground that the offenses charged therein were not impeachable.

In Peck's Case it was admitted that the defendant would be liable to impeachment under a state of facts that would not render him liable to indictment. Peck's Trial, by Stansbury.

At the trial of President Johnson the defense was rested mainly on a denial of the truth of the allegations contained in the articles of impeachment, and on the contention that the President had not been guilty of any breach of official trust or duty, but had acted entirely within his right as the chief executive officer and the commander in chief of the army. Johnson's Trial, 2 Am. L. Rev. 714.

8. Chase's Trial, by Smith and Lloyd; 7 Dane's Abr. 364.

mere mode of procedure for the punishment of indictable crimes; that the phrase "high crimes and misdemeanors" is to be taken, not in its common-law, but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage;<sup>1</sup> that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruption, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of state, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Constitution by the opinions of eminent writers on constitutional and parliamentary law,<sup>2</sup> and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it.<sup>3</sup>

The Provisions of Most of the State Constitutions on this subject closely resemble that of the Federal Constitution, and the cases which have arisen under them tend strongly to sustain the rule that impeachment will lie for many offenses of a political nature for which an indictment cannot be brought.<sup>4</sup>

The Constitution of Alabama is more specific as to what offenses are impeachable than are the constitutions of most of the states.<sup>5</sup>

**VII. PROCEDURE.** — In the *United States* the mode of instituting impeachment and the method of its trial are in most respects similar to the English

1. As has been previously stated, impeachment was resorted to in *England* for a great variety of offenses which were not subject to indictment. See *supra*, this section, *In England*.

2. **Opinions of Writers on Constitutional and Parliamentary Law.** — Cooley on Constitutional Law 159; Curtis's History of the Constitution 260. See also Gelden's Judicature in Parliament 6; article by Judge Lawrence in 6 Am. L. Reg. N. S. 644.

3. **Opinions of Framers of the Constitution.** — See 4 Elliott's Debate 380. See also Debates of the Virginia Convention 353; Federalist, No. 66.

4. **In Pennsylvania**, where the cause for impeachment under the constitution is "any misdemeanor in office" (art. 6, § 3), it has been held that a presiding judge is liable to impeachment for preventing an associate judge from delivering his opinion to a grand or petit jury upon a matter before the court. Addison's Trial. It had previously been held by the Supreme Court that the offense charged in this case was not indictable (*Com. v. Addison*, 4 Dall. (Pa.) 225), and the defendant maintained that he could not be impeached for any but an indictable offense. A verdict of guilty was reached by a vote of twenty to four. See also Porter's Trial (Pa.) 61; and see the proceedings of the General Assembly in reference to the impeachment of three judges of the Supreme Court of Pennsylvania, in a note to *Respublica v. Oswald*, 1 Dall. (Pa.) 329, 1 Am. Dec. 246.

Under the Constitution of Nebraska the only impeachable offenses are misdemeanors in office and drunkenness. *State v. Hill*, 37 Neb. 80; *State v. Hastings*, 37 Neb. 96.

In Massachusetts, where the constitution (c. 1, § 2, art. 8) makes "misconduct and maladministration" in office the subject of impeachment, judges and justices of the peace have been held to be liable to impeachment not only for common-law and statutory crimes, but for

corrupt practices and wilful violations of law, not of an indictable character. Hunt's Trial, 7 Dane's Abr. 352; Prescott's Trial, by Pickering and Gardiner. See also the abstract of the other impeachment trials in Massachusetts in the appendix to Prescott's Trial.

In New York, where the constitution merely adopts impeachment without specifying the offenses for which it may be brought, Judge Barnard, a justice of the Supreme Court, was impeached for, and found guilty of, granting, contrary to law, an *ex parte* order enjoining a railroad company to close its books against the transfer of certain stocks; misconduct and corrupt conduct in granting injunction orders and appointing receivers; and indecorous and indecent remarks and conduct while on the bench. Barnard's Trial, 6 Alb. L. J., 67, 79, 130.

**Judges Impeached for Refusing to Enforce Unconstitutional Enactments.** — In the latter part of the eighteenth century, in *Rhode Island*, and early in the nineteenth century, in *Ohio*, while it was still doubted whether the courts had power to declare legislative enactments unconstitutional, judges were impeached for refusing to enforce unconstitutional enactments. Fortunately both cases resulted in an acquittal. 2 Arnold's Hist. of Rhode Island, c. 24; Opinion of Chief Justice Hitchcock on the constitutionality of county subscriptions to railroad companies, 20 Ohio, appendix, p. 3; 5 West. L. Month. 3; Cooley's Const. Lim. 193, note.

5. **The Causes for Impeachment under the Alabama Constitution**, art. 7, § 1, are "wilful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith." *State v. Seawell*, 64 Ala. 225; *State v. Savage*, 89 Ala. 1; *State v. Robinson*, 111 Ala. 482, in which case it was held that habitual drunkenness as a ground of impeachment applies alike to all public officers.



procedure in impeachment trials. It will, therefore, be sufficient to show the mode of procedure by the House of Representatives and Senate of the United States, and to indicate in the notes any variation from this in the procedure in England or in any of the states.<sup>1</sup> When a person who may be legally impeached has been guilty or is supposed to have been guilty of some impeachable offense, a resolution is generally brought forward by a member of the House of Representatives to impeach the party, or for a committee of inquiry. The resolution or report of the committee is voted upon, and if the House votes to impeach, a committee is appointed to draw up articles of impeachment, and announcement is made to the Senate by committee that the House has impeached the accused and will in due time exhibit articles of impeachment against him. The House then agrees upon and adopts articles of impeachment,<sup>2</sup> and appoints managers to prosecute the impeachment,<sup>3</sup> and the managers present the articles of impeachment to the Senate.<sup>4</sup> Before the Senate proceeds to the consideration of the articles presented, the senators are sworn to do justice according to the Constitution and laws.<sup>5</sup> When the President of the United States is impeached, the chief justice of the United States presides.<sup>6</sup> After the organization of the Senate as a court of

**1. As Has Been Shown, the Constitutions of a Few of the States provide for the trial of impeachments by the ordinary courts of law, or by the Supreme Court of the state. See *supra*, this title, *By Whom Brought and by Whom Tried — In the United States*.**

**In Nebraska** the constitutional provision (art. 3, § 14) giving to the Supreme Court the power to try impeachments has been held not to have conferred upon that court any of the political functions which the Senate exercised as a court of impeachment, under the former constitution, but to have been intended to insure a strictly judicial investigation according to judicial methods. *State v. Hastings*, 37 Neb. 96.

**2. Requisites of the Articles of Impeachment.** — The articles of impeachment need not pursue the strict forms of law. *Com. Dig.*, tit. Parliament, L 21; *Rex v. Sacheverell*, 15 How. St. Tr. 466. But there must be a sufficient statement to enable the accused to plead. *Per Finch*, 6 How. St. Tr. 354.

**Under the Code of Alabama** (1896, § 4887), which requires the attorney-general to institute proceedings before the Supreme Court to impeach certain officers "when it appears from the report of any grand jury that any such officer ought to be removed from office for any cause mentioned in" section 4864 of the code, the information presented by the attorney-general, if it refers to the report of a grand jury, and is accompanied by it, as the authorization, is *prima facie* sufficient to uphold the proceeding, without the contents of the report being specifically set forth in the information itself. *State v. Savage*, 89 Ala. 1.

**3. The Procedure in the House of Commons in the Institution of an Impeachment** is substantially similar to that in the House of Representatives. *Com. Dig.*, tit. Parliament, L 19, 20; 2 Lord Colchester's Diary 65.

**4.** In his letter to the Senate in reference to the trial of President Johnson, Chief Justice Chase contended that the organization of the Senate as a court of impeachment, under the Constitution, should precede the actual announcement of the impeachment on the part of the House, and that articles of impeach-

ment should be presented only to a court of impeachment. *Johnson's Trial*, 2 Am. L. Rev. 556.

**In England** the House of Commons is the judge of the proper time for presenting the articles of impeachment; but the House of Lords has claimed a power to limit the time. *Com. Dig.*, tit. Parliament, L 21.

**Right to Amend Articles or to Present Additional Ones.** — After the articles of impeachment have been presented to the Senate (or in England to the House of Lords), the House of Representatives (or in England the House of Commons) can adopt and present additional or amended articles or specifications. *Com. Dig.*, tit. Parliament, L 20; *State v. Lease*, 37 Neb. 94, 40 Am. St. Rep. 474.

But this right is exclusive in the House of Representatives. The committee or managers of impeachment cannot change in any material matter the specifications contained in the articles of impeachment, nor can the power to do so be delegated to them. *State v. Lease*, 37 Neb. 94, 40 Am. St. Rep. 474.

**5. The Constitution of Kansas** is silent as to when the Senate shall sit for the purpose of impeachment, and as to how the trial shall be conducted, except in declaring that the senators shall be sworn when sitting for that purpose; and it has been held that in the absence of express provision the common law will regulate, interpret, and control the powers and duties of the court of impeachment, as far as the trial and proceedings are concerned. *State v. Hillyer*, 2 Kan. 17.

**6.** See *supra*, this title, *By Whom Brought and by Whom Tried — In the United States*.

**In England** the lord chancellor or speaker of the Lords presides, except when a peer is tried, when, ordinarily, the high steward presides. 2 Lord Colchester's Diary 65; and see *supra*, this title, *By Whom Brought and by Whom Tried — In England*.

**Court Cannot Make Rules until Chief Justice Has Taken His Place.** — Upon the trial of an impeachment against the President of the United States the Senate does not become a court of impeachment, capable of making rules, until the chief justice of the Supreme Court has



impeachment, process is issued summoning the accused to appear upon a day named to answer to the articles of impeachment. On the return day of the process, the Senate having convened as a court of impeachment, the accused is called to appear and answer. If he appears in person or by attorney and files his answer, the parties are then required to form an issue, and a day is fixed for the trial. If on the return day the accused fails to appear, or appearing fails to file his answer, the Senate may proceed *ex parte*, as upon a plea of not guilty.<sup>1</sup> If a plea of guilty be entered, judgment may be entered thereon without further proceedings. At the trial counsel are admitted to appear and defend the accused.<sup>2</sup> In the conduct of the trial the practice is similar in nearly all respects to the practice in trials before the ordinary courts of law.<sup>3</sup> On the final question whether the impeachment is sustained, the yeas and nays are taken on each article of impeachment separately. If the impeachment, upon any of the articles presented, is not sustained, a judgment of acquittal is entered; but if a conviction results upon any of the articles, the Senate proceeds to pronounce judgment,<sup>4</sup> and a certified copy of such judgment is deposited in the office of the secretary of state.<sup>5</sup>

**VIII. RULES OF EVIDENCE.** — On trials of impeachments the rules of evidence are the same as prevail in criminal trials before the ordinary courts of law.<sup>6</sup> The same quantum of proof is required to warrant a conviction; hence

taken his place as presiding officer. Johnson's Trial, 2 Am. L. Rev. 549.

1. **But the Senate May Give to the Accused Additional Time** within which to file his answer. Thus, in the case of Andrew Johnson, the accused appeared by his counsel on the return day of the summons, and asked for forty days in which to prepare and file his answer. He was ordered to file his answer in ten days. Johnson's Trial, 2 Am. L. Rev. 549.

2. **In England**, also, counsel are permitted to appear for the accused, though formerly in cases of impeachment for treason or felony it was discretionary with the House of Lords whether counsel should be allowed. See statute of 20 Geo. II., c. 30; Com. Dig., tit. Parliament, L 27.

3. **How Questions of Practice and Evidence Are Decided.** — The presiding officer directs all the forms of proceeding not otherwise provided for, and such officer may rule all questions of evidence and incidental questions, which ruling will stand as the judgment of the Senate, unless some member of the Senate asks that a formal vote be taken thereon, in which case it will be submitted to the Senate for decision; or the presiding officer may, at his option, in the first instance, submit any such question to a vote of the members of the Senate. Johnson's Trial, 2 Am. L. Rev. 558, 748.

**How Motions Addressed — May Be Required to Be in Writing.** — All motions made by the parties or their counsel are addressed to the presiding officer; and if he, or any senator, require it, they must be committed to writing, and read at the secretary's table. Johnson's Trial, 2 Am. L. Rev. 559.

**The Case on Each Side Is Opened by One Person.** — Johnson's Trial, 2 Am. L. Rev. 559.

**Examination and Cross-examination of Witnesses.** — Witnesses are examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side. Johnson's Trial, 2 Am. L. Rev. 559.

**The Constitution of Alabama**, art. 1, § 7,

guarantees to the accused in all criminal prosecutions the right "to be confronted by the witnesses against him." This provision applies to impeachments, and provisions of an impeachment law requiring the taking of testimony by examiners not in the presence of the court violate this constitutional right of the accused. State v. Buckley, 54 Ala. 599.

**If a Senator Is Called as a Witness** he is sworn, and gives his testimony standing in his place. Johnson's Trial, 2 Am. L. Rev. 559.

**How Question or Motion by Senator Must Be Put.** — If a senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it must be reduced to writing and put by the presiding officer. Johnson's Trial, 2 Am. L. Rev. 559.

**The Final Argument on the Merits** may be made by two persons on each side (unless otherwise ordered by the Senate, upon application for that purpose), and the argument is opened and closed on the part of the House of Representatives. Johnson's Trial, 2 Am. L. Rev. 559.

4. **In England**, if a verdict of guilty is reached, the Lords agree upon a judgment, but they do not pronounce it until the Commons demand it. See *infra*, this title, *Requisites of Valid Verdict and Judgment*.

5. **Procedure in Institution and Trial of Impeachment.** — Chase's Trial, by Smith and Lloyd; Peck's Trial, by Stansbury; Proceedings Against Judge Humphreys, Congressional Globe, pt. 4, 3d sess. 32d Congress, 2942-2953; Johnson's Trial, 5 *et seq.*, 2 Am. L. Rev. 547, 557, 747-754; Congressional Globe, pt. 5, supplement 40th Congress, 2d session; 2 Story on the Constitution, §§ 805-810; Cushing's Law and Practice of Legislative Assemblies, §§ 2535-2570. As to the requisites of a valid verdict and judgment, see *infra*, this title, *Requisites of Valid Verdict and Judgment*.

6. **Same Rules of Evidence as in Ordinary Criminal Trials.** — 4 Hatsell's Precedents 153; Story on the Constitution, § 798; Cushing's Law and Practice of Legislative Assemblies, § 2569;

the guilt of the accused must be established beyond a reasonable doubt.<sup>1</sup>

**IX. REQUISITES OF VALID VERDICT AND JUDGMENT — 1. In England — Majority Render Verdict.** — On the trial of an impeachment by the House of Lords, a majority may render a valid verdict, provided at least twelve peers be present and concur in it.<sup>2</sup>

**Judgment Cannot Be Rendered Before Commons Demand It.** — When the impeachment is prosecuted by the Commons, judgment cannot be rendered on the verdict before the Commons demand it. If they refrain from this demand, their action is equivalent to a pardon.<sup>3</sup>

**Form of Judgment — Must Not Omit Anything Material.** — The judgment, when rendered, need not follow the form of a judgment at common law for the same offense, but it must not omit anything material.<sup>4</sup>

**2. In the United States.** — The Constitution of the United States provides in reference to impeachment that "no person shall be convicted without the concurrence of two-thirds of the members [of the Senate] present."<sup>5</sup> The question has been raised whether, under this provision, a jurisdictional question can be decided against the accused by a majority of less than two-thirds, but it has not been satisfactorily determined.<sup>6</sup>

Under the Constitutions of Some of the States, a concurrence of two-thirds of the senators elected is essential to a conviction.<sup>7</sup>

**X. EFFECT OF ADJOURNMENT OF SESSION OR TERM.** — When acting as a court of impeachment, the Senate, like any other judicial tribunal, does not die or cease to exist with the adjournment of the session or term. All cases of impeachment pending and undisposed of at the time of the adjournment remain upon its calendar or docket until the Senate sitting as a court enters an order finally disposing of each case; and the fact that there is a change in the individual membership of the Senate between sessions or terms does not destroy the court or affect its functions in any way.<sup>8</sup>

**XI. ARREST.** — In England, when a commoner is impeached for any offense, he may be arrested and delivered to the custody of the black rod, or be required to give security for his appearance at the trial.<sup>9</sup> A peer cannot be arrested except for a capital offense.<sup>10</sup> The House of Lords, if the case justifies it, may admit the prisoner to bail.<sup>11</sup>

In the United States, as has been stated, the person impeached is summoned to appear and answer the articles of impeachment, and if he does not do so the trial nevertheless proceeds *ex parte*, and judgment is rendered.<sup>12</sup> The pen-

State *v.* Buckley, 54 Ala. 599; State *v.* Hastings, 37 Neb. 96.

1. State *v.* Tally, 102 Ala. 25; State *v.* Robinson, 111 Ala. 482; State *v.* Hastings, 37 Neb. 96; Belknap's Trial, Trial of Judge Barnard.

2. In England Verdict by Majority. — Com. Dig., tit. Parliament, L 17.

3. Judgment Must Be Demanded by the Commons. — Com. Dig., tit. Parliament, L 40; Strafford's Case, 2 Commons Journal 105; Prof. Dwight, in 6 Am. L. Reg. N. S. 281; State *v.* Hillyer, 2 Kan. 17.

The House of Commons Has a Right to Be Present at the trial of an impeachment, that every member may satisfy his conscience whether he will give his vote to demand judgment. Com. Dig., tit. Parliament, L 40; Strafford's Case, 2 Commons Journal 105; State *v.* Hillyer, 2 Kan. 17.

4. Com. Dig., tit. Parliament, L 43.

5. Const. U. S., art. 1, § 3, cl. 6.

6. Decision Against Accused on Question of Jurisdiction. — See Belknap's Trial, 3 Cent. L. J. 507.

7. This is so in Kansas and in South Caro-

lina. State *v.* Hillyer, 2 Kan. 17; State *v.* O'Driscoll, 3 Brev. (S. Car.) 526.

8. Adjournment of Session or Term. — Matter of Executive Communication, 14 Fla. 289.

Under the Constitution and Laws of Kansas (Const., art. 2, § 10; Gen. Stat. 1897, c. 6, § 22), the Senate, when acting as a court of impeachment, may, with the consent of the House, adjourn to any period during their term of office not beyond the next regular meeting of the legislature, whether the House be in session or not at such time, and at such adjourned session its judicial acts as a court of impeachment will be valid and conclusive. State *v.* Hillyer, 2 Kan. 17.

9. Person Impeached May Be Arrested or Required to Give Security. — Com. Dig., tit. Parliament, L 22; 4 Hatsell's Prec. 256.

10. Peer Can Be Arrested Only for Capital Offense. — Com. Dig., tit. Parliament, L 22; 14 How. St. Tr. 240, 287; 15 How. St. Tr. 806; 15 How. St. Tr. 1170.

11. Bail. — Com. Dig., tit. Parliament, L 22; 4 How. St. Tr. 56, 82; 15 How. St. Tr. 20; Sacheverell's Case, 4 Hatsell 265.

12. See *supra*, this title, Procedure.



alty upon conviction, extending only to removal from and disqualification to hold office,<sup>1</sup> does not require the presence of the person convicted for its administration. Therefore, arrest is unnecessary, and it has not been resorted to.

**XII. SUSPENSION FROM OFFICE.** — In England the House of Commons has, upon impeaching one of its own members, suspended him during the period of the trial.<sup>2</sup> But the Commons have never attempted, upon an impeachment, to suspend from office a member of the House of Lords, or an administrative or judicial officer. They have, in cases of impeachment of officers removable at the king's pleasure, asked the Lords to concur with them in addressing the king, to remove or suspend the officer impeached,<sup>3</sup> but further than this they have never attempted to go. When a member of the House of Lords is impeached for a misdemeanor, he may continue in his place and may vote upon all matters before the House, except those relating to his own trial;<sup>4</sup> but when he is charged with a capital offense he may be arrested and imprisoned.<sup>5</sup>

In the Constitution of the United States there is no language expressly conferring the power to suspend an impeached officer before conviction, and neither the House of Representatives nor the Senate has ever attempted to exercise such power.

Under Some of the State Constitutions impeachment disqualifies an officer from performing his official duties until he shall have been acquitted.<sup>6</sup>

**XIII. PUNISHMENT.** — In England, when a person is impeached and convicted, any penalty known to the law may be inflicted upon him, even to the deprivation of life, the character and extent of the punishment being within the discretion of the House of Lords.<sup>7</sup>

In the United States, under the federal and state constitutions, judgment in cases of impeachment cannot extend further than to removal from and disqualification to hold office.<sup>8</sup>

**XIV. PARDON.** — In England, by statute,<sup>9</sup> no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament;<sup>10</sup> but an act of pardon may be pleaded.<sup>11</sup> After judgment, the crown may grant a full pardon except in capital cases. In capital cases it may remit all the parts of the judgment except the capital punishment itself.<sup>12</sup>

The Constitution of the United States provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."<sup>13</sup>

1. See *infra*, this title, *Punishment*.

2. *Suspension.* — Penn's Trial, 6 How. St. Tr. 872.

3. 4 Hatsell 129; Scroggs's Trial, 4 Hatsell 156, 8 How. St. Tr. 213.

4. Com. Dig., tit. Parliament, L 22; Twelve Bishops' Case, 4 Hatsell 151.

5. See *supra*, this title, *Arrest*.

6. Under the Constitution of Nebraska impeachment has this result. Const. 1875, art. 3, § 14. See Opinion of Judges, 3 Neb. 463.

In Florida, under the present constitution, impeachment disqualifies the governor from performing his official duties. Const. 1885, art. 4, § 19. This was also the case in this state under the former constitution. Matter of Executive Communication, 14 Fla. 289.

7. Character and Extent of Punishment in England. — Com. Dig., tit. Parliament, L 44; 1 Bishop's N. Crim. Law, § 463; May's Parl. Law (2d ed.) 474-476; Story on the Constitution, § 784; Judge Lawrence in 6 Am. L. Reg. N. S. 643; State v. Buckley, 54 Ala. 599.

8. What Punishment May Be Inflicted in the United States. — Const. U. S., art. I, § 3, cl. 7; Hiss v. Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768; State v. Hill, 37 Neb. 80; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

Under the Constitution of Alabama, art. 7, § 4, penalties in cases of impeachment "shall not extend beyond removal from office, and disqualification from holding office under the authority of this state, for the term for which he [the officer impeached] was elected or appointed." State v. Buckley, 54 Ala. 599.

9. 12 & 13 Wm. III., c. 2, § 3.

10. Pardon under Great Seal Not Pleadable to Impeachment. — 4 Black. Com. 261, 399; Com. Dig., tit. Parliament, L 45; Reg. v. Boyes, 1 B. & S. 311, 101 E. C. L. 311.

11. Act of Pardon May Be Pleadable to Impeachment. — Com. Dig., tit. Parliament, L 46.

12. Power of Crown to Pardon After Judgment. — Com. Dig., tit. Parliament, L 45; 4 Black. Com. 400. See also Reg. v. Boyes, 1 B. & S. 311, 101 E. C. L. 311.

13. Const. U. S., art. 2, § 2, cl. 1.



Most of the State Constitutions except cases of impeachment from the pardoning power.<sup>1</sup>

**XV. IMPEACHMENT AND INDICTMENT CONCURRENT PROCEEDINGS.** — At Common Law a person may be impeached for a crime although he has already been indicted for the same crime, and the impeachment trial may proceed notwithstanding the indictment.<sup>2</sup> On the other hand, it has been held that a judgment on an impeachment is no answer to an indictment in the King's Bench.<sup>3</sup>

**Express Constitutional Provisions.** — The Constitution of the United States and some of the state constitutions expressly provide that a person convicted upon an impeachment shall be liable to indictment, trial, and punishment according to law.<sup>4</sup>

**IMPEACHMENT OF WASTE.** — See the title WASTE.

**IMPEDE — IMPEDIMENT.** — See note 5.

**IMPEDING JUSTICE.** — See HINDER, *ante*; and the references there given.

**IMPEDING NAVIGATION.** — See the title NAVIGABLE WATERS.

**IMPERFECT.** — See PERFECT.

**IMPENDING.** — See note 6.

**IMPERCEPTIBLE.** — See the title ACCRETION, vol. 1, p. 467.

**IMPERTINENCE.** (See also IMMATERIAL, *ante*; and see ENCYC. OF PL. AND PR., title SCANDAL AND IMPERTINENCE.) — Facts not material to a decision are impertinent, and the best test by which to ascertain whether matter is impertinent is to try whether the subject of the allegation could be put in issue and would be matter admissible in evidence between the parties.<sup>7</sup>

1. See the constitutions of the several states, and see the title PARDON.

2. Indictment No Bar to Impeachment. — Stafford's Trial, 7 How. St. Tr. 1297.

3. Judgment on Impeachment No Answer to Indictment. — Fitzharris's Case, 6 Am. L. Reg. N. S. 262, 644.

4. Constitutional Provisions. — Const. U. S., art. 1, § 3, cl. 7; Hiss v. Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

5. Impede and Obstruct. (See also OBSTRUCT.) — By a lease of a quarry it was provided that the "strippings" should be deposited on the bottom, unless it could not be done without obstructing the working of the quarry. The court said: "But the deposition read to contradict it [an answer denying that access to the quarry was obstructed], if it could be admitted, only says that the deposit *impedes* the ingress and egress, not that it obstructs it; any deposit would prevent passing over the spot where it was made, but if sufficient room was provided to pass in and out of the quarry, the access is not obstructed; which word does not include 'made a little more inconvenient.'" Keeler v. Green, 21 N. J. Eq. 30.

"The word *impediment* is almost synonymous with 'obstruction,' except that it is seldom, if ever, used to signify an entire blocking up of the way. It is an obstacle, not an impassable barrier." Com. v. Erie, etc., R. Co., 27 Pa. St. 355. This was upon the construction of a charter providing that a railroad should be constructed so as not to obstruct or *impede* the free use of any public street.

**Impediment to Registration.** (See also the title RECORDING ACTS.) — A statute provided that

in case the devisee of lands was disabled from registering the will by reason of a contest or other inevitable difficulty the registration might be made within the space of twelve months next after the removal of the *impediment*. In construing this provision the court said: "The words used by the legislature are 'inevitable difficulty' and *impediment*. By these, I think, must be meant something less than an absolute impossibility; and if so, it appears to me that it would be difficult to conceive a case in which the circumstances and facts would present an inevitable difficulty if they did not do so in the present case." O'Neill v. Owen, 17 Ont. 540. See also McLeod v. Truax, 5 U. C. Q. B. O. S. 455; Mandeville v. Nicholl, 16 U. C. Q. B. 609; Re Davis, 27 Grant Ch. (U. C.) 199.

6. **Impending.** — "*Impending* denotes that something hangs suspended over us and may so remain indefinitely." Eckhardt v. Buffalo, 19 N. Y. App. Div. 12. This case was upon the construction of a statute conferring extraordinary powers upon a health officer in case of *impending* pestilence.

A legal proceeding is said to be *impending* when a recourse to it is pressingly necessary in order to ascertain a right or status. Grimston v. Turner, 18 W. R. 724; Stroud. Jud. Dict.

7. Woods v. Morrell, 1 Johns. Ch. (N. Y.) 106; Harrison v. Perca, 168 U. S. 318.

It is also said that *impertinence* is the introduction of any matters in a bill, answer, or other pleading in the suit, which are not properly before the court for decision at any particular stage of the suit. Wood v. Mann, 1 Sumn. (U. S.) 578, 30 Fed. Cas. No. 17,952.

**IMPLEAD.** — To implead means to sue or prosecute by due process of law.<sup>1</sup>

**IMPLEMENT.** (See also the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 118; GAMING, vol. 14, p. 684; and see TOOLS.) — Implements are defined to be “things necessary to any trade, without which the work cannot be performed.”<sup>2</sup>

**IMPLICATION.** — See note 3.

**IMPLIED.** — See note 4.

1. **Implead.** — *Turner v. Roby*, 3 N. Y. 195; *People v. Clarke*, 9 N. Y. 368. See also *Bell v. Bell*, 9 Watts (Pa.) 47.

Although the first process in the Marine Court is by summons or warrant, it does not follow from this that such process may not be founded upon a plaint previously filed. But if otherwise, then the words “levied his certain plaint” are to be taken as tantamount to “commenced his suit,” or “impleaded the defendant,” either of which would be sufficient, *prima facie*, to show that the court had jurisdiction over the defendant's person. *Bennet v. Moody*, 2 Hall (N. Y.) 471.

2. *Stemmer v. Scottish Ins. Co.*, 33 Oregon 65. And in that case it was held that the stationery and boxes of a glove manufacturer were not included in the term “all other kinds of implements of trade,” as used in submission to arbitrators on the question of loss under an insurance policy.

In *Talcott v. Meigs*, 64 Conn. 58, it was said that the term *implements* is defined “as signifying ‘things tending to the necessary use of any trade or furniture of household,’ and *Bouvier's Law Dictionary* gives it as meaning ‘such things as are used or employed for a trade or furniture of a house.’”

**Compared with Tools.** — In *Matter of McManus*, 87 Cal. 294, the court said: “It is difficult to define accurately the word *implements*, and the courts, so far as we are advised, have never attempted to define it. *Webster* gives as the meaning of the word, ‘whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as, the *implements* of trade, of husbandry, or of war.’ And ‘utensil’ he defines as ‘that which is used; an instrument; an *implement*; especially an instrument or vessel used in a kitchen, or in domestic and farming business.’ By the courts these words are accorded a broad signification, and under them many things have been exempted which are not tools.”

**Examples.** — Gamecocks are not *implements* of gaming, within the meaning of an act authorizing the seizure of such *implements*. The term is here synonymous with “apparatus,” used in the same act. *Coolidge v. Choate*, 11 Met. (Mass.) 79.

The words “the proper tools or *implements* of a farmer” include only the ordinary and usual tools of husbandry, and do not extend to a threshing machine owned by the farmer, and used to thresh his own grain, and that of others for hire. *Meyer v. Meyer*, 23 Iowa 375.

Sprags or props used in a mine are not tools or *implements* used by a miner in his occupation. *Cutts v. Ward*, L. R. 2 Q. B. 364.

**Binding Twine.** — In *Davis v. Anchor Mut. F. Ins. Co.*, 96 Iowa 70, where a policy of insurance was taken out on *implements*, including

binders and “all such goods, not more hazardous, kept for sale in a general *implement* store,” it was held that binding twine was included.

**Safe.** (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 118.) — A statute provided that the retention of *implements* used in any manufactory or mechanical establishment by the mortgagor should not impair the title of the mortgagee. It was held that a portable safe in the office of a manufacturing establishment used for the purpose of keeping the books of the establishment was an *implement*. *Talcott v. Meigs*, 64 Conn. 55. See also *Matter of McManus*, 87 Cal. 292.

3. **Implication.** — In *Matter of Buffalo*, 68 N. Y. 173, it was said: “An *implication* is an inference of something not directly declared, but arising from what is admitted or expressed. Thus, when a statute looking beyond the question of revenue inflicts a penalty for doing an act, though that act be not in terms prohibited, yet it is unlawful, for the penalty implies a prohibition.”

**Statutes.** (See also the title STATUTES.) — In *Conn v. Cass County*, 151 Ind. 517, it was said: “It is a well-affirmed principle that where a power is conferred by a statute, everything necessary to carry out the purpose of the power conferred and make it effectual and complete will be implied. *Studabaker v. Studabaker*, 152 Ind. 89; *Sutherland* on Statutory Construction, §§ 340, 341. The *implication* or inference which may arise in the construction of statutes is of something not expressly declared, but arises out of that which is directly or expressly declared in the statute.”

An *implication* should not be permitted to destroy the effect of express words in statutes. *Woodbridge v. Amboy*, 1 N. J. L. 246.

**Repeal by Implication.** — See the title STATUTES.

**Necessary Implication — Devise.** (See also the title WILLS.) — Within the rule that an heir can be disinherited only by a devise to another, the devise need not be in express words, but if the devise is by *implication* only, the *implication* must in every case be necessary. By necessary *implication* in such a case is meant so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. *Beard v. Beard*, 22 W. Va. 136. See also *Wilkinson v. Adam*, 1 Ves. & B. 465; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Wright v. Hicks*, 12 Ga. 156; *Bender v. Dietrick*, 7 W. & S. (Pa.) 284; *Jacob's Estate*, 140 Pa. St. 274.

4. **Inferred and Implied.** — In *State v. Millain*, 3 Nev. 450, it was held that there was no real distinction between the word “inferred” and the word *implied*. The former word had been used by the court in its instructions to the jury, and the latter was used in the statute.

**Implied Condition.** (See also the title CON-

**IMPLIED ADMISSIONS.**—See the title ADMISSIONS, vol. 1, p. 671.

**IMPLIED AGREEMENTS.**—See the title IMPLIED OR QUASI CONTRACTS, *post*.

**IMPLIED CONFESSIONS.**—See the title CONFESSIONS, vol. 6, pp. 523, 580.

**IMPLIED MALICE.**—See the title MALICE.

DITIONS, vol. 6, p. 500.)—In *Raley v. Umatilla County*, 15 Oregon 179, it was said: "An *implied* [condition], or a condition in law, is one which the law implies either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances."

**Implied Consideration.** (See also the title CONSIDERATION, vol. 6, p. 673.)—A consideration is either express or *implied*. An express consideration is one which is distinctly declared in the contract. A consideration is *implied* where an act is done or forbore at the request of another, without an express stipulation, in which case the law presumes an adequate compensation for the act or forbearance to have been the inducement of the one party and the undertaking of the other. *Bixler v. Ream*, 3 P. & W. (Pa.) 282.

**Implied Corporation.**—In *Warner v. Beers*, 23 Wend. (N. Y.) 176, it was said: "An *implied* corporation is where there is a grant of such corporate powers as necessarily imply either the existence of or the intention to create a corporation."

**Implied License.** (See also the title LICENSE.)—In *Eldridge v. Adams*, 54 Barb. (N. Y.) 421, it was said: "An *implied* license is one which, though not expressly given, may be

presumed from the acts of the party having a right to give it or from the character of the act."

**Implied Obligation.**—In *People v. Albany, etc.*, R. Co., 37 Barb. (N. Y.) 218, speaking of the obligations arising out of the charter of a railroad, the court said: "The obligations thus imposed are either express or *implied*; express, when they are declared in positive terms in their charter; *implied*, when they necessarily result from the express obligations assumed, or are essential to carry out the substantial objects of the charter."

**Implied Powers.**—In *Grand Rapids Electric Light, etc., Co. v. Grand Rapids Edison Electric Light, etc., Co.*, 33 Fed. Rep. 667, it was said: "*Implied* powers, says Judge Cooley (Const. Lim. marg. p. 194), 'are such as are necessary in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant.'"

**Implied Promise.** (See also the title IMPLIED OR QUASI CONTRACTS, *ante*.)—An *implied* promise is that which may be legally inferred by the jury from circumstances, and it is equally obligatory in conscience and in law with that which has been clothed in words. *Wood v. Gill*, 1 N. J. L. 514.



# IMPLIED OR QUASI CONTRACTS.

BY W. A. MARTIN.

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#### CROSS-REFERENCES.

*For matters of PLEADING, see ENCYCLOPEDIA OF PLEADING AND PRACTICE, title CONTRACTS, vol. 4, p. 922.*

*For implied contracts arising from delivery of personal property, see the title IMPLIED WARRANTIES.*

*For implied contracts arising from payment of money or judgments subsequently reversed, see the title JUDGMENTS AND DECREES.*

*For contracts implied from past course of dealing, see the title PARTNERSHIP.*

*For contracts implied from usage, see the title USAGES AND CUSTOMS.*

*For money paid on taxes not due, see the title TAXATION.*

*For implied contracts arising from work and services rendered to decedents, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.*

**I. DEFINITION AND NATURE.** — Implied contracts are of two kinds which are radically different in their nature. They are, first, contracts implied in fact, and, second, contracts implied in law, or *quasi* contracts.

1. **Contracts Implied in Fact.** — The first class of contracts arises under circumstances which according to the ordinary course of dealing and the common understanding of men show a mutual intent to contract.<sup>1</sup> It follows, then, that the only distinction between this species of contract and express contracts is in the mode of proof. There is none in the nature of the understanding. Both express contracts and contracts implied in fact are founded upon the actual agreement of the parties.<sup>2</sup> The one class is proved by direct, the other by indirect evidence;<sup>3</sup> in other words, the one must be proved by an actual agreement, while in the case of the other it will be implied that the party did make such agreement as under the circumstances disclosed he ought in fairness to have made.<sup>4</sup> The implication, of course, must be a reasonable deduction from all the circumstances and relations of the parties,<sup>5</sup> and no contract will be implied in a case where the parties cannot legally make an express contract.<sup>6</sup>

2. **Contracts Implied in Law.** — These contracts are legal fictions adopted for the purpose of enforcing legal duties by actions *ex contractu*, where no actual contract exists, either express or implied.<sup>7</sup> While evidence of an actual contract is generally to be found, either in some writing made by the parties or in verbal communications which passed between them or in other acts or conduct considered in the light of the circumstances of the particular case, a contract implied by law, on the contrary, rests on no evidence. It is not actually in existence, but is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when in point of fact there was none; it is a legal fiction resting wholly for its support on a plain legal obligation and a plain legal right.<sup>8</sup> In the case of a contract implied in fact the contract is legitimately inferred; in the case of a contract implied in law the contract is a mere fiction. In the latter class of contracts the intention is disregarded; in the former it is ascertained and enforced. In the latter the duty defines the contract; in the former the contract defines the duty.<sup>9</sup>

II. **IMPLIED CONTRACTS EXCLUDED BY EXPRESS CONTRACTS RELATING TO SAME SUBJECT-MATTER.** — It is well settled that there cannot be an express and an implied contract embracing the same subject-matter at the same time. The former necessarily excludes the latter. It is only where parties do not expressly agree that the law interposes and raises a promise.<sup>10</sup> The reason of

1. *Hertzog v. Hertzog*, 29 Pa. St. 465; *Fouke v. Jackson County*, 84 Iowa 616; *Commercial Bank v. Pfeiffer*, 22 Hun (N. Y.) 335.

2. **Contracts Implied in Fact and Express Contracts Based on Actual Agreement.** — *Keel v. Larkin*, 72 Ala. 502; *Montgomery v. Montgomery Water Works Co.*, 77 Ala. 254; *Smith v. Moynihan*, 44 Cal. 62; *People v. Speir*, 77 N. Y. 144; *Chilcott v. Trimble*, 13 Barb. (N. Y.) 502; *Hertzog v. Hertzog*, 29 Pa. St. 465.

**Implied Contract Must Be Proved.** — An implied as well as an express contract should be established by proof in order to authorize recovery thereon, and the burden of proof rests upon the party seeking to establish such contract. *Richardson v. Hoyt*, 60 Iowa 68. No proof, however, is necessary of the facts out of which the implication arises; for to speak of proving an implication involves an absurdity, as an implication can arise only in the absence of an express agreement to that which the law says ought in equity to be done. *Hill v. Childress*, 10 Verg. (Tenn.) 516.

3. **Difference in Mode of Proof.** — *Chilcott v. Trimble*, 13 Barb. (N. Y.) 506.

4. *Smith v. Moynihan*, 44 Cal. 53.

5. **Implication Must Be Reasonable.** — *Burt v.*

*Myer*, 71 Md. 467; *Newmarket Mfg. Co. v. Coon*, 150 Mass. 566.

6. **Under What Circumstances Contract Cannot Be Implied.** — *Simpson v. Bowden*, 33 Me. 549; *Chase v. Second Ave. R. Co.*, 97 N. Y. 384, 49 Am. Rep. 531.

**Act Contrary to Duty or Law.** — A promise to do an act contrary to duty or to law is never implied. *Cary v. Curtis*, 3 How. (U. S.) 236.

7. **Contracts Implied in Law—Nature of.** — *Hertzog v. Hertzog*, 29 Pa. St. 465.

8. *Sceva v. True*, 53 N. H. 627.

9. *Hertzog v. Hertzog*, 29 Pa. St. 468.

10. **Express Excludes Implied Contract—England.** — *James v. Cotton*, 7 Bing. 272, 20 E. C. L. 129; *Cutter v. Powell*, 6 T. R. 320; *Toussaint v. Martinant*, 2 T. R. 104; *Hulle v. Heightman*, 2 East 145; *Selway v. Fogg*, 5 M. & W. 83.

*United States.* — *Hawkins v. U. S.*, 96 U. S. 689.

*Arkansas.* — *Manuel v. Campbell*, 3 Ark. 324; *Jackson v. Jones*, 22 Ark. 158.

*Connecticut.* — *King v. Kilbride*, 58 Conn. 109; *Avery v. Kinsman*, *Kirby* (Conn.) 354.

*Delaware.* — *Draper v. Randolph*, 4 Harr. (Del.) 454.



the rule is plain. Parties are bound by their agreement, and therefore there is no ground for implying a promise where there is an express contract,<sup>1</sup> and it can make no difference whether the contract is made by the parties themselves or by others for them.<sup>2</sup> The rule is necessarily confined to cases where both contracts relate to the same subject and the express contract was intended to supersede any implied contract;<sup>3</sup> and where the express contract is rescinded, resort may be had to an implied contract.<sup>4</sup> So if the contract has been completely executed, the plaintiff may recover as on an implied contract, under an *indebitatus assumpsit*, the price of his services, but the contract must regulate the amount of his recovery.<sup>5</sup> This distinction in the form of the remedy upon executed or executory contracts is fully laid down and recognized and is perfectly consistent with the principle excluding implications when express contracts exist.<sup>6</sup>

**III. WORK AND SERVICES — 1. Voluntary Services — a. SERVICES RENDERED WITHOUT INTENT TO CHARGE.** — There can be no recovery for services rendered voluntarily, and with no expectation at the time of rendition that they will be compensated; and this is true whether the services were or were not beneficial. Under such circumstances no obligation, either legal or moral, is incurred.<sup>7</sup> A subsequent change of intention by the party performing the

*Illinois.* — *Ginders v. Ginders*, 21 Ill. App. 522; *Walker v. Brown*, 28 Ill. 383, 81 Am. Dec. 287; *Ford v. McVay*, 55 Ill. 119.

*Indiana.* — *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87.

*Iowa.* — *Powell v. Crampton*, 102 Iowa 364.

*Kentucky.* — *Pringle v. Samuel*, 1 Bibb (Ky.) 172; *Coffman v. Allin*, Litt. Sel. Cas. (Ky.) 201; *Fonda v. Smith*, 5 Ky. L. Rep. 853.

*Maine.* — *Charles v. Dana*, 14 Me. 383; *Simpson v. Bowden*, 33 Me. 549.

*Massachusetts.* — *Whiting v. Sullivan*, 7 Mass. 107.

*Michigan.* — *Schurr v. Savigny*, 85 Mich. 144; *Galloway v. Holmes*, 1 Dougl. (Mich.) 330; *Wilson v. Wagar*, 26 Mich. 452; *Hunt v. Sackett*, 31 Mich. 18; *Keystone Lumber, etc., Mfg. Co. v. Dole*, 43 Mich. 370.

*Minnesota.* — *Marcotte v. Beaupre*, 15 Minn. 152.

*Mississippi.* — *Morrison v. Ives*, 4 Smed. & M. (Miss.) 652; *New Orleans, etc., R. Co. v. Pressley*, 45 Miss. 66.

*Missouri.* — *Davidson v. Biermann*, 27 Mo. App. 655; *Clarke v. Kane*, 37 Mo. App. 258; *Lindersmith v. South Missouri Land Co.*, 31 Mo. App. 258; *Houck v. Bridwell*, 28 Mo. App. 644; *Suits v. Taylor*, 20 Mo. App. 166; *Christy v. Price*, 7 Mo. 430; *Johnson v. Strader*, 3 Mo. 359; *Stollings v. Sappington*, 8 Mo. 118.

*Nebraska.* — *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339.

*New Hampshire.* — *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

*New Jersey.* — *Voorhees v. Combs*, 33 N. J. L. 494.

*New York.* — *Work v. Beach*, 53 Hun (N. Y.) 7; *Merrill v. Ithaca, etc., R. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Gauld v. Lipman*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 78.

*North Carolina.* — *Lawrence v. Hester*, 93 N. Car. 79; *Winstead v. Reid*, Busb. L. (44 N. Car. 76, 57 Am. Dec. 571; *Lindsay v. Hamburg Bremen Ins. Co.*, 115 N. Car. 212; *Dula v. Cowles*, 2 Jones L. (47 N. Car.) 454.

*Ohio.* — *Abbott v. Inskip*, 29 Ohio St. 59; *Creighton v. City*, 18 Ohio St. 447.

*South Carolina.* — *Wood v. Ashe*, 1 Strobb. L. (S. Car.) 407.

For an application of this doctrine to a particular class of contracts see the title IMPLIED WARRANTIES.

**1. Reason for Rule.** — *Walker v. Brown*, 28 Ill. 385, 81 Am. Dec. 287.

**2. Contracts Made for Parties by Others.** — *Walker v. Brown*, 28 Ill. 385, 81 Am. Dec. 287.

**3. Contracts Must Relate to Same Subject-matter.** — *Commercial Bank v. Pfeiffer*, 22 Hun (N. Y.) 327.

**4. Resort to Implied Contract Proper on Rescission of Express Contract.** — *Towers v. Barrett*, 1 T. R. 133; *Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299; *Cody v. Raynaud*, 1 Colo. 272; *Walker v. Brown*, 28 Ill. 381, 81 Am. Dec. 287; *Morrison v. Ives*, 4 Smed. & M. (Miss.) 652.

**5. Executed Contracts.** — *James v. Cotton*, 7 Bing. 272, 20 E. C. L. 129; *Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299; *Londregon v. Crowley*, 12 Conn. 561; *Walker v. Brown*, 28 Ill. 385, 81 Am. Dec. 287; *Holmes v. Stummel*, 24 Ill. 370; *Charles v. Dana*, 14 Me. 383.

**6. Walker v. Brown**, 28 Ill. 385, 81 Am. Dec. 287.

**7. Services Rendered Without Intention to Demand Compensation — England.** — *Osborn v. Guy's Hospital*, 2 Stra. 728.

*United States.* — *Goode v. U. S.*, 25 Ct. Cl. 261.

*Arkansas.* — *Osier v. Hobbs*, 33 Ark. 215.

*Illinois.* — *Evans v. Henry*, 66 Ill. App. 144.

*Indiana.* — *McFadden v. Ferris*, 6 Ind. App. 411.

*Iowa.* — *Allen v. Bryson*, 67 Iowa 591, 56 Am. Rep. 358; *Tank v. Bohweder*, 98 Iowa 154.

*Kentucky.* — *Conover v. Conover*, 1 Ky. L. Rep. 398.

*Louisiana.* — *Jacob v. Ursuline Nuns*, 2 Mart. (La.) 269, 5 Am. Dec. 730; *Tilghman v. Lewis*, 8 La. Ann. 108.

*Michigan.* — *St. Jude's Church v. Van Den-*

services does not alter the rule.<sup>1</sup> Nor is the rule affected by the fact that the services were rendered with some ulterior design, as, for instance, that the party rendering the voluntary services might be rewarded, by will or otherwise, through the generosity of the beneficiary.<sup>2</sup>

*b. SERVICES RENDERED WITHOUT REQUEST OR SUBSEQUENT PROMISE TO PAY* — (1) *Statement of Rule.* — Extending the doctrine of the preceding section a little further, it is held that services rendered without request and without a subsequent promise to pay shall be deemed voluntary, and that no compensation can be recovered for such services, whether the person performs the services with or without expectation of reward. A person cannot be made a debtor whether he will or not, for gratuitous services.<sup>3</sup>

(2) *Illustrations of Rule.* — Probably the most familiar illustration of this rule occurs where one performs services in saving another's property from injury or destruction. In such case the law will not raise an implied promise to pay for these services, and it is altogether immaterial whether the person performing them did so with the expectation of reward.<sup>4</sup> Further illustra-

berg, 31 Mich. 287; *Covel v. Turner*, 74 Mich. 408; *Coe v. Wager*, 42 Mich. 49; *Cicotte v. Catholic, etc., Church*, 60 Mich. 552; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396.

*Missouri.* — *Hoolan v. Bailey*, 30 Mo. App. 585; *Folger v. Heidel*, 60 Mo. 284; *Kinner v. Tschirpe*, 54 Mo. App. 575; *Lippman v. Tittmann*, 31 Mo. App. 69; *Lynch v. Bogy*, 19 Mo. 170; *Kerr v. Cusenbary*, 60 Mo. App. 558; *Hay v. Walker*, 65 Mo. 17; *Aull Sav. Bank v. Aull*, 80 Mo. 202; *Allen v. Bowman*, 7 Mo. App. 29.

*New Jersey.* — *Force v. Haines*, 17 N. J. L. 385.

*New York.* — *Livingston v. Ackeston*, 5 Cow. (N. Y.) 531; *Griffin v. Potter*, 14 Wend. (N. Y.) 209; *Maltby v. Harwood*, 12 Barb. (N. Y.) 473; *Dye v. Kerr*, 15 Barb. (N. Y.) 444; *Doyle v. Trinity Church*, 133 N. Y. 372; *Collyer v. Collyer*, 113 N. Y. 442.

*Oregon.* — *Rohr v. Baker*, 13 Oregon 350; *Glenn v. Savage*, 14 Oregon 567.

*Pennsylvania.* — *Kneeder v. Goodman*, 47 Leg. Int. (Pa.) 4; *Hoffeditz v. Maiden Creek Iron Co.*, 141 Pa. St. 58.

*Vermont.* — *Crampton v. Seymour*, 67 Vt. 393.

**Intention a Question for Jury.** — An intended gratuity cannot be turned into a charge, and whether intended as a gratuity is a question for the jury. *Kerr v. Cusenbary*, 60 Mo. App. 558.

**1. Effect of Subsequent Change of Intention.** — *Ayland v. Rice*, 23 La. Ann. 75; *Hoolan v. Bailey*, 30 Mo. App. 585; *Folger v. Heidel*, 60 Mo. 284; *Lippman v. Tittmann*, 31 Mo. App. 69; *Kinner v. Tschirpe*, 54 Mo. App. 575; *Morris v. Barnes*, 35 Mo. 412; *Hart v. Hart*, 41 Mo. 441; *Moore v. Moore*, 3 Abb. App. Dec. (N. Y.) 303.

**Illustrations.** — Where the plaintiff undertook, as an act of friendship, to have the house of the defendant painted, but when he presented a memorandum of the cost to the defendant a quarrel ensued and the plaintiff brought suit claiming not only for the cost of the work but for his services, it was held that the subsequent intention to charge for the services rendered did not entitle the plaintiff to recover. *Ayland v. Rice*, 23 La. Ann. 75.

**2. England.** — *Osborn v. Guy's Hospital*, 2 Stra. 728.

*Kentucky.* — *Myles v. Myles*, 6 Bush (Ky.) 245.

*Louisiana.* — *Jacob v. Ursuline Nuns*, 2 Mart. (La.) 269, 5 Am. Dec. 730; *Tilghman v. Lewis*, 8 La. Ann. 108.

*Maine.* — *Brown v. Tuttle*, 80 Me. 162.

*New Jersey.* — *Grandin v. Reading*, 10 N. J. Eq. 370.

*New York.* — *Collyer v. Collyer*, 113 N. Y. 442; *Jacobson v. Le Grange*, 3 Johns. (N. Y.) 199.

*North Carolina.* — *Miller v. Lash*, 85 N. Car. 51, 39 Am. Rep. 678.

*Pennsylvania.* — *Houck v. Houck*, 99 Pa. St. 552.

*South Carolina.* — *Callum v. Rice*, (S. Car. 1892) 15 S. E. Rep. 268.

**3. Services Rendered Without Request or Promise to Pay** — *England.* — *Boulton v. Jones*, 2 H. & N. 564.

*United States.* — *Utica, etc., R. Co. v. U. S.*, 22 Ct. Cl. 265; *Wightman v. U. S.*, 23 Ct. Cl. 144; *The Portland*, 7 U. S. App. 652.

*Louisiana.* — *Fox v. Sloo*, 10 La. Ann. 11; *New Orleans, etc., R. Co. v. Turcan*, 46 La. Ann. 155; *Watson v. Ledoux*, 8 La. Ann. 68.

*Massachusetts.* — *Boston Ice Co. v. Potter*, 123 Mass. 28.

*New Jersey.* — *Potter v. Potter*, 3 N. J. L. 9; *Force v. Haines*, 17 N. J. L. 385.

*New York.* — *Everts v. Adams*, 12 Johns. (N. Y.) 352; *Dunbar v. Williams*, 10 Johns. (N. Y.) 249; *Brennan v. Chapin*, (C. Pl. Gen. T.) 19 N. Y. Supp. 237; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Merritt v. American Dock, etc., Co.*, 59 N. Y. Super. Ct. 83.

*Oklahoma.* — *Cleveland County v. Seawell*, 3 Okla. 281.

*Oregon.* — *Glenn v. Savage*, 14 Oregon 567.

*Pennsylvania.* — *Webb v. School*, 3 Phila. (Pa.) 125; *Anderson v. Hamilton Tp.*, 25 Pa. St. 75.

*Vermont.* — *State v. St. Johnsbury*, 59 Vt. 332.

**4. Preventing Loss or Destruction to Property.** — *The Portland*, 7 U. S. App. 652; *Watson v. Ledoux*, 8 La. Ann. 68; *New Orleans, etc., R. Co. v. Turcan*, 46 La. Ann. 155; *Merritt v. American Dock, etc., Co.*, 59 N. Y. Super. Ct. 83; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.



tions of this rule will be found in the notes hereto.<sup>1</sup>

(3) *Exceptions to Rule.* — There is a well-established exception to the rule. Where a person lies under a moral and legal obligation to do an act, and another does it for him in such circumstances of urgent necessity that humanity and decency admit of no time for delay, the law will imply a promise to pay without proof of the actual promise.<sup>2</sup> But even under these circumstances a party performing the services must do so under an expectation that he will be reimbursed.<sup>3</sup>

**2. Services Performed at Request of Another — For Party Requesting Services.** — It is well settled that where one performs services for another at his request, but without any agreement or understanding as to wages or remuneration, the law implies a promise on the part of the party requesting the services to pay a just and reasonable compensation, unless there is a family relation existing between the parties, and this remuneration is recoverable on a *quantum meruit*.<sup>4</sup> So if the party seeking to recover alleges a verbal contract to per-

**Saving Property from Destruction by Fire.** — Where a person renders services to prevent his neighbor's wheat stack from being destroyed by fire, the services will be deemed voluntary, and no recovery can be had therefor. *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

**Services Rendered to Prevent Destruction of Property by Flood.** — Since under the existing laws of *Louisiana* a riparian proprietor upon whose property a crevasse has occurred is not legally bound to close or rebuild the broken levee, one who voluntarily repairs the work cannot compel the landowner to reimburse him for his expenditure. *New Orleans, etc., R. Co. v. Turcan*, 46 La. Ann. 155.

**1. Illustrations.** — An owner of a horse is not liable for the expense of shoeing voluntarily incurred by a gratuitous bailee, without request or promise to pay therefor. *Brennan v. Chapin*, (C. Pl. Gen. T.) 19 N. Y. Supp. 237.

The owner of a building leased to the county, who voluntarily performs the work of janitor in such building without being employed or directed by the commissioners to perform such labor, cannot recover from the county the value of his services. *Cleveland County v. Seawell*, 3 Okla. 281.

So it has been held that where the additional service of a mail contractor is voluntary, no liability is imposed on the government. *Wightman v. U. S.*, 23 Ct. Cl. 144.

**2. Exceptions.** — *Jenkins v. Tucker*, 1 H. Bl. 90 (leading case); *Rogers v. Price*, 3 Y. & J. 28; *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776; *Bradshaw v. Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344; *Maxwell v. Whieldon*, 10 Cush. (Mass.) 221; *Force v. Haines*, 17 N. J. L. 389; *Gould v. Moulahan*, 53 N. J. Eq. 341; *Patterson v. Patterson*, 59 N. Y. 582, 17 Am. Rep. 384.

**Illustrations.** — This exception, so far as the reported decisions show, usually arises in the case of payment of burial expenses. In applying the doctrine it has been held that where a husband and wife were separated, and a distant relative, not knowing where the husband was, on the death of the wife defrayed her burial expenses, he was entitled to recover from the husband the amount so expended. *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776. A recovery was allowed in *Bradshaw v.*

*Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344, on the same state of facts except that the person defraying the expense was the brother of the wife.

So in *Gould v. Moulahan*, 53 N. J. Eq. 341, it was held that although the husband is primarily liable for the expenses of burying his wife, yet if he is insolvent and unable to do so a personal representative of the wife may pay such expenses and recover them from her separate estate.

**3. Services Must Be Performed under Expectation of Payment.** — *Quin v. Hill*, 4 Dem. (N. Y.) 69, in which case it was held that where a person assumed entire control of the burial of a wife in the husband's presence, entirely ignoring the husband, who lived under the same roof with her, there could be no recovery for the services rendered and expenses of the burial.

**4. Requested Services Without Agreement as to Compensation — United States.** — *Johnson v. The Frank S. Hall*, 38 Fed. Rep. 258.

*Arkansas.* — *Spearman v. Texarkana*, 58 Ark. 348.

*Connecticut.* — *Clark v. Clark*, 46 Conn. 588; *Londregon v. Crowley*, 12 Conn. 564.

*Florida.* — *Lewis v. Meginnis*, 30 Fla. 419.

*Illinois.* — *Linn v. Linderth*, 40 Ill. App. 320.

*Indiana.* — *Lockwood v. Robbins*, 125 Ind. 398; *Louisville, etc., R. Co. v. Hubbard*, 116 Ind. 193; *Roll v. Mason*, 9 Ind. App. 651.

*Iowa.* — *Rea v. Flathers*, 31 Iowa 545; *Wadleigh v. McDowell*, 102 Iowa 480.

*Kentucky.* — *Baxter v. Knox*, 19 Ky. L. Rep. 1973; *Ransom v. Milward*, 5 Ky. L. Rep. 252; *Norris v. Philpot*, 12 Ky. L. Rep. 557; *Coleman v. Simpson*, 2 Dana (Ky.) 166; *Grundy v. Pine Hill Coal Co.* (Ky. 1888) 9 S. W. Rep. 414.

*Louisiana.* — *Beall v. Van Bibber*, 19 La. Ann. 434; *Krekeler's Succession*, 44 La. Ann. 726.

*Massachusetts.* — *Blaisdell v. Gladwin*, 4 Cush. (Mass.) 373.

*Michigan.* — *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168.

*Minnesota.* — *Schwab v. Pierro*, 43 Minn. 520.

*Mississippi.* — *Jordan v. Foxworth*, 48 Miss. 607.

*Missouri.* — *Crole v. Thomas*, 19 Mo. 70; *Dougherty v. Whitehead*, 31 Mo. 255; *Morris*



form the services at a stipulated compensation, but fails to prove the stipulation alleged, he may nevertheless recover the reasonable value of the services.<sup>1</sup> In all cases the value of the services is to be determined by the jury.<sup>2</sup>

**For Third Persons.**—Where one procures services to be rendered for the benefit of a third person, without authority from or subsequent ratification by the latter, he will be liable to the party performing the services for their reasonable value.<sup>3</sup> He will be liable if it be shown that the work, though done for another, was performed at his request and on his credit,<sup>4</sup> but of course the reasonable value of the services is in all cases the limit of the recovery.<sup>5</sup>

**3. Accepted Services.**—Where services are performed by one for another

*v. Barnes*, 35 Mo. 412; *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232; *Reppy v. Jefferson County*, 47 Mo. 66; *Penter v. Roberts*, 51 Mo. App. 222; *McQueen v. Wilson*, 51 Mo. App. 138; *Rose v. Spies*, 44 Mo. 20; *Thomas v. Walnut Land, etc., Co.*, 43 Mo. App. 653; *Levitt v. Miller*, 64 Mo. App. 147.

*Montana.*—*Cockrill v. Davie*, 14 Mont. 131.

*Nebraska.*—*Emery v. Cobbe*, 27 Neb. 621.

*Nevada.*—*White v. Sheldon*, 4 Nev. 280.

*New York.*—*Port Jervis Water Works Co. v. Port Jervis*, 151 N. Y. 111; *Bonwell v. Auld*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 65; *Crosby v. Kropf*, 33 N. Y. App. Div. 446; *Press Pub. Co. v. Baker*, (C. Pl. Gen. T.) 13 N. Y. Supp. 822.

*North Carolina.*—*Prince v. McRae*, 84 N. Car. 674.

*Pennsylvania.*—*Lindsey's Appeal*, (Pa. 1888) 15 Atl. Rep. 434; *Gracy v. Bailee*, 16 S. & R. (Pa.) 126; *Masterson v. Masterson*, 121 Pa. St. 605.

*Rhode Island.*—*Fuller v. Mowry*, 18 R. I. 424.

*Wisconsin.*—*Link v. Chicago, etc., R. Co.*, 80 Wis. 304; *Standard Printing Co. v. Democrat Pub. Co.*, 87 Wis. 127.

**Illustrations — Commission Merchants.**—Where a person acts as commission merchant for another without any express agreement as to what he shall receive for this service, the law will imply a promise to pay to him the customary commissions therefor. *Masterson v. Masterson*, 121 Pa. St. 605.

**Services of Physicians.**—Physicians' services rendered without an express agreement as to remuneration raise an implied contract to pay their value. *Prince v. McRae*, 84 N. Car. 674.

A physician who is a member of a board of health is entitled to reasonable compensation for professional services rendered by him under directions of such board, without any express agreement for compensation. *Spearman v. Texarkana*, 58 Ark. 348.

**Services of Attorneys.**—Attorneys are entitled to reasonable compensation for services rendered on request but without any express agreement as to remuneration. *Rose v. Spies*, 44 Mo. 20.

Where residuary legatees request attorneys employed by executors to defend the validity of a will to file answers and appear for them, in order to enable them to be subject to the jurisdiction without process and to escape the burden of the litigation, they are liable upon an implied promise for the reasonable value of the attorney's services. *Roll v. Mason*, 9 Ind. App. 651.

**Services of Agents.**—An agent need not establish an express contract for remuneration

for his services, as this may be inferred from the nature of the employment. *Krekeler's Succession*, 44 La. Ann. 726.

If a person has been elected president and agent of a company by its directors, and has rendered services under his appointment, the law will raise an implied promise for a reasonable compensation for the services rendered, if no salary has been fixed by the board of directors. *Grundy v. Pine Hill Coal Co.*, (Ky. 1888) 9 S. W. Rep. 414.

**1. Failure to Prove Alleged Agreement for Compensation.**—*Miller v. Eldridge*, 126 Ind. 451.

**2. Value of Services Question for Jury.**—*Baumgardner v. Burnham*, 93 Pa. St. 88.

**Scale of Prices as Affected by Locality.**—If a workman residing in one locality is employed to perform work in another locality without any agreement as to the amount of remuneration which he shall receive, the presumption of law will be that his remuneration will be fixed according to the scale of prices prevailing in the locality where the work is done, and not that which prevails in the locality where he lives. *Gracy v. Bailee*, 16 S. & R. (Pa.) 126.

**Services Rendered by Emancipated Infant.**—An infant authorized by his father to have his own earnings may recover against his employer for such services although the employer made no express contract with any one for his services and did not know that the infant was to have his earnings. The law will imply a promise to the infant, and not to the father. *Corey v. Corey*, 19 Pick. (Mass.) 29, 31 Am. Dec. 117.

**Running of Statute of Limitations.**—Where services are rendered for a series of years under no definite contract as to duration or rate or mode of compensation other than that implied by law, the promise which the law implies is to pay for the services as they are rendered, and the statute of limitations begins to run then, or at least at the end of each year; but where the services are rendered with the understanding that the party receiving the services will make compensation by will, which he fails to do, the party rendering the services can recover on a *quantum meruit*, freed from the operation of the statute, as such action is not maintainable until after the death of the party liable. *Miller v. Lash*, 85 N. Car. 51, 39 Am. Rep. 678.

**3. Services Rendered to Third Persons.**—*Ludlum v. Couch*, 10 N. Y. App. Div. 603.

**4. Services Performed on Credit of Party Requesting.**—*Clark v. Roop*, 15 Ark. 172; *Scott v. Messick*, 4 T. B. Mon. (Ky.) 535.

**5. Limit of Recovery.**—*Fowler v. Hess*, 83 Va. 506, in which case it was held that one who in return for his services in managing

either with or without the latter's consent and knowledge, and he knowingly accepts and avails himself of these services, the general rule is that the law will imply a promise to pay a fair and reasonable compensation therefor.<sup>1</sup> But the following limitations of this rule are well settled: First, in order that the doctrine of liability upon an implied contract may be applied, there must be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied.<sup>2</sup> Second, no contract will be implied unless the party receiving the benefits is entirely free to elect whether he will or will not accept the work.<sup>3</sup> And third, where such acceptance has in no way influenced the conduct of the other party with reference to the work itself, no contract will be implied.<sup>4</sup>

**4. Services Rendered to Each Other by Members of One Family** — *a. STATEMENT OF RULE.* — Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them; but where the services are rendered to each other by members of a family living as one household, there will be no such implication from the mere rendition and acceptance of the services. On the contrary, the presumption is that the services are intended to be gratuitous, and in order to recover

another's farm received its full product could recover nothing beyond that, where it appeared that his services were worth no more.

**1. Accepted Services** — *Alabama.* — *Humes v. Decatur Land Imp., etc., Co.*, 98 Ala. 461.

*Arkansas.* — *Simpson v. McDonald*, 2 Ark. 370; *McDaniel v. Parks*, 19 Ark. 671; *Ford v. Ward*, 26 Ark. 360.

*Delaware.* — *Draper v. Randolph*, 4 Harr. (Del.) 454.

*Illinois.* — *Rockford, etc., R. Co. v. Wilcox*, 66 Ill. 417.

*Indiana.* — *Chamness v. Cox*, 2 Ind. App. 477.

*Iowa.* — *Shelton v. Johnson*, 40 Iowa 84; *McGarvy v. Roods*, 73 Iowa 363; *Cowan v. Musgrave*, 73 Iowa 384; *Shoemaker v. Roberts*, 103 Iowa 681; *Hudspeth v. Yetzer*, 78 Iowa 111.

*Kentucky.* — *Viley v. Pettit*, 96 Ky. 576; *Carter v. Orme*, 3 Ky. L. Rep. 56.

*Maine.* — *Abbot v. Third School Dist.*, 7 Me. 118; *True v. McGilvery*, 43 Me. 485; *Tebbetts v. Haskins*, 16 Me. 283; *Weston v. Davis*, 24 Me. 374.

*Michigan.* — *McClary v. Michigan Cent. R. Co.*, 102 Mich. 312; *Strong v. Saunders*, 15 Mich. 339; *Hosmer v. Wilson*, 7 Mich. 294. 74 Am. Dec. 716; *Donovan v. Halsey F. Engine Co.*, 58 Mich. 39.

*Missouri.* — *Hiemenz v. Goerger*, 51 Mo. App. 586; *Painter v. Ritchey*, 43 Mo. App. 111; *Holmes v. Board of Trade*, 81 Mo. 137; *Thomas v. Walnut Land, etc., Co.*, 43 Mo. App. 653.

*New Hampshire.* — *Low v. Connecticut, etc., Rivers R. Co.*, 46 N. H. 284; *Goodwin v. Union Screw Co.*, 34 N. H. 379; *Hatch v. Purcell*, 21 N. H. 544.

*New York.* — *Port Jervis Water Works Co. v. Port Jervis*, 71 Hun (N. Y.) 66; *Crane v. Baudouine*, 55 N. Y. 256; *Coale v. Suckert*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 76; *Storrs v. Congregational Church*, 17 N. Y. Wkly. Dig. 179.

*North Carolina.* — *Blount v. Guthrie*, 99 N. Car. 93; *Bailey v. Rutjes*, 86 N. Car. 517; *Moffitt v. Glass*, 117 N. Car. 142; *Dixon v. Gravely*, 117 N. Car. 84.

*Ohio.* — *Holmes v. Holland*, 29 Cinc. L. Bul. 115, 11 Ohio Dec. (Reprint) 768.

*Oregon.* — *Kiser v. Holladay*, 29 Oregon 338; *Forbis v. Inman*, 23 Oregon 68.

*Pennsylvania.* — *Com. v. Buchanan*, 6 Kulp (Pa.) 217.

*Vermont.* — *Rowell v. School Dist. No. 19*, 59 Vt. 658.

*Wisconsin.* — *Wheeler v. Hall*, 41 Wis. 447; *Felker v. Haight*, 33 Wis. 259.

*Wyoming.* — *Hay v. Peterson*, 6 Wyo. 419.

**Illustration of Rule.** — A promise by a railroad company to pay one for carrying mails is implied from its acceptance of his services, although he carried such mails under a mistaken belief that he was required to do so under contract with the government. *McClary v. Michigan Cent. R. Co.*, 102 Mich. 312.

**Previous Payment for Similar Services Competent Evidence.** — Previous payment by the defendant for the like services may be proved as a circumstance bearing on the question of a promise. *Strong v. Saunders*, 15 Mich. 339.

**2. Contracts Forbidden by Law.** — *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Reichard v. Warren County*, 31 Iowa 381; *Detroit v. Michigan Paving Co.*, 36 Mich. 335; *Brady v. New York*, 2 Bosw. (N. Y.) 187.

**Services Rendering Party Liable for Misdemeanor.** — Where a party has rendered services under a contract which is not prohibited by law, he may recover compensation therefor although in rendering them he has committed a misdemeanor owing to his noncompliance with a statute requiring him first to procure a certificate or license. *Smythe v. Hanson*, 61 Mo. App. 285.

**3. Freedom of Election Necessary.** — *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Davis v. School Dist. No. 2*, 24 Me. 349.

**4. Where Acceptance Does Not Influence Other Party's Action.** — *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Reichard v. Warren County*, 31 Iowa 381.

**Illustration.** — The city of Detroit, being incapable of contracting in regard to public improvements except by express contract, conforming to the charter conditions, and let under supervision, cannot be held upon an



therefor the plaintiff must affirmatively show either that an express contract for remuneration existed or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation.<sup>1</sup> The reason for this is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will which tend to mutual comfort and convenience of the family;<sup>2</sup> and the rule stated applies not only to members of a family who are related by blood, but to those distantly related,<sup>3</sup> and to those who are in fact not related at all, provided they live together as members of one family.<sup>4</sup>

**Presumption that Services Were Gratuitous Not Conclusive.** — The presumption that services rendered by one member of a family to another were gratuitous is not a conclusive one. It may be overcome by showing an express agreement for payment, or by showing circumstances which will support the implication that the services were to be paid for.<sup>5</sup> The burden is, of course, on the per-

implied contract. *Detroit v. Michigan Paving Co.*, 35 Mich. 335.

**1. Services Rendered by Members of a Common Family** — *Delaware*. — *Cannon v. Windsor*, 1 *Houst. (Del.)* 143; *Mariner v. Collins*, 5 *Harr. (Del.)* 290; *State v. Connoway*, 2 *Houst. (Del.)* 206; *Cantine v. Phillips*, 5 *Harr. (Del.)* 428; *Morris v. Simpson*, 3 *Houst. (Del.)* 568.

*Georgia*. — *Hudson v. Hudson*, 90 *Ga.* 581; *Oliver v. Hammond*, 85 *Ga.* 323.

*Illinois*. — *Quigly v. Harold*, 22 *Ill. App.* 269; *Clawson v. Moore*, 29 *Ill. App.* 296; *Col-lar v. Patterson*, 137 *Ill.* 403.

*Indiana*. — *Hill v. Hill*, 121 *Ind.* 255; *James v. Gillen*, 3 *Ind. App.* 472, 34 *Cent. L. J.* 389.

*Iowa*. — *Van Sandt v. Cramer*, 60 *Iowa* 424; *Cowan v. Musgrave*, 73 *Iowa* 384; *McGarvy v. Roods*, 73 *Iowa* 363; *Tank v. Rohweder*, 98 *Iowa* 154; *Salvador v. Feeley*, 105 *Iowa* 478; *Resso v. Lehan*, 96 *Iowa* 45; *Scully v. Scully*, 28 *Iowa* 548; *Harper v. Kissick*, 52 *Iowa* 733; *Keegan v. Malone*, 62 *Iowa* 208.

*Kansas*. — *Shane v. Smith*, 37 *Kan.* 55; *Wyley v. Bull*, 41 *Kan.* 209.

*Kentucky*. — *Coleman v. Simpson*, 2 *Dana (Ky.)* 166; *Turner v. Turner*, (*Ky.* 1897) 38 *S. W. Rep.* 506.

*Maine*. — *Holmes v. Waldron*, 85 *Me.* 312.

*Maryland*. — *Bixler v. Sellman*, 77 *Md.* 494.

*Michigan*. — *Allen v. Allen*, 60 *Mich.* 635.

*Missouri*. — *Woods v. Land*, 30 *Mo. App.* 176; *Louder v. Hart*, 52 *Mo. App.* 377; *Bittrick v. Gilmore*, 53 *Mo. App.* 53.

*Nebraska*. — *Newman v. Edwards*, 22 *Neb.* 248.

*New Jersey*. — *Disbrow v. Durand*, 54 *N. J. L.* 343, 33 *Am. St. Rep.* 678; *Ridgway v. English*, 22 *N. J. L.* 409; *Udike v. Ten Broeck*, 32 *N. J. L.* 105.

*New York*. — *Gallagher v. Vought*, 8 *Hun (N. Y.)* 87; *Ackerman v. Ackerman*, (*Supm. Ct. Gen. T.*) 2 *N. Y. St. Rep.* 181; *Carpenter v. Weller*, 15 *Hun (N. Y.)* 134; *Kelly's Estate*, *Tuck. (N. Y.)* 28; *Matter of Ryder*, 2 *Connoly (N. Y.)* 224; *Sullivan v. Sullivan*, 6 *Hun (N. Y.)* 658; *Wilcox v. Wilcox*, 48 *Barb. (N. Y.)* 327; *Matter of Stewart*, (*Surrogate Ct.*) 21 *Misc. (N. Y.)* 412; *Jagau v. Goetz*, (*C. Pl. Gen. T.*) 11 *Misc. (N. Y.)* 380; *Keller v. Stuck*, 4 *Redf. (N. Y.)* 294.

*North Carolina*. — *Callahan v. Wood*, 118 *N. Car.* 752; *Mull v. Walker*, 100 *N. Car.* 46; *Harty v. Harris*, 120 *N. Car.* 408.

*Ohio*. — *Finch v. Finch*, 4 *Cinc. L. Bul.* 908,

7 *Ohio Dec. (Reprint)* 673; *Pollock v. Pollock*, 2 *Ohio Cir. Ct.* 143, 1 *Ohio Cir. Dec.* 410.

*Oregon*. — *Wilkes v. Cornelius*, 21 *Oregon* 341.

*Pennsylvania*. — *Moyer's Appeal*, 112 *Pa. St.* 290.

*South Dakota*. — *Murphy v. Murphy*, 1 *S. Dak.* 316.

*Vermont*. — *Sawyer v. Hebard*, 58 *Vt.* 375; *Hatch v. Hatch*, 60 *Vt.* 160.

*Virginia*. — *Jackson v. Jackson*, 96 *Va.* 165.

*West Virginia*. — *Riley v. Riley*, 38 *W. Va.* 283.

*Wisconsin*. — *Ellis v. Cary*, 74 *Wis.* 176; *Wells v. Perkins*, 43 *Mis.* 160.

**What Circumstances Strengthen Presumption.** — The closer the family relationship is, the stronger is the presumption that services are gratuitous. *Woods v. Land*, 30 *Mo. App.* 176; *Quigly v. Harold*, 22 *Ill. App.* 269.

**2. Considerations on Which Rule Based.** — *Disbrow v. Durand*, 54 *N. J. L.* 343, 33 *Am. St. Rep.* 678.

**3. Rule Applicable to All Degrees of Relationship.** — See cases cited in the following subdivision of this section.

**4. Rule Applicable to Persons Not Related.** — *Windland v. Deeds*, 44 *Iowa* 98; *Smith v. Johnson*, 45 *Iowa* 308; *Wyley v. Bull*, 41 *Kan.* 206; *Cooper v. Cooper*, 147 *Mass.* 370, 9 *Am. St. Rep.* 721; *Ryan v. Lynch*, 9 *Mo. App.* 18; *Disbrow v. Durand*, 54 *N. J. L.* 343, 33 *Am. St. Rep.* 678; *Griffin v. Potter*, 14 *Wend. (N. Y.)* 209; *Livingston v. Ackeston*, 5 *Cow. (N. Y.)* 531; *Hartman's Appeal*, 3 *Grant Cas. (Pa.)* 271.

**5. Presumption that Services Were Gratuitous Rebuttable.** — *Pitts v. Pitts*, 21 *Ind.* 309; *Resso v. Lehan*, 96 *Iowa* 45; *Harper v. Kissick*, 52 *Iowa* 733; *Scully v. Scully*, 28 *Iowa* 548; *Koch v. Hebel*, 32 *Mo. App.* 103; *Jagau v. Goetz*, (*C. Pl. Gen. T.*) 11 *Misc. (N. Y.)* 380; *Doremus v. Lott*, 49 *Hun (N. Y.)* 284; *Van Schoyck v. Backus*, 9 *Hun (N. Y.)* 68.

**The Giving of a Note in Payment for Services Rendered** by one member of a family to another raises the presumption that there was a contract to pay for such services. *Pitts v. Pitts*, 21 *Ind.* 309.

**Not Necessary that Amount of Compensation Be Fixed.** — Where facts and circumstances are shown which raise the presumption that services rendered by one member of a family to another are to be paid for, the one rendering



son rendering the services to overcome the presumption which the law raises that such services were rendered gratuitously.<sup>1</sup>

**b. APPLICATIONS OF RULE — Parent and Child.** — In accordance with the rule stated in the preceding subdivision of this section, unless an express contract for compensation exists or the circumstances are such as will raise an implied promise to pay therefor, a child cannot recover for services rendered while a member of the parent's family, whether he be of age or not, and whether the relationship be one of blood or the head of the family is merely *in loco parentis*.<sup>2</sup> The converse of this doctrine is equally well established. Services and support rendered by a parent to a child while a member of the parent's household will be presumed to be gratuitous unless the contrary be conclusively shown.<sup>3</sup> The rule also applies in the case of the following relatives living together as members of a common family: husband and wife,<sup>4</sup> cousins,<sup>5</sup> brothers and sisters,<sup>6</sup> brothers-in-law and sisters-in-law,<sup>7</sup> uncle and niece or

such services will be entitled to recover therefor, and it is not essential to this right that the amount of compensation should be agreed upon. *McGarvy v. Roods*, 73 Iowa 363.

**1. Burden of Proof.** — *Enger v. Lofland*, 100 Iowa 303.

**2. Parent and Child.** — *Stock v. Stoltz*, 137 Ill. 349; *Chadwick v. Devore*, 69 Iowa 637; *Spitzmiller v. Fisher*, 77 Iowa 289; *Perry v. Perry*, 2 Duv. (Ky.) 312; *Wright v. Senn*, 85 Mich. 191; *Allen v. Allen*, 60 Mich. 635; *Penter v. Roberts*, 51 Mo. App. 222; *Erhart v. Dietrich*, 118 Mo. 418; *Matter of Dusenberry*, (Surrogate Ct.) 10 Misc. (N. Y.) 633; *Matter of Hughey*, (Surrogate Ct.) 7 N. Y. St. Rep. 732; *Hertzog v. Hertzog*, 29 Pa. St. 465. For a full treatment of the subject and a citation of all the authorities, see the title PARENT AND CHILD.

**Illustrations.** — Services rendered by a daughter who has attained her majority but has continued to live with her parents as a member of the family do not give rise to a promise to pay any consideration for such services, and if rendered without an express promise therefor, a subsequent agreement to pay will not be supported by any legal consideration. *Chadwick v. Devore*, 69 Iowa 637.

**3. Services Rendered by Parent to Child.** — *Larsen v. Hansen*, 74 Cal. 320; *Bradley v. Kent*, 7 Houst. (Del.) 372; *Oliver v. Hammond*, 85 Ga. 323; *Reid v. Farror*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 199; *Hatch v. Hatch*, 60 Vt. 160; *Bostwick v. Bostwick*, 71 Wis. 273.

**Illustration.** — No implied promise arises on the part of a son to pay rent for a house owned by his mother and occupied by him and his family with her, without anything being said as to rent. *Matter of Perry*, (Surrogate Ct.) 5 Misc. (N. Y.) 149.

**4. Husband and Wife.** — *Holmes v. Waldron*, 85 Me. 312; *Lapworth v. Leach*, 79 Mich. 16; *Lynn v. Smith*, 35 Hun (N. Y.) 275. See also the title HUSBAND AND WIFE, *ante*.

**Rule Applicable to Parties Cohabiting as Husband and Wife.** — The rule is applicable in the case of parties cohabiting as man and wife, although they are not actually married. *Fosbinder's Estate*, 2 Lehigh Val. L. Rep. (Pa.) 270.

**5. Cousins.** — *Clark's Estate*, 35 Leg. Int. (Pa.) 421, 12 Phila. (Pa.) 147; *Neal v. Gilmore*, 79 Pa. St. 421.

**Presumption that Services Were Gratuitous Rebuttable.** — One who renders services to come and keep house for him, which she does

at his request for several years, is liable to her for the value of her services, although family privileges are allowed to her. *Heffron v. Brown*, 54 Ill. App. 377.

**6. Brothers and Sisters.** — *Fuller v. Fuller*, 21 Ind. App. 42; *Martin v. Sheridan*, 46 Mich. 93; *Callahan v. Riggins*, 43 Mo. App. 130; *Bundy v. Hyde*, 50 N. H. 116; *Woodward v. Bugsbee*, 2 Hun (N. Y.) 128; *Bowen v. Bowen*, 2 Bradf. (N. Y.) 336; *Collyer v. Collyer*, 113 N. Y. 442; *Schumberger v. Hoy*, 7 Pa. Super. Ct. 206; *Bishop's Estate*, 2 W. N. C. (Pa.) 447; *Culp's Appeal*, 28 Leg. Int. (Pa.) 160; *Lackey's Estate*, 181 Pa. St. 638.

**Illustrations of Rule.** — Where a sister resides in the family of her brother, performing the ordinary services of a housekeeper, and receiving clothing and the benefits of a home, for nearly eight years, without keeping any account and without any promise or understanding that she should receive wages, the law will not imply a contract for services rendered nor hold the brother's estate chargeable for such services for the first time after the death of the brother. *Ayres v. Hull*, 5 Kan. 419.

So where a person lived with his sister at intervals for a number of years, and it appeared that his position in the household was that of a member of the family; that during all the time of occupancy no board was asked for or paid; that he assisted in the family work and occasionally advanced to his sister small sums of which no account was kept, it was held that the sister was not entitled to recover for board. *Culp's Appeal*, 28 Leg. Int. (Pa.) 160.

**Effect of Express Contract.** — Where there is an express contract by a sister to pay her brother for board and nursing, the fact that the parties are near relatives does not affect the right of recovery. *Frame's Estate*, 1 Del. Co. Rep. (Pa.) 115. See also *Huffman v. Wyrick*, 5 Ind. App. 183; *Gibbon's Estate*, 8 Lanc. L. Rev. (Pa.) 305.

**Implied Contract Overcoming Presumption.** — Where a man lived much of his time in his sister's family, where his washing and ironing were done and he was cared for when sick, and never paid anything, but repeatedly said that he would pay for all that was done for him, and it did not appear that no return was expected, it was held that his estate was liable on an implied contract for services rendered him. *O'Connor v. Beckwith*, 41 Mich. 657.

**7. Brothers-in-law and Sisters-in-law.** — *Hill v. Hill*, 121 Ind. 255.

nephew,<sup>1</sup> and aunt and niece or nephew.<sup>2</sup>

5. **Services Rendered under Mistake.** — Where services are rendered under a mutual mistake of the parties as to the price to be paid therefor, the law rejects the understanding of each party and awards what the services are reasonably worth.<sup>3</sup> So where services are rendered under a supposed contract with a partnership, which is in fact no contract because executed by one partner without authority, the plaintiff is entitled to recover the reasonable value of the services.<sup>4</sup> No recovery, however, is permissible for services rendered by mistake on another's property without his consent,<sup>5</sup> or for work performed by mistake on another's contract.<sup>6</sup> But if the defendant receives the benefit of work and afterwards agrees to pay therefor, the plaintiff may recover the reasonable value of the services.<sup>7</sup> If one performs services for another through mistake procured by the fraud of that other, he will be permitted to recover the reasonable value of the services regardless of any original intention to charge therefor.<sup>8</sup>

**Presumption May Be Rebutted.** — The presumption that services rendered to a brother-in-law and sister-in-law were intended to be gratuitous may be rebutted by evidence of facts and circumstances showing that they were not so intended. *Mayfaith's Appeal*, (Pa. 1885) 2 Atl. Rep. 28; *McCarthy's Estate*, 9 Phila. (Pa.) 318, 30 Leg. Int. (Pa.) 12; *White v. Knowles*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 579.

1. **Uncle and Niece or Nephew.** — *Beatty's Estate*, 25 Pittsb. Leg. J. 117; *Lafferty's Estate*, 13 Pa. Co. Ct. 82; *Hanway's Estate*, 1 Chest. Co. Rep. (Pa.) 531; *Brown's Estate*, 6 Pa. Co. Ct. 428.

**Evidence Held Sufficient to Overcome Presumption that Services Were Gratuitous.** — Where a person's niece left, at his request, a business of her own to render personal services in his home, and after working six years without receiving payment the uncle died, leaving a will bequeathing a certain sum to her and describing her to be "at present employed as my housekeeper," it was held that neither the relationship nor the fact of nonpayment negatived the implication of the promise to pay for the services. *Ranninger's Appeal*, 118 Pa. St. 20.

2. **Aunt and Niece or Nephew.** — *Kneass's Estate*, 6 Phila. (Pa.) 353, 24 Leg. Int. (Pa.) 245.

**Under What Circumstances Compensation Is Recoverable.** — Where the plaintiff occupied his aunt's house on an agreement to pay rent, and boarded her, it was held that he was entitled to recover from her estate for board, lodging, and washing, since their relationship imposed no obligation upon him to support her. *Fleer v. Finken*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 902.

A claim against the estate of an aunt for board and nursing in her last illness will be allowed where the purpose to make and receive payment existed. *Chapman v. Barnes*, 29 Ill. App. 184.

3. **Services Performed under Mutual Mistake as to Price.** — *Turner v. Webster*, 24 Kan. 38, 36 Am. Rep. 251, in which case the court said: "The minds of the parties met upon everything but the compensation. As to that there was no *aggregatio mentium*. What, then, should result? Should he receive nothing because there was no mutual assent to the compensa-

tion? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid."

4. **Services Rendered under Mistaken Belief that a Contract Exists.** — *Van Deusen v. Blum*, 18 Pick. (Mass.) 229, 29 Am. Dec. 582.

5. **Labor Performed on Another's Property by Mistake.** — *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520 (for cutting another's trees and hauling and piling the wood).

6. **Labor on Another's Contract by Mistake.** — *Rohr v. Baker*, 13 Oregon 350; *Forbis v. Inman*, 23 Oregon 68.

**Illustrations.** — Where a stranger performs work on another's contract to excavate a street, without the latter's knowledge, by mistake, he cannot recover the cost thereof. *Rohr v. Baker*, 13 Oregon 350.

7. **Rule Where Defendant Accepts Benefit of Work.** — *Forbis v. Inman*, 23 Oregon 68.

8. **Mistake Procured by Another's Fraud.** — *Fox v. Dawson*, 8 Mart. (La.) 94; *Boardman v. Ward*, 40 Minn. 399, 12 Am. St. Rep. 749; *Hickam v. Hickam*, 46 Mo. App. 497; *Higgins v. Breen*, 9 Mo. 497; *Rickard v. Stanton*, 16 Wend. (N. Y.) 25. Compare *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721; *Robbins v. Potter*, 11 Allen (Mass.) 588.

**Services Rendered by Person Formerly a Slave.** — Where a person originally a slave continued in the employment of the master after emancipation, under an impression produced by the fraud of the master that he was still a slave, he was entitled to recover the reasonable value of his services. *Hickam v. Hickam*, 46 Mo. App. 497; *Peter v. Steel*, 3 Yeates (Pa.) 250. See also *Kinney v. Cook*, 4 Ill. 232. *Contra*, *Franklin v. Waters*, 8 Gill (Md.) 322.

**Labor on Land Induced by Fraudulent Representations that Employer Is Owner.** — Where a person, by a fraudulent representation that he is the owner of land, induces another to bestow labor upon it in the expectation of enjoying the property as a joint owner, the person performing the labor may, on discovery of the fraud, abandon the contract under which the labor was performed and recover on the common count of *indebitatus assumpsit* the value of the work done. *Rickard v. Stanton*, 16 Wend. (N. Y.) 25.



**6. Services Rendered under Unfinished Contract** — *a. WHERE PLAINTIFF WILFULLY ABANDONS CONTRACT BEFORE COMPLETION* — (1) *View that There Can Be No Recovery on a Quantum Meruit* — (a) **General Rule and Considerations on Which Based.** — Although there is considerable conflict in the decisions, the decided weight of authority is that where there is an entire contract and the plaintiff has performed a part of it, and without legal excuse and against the consent of the other contracting party refuses to perform the remaining part, he is not entitled to recover anything for the part performed. He must perform the agreed service as a condition precedent to his right to recover anything on the contract.<sup>1</sup> The rule is not altered by the fact that he subsequently agrees to finish performance and is not permitted to do so by the

**Services Performed by Plaintiff under Supposition that She Is Defendant's Wife.** — Where a woman is induced to marry a man on his fraudulent representations that he is single, she may, on discovering the fraud, recover for services rendered to him while living in the relation of man and wife. *Higgins v. Breen*, 9 Mo. 497; *Fox v. Dawson*, 8 Mart. (La.) 94. *Contra*, *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, cited with approval in *Ogden v. McHugh*, 167 Mass. 279.

**1. Rule that Plaintiff Is Entitled to Recover Nothing** — *England.* — *Sinclair v. Bowles*, 9 B. & C. 92, 17 E. C. L. 340; *Cutter v. Powell*, 6 T. R. 324; *Spain v. Arnott*, 2 Stark. 256, 3 E. C. L. 400; *Collins v. Stimson*, 11 Q. B. D. 142. *United States.* — *Dermott v. Jones*, 2 Wall. (U. S.) 1.

*Alabama.* — *Wright v. Turner*, 1 Stew. (Ala.) 29, 18 Am. Dec. 35; *Hawkins v. Gilbert*, 19 Ala. 54; *Nesbitt v. Drew*, 17 Ala. 379; *Davis v. Wade*, 4 Ala. 208.

*Arkansas.* — *Hibbard v. Kirby*, 38 Ark. 102; *Wright v. Morris*, 15 Ark. 444.

*California.* — *Hogan v. Titlow*, 14 Cal. 255.

*Colorado.* — *Cody v. Raynaud*, 1 Colo. 272; *Walling v. Warren*, 2 Colo. 434.

*Connecticut.* — *Coburn v. Hartford*, 38 Conn. 290.

*Illinois.* — *Eldridge v. Rowe*, 7 Ill. 93, 43 Am. Dec. 41; *Thrift v. Payne*, 71 Ill. 408; *Angle v. Hanna*, 22 Ill. 431, 74 Am. Dec. 161; *Badgley v. Heald*, 9 Ill. 64; *Hansell v. Erickson*, 28 Ill. 257.

*Kentucky.* — *Escott v. White*, 10 Bush (Ky.) 169.

*Maine.* — *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638.

*Maryland.* — *Watkins v. Hodges*, 6 Har. & J. (Md.) 38; *Howard v. Wilmington, etc., R. Co.*, 1 Gill (Md.) 342; *Denmead v. Coburn*, 15 Md. 39.

*Massachusetts.* — *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; *Davis v. Maxwell*, 12 Met. (Mass.) 386; *Thayer v. Wadsworth*, 19 Pick. (Mass.) 249; *Faxon v. Mansfield*, 2 Mass. 147; *Whiting v. Sullivan*, 7 Mass. 107.

*Michigan.* — *Scheible v. Klein*, 89 Mich. 376; *Hanley v. Walker*, 79 Mich. 607.

*Minnesota.* — *Mason v. Heyward*, 3 Minn. 182; *Williams v. Anderson*, 9 Minn. 50; *Stees v. Leonard*, 20 Minn. 494; *Weber v. Clark*, 24 Minn. 354.

*Missouri.* — *Gruetzner v. Aude Furniture Co.*, 28 Mo. App. 263; *Fox v. Pullman Palace Car Co.*, 16 Mo. App. 122; *Schnerr v. Lemp*, 19 Mo. 41; *White v. Wright*, 16 Mo. App. 551; *Hanel v. Freund*, 17 Mo. App. 623; *Earp v.*

*Tyler*, 73 Mo. 617; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183; *Caldwell v. Dickson*, 17 Mo. 575; *Henson v. Hampton*, 32 Mo. 408; *Downs v. Smit*, 15 Mo. App. 583; *Blanton v. King*, 73 Mo. App. 148; *Stout v. St. Louis Tribune Co.*, 52 Mo. 342.

*New Jersey.* — *Erving v. Ingram*, 24 N. J. L. 520; *Brown v. Fitch*, 33 N. J. L. 418; *Haslack v. Mayers*, 26 N. J. L. 292.

*New York.* — *Bowery Nat. Bank v. New York*, 63 N. Y. 336; *Reab v. Moor*, 19 Johns. (N. Y.) 337; *M'Millan v. Vanderlip*, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; *Thorpe v. White*, 13 Johns. (N. Y.) 53; *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *Stephens v. Beard*, 4 Wend. (N. Y.) 604; *Marsh v. Ruleson*, 1 Wend. (N. Y.) 514; *Pierce v. Schenck*, 3 Hill (N. Y.) 28; *Jennings v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367.

*North Carolina.* — *Thigpen v. Leigh*, 93 N. Car. 49; *Niblett v. Herring*, 4 Jones L. (49 N. Car.) 262; *Dula v. Cowles*, 7 Jones L. (52 N. Car.) 290, 75 Am. Dec. 463; *Russell v. Stewart*, 64 N. Car. 487; *Brewer v. Tysor*, 3 Jones L. (48 N. Car.) 180; *White v. Brown*, 2 Jones L. (47 N. Car.) 403.

*Ohio.* — *Allen v. Curles*, 6 Ohio St. 505.

*Pennsylvania.* — *Hartman v. Meighan*, 171 Pa. St. 46; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19; *McDowell v. Ingersoll*, 5 S. & R. (Pa.) 101; *Martin v. Schoenberger*, 8 W. & S. (Pa.) 367; *Shaw v. Lewistown, etc., Turnpike Co.*, 2 P. & W. (Pa.) 454; *Harris v. Liggett*, 1 W. & S. (Pa.) 301.

*Vermont.* — *St. Albans Steamboat Co. v. Wilkins*, 8 Vt. 54; *Kettle v. Harvey*, 21 Vt. 301; *Mullen v. Gilkinson*, 19 Vt. 503; *Winn v. Southgate*, 17 Vt. 355.

*Wisconsin.* — *Malbon v. Birney*, 11 Wis. 107.

**Illustrations of Rule** — *Building Contract.* — Where a party contracts to build a house complete for another, but after doing a small part of the work abandons it without any default of the other contracting party, and the latter enters upon the premises and completes the work, making use of the unfinished job of the former, the former cannot recover for what he has done. *Malbon v. Birney*, 11 Wis. 107.

Where the terms of a contract are that A shall cut a mill race within a certain time, he cannot recover anything on special contract or upon a *quantum meruit* unless he shows entire performance. *Brewer v. Tysor*, 3 Jones L. (48 N. Car.) 180.

*Contracts of Hire.* — Under a contract for services for a specified term, a servant who leaves the service before the expiration of the time without sufficient cause cannot recover anything for services rendered. *St. Albans*



other contracting party,<sup>1</sup> and if by his own misconduct he renders his discharge necessary, his right to compensation fails the same as if he had refused to complete the performance of the contract.<sup>2</sup>

**Reason for Rule.** — The theory on which these decisions proceed is that there can be no recovery on the express contract, because it is not executed on the part of the plaintiff and because the performance is a condition precedent to the payment; that there can be no recovery on a *quantum meruit* for the labor performed, because an express contract always excludes an implied contract in relation to the same matter.<sup>3</sup>

(b) **Exceptions to Rule.** — The rule stated does not apply in the case of contracts with infants; they may abandon a contract without cause after partial performance and nevertheless recover on a *quantum meruit*.<sup>4</sup> Yet if the other contracting party is injured by the sudden termination of the contract, it seems that a deduction should be made on that account.<sup>5</sup>

**Building Contracts.** — In *Missouri* another exception to this rule is made which is not elsewhere recognized and which does not seem to be based upon any valid reason. In this jurisdiction, if a party to a building contract voluntarily abandons it before completion, he is nevertheless entitled to recover for his work and materials, if the other party has received or enjoyed the benefit thereof, but the damages caused by his nonperformance must be deducted from the amount so recoverable.<sup>6</sup>

(c) **How Rule Affected by Fact that Contract Is Within Statute of Frauds.** — Where a party enters into a contract which is within the statute of frauds and abandons it after part performance for no other reason than that it is within the statute of frauds, the weight of authority is, it is believed, that he cannot recover on a

*Steamboat Co. v. Wilkins*, 8 Vt. 54; *Wright v. Turner*, 1 Stew. (Ala.) 29, 18 Am. Dec. 35; *Eldridge v. Rowe*, 7 Ill. 98, 43 Am. Dec. 41.

*Cropper's Contract.* — Every agreement between the owner of lands and a cropper for their cultivation is a special and entire contract; if the cropper abandons it before completion he cannot recover for a partial performance, and his interest becomes vested in the landlord, divested of any lien which may have attached to it for agricultural advances while it was the property of the cropper. *Thigpen v. Leigh*, 93 N. Car. 47.

*Contracts of Attorney and Client.* — The rule that a party who abandons a contract without cause, after partially performing it, cannot recover on a *quantum meruit*, is especially applicable to the engagements of attorneys with their clients. *Blanton v. King*, 73 Mo. App. 148.

**What Constitutes Abandonment by Plaintiff.** — Where a plaintiff who had engaged to work for a certain length of time for the defendant got the consent of his employer, before his time expired, to absent himself for a short time, and was absent a few days longer than he expected to be, but held himself subject to his employer's control, and returned and worked for such employer again until after the expiration of the time for which he engaged, it was held that there was no abandonment of the contract, and that the plaintiff was entitled to recover on it. *Thrift v. Payne*, 71 Ill. 408. For another decision in which it was held that the facts did not show an abandonment, see *Mather v. Butler County*, 28 Iowa 253.

**1. Subsequent Offer to Complete Performance.** — *Lantry v. Parks*, 8 Cow. (N. Y.) 63.

## 2. Effect of Misconduct Necessitating Discharge.

— *Turner v. Robinson*, 5 B. & Ad. 789, 27 E. C. L. 190; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183; *Lane v. Phillips*, 6 Jones L. (51 N. Car.) 455, in which case the court said: "Had the plaintiff wilfully and without excuse left the defendant's service, he would undoubtedly, both according to the principles of the common law and by force of our statute, have forfeited his wages. \* \* \* Is it reasonable that he should be in any better condition by acting so badly as to compel his employer to dismiss him?"

**3. Reason for Rule.** — *Olmstead v. Beale*, 19 Pick. (Mass.) 528.

**4. Exceptions to Rule — Contracts of Infants.** — *Corpe v. Overton*, 10 Bing. 252, 25 E. C. L. 121 [overruling *Holmes v. Blogg*, 8 Taunt. 508, 4 E. C. L. 189]; *Harney v. Owen*, 4 Blackf. (Ind.) 338; *Judkins v. Walker*, 17 Me. 40, 35 Am. Dec. 229; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Lowe v. Sinklear*, 27 Mo. 308; *Medbury v. Watrous*, 7 Hill (N. Y.) 110 [overruling *M'Coy v. Huffman*, 8 Cow. (N. Y.) 84]. *Contra*, *Weeks v. Leighton*, 5 N. H. 343; *Abbott v. Inskip*, 29 Ohio St. 59. See the title INFANCY.

**5. Moses v. Stevens**, 2 Pick. (Mass.) 332.

**6. Building Contracts — Rule in Missouri.** — *Lee v. Ashbrook*, 14 Mo. 379, 55 Am. Dec. 110; *Gregg v. Dunn*, 38 Mo. App. 283. See also *Gruetzner v. Aude Furniture Co.*, 28 Mo. App. 263, in which the court said: "This exception has probably been engrafted on the law owing to the difficulty of determining whether there has been an exact performance of the contract in such cases, and the hardship of depriving the contractor of all compensation upon his failure to show that there was."

*quantum meruit* for services performed.<sup>1</sup> The same considerations apply as in the case of contracts which are not affected by the statute of frauds. Complete performance is a condition precedent to a recovery on the express contract, and the express contract excludes any implied promise.<sup>2</sup> While the effect of the statute is to prevent either party from enforcing performance of the contract against the other,<sup>3</sup> it does not make a different contract between them.<sup>4</sup> So far as the parties have voluntarily acted under and performed the contract it is to be taken as defining and measuring their rights.<sup>5</sup>

(2) *View that Plaintiff Can Recover Value of Services Less Damages Resulting from Breach.* — Although, as already shown, the weight of authority is against the following view, it is apparently well settled in a number of states that where the plaintiff has without cause abandoned his contract after part performance, he may, nevertheless, recover on a *quantum meruit*, after deducting the damages to the other contracting party caused by his refusal to complete the contract, for the work actually done.<sup>6</sup>

**b. WHERE FULL PERFORMANCE BY PLAINTIFF IS IMPOSSIBLE — Because of Sickness.** — The rule is well settled that where the plaintiff, after partially performing a contract, is prevented from completing it by sickness or death,<sup>7</sup> or

**1. Effect of Statute of Frauds on Right of Recovery.** — *Clark v. Terry*, 25 Conn. 395; *Kruger v. Leppel*, 42 Minn. 6; *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58 [*approving* *Lockwood v. Barnes*, 3 Hill (N. Y.) 128, 38 Am. Dec. 620]; *Abbott v. Inskip*, 29 Ohio St. 59; *Philbrook v. Belknap*, 6 Vt. 383. *Contra*, *Crawford v. Parsons*, 18 N. H. 293. See generally the title STATUTE OF FRAUDS.

**Illustrations.** — If A agrees to serve B for three years, for a stated compensation, the contract being entire, and he serves for six months, and then voluntarily leaves the service; and supposing the contract to be within the statute; still, if A sue for his service, B may protect himself under the terms of the contract. *Philbrook v. Belknap*, 6 Vt. 383.

Where a party makes a parol contract to labor for another for a year, and without cause abandons the contract before the end of the year, he cannot recover on a *quantum meruit*, although the contract itself is bad because of the statute of frauds. *Clark v. Terry*, 25 Conn. 395.

**Money Paid under Contract Within Statute of Frauds.** — If money is paid under a parol contract for the sale of lands which is within the statute of frauds, it cannot be recovered back unless the vendor refuses to convey; so long as the vendor is willing to perform his part of the contract by making a conveyance the party paying the money must take the land or nothing. *Rhodes v. Storr*, 7 Ala. 346; *Duncan v. Baird*, 8 Dana (Ky.) 101; *Thompson v. Gould*, 20 Pick. (Mass.) 134; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640; *Sims v. Hutchins*, 8 Smed. & M. (Miss.) 328; *Collier v. Coates*, 17 Barb. (N. Y.) 471; *Abbott v. Draper*, 4 Den. (N. Y.) 51; *Dowdle v. Camp*, 12 Johns. (N. Y.) 451; *Hoskins v. Mitcheson*, 14 U. C. Q. B. 551.

**Rule Where Each Party Is Considered Entitled to Rescind.** — In jurisdictions where it is held that either party is entitled to rescind because the contract is within the statute of frauds, the party rescinding may recover back any benefit which has moved from him to the other party. *Winters v. Elliott*, 1 Lea (Tenn.) 676; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311.

**2. Reason for Rule.** — *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58.

**3. Neither Party Can Enforce Contract.** — *Galvin v. Prentice*, 45 N. Y. 165, 6 Am. Rep. 58; *Kruger v. Leppel*, 42 Minn. 6.

**4. Statute Does Not Create New Contract.** — *Galvin v. Prentice*, 45 N. Y. 165, 6 Am. Rep. 58.

**5. Kruger v. Leppel**, 42 Minn. 6.

**6. Indiana.** — *Wheatly v. Miscal*, 5 Ind. 142; *Dallas v. Hollinsworth*, 3 Ind. 537.

*Iowa.* — *McClay v. Hedge*, 18 Iowa 66; *Pixler v. Nichols*, 8 Iowa 106, 74 Am. Dec. 298; *McAfferty v. Hale*, 24 Iowa 355; *Lowen v. Crossman*, 8 Iowa 325; *Tait v. Sherman*, 10 Iowa 60; *Byerlee v. Mendel*, 39 Iowa 382; *Wolf v. Gerr*, 43 Iowa 339.

*Kansas.* — *Duncan v. Baker*, 21 Kan. 99; *School Dist. No. 46 v. Lund*, 51 Kan. 731.

*Nebraska.* — *Parcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366.

*New Hampshire.* — *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713 (the leading case).

*Texas.* — *Carroll v. Welch*, 26 Tex. 149; *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475.

**Illustration.** — Where A hired B to work for him seven months at fifteen dollars per month, and B worked only fifty-nine days and then quit without any reasonable excuse therefor, it was held that B might nevertheless recover from A for what the work was reasonably worth, less any damages that A might have sustained by reason of the partial nonfulfillment of the contract. *Duncan v. Baker*, 21 Kan. 99.

**When Action Accrues.** — In *Hartwell v. Jewett*, 9 N. H. 249, it was held that there can be no recovery on a *quantum meruit* for partial services until the time when the money would have been payable under the special contract has expired. In *Parcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366, the court takes the contrary view.

**7. Performance Prevented by Sickness or Death** — *Illinois.* — *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93.

*Maine.* — *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Knight v. Bean*, 22 Me. 536.

*Massachusetts.* — *Fuller v. Brown*, 11 Met.



by act of law,<sup>1</sup> he is entitled to recover on a *quantum meruit* for his services performed, but he cannot, of course, recover for that part of his services which he was prevented from performing.<sup>2</sup> If, however, the sickness is such as must have been foreseen by the plaintiff at the time of entering into the contract, and the full performance thereof is prevented by sickness, he is not entitled to recover on a *quantum meruit*.<sup>3</sup>

**Destruction of Property on Which Work Is Being Done.** — So it has been held that where the plaintiff is under contract to perform certain work on property belonging to the defendant, and without the fault of either the property is destroyed by fire or otherwise, the plaintiff can recover on a *quantum meruit* for the services performed,<sup>4</sup> unless, perhaps, it is expressly provided in the contract that the plaintiff shall receive nothing for his services until the work is complete.<sup>5</sup> Most of these decisions proceed upon the theory that where the owner of the property retains possession there is an implied obligation for him to have the premises ready for the labor to be performed upon them, and that the destruction of the premises puts him in default.<sup>6</sup> The reason on which this rule is based is scarcely satisfactory. The sole theory on which a contract is implied is to prevent the unjust enrichment of one person at another's expense. In a case of this nature, the defendant receives no benefit, and if he is equally blameless and irresponsible for the accident by which the property is destroyed, why should not the law leave the parties as it finds them, and let each suffer his own loss?

c. WHERE CONTRACT IS TERMINATED THROUGH DEFAULT OF DEFENDANT — (1) *Statement of Rule* — **Simple Contracts.** — Where a simple contract under which a plaintiff is to perform stipulated services for the defendant is without cause abandoned by the latter, and full performance is prevented by him, the plaintiff is entitled to the reasonable value of the services performed and may sue therefor on a *quantum meruit*.<sup>7</sup> This, of course, is not the only

(Mass.) 440; *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82.

*New York.* — *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

*Vermont.* — *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645.

*Wisconsin.* — *Green v. Gilbert*, 21 Wis. 395; *Jennings v. Lyons*, 39 Wis. 554, 20 Am. Rep. 57.

**Reason for Rule.** — Sickness or death is generally regarded as an act of God in such a sense as excuses nonperformance, and a recovery is allowed on a *quantum meruit*. *Jennings v. Lyons*, 39 Wis. 557, 20 Am. Rep. 57. See the title ACT OF GOD, vol. 1, p. 584.

**Full Performance Prevented by Fear of Contagious Sickness.** — The fact that a fatal disease prevails in the vicinity of the place where one has contracted to labor for a specified time, the danger being such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, is sufficient cause for not fulfilling the contract. *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

**1. Performance Prevented by Act of Law.** — *Jones v. Judd*, 4 N. Y. 411; *M'Gowan v. Windham*, 25 Conn. 86.

**2. Leopold v. Salkey**, 89 Ill. 412, 31 Am. Rep. 93; *Hubbard v. Belden*, 27 Vt. 645.

**3. Illustration.** — *Jennings v. Lyons*, 39 Wis. 554, 20 Am. Rep. 57. In this case the plaintiff contracted to render to the defendant the domestic services of himself and wife for one year, at a specified price. Four months and

ten days thereafter the wife left the service in anticipation of her confinement; both were then discharged from the service, and the wife was confined four or six weeks thereafter. It was held that the plaintiff was not excused by such sickness, which he should have foreseen, and could not recover on a *quantum meruit*.

**4. Destruction of Property on Which Work Is Being Done.** — *Rawson v. Clark*, 70 Ill. 656; *Schwartz v. Saunders*, 46 Ill. 18; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Cleary v. Sohler*, 120 Mass. 210; *Haynes v. Second Baptist Church*, 12 Mo. App. 536; *Niblo v. Binsse*, 1 Keyes (N. Y.) 476; *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293; *Hollis v. Chapman*, 36 Tex. 1; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765.

**5. Brumby v. Smith**, 3 Ala. 123; *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433.

**6. Reason for Rule.** — See cases cited in the preceding note.

**7. Where Defendant Prevents Full Performance of Contract — Suit in Quantum Meruit — England.** — *Planche v. Colburn*, 8 Bing. 14, 21 E. C. L. 203; *Goodman v. Pocock*, 15 Q. B. 576, 69 E. C. L. 576; *Prickett v. Badger*, 1 C. B. N. S. 296, 87 E. C. L. 296.

*United States.* — *Chicago v. Tilley*, 103 U. S. 146.

*Illinois.* — *Butts v. Huntley*, 2 Ill. 410.

*Indiana.* — *Hoagland v. Moore*, 2 Blackf. (Ind.) 167.

*Iowa.* — *McCausland v. Cresap*, 3 Greene (Iowa) 161.

*Massachusetts.* — *Fitzgerald v. Allen*, 128 Volume XV.



remedy, for he may elect to treat the contract as still existing and binding upon the defendant, and bring action on the contract for a breach thereof,<sup>1</sup> but a judgment rendered in either proceeding will bar a resort to the other.<sup>2</sup> If suit is brought on a *quantum meruit*, no demand before bringing suit is necessary.<sup>3</sup> and when the plaintiff elects to sue on a *quantum meruit* he is entitled to recover the true value of the services regardless of the contract price. He is not restricted in his recovery to a *pro rata* share of the contract price.<sup>4</sup> On the other hand, he can recover only for services actually performed; if he desires to recover damages for being prevented from completing performance of the contract, or for being prevented from performing any part thereof, he must seek some other remedy.<sup>5</sup>

**Contracts under Seal.** — Where the contract is under seal, and full performance is prevented by the defendant, the plaintiff cannot recover on a *quantum meruit* for services performed; he must declare on the special contract.<sup>6</sup>

(2) *How Rule Affected by Statute of Frauds.* — Where a contract under which the plaintiff is to perform services for the defendant is within the statute of frauds, and the plaintiff performs the whole of such services, or after performing a part is prevented by the defendant from finishing performance, the law raises an implied contract to pay for such services, and the plaintiff may recover on a *quantum meruit*.<sup>7</sup>

Mass. 234; Moulton v. Trask, 9 Met. (Mass.) 577.

Michigan. — Cadman v. Markle, 76 Mich. 448; Mitchell v. Scott, 41 Mich. 108.

Missouri. — Ehrlich v. Aetna L. Ins. Co., 88 Mo. 257; Ream v. Watkins, 27 Mo. 516, 72 Am. Dec. 283; McCullough v. Baker, 47 Mo. 401.

North Carolina. — Martin v. Holly, 104 N. Car. 36; Dover v. Plemmons, 10 Ired. L. (32 N. Car.) 23; Fulps v. Mock, 108 N. Car. 601; Harris v. Separks, 71 N. Car. 372.

Pennsylvania. — Hall v. Rupley, 10 Pa. St. 231.

Vermont. — Derby v. Johnson, 21 Vt. 17.

**Rule Not Applicable Where Payment Is Not to Be Made in Money.** — Where payment is not to be made in money, the weight of authority is that in case full performance is prevented by the defendant there can be no recovery for the services rendered on an *indebitatus* count. Bradley v. Levy, 5 Wis. 400; Cochran v. Tatum, 3 T. B. Mon. (Ky.) 405; Anderson v. Rice, 20 Ala. 239; Allen v. Jarvis, 20 Conn. 38. *Contra*, Brown v. St. Paul, etc., R. Co., 36 Minn. 236.

Thus, where, by the terms of an express contract, payment is to be made wholly or in part by the delivery of specific articles or property, the contract must be specially declared upon in order to recover for a failure of payment — that is, the failure to deliver such articles or property. Bradley v. Levy, 5 Wis. 400.

So where an overseer, by agreement with his employer, is to receive a certain portion of the crop raised as compensation for his services, he cannot recover in assumpsit for work and labor done. Anderson v. Rice, 20 Ala. 239.

**1. Action for Breach.** — Derby v. Johnson, 21 Vt. 17; Ehrlich v. Aetna L. Ins. Co., 88 Mo. 249. The decisions in support of this rule are of course very numerous, but as this treatise merely deals with implied contracts, an extended treatment of this question would be out of place.

**2. Judgment in Quantum Meruit Bars Suit for Breach, and Vice Versa.** — Goodman v. Pocock, 15 Q. B. 576, 69 E. C. L. 576.

**3. Whether Demand Necessary Before Suing on Quantum Meruit.** — See Trinkle v. Reeves, 25 Ill. 214, 76 Am. Dec. 793; Raymond v. Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317.

**4. Recovery Not Limited to Pro Rata of Contract Price.** — Fitzgerald v. Allen, 128 Mass. 234; McCullough v. Baker, 47 Mo. 401; Ehrlich v. Aetna L. Ins. Co., 88 Mo. 249; Derby v. Johnson, 21 Vt. 17.

**5.** Ream v. Watkins, 27 Mo. 516, 72 Am. Dec. 283; Ehrlich v. Aetna L. Ins. Co., 88 Mo. 257; Goodman v. Pocock, 15 Q. B. 576, 69 E. C. L. 576.

**Illustrations.** — Where a party is employed to work and is prevented by his employer from so doing, he cannot sue on a *quantum meruit*, for he has done nothing; his only remedy is on the contract. Moore v. Nason, 48 Mich. 300; Algeo v. Algeo, 10 S. & R. (Pa.) 235.

So servants entitled under the hiring to a month's warning or a month's wages cannot, on the *indebitatus* count, recover the month's wages for having been improperly dismissed without a month's warning. Fewings v. Tisdal, 1 Exch. 295.

**6. Contracts under Seal.** — Atty v. Parish, 1 B. & P. N. R. 104; Middleditch v. Ellis, 2 Exch. 623; McManus v. Cassidy, 66 Pa. St. 263; Harris v. Liggett, 1 W. & S. (Pa.) 301.

**7. Effect of Statute of Frauds.** — Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222; Wonsetler v. Lee, 40 Kan. 367; Montague v. Garnett, 3 Bush (Ky.) 298; Dowling v. McKenney, 124 Mass. 478; Cadman v. Markle, 76 Mich. 448; Lockwood v. Barnes, 3 Hill (N. Y.) 128, 38 Am. Dec. 620; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Campbell v. Campbell, 65 Barb. (N. Y.) 639; Kahn v. Walton, 46 Ohio St. 195; Ellis v. Cary, 74 Wis. 176.

**Partial Contract to Convey Land.** — One who performs services under an oral contract to convey land as a consideration therefor can-

*d.* WHERE EITHER PARTY HAS RIGHT TO TERMINATE CONTRACT AT ANY TIME. — Where parties enter into a contract by which one of them is to render services for a specified time, but it is agreed that either may terminate the contract at any time on becoming dissatisfied therewith, the party who is to perform the services, on abandoning the contract before the time specified therein has expired, may recover on a *quantum meruit* for services performed.<sup>1</sup>

**7. Services Rendered under Illegal Contracts.** — Where a contract is illegal and the parties are *in pari delicto*, one rendering services to the other under such contract, whether it be completed or not, is not entitled to recover for such services.<sup>2</sup> But if the party rendering the services is not *in pari delicto* with the party for whom they are rendered, he may recover their reasonable value on an implied contract.<sup>3</sup>

**8. Services Rendered on Modified Contracts.** — Where there is a contract to do a particular piece of work at a specified price and on an agreed plan, and there is a deviation from the original contract by mutual consent, the contract itself is to be made the rule of payment so far as it can be traced, and for the extra labor the plaintiff can recover on a *quantum meruit*.<sup>4</sup> But if the original plan be so entirely abandoned that it is impossible to trace the contract and to say to which part it shall be applied, the plaintiff may recover by measure and value for the work done as if no contract had been made.<sup>5</sup> In such case the contract is no longer a guide for estimating the price of the work done and the materials provided.<sup>6</sup>

**9. Services Rendered After Termination of Contract.** — Where a contract is entered into by which one person agrees to perform services for another for a definite time and at a stated salary, and such services are continued after the expiration of the term without objection by the employer and without any new agreement, the law raises a presumption that the parties have assented to a continuance of the services for another term of the same length and at the same salary;<sup>7</sup> and the rule is the same where the employment is for a definite

not enforce the contract, because it is within the statute of frauds, but he may nevertheless recover the value of the services on a *quantum meruit*. Ellis v. Cary, 74 Wis. 176.

1. Booth v. Ratcliffe, 107 N. Car. 6.

**Contract Terminated by Mutual Consent.** — Where a contract is mutually abandoned before completion, the party for whom the services are performed will be liable upon acceptance for the value of the work done. Prince v. Thomas, 15 Ark. 378; Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564. The plaintiff can recover only *pro rata* on the basis of the contract price. Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564.

**2. Services Rendered under Illegal Contract — Parties in Pari Delicto.** — Embrey v. Jemison, 131 U. S. 336; Gibbs v. Consolidated Gas Co., 130 U. S. 396; Cothran v. Ellis, 125 Ill. 496; Harvey v. Merrill, 150 Mass. 1, 15 Am. St. Rep. 159; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745.

**3. Parties Not in Pari Delicto.** — Irwin v. Williar, 110 U. S. 499; Gray v. Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 383; Duval v. Wellman, 124 N. Y. 156. For a full treatment of his subject see the title ILLEGAL CONTRACTS, *ante*.

**4. Work Done on Modified Contract.** — Robson v. Godfrey, Holt N. P. 236, 3 E. C. L. 100; O'Connor v. Dingley, 26 Cal. 20; De Boom v. Priestly, 1 Cal. 206; McClelland v. Snider, 18 Ill. 58; Stewart v. Craig, 3 Greene (Iowa) 505; Andre v. Bodman, 13 Md. 241, 71 Am. Dec.

628; Wheeden v. Fisk, 50 N. H. 127; Goldsmith v. Hand, 26 Ohio St. 101; Chitty on Contracts (11th Am. ed.) 823.

5. Ford v. Smith, 25 Ga. 675; Hummer v. Lockwood, 3 Greene (Iowa) 90; Austin v. Keating, 21 Mo. App. 30; Wheeden v. Fiske, 50 N. H. 125; Chitty on Contracts (11th Am. ed.) 824.

6. Hummer v. Lockwood, 3 Greene (Iowa) 90; Tebbetts v. Haskins, 16 Me. 283; Wheeden v. Fiske, 50 N. H. 125.

**7. Services Rendered After Termination of Contract — Compensation by Salary — California.** — Nicholson v. Patchin, 5 Cal. 474.

*Illinois.* — Moline Plow Co. v. Booth, 17 Ill. App. 574.

*Louisiana.* — Lalande v. Aldrich, 41 La. Ann. 307; Sullivan v. New Orleans Stave, etc., Co., 44 La. Ann. 787.

*Massachusetts.* — Tatterson v. Suffolk Mfg. Co., 106 Mass. 56.

*Michigan.* — Sines v. Superintendents of Poor, 58 Mich. 503.

*New Hampshire.* — New Hampshire Iron Factory Co. v. Richardson, 5 N. H. 294.

*New Jersey.* — Taylor v. Lambertville, 43 N. J. Eq. 107.

*New York.* — Adams v. Fitzpatrick, 125 N. Y. 124; Bacon v. New Home Sewing Mach. Co., 59 Hun (N. Y.) 624, 13 N. Y. Supp. 359; Ball v. Stover, 32 Hun (N. Y.) 460; Wallace v. Devlin, 36 Hun (N. Y.) 275; Greer v. Peoples Telephone, etc., Co., 50 N. Y. Super. Ct. 517.

*Pennsylvania.* — Good Intent Co. v. Hartzell,



time and the compensation consists of commissions instead of a salary.<sup>1</sup> It follows, therefore, as a result of this presumption, that where services are performed after expiration of the term, the plaintiff cannot recover on a *quantum meruit*, but is limited to the price fixed by the original agreement.<sup>2</sup>

**10. Services Rendered Not in Strict Accordance with Contract.**—Where a party employed to perform designated services for another, unintentionally performs such services defectively and not in strict accordance with the terms of the contract, he cannot recover the remuneration stipulated for in the contract, because he has not done that which is to be the consideration for it. Yet if the other party derives any benefit from such services the law will imply a promise on his part to pay such an amount as the benefit is reasonably worth, and this amount is recoverable as on a *quantum meruit*. This rule is supported by a multitude of authorities and may be considered as well settled,<sup>3</sup> although it has been said that courts of eminent authority,

22 Pa. St. 277; *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *Ranck v. Albright*, 36 Pa. St. 367.

*Wisconsin*.—*Weise v. Milwaukee County*, 51 Wis. 564.

**Illustrations.**—Where A agreed to serve B for a stipulated salary for a year, and continued in B's service for three years without any new agreement, it was held that he could not recover on a *quantum meruit* for his services, but could only recover at the rate of the stipulated salary fixed for the first year. *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620.

So where after the expiration of a contract to furnish gas to a city for one year the company continued to furnish and the city to pay therefor according to the contract, this was held to operate as a new contract for another year at the same price. *Taylor v. Lambertville*, 43 N. J. Eq. 107.

In a contract between a planter and an overseer under which the latter was employed for several years at a stipulated salary per year, the fact that the overseer began a new year without express agreement or renewal of terms was held to be a tacit reconduction of the contract for the same term at the same salary. *Lalande v. Aldrich*, 41 La. Ann. 307.

**Effect of Discontinuance of Employer's Business.**—The fact that the employer does not continue to carry on his business during a portion of the time, and during that interval there is nothing for the employee to do in one of the capacities in which he is employed, will not affect the construction of the contract or the liability of the parties. *Vail v. Jersey Little Falls Mfg. Co.*, 32 Barb. (N. Y.) 564.

**Continuance at Request of Employer.**—Where, after the expiration of the contract, the employer requests his agent to continue to sell his merchandise, the law will raise an implied promise to pay to such agent a reasonable compensation therefor. *Taylor Mfg. Co. v. Key*, 86 Ala. 212.

**1. Compensation by Commissions.**—*Dean v. Woodward*, 52 Hun (N. Y.) 421; *Ball v. Stover*, 82 Hun (N. Y.) 460.

**2. Compensation Fixed by Original Contract Price.**—*Weise v. Milwaukee County*, 51 Wis. 564; *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *Sullivan v. New Orleans Stave, etc., Co.*, 44 La. Ann. 787.

**3. Defective Performance of Contract—Recovery on Quantum Meruit.**

*win*, 3 Bing. N. Cas. 737, 32 E. C. L. 309; *Cooke v. Munstone*, 1 B. & P. N. R. 351; *Bartholomew v. Markwick*, 15 C. B. N. S. 711, 109 E. C. L. 711; *Chapel v. Hickes*, 2 Crompt. & M. 214; *Thornton v. Place*, 1 M. & Rob. 218; *Burn v. Miller*, 4 Taunt. 745; *Inchbald v. Western Neilgherry Coffee, etc., Plantation Co.*, 17 C. B. N. S. 733, 112 E. C. L. 733.

*United States*.—*Dermott v. Jones*, 23 How. (U. S.) 220; *Standard Gas Light Co. v. Wood*, 26 U. S. App. 15; *Stillwell, etc., Mfg. Co. v. Phelps*, 130 U. S. 520; *Hawkins v. U. S.*, 96 U. S. 697.

*California*.—*Katz v. Bedford*, 77 Cal. 319.

*Connecticut*.—*Blakeslee v. Holt*, 42 Conn. 226; *Smith v. Scott's Ridge School Dist.*, 20 Conn. 312; *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183.

*Illinois*.—*Eldridge v. Rowe*, 7 Ill. 92, 43 Am. Dec. 41.

*Indiana*.—*McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Lomax v. Bailey*, 7 Blackf. (Ind.) 599.

*Iowa*.—*Corwin v. Wallace*, 17 Iowa 374; *McClay v. Hedge*, 18 Iowa 66.

*Kansas*.—*School Dist. No. 2 v. Boyer*, 46 Kan. 54; *School Dist. No. 46 v. Lund*, 51 Kan. 731.

*Kentucky*.—*Morford v. Ambrose*, 3 J. J. Marsh. (Ky.) 690; *Escott v. White*, 10 Bush (Ky.) 169.

*Maine*.—*Jewett v. Weston*, 11 Me. 346; *White v. Oliver*, 36 Me. 92; *Hattin v. Chase*, 88 Me. 240; *Morgan v. Hefner*, 68 Me. 131; *Hayden v. Madison*, 7 Me. 76.

*Massachusetts*.—*Cullen v. Sears*, 112 Mass. 299; *Smith v. First Cong. Meeting-house*, 8 Pick. (Mass.) 178; *Moulton v. McOwen*, 103 Mass. 591; *Snow v. Ware*, 13 Met. (Mass.) 49; *Cullen v. Sears*, 112 Mass. 299; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Gleason v. Smith*, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; *Blood v. Wilson*, 141 Mass. 25; *Powell v. Howard*, 109 Mass. 192.

*Michigan*.—*Allen v. McKibbin*, 5 Mich. 449; *Willey v. Fractional School Dist. No. 1*, 25 Mich. 419.

*Missouri*.—*Freeman v. Aylor*, 62 Mo. App. 616; *Austin v. Keating*, 21 Mo. App. 30; *Smith v. Keith, etc., Coal Co.*, 36 Mo. App. 567; *James Halpin Mfg. Co. v. School Dist.*, 54 Mo. App. 376; *Globe Light, etc., Co. v. Doud*, 47 Mo. App. 439; *Yeats v. Ballentine*, 56 Mo. 530; *Williams v. Chicago, etc., R. Co.*,



both in *England* and in the *United States*, have held that no recovery can be had for labor furnished under a special contract unless the contract has been performed according to its terms or its performance has been dispensed with by the other party.<sup>1</sup> Such a recovery is permitted because of the hardship resulting to the person performing the services in withholding from him all compensation whatever for his work and labor, when by reason of his failure to perform the stipulations of his contract he can maintain no action upon it,<sup>2</sup> and because of the unquestionable advantage which a contrary rule would give to the party who receives and retains the benefit of his labor.<sup>3</sup> The amount recoverable depends upon the extent of the benefit conferred, having reference to the contract for the entire work,<sup>4</sup> and this is usually the contract price, less the damages caused by not complying with the exact terms of the contract.<sup>5</sup> The amount recoverable cannot in any event exceed the price which would have been allowed under the contract for the same amount of work had the contract been fulfilled.<sup>6</sup>

**11. Extra Services — Persons Employed to Do Particular Piece of Work.** — Where a person employed to do a particular piece of work performs services not contemplated by the contract, without the assent or knowledge of his employer, he cannot recover therefor, however valuable or important the services are.<sup>7</sup> Nor can there be any recovery for extra services in the absence of a request to perform them or an express promise to pay for them, even though the employer knew that they were being rendered.<sup>8</sup> If, however, services not con-

112 Mo. 463, 34 Am. St. Rep. 403; *Moore v. H. Gaus, etc., Mfg. Co.*, 113 Mo. 98; *Freeman v. Aylor*, 62 Mo. App. 613; *Phillippi v. McLean*, 5 Mo. App. 587; *Haysler v. Owen*, 61 Mo. 270.

*New York.* — *Jewell v. Schroepel*, 4 Cow. (N. Y.) 564; *Linningdale v. Livingston*, 10 Johns. (N. Y.) 36; *Jennings v. Camp*, 13 Johns. (N. Y.) 97, 7 Am. Dec. 367; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Johnson v. DePeyster*, 50 N. Y. 666; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Phillip v. Gallant*, 62 N. Y. 264; *Heckmann v. Pinkney*, 81 N. Y. 211; *Woodward v. Fuller*, 80 N. Y. 312.

*North Carolina.* — *Byerly v. Kopley*, 1 Jones L. (46 N. Car.) 35.

*Ohio.* — *Newman v. McGregor*, 5 Ohio 349, 24 Am. Dec. 293.

*Oregon.* — *Gove v. Island City Mercantile, etc., Co.*, 19 Oregon 369; *Steeple v. Newton*, 7 Oregon 110, 33 Am. Rep. 705; *Tribou v. Strowbridge*, 7 Oregon 156.

*Pennsylvania.* — *Gallagher v. Sharpless*, 134 Pa. St. 134; *Liggett v. Smith*, 3 Watts (Pa.) 331, 27 Am. Dec. 358; *Preston v. Finney*, 2 W. & S. (Pa.) 53.

*Tennessee.* — *Elliott v. Wilkinson*, 8 Yerg. (Tenn.) 411; *Pettee v. Tennessee Mfg. Co.*, 1 Sneed (Tenn.) 383; *Whitaker v. Pullen*, 3 Humph. (Tenn.) 466; *Porter v. Woods*, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153.

*Vermont.* — *Kelly v. Bradford*, 33 Vt. 35.

*Wisconsin.* — *Trowbridge v. Barrett*, 30 Wis. 661.

1. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183.

2. *Reason for Rule.* — *Escott v. White*, 10 Bush (Ky.) 173.

3. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183.

4. *Measure of Recovery.* — *Lucas v. Godwin*, 3 Bing. N. Cas. 737, 32 E. C. L. 309; *Dermott v. Jones*, 23 How. (U. S.) 220; *Pinches v.*

*Swedish Evangelical Lutheran Church*, 55 Conn. 187; *Smith v. First Cong. Meeting-house*, 8 Pick. (Mass.) 178; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Kelly v. Bradford*, 33 Vt. 35.

5. *Corwin v. Wallace*, 17 Iowa 374; *Escott v. White*, 10 Bush (Ky.) 169; *Morgan v. Hefler*, 68 Me. 131; *White v. Oliver*, 36 Me. 92; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Cullen v. Sears*, 112 Mass. 299; *Moulton v. McOwen*, 103 Mass. 587; *Gove v. Island City Mercantile, etc., Co.*, 19 Oregon 362; *Steeple v. Newton*, 7 Oregon 110, 33 Am. Rep. 705; *Gallagher v. Sharpless*, 134 Pa. St. 134; *Kelly v. Bradford*, 33 Vt. 35.

6. *Amount Recoverable Cannot Exceed Contract Price.* — *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Freeman v. Aylor*, 62 Mo. App. 613.

7. *Extra Services — Person Employed to Do Particular Work.* — *Hort v. Norton*, 1 McCord L. (S. Car.) 22; *Wilmot v. Smith*, 3 C. & P. 453, 14 E. C. L. 386.

For an application of the general principles set forth in this section, consult specific titles in which particular kinds of contracts are discussed, as, for instance, ATTORNEY AND CLIENT, vol. 3, p. 414 *et seq.*; MASTER AND SERVANT; WORKING CONTRACTS, etc.

8. *Request or Express Promise to Pay Necessary.* — *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167; *Spence v. Bowen*, 41 Mich. 149; *Miller v. McCaffrey*, 9 Pa. St. 245.

*Illustration.* — Where the plaintiff agreed to construct for the defendant, for four pounds ten shillings, a printing press with a cast-iron bottom, and he furnished one with a wrought-iron bottom, and sued for five pounds five shillings, it was held that he could recover but four pounds ten shillings, although the press was better and the defendant did not object to it or offer to return it. *Wilmot v. Smith*, 3 C. & P. 453, 14 E. C. L. 386.

templated by the contract are rendered at the express request of the employer, a recovery therefor may be had as on an independent contract, regardless of any promise to pay for them,<sup>1</sup> especially where the extra services are performed under protest by the employee.<sup>2</sup>

**Persons Working for Salary or Wages.** — Where one is employed by another at a stipulated salary or receives stipulated wages, there is a presumption of law that all services rendered by him, especially if of a nature closely similar to his regular duties, are rendered under the contract of employment. If the employee seeks to overcome this presumption and recover for what he considers extra services, he must show an express promise to pay for them. A mere request for such services on the part of the employer gives no right of action.<sup>3</sup> If, however, the services are outside the scope of his legal employment and are rendered at the request of the employer, he may recover their reasonable value,<sup>4</sup> and no express agreement to pay therefor is essential to a recovery.<sup>5</sup>

**12. Implied Contract that Party Performing Services Possesses Ordinary Skill.** — Where a person enters into a contract to perform designated services for another, the law will imply that he assumes to possess the knowledge and skill necessary to the performance of such services and that he undertakes to use due and ordinary care in performing them. This rule has a wide application and includes services of all kinds.<sup>6</sup> If a party contracting to perform

**1. Extra Services Performed on Request.** — *Slusser v. Burlington*, 47 Iowa 300; *Evans, v. McConnell*, 99 Iowa 326; *Escott v. White*, 10 Bush (Ky.) 169; *Isham v. Parker*, 3 Wash. 755.

**Extra Services Rendered Necessary by Mistake of Employer.** — Where a contractor agreed to grade and flag the defendant's street, and through the erroneous action of the defendant's engineer, not from any intentional change of plan, more work was required of the contractor than would have been necessary under the contract, and additional expense was incurred by him, it was held that the contractor could recover for the extra labor and additional expense according to its value and amount, and that he was not confined to the rate of compensation provided for similar work by the special contract. *Mulholland v. New York*, 113 N. Y. 631.

**2. Services Performed under Protest.** — *Slusser v. Burlington*, 47 Iowa 300. In this case a contractor excavating streets under contract was required by the city and proceeded under protest to excavate to a greater depth than was properly contemplated by the contract. It was held that as to the extra labor involved the contractor was entitled to recover the reasonable value of such labor in addition to the compensation under the contract.

**Extra Services Rendered by Third Person Called In by Employee.** — Where a codefendant in a suit, being an attorney, specially contracted with his codefendants in an action for a stipulated sum to defend the suit in behalf of himself and his codefendants, he to employ and pay assistant counsel, it was held that the assistant counsel called into the case by such attorney, and who performed valuable services in the defense of the case with the knowledge of the other defendants, and without any knowledge on their part of the special contract existing between such attorney and his codefendants, were entitled, in an action against all the defendants, to recover compensation

for the services rendered by them in defense of the suit. *McCrary v. Ruddick*, 35 Iowa 521.

**Constructing Bar for Hotel.** — Where a building is constructed expressly for a tavern or hotel a bar is implied, and a charge for extra work therefor will not be sustained. *Dodd v. Pierson*, 11 N. J. L. 287.

**3. Services Performed by One Working on Salary or for Wages.** — *Cany v. Halleck*, 9 Cal. 198; *Luske v. Hotchkiss*, 37 Conn. 219, 6 Am. Rep. 314; *Guthrie v. Merrill*, 4 Kan. 187; *Voorhees v. Combs*, 33 N. J. L. 497; *Ross v. Hardin*, 79 N. Y. 84; *Carrere v. Dun*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 18; *McCormack v. New York*, (N. Y. Super. Ct. Tr. T.) 14 Misc. (N. Y.) 272; *Lyons v. Jube*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 664.

**Illustration.** — No implied contract for extra compensation for a bookkeeper arises from the request by a member of the firm employing him to go over his individual books, nor will the fact that with the knowledge of such member the work was done at night and on Sundays raise such a promise. *Carrere v. Dun*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 18.

**4. Services Not Within Scope of Regular Employment.** — *U. S. v. Brindle*, 110 U. S. 688; *Cincinnati, etc., R. Co. v. Clarkson*, 7 Ind. 595; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Merzbach v. New York*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 131.

**5. Express Promise to Pay Unnecessary.** — *Cincinnati, etc., R. Co. v. Clarkson*, 7 Ind. 595.

**6. Implied Contract as to Skill and Knowledge — England.** — *Francis v. Cockrell*, 10 B. & S. 850; *Lucas v. Godwin*, 3 Bing. N. Cas. 737, 32 E. C. L. 309; *Pearce v. Tucker*, 3 F. & F. 136. **Arkansas.** — *Manuel v. Campbell*, 3 Ark. 324; *McDonald v. Simpson*, 4 Ark. 523, 38 Am. Dec. 45.

**California.** — *E. E. Thomas Fruit Co. v. Start*, 107 Cal. 206.



services falls short of what the law implies, and the services are such as may be rejected, the employer is not bound to accept them; but if he accepts them he must pay for whatever of benefit he may have received.<sup>1</sup> If the employer has actually sustained damages, he is entitled to recover therefor.<sup>2</sup>

**13. Implied Contract that Work Shall Be Performed Within Reasonable Time.** — Whenever a contract is silent as to the time of performance, the law always implies an agreement that the terms thereof shall be performed within a reasonable time.<sup>3</sup> What is a reasonable time must, of course, depend upon the particular circumstances of each case.<sup>4</sup>

**IV. MONEY HAD AND RECEIVED AND MONEY PAID — 1. Money Which Rightfully Belongs to Another.** — Where one has in his hands money which in equity and good conscience belongs and ought to be paid to another, an action for

*Delaware.* — *Hall v. Cannon*, 4 Harr. (Del.) 360.

*Illinois.* — *Chase v. Heaney*, 70 Ill. 268; *Union Hide, etc., Co. v. Reissig*, 48 Ill. 75; *Springdale Cemetery Assoc. v. Smith*, 32 Ill. 252.

*Iowa.* — *Smith v. Bristol*, 33 Iowa 24.

*Mississippi.* — *Leflore v. Justice*, 1 Smed. & M. (Miss.) 381.

*New Hampshire.* — *Murray v. Warner*, 55 N. H. 546, 20 Am. Rep. 227; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

*New Jersey.* — *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668.

*New York.* — *Barrett Dyeing Establishment v. Wharton*, 16 N. Y. Wkly. Dig. 500.

*Ohio.* — *Gallaher v. Thompson*, Wright (Ohio) 466; *Carter v. Adams*, Wright (Ohio) 471; *Bliss v. Long*, Wright (Ohio) 351; *Geiselman v. Scott*, 25 Ohio St. 86; *Somerby v. Tappan*, Wright (Ohio) 570; *McCrary v. Skinner*, 2 West. L. Month. 203, 2 Ohio Dec. (Reprint) 268; *Grindle v. Rush*, 7 Ohio (pt. ii.) 123; *Craig v. Chambers*, 17 Ohio St. 253.

*Pennsylvania.* — *Heck v. Shener*, 4 S. & R. (Pa.) 249, 8 Am. Dec. 700; *Wade v. Haycock*, 25 Pa. St. 382.

*Wisconsin.* — *Kuehn v. Wilson*, 13 Wis. 104; *Reynolds v. Graves*, 3 Wis. 416; *Norris v. Cargill*, 57 Wis. 257.

**Services of Mechanics or Workmen.** — Where a workman contracts to build a chimney, the law implies that he shall employ in the work sufficient skill, and that he shall construct the chimney according to the received rules of the art he practices in order to effect the desired result, which is to carry the smoke out; but if the ordinary method and rule be followed he will not be liable for failure in effecting the result. *Somerby v. Tappan*, Wright (Ohio) 229.

So a man who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to seats in the building, impliedly undertakes that due care has been exercised in the erection and that the building is reasonably fit for the purpose, and it is immaterial whether the money is or is not to be appropriated to his own use. *Francis v. Cockrell*, 10 B. & S. 850.

**Services in Making Abstract of Title.** — If a person engages in the business of searching the public records, examining title to real estate, and making abstracts thereof for compensation, the law will imply that he assumes to possess the requisite knowledge and skill,

and that he undertakes to use due and ordinary care in the performance of his duty; and for a failure in either of these respects, resulting in damages, the party injured is entitled to recover. *Chase v. Heaney*, 70 Ill. 268.

**1. Employer Must Pay for Accepted Services.** — *Hall v. Cannon*, 4 Harr. (Del.) 360.

**2. Employer May Recover Damages.** — *Chase v. Heaney*, 70 Ill. 268; *Van Buskirk v. Murden*, 22 Ill. 446, 74 Am. Dec. 163.

**3. Implied Contract that Work Will Be Performed in Reasonable Time** — *England*. — *Ellis v. Thompson*, 3 M. & W. 445.

*Canada.* — *Mahaffy v. Baril*, 11 Quebec Super. Ct. 475.

*United States.* — *Cocker v. Franklin Hemp, etc., Mfg. Co.*, 3 Sumn. (U. S.) 530; *Minneapolis Gas Light Co. v. Kerr Murray Mfg. Co.*, 122 U. S. 300.

*Colorado.* — *Walling v. Warren*, 2 Colo. 434.

*Illinois.* — *George Lehman, etc., Co. v. Clark*, 33 Ill. App. 33; *Wilderman v. Pitts*, 29 Ill. App. 528; *Driver v. Ford*, 90 Ill. 595; *Fowler v. Deakman*, 84 Ill. 130; *Hamilton v. Sculley*, 118 Ill. 192.

*Iowa.* — *Paddock v. Bartlett*, 68 Iowa 16.

*Massachusetts.* — *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 657.

*Michigan.* — *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Byram v. Gordon*, 11 Mich. 531; *Bolton v. Riddle*, 35 Mich. 13; *Grant v. Merchants', etc., Bank*, 35 Mich. 515; *Youmans v. Hearty*, 34 Mich. 397.

*Minnesota.* — *Liljengren Furniture, etc., Co. v. Mead*, 42 Minn. 420; *Stone v. Harmon*, 31 Minn. 512.

*Missouri.* — *Bryant v. Saling*, 4 Mo. 522.

*New Hampshire.* — *Morse v. Bellows*, 7 N. H. 566, 28 Am. Dec. 372.

*New York.* — *Davis v. Tallcot*, 12 N. Y. 184.

*Vermont.* — *Dennis v. Stoughton*, 55 Vt. 376.

*Washington.* — *McCartney v. Glassford*, 1 Wash. 579.

"Where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time, without reference to extraordinary circumstances." <sup>2</sup> *Chitty on Contracts* (11th Am. ed.) 1062.

**4. What Is Reasonable Time.** — *Cocker v. Franklin Hemp, etc., Mfg. Co.*, 3 Sumn. (U. S.) 530; *Tucker v. Maxwell*, 11 Mass. 143; *Stange v. Wilson*, 17 Mich. 342; *Bryant v. Saling*, 4 Mo. 522.



money had and received will lie for the recovery thereof. No privity of contract is necessary to sustain this action, for the law, under these circumstances, implies a promise to pay.<sup>1</sup> It is of no importance how the money

**1. Money Which Rightfully Belongs to Another** — *England*. — Pickard v. Banks, 13 East 20; Spratt v. Hobhouse, 4 Bing. 173, 13 E. C. L. 395; Israel v. Douglas, 1 H. Bl. 239; Moses v. Macferlan, 2 Burr. 1005; Farmer v. Arundel, 2 W. Bl. 824; Brisbane v. Dacres, 5 Taunt. 144, 1 E. C. L. 43; Williams v. Everett, 14 East 582.

*Canada*. — Owston v. Grand Trunk R. Co., 28 Grant Ch. (U. C.) 431.

*United States*. — Curtis v. Fiedler, 2 Black (U. S.) 461; Cary v. Curtis, 3 How. (U. S.) 236; Gaines v. Miller, 111 U. S. 395; Crane v. Runey, 26 Fed. Rep. 16, 11 Sawy. (U. S.) 420; Commonwealth Bank v. Wister, 2 Pet. (U. S.) 318.

*Alabama*. — Branch Bank v. Parrish, 20 Ala. 433; Wilson v. Sergeant, 12 Ala. 778; Knox v. Abercrombie, 11 Ala. 997; Houston v. Frazier, 8 Ala. 81; King v. Martin, 67 Ala. 177; Planters', etc., Ins. Co. v. Tunstall, 72 Ala. 142; Hitchcock v. Lukens, 8 Port. (Ala.) 333; Wilson v. Sergeant, 12 Ala. 778; Huckabee v. May, 14 Ala. 263; Thompson v. Merriman, 15 Ala. 166.

*California*. — Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98; Kreutz v. Livingston, 15 Cal. 344; De Celis v. Porter, 65 Cal. 3.

*Connecticut*. — Findley v. Adams, 2 Day (Conn.) 369; Northrop v. Graves, 10 Conn. 555, 50 Am. Dec. 264; Camp v. Tompkins, 9 Conn. 554; Brainard v. Colchester, 31 Conn. 411.

*Delaware*. — Burton v. Wharton, 4 Harr. (Del.) 296; Guthrie v. Hyatt, 1 Harr. (Del.) 446; Wright v. Wright, 2 Harr. (Del.) 350.

*Illinois*. — Taylor v. Taylor, 20 Ill. 650; Barnes v. Johnson, 84 Ill. 95; Trumbull v. Campbell, 8 Ill. 502.

*Indiana*. — Long v. Straus, 107 Ind. 94, 57 Am. Rep. 87; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299.

*Iowa*. — District Tp. v. District Tp., 11 Iowa 506.

*Kansas*. — Hubbard v. Ogden, 22 Kan. 363.

*Kentucky*. — Gaines v. Scott, 3 Ky. L. Rep. 418; Garrott v. Jaffray, 10 Bush (Ky.) 418; Atcherson v. Talbot, 5 Dana (Ky.) 325.

*Maine*. — Norton v. Kidder, 54 Me. 189; Lewis v. Sawyer, 44 Me. 332; Calais v. Whidden, 64 Me. 249.

*Massachusetts*. — Hall v. Marston, 17 Mass. 575; Claflin v. Godfrey, 21 Pick. (Mass.) 1; Jacobs v. Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; Wiseman v. Lyman, 7 Mass. 288; Mason v. Waite, 17 Mass. 560; Goodridge v. Lord, 10 Mass. 487.

*Michigan*. — Catlin v. Birchard, 13 Mich. 110; Beardslee v. Horton, 3 Mich. 560; Spencer v. Towles, 18 Mich. 9; Moore v. Mandlebaum, 8 Mich. 433; Atkinson v. Scott, 36 Mich. 18.

*Missouri*. — Davis v. Krum, 12 Mo. App. 279; Koopman v. Cahoon, 47 Mo. App. 357; Clark v. Harrisonville First Nat. Bank, 57 Mo. App. 285; Jacoby v. O'Hearn, 32 Mo. App. 566; Winningham v. Fancher, 52 Mo. App. 458; Chase v. Willman Mercantile Co., 63 Mo. App. 482; Robbins v. Alton M. & F. Ins. Co., 12

Mo. 380; Reed v. Foote, 36 Mo. App. 471; Frost v. Redford, 54 Mo. App. 345.

*New Hampshire*. — McCrillis v. Bartlett, 8 N. H. 569; Burleigh v. Bennett, 9 N. H. 15, 31 Am. Dec. 213; Spencer v. Goddard, 62 N. H. 702.

*New York*. — Ross v. Curtis, 30 Barb. (N. Y.) 238; Byxhie v. Wood, 24 N. Y. 607; Beardsley v. Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386; Raymond v. Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317; Dumond v. Carpenter, 3 Johns. (N. Y.) 183; Buel v. Boughton, 2 Den. (N. Y.) 91; M'Neilly v. Richardson, 4 Cow. (N. Y.) 607.

*North Carolina*. — Anderson v. Hawkins, 3 Hawks (10 N. Car.) 568; Bond v. Hall, 8 Jones L. (53 N. Car.) 14; White v. Hunt, 64 N. Car. 496; Robertson v. Dunn, 87 N. Car. 191; Bahnsen v. Clemmons, 79 N. Car. 556; Winslow v. Fenner, Phil. L. (61 N. Car.) 565; Draughan v. Bunting, 9 Ired. L. (31 N. Car.) 10.

*Oregon*. — Hoxter v. Poppleton, 9 Oregon 487; Peterson v. Foss, 12 Oregon 82.

*Pennsylvania*. — Brubaker v. Robinson, 3 P. & W. (Pa.) 295; Telford, etc., Turnpike Co. v. Gerhab, 22 W. N. C. (Pa.) 175; Pugh v. Powell, (Pa. 1887) 11 Atl. Rep. 570; Hoopes v. Stott, 2 Chest. Co. Rep. (Pa.) 40; Smith v. Austin, 4 Brews. (Pa.) 89; Gangwer v. Fry, 17 Pa. St. 491, 55 Am. Dec. 578; Wilson v. Wilson, 3 Binn. (Pa.) 577; Hopkins v. Beebe, 26 Pa. St. 86; Barr v. Craig, 2 Dall. (Pa.) 151.

*Texas*. — Floyd v. Patterson, 72 Tex. 202, 13 Am. St. Rep. 787.

*Vermont*. — Phelps v. Conant, 30 Vt. 277.

*Wisconsin*. — Woodward v. Hill, 6 Wis. 143; Wells v. American Express Co., 49 Wis. 224; Ela v. American Merchants' Union Express Co., 29 Wis. 611, 9 Am. Rep. 619.

**Illustrations of Rule** — **Money Received by Trustee**. — Assumpsit will lie to recover back money paid to a trustee for a specific purpose, if it has not been applied to that purpose. Guthrie v. Hyatt, 1 Harr. (Del.) 446.

**Money Received by Agent**. — The lawful representative of a deceased person, who ratifies sales of property made by an agent of executors in their own wrong, may maintain an action at law against the agent for money had and received, to recover the proceeds of the sale in his hands. Gaines v. Miller, 111 U. S. 315.

**Money Received on Judgment**. — Where money is received on a judgment by a party thereto, the law, on a reversal of the judgment, raises an obligation against such party to restore the amount so received, and this obligation is enforceable by an action for money had and received to the use of the plaintiff therein. Crane v. Runey, 26 Fed. Rep. 15.

**No Actual Agreement Necessary**. — To entitle the plaintiff to maintain this action it is unnecessary that there should have been any actual agreement between the parties, for the law creates the privity of the promise. Hitchcock v. Lukens, 8 Port. (Ala.) 333; Neilson v. Blight, 1 Johns. Cas. (N. Y.) 205.

**Plaintiff Must Show Title to Money**. — To

came into his hands, if the other party is legally entitled to it,<sup>1</sup> and usually no demand is necessary to the maintenance of the action.<sup>2</sup> The action lies although the person in whose possession the money is has never seen or heard of the party who has the right of action,<sup>3</sup> and the promise is implied even though the party in whose possession the money is partly objected to receiving it, provided he does nevertheless actually receive it and use it for his own purposes, or so deals with it as to retain and enjoy its benefits.<sup>4</sup>

**Nature of Action.** — The action for money had and received, though in the theory of the common law an action of assumpsit and hence an action *ex contractu*, is in reality in the nature of a bill in equity, and the gist of the action is that the party is obliged, by the ties of equity and natural justice, to refund the money.<sup>5</sup>

**Statute of Frauds.** — The statute of frauds interposes no barrier to a recovery. The undertaking of the defendant is not to answer for the debt, default, or miscarriage of another, but to pay the money of another already received, or when received, to a third person.<sup>6</sup>

**The Rule Does Not Apply** where a debtor places money in the hands of another to deliver to his creditor in payment of a debt, but subsequently recalls it; in such case the party in whose hands the money was placed will not be liable to the creditor therefor.<sup>7</sup>

**Illegality of Transaction Between Third Persons.** — One who has received of a third party money for the use of another is liable to the latter on an implied promise and cannot defend on the ground of the illegality of the transaction between the other parties.<sup>8</sup>

**2. Money Received as Agent.** — Where one has received money as the agent of another, the law implies a promise to pay it over to such other as principal.<sup>9</sup> But where one receives money as agent on a contract of sale made with

maintain an action for money had and received, it is necessary to establish that the defendant has received money belonging to the plaintiff or to which he is entitled; it is not sufficient to show that he has by fraud or wrong caused the plaintiff to pay money to others or to sustain loss or damages. *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *New York Guaranty, etc., Co. v. Gleason*, 78 N. Y. 503.

**1. Immaterial How Party Got Money.** — *Clark v. Harrisonville First Nat. Bank*, 57 Mo. App. 277.

**2. Necessity for Demand.** — *Calais v. Whidden*, 64 Me. 249; *Stetson v. Howe*, 31 Me. 353; *Hall v. Marston*, 17 Mass. 575; *Stacy v. Graham*, 14 N. Y. 492; *Utica Bank v. Van Gieson*, 18 Johns. (N. Y.) 485.

**Exception to Rule.** — One who has received money standing in the position of a trustee, that is, a collecting agent, is in general not liable to an action for money received until demand is made or some breach of trust or duty committed. *Walrath v. Thompson*, 6 Hill (N. Y.) 540; *Phelps v. Bostwick*, 22 Barb. (N. Y.) 314.

**3. Lewis v. Sawyer**, 44 Me. 332; *Calais v. Whidden*, 64 Me. 249; *Hitchcock v. Lukens*, 8 Port. (Ala.) 338.

**4. Immaterial that Party Objected to Reconveyance.** — *De Celis v. Porter*, 65 Cal. 3.

**5. Nature of Action for Money Had and Received.** — *Camp v. Tompkins*, 9 Conn. 554; *Brainard v. Colchester*, 31 Conn. 411; *Davis v. Krum*, 12 Mo. App. 279; *Koopman v. Cahoon*, 47 Mo. App. 357; *Buel v. Boughton*, 2 Den. (N. Y.)

91; *Kingston Bank v. Eltinge*, 66 N. Y. 625.

**6. Statute of Frauds.** — *Hitchcock v. Lukens*, 8 Port. (Ala.) 338.

**7. When Rule Does Not Apply.** — *Lewis v. Sawyer*, 44 Me. 332.

**8. Illegality of Transaction Between Third Persons.** — *Beeston v. Beeston*, 1 Ex. D. 13; *Gilliam v. Brown*, 43 Miss. 641; *Owen v. Davis*, 1 Bailey L. (S. Car.) 315; *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787. See also *Simpson v. Bloss*, 7 Taunt. 246, 2 E. C. L. 246.

**The Cause of Action Is Not Dependent upon the Illegal Transaction.** — When the plaintiff shows that the defendant has received of a third party money for his own use, the law implying a promise from the naked fact, the case is made out without going into the illegal transaction, and the defendant will not be permitted, in order to defeat a recovery, to set up the illegality of the original contract. *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787.

**9. Money Received as Agent.** — *Benton v. Craig*, 2 Mo. 198. See the title AGENCY, vol. 1, p. 1086.

**Facts Held Not to Constitute an Agency.** — The defendant's father, representing himself to be her agent, obtained from the plaintiffs their check payable to her order, the amount of which they charged to her, and she, at her father's request, having indorsed the check, he drew the money on it. It was held that there was no inference of law from these facts that the money was paid by the plaintiffs for her use or at her request. *Waterbury Brass Co. v. Pritchard*, 34 Conn. 418.

his principal, he cannot be held liable in an action by the purchaser to recover back the money so paid, on proof of facts which entitle the purchaser to rescind.<sup>1</sup>

**3. Money Paid at Another's Request.** — If a person pays money at the request of another, or assumes an obligation for him under which he is eventually compelled to pay money, the law implies a promise on the part of the party making the request to reimburse the party paying the money, and it may be recovered back in assumpsit.<sup>2</sup>

**4. Voluntary Payments** — *a.* **MONEY PAID ON ILLEGAL DEMANDS.** — As a general rule, where money is paid on an illegal demand, with a knowledge of the facts, the payment will be deemed voluntary, and it cannot be recovered back on the theory of an implied promise.<sup>3</sup>

**1.** *Kurzawski v. Schneider*, 179 Pa. St. 500. See the title *AGENCY*, vol. 1, p. 1129.

**2. Money Paid at Another's Request** — *Alabama.* — *Roundtree v. Weaver*, 8 Ala. 314; *Ross v. Pearson*, 21 Ala. 473; *Poe v. Dorrah*, 20 Ala. 288, 56 Am. Dec. 196; *Roundtree v. Holloway*, 13 Ala. 357.

*Iowa.* — *Bruguier v. Goewey*, 39 Iowa 190; *Littleton Sav. Bank v. Osceola Land Co.*, 76 Iowa 660.

*Kentucky.* — *Armstrong v. Keith*, 3 J. J. Marsh. (Ky.) 155, 20 Am. Dec. 131; *Gaines v. Scott*, 3 Ky. L. Rep. 418.

*Massachusetts.* — *Wheeler v. Young*, 143 Mass. 143; *Robinson v. Green*, 3 Met. (Mass.) 159.

*Missouri.* — *Watkins v. Richmond College*, 41 Mo. 302.

*New York.* — *Tradesmen's Bank v. Astor*, 11 Wend. (N. Y.) 87; *Berry v. Mayhew*, 1 Daly (N. Y.) 54; *Albany v. McNamara*, 117 N. Y. 165.

*Pennsylvania.* — *Brown v. Campbell*, 1 S. & R. (Pa.) 176.

*Wisconsin.* — *Wolff v. McGavock*, 29 Wis. 290.

**Illustrations.** — Where a person, not a party to a note, in the presence of the maker requested a third person to pay it, and such third person did pay it and on receiving it handed it to the maker, telling him: "Pay me the amount of the note some time," it was held that the request in the presence of the maker without his objection, and his acceptance of the note, raised an implied promise on his part to repay the person who paid it. *Bruguier v. Goewey*, 39 Iowa 190.

So where one person requests the agent of another to pay his debt out of money of the principal in the agent's hands, and the agent does so, the law will imply a promise on the part of the party requesting the payment to refund to the principal the amount so paid. *Brown v. Campbell*, 1 S. & R. (Pa.) 176.

**3. Payment of Illegal Demand with Knowledge of Facts** — *Alabama.* — *Wheeler v. Young*, 143 Mass. 143; *Robinson v. Green*, 3 Met. (Mass.) 159; *El. 82*, 37 E. C. L. 50; *Derby v. Pierce*, 1 Dane's Abr. 190; *Brisbane v. Dacres*, 5 Taunt. 144, 1 E. C. L. 43; *Oates v. Hudson*, 5 Eng. L. & Eq. 469; *Bize v. Dickason*, 1 T. R. 285; *Morgan v. Palmer*, 4 Dowl. & R. 283.

*Canada.* — *Herring v. Wilson*, 4 Ont. 607.

*United States.* — *Philadelphia v. Collector*, 5 Wall. (U. S.) 720; *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. (U. S.) 296; *White's Case*, 11 Ct. Cl. 578; *The Nicanor*, 40 Fed. Rep. 361.

*Alabama.* — *Prichard v. Sweeney*, 109 Ala. 657; *Alabama University v. Keller*, 1 Ala. 406; *Raisler v. Athens*, 66 Ala. 194.

*Arkansas.* — *Shirey v. Beard*, 62 Ark. 621.

*California.* — *Wills v. Austin*, 53 Cal. 152; *Maxwell v. San Luis Obispo County*, 71 Cal. 466; *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220; *Santa Rosa Bank v. Chalfant*, 52 Cal. 170; *Woodland Bank v. Webber*, 52 Cal. 73.

*Connecticut.* — *Sheldon v. South School Dist.*, 24 Conn. 88.

*Illinois.* — *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Swanston v. Ijams*, 63 Ill. 165.

*Indiana.* — *Jenks v. Lima Tp.*, 17 Ind. 326; *Thompson v. Doty*, 72 Ind. 336; *Connecticut Mut. L. Ins. Co. v. Stewart*, 95 Ind. 588; *Woodburn v. Stout*, 28 Ind. 77.

*Iowa.* — *Hipp v. Crenshaw*, 64 Iowa 404; *Bailey v. Paullina*, 69 Iowa 463; *Kraft v. Keokuk*, 14 Iowa 86; *Espy v. Ft. Madison*, 14 Iowa 226; *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

*Kansas.* — *Lyon County v. Goddard*, 22 Kan. 389; *Wabaunsee County v. Walker*, 8 Kan. 431; *Juneau v. Stunkle*, 40 Kan. 756.

*Kentucky.* — *Tyler v. Smith*, 18 B. Mon. (Ky.) 793.

*Louisiana.* — *Jackson v. Ferguson*, 2 La. Ann. 723.

*Maine.* — *Smith v. Readfield*, 27 Me. 145.

*Maryland.* — *Baltimore v. Hussey*, 67 Md. 112; *Lester v. Baltimore*, 29 Md. 418; *George's Creek Coal, etc., Co. v. Allegany County*, 59 Md. 260; *Baltimore v. Lefferman*, 4 Gill (Md.) 425, 45 Am. Dec. 145.

*Massachusetts.* — *Cook v. Boston*, 9 Allen (Mass.) 393; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Benson v. Monroe*, 7 Cush. (Mass.) 125, 54 Am. Dec. 716; *Forbes v. Appleton*, 5 Cush. (Mass.) 115; *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689.

*Michigan.* — *Tompkins v. Hollister*, 60 Mich. 485; *Hough v. Comstock*, 97 Mich. 11.

*Minnesota.* — *Shelley v. Lash*, 14 Minn. 498; *Smith v. Schroeder*, 15 Minn. 35.

*Mississippi.* — *Hope v. Evans, Smed. & M. Ch. (Miss.)* 195.

*Missouri.* — *Christy v. St. Louis*, 20 Mo. 143, 61 Am. Dec. 508; *Duval v. Laclede County*, 21 Mo. 396; *Handlin v. Morgan County*, 57 Mo. 114; *Morley v. Carlson*, 27 Mo. App. 5.

*Nebraska.* — *Gerecke v. Campbell*, 24 Neb. 306.

*Nevada.* — *Randall v. Lyon County*, 20 Nev. 35.



**What Constitutes Voluntary Payment.** — When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are, in fact, made unwillingly and only as a choice of evils and risks.<sup>1</sup> A payment will be recognized as involuntary only where the party making it does so to release his person or property from detention or to prevent a seizure of his person or property by one having actual or apparent authority to make such seizure without first bringing suit.<sup>2</sup>

**Character of Payment Not Changed by Protest.** — Accordingly the case is no wise altered by the fact that the party so paying protests that he is not answerable and gives notice that he will bring an action to recover back the money.<sup>3</sup> A protest is of no avail except in case of duress of some sort, and then it only tends to show that the payment was the result of the duress.<sup>4</sup>

*New Jersey.* — *Eaton v. Eaton*, 35 N. J. L. 290.

*New York.* — *New York, etc., R. Co. v. Marsh*, 12 N. Y. 308; *Fleetwood v. New York*, 2 Sandf. (N. Y.) 475; *Lowber v. Selden*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 526; *Forrest v. New York*, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 350; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Silliman v. Wing*, 7 Hill (N. Y.) 159; *Abell v. Douglass*, 4 Den. (N. Y.) 308; *Mutual L. Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354; *Bennett v. Bates*, 94 N. Y. 354; *Reading v. Gray*, 37 N. Y. Super. Ct. 79; *Southwick v. Memphis First Nat. Bank*, 84 N. Y. 420; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Onondaga v. Briggs*, 2 Den. (N. Y.) 26; *Wyman v. Farnsworth*, 3 Barb. (N. Y.) 369.

*North Carolina.* — *Macon County v. Jackson County*, 75 N. Car. 240; *Devereux v. Rochester German Ins. Co.*, 98 N. Car. 6.

*Ohio.* — *Baker v. Cincinnati*, 11 Ohio St. 534; *Mays v. Cincinnati*, 1 Ohio St. 268.

*Pennsylvania.* — *Morris v. Tarin*, 1 Dall. (Pa.) 147, 1 Am. Dec. 233; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Natcher v. Natcher*, 47 Pa. St. 496; *Thomas v. Philadelphia, etc., R. Co.*, 1 W. N. C. (Pa.) 621; *Gould v. McFall*, 118 Pa. St. 455, 4 Am. St. Rep. 606; *Harvey v. Girard Nat. Bank*, 119 Pa. St. 212; *De La Cuesta v. Insurance Co. of North America*, 136 Pa. St. 62; *Ditman v. Raule*, 134 Pa. St. 480; *Christman v. Siegfried*, 5 W. & S. (Pa.) 400; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724; *McCrickart v. Pittsburgh*, 88 Pa. St. 133; *Keener v. U. S. Bank*, 2 Pa. St. 237.

*South Carolina.* — *Robinson v. Charleston*, 2 Rich. L. (S. Car.) 317, 45 Am. Dec. 739; *Kenneth v. South Carolina R. Co.*, 15 Rich. L. (S. Car.) 284, 98 Am. Dec. 382; *Smith v. Hutchinson*, 8 Rich. L. (S. Car.) 260.

*Texas.* — *Galveston County v. Gorham*, 49 Tex. 279.

*Vermont.* — *Gillett v. Brewster*, 62 Vt. 312; *Wilson v. Bingham*, 43 Vt. 410, 5 Am. Rep. 289.

*Wisconsin.* — *Clancy v. McEnery*, 17 Wis. 177.

**Voluntary Payments by Corporations.** — The rule that money voluntarily paid cannot be recovered applies as well to corporations as to individuals. *Macon County v. Jackson County*, 75 N. Car. 240.

**1. Sense in Which Word "Voluntary" Is Used.** — *Maxwell v. San Luis Obispo County*, 71 Cal. 466.

**2. When Payment Considered Involuntary.** — *England.* — *Oates v. Hudson*, 5 Eng. L. & Eq. 469; *Atlee v. Backhouse*, 3 M. & W. 645; *Valpy v. Manley*, 1 C. B. 602, 50 E. C. L. 602. *United States.* — *Bend v. Hoyt*, 13 Pet. (U. S.) 263; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541.

*California.* — *Phelan v. San Francisco*, 120 Cal. 5; *Santa Rosa Bank v. Chalfant*, 52 Cal. 170; *Woodland Bank v. Webber*, 52 Cal. 73; *Bucknall v. Story*, 46 Cal. 598, 13 Am. Rep. 220.

*Illinois.* — *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361.

*Indiana.* — *Jenks v. Lima Tp.*, 17 Ind. 326.

*Maine.* — *Chase v. Dwinall*, 7 Me. 134, 20 Am. Dec. 352; *Smith v. Readfield*, 27 Me. 145.

*Maryland.* — *Baltimore v. Lefferman*, 4 Gill (Md.) 425, 45 Am. Dec. 145; *Morris v. Baltimore*, 5 Gill (Md.) 244.

*Massachusetts.* — *Lazell v. Miller*, 15 Mass. 207; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Amesbury Woollen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461.

*Ohio.* — *Mays v. Cincinnati*, 1 Ohio St. 269.

**3. Effect of Protest.** — *United States.* — *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. (U. S.) 296; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541.

*Alabama.* — *Prichard v. Sweeney*, 109 Ala. 657; *Welch v. Marion*, 48 Ala. 291; *Rutherford v. McIver*, 21 Ala. 750; *Cahaba v. Burnett*, 34 Ala. 405.

*Arkansas.* — *Vick v. Shinn*, 49 Ark. 70, 4 Am. St. Rep. 26; *Shirey v. Beard*, 62 Ark. 621.

*California.* — *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Garrison v. Tillinghast*, 18 Cal. 404; *Phelan v. San Francisco*, 120 Cal. 5.

*Indiana.* — *Connecticut Mut. L. Ins. Co. v. Stewart*, 95 Ind. 588.

*Kansas.* — *Wabaunsee County v. Walker*, 8 Kan. 431.

*Massachusetts.* — *Benson v. Monroe*, 7 Cush. (Mass.) 125, 54 Am. Dec. 716; *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689; *Cook v. Boston*, 9 Allen (Mass.) 393.

*North Carolina.* — *Devereux v. Rochester German Ins. Co.*, 98 N. Car. 6.

*Pennsylvania.* — *Harvey v. Girard Nat. Bank*, 119 Pa. St. 212; *De La Cuesta v. Insurance Co. of North America*, 136 Pa. St. 62.

**4. For What Purpose Protest Considered.** — *Vick v. Shinn*, 49 Ark. 70, 4 Am. St. Rep. 26; *Shirey*

**Effect of Apprehension of Judicial Proceedings.** — To take the case out of the rule, a mere apprehension of judicial proceedings for the recovery of the money is not sufficient; such apprehension will not prevent the payment from being regarded as voluntary.<sup>1</sup> No one can be heard to say that he had the right of the law with him, but feared that his adversary would carry him into court, and that, being thereby deprived of his free will, he yielded to the wrong, and the courts must assist him to a reclamation.<sup>2</sup> The party paying the money has an opportunity in the first instance to test the claim at law, and it is his duty to do so, if he considers it unfounded. He has, or may have, a day in court. He may plead and make proof that the claim on him is such as he is not bound to pay.<sup>3</sup> So it seems no apprehension of criminal prosecution for nonpayment will take the case out of the rule.<sup>4</sup>

**6. MONEY PAID FOR ANOTHER WITHOUT REQUEST.** — Where one pays money in the extinguishment of another's debt without his request, he cannot recover it back; in such case the law raises no implied promise to repay it.<sup>5</sup>

**5. Money Paid under Duress.** — In case the payment of money is procured through duress, either of person or of property, it may be recovered back. The law raises an implied promise to refund under these circumstances.<sup>6</sup> A protest, however, is usually necessary in order to entitle the party making the payment to reclaim it.<sup>7</sup>

*v. Beard*, 62 Ark. 621; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137.

**1. Payment Voluntary though Made in Apprehension of Judicial Proceedings.** — *Brown v. M'Kinally*, 1 Esp. 279; *Cahaba v. Burnett*, 34 Ala. 400; *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323; *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185; *Matthews v. Smith*, 67 N. Car. 374.

**2. Cahaba v. Burnett, 34 Ala. 400; *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323.**

**3. Should Contest Claim.** — *Cahaba v. Burnett*, 34 Ala. 405; *Benson v. Monroe*, 7 Cush. (Mass.) 125, 54 Am. Dec. 716.

"Having chosen to make terms with his creditors instead of pressing his rights when there was nothing to prevent him from so doing, he could not afterwards change position and complain that the terms were forced upon him." *Vick v. Shinn*, 49 Ark. 70, 4 Am. St. Rep. 26, quoted in *Shirey v. Beard*, 62 Ark. 626.

**4. Fear of Criminal Prosecution for Nonpayment.** — *Cahaba v. Burnett*, 34 Ala. 400.

**Liability to a Fine and Imprisonment under an ordinance imposing a license tax, for nonpayment thereof, does not render a payment involuntary.** *Cahaba v. Burnett*, 34 Ala. 400.

**5. Money Paid for Another Without Request.** — *King v. Riddle*, 7 Cranch (U. S.) 168; *Weakley v. Brahan*, 2 Stew. (Ala.) 500; *Stephens v. Brodnax*, 5 Ala. 258; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Bailey v. Gibbs*, 9 Mo. 45; *Schmidt v. Smith*, 57 Mo. 135; *Beach v. Vandemburgh*, 10 Johns. (N. Y.) 361; *Overseers of Poor v. Overseers of Poor*, 14 Johns. (N. Y.) 87; *Osborn v. Cunningham*, 4 Dev. & B. L. (20 N. Car.) 423; *Turner v. Patridge*, 3 P. & W. (Pa.) 172.

**Illustrations — Unauthorized Payment of Tax.** — Where a collector of taxes lawfully pays the amount of the defendant's tax to the treasury without request or subsequent promise to repay, no action is maintainable. *Beach v. Vandemburgh*, 10 Johns. (N. Y.) 361.

**Unauthorized Improvements.** — A grandfather

devised to his grandsons a tract of land which, by his will, he directed should be patented, and the price thereof paid out of the estate; an uncle of the devisees obtained the patent and paid for it, and brought an action against the executors of the grandfather's estate to recover it back. It was held that it was a voluntary payment by him, which gave no right of action. *Turner v. Patridge*, 3 P. & W. (Pa.) 172.

**Threat of Distress of Goods.** — The threat of a distress for rent is no duress, because the party may replevin the goods distrained and try the question of liability at law. *Knibbs v. Hall*, 1 Esp. 84.

**6. Money Paid under Duress.** — *De Cadaval v. Collins*, 4 Ad. & El. 858, 31 E. C. L. 206; *Sanderson v. Gairdner*, 14 U. C. C. P. 330; *De Bow's Case*, 11 Ct. Cl. 672; *Arnold v. Georgia R., etc., Co.*, 50 Ga. 304; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *Nickodemus v. East Saginaw*, 25 Mich. 456; *Adams v. Reeves*, 68 N. Car. 134, 12 Am. Rep. 627; *Tenbrook v. Philadelphia*, 7 Phila. (Pa.) 105; *Ruggles v. Fond du Lac*, 53 Wis. 436; *Ileckman v. Swartz*, 64 Wis. 48.

For what constitutes duress, see *supra*, this section, *1. Threat of Imprisonment*, *2. Threat of Illegal Demands*. For more extended treatment of the subject of money paid under duress, see the titles DURESS, vol. 10, p. 320; TAXATION, etc.

**7. Necessity for Protest.** — *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323; *White's Case*, 11 Ct. Cl. 578.

**Illustrations.** — One who has been induced by duress of imprisonment, on a false charge, to procure his friend to give notes to the prosecutor for a specified sum to secure his release, he giving security to his friend for the amount, may recover back from the prosecutor the amount paid by his friend on such notes. So a payment of taxes under protest to an officer having a warrant for their collec-



**6. Money Paid by Mistake — a. MISTAKE OF LAW —** (1) *Statement of Rule and Considerations on Which It Is Based.* — Although a few of the earlier English decisions<sup>1</sup> and some decisions in the *United States* maintain a contrary doctrine,<sup>2</sup> the settled weight of authority is that money voluntarily paid in ignorance of law, without fraud or imposition and with knowledge of all the facts, cannot be recovered back, either at law or in equity.<sup>3</sup> In the leading

tion and threatening to collect by levy and sale of property is a compulsory payment, and the amount may be recovered back. *Ruggles v. Fond du Lac*, 53 Wis. 436.

**1. Rule that Money Paid under Mistake of Law May Be Recoverable — English Decisions.** — *Lansdowne v. Lansdowne*, 2 Jac. & W. 205; *Hewer v. Bartholomew*, Cro. Eliz. 614; *Bingham v. Bingham*, 1 Ves. 126; *Farmer v. Arundel*, 2 W. Bl. 824; *Bize v. Dickason*, 1 T. R. 285.

**2. American Decisions.** — *Mansfield v. Lynch*, 59 Conn. 320; *Northrop v. Graves*, 19 Conn. 554, 50 Am. Dec. 264; *Stedwell v. Anderson*, 21 Conn. 139; *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178; *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375; *Ray v. State Bank*, 3 B. Mon. (Ky.) 510, 39 Am. Dec. 479; *Underwood v. Brockman*, 4 Dana (Ky.) 309, 29 Am. Dec. 407.

**Conditions under Which Money May Be Recovered under This Rule.** — Where the rule laid down by the minority of decisions obtains, the conditions under which a party may recover back money which he has paid under a mistake, either of law or of fact, are: (1) that the money must have been paid by one under a mistake of his rights and his duty, and be such as he was under no legal or moral obligation to pay; and (2) that the receiver of the money must have no right in good conscience to retain it. *Mansfield v. Lynch*, 59 Conn. 320.

**3. Rule that Money Paid under Mistake of Law Is Not Recoverable — England.** — *Bilbie v. Lumley*, 2 East 469; *Stevens v. Lynch*, 12 East 38; *Lowry v. Bourdieu*, 2 Dougl. 468; *Brisbane v. Dacres*, 5 Taunt. 144, 1 E. C. L. 43; *Knibbs v. Hall*, 1 Esp. 84; *Gomery v. Bond*, 3 M. & S. 378; *Platt v. Bromage*, 24 L. J. Exch. 63; *Bramston v. Robins*, 4 Bing. 11, 13 E. C. L. 323; *Naylor v. Winch*, 1 Sim. & St. 555.

*Canada.* — *Baldwin v. Kingstone*, 16 Ont. 341; *Rogers v. Ingham*, 3 Ch. D. 357.

*United States.* — *Milwaukee, etc., R. Co. v. Soutter*, 13 Wall. (U. S.) 517; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *U. S. Bank v. Daniel*, 12 Pet. (U. S.) 33; *Waples v. U. S.*, 110 U. S. 630.

*Alabama.* — *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Cahaba v. Burnett*, 34 Ala. 400; *Alabama University v. Keller*, 1 Ala. 406; *Beene v. Collenberger*, 38 Ala. 647.

*Arkansas.* — *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571.

*California.* — *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220.

*Colorado.* — *Richardson v. Denver*, 17 Colo. 378.

*Florida.* — *Jefferson County v. Hawkins*, 23 Fla. 223.

*Georgia.* — *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731; *Bohler v. Verdery*, 92 Ga. 715.

*Illinois.* — *Fowler v. Black*, 136 Ill. 363.

*Indiana.* — *Snelson v. State*, 16 Ind. 31; *Patterson v. Cox*, 25 Ind. 261.

*Iowa.* — *Painter v. Polk County*, 81 Iowa 242, 25 Am. St. Rep. 489.

*Maine.* — *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *Livermore v. Peru*, 55 Me. 469.

*Maryland.* — *Schwarzenbach v. Odorless Excavating Apparatus Co.*, 65 Md. 34, 57 Am. Rep. 301.

*Massachusetts.* — *Wilde v. Baker*, 14 Allen (Mass.) 349.

*Minnesota.* — *Erkens v. Nicolin*, 39 Minn. 461.

*Missouri.* — *Mutual Sav. Inst. v. Enslin*, 46 Mo. 200.

*New Hampshire.* — *Ladd v. Kenney*, 2 N. H. 340, 9 Am. Dec. 77; *Pinkham v. Gear*, 3 N. H. 484; *Peterborough v. Lancaster*, 14 N. H. 382.

*New Jersey.* — *Camden v. Green*, 54 N. J. L. 591, 33 Am. St. Rep. 686.

*New York.* — *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Doll v. Earle*, 65 Barb. (N. Y.) 298; *Shotwell v. Murray*, 2 Johns. Ch. (N. Y.) 512; *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 60; *Champlin v. Laytin*, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; *Onondaga v. Briggs*, 2 Den. (N. Y.) 26; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508.

*Ohio.* — *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44.

*Oregon.* — *Johnson v. McGinness*, 1 Oregon 293.

*Pennsylvania.* — *Workingmen's Bldg., etc., Assoc. v. Roumfort*, 98 Pa. St. 85; *Gould v. McFall*, 118 Pa. St. 455, 4 Am. St. Rep. 606; *Diechman v. Northampton Bank*, 1 Rawle (Pa.) 54; *Westfield v. Dill*, 12 Pa. Co. Ct. 30; *Peters v. Florence*, 38 Pa. St. 194; *Real Estate Sav. Inst. v. Linder*, 74 Pa. St. 371; *Natcher v. Natcher*, 47 Pa. St. 496; *Espy v. Allison*, 9 Watts (Pa.) 462; *Boas v. Updeweg*, 5 Pa. St. 516, 47 Am. Dec. 425; *During's Appeal*, 13 Pa. St. 224; *Deysher v. Triebel*, 64 Pa. St. 383.

*South Carolina.* — *Robinson v. Charleston*, 2 Rich. L. (S. Car.) 317, 45 Am. Dec. 739; *James v. Cavit*, 2 Brev. (S. Car.) 174.

*South Dakota.* — *Evans v. Hughes County*, 3 S. Dak. 244.

*Tennessee.* — *Hubbard v. Martin*, 8 Verg. (Tenn.) 498.

*Texas.* — *Galveston County v. Gorham*, 49 Tex. 279.

*West Virginia.* — *Haigh v. U. S. Building, etc., Assoc.*, 19 W. Va. 810; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434.

*Wisconsin.* — *Birkhauser v. Schmitt*, 45 Wis. 316, 30 Am. Rep. 740.

**Illustrations.** — A contract written as the parties intended it to be written cannot be reformed for their mistake as to its legal effect. *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571; *Hunt v. Rhodes*, 1 Pet. (U. S.) 1.

Where two parties claim the same land under a will, and with a knowledge of all the



case on this subject it was said: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried."<sup>1</sup>

(2) *Exceptions to Rule.* — Whatever exceptions there may be to the rule will be found to be few in number, and to have something peculiar in their character, and to involve other elements of decision.<sup>2</sup>

**Total Failure of Consideration.** — An exception to the general rule stated occurs in case of a total failure or want of consideration. Under these circumstances it is immaterial whether the mistake be one of law or of fact.<sup>3</sup>

**Fraud.** — So relief may be and often has been decreed in cases of mistake in law induced by the fraud or circumvention of the party profiting thereby.<sup>4</sup>

**Mistake as to Foreign Law.** — And money paid under a mistake as to a foreign law can be recovered back, for the reason that it is considered a mistake of fact.<sup>5</sup> It is not the duty of a party to know the laws of a state other than that in which he lives, nor does ignorance of them imply negligence.<sup>6</sup>

**b. MISTAKE OF FACT** — (1) *In General.* — Where money has been paid under a mistake as to a material fact, to one not entitled thereto, and who cannot in good conscience receive and retain it, the law raises an implied promise on his part to refund it, and an action will lie to recover it back.<sup>7</sup>

facts, and without any fraud or imposition, collect and voluntarily divide the rents and profits, neither can subsequently recover from the other the rents thus voluntarily paid or allowed to be paid. *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731.

A party in ignorance of the law that distances must yield to natural boundaries called for in a deed paid money for a quitclaim deed of property which under this rule already belonged to him. It was held that the money could not be recovered back. *Erkens v. Nicolin*, 39 Minn. 461.

1. **Leading Case on Money Paid by Mistake.** — *Bilbie v. Lumley*, 2 East 469.

**The Maxim that Every Man is Supposed to Know the Law** means more than that he is supposed to know the letter of the law. It charges him with a knowledge of his legal rights, whether dependent upon the constitution, the statutes, or the decisions of courts. *Evans v. Hughes County*, 3 S. Dak. 244.

2. See *U. S. Bank v. Daniel*, 12 Pet. (U. S.) 33.

3. **Failure of Consideration.** — *Champlin v. Laytin*, 6 Paige (N. Y.) 189.

4. **Mistake Caused by Fraud of Other Party.** — *Jones v. Watkins*, 1 Stew. (Ala.) 93.

5. **Mistake as to Foreign Law.** — *Norton v. Marden*, 15 Me. 46, 32 Am. Dec. 132; *Sawyer v. Hammatt*, 15 Me. 43; *Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Bentley v. Whittemore*, 18 N. J. Eq. 366; *Vinal v. Continental Constr., etc., Co.*, 53 Hun (N. Y.) 247; *King v. Doolittle*, 1 Head (Tenn.) 77.

6. *Haven v. Foster*, 9 Pick. (Mass.) 128, 19 Am. Dec. 353.

**Ignorance of Domestic Law by Foreigner.** — A person who discounts commercial paper in Ohio which was issued in New York and was void under the laws of the latter state, because of illegality, is entitled to recover money paid thereon although he cannot recover on the paper itself. *Chillicothe Bank v. Dodge*, 8 Barb. (N. Y.) 233.

7. **Right to Recover Money Paid under Mistake of Fact** — *England*, — *Lucas v. Worswick*, 1 M.

& Rob. 293; *Gurney v. Womersley*, 4 El. & Bl. 133, 82 E. C. L. 133; *Farmer v. Arundel*, 2 W. Bl. 824; *Devaux v. Connolly*, 8 C. B. 640, 65 E. C. L. 640; *Gompertz v. Bartlett*, 2 El. & Bl. 849, 75 E. C. L. 849; *Bize v. Dickason*, 1 T. R. 286; *Goodall v. Dolley*, 1 T. R. 712; *Williams v. Bartholomew*, 1 B. & P. 326; *Hern v. Nichols*, 1 Salk. 289; *Cox v. Prentice*, 3 M. & S. 344; *Feise v. Parkinson*, 4 Taunt. 640; *Milnes v. Duncan*, 6 B. & C. 671, 13 E. C. L. 293; *Gregory v. Pilkington*, 39 Eng. L. & Eq. 316; *Martin v. Sitwell*, 1 Show. 156; *Bank of England v. Tomkins*, 6 Jur. 347.

*Canada.* — *Perry v. Newcastle Dist. Mut. F. Ins. Co.*, 8 U. C. Q. B. 363; *Colonial Bank v. Exchange Bank*, 17 Nova Scotia 215.

*United States.* — *Espy v. Cincinnati First Nat. Bank*, 18 Wall. (U. S.) 604; *McElrath's Case*, 12 Ct. Cl. 201; *Omaha First Nat. Bank v. Mastin Bank*, 2 McCrary (U. S.) 438.

*Alabama.* — *Rutherford v. McIvor*, 21 Ala. 757; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Wilson v. Sergeant*, 12 Ala. 778; *Sellers v. Smith*, 11 Ala. 264; *Walker v. Mock*, 39 Ala. 568.

*Connecticut.* — *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264; *Newell v. Smith*, 53 Conn. 72; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *East-Haddam Bank v. Scovil*, 12 Conn. 310.

*Delaware.* — *Griffith v. Johnson*, 2 Harr. (Del.) 177.

*Illinois.* — *McLean County Bank v. Mitchell*, 88 Ill. 52.

*Indiana.* — *Worley v. Moore*, 97 Ind. 15.

*Iowa.* — *Diamond v. Jones*, 76 Iowa 422; *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 25 Am. St. Rep. 512; *Baldwin v. Foss*, 71 Iowa 389; *Murphy v. Creighton*, 45 Iowa 179; *Muscataine v. Keokuk Northern Line Packet Co.*, 45 Iowa 85.

*Kansas.* — *Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262.

*Kentucky.* — *Mercer v. Clark*, 3 Bibb (Ky.) 224.

*Louisiana.* — *Fellows v. Frelson*, 6 La. Ann. 478; *Major v. Tardos*, 14 La. Ann. 10.

The right of recovery proceeds upon the theory that the plaintiff has paid money which he was under no obligation to pay, and which the party to

*Maine.* — *Livermore v. Peru*, 55 Me. 469; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *Starbird v. Curtis*, 43 Me. 352; *Sheridan v. Carpenter*, 61 Me. 83; *Piscataquis County v. Kingsbury*, 73 Me. 326.

*Maryland.* — *Lammot v. Bowly*, 6 Har. & J. (Md.) 500; *Kearney v. Sascor*, 37 Md. 280.

*Massachusetts.* — *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Union Bank v. U. S. Bank*, 3 Mass. 74; *Pearson v. Lord*, 6 Mass. 81; *Stuart v. Sears*, 119 Mass. 143.

*Michigan.* — *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63.

*Missouri.* — *Chase v. Willman Mercantile Co.*, 63 Mo. App. 482; *Ashley v. Jennings*, 48 Mo. App. 142; *Davis v. Krum*, 12 Mo. App. 279; *McDonald v. Lynch*, 59 Mo. 350.

*Nebraska.* — *Manzy v. Hardy*, 13 Neb. 36; *Billings v. McCoy*, 5 Neb. 187.

*New Jersey.* — *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523.

*New York.* — *Franklin Bank v. Raymond*, 3 Wend. (N. Y.) 69; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Wheaton v. Olds*, 20 Wend. (N. Y.) 174; *Mayer v. New York*, 63 N. Y. 455; *Canal Bank v. Albany Bank*, 1 Hill (N. Y.) 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Adams v. Cole*, 1 Daly (N. Y.) 147; *Duncan v. Berlin*, (Ct. App.) 11 Abb. Pr. N. S. (N. Y.) 116; *Murphy v. Ball*, 38 Barb. (N. Y.) 262; *Waite v. Leggett*, 8 Cow. (N. Y.) 195, 18 Am. Dec. 441; *Durkin v. Cranston*, 7 Johns. (N. Y.) 442; *Watson v. Cabot Bank*, 5 Sandf. (N. Y.) 423; *Merchants' Bank v. McIntyre*, 2 Sandf. (N. Y.) 431; *Crain v. Colwell*, 8 Johns. (N. Y.) 384; *Onondaga v. Briggs*, 2 Den. (N. Y.) 26; *Holtz v. Schmidt*, 59 N. Y. 253; *Martin v. McCormick*, 8 N. Y. 331.

*North Carolina.* — *Brummitt v. McGuire*, 107 N. Car. 351.

*Pennsylvania.* — *Donaldson v. Means*, 4 Dall. (Pa.) 109; *Ege v. Koonitz*, 3 Pa. St. 109; *D'Utricht v. Melchor*, 1 Dall. (Pa.) 428; *Durdon v. Gaskill*, 2 Yeates (Pa.) 268; *Ritchie v. Summers*, 3 Yeates (Pa.) 531; *Thomas v. Brady*, 10 Pa. St. 164; *Hoover v. Senseman*, (Pa. 1886) 3 Cent. Rep. 540; *Wilson's Estate*, 18 Phila. (Pa.) 56, 43 Leg. Int. (Pa.) 140; *Clapp v. Pinegrove Tp.*, 138 Pa. St. 35; *Cannell v. Smith*, 142 Pa. St. 25; *McKibben v. Doyle*, 173 Pa. St. 579, 51 Am. St. Rep. 785; *Tybout v. Thompson*, 2 Browne (Pa.) 27; *Ward v. McCue*, 31 Pittsb. Leg. J. (Pa.) 160.

*Rhode Island.* — *Hazard v. Franklin Mut. F. Ins. Co.*, 7 R. I. 429.

*South Carolina.* — *Ashe v. Livingston*, 2 Bay (S. Car.) 80; *Glenn v. Shannon*, 12 S. Car. 570; *Ash v. Ash*, 1 Bay (S. Car.) 304.

*Tennessee.* — *Dickins v. Jones*, 6 Yerg. (Tenn.) 483, 27 Am. Dec. 488; *Frazier v. Tubb*, 2 Heisk. (Tenn.) 662; *Metcalf v. Denison*, 4 Baxt. (Tenn.) 565.

*Texas.* — *Gilliam v. Alford*, 69 Tex. 267.

*Vermont.* — *Hathaway v. Hagan*, 59 Vt. 75; *Noyes v. Parker*, 64 Vt. 379.

*Virginia.* — *Citizens' Nat. Bank v. Manoni*, 76 Va. 802.

**Illustrations of Rule — Mistake in Computing Interest.** — A mistake in computing interest is a mistake of fact for which money may usually be recovered. *Major v. Tardos*, 14 La. Ann. 10; *Boon v. Miller*, 16 Mo. 457; *Worley v. Moore*, 97 Ind. 15.

**Overpayments.** — The rule also finds frequent application in the case of overpayments by mistake. Thus, where a depositor gives a check on his bank and his account is thereby overdrawn, a promise to pay the bank, if it honors the check, is implied. *Thomas v. International Bank*, 46 Ill. App. 461.

And where a person by mistake overpays another he may recover the excess, notwithstanding he may have given a receipt. *Stemmel v. Thomas*, 89 Ill. 147.

It has also been said that if a creditor holds different securities for the same debt, and collects from them more than the amount of the debt secured, with no obligation to repay such excess, an action may be maintained against him therefor. *Diamond v. Jones*, 76 Iowa 422.

For other instances of overpayment which may be recovered, see *Cook v. Chicago*, etc., R. Co., 81 Iowa 551, 25 Am. St. Rep. 512; *Rogers v. Weaver*, 5 Ohio 536.

**Money Belonging to One Paid to Another.** — Where a common agent of two parties by mistake pays the money of one to the other, the former may maintain an action against the latter, and no privity of contract between the parties is necessary. *Chase v. Willman Mercantile Co.*, 63 Mo. App. 482.

**Surrender of Note.** — If an indorsee of a note gives it up on a mistaken belief that it has been paid, he may, on proof of these facts, recover against the maker on the common money counts. *Eagle Bank v. Smith*, 5 Conn. 75, 13 Am. Dec. 37.

**Money Paid by Agents in Excess of Authority.** — Money paid by the agents of the government in excess of their authority may be recovered back by the government. *U. S. v. City Bank*, 6 McLean (U. S.) 130.

**Money Paid to Officer under a Mistake.** — A government officer to whom money to which he is not entitled has been paid, through a mistake of the accounting officers, may be compelled to refund it. *McElrath's Case*, 12 Ct. Cl. 201.

**Money Paid under Mistake as to Title of Premises.** — Where money was so paid, it was held that an action would lie to recover the rents and profits from the person who supposed that he had the right to receive them. *Shaw v. Mussey*, 48 Me. 247.

**What Is a Mistake of Fact.** — A mistake of fact takes place either in some fact which really exists and is unknown, or in some fact which is supposed to exist but really does not exist. *Mowatt v. Wright*, 1 Wend. (N. Y.) 360, 19 Am. Dec. 508; *Wheaton v. Olds*, 20 Wend. (N. Y.) 176; *Hurd v. Hall*, 12 Wis. 112.

**Mistake Must Relate to Demand Itself.** — To entitle a party to recover back money paid on the ground of mistake of fact, the mistake must relate to the demand itself. An omission, through mistake, to insist upon a set-off



whom it was paid has no right either to receive or to retain,<sup>1</sup> and although the form of the action to recover money so paid is one of contract, the reasons which permit its recovery are purely equitable in their nature.

(2) *Necessity of Belief that Money Is Due.* — To entitle one to recover money on the ground that it has been paid under a mistake, it is necessary that the payment shall have been made under the belief that the money was due. If the party did not believe at the time of the payment that he owed the money he cannot recover it.<sup>2</sup> Yet a recovery cannot be resisted on the ground that at the time of the payment the plaintiff may have entertained and expressed a vague belief, resting on no evidence and amounting to nothing like conviction or moral certainty, that a fact existed which would exempt him from payment.<sup>3</sup>

(3) *Mistake Must Be as to Material Fact.* — A mistake, when the foundation of the action, must be a material one. A payment under the influence of a mistake concerning a fact which, even if it were as it is supposed to be, would create no legal obligation, but would merely operate as an inducement upon the mind of the party paying the money, will not justify a recovery as for money had and received.<sup>4</sup>

(4) *Necessity of Showing Failure of Consideration.* — It is also necessary to establish a failure of consideration, or, in other words, that the plaintiff parted with his money without receiving an equivalent therefor;<sup>5</sup> but the mere fact that the plaintiff is mistaken as to the value of that which he receives as an equivalent does not amount to a failure of consideration.<sup>6</sup>

(5) *Necessity of Payment in Money or Its Equivalent.* — To sustain an action for money paid under a mistake of fact, there must be a payment either in money or in something which the other party has agreed to accept as its equivalent.<sup>7</sup>

(6) *Retention of Money Must Be Inequitable.* — So it must appear that it is against equity and good conscience for the other party to retain money paid by mistake. Whenever the latter may retain it in good conscience and uses no deceit or unfair practice in obtaining it, the action for money had and received will not lie.<sup>8</sup>

is not enough. *Franklin Bank v. Raymond*, 3 Wend. (N. Y.) 69.

**Burden of Proof.** — The burden is on the plaintiff to show by clear and indubitable evidence that he made the payment by mistake. *Ward v. McCue*, 31 Pittsb. Leg. J. (Pa.) 160.

1. *Guild v. Baldrige*, 2 Swan (Tenn.) 295.

2. **Plaintiff Must Believe Money Is Due.** — *National L. Ins. Co. v. Jones*, 1 Thomp. & C. (N. Y.) 466, 200 N. Y. 447; *Windbiel v. Carroll*, 16 Hun (N. Y.) 101.

3. **Belief Unsupported by Evidence Does Not Affect Right.** — *Chatfield v. Paxton*, 2 East 471, note a; *Guild v. Baldrige*, 2 Swan (Tenn.) 295.

4. **Mistake Must Be Material.** — *Aiken v. Short*, 1 H. & N. 210; *Langevin v. St. Paul*, 49 Minn. 196; *Needles v. Burk*, 81 Mo. 573, 51 Am. Rep. 251. See also *Chambers v. Miller*, 13 C. B. N. S. 125, 106 E. C. L. 125; *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63.

"If a simple mistake of fact which creates no legal liability, and which is wholly disconnected from any fraud, induces a payment of money to one who is lawfully entitled to compensation, but not from the party paying, while there may be a moral obligation to return the money, such moral obligation cannot be made the basis of an implied legal obligation which will sustain an action." *Needles v. Burk*, 81 Mo. 573, 51 Am. Rep. 251.

5. **Plaintiff Must Show Failure of Consideration.** — *Taylor v. Hare*, 1 B. & P. N. R. 260; *Badeau v. U. S.*, 130 U. S. 439; *Illinois Trust, etc., Bank v. Felsenthal*, 26 Ill. App. 624; *Merchants' Nat. Bank v. National Bank of Commonwealth*, 139 Mass. 513.

6. **Effect of Mistake as to Value of Equivalent.** — *Harris v. Loyd*, 5 M. & W. 432. See also *Lemans v. Wiley*, 92 Ind. 436.

7. **Payment in Money or Its Equivalent Necessary.** — *Standish v. Ross*, 3 Exch. 527; *Lee v. Merrett*, 8 Q. B. 820, 55 E. C. L. 820; *Brundage v. Port Chester*, 102 N. Y. 494; *Hendricks v. Goodrich*, 15 Wis. 679. See also *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202; *Beardsley v. Root*, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386.

**Credit on Account.** — There can be no recovery for money paid under a mistake of fact, where the defendant merely received a credit on an account to which he was not entitled. *Lee v. Merrett*, 8 Q. B. 820, 55 E. C. L. 820.

8. **Retention by Payee Must Be Against Conscience — England.** — *Farmer v. Arundel*, 2 W. Bl. 824; *Munt v. Stokes*, 4 T. R. 561; *Platt v. Bromage*, 24 L. J. Exch. 63; *Moses v. Macferlan*, 2 Burr. 1005; *Aiken v. Short*, 1 H. & N. 210.

**Connecticut.** — *Goddard v. Seymour*, 30 Conn. 394.



(7) *Necessity of Restoring Payee to Original Status.* — The rule supported by the weight of authority is that where a payment is made under a mistake of fact as to which both parties are equally innocent or equally negligent, as the case may be, a recovery should not be allowed if the parties cannot be placed *in statu quo*, or if the repayment will throw a loss on the payee.<sup>1</sup>

(8) *When Mutual Mistake Necessary.* — Where a payment is made in excess of the amount due on a contract and the mistake is not mutual, the excess is not recoverable in an action for money had and received, unless the defendant has promised to repay it.<sup>2</sup> To obtain relief he must go into equity and show such facts as will entitle him to a reformation or a rescission of the contract, and that in the event of such rescission or reformation he will be entitled to a repayment of the money.<sup>3</sup>

(9) *Effect of Plaintiff's Negligence on Right of Recovery* — In *Ascertaining Facts.* — On this question the decisions are very conflicting. There are numerous decisions holding that where money is paid with means of knowledge of all the material facts, and the party neglects to avail himself thereof, he cannot recover money paid under a mistake of fact. These authorities place knowledge and means of knowledge on the same footing.<sup>4</sup> But this rule

*Kentucky.* — *Hubbard v. Hickman*, 4 Bush (Ky.) 204.

*Missouri.* — *Foster v. Kirby*, 31 Mo. 496.

*New York.* — *New York v. Erben*, 10 Bosw. (N. Y.) 189; *Franklin Bank v. Raymond*, 3 Wend. (N. Y.) 69; *Buel v. Boughton*, 2 Den. (N. Y.) 91.

*Pennsylvania.* — *Carson v. M'Farland*, 2 Rawle (Pa.) 118, 19 Am. Dec. 627.

*South Carolina.* — *Glenn v. Shannon*, 12 S. Car. 570.

*Applications of Doctrine — Claim Barred by Statute of Limitations.* — Money paid in ignorance of the fact that the claim on which it is paid is barred by the statute of limitations is not recoverable. *Moses v. Macferlan*, 2 Burr. 1005.

*Interest Omitted by Mistake from Note.* — Where by mutual mistake of the parties a note is so drawn that it does not bear interest, and the maker, by mistake, pays the note with interest at maturity, supposing that it calls for interest, he cannot recover any part of the sum so paid. *Buel v. Boughton*, 2 Den. (N. Y.) 91.

*Overpayment of Note.* — The fact that by mistake a person overpays the amount due on a note is no ground to recover any part of such payment, if the whole thereof is equitably and justly due to the other party. *Foster v. Kirby*, 31 Mo. 496.

1. *Parties Must Be Placed in Statu Quo* — *England.* — *Cocks v. Masterman*, 9 B. & C. 902, 17 E. C. L. 517; *Smith v. Mercer*, 6 Taunt. 76, 1 E. C. L. 312; *Brisbane v. Dacres*, 5 Taunt. 144, 1 E. C. L. 43. *Compare Newall v. Tomlinson*, L. R. 6 C. P. 405.

*New York.* — *Rathbone v. Stocking*, 2 Barb. (N. Y.) 135; *Moyer v. Shoemaker*, 5 Barb. (N. Y.) 319; *Barber v. Cary*, 11 Barb. (N. Y.) 549. But see *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655, in which the early New York decisions are in effect overruled and the doctrine laid down that if the parties are equally innocent and the defendant cannot be restored to his original status, he must suffer the loss.

*Ohio.* — *Ellis v. Ohio L. Ins., etc., Co.*, 4 Ohio St. 628, 64 Am. Dec. 610.

*Pennsylvania.* — *Grier v. Huston*, 8 S. & R. (Pa.) 402, 11 Am. Dec. 627; *Pittsburgh, etc., Turnpike Road Co. v. Com.*, 2 Watts (Pa.) 433; *Boas v. Updegrove*, 5 Pa. St. 516, 47 Am. Dec. 425.

*Tennessee.* — *Guild v. Baldrige*, 2 Swan (Tenn.) 304.

*Illustration.* — In *Guild v. Baldrige*, 2 Swan (Tenn.) 303, the court illustrated this principle as follows: "Take the case of a payment without knowledge of the facts, made, not to the original creditor of the party paying, whose debt had been previously satisfied, but to a creditor of his who received the money in good faith, ignorant of the mistake, and in satisfaction of a just demand; and who, in consequence of such payment, may have waived or lost his remedy against his debtor. In such case \* \* \* the plaintiff would not be entitled to recover. The defendant in the given case would be equally innocent as the plaintiff of the mistake; and having lost his remedy upon the faith of such payment, it would not be against conscience for him to retain the money; and the loss must fall upon the plaintiff, by whose act, though innocently done, it was occasioned."

2. *When Necessary that Mistake Be Mutual.* — *De Voin v. De Voin*, 76 Wis. 66.

3. *Norton v. Bohart*, 105 Mo. 615.

4. *Rule that Negligence Bars Recovery* — *United States.* — *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90.

*Connecticut.* — *East-Haddam Bank v. Scovill*, 12 Conn. 310.

*Delaware.* — *Johnson v. Johnson*, 4 Harr. (Del.) 171.

*Maine.* — *Gooding v. Morgan*, 37 Me. 419; *Wilson v. Barker*, 50 Me. 447.

*New Hampshire.* — *Peterborough v. Lancaster*, 14 N. H. 389; *Manchester v. Burns*, 45 N. H. 482.

*North Carolina.* — *Brummitt v. McGuire*, 107 N. Car. 351.

*Pennsylvania.* — *Real Estate Sav. Inst. v. Linder*, 74 Pa. St. 371.

seems to be opposed by the weight of authority; a considerably larger number of decisions hold that the general rule is in no wise affected by the negligence of the plaintiff and that he may recover although he had the means of knowledge and failed to avail himself of it.<sup>1</sup> These decisions, however, recognize a limitation of this doctrine to the extent that if the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, no recovery should be allowed.<sup>2</sup> The person making the payment must, in that case, bear the loss occasioned by his own negligence.<sup>3</sup> So if money is intentionally paid without reference to the truth or falsity of the fact, the party paying it meaning to waive all inquiry into the fact, or if, believing there is a mistake, he may by investigation learn the state of facts more accurately, and fails at the time so to do, and chooses to pay the money notwithstanding, he cannot recover it back.<sup>4</sup>

**In Asserting Claim.** — Where the parties cannot be placed *in statu quo* and the defendant will suffer a loss if a recovery be allowed, the action cannot be sustained, if the defendant's change of position is the result of the plaintiff's laches in asserting his claim.<sup>5</sup>

**7. Money Procured to Be Paid by Fraud.** — Where the payment of the money is procured through fraud, the law raises an implied promise to refund on the part of the party procuring the payment.<sup>6</sup>

**1. Rule that Negligence Does Not Bar Recovery** — *England.* — *Townsend v. Crowdy*, 8 C. B. N. S. 477, 98 E. C. L. 477; *Kelly v. Solari*, 9 M. & W. 54; *Marriot v. Hampton*, 2 Smith Lead. Cas. 421.

*Alabama.* — *Rutherford v. McIvor*, 21 Ala. 750.

*Connecticut.* — *Stanley Rule, etc., Co. v. Bailey*, 45 Conn. 465.

*Illinois.* — *Devine v. Edwards*, 87 Ill. 177; *Trambers v. Risk*, 2 Ill. App. 499.

*Indiana.* — *Indianapolis v. McAvoy*, 86 Ind. 589.

*Kansas.* — *Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262.

*Massachusetts.* — *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 522, 64 Am. Dec. 92; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24.

*Michigan.* — *Walker v. Conant*, 65 Mich. 194.

*Missouri.* — *Lyle v. Shinnebarger*, 17 Mo. App. 66; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Harris v. Board of Education*, 3 Mo. App. 570; *Dobson v. Winner*, 26 Mo. App. 330. *Compare Wolfe v. Marshal*, 52 Mo. 167.

*New York.* — *Lawrence v. American Nat. Bank*, 54 N. Y. 435; *National Bank of Commerce v. National Mechanics' Banking Assoc.*, 55 N. Y. 211, 14 Am. Rep. 232; *Lake v. Artisans' Bank*, 3 Abb. App. Dec. (N. Y.) 10; *Mayer v. New York*, 63 N. Y. 455; *Curnen v. New York*, 79 N. Y. 511; *Duncan v. Berlin*, (Ct. App.) 11 Abb. Pr. N. S. (N. Y.) 116; *Union Nat. Bank v. New York Sixth Nat. Bank*, 43 N. Y. 452, 3 Am. Rep. 718. *Compare Windbill v. Carroll*, 16 Hun (N. Y.) 101.

*Texas.* — *Alston v. Richardson*, 51 Tex. 1.

**Reason for Rule.** — The ground on which the rule rests is that money paid through misapprehension of facts in equity and good conscience belongs to the party who paid it and cannot be justly retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties.

\* \* \* The cause of the mistake, therefore, is wholly immaterial. The money is none the

less due to the plaintiffs because their negligence caused the mistake under which the payment was made." *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92.

The question is whether the plaintiff has paid to the defendant, by mistake, money which is not rightfully his; if so, the plaintiff's negligence in failing to ascertain the true state of facts will not affect his rights. *Dobson v. Winner*, 26 Mo. App. 330.

**Knowledge of Fact Which Is Subsequently Forgotten.** — When money is paid under a *bona fide* forgetfulness of facts which disintitled the defendant to receive it, an action will lie to recover it back. *Kelly v. Solari*, 9 M. & W. 54; *Lucas v. Worswick*, 1 M. & Rob. 293; *Perry v. Newcastle, Dist. Mut. F. Ins. Co.*, 8 U. C. Q. B. 363.

Thus, where a receiver, forgetting that he had already paid a dividend, paid it again to one who was aware of the error, and he subsequently sued for its recovery, it was held that he was entitled to recover. *Kerr v. Ames*, 39 Leg. Int. (Pa.) 392.

**Where Mistake Is Caused by the Defendant's Negligence**, it is immaterial that the recovery will involve him in a loss. *Union Bank v. U. S. Bank*, 3 Mass. 74.

**2. Where Original Status of Other Party Cannot Be Restored.** — *Espy v. Cincinnati First Nat. Bank*, 18 Wall. (U. S.) 604; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Walker v. Conant*, 65 Mich. 194; *Mayer v. New York*, 65 N. Y. 455; *National Bank of Commerce v. National Mechanics' Banking Assoc.*, 55 N. Y. 211, 14 Am. Rep. 232; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516.

*3. Mayer v. New York*, 63 N. Y. 455.

**4. Intentional Waiver of Inquiry.** — *Framlers v. Risk*, 2 Ill. App. 499; *Neal v. Read*, 7 Baxt. (Tenn.) 333.

**5. Laches in Asserting Claim.** — *Skyring v. Greenwood*, 4 B. & C. 281, 10 E. C. L. 335.

**6. Money Procured to Be Paid by Fraud.** — *Warner v. Cammack*, 37 Iowa 642; *Stanhope v. Swafford*, 77 Iowa 594; *Lockwood v. Kelsea*,



8. **Money Paid on Consideration Which Fails.** — Money paid upon any legal consideration which has wholly failed is recoverable in an action for money had and received. In such a case the law will always imply a promise to refund.<sup>1</sup> Even illegality in the contract will not prevent the recovery of money paid under it, unless the plaintiff is *in pari delicto* with the defendant.<sup>2</sup> If, however, the parties are *in pari delicto*, the contract is wholly void. The law does not lend its aid to carry such agreements into effect. Neither party can maintain an action which requires the contract for its support, and if the contract has been executed the law will not relieve either party, but leaves both in the situation in which it finds them, to suffer or to enjoy the consequences of their unlawful act.<sup>3</sup>

9. **Money Which One Is Compelled to Pay through Default of Another** —  
*a. STATEMENT OF RULE.* — Although, as already shown, the general rule is that one person cannot make another his debtor by paying the debts of such person without his request or assent, a request or assent may nevertheless be inferred under some circumstances. It is well settled that where one person is compelled to pay money which another is under legal obligation to pay, the former is entitled to recover it back from the person legally bound.<sup>4</sup> The

41 N. H. 185; *D'Utricht v. Melchor*, 1 Dall. (Pa.) 428; *Mathers v. Pearson*, 13 S. & R. (Pa.) 258; *Vantine v. Wood*, 13 Pa. St. 270. For a full treatment of this subject see the title FRAUD AND DECEIT, vol. 14, p. 12.

**Illustration of Rule — Sale of Land.** — Proof that the vendor of land got the purchase price by fraud will support an action for money had and received. *D'Utricht v. Melchor*, 1 Dall. (Pa.) 428.

**Overpayment of Amount Due for Telegraphic Message.** — An action for money had and received will lie against the bearer of a telegraphic message for the excess or upon his false representations that it was paid by him for bringing the despatch to the place where the bearer took it. *Lockwood v. Kelsea*, 41 N. H. 185.

1. **Where Consideration Fails — California.** — *S. C. V. Peat Fuel Co. v. Tuck*, 53 Cal. 304; *Rose v. Foord*, 96 Cal. 152; *Redington v. Woods*, 45 Cal. 429; *Sutro v. Rhodes*, 92 Cal. 125; *Hayes v. Los Angeles County*, 99 Cal. 74. *Kentucky.* — *Gray v. Gray*, 2 J. J. Marsh. (Ky.) 23.

*New Hampshire.* — *Holden v. Curtis*, 2 N. H. 61; *Leach v. Tilton*, 40 N. H. 475.

*New York.* — *Schwinger v. Hickok*, 53 N. Y. 286.

*Oregon.* — *Hoxter v. Poppleton*, 9 Oregon 481.

*Tennessee.* — *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492.

**Illustrations of Principle — Execution Sales Unsupported by Judgment.** — *Hoxter v. Poppleton*, 9 Oregon 481; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492. See also *Schwinger v. Hickok*, 53 N. Y. 286.

**Sales of Personal Property Where Title Fails.** — *Holden v. Curtis*, 2 N. H. 61.

**Money Paid for Corporate Stock Not Issued.** — *Rose v. Foord*, 96 Cal. 152.

2. *Leach v. Tilton*, 40 N. H. 475.

3. *Leach v. Tilton*, 40 N. H. 475.

4. **Payment of Money Which Another Should Have Paid — England.** — *Moule v. Garrett*, L. R. 7 Exch. 101; *Emery v. Clark*, 2 C. B. N. S. 582, 89 E. C. L. 582; *Hawley v. Beverley*, 6

Scott N. R. 837; *Horton v. Riley*, 11 M. & W. 492; *Hooper v. Treffry*, 1 Exch. 17; *Exall v. Partridge*, 8 T. R. 308; *Bleaden v. Charles*, 7 Bing. 246, 20 E. C. L. 119; *Brittain v. Lloyd*, 14 M. & W. 762; *Jenkins v. Tucker*, 1 H. Bl. 90; *Pearson v. Skelton*, 1 M. & W. 504; *Edmunds v. Wallingford*, 14 Q. B. D. 811; *Pownall v. Ferrand*, 6 B. & C. 439, 13 E. C. L. 230; *Brown v. Hodgson*, 4 Taunt. 189; *Deering v. Winchelsea*, 2 B. & P. 270; *Reynolds v. Wheeler*, 10 C. B. N. S. 561, 100 E. C. L. 561; *Turner v. Davies*, 2 Esp. 478.

*United States.* — *Lidderdale v. Robinson*, 2 Brock. (U. S.) 160; *Hall v. Smith*, 5 How. (U. S.) 102.

*Alabama.* — *De Bard v. Smith*, 9 Ala. 788; *Walker v. Smith*, 28 Ala. 569.

*California.* — *Curtis v. Parks*, 55 Cal. 106; *San Gabriel Valley Land, etc., Co. v. Witmer Bros. Co.*, 96 Cal. 623; *Logan v. Talbot*, 59 Cal. 652.

*Connecticut.* — *Berlin v. School Soc.*, 9 Conn. 179.

*Illinois.* — *Farwell v. Becker*, 129 Ill. 261, 16 Am. St. Rep. 267.

*Indiana.* — *Preston v. Harrison*, 9 Ind. 1; *Dunn v. Frazier*, 8 Blackf. (Ind.) 432.

*Iowa.* — *Reed v. Crosthwait*, 6 Iowa 219, 71 Am. Dec. 406; *Goodnow v. Moulton*, 51 Iowa 555; *Lindley v. Snell*, 80 Iowa 103.

*Kentucky.* — *Crowder v. Shelby*, 6 J. J. Marsh. (Ky.) 62; *M'Ghee v. Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124.

*Louisiana.* — *Smith v. Wilson*, 10 La. Ann. 255.

*Maryland.* — *Myers v. Smith*, 27 Md. 91. *Massachusetts.* — *Nichols v. Bucknam*, 117 Mass. 488; *Hale v. Huse*, 10 Gray (Mass.) 99; *Johnson v. Johnson*, 11 Mass. 359; *Gibbs v. Bryant*, 1 Pick. (Mass.) 121; *Whitwell v. Brigham*, 19 Pick. (Mass.) 120; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105.

*New Hampshire.* — *Sanborn v. Emerson*, 12 N. H. 58; *Lord v. Staples*, 23 N. H. 448; *Rushworth v. Moore*, 36 N. H. 188; *Martin v. Far-num*, 24 N. H. 194.



request necessary will be implied as well as the promise, where the consideration consists in the plaintiff's having been compelled to do that, to perform which the defendant is legally compellable.<sup>1</sup> Under these circumstances the person paying the money has the same right of action as if he had paid it at the other's express request.<sup>2</sup>

**Whether Payment in Money Necessary.** — To support the action under discussion, which is an action for money paid, the better opinion is that a payment in money is not absolutely necessary, and that whenever the debt of one person is actually extinguished and satisfied by the application of another's property to the payment thereof, such payment will support the action for money paid.<sup>3</sup> It is equally well settled, however, that the giving of a new security, or mere evidence of indebtedness, such as a note, bond, or mortgage, on the claim, will not support the action.<sup>4</sup> An obligation to pay is not equivalent to payment.<sup>5</sup>

**b. APPLICATIONS OF RULE — Rights of Surety Who Has Paid Principal's Obligation — As Against Principal.** — The rule is applied to a large variety of transactions, the most familiar application probably being the case of a surety who has paid the obligation of his principal. This is a sufficient consideration to raise an implied promise by the principal to repay the amount, though made without an actual request on his part.<sup>6</sup>

*New York.* — *Butler v. Wright*, 20 Johns. (N. Y.) 367; *Barker v. Cassidy*, 16 Barb. (N. Y.) 178; *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. Rep. 515; *Wells v. Porter*, 7 Wend. (N. Y.) 119; *Norton v. Coons*, 6 N. Y. 33; *Hunt v. Amidon*, 4 Hill (N. Y.) 345, 40 Am. Dec. 283; *Graham v. Dunigan*, 2 Bosw. (N. Y.) 516.

*North Carolina.* — *Hall v. Whitaker*, 7 Ired. L. (29 N. Car.) 353; *Draughan v. Bunting*, 9 Ired. L. (31 N. Car.) 13.

*Ohio.* — *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663.

*Pennsylvania.* — *Steckel v. Steckel*, 28 Pa. St. 233; *Hassinger v. Solms*, 5 S. & R. (Pa.) 4; *Horback v. Reeside*, 6 Whart. (Pa.) 47; *Wharton v. Williamson*, 13 Pa. St. 273; *Hogg v. Longstreth*, 97 Pa. St. 255; *Kearney v. Tanner*, 17 S. & R. (Pa.) 94, 17 Am. Dec. 648; *Gross v. Partenheimer*, 159 Pa. St. 556; *Armstrong County v. Clarion County*, 66 Pa. St. 218, 5 Am. Rep. 368.

*Tennessee.* — *Snyder v. Summers*, 1 Lea (Tenn.) 534, 27 Am. Rep. 778; *Hill v. Childress*, 10 Yerg. (Tenn.) 514.

*Vermont.* — *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791.

*West Virginia.* — *Nutter v. Sydenstricker*, 11 W. Va. 537.

*Wisconsin.* — *Allyn v. Boorman*, 30 Wis. 684.

**Recovery Had on Count for Money Paid.** — In general, where the plaintiff shows that either by compulsion of law, or to relieve himself from liability, or to save himself from damages he has paid that which the defendant ought to have paid, the count for money paid will be supported. *Nutter v. Sydenstricker*, 11 W. Va. 535; *San Gabriel Valley Land, etc., Co. v. Witmer Bros. Co.*, 96 Cal. 623.

1. **Implications from Payments So Made.** — *Nutter v. Sydenstricker*, 11 W. Va. 535.

2. *San Gabriel Valley Land, etc., Co. v. Witmer Bros. Co.*, 96 Cal. 623.

3. **Payment in Property of Any Description Sufficient.** — *Randall v. Rich*, 11 Mass. 494; *Lord v. Staples*, 23 N. H. 457; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Ainslie v. Wilson*, 7 Cow.

(N. Y.) 662, 17 Am. Dec. 532; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202. Compare *Madison v. Wallace*, 7 J. J. Marsh. (Ky.) 98.

"Although it is said it must appear that money has actually been advanced, the expression is to be understood that nothing short of actual payment will support the count. It has been often held that where the original liability has been extinguished by actual payment, it is immaterial in what description of property the payment has been made." *Lord v. Staples*, 23 N. H. 456.

In *Randall v. Rich*, 11 Mass. 494, a negotiable promissory note was indorsed to a lessor, as collateral security for the rent of the premises leased, and he sued the promisor in his own name, and caused execution to be levied on the debtor's land. It was held that the debtor might recover, in an action for money had and received, the balance of the note, after deducting the rent in arrear. The satisfaction of the execution, it was said, ought to be considered as a payment of the money, and although land was taken, it was taken at money's worth, and the debt which might have been exacted in money at all events had been discharged.

4. **Effect of Giving New Security.** — *Maxwell v. Jameson*, 2 B. & Ald. 51; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202; *Morrison v. Berkey*, 7 S. & R. (Pa.) 238; *Kearney v. Tanner*, 17 S. & R. (Pa.) 94, 17 Am. Dec. 648.

5. *Cumming v. Hackley*, 8 Johns. (N. Y.) 202.

6. **Rights of Surety as Against Principal — England.** — *Pownall v. Ferrand*, 6 B. & C. 439, 13 E. C. L. 230.

*United States.* — *Hall v. Smith*, 5 How. (U. S.) 96.

*California.* — *Curtis v. Parks*, 55 Cal. 106.

*Massachusetts.* — *Gibbs v. Bryant*, 1 Pick. (Mass.) 121.

*New Hampshire.* — *Rushworth v. Moore*, 36 N. H. 188.

*New York.* — *Butler v. Wright*, 20 Johns. (N. Y.) 367.

**As Against Cosureties.** — The right to enforce contribution from a cosurety is also well settled and exists whether the payment of the debt for which the surety was liable has or has not been made under the compulsion of legal proceedings. All that is necessary to the enforcement of this right consists of the legal liability of the sureties for the debt and the payment thereof by one of them.<sup>1</sup>

**Rights of One Who Pays Money to Prevent Seizure or Sale of His Property for Another's Debt.** — Another application of the rule arises where a person is obliged to pay money to prevent the seizure or sale of his property for the debt of another.<sup>2</sup>

**Contribution as Between Tortfeasors.** — While it is elementary law that no one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed,<sup>3</sup> the rule is not extended to cases where parties have acted in good faith without any unlawful design, or for the purpose of asserting the right in themselves or others, although thereby they may have infringed upon the legal rights of other persons.<sup>4</sup> It is only where a person knows or must be presumed to know that his acts were unlawful that the law will refuse to aid him in seeking an indemnity or contribution. The rule does not apply where the tort is merely one by construction or inference of law.<sup>5</sup>

**10. Money Paid on Illegal Contract.** — If the illegality of the contract be merely *malum prohibitum*, so long as the contract is executory the money paid thereon may be recovered back, and this right is not affected by the fact that the parties are *in pari delicto*.<sup>6</sup> If, however, the contract is *malum in se*, the general rule, it is believed, is that the money is not recoverable, whether the contract be executed or executory.<sup>7</sup>

**11. Money Paid on Contract Subsequently Rescinded.** — If money is paid on a contract which is subsequently rescinded, the law implies a promise to refund it, and an action for money had and received will lie to recover it back; no promise to refund is necessary.<sup>8</sup>

**12. Promise Implied from Acknowledgment of Indebtedness.** — An acknowledgment of indebtedness implies on its face a promise to pay.<sup>9</sup>

*West Virginia.* — *Nutter v. Sydenstricker*, 11 W. Va. 537.

**1. Right to Contribution from Cosureties.** — *Pitt v. Purssord*, 8 M. & W. 538; *Berlin v. School Soc.*, 9 Conn. 179; *Rushworth v. Moore*, 36 N. H. 193; *Norton v. Coons*, 6 N. Y. 33; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791.

**2. Exall v. Partridge**, 8 T. R. 308 (leading case); *Edmunds v. Wallingford*, 14 Q. B. D. 311 [*critising* *England v. Marsden*, L. R. 1 C. P. 529]; *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38; *Cole v. Wright*, 70 Ind. 179.

**3. No Right of Contribution Where Tort Is Wilful.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 364.

**4. Jacobs v. Pollard**, 10 Cush. (Mass.) 289.

**5. Rule Not Applicable Where Tort Is Not Wilful.** — *Wooley v. Batte*, 2 C. & P. 417, 12 E. C. L. 198; *Bailey v. Bussing*, 28 Conn. 455; *Farwell v. Becker*, 129 Ill. 271, 16 Am. St. Rep. 267; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; *Port Jervis v. Port Jervis First Nat. Bank*, 96 N. Y. 550; *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663.

**6. Contracts Mala Prohibita.** — *Hastelow v. Jackson*, 8 B. & C. 221, 15 E. C. L. 204; *Taylor v. Bowers*, 1 Q. B. D. 296; *Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49; *Jeffer-*

*son County v. Burlington, etc.*, R. Co., 66 Iowa 385; *Morgan v. Beaumont*, 121 Mass. 7.

**7. Contract Malum in Se.** — *Tappenden v. Randall*, 2 B. & P. 467; *Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49; *Johnson v. Byerly*, 3 Head (Tenn.) 194, 75 Am. Dec. 764. For a full treatise of this subject, see the titles GAMING, vol. 14, p. 664; ILLEGAL CONTRACTS, *ante*, p. 927.

**8. Money Paid on Rescinded Contract.** — *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *Wheelock v. Wright*, 4 Stew. & P. (Ala.) 163; *Pharr v. Bachelor*, 3 Ala. 237; *White v. Wood*, 15 Ala. 358; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Williams v. Hurt*, 2 Humph. (Tenn.) 68.

**9. Acknowledgment of Indebtedness — Implied Promise.** — *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87; *Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; *Tassey v. Church*, 4 W. & S. (Pa.) 141, 39 Am. Dec. 65.

**Illustrations of Rule.** — A duebill in the form, "Due A B three hundred and twenty-five dollars, payable on demand," is an acknowledgment of indebtedness and implies on its face a promise to pay. *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590.

So an acknowledgment that money was re-



**V. GOODS SOLD AND DELIVERED.** — Where goods are sold and delivered to another, the law implies a promise to pay for them what they are reasonably worth, in the absence of an express agreement as to the price.<sup>1</sup> But a party cannot recover on an implied agreement for the price of goods sold and delivered if he could have maintained an action on a special contract relating to that price.<sup>2</sup>

**VI. USE AND OCCUPATION.** — As is shown in another section, assumpsit for use and occupation will not lie unless the relation of landlord and tenant exists between the parties.<sup>3</sup> But to create the relation of landlord and tenant, it is not essential that there should be a specific and definite agreement to pay rent;<sup>4</sup> in the absence of all evidence to the contrary, the law will imply the existence of the relation of landlord and tenant between two parties, where one owns land and by his permission it is used and occupied by the other.<sup>5</sup> If the tenant's use and occupation has been beneficial to him, this is a sufficient ground from which to imply a promise on his part to pay a reasonable compensation for such use and occupation. It is not necessary that there should have been any express agreement as to the payment of rent.<sup>6</sup>

**VII. WAIVING TORT AND SUING IN ASSUMPSIT** — 1. In What Cases Tort May Be Waived. — Originally the only remedy of one who had suffered from the tortious acts of another was an action of tort.<sup>7</sup> There are, however, at the present time, a few instances in which the injured party is permitted to treat that which is purely a tort as having created a contract between himself and

ceived on deposit implies a promise to pay it to the depositor. *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87.

And where a person, on the settlement of an account, admits that he owes the balance, this raises an implied promise to pay it. *Tassey v. Church*, 4 W. & S. (Pa.) 141, 39 Am. Dec. 65.

1. *Goods Sold and Delivered* — *England*, — *Hart v. Mills*, 15 M. & W. 85.

*Canada*. — *Oldfield v. Hutton*, 2 Rev. Lég. 207.

*Delaware*. — *Ward v. Powell*, 3 Harr. (Del.) 379.

*North Carolina*. — *Finn v. Fitts*, 2 Dev. & B. L. (19 N. Car.) 236; *Mauney v. Coit*, 86 N. Car. 463; *Miller v. Land, etc., Co.*, 66 N. Car. 503; *Smith v. Summerfield*, 108 N. Car. 284.

*Pennsylvania*. — *Reis v. Herman*, 1 W. N. C. (Pa.) 84; *Hill v. Wallace*, Add. (Pa.) 145; *Indiana Mfg. Co. v. Hayes*, 155 Pa. St. 160; *Adams v. Columbian Steamboat Co.*, 3 Whart. (Pa.) 75; *Graff v. Callahan*, 158 Pa. St. 380.

See the title *SALES*.

**Illustrations.** — In assumpsit for goods sold and delivered, the defendant denied that he had ordered the goods or contracted to pay for them. It appeared, however, that when notified that the goods were at the depot for him he had taken them out and used them and had subsequently corresponded with the seller in relation to other goods. It was held that a promise to pay for them would be implied. *Indiana Mfg. Co. v. Hayes*, 155 Pa. St. 160.

So where it appeared that the defendant had by permission of the plaintiff's agents obtained wood from the shed where the defendant's wood was stored, it was held that the defendant's conduct amounted to a promise to pay for the wood and that a recovery would lie although there was no express promise to pay. *Adams v. Columbian Steamboat Co.*, 3 Whart. (Pa.) 75.

**Sales After Notice Not to Deliver.** — In an action for goods sold and delivered the defense was that the defendant had notified the plaintiff not to sell any goods to his family. It appeared, however, that subsequent to this notice the plaintiff had sold goods to the defendant's family with his knowledge and assent. It was held that the plaintiff could recover notwithstanding such notice. *Graff v. Callahan*, 158 Pa. St. 380.

2. *Carter v. McNeeley*, 1 Ired. L. (23 N. Car.) 448.

3. See *infra*, this title, *Waiving Tort and Suing in Assumpsit* — *Actions Based on Wrongful Use of Real Property*.

4. **Agreement to Pay Rent Not Essential to Relation.** — *Wilkinson v. Wilkinson*, 62 Mo. App. 249.

5. **When Law Will Imply Relation.** — *Skinner v. Skinner*, 38 Neb. 756.

6. **When Law Will Imply Promise to Pay Rent** — *United States*. — *Devereux v. Fleming*, 53 Fed. Rep. 401.

*Colorado*. — *Dickson v. Moffat*, 5 Colo. 111.

*Connecticut*. — *Gunn v. Scovil*, 4 Day (Conn.) 229, 4 Am. Dec. 208.

*Indiana*. — *Wills v. Wills*, 34 Ind. 106.

*Kentucky*. — *Logan v. Lewis*, 7 J. J. Marsh. (Ky.) 6.

*Nebraska*. — *Skinner v. Skinner*, 38 Neb. 756.

*North Carolina*. — *Hayes v. Acre*, Conf. Rep. (1 N. Car.) 19.

*Virginia*. — *Sutton v. Mandeville*, 1 Munf. (Va.) 407, 4 Am. Dec. 549; *Eppes v. Cole*, 4 Hen. & M. (Va.) 161, 4 Am. Dec. 512.

*Canada*. — *Burns v. Burrell*, 2 Rev. Lég. 205.

For a full treatment of this question, see the title *LIEN AND PLEDGE*.

7. **Former Doctrine.** — *Phillips v. Thompson*, 3 Lev. 191; *Jones v. Hoar*, 5 Pick. (Mass.) 285.



the tortfeasor, and to waive the cause of action arising in tort and sue on the implied contract.<sup>1</sup> The application of this doctrine usually arises, as will be shown in subsequent divisions of this section, where one party has converted and sold another's property, or (in some jurisdictions) where he has converted another's property and consumed it, or where he wrongfully obtains money belonging to another, or where one wrongfully entices away another's servant.

**Doctrine Not Applicable to Naked Trespass.** — The doctrine of waiving a tort and suing in assumpsit is never applied where the tort in question is a mere naked trespass. Where one person commits a tort against another without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay resulting damages.<sup>2</sup>

**2. Election of Remedies and Its Consequences** — **Where Tort Is Committed by One Person.** — If the tort is of such character as to give to the plaintiff a choice of remedies — that is, the right to sue either in tort or in assumpsit — and he elects to sue in assumpsit, he is bound by his election and will not be permitted to sue in tort after bringing assumpsit.<sup>3</sup> The converse of this proposition is equally true. If the plaintiff elects to sue in tort, he cannot afterwards sue in assumpsit. When suit is brought in assumpsit, the plaintiff is usually said to have waived the tort. This expression, however, is not strictly accurate; the proposition probably can be better expressed by the statement that the plaintiff waives the damages for the conversion and sues for the value of the property.<sup>4</sup>

**Where Tort Is Committed by Several Persons.** — As preliminary to a consideration of the rights of a person waiving the tort and suing in assumpsit where the tort is joint, it may be stated that there is some conflict of opinion upon the point whether a judgment in trespass or trover in favor of the plaintiff, without satisfaction, vests title to the property in suit in the defendant. According to a number of decisions, an unsatisfied judgment has no such effect, and, consequently, a judgment against one tortfeasor, so long as it remains unsatisfied, is not a bar to an action against the other tortfeasors.<sup>5</sup> On the other

**1. Present Doctrine.** — Cooley on Torts (2d ed.) 91.

**2. Naked Trespass.** — *Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367; *Tightmeyer v. Mongold*, 20 Kan. 90; *Fanson v. Lindsley*, 20 Kan. 235; *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 238; *Noyes v. Loring*, 55 Me. 408.

In most actions of trespass, nothing could be more repugnant to the real facts than the implication of a promise on the part of the tortfeasor, and it would often be in direct conflict with his express declaration. Thus, the law will not raise an implied promise to pay rent by one who takes possession of and holds land taken by force and with a claim of right in himself, nor will the law raise an implied promise to pay a certain sum of money as damages for an assault and battery. *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249.

**3. Election of Remedies** — **Suit in Assumpsit Bars Suit in Tort.** — *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721.

**Effect of Unsatisfied Demand on Right of Election.** — Where there is a wrongful conversion of goods, and the parties entitled thereto demand payment from the tortfeasors, which demand is repudiated, this does not constitute such an affirmation of the sale as will bar their right to maintain trover for the goods. *Valpy v. Sanders*, 5 C. B. 886, 57 E. C. L. 886.

**Effect of Notice Given to Prevent Sale of Converted Property on Right of Action.** — Where a

person whose goods are wrongfully sold by the sheriff gives notice at the sheriff's sale that the goods belong to him, and that the purchaser will take no title, he is not estopped by such notice from maintaining an action of trespass against the sheriff. *Hyde v. Kiehl*, 183 Pa. St. 415.

**Effect of Discontinuing Action in Assumpsit on Right of Election.** — In *Thompson v. Howard*, 31 Mich. 309, it was held that where a party waives the tort and sues in assumpsit, which suit is subsequently discontinued, he cannot thereafter bring an action of tort.

In *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25, it was held that the mere bringing of an action for the price of goods converted is not a binding election of remedies, where at the time of its commencement the plaintiff was not aware of the facts which would have enabled him to elect, and that he might discontinue the suit in assumpsit and bring suit in trover.

In *Conrow v. Little*, 115 N. Y. 387, the court reached practically the same conclusion. In that case it was held that the commencement of the action, where all the facts are known, is conclusive evidence of an election.

**4. Suit in Tort Bars Suit in Assumpsit.** — *Huffman v. Hughtlett*, 11 Lea (Tenn.) 554; *Kirkman v. Phillips*, 7 Heisk. (Tenn.) 222.

**5. Effect of Unsatisfied Judgment.** — *Brinsmead v. Harrison*, 6 L. R. C. P. 584; *Lovejoy v.*

hand, a number of decisions maintain that an unsatisfied judgment vests title to the property in the defendant,<sup>1</sup> and that judgment against one of two joint tortfeasors without execution or satisfaction is a bar to an action by the same plaintiff against the other tortfeasor.<sup>2</sup> In one case the doctrine was laid down that the title to property by the force of the plaintiff's election to sue in assumpsit vests in the tortfeasors sued for its value.<sup>3</sup> So it has been held that if one of the tortfeasors is sued in tort the plaintiff cannot thereafter sue the others in assumpsit although the judgment in that action remains unsatisfied,<sup>4</sup> and that a judgment in tort in favor of the plaintiff divests him of his title in the property.<sup>5</sup>

**3. Actions Based on Conversion of Property** — *a. WHERE PROPERTY CONVERTED IS SOLD* — (1) *General Considerations Applicable to Waiver of Tort.* — Formerly the doctrine prevailed that what was a tort in its inception could not by any subsequent transaction be made the foundation of an implied assumpsit; and therefore one whose goods had been wrongfully converted and sold was limited to an action of tort as the sole remedy.<sup>6</sup> The contrary doctrine, however, has prevailed for a long time, and at the present day is unquestioned. If one person wrongfully converts and sells another's property, the injured party may disaffirm his act and sue him as a wrongdoer, or he may waive the tort, affirm the sale, and recover in assumpsit upon a count for money had and received to his use.<sup>7</sup> The owner of property wrongfully

Murray, 1 Wall. (U. S.) 70; Bell v. Terry, 43 Iowa 468; United Society of Shakers v. Underwood, 74 Ky. 265; Elliott v. Porter, 5 Dana (Ky.) 299; Atwater v. Tuttle, 55 Ky. 144; Nott v. Cunningham, 2 Sneed (Tenn.) 204; Smith v. Smith, 51 N. H. 571; Saunderson v. Caldwell, 2 Aik. (Vt.) 195.

1. Adams v. Broughton, Stra. 1078; Nast v. Pier, 4 Rawle (Pa.) 273; Floyd v. Browne, 1 Rawle (Pa.) 121; Murrell v. Johnson, 1 Hen. & M. (Va.) 449; Bogan v. Wilburn, 1 Spears (S. Car.) 167; Rogers v. Thompson, Rice L. (S. Car.) 60; Hunt v. Bates, 7 R. I. 217.

2. Hunt v. Bates, 7 R. I. 217.

3. Terry v. Munger, 121 N. Y. 161. Compare Huffman v. Hughlett, 11 Lea (Tenn.) 549.

4. Floyd v. Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602; Hyde v. Kiehl, 183 Pa. St. 414; Buckland v. Johnson, 15 C. B. 145.

5. Floyd v. Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602; Fox v. The Northern Liberties, 3 W. N. C. (Pa.) 107; Merrick's Estate, 5 W. & S. (Pa.) 17; Nast v. Pier, 4 Rawle (Pa.) 286.

As to the Effect of judgments generally see the title JUDGMENTS AND DECREES.

6. Former Rule. — Phillips v. Thompson, 3 Lev. 191; Jones v. Hoar, 5 Pick. (Mass.) 285.

7. Present Rule — Waiver of Tort and Suit in Assumpsit — England. — Powell v. Reese, 7 Ad. & El. 426, 34 E. C. L. 136; Young v. Marshall, 8 Bing. 43, 21 E. C. L. 215; Lamine v. Dorrell, 2 Ld. Raym. 1216; Brewer v. Sparrow, 7 B. & C. 310, 14 E. C. L. 50; Neate v. Harding, 20 L. J. Exch. 250; Feltham v. Terry, cited in 1 Cowp. 419.

Alabama. — Fuller v. Duren, 36 Ala. 77, 76 Am. Dec. 318; Pike v. Bright, 29 Ala. 336; Strother v. Butler, 17 Ala. 733; Smith v. Jernigan, 83 Ala. 256; Crow v. Boyd, 17 Ala. 53; Cameron v. Clarke, 11 Ala. 259; Upchurch v. Norsworthy, 15 Ala. 705; Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318.

Arkansas. — Bowman v. Browning, 17 Ark. 599; Hudson v. Gilliland, 25 Ark. 100; Chamblee v. McKenzie, 31 Ark. 155.

California. — Halleck v. Mixer, 16 Cal. 574; Fratt v. Clark, 12 Cal. 89.

Connecticut. — Tucker v. Jewett, 32 Conn. 563.

Delaware. — Hutton v. Wetherald, 5 Harr. (Del.) 38.

Georgia. — Barlow v. Stalworth, 27 Ga. 517. Illinois. — De Clerq v. Mungin, 46 Ill. 112; Cushman v. Hayes, 46 Ill. 145; Staat v. Evans, 35 Ill. 455.

Iowa. — Goodenow v. Snyder, 3 Greene (Iowa) 599; Moses v. Arnold, 43 Iowa 187, 22 Am. Rep. 239.

Maine. — Howe v. Clancey, 53 Me. 130; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238; Rand v. Nesmith, 61 Me. 111; Balch v. Patten, 45 Me. 49, 71 Am. Dec. 526.

Maryland. — Leighton v. Preston, 9 Gill (Md.) 201; Stockett v. Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 433.

Massachusetts. — Gilmore v. Wilbur, 12 Pick. (Mass.) 124; Allen v. Ford, 19 Pick. (Mass.) 217; Jones v. Hoar, 5 Pick. (Mass.) 285; Berkshire Glass Co. v. Wolcott, 2 Allen (Mass.) 227, 79 Am. Dec. 781; Boston, etc., R. Corp. v. Dana, 1 Gray (Mass.) 83; Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264.

Michigan. — Watson v. Stever, 25 Mich. 386; Tolan v. Hodgeboom, 38 Mich. 625.

Missouri. — Dougherty v. Chapman, 29 Mo. App. 242.

New Hampshire. — White v. Brooks, 43 N. H. 402; Smith v. Smith, 43 N. H. 536; Mann v. Locke, 11 N. H. 246.

New Jersey. — Budd v. Hiler, 27 N. J. L. 43.

New York. — Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Berly v. Taylor, 5 Hill (N. Y.) 582.

North Carolina. — Scottish Carolina Timber, etc., Co. v. Brooks, 109 N. Car. 698; Bullinger v. Marshall, 70 N. Car. 520; Edwards v. Cowper, 99 N. Car. 421; Wall v. Williams, 91 N. Car. 477.



taken has a right to follow it and adopt any act done to it, and treat the proceeds as money had and received to his use.<sup>1</sup> Probably the true ground upon which this principle rests is that the subsequent assent to treat the matter as resting on the contract has relation back to the time when the goods were taken, and in legal effect converts it into a sale of goods at the request of the owner.<sup>2</sup>

**Right to Proceeds of Sale Necessary.** — To authorize a recovery in assumpsit, the plaintiff must be entitled to the proceeds of the sale.<sup>3</sup> This, however, does not necessarily mean that the plaintiff must have title to the property converted. If at the time of conversion the plaintiff is in possession and is exercising acts of ownership, he may maintain trespass against the wrongdoer; and if this is so, it follows that he may waive the tort and maintain an action to recover the money accruing from its sale.<sup>4</sup>

**Payment in Money Unnecessary.** — It is not essential to the maintenance of the action that payment for the goods shall have been actually made in money; payment in property of any sort will be sufficient.<sup>5</sup>

**Whether Sale of Property Without Actual Payment Sufficient.** — Whether the mere sale of converted property is or is not in and of itself sufficient to warrant the bringing of an action in assumpsit is a controverted question. According to one decision, the tortfeasor must actually have received the purchase money or its equivalent;<sup>6</sup> but a more recent decision holds that the action will lie

*Pennsylvania.* — *Willet v. Willet*, 3 Watts (Pa.) 277.

*Rhode Island.* — *Hall v. Peckham*, 8 R. I. 372.

*Tennessee.* — *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Huffman v. Hughlett*, 11 Lea (Tenn.) 549.

*Vermont.* — *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595; *Stearns v. Dillingham*, 22 Vt. 624, 54 Am. Dec. 88; *Burnap v. Partridge*, 3 Vt. 144.

*Wisconsin.* — *Elliott v. Jackson*, 3 Wis. 649.

**Illustrations — Conversion by Decedent.** — An administrator is liable to an action for money had and received, by his intestate, for coal tortiously taken from the plaintiff's land, if the intestate had sold it and received the money. *Powell v. Reese*, 7 Ad. & El. 426, 34 E. C. L. 136.

**Conversion by Tenant in Common.** — If one tenant in common sells the whole of an article owned in common, or undertakes to do so, without the authority or consent of the other tenant, this constitutes a wrongful conversion, and the latter tenant may waive the tort, ratify the sale, and bring his action of money had and received for the money received by the defendant for the plaintiff's interest in the property. *White v. Brooks*, 43 N. H. 402.

**Conversion by Trustees.** — Certain goods were mortgaged by the owners to the plaintiff to secure a deed from the former to the latter. The mortgagors afterwards conveyed the same goods to the defendants in trust to sell and distribute the proceeds among the creditors of the grantor. Under this deed of trust the defendants sold the goods and received the proceeds. It was held that in making this sale the defendants committed a tort and the plaintiff might recover the proceeds to satisfy his mortgage deed in an action for money had and received. *Leighton v. Preston*, 9 Gill (Md.) 201.

**Conversion by Infants.** — The rule stated in the text applies in case of wrongful conversions and sales of goods by infants. *Shaw v.*

*Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Walker v. Davis*, 1 Gray (Mass.) 506; *Munger v. Hess*, 28 Barb. (N. Y.) 75; *Peigne v. Sutcliffe*, 4 M'Cord L. (S. Car.) 387, 17 Am. Dec. 756.

**Sale of Articles by Thief.** — Where specific articles are sold and converted into money the owner may maintain assumpsit for money had and received against the thief. *Howe v. Clancey*, 53 Me. 130. See also *Boston, etc., R. Corp. v. Dana*, 1 Gray (Mass.) 83.

1. *Neate v. Harding*, 20 L. J. Exch. 250.

2. *Stearns v. Dillingham*, 22 Vt. 624, 54 Am. Dec. 88.

3. **Plaintiff Must Be Entitled to Proceeds of Sale.** — *Bigelow v. Jones*, 10 Pick. (Mass.) 161, in which case it was held that the disseizee of land, until he has regained seizin and possession by judgment or entry, has not such an interest in the land as will give him an interest in the trees which have been severed therefrom and sold during the continuance of the disseizin, and that he has no such interest in the money for which they were sold as will enable him to maintain assumpsit for money had and received.

4. **Title in Plaintiff Not Necessary to Support Action.** — *Oughton v. Seppings*, 1 B. & Ad. 241, 20 E. C. L. 380.

5. **Payment in Money Unnecessary.** — *Stewart v. Conner*, 9 Ala. 813; *Cameron v. Clarke*, 11 Ala. 259; *Fuller v. Duren*, 36 Ala. 77, 76 Am. Dec. 318; *Arms v. Ashley*, 4 Pick. (Mass.) 71; *Miller v. Miller*, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; *Mason v. Waite*, 17 Mass. 560.

**Illustration.** — If one tenant in common sells trees growing on the land and receives payment, whether in money, goods, or real estate, he will be liable to his cotenant in an action for money had and received, if no question is made in regard to the title of the land held in common. *Miller v. Miller*, 7 Pick. (Mass.) 134, 19 Am. Dec. 264.

6. **Whether Payment Necessary to Sustain Action — Affirmative View.** — *Budd v. Hiler*, 27 N. J. L. 48.



although the tortfeasor may not have actually collected the price, but has accepted in lieu thereof the promise of the vendee to pay.<sup>1</sup>

**Barter or Exchange of Property Insufficient.** — It has been held that the action will not be supported by a showing that the tortfeasor has bartered or exchanged the property.<sup>2</sup>

**Benefit to Tortfeasor Necessary.** — If no benefit accrues to the tortfeasor by reason of the tort committed, assumpsit will not lie. He cannot be charged as on an implied contract unless some benefit has actually accrued to him.<sup>3</sup>

**Detriment to Plaintiff Necessary.** — There must also be a corresponding detriment to the plaintiff, or, in other words, the defendant's estate must have been enriched at the expense of the plaintiff's.<sup>4</sup>

**Limit of Recovery.** — When suit is brought in assumpsit, the plaintiff waives all tort and damages, and the recovery is limited to the amount actually received from the sale;<sup>5</sup> and if, for any reason, the amount received cannot be ascertained, assumpsit will not lie. The only remedy in that case is trespass or trover.<sup>6</sup>

(2) *Running of Statute of Limitations.* — The cases are not uniform as to the time when the statute of limitations begins to run against the right to sue in assumpsit for the proceeds of the sale. According to one decision, the right to the proceeds accrues by force of and at the moment of the election, and as a consequence thereof it was held that the plaintiff is not entitled to interest prior to the time of the election.<sup>7</sup> According to another decision, the time from which the statutory period is to be computed is neither the time of the election nor the time of the sale (when sale and payment are not contemporaneous), but the time when the defendant actually received payment for the property.<sup>8</sup> Provided the tortfeasor sells the property before the statute of limitations has barred the right of the plaintiff to bring his action of tort for the conversion,<sup>9</sup> the most reasonable view is that the statute of limitations will begin to run against an action of assumpsit from the date of the sale of the property if payment is contemporaneous with the sale, or from the date of payment if the payment is made at a time subsequent to the sale. It follows, then, that the mere fact that the action of tort is barred is no reason why the action of assumpsit should also be barred, and it has been so held.<sup>10</sup> If the injured party chooses to bring assumpsit instead of tort, the tortfeasor

1. *Negative View.* — *Burton Lumber Co. v. Wilder*, 108 Ala. 669, in which case the court said: "A wrongdoer \* \* \* cannot deprive the owner of this right by failing or declining to collect the purchase money, and in accepting in lieu thereof the promise of the purchaser to pay it; but, accepting such promise, he will be conclusively deemed, as in favor of the owner, to have treated it as the equivalent of money. By selling the goods for a price, he impliedly agrees to give the owner the benefit of it; and if he accept anything else than money for the price, he does so at his own hazard."

2. *Barter or Exchange of Property Insufficient.* — *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595.

3. *Tortfeasor Must Have Been Benefited.* — *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 238; *Ford v. Caldwell*, 3 Hill L. (S. Car.) 248.

4. *Plaintiff Must Have Suffered Loss.* — *Phillips v. Homfray*, 24 Ch. D. 439.

5. *Limit of Recovery.* — *London & Hampshire Cowp.* 414; *Dougherty v. Chapman*, 29 Mo. App. 241; *Saville v. Welch*, 58 Vt. 683. See also *Moses v. Macferlan*, 2 Burr. 1005.

6. *No Recovery in Assumpsit Where Amount Not Ascertainable.* — *Saville v. Welch*, 58 Vt. 683.

7. *Running of Statute of Limitations — From Time of Election.* — *Dougherty v. Chapman*, 29 Mo. App. 233.

8. *From Time of Receiving Payment for Property.* — *Miller v. Miller*, 7 Pick. (Mass.) 133, 19 Am. Dec. 264. In this case it was held that where a promissory note was taken from the purchaser, and payments were afterwards made on it, the statute began to run from the date of these payments.

9. *Where Suit in Tort Is Barred Before Sale of Property.* — Mr. Keener says that if the tortfeasor retains the property until the statutory period has run against the injured party's right to maintain an action of tort for its conversion, the latter cannot maintain an action for the proceeds, if the tortfeasor subsequently sells the property. Keener on *Quasi Contracts* 176, 177. See also *Currier v. Studley*, 159 Mass. 17.

10. *Suit in Assumpsit Not Barred Because Suit in Tort Is Barred.* — *Hony v. Hony*, 1 Sim. & St. 568; *Ivey v. Owens*, 28 Ala. 642; *Lamb v. Clark*, 5 Pick. (Mass.) 193.

cannot allege his own wrong for the purpose of carrying back the injury to a time which will let in the statute of limitations.<sup>1</sup>

*b. WHERE PROPERTY CONVERTED IS USED OR CONSUMED BY TORTFEASOR.*—There is much conflict of authority on the question whether the injured party can sue in assumpsit for the value of converted property where the tortfeasor, instead of selling it, retains it for his own use or consumes it. In *England* there are decisions which seem to support both sides of the controversy.<sup>2</sup> In the *United States* the decisions are also very conflicting, and in many states it is well settled that if the goods are not sold, assumpsit will not lie, and that the consumption or retention of the property converted by the defendant is not sufficient to authorize this remedy.<sup>3</sup> In a larger number of states the rule is equally well settled to the contrary, and one whose property has been converted by another who retains it for his own use or consumes it may waive the tort and sue in assumpsit to recover its value.<sup>4</sup>

1. *Lamb v. Clark*, 5 Pick. (Mass.) 193. In this case the defendant obtained possession of divers promissory notes without a legal transfer from the owner, and received payment of some of them more than six years, and of others within six years, next before the commencement of the action, and it was held that he was liable in assumpsit for the sums received within the six years, and that he was estopped to say that the notes were obtained by fraud and so an action for trover would have been barred by the statute.

2. *That Assumpsit Will Lie.*—*Russell v. Bell*, 10 M. & W. 340; *Lightly v. Clouston*, 1 Taunt. 112, which supports this view at least by implication.

*That Assumpsit Will Not Lie.*—In *Bennett v. Francis*, 2 B. & P. 550, this question was considered but not decided. The court intimated very strongly, however, that the action would not lie.

3. *View that Assumpsit Will Not Lie*—*Alabama*.—*Pike v. Bright*, 29 Ala. 332; *Strother v. Butler*, 17 Ala. 733; *Lytle v. Bowdon*, 107 Ala. 361; *Crow v. Boyd*, 17 Ala. 51; *Smith v. Jernigan*, 83 Ala. 256; *Bradfield v. Patterson*, 106 Ala. 397.

*Arkansas*.—*Bowman v. Browning*, 17 Ark. 599. The contrary doctrine formerly prevailed in this state. *Johnson v. Reed*, 8 Ark. 202.

*Connecticut*.—*Tucker v. Jewett*, 32 Conn. 563.

*Iowa*.—*Moses v. Arnold*, 43 Iowa 187, 22 Am. Rep. 239.

*Kentucky*.—*Pritchard v. Ford*, 1 J. J. Marsh. (Ky.) 543; *Sanders v. Hamilton*, 3 Dana (Ky.) 550.

*Maine*.—*Androscoggin Water Power Co. v. Metcalf*, 65 Me. 40; *Balch v. Patten*, 45 Me. 41, 71 Am. Dec. 526; *Emerson v. McNamara*, 41 Me. 565.

*Massachusetts*.—*Jones v. Hoar*, 5 Pick. (Mass.) 285.

*Missouri*.—*Sandeen v. Kansas City, etc.*, R. Co., 79 Mo. 278; *Ahern v. Carroll*, 30 Mo. 200. The rule was formerly to the contrary. See *Floyd v. Wiley*, 1 Mo. 430.

*New Hampshire*.—*Smith v. Smith*, 43 N. H. 536; *Mann v. Locke*, 11 N. H. 246; *White v. Brooks*, 43 N. H. 402. That the rule was formerly otherwise, see *Hill v. Davis*, 3 N. H. 384, 14 Am. Dec. 373.

*Pennsylvania*.—*Bethlehem v. Perseverance*

*F. Co.*, 81 Pa. St. 445; *Willet v. Willet*, 3 Watts (Pa.) 277. But see the memorandum opinion in *Philadelphia Co. v. Park*, 138 Pa. St. 346, which seems to be in conflict with the other Pennsylvania decisions.

*South Carolina*.—*Schweizer v. Weiber*, 6 Rich. L. (S. Car.) 159.

*Vermont*.—*Stearns v. Dillingham*, 22 Vt. 624, 54 Am. Dec. 88; *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595; *Saville v. Welch*, 58 Vt. 683; *Scott v. Lance*, 21 Vt. 507.

4. *View that Assumpsit Lies*—*United States*.—*James v. Buzzard*, *Hempst.* (U. S.) 240.

*California*.—*Lehmann v. Schmidt*, 87 Cal. 15; *Roberts v. Evans*, 43 Cal. 380.

*Georgia*.—*Newton Mfg. Co. v. White*, 53 Ga. 395. The contrary rule formerly prevailed in this state. *Barlow v. Stalworth*, 27 Ga. 517.

*Illinois*.—*Toledo, etc., R. Co. v. Chew*, 67 Ill. 378. The rule was formerly otherwise in Illinois. *O'Reer v. Strong*, 13 Ill. 688; *Morrison v. Rogers*, 3 Ill. 317.

*Indiana*.—*Morford v. White*, 53 Ind. 547; *Jones v. Gregg*, 17 Ind. 84; *Cooper v. Helsabeck*, 5 Blackf. (Ind.) 14.

*Kansas*.—*Tamson v. Linsley*, 20 Kan. 235; *Stewart v. Balderston*, 10 Kan. 142.

*Michigan*.—*Aldine Mfg. Co. v. Barnard*, 84 Mich. 632; *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54.

*Mississippi*.—*Evans v. Miller*, 58 Miss. 128, 38 Am. Rep. 313, *disapproving* intimations to the contrary in *O'Conley v. Natchez*, 1 Smed. & M. (Miss.) 46, 40 Am. Dec. 87, and *Mhoon v. Greenfield*, 52 Miss. 440.

*New York*.—*Goodwin v. Griffis*, 88 N. Y. 629; *Terry v. Munger*, 121 N. Y. 166, 18 Am. St. Rep. 803; *McGoldrick v. Willits*, 52 N. Y. 620; *Osborn v. Bell*, 5 Den. (N. Y.) 370, 49 Am. Dec. 275; *Wigand v. Sichel*, 3 Keyes (N. Y.) 120; *Butts v. Collins*, 13 Wend. (N. Y.) 154; *Abbott v. Blossom*, 66 Barb. (N. Y.) 353.

*North Carolina*.—*Logan v. Wallis*, 76 N. Car. 416.

*Ohio*.—*Barker v. Cory*, 15 Ohio 1.

*Tennessee*.—*Kirkman v. Philips*, 7 Heisk. (Tenn.) 222; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454.

*Texas*.—*Ferrill v. Mooney*, 33 Tex. 219.

*West Virginia*.—*McDonald v. Peacemaker*, 5 W. Va. 439.

*Wisconsin*.—*Walker v. Duncan*, 68 Wis.



**4. Wrongfully Obtaining Another's Money.** — Where one wrongfully obtains another's money, the tort may be waived and an action for money had and received may be brought.<sup>1</sup>

**5. Actions Based on Wrongful Enticement of Servants.** — One whose servant has been enticed away by another may waive the tort and sue on an implied promise for the value of the services rendered by the servant to the second employer.<sup>2</sup>

**6. Actions Based on Wrongful Use of Real Property** — *a.* **STATEMENT OF RULE.** — An action for use and occupation is founded on a contract express or implied. Before a recovery can be had in this form of action, it must be made to appear that the relation of landlord and tenant existed between the parties; under no other circumstances will this action lie. Title in the plaintiff and use and occupation by the defendant are not enough.<sup>3</sup>

624; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782. The earlier decisions in this state are to the contrary. *Kelty v. Owens*, 3 Pin. (Wis.) 372; *Elliott v. Jackson*, 3 Wis. 649.

1. See *supra*, this title, *Money Had and Received and Money Paid—Money Paid under Duress; Money Procured to Be Paid by Fraud.*

2. **Enticing Away Servant.** — *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191; *Thompson v. Havelock*, 1 Campb. 527; *Stockett v. Watkins*, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; *James v. Le Roy*, 6 Johns. (N. Y.) 274. *Contra*, *Crow v. Boyd*, 17 Ala. 51.

**Illustration.** — Where A, an apprentice, ran away from his master, in New York, boarded a ship, and signed articles by which he engaged to perform the whole voyage and to forfeit his wages in case of desertion or embezzlement, and during the voyage he deserted, having been guilty of embezzlement, it was held that the master was entitled to recover from the shipowners his whole earnings during the time when he was on board, without any deduction for wages advanced to him, though neither the owners nor the captain knew that he was an apprentice. *James v. Le Roy*, 6 Johns. (N. Y.) 274.

3. **Necessity of Relation of Landlord and Tenant** — *England.* — *Birch v. Wright*, 1 T. R. 378; *Tew v. Jones*, 13 M. & W. 12.

*United States.* — *Lloyd v. Hough*, 1 How. (U. S.) 160.

*Alabama.* — *Lankford v. Green*, 52 Ala. 103; *Stringfellow v. Curry*, 76 Ala. 394; *Fielder v. Childs*, 73 Ala. 568; *Grady v. Ibach*, 94 Ala. 152.

*Arkansas.* — *Byrd v. Chase*, 10 Ark. 602. *California.* — *Sampson v. Schaeffer*, 3 Cal. 196; *Ramirez v. Murray*, 5 Cal. 222; *O'Conner v. Corbitt*, 3 Cal. 370.

*Delaware.* — *Redden v. Barker*, 4 Harr. (Del.) 179.

*Georgia.* — *Williams v. Hollis*, 19 Ga. 313.

*Illinois.* — *McNair v. Schwartz*, 16 Ill. 24; *Dudding v. Hill*, 15 Ill. 61; *Dixon v. Haley*, 16 Ill. 145.

*Indiana.* — *Estep v. Estep*, 23 Ind. 114; *Newby v. Vestal*, 6 Ind. 413.

*Kentucky.* — *Waller v. Morgan*, 18 B. Mon. (Ky.) 142.

*Maine.* — *Howe v. Russell*, 41 Me. 446; *Emery v. Emery*, 87 Me. 282; *Burdin v. Ordway*, 88 Me. 375; *Rogers v. Libbey*, 35 Me. 200; *Curtis v. Treat*, 21 Me. 525.

*Maryland.* — *Stoddert v. Newman*, 7 Har. &

J. (Md.) 251; *Stockett v. Watkins*, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438.

*Massachusetts.* — *Kirchgassner v. Rodick*, 170 Mass. 543; *Central Mills Co. v. Hart*, 124 Mass. 123; *Merrill v. Bullock*, 105 Mass. 486; *Codman v. Jenkins*, 14 Mass. 93; *Boston v. Binney*, 11 Pick. (Mass.) 1, 22 Am. Dec. 353.

*Michigan.* — *Dalton v. Laudahn*, 30 Mich. 349; *Henderson v. Detroit*, 61 Mich. 378; *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536; *Marquette, etc., R. Co. v. Harlow*, 37 Mich. 554, 26 Am. Rep. 538.

*Minnesota.* — *Folsom v. Carli*, 6 Minn. 420, 80 Am. Dec. 456; *Hurley v. Lamoreaux*, 29 Minn. 138; *Crosby v. Horne, etc., Co.*, 45 Minn. 249.

*Mississippi.* — *Scales v. Anderson*, 26 Miss. 94.

*Missouri.* — *Edmonson v. Kite*, 43 Mo. 176; *Hood v. Mathis*, 21 Mo. 308; *Cohen v. Kyler*, 27 Mo. 123; *Landree v. Warren*, 53 Mo. App. 445; *Sturges v. Botts*, 24 Mo. App. 282.

*Nebraska.* — *Skinner v. Skinner*, 38 Neb. 756.

*Nevada.* — *Dixon v. Aherr*, 19 Nev. 422.

*New Hampshire.* — *Wiggin v. Wiggin*, 6 N. H. 298; *Barron v. Marsh*, 63 N. H. 107; *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Durrell v. Emery*, 64 N. H. 223.

*New Jersey.* — *Brewer v. Craig*, 18 N. J. L. 214; *Stewart v. Fitch*, 31 N. J. L. 17.

*New York.* — *Sylvester v. Ralston*, 31 Barb. (N. Y.) 286; *Hall v. Southmayd*, 15 Barb. (N. Y.) 32; *Croswell v. Crane*, 7 Barb. (N. Y.) 203; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489, 7 Am. Dec. 396; *Osgood v. Dewey*, 13 Johns. (N. Y.) 240; *Smith v. Stewart*, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; *Collyer v. Collyer*, 113 N. Y. 442; *Benjamin v. Benjamin*, 5 N. Y. 383; *Preston v. Hawley*, 101 N. Y. 586.

*Ohio.* — *Richey v. Hinde*, 6 Ohio 371; *Cincinnati v. Walls*, 1 Ohio St. 223; *Butler v. Cowles*, 4 Ohio 213.

*Oregon.* — *Espy v. Fenton*, 5 Oregon 423.

*Pennsylvania.* — *Wharton v. Fitzgerald*, 3 Dall. (Pa.) 503; *Pott v. Leshner*, 1 Yeates (Pa.) 576; *Henwood v. Cheeseman*, 3 S. & R. (Pa.) 500; *Brolasky v. Ferguson*, 48 Pa. St. 434.

*South Carolina.* — *Ryan v. Marsh*, 2 Nott & M. (S. Car.) 156.

*Vermont.* — *Watson v. Brainard*, 33 Vt. 88; *Hough v. Birge*, 11 Vt. 150, 34 Am. Dec. 682; *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551; *Moore v. Harvey*, 50 Vt. 297.

*Wisconsin.* — *De Pere Co. v. Reynen*, 65 Wis. 271; *Ackerman v. Lyman*, 20 Wis. 455.



*b. APPLICATIONS OF RULE.* — Accordingly, if one enters as a trespasser upon another's land, an action for use and occupation cannot be maintained.<sup>1</sup> The burden of proof rests upon the owner of land to show that the person who had first entered upon the land as a trespasser afterwards became a tenant. The presumption is that he continued to hold the land in the same character as that in which he had first held it.<sup>2</sup> So no action for use and occupation will lie where possession is adverse, for such possession necessarily excludes the idea of a contract.<sup>3</sup> The courts will not try the title to real property in an action of assumpsit for use and occupation.<sup>4</sup> So the weight of authority is that the action will not, under any circumstances, lie when one of the parties goes into possession of the premises under a contract of sale. When this is the case every implication of a promise to pay rent is necessarily rebutted.<sup>5</sup> There can be no recovery in assumpsit for use and occupation where the vendor refuses or is unable to carry out the contract of sale,<sup>6</sup> or where the contract is rescinded;<sup>7</sup> and the weight of authority is that even though the vendee, after taking possession, abandons the contract without cause, there can be no recovery in this form of action.<sup>8</sup>

**Possession by One Not Claiming Title and Expressing Willingness to Pay Rent.** — It has been held in *Alabama* that an action for use and occupation will lie against one who takes possession of unoccupied land, admitting that he has no title and stating his willingness to pay rent to the rightful owner. *Smith v. Houston*, 16 Ala. 111.

1. **Trespassers.** — *Lloyd v. Hough*, 1 How. (U. S.) 160; *Smith v. Houston*, 16 Ala. 111; *Weaver v. Jones*, 24 Ala. 420; *Stringfellow v. Curry*, 76 Ala. 394; *Stockett v. Watkins*, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; *Goddard v. Hall*, 55 Me. 579; *Dixon v. Ahern*, 19 Nev. 422; *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 134; *Hurd v. Miller*, 2 Hilt. (N. Y.) 540; *Watson v. Brainard*, 33 Vt. 88.

2. *Dixon v. Ahern*, 19 Nev. 423.

3. *Stringfellow v. Curry*, 76 Ala. 394; *Sampson v. Schaeffer*, 3 Cal. 197; *Williams v. Hollis*, 19 Ga. 313; *Codman v. Jenkins*, 14 Mass. 96; *Boston v. Binney*, 11 Pick. (Mass.) 9, 22 Am. Dec. 353; *Henderson v. Detroit*, 61 Mich. 378; *Dixon v. Ahern*, 19 Nev. 423; *Wiggin v. Wiggin*, 6 N. H. 298; *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Watson v. Brainard*, 33 Vt. 88.

**Illustration.** — Where possession of the premises of a landowner is taken and a building is erected and other improvements are made thereon, all without his consent, and he notifies the intruder to remove the additions or pay to him a specified rent for the use of his property, which payment is refused and possession is retained, the plaintiff's remedy is not by an action for use and occupation, but by an action of trespass or ejectment, with claim for mesne profits. *Henderson v. Detroit*, 61 Mich. 378.

4. *Stringfellow v. Curry*, 76 Ala. 396; *Boston v. Binney*, 11 Pick. (Mass.) 9, 22 Am. Dec. 353; *Codman v. Jenkins*, 14 Mass. 96; *Hogsett v. Ellis*, 17 Mich. 351.

5. *England v. Kirtland v. Pounsett*, 2 Taunt. 145.

*Connecticut.* — *Vandenheuvel v. Storrs*, 3 Conn. 203.

*Illinois.* — *Dixon v. Haley*, 16 Ill. 145; *McNair v. Schwartz*, 16 Ill. 24.

*Indiana.* — *Newby v. Vestal*, 6 Ind. 473.

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*Massachusetts.* — *Little v. Pearson*, 7 Pick. (Mass.) 301, 19 Am. Dec. 289.

*Missouri.* — *Coffman v. Huck*, 19 Mo. 435.

*New York.* — *Smith v. Stewart*, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; *Sylvester v. Ralston*, 31 Barb. (N. Y.) 286; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489, 7 Am. Dec. 396.

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**Whatever Excludes All Idea of a Contract** excludes at the same time a remedy which can spring from contract only, which affirms it and seeks its enforcement. *Lloyd v. Hough*, 1 How. (U. S.) 159.

Where the defendants entered under a contract of purchase, which was not executed within the time first agreed upon, and the plaintiff could have treated it as rescinded if he had chosen to do so, but did not so treat it, and renewed it from time to time, making no claim for rent, until it was finally consummated and the conveyance was actually made, it was held that the law would not imply a promise to pay rent. *Dennett v. Penobscot Fair Ground Co.*, 57 Me. 427.

6. *Kirtland v. Pounsett*, 2 Taunt. 145; *Little v. Pearson*, 7 Pick. (Mass.) 301, 19 Am. Dec. 289; *Sylvester v. Ralston*, 31 Barb. (N. Y.) 286; *Hough v. Birge*, 11 Vt. 190, 34 Am. Dec. 682; *Way v. Raymond*, 16 Vt. 371.

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# IMPLIED TRUSTS.

BY BRISCOE BALDWIN CLARK.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *TRUSTS AND TRUSTEES*, *ENCYCLOPEDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADVANCEMENTS*, vol. 1, p. 760; *AGENCY*, vol. 1, p. 930; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *CONVERSION AND RECONVERSION*, vol. 7, p. 463; *EQUITY*, vol. 11, p. 145; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *FRAUD AND DECEIT*, vol. 14, p. 12; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *GIFTS*, vol. 14, p. 1006; *GUARDIAN AND WARD*, ante, p. 16; *HUSBAND AND WIFE*, ante; *INVESTMENTS; JUDICIAL SALES; LEGACIES AND DEVISES; PARENT AND CHILD; PURCHASERS FOR VALUE AND WITHOUT NOTICE; SHERIFFS' SALES; STATUTE OF FRAUDS; TRUSTS AND TRUSTEES; WILLS*.

**I. SCOPE OF TITLE AND DEFINITIONS.** — Implied trusts, properly speaking, are such only as arise by operation of law as contradistinguished from such as arise by properly executed agreements of the parties. They are raised by law for the purpose of carrying out the presumed intention of the parties, or, without regard to such intention, for the purpose of asserting equitable rights of parties or frustrating fraud, and include the two classes of trusts known generally as resulting and constructive trusts.<sup>1</sup> In some jurisdictions trusts of the latter class are spoken of as "involuntary trusts."<sup>2</sup> Some text

1. **Classification of Implied Trusts.** — Bospham's Eq. (4th ed.) 118; 1 Pomeroy's Eq. Jur. (2d ed.), § 155; 2 Story's Eq. Jur. (13th ed.), § 980; Bouvier's L. Dict., tit. Trust; Burrill's L. Dict., tit. Implied Trust; Wharton's L. Lex., tit. Implied Trusts; Stimson's L. Gloss., tit. Trust; Adams's Eq. (5th Am. ed.) 27.

*England.* — Cook v. Fountain, 3 Swanst. 590.

*Alabama.* — Cresswell v. Jones, 68 Ala. 420.  
*Colorado.* — Kayser v. Maugham, 8 Colo. 232;  
Learned v. Tritch, 6 Colo. 432.

*Connecticut.* — Cone v. Dunham, 59 Conn. 145, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 2.

*Illinois.* — Tyler v. Tyler, 25 Ill. App. 333;  
Godschalk v. Fulmer, 179 Ill. 64; Reynolds v.

Skinner, 120 Ill. 58, 6 Am. St. Rep. 523; Donlin v. Bradley, 119 Ill. 412; Jacksonville Nat. Bank v. Beesley, 159 Ill. 120.

*New York.* — Brown v. Cherry, 56 Barb. (N. Y.) 635.

*South Carolina.* — Joyce v. Gunnels, 2 Rich. Eq. (S. Car.) 259; Beard v. Stanton, 15 S. Car. 164.

*Texas.* — Boehl v. Wadgyamar, 54 Tex. 589; O'Connor v. Vineyard, 91 Tex. 488; Caldwell v. Bryan, (Tex. Civ. App. 1898) 49 S. W. Rep. 240.

*West Virginia.* — Currence v. Ward, 43 W. Va. 367, citing 27 AM. AND ENG. ENCYC. OF LAW (1st ed.) 3.

2. "Involuntary Trusts." — Civ. Code Cal., § 2401; Cal. Code Dist. 1, § 27.



writers have treated, under the classification of implied trusts, those inferred from the construction of deeds and wills, from the use of precatory words, etc.<sup>1</sup> The grouping of this class of trusts under the division of implied trusts is not technically correct, and accordingly this title will treat only of constructive and resulting trusts. The so-called implied trusts arising from the construction of deeds, wills, etc., from the use of precatory words, etc., will be treated in another place.<sup>2</sup>

**Resulting and Constructive Trusts Distinguished — Resulting Trusts.** — Resulting trusts are trusts raised by implication or construction of law and presumed to exist from the supposed intention of the parties and the nature of the transaction.<sup>3</sup>

**Constructive Trusts.** — Constructive trusts, though often spoken of as resulting trusts, are properly trusts which are raised by equity for the purpose of working out right and justice, where there was no intention of the parties to create such a relation, and often directly contrary to their intention; they involve usually an element of fraud, actual or constructive.<sup>4</sup>

**Two Classes Distinct.** — These two classes of implied trusts, though often confounded, are still distinct from each other.<sup>5</sup>

**II. RESULTING TRUSTS — 1. Resulting Trusts Arising Out of Voluntary Conveyances — a. IN GENERAL.** — Under the old *English* doctrine it was held that where land was conveyed by deed without consideration and without any use or trust being declared, the presumption was that a trust resulted to the feoffor, the feoffee taking only the naked legal title,<sup>6</sup> and the same rule has been announced in the *United States* where the deed simply contained words of grant or transfer and did not recite or imply any consideration nor declare any use in favor of the grantee, and the conveyance was not in fact intended as a gift.<sup>7</sup> In other jurisdictions it has been held that though there was no presumption of a resulting trust in favor of the grantor in the case of a voluntary conveyance,<sup>8</sup> still, parol evidence was admissible to show that the conveyance was in trust for the grantor.<sup>9</sup> In *Massachusetts* and in *Colorado* it has been held that a resulting trust could not arise in case of a voluntary grant, irrespective of the intention of the parties.<sup>10</sup> And again, in other juris-

1. Precatory Trusts Classified as Implied Trusts. — See Lewin on Trusts, c. 8, § 2.

2. Cross-reference. — See the titles PRECATORY TRUSTS; JUDICIAL TRUSTS; AND TRUSTEES.

3. Resulting Trusts. — Dean v. Dear, 6 Conn. 288; Bruce v. Roney, 18 Ill. 67; Sheldon v. Harding, 44 Ill. 68; Remington v. Campbell, 60 Ill. 516; Jacksonville Nat. Bank v. Beesley, 159 Ill. 120; Burkhardt v. Burkhardt, 107 Iowa 369, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 2.

4. Constructive Trusts. — Jackson v. Landers, 134 Ind. 529; Wright v. Moody, 116 Ind. 175; Noe v. Roll, 134 Ind. 115; Acker v. Priest, 92 Iowa 610; Gebhard v. Sattler, 40 Iowa 152; Graham v. King, 96 Ky. 339; Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783.

5. Sisemore v. Pelton, 17 Oregon 546.

6. Voluntary Grants — Common-law Rule. — Sculthorp v. Burgess, 1 Ves. Jr. 91; Walker v. Burrows, 1 Atk. 93; Brown v. Jones, 1 Atk. 190; Lloyd v. Spillet, 2 Atk. 150. See also for a statement of this doctrine, Graves v. Graves, 29 N. H. 129.

7. Old Doctrine Recognized in United States. — Beadle v. Beadle, 40 Fed. Rep. 315; Russ v. Mebius, 16 Cal. 350; Acker v. Priest, 92 Iowa 610; Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Van der Volgen v. Yates, 9 N. Y. 219; Shelton v. Shelton, 5 Jones Eq. (58 N. Car.) 292; Starr v. Starr, 1 Ohio 321. See Feeney v. Howard, 79 Cal. 525, 12 Am. St.

Rep. 162; Coffin v. Portland, 16 Oregon 77; Story's Eq. Jur., § 1197; 2 Pomeroy's Eq. Jur., § 1035.

Conveyance Executed on Account of Failing Health of Grantor — Consideration One Dollar. — In Clark v. Hershey, 52 Ark. 473, it was held that the grantee would be considered as having taken the conveyance in trust for the grantor where the land was conveyed for a nominal consideration of one dollar on account of the failing health of the grantor, and it was shown that the latter, and after his death his widow and heirs, remained in possession and made improvements and received the rents.

Where a Real-estate Mortgage Was Assigned Without Consideration, and upon an understanding that the beneficial interest should remain in the assignor, it was held that a trust arose in favor of the latter, which, upon his death, passed to his estate, although the assignment was absolute in form. Rice v. Rice, 107 Mich. 241.

8. No Presumption of Resulting Trust. — Palmer v. Sterling, 41 Mich. 218; Rogers v. Rogers, 20 R. 1. 400.

9. Reeves v. Bass, 39 Tex. 618.

10. No Resulting in Case of Absolute Conveyance. — Farrand v. Beshoar, 9 Colo. 291; Bartlett v. Bartlett, 14 Gray (Mass.) 277; Titcomb v. Morrill, 10 Allen (Mass.) 15. See also Robinson v. Robinson, 29 W. N. C. (Pa.) 159; Taylor v. Thompson, 88 Mo. 86.

dictions the old doctrine of resulting trusts arising out of voluntary conveyances has been expressly abolished by statute.<sup>1</sup>

*b. DEED RECITING CONSIDERATION.* — If the deed recites a consideration, even though it be nominal, as paid by the grantee, this recital, as a rule, in the absence of fraud or mistake, raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and no extrinsic evidence is admissible to contradict the recital and to show that there was in fact no consideration, for the purpose of raising a resulting trust in the grantor.<sup>2</sup>

In England, however, the later decisions have shown a disposition on the part of the judges to imply a resulting trust in favor of the grantor, though the deed recites a consideration, from the mere nonpayment of the consideration money.<sup>3</sup>

*Recovery of Recited Consideration.* — And though a trust does not result in favor of the grantor in case a voluntary deed recites a money consideration, still the grantor, if the grantee claims to hold the beneficial interest in the estate in contravention of the intention of the parties at the time of the conveyance, has been allowed to recover the consideration recited.<sup>4</sup>

*c. HABENDUM CLAUSE DECLARING USE TO GRANTEE.* — So, also, if the deed contains a *habendum* clause declaring a beneficial use to the grantee it will prevent a trust resulting in favor of the grantor, though there was no valuable consideration to support the conveyance.<sup>5</sup>

**1. Statutory Abolition.**—See *Bulen v. Granger*, 56 Mich. 207.

**2. Deed Reciting Valuable Consideration** — *England*. — *Leman v. Whitley*, 4 Russ. 423; *Brown v. Jones*, 1 Atk. 190; *Fordyce v. Willis*, 3 Bro. C. C. 577; *Pilkington v. Bayley*, 7 Bro. P. C. (Toml. ed.) 383; *Taylor v. Taylor*, 1 Atk. 447; *Young v. Peachy*, 2 Atk. 254.

*California*. — *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; *Russ v. Mebius*, 16 Cal. 359.

*Connecticut*. — *Belden v. Seymour*, 8 Conn. 312, 21 Am. Dec. 661; *Dean v. Dear*, 6 Conn. 285.

*Illinois*. — *Seaman v. Cook*, 14 Ill. 501; *Kimball v. Walker*, 30 Ill. 489; *Francis v. Roades*, 146 Ill. 635; *McDonald v. Stow*, 109 Ill. 40; *Myers v. Myers*, 167 Ill. 52.

*Iowa*. — *Hemstreet v. Wheeler*, 100 Iowa 299; *Acker v. Priest*, 92 Iowa 610.

*Kansas*. — *Beavers v. McKinley*, 50 Kan. 602; *Miller v. Edgerton*, 38 Kan. 36.

*Maine*. — *Philbrook v. Delano*, 29 Me. 410.

*Maryland*. — *Groff v. Rohrer*, 35 Md. 327.

*Massachusetts*. — *Gove v. Learoyd*, 140 Mass. 524; *Gould v. Lynde*, 114 Mass. 366; *Titcomb v. Morrill*, 10 Allen (Mass.) 15; *Blodgett v. Hildreth*, 103 Mass. 484.

*Michigan*. — *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Calder v. Moran*, 49 Mich. 14; *Palmer v. Sterling*, 41 Mich. 221.

*Minnesota*. — *McKusick v. Washington County*, 16 Minn. 151.

*Mississippi*. — *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641.

*Missouri*. — *Hickman v. Hickman*, 55 Mo. App. 303; *Weiss v. Heitkamp*, 127 Mo. 23; *Bobb v. Bobb*, 89 Mo. 412.

*New Hampshire*. — *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 36 N. H. 86.

*New Jersey*. — *Whyte v. Arthur*, 17 N. J. Eq. 521; *Osborn v. Osborn*, 29 N. J. Eq. 385; *Baldwin v. Campfield*, 8 N. J. Eq. 891; *Smith v.*

*Howell*, 11 N. J. Eq. 349; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644.

*New York*. — *Van der Volgen v. Yates*, 9 N. Y. 219; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 105; *Squire v. Harder*, 1 Paige (N. Y.) 494, 19 Am. Dec. 446.

*Oregon*. — *Finlayson v. Finlayson*, 17 Oregon 347, 11 Am. St. Rep. 836; *Coffin v. Portland*, 16 Oregon 77.

*Pennsylvania*. — *Barry v. Hill*, 166 Pa. St. 344; *Porter v. Mayfield*, 21 Pa. St. 263; *Balbec v. Donaldson*, 2 Grant Cas. (Pa.) 459.

*Vermont*. — *Salisbury v. Clarke*, 61 Vt. 453.

*Wisconsin*. — *Campbell v. Campbell*, 70 Wis. 311; *Fairchild v. Rasdall*, 9 Wis. 379.

*Compare Bayles v. Crossman*, 5 Am. L. Rec. 13, 5 Ohio Dec. (Reprint) 354.

**Neglect of Purchaser to Pay for Land until Claim Is Barred by Statute of Limitations.** — Where the grantee in a deed based on a valuable consideration fails to pay the purchase price until the claim of the grantor therefor is barred by the statute of limitations, a resulting trust in the land conveyed will not be decreed in favor of the grantor. *Kellogg v. Western Electric Mfg. Co.*, 168 Ill. 240, *affirming* 67 Ill. App. 53.

**3. Later English Decisions.** — See *Davies v. Otty*, 33 Beav. 542; *Childers v. Childers*, 3 Kay & J. 310; *Haigh v. Kaye*, L. R. 7 Ch. 469.

**4. Leman v. Whitley**, 4 Russ. 427; *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142.

**5. Habendum Clause Declaring Use to Grantee** — *Illinois*. — *Myers v. Myers*, 167 Ill. 52; *Donlin v. Bradley*, 119 Ill. 412; *Bragg v. Geddes*, 93 Ill. 327.

*Iowa*. — *Acker v. Priest*, 92 Iowa 610.

*Kansas*. — *Beavers v. McKinley*, 50 Kan.

*Massachusetts*. — *Gould v. Lynde*, 114 Mass. 366; *Gove v. Learoyd*, 140 Mass. 524.

*Michigan*. — *Jackson v. Cleveland*, 15 Mich.

*d.* **DEED CONTAINING COVENANTS OF WARRANTY.** — And where the deed contains covenants of warranty running from the grantor to the grantee, it will prevent a trust resulting in favor of the grantor.<sup>1</sup>

*e.* **DEED EXECUTED IN PURSUANCE OF WRITTEN AGREEMENT.** — There can be no resulting trust where the deed is executed in pursuance of a written agreement.<sup>2</sup>

*f.* **CONSIDERATION NATURAL LOVE AND AFFECTION** — (1) *In General.*

Where the grantor stands in close relationship to the grantee, the fact that the consideration of the conveyance was merely natural love and affection will not of itself raise a resulting trust in favor of the grantor, as the presumption in such a case is that the grantee should take the beneficial interest.<sup>3</sup> Thus, in the case of a conveyance by a parent to his child,<sup>4</sup> or by a husband to his wife,<sup>5</sup> it will be presumed that the conveyance was intended as an advancement or gift, and that the grantee therefore took the beneficial interest.

**Rebutting Presumption.** — In *England*, however, in case of a conveyance in consideration of love and affection between members of a family, the presumption that the grantee was intended to take the beneficial interest in the land conveyed has been held rebuttable for the purpose of showing a resulting trust in favor of the grantor.<sup>6</sup>

(2) *Conveyance to Husband or Wife of Child of Grantor as Advancement.* — Where land is conveyed by a grantor to the husband or wife of his child, the fact that the sole actual consideration for the conveyance, or a part of the actual consideration, was the natural love and affection of the grantor for his child, will not raise a resulting trust in favor of the latter in any portion of the land.<sup>7</sup>

94, 90 Am. Dec. 266; *Brown v. Bronson*, 35 Mich. 415.

*Mississippi.* — *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641.

*New Hampshire.* — *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 36 N. H. 86.

*New Jersey.* — *Stucky v. Stucky*, 30 N. J. Eq. 546; *Lovett v. Taylor*, 54 N. J. Eq. 311.

*Ohio.* — *Miller v. Stokely*, 5 Ohio St. 194.

*Vermont.* — *Salisbury v. Clarke*, 61 Vt. 453.

*Compare* *Hall v. Livingston*, 3 Del. Ch. 348.

**1. Deed Containing Covenant of Warranty.** — *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641; *Squire v. Harder*, 1 Paige (N. Y.) 494, 19 Am. Dec. 446. See also *White v. Carpenter*, 2 Paige (N. Y.) 217. *Compare* *Hawkins v. Wilford*, (Tex. Civ. App. 1896) 38 S. W. Rep. 365.

**2. Deed Executed in Pursuance of Written Agreement.** — *St. John v. Benedict*, 6 Johns. Ch. (N. Y.) 111.

**3. Consideration Natural Love and Affection.** — *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323; *Acker v. Priest*, 92 Iowa 610; *Gatewood v. Long*, (Ky. 1893) 21 S. W. Rep. 537; *Dilts v. Stewart*, 43 Leg. Int. (Pa.) 205. See also *Hawks v. Sailors*, 87 Ga. 234; *Stonehill v. Swartz*, 129 Ind. 310.

**4. Conveyance by Parent to Child** — *California.* — *Smith v. Mason*, 122 Cal. 426; *Tillaux v. Tillaux*, 115 Cal. 663; *Emmons v. Barton*, 109 Cal. 671; *Soberanes v. Soberanes*, 97 Cal. 140. *Colorado.* — *Annis v. Wilson*, 15 Colo. 236.

*Illinois.* — *Francis v. Wilkinson*, 147 Ill. 370.

*Indiana.* — *McCaw v. Burk*, 31 Ind. 56; *Bright v. Bright*, 132 Ind. 56.

*Kansas.* — *Beavers v. McKinley*, 50 Kan. 602.

*Mississippi.* — *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641.

*North Carolina.* — *Tolar v. Tolar*, 1 Dev. Eq. (16 N. Car.) 460, 18 Am. Dec. 598.

**Voluntary Transfer of Stock Certificates.** — Where one transfers stocks to an orphan niece of his wife, to whom he stands *in loco parentis*, and declares his intention to treat her as a child, there is no resulting trust. *Roberts's Appeal*, 85 Pa. St. 84.

**Grant of Remainder After Death of Grantor.** — A., jointly seized with two others, conveyed his third part to the use of himself for life, remainder to his wife for life, remainder to his son in fee, and at the same time made his will and gave the same lands to his son in tail, charged with his debts. It was held that the son was not a trustee for the father in the settlement, though it would have been otherwise if the entire fee had been conveyed to the son. *Baylis v. Newton*, 2 Vern. 28.

**5. Conveyance by Husband to Wife** — *Indiana.* — *McCaw v. Burk*, 31 Ind. 56; *Carver v. Carver*, 53 Ind. 241.

*Iowa.* — *Rogers v. McFarland*, 89 Iowa 286.

*Maine.* — *Lane v. Lane*, 80 Me. 570.

*Maryland.* — *Groff v. Rohrer*, 35 Md. 327.

*Missouri.* — *Price v. Kane*, 112 Mo. 412.

*Nebraska.* — *Courvoisier v. Bouvier*, 3 Neb. 61.

*New Hampshire.* — *Hill v. Pine River Bank*, 45 N. H. 300.

*New Jersey.* — *Osborn v. Osborn*, 29 N. J. Eq. 385.

*Oregon.* — *Taylor v. Miles*, 19 Oregon 550.

**6. Childers v. Childers**, 1 De G. & J. 482, 3 Jur. N. S. 1277, reversing 3 Kay & J. 310, 3 Jur. N. S. 509.

**7. Conveyance to Husband or Wife of Child of Grantor** — *Georgia.* — *Hawks v. Sailors*, 87 Ga. 234.

*Indiana.* — *Heath v. Carter*, 20 Ind. App.



*g.* TRANSFERS BY PERSONS NON SUI JURIS. — Where property is conveyed by a person *non sui juris* the grantee may be held a trustee.<sup>1</sup>

*h.* CONVEYANCES FOR SPECIFIC PURPOSES — (1) *In General.* — Where land has been conveyed by an absolute deed, the intention of the parties not being to confer on the grantee the beneficial interest, but merely to facilitate the accomplishment of some specific purpose, it has been held that the purpose of the conveyance may be shown by parol and thereby a resulting trust may be raised in favor of the grantor.<sup>2</sup>

(2) *Absolute Conveyance as Security.* — Where land is conveyed by a deed absolute on its face, it is practically the universally accepted doctrine of the present day that parol evidence is admissible to show that it was in fact intended as a mortgage. The decisions, while harmonious in their recognition of this doctrine, are not harmonious as to the extent of its application or the grounds upon which it is based. In some jurisdictions the decisions are based on the ground of fraud, accident, or mistake, whereas in others such evidence is admitted though the defeasance clause was intentionally omitted.<sup>3</sup> And again, still other decisions seem to be based on the ground that in such a case there is a resulting trust in favor of the grantor.<sup>4</sup>

2. Resulting Trusts Arising Out of Conveyances and Devises upon Trusts — *a.* CONVEYANCES INTER VIVOS — (1) *In General.* — The general rule is that where property is transferred or conveyed for particular purposes in trust, though the entire legal estate is conveyed or transferred to the trustee, still the beneficial interest passes only to the extent necessary for the purposes of the trust, and there arises a resulting trust in the residue or in the entire property in case of a failure or extinction of the trust, in favor of the grantor.<sup>5</sup>

83; *Noe v. Roll*, 134 Ind. 115; *Stonehill v. Swartz*, 129 Ind. 310; *Meredith v. Meredith*, 150 Ind. 299; *Lewis v. Stanley*, 148 Ind. 351.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610.

*Minnesota.* — *Luse v. Reed*, 63 Minn. 5.

*Missouri.* — *Higbee v. Higbee*, 123 Mo. 287; *Morris v. Clare*, 132 Mo. 232.

*North Carolina.* — *Butler v. McLean*, 122 N. Car. 357; *Mosely v. Mosely*, 87 N. Car. 69.

*South Carolina.* — *Rogers v. Rogers*, 52 S. Car. 388, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 5.

See also *In re Stanger*, 35 Fed. Rep. 238.

In *Pennsylvania*, however, where land was conveyed by a father to his son-in-law, as an advancement to his daughter, the wife of the grantee, and a note for the recited consideration was executed by the grantee to the grantor, for the purpose of preserving a memorandum of the valuation of the land, so that the daughter could be charged therefor as an advancement in the distribution of the estate of the grantor, and the conveyance was also made to the son-in-law under the belief that the grantor could not convey directly to his daughter, it was held that a trust resulted in favor of the daughter. *Beringer v. Lutz*, 188 Pa. St. 364.

And in *Alabama* an express trust in favor of the daughter of the grantor has been held to arise out of a conveyance by her father to her husband as an advancement to the daughter, and as a part of the distributive share of the daughter in the estate of the grantor. *Cresswell v. Jones*, 68 Ala. 420.

1. Transfers by Persons Non Sui Juris. — *Manning v. Gill*, L. R. 13 Eq. 485; *Tregarden Lewis*, (Ind. 1893) 35 N. E. Rep. 24. See also the titles HUSBAND AND WIFE, ante; FIDUCIARY.

*Lunatic.* — Where land was conveyed by a lunatic by deed absolute to his brother, who during his life accumulated the income, a portion of which he spent for the benefit of the lunatic, it was held that the grantee held the property as trustee and that his estate would be compelled to account therefor. *Manning v. Gill*, L. R. 13 Eq. 485.

2. See *Beadle v. Beadle*, 2 McCrary (U. S.) 586; *Pierson v. Pierson*, 5 Del. Ch. 11; *Rice v. Rice*, 107 Mich. 241; *Thompson v. Thompson*, 30 Neb. 489; *Stubblefield v. Stubblefield*, (Tex. Civ. App. 1898) 45 S. W. Rep. 965; *Wallace v. Lewis*, 60 Tex. 247. But compare *Leman v. Whitley*, 4 Russ. 423; *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Gee v. Thrailkill*, 45 Kan. 173.

3. Absolute Conveyances as Mortgages. — See the title MORTGAGES.

4. Trust Doctrine. — *Miami Exporting Co. v. U. S. Bank*, Wright (Ohio) 249; *Miller v. Stokely*, 5 Ohio St. 194; *Stafford v. Wheeler*, 93 Pa. St. 462; *Mead v. Randolph*, 8 Tex. 191; *Phelps v. Seely*, 22 Gratt. (Va.) 573.

5. Conveyance in Trust — Resulting Trust to Grantor in Surplus — *England.* — *Re Tilt*, 74 L. T. N. S. 163; *Hill v. London*, 1 Atk. 618; *Robinson v. Taylor*, 1 Ves. Jr. 44; *In re Brown*, 1 Kay & J. 522; *In re Wilcock*, 62 L. T. N. S. 317.

*United States.* — *Hopkins v. Grimshaw*, 165 U. S. 342.

*Arkansas.* — *Cagwin v. Buerkle*, 55 Ark. 5.

*California.* — *Schlesinger v. Mulligan*, 70 Cal. 326.

*Delaware.* — *Harker v. Reilly*, 4 Del. Ch. 72. *Florida.* — *Smith v. Watson*, 10 Fla. 1. *Beneficial Endowment Assoc. v. Wood*, 4 Mackey (D. C.) 19, 54 Am. Rep. 251.

*Illinois.* — *Lill v. Brant*, 6 Ill. App. 366.

And where land was conveyed in trust by the grantor, for a consideration paid by third persons, it has been held that in case of the failure of the trust the persons contributing the purchase money were entitled to the property by way of a resulting trust.<sup>1</sup> Still, the mere fact that the grantor received a consideration for the conveyance by him in trust will not necessarily prevent a trust resulting in his favor.<sup>2</sup>

**Conveyance in Trust for Payment of Grantor's Debts.** — Thus, where property is conveyed in trust for the payment of the grantor's debts, a trust results in favor of the grantor with respect to any surplus not necessary for the payment of such debts.<sup>3</sup> The grantor, however, may of course part with his entire interest in the property assigned for such a purpose and thereby prevent a trust resulting in his favor.<sup>4</sup>

(2) *Character in Which Trust Results.* — If the property transferred is personalty, the trust results as personalty;<sup>5</sup> if the property conveyed is real estate, the trust results as real estate.<sup>6</sup>

**Death of Grantor.** — This distinction is important, as in the case of personalty the trust would, on the death of the grantor, pass to the personal representative of the grantor and be for the benefit of the distributee,<sup>7</sup> whereas in the case of realty the trust would be for the benefit of the heir at law;<sup>8</sup> and so where the administrator is not authorized to recover the real estate, except under particular circumstances, such a resulting trust in real estate would ordinarily be enforceable only by the heir at law.<sup>9</sup>

**Conversion by Trustee of Realty into Personalty.** — In case real estate is conveyed in trust the property may be converted by the trustee, during the life of the grantor, into personal estate in order to accomplish the objects of the trust, in

*Massachusetts.* — *McElroy v. McElroy*, 113 Mass. 509; *Varnum v. Meserve*, 8 Allen (Mass.) 158.

*Missouri.* — *Patrick v. Blair*, 119 Mo. 105.

*New York.* — *Cameron v. Havemeyer*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 438.

*North Carolina.* — *Haskill v. Freeman*, Winst. Eq. (60 N. Car.) 34; *Lemmond v. Peoples*, 6 Ired. Eq. (41 N. Car.) 137.

*Pennsylvania.* — *Huston v. Hamilton*, 2 Binn. (Pa.) 387.

*South Carolina.* — *Dawson v. Dawson*, Cheves Eq. (S. Car.) 148; *Witt v. Carroll*, 37 S. Car. 388; *Gwynn v. Gwynn*, 27 S. Car. 525.

*West Virginia.* — *Heiskell v. Trout*, 31 W. Va. 810.

**As to the Cy-pres Doctrine**, see the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 936.

**1. Conveyance by Grantor on Consideration Paid by Third Persons.** — *Heiskell v. Trout*, 31 W. Va. 810.

**2. Valuable Consideration to Grantor Does Not Prevent Resulting Trust.** — In *Hopkins v. Grimshaw*, 165 U. S. 342, wherein land was conveyed to trustees to hold in trust for a society for use as a burying place, it was held that on the extinction of the society for whose benefit the grant was made there arose a resulting trust to the grantor and his heirs, irrespective of whether the conveyance was by way of gift or for a valuable consideration.

**3. Conveyances in Trust for Payment of Grantor's Debts** — *England.* — *Hewitt v. Wright*, 1 Bro. C. C. 86; *Anonymous*, 1 Comyns 345; *Knights v. Atkyns*, 2 Vern. 20.

*United States.* — *Saunders v. Mason*, 5 Cranch. (C. C.) 470.

*Connecticut.* — *Ingraham v. Wheeler*, 6 Conn. 277.

*Illinois.* — *Lill v. Brant*, 6 Ill. App. 365.

*Iowa.* — *Zuver v. Lyons*, 40 Iowa 510.

*Massachusetts.* — *Varnum v. Meserve*, 8 Allen (Mass.) 158.

See *Hogan v. Strayhorn*, 65 N. Car. 279.

**4. Assignment for Creditor — Entire Interest Parted with by Assignor.** — *Smith v. Cooke*, (1891) A. C. 297.

**5. Character in Which Trust Results — Personalty.** — *Lill v. Brant*, 6 Ill. App. 366.

**6. Real Estate.** — *Lill v. Brant*, 6 Ill. App. 366; *Hawley v. James*, 7 Paige (N. Y.) 213, 32 Am. Dec. 623; *Dover v. Rhea*, 108 N. Car. 88.

**Conveyance of Resulting Trust — Statute of Frauds.** — In *Dover v. Rhea*, 108 N. Car. 88, wherein land was conveyed upon trust to pay certain judgments which were paid off and discharged by other means, it was held that a trust resulted to the grantor as real estate and could not be transferred by him except in writing in compliance with the statute of frauds.

**7. Resulting Trust in Personalty Passes to Personal Representative of Grantor.** — *Lill v. Brant*, 6 Ill. App. 366.

**8. Resulting Trust in Realty Passes to Heir of Grantor.** — *Lill v. Brant*, 6 Ill. App. 366.

**9. Resulting Trust in Realty Not Enforceable by Personal Representative.** — In *Lill v. Brant*, 6 Ill. App. 366, real estate and personal property were conveyed by a grantor in trust for the payment of his debts, and it was held that if the purposes of the trust were satisfied out of the personalty in the lifetime of the grantor, leaving the real estate not subject, the resulting trust which arose in favor of the grantor on his death descended to his heirs, who alone could maintain a bill to compel the trustee to convey the legal title, and that such a bill was not maintainable by the administrator of the grantor.

which case the trust will partake of the nature of personalty and will be enforceable on the death of the grantor by his personal representative.<sup>1</sup> The fact, however, that the real estate conveyed is, after the death of the grantor, converted by the trustee into personalty will not of itself entitle the personal representative of the grantor to enforce the trust.<sup>2</sup>

**Equitable Conversion.** — Again, the conveyance itself may work an equitable conversion out and out of the real estate conveyed, which would have the same effect as an actual conversion by the trustee and render the trust enforceable by the personal representative of the grantor.<sup>3</sup>

**b. LEGACIES AND DEVISES IN TRUST** — (1) *In General.* — The most common form of a resulting trust of this class arises where a legacy or devise is given in trust and fails either on account of the incapacity of the *cestui que trust* to receive it, or on account of its illegality.<sup>4</sup> Thus, in case of the failure of a devise of land in trust for a charitable purpose,<sup>5</sup> or in case the legacy or

**1. Land Converted into Personalty During Life of Grantor.** — In *Varnum v. Meserve*, 8 Allen (Mass.) 158, wherein real and personal estate were conveyed in trust for the payment of the grantor's debts, the trustee converted the real estate into money during the life of the grantor, and it was held that the resulting trust, with respect to the surplus not necessary for the payment of the debts, was, on the death of the grantor, enforceable by his personal representative.

**2. Real Estate Converted into Personalty After Death of Grantor.** — *Lill v. Brant*, 6 Ill. App. 366.

**3. Equitable Conversion.** — See the title CONVERSION AND RECONVERSION, vol. 7, p. 463.

**4. Legacies and Devises in Trust** — *England.* — *Mogg v. Hodges*, 2 Ves. 52; *Cogan v. Stephens*, 5 L. J. Ch. 17; *Hatfield v. Pryme*, 2 Coll. Ch. Cas. 204; *Jessopp v. Watson*, 1 Myl. & K. 665; *Pickering v. Stamford*, 2 Ves. Jr. 272; *Fairbairn v. Rothwell*, 9 Jur. 787; *Burley v. Evelyn*, 16 Sim. 290; *Jones v. Mitchell*, 1 Sim. & St. 290; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Tregonwell v. Sydenham*, 3 Dow 196; *Bective v. Hodgson*, 10 H. L. Cas. 656; *Clarke v. Franklin*, 4 Kay & J. 257; *Spencer v. Wilson*, L. R. 16 Eq. 501; *Scudamore v. Scudamore*, Prec. Ch. 543; *Sharpe v. Rhoades*, 2 Rose 192; *Ripley v. Waterworth*, 7 Ves. Jr. 425; *Nash v. Smith*, 17 Ves. Jr. 29; *Hill v. Cock*, 1 Ves. & B. 174; *Cruse v. Barley*, 3 P. Wms. 20; *Eyre v. Marsden*, 2 Keen 564; *Muckleston v. Brown*, 6 Ves. Jr. 52; *Morice v. Durham*, 10 Ves. Jr. 522; *Boson v. Statham*, 1 Eden 508; *Joy v. Aspinwall*, 18 Jur. 284; *Amphlett v. Parke*, 2 Russ. & M. 221; *Hooper v. Goodwin*, 18 Ves. Jr. 156.

*United States.* — *King v. Mitchell*, 8 Pet. (U. S.) 326; *Craig v. Leslie*, 3 Wheat. (U. S.) 563.

*Connecticut.* — *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346.

*Delaware.* — *Gray v. Corbit*, 4 Del. Ch. 357.

*Maine.* — *Drew v. Wakefield*, 54 Me. 291.

*Maryland.* — *Orrick v. Boehm*, 49 Md. 72; *Rizer v. Perry*, 58 Md. 112; *Trippe v. Frazier*, 4 Har. & J. (Md.) 446; *Dashiell v. Atty.-Gen.*, 5 Har. & J. (Md.) 392, 9 Am. Dec. 572, 6 Har. & J. (Md.) 1.

*Massachusetts.* — *Blake v. Dexter*, 12 Cush. (Mass.) 559; *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17; *Sears v. Hardy*, 120 Mass. 524.

*Mississippi.* — *Lusk v. Lewis*, 32 Miss. 297; *Cheairs v. Smith*, 37 Miss. 646.

*New Jersey.* — *Leitch v. Oberly*, 18 N. J. Eq. 575; *Hand v. Marcy*, 28 N. J. Eq. 59; *Roy v. Monroe*, 47 N. J. Eq. 356.

*New York.* — *Hawley v. James*, 7 Paige (N. Y.) 213, 32 Am. Dec. 623; *Chamberlain v. Taylor*, 105 N. Y. 185; *Wood v. Cone*, 7 Paige (N. Y.) 471; *Hawley v. James*, 5 Paige (N. Y.) 444; *Giraud v. Giraud*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 175; *Jackson v. Jansen*, 6 Johns. (N. Y.) 73; *Bogert v. Hertell*, 4 Hill (N. Y.) 492; *McCarty v. Terry*, 7 Lans. (N. Y.) 236; *Gott v. Cook*, 7 Paige (N. Y.) 542; *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295; *Wood v. Keyes*, 8 Paige (N. Y.) 365; *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748; *Cushney v. Henry*, 4 Paige (N. Y.) 345; *Betts v. Betts*, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 317; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609.

*North Carolina.* — *Robinson v. McDiarmid*, 87 N. Car. 455; *Lindsay v. Pleasants*, 4 Ired. Eq. (39 N. Car.) 320.

*Pennsylvania.* — *Nagle's Appeal*, 13 Pa. St. 260; *Worsley's Estate*, 4 Pa. Dist. 179.

*South Carolina.* — *Bynum v. Bostick*, 4 Desaus. (S. Car.) 266; *Ford v. Dangerfield*, 8 Rich. Eq. (S. Car.) 95; *Craig v. Beatty*, 11 S. Car. 380; *Blakely v. Tisdale*, 14 Rich. Eq. (S. Car.) 95.

**Joint Legatees — Illegality of Legacy with Respect to One.** — In *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, it was held that where the residuary clause of a will bequeaths the property to two legatees as tenants in common, the fact that the legacy fails with respect to one on account of his secret promise to hold it in trust for an illegal purpose does not work a resulting trust with respect to the share of the other legatee, but only with respect to the share of the former.

**5. Failure of Trust for Charitable Purposes** — *England.* — *Halling v. Ashby*, 105 N. Y. 185; *Mogg v. Hodges*, 2 Ves. 52; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Jones v. Mitchell*, 1 Sim. & St. 290; *Cooke v. Stationers' Co.*, 3 Myl. & K. 262; *Williams v. Williams*, 5 L. J. Ch. 84; *Johnson v. Woods*, 2 Beav. 409; *Cogan v. Stephens*, 5 L. J. Ch. 17.

*Massachusetts.* — *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221.



devise in trust lapses,<sup>1</sup> there is a resulting trust in favor of those who would have been entitled to the property if it had been undisposed of by the will.<sup>2</sup> So, in case land is devised in trust, the trust results in favor of the heir,<sup>3</sup> whereas in the case of personalty the trust results in favor of the next of kin or personal representative.<sup>4</sup>

(2) *Devise or Bequest in Trust Without Disposition of Entire Beneficial Interest.* — Where property is bequeathed or devised in trust and the whole beneficial interest in the property is undisposed of by the will, there is a resulting trust with respect to the portion undisposed of.<sup>5</sup>

(3) *Failure to Specify Trust.* — So, again, where property is devised or bequeathed to a trustee to be applied to uses subsequently to be appointed by the testator, a trust will result, on failure of the testator to specify the uses, in favor of the heir at law or next of kin of the testator, according as the property disposed of is real estate or personalty.<sup>6</sup>

(4) *Nonexecution of Trust by Trustee.* — In the case of devises or legacies in trust for charitable uses, no neglect, misapplication of funds, or other breach of trust by the trustees will give to the heirs or next of kin of the donor a right to call upon a court of equity to declare a resulting trust for themselves, as they have no beneficial interest accruing from the nonexecution of such a trust.<sup>7</sup>

(5) *Devise or Bequest in Trust and upon Condition—Distinction.* — A devise or bequest may be upon condition as distinguished from a devise or bequest in trust. As a rule there is no difficulty in distinguishing between

*New York.* — *Wright v. Methodist Episcopal Church*, Hoffm. (N. Y.) 202.

*Pennsylvania.* — *Luffberry's Appeal*, 125 Pa. St. 513.

See also the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 941.

1. *Lapsed Legacies* — *England.* — *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Barker v. Gyles*, 3 Bro. P. C. 297; *Cruse v. Barley*, 3 P. Wms. 20; *Digby v. Legard*, 2 Dick. 500; *Gibbs v. Ougier*, 12 Ves. Jr. 416; *Roberts v. Walker*, 1 Russ. & M. 752; *Williams v. Coade*, 10 Ves. Jr. 500.

*Delaware.* — *Harker v. Reilly*, 4 Del. Ch. 92.

*Maryland.* — *Trippe v. Frazier*, 4 Har. & J. (Md.) 446.

*New Jersey.* — *Hand v. Marcy*, 28 N. J. Eq. 59.

*New York.* — *In re Vandervoort*, 1 Redf. (N. Y.) 270; *Wood v. Keyes*, 8 Paige (N. Y.) 365; *Wood v. Cone*, 7 Paige (N. Y.) 471.

2. *Escheat.* — In *Ford v. Dangerfield*, 8 Rich. Eq. (S. Car.) 95, it was held that where property was given in trust by will and the trust failed on account of its illegality, if the testator left no next of kin or heirs the property would escheat to the state and the trustee in the will would not be entitled to keep it.

3. *Failure of Trust on Devise of Realty.* — *Muckleston v. Brown*, 6 Ves. Jr. 52; *Morice v. Durham*, 10 Ves. Jr. 522; *Gray v. Corbit*, 4 Del. Ch. 357; *Olliffe v. Wells*, 130 Mass. 221; *Eastbrook v. Tillinghast*, 5 Gray (Mass.) 17.

*Contrary to Intention of Testator.* — A trust may result in favor of the heir though the testator expressly states that no part shall result for the benefit of his heir. *Fitch v. Weber*, 12 Jur. 645.

*Effect of Legacy to Heir.* — The fact that a legacy is given to the heir will not deprive him of the right to claim a resulting trust. *Kellet v. Kellet*, 1 Ball. & B. 533.

4. *Failure of Trust on Bequest of Personalty.* — *Curteis v. Wormald*, 10 Ch. D. 172; *Hereford v. Ravenhill*, 5 Beav. 51; *Cogan v. Stephens*, 5 L. J. Ch. 17; *Bective v. Hodgson*, 10 H. L. Cas. 656; *Eyre v. Marsden*, 2 Keen 564; *Head v. Godlee*, 6 Jur. N. S. 499; *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445; *Lusk v. Lewis*, 32 Miss. 297; *Hawley v. James*, 5 Paige (N. Y.) 318; *Gott v. Cook*, 7 Paige (N. Y.) 542.

5. *Surplus Undisposed Of* — *England.* — *Sheldon v. Barnes*, 2 Ves. Jr. 447; *Robinson v. Taylor*, 1 Ves. Jr. 44, 2 Bro. C. C. 589; *Fletcher v. Chapman*, 1 Bro. P. C. 43; *Stanley v. Stanley*, 16 Ves. Jr. 491; *Hill v. Cock*, 1 Ves. & B. 173; *Berry v. Usher*, 11 Ves. Jr. 87; *Culpepper v. Aston*, 2 Ch. Cas. 115; *Starkey v. Brooks*, 1 P. Wms. 390; *Randall v. Bookley*, 2 Vern. 425; *London v. Garway*, 2 Vern. 571; *Wright v. Wright*, 16 Ves. Jr. 188; *Watson v. Hayes*, 5 Myl. & C. 125; *Chitty v. Parker*, 2 Ves. Jr. 271; *Halliday v. Hudson*, 3 Ves. Jr. 210; *Levet v. Needham*, 2 Vern. 138; *Buggins v. Yates*, 9 Mod. 122; *Flint v. Warren*, 16 Sim. 124; *Collins v. Wakeman*, 2 Ves. Jr. 683; *Maugham v. Mason*, 1 Ves. & B. 410; *Jessopp v. Watson*, 1 Myl. & K. 665; *Emblin v. Freeman*, Prec. Ch. 541; *Fitch v. Weber*, 12 Jur. 645.

*District of Columbia.* — *Hilton v. Hilton*, 2 MacArthur (D. C.) 70.

*Massachusetts.* — *Sears v. Hardy*, 120 Mass. 524.

*New Jersey.* — *Moore v. Robbins*, 53 N. J. Eq. 137.

*Pennsylvania.* — *Wilson v. Hamilton*, 9 S. & R. (Pa.) 424.

6. *Failure to Specify Trusts.* — *Olliffe v. Wells*, 130 Mass. 221.

7. *Nonexecution of Trust by Trustee.* — *Sanderson v. White*, 18 Pick. (Mass.) 328, 29 Am. Dec. 591.

the two, though sometimes the distinction is not easy to draw.<sup>1</sup> The necessity for drawing it is, however, very important, as in case of a devise upon condition subsequent, if the condition fails the devisee takes the property free of the condition;<sup>2</sup> whereas in case of the failure of the trust, as heretofore stated, a resulting trust arises.

(6) *Legacy a Charge on Land Devised.* — So, also, where a legacy is merely made a charge on land which is subsequently devised, the failure of such a legacy inures to the benefit of the devisee and there arises no resulting trust with respect thereto in favor of the heir at law.<sup>3</sup>

(7) *Devise to Take Effect on Happening of Event.* — Where land is devised in trust, the gift not to take effect until the happening of a specified event, there is a resulting trust to the heir of the testator until the happening of the event.<sup>4</sup> And where land was devised in trust with a devise over upon the happening of a specified event, it was held that on the failure of the trust there was a resulting trust until the happening of the event upon which the devise over was to take effect.<sup>5</sup>

c. RULES OF CONSTRUCTION OF DEED OR WILL — With Respect to Beneficial Interest of Trustee. — Whether there is a resulting trust, or whether the grantee or devisee takes a beneficial interest in the property subject to the trust expressed, depends upon the intention of the grantor or testator, and for the purpose of determining that question it is necessary to look carefully at the language of the deed or will with the aid of such light as can lawfully be derived from the circumstances of the case. No such trust can result against that intent or take effect where a contrary intent is indicated by the terms of the deed. The question must always be whether the title was given for a particular purpose with no intent that the grantee should have any beneficial interest whatever, or whether the intention was to confer upon him a valuable interest subject to a particular and temporary charge or incumbrance. Upon this question the fact that he is described as a trustee is not necessarily decisive. It may be apparent from the context and general interpretation of the whole instrument that he was intended to be more than a mere trustee, and that the intention was to give to him the entire fee of the estate subject to the charge of a temporary trust for the benefit of another person.<sup>6</sup>

1. See the titles WILLS; LEGACIES AND DEVISES; TRUSTS AND TRUSTEES.

2. *Failure of Condition Subsequent.* — In *Weathersby v. Weathersby*, 13 Smed. & M. (Miss.) 685, a father had made a bequest of slaves to his son, "in trust," and upon condition that the slaves should be maintained as free persons, and it was held that the devise was upon condition and not in trust, and that as the condition was illegal the legatee took the entire interest in the slaves. See also *Cheairs v. Smith*, 37 Miss. 646; *Barksdale v. Elam*, 30 Miss. 694. Compare *Lusk v. Lewis*, 32 Miss. 297.

In *King v. Mitchell*, 8 Pet. (U. S.) 326, however, where a devise was made to a man on condition of his marrying the daughter of a certain person who never had a daughter, the devisee was held to hold the land as a resulting trust for the heirs of the testator.

3. *Failure of Legacy Charged on Land.* — *Wright v. Row*, 1 Bro. C. C. 61; *Carter v. Haswell*, 3 Jur. N. S. 788; *Matter of Cooper*, 4 De G. M. & G. 757; *Henchman v. Atty.-Gen.*, 3 Myl. & K. 485, reversing 2 Sim. & St. 498; *Baker v. Hall*, 12 Ves. Jr. 497; *Joy v. Aspinwall*, 18 Jur. 284. See, however, *McClelland v. Shaw*, 2 Sch. & Lef. 538, wherein it was said that the rule expressed as to legacies made a

charge on land is exploded, and does not prevent a resulting trust in favor of the heir.

4. *Interest of Cestui Que Trust Dependent on Condition.* — *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Atty.-Gen. v. Craven*, 21 Beav. 392; *Atty.-Gen. v. Bowyer*, 3 Ves. Jr. 714.

*Time of Application of Fund to Purpose of Charity Uncertain.* — When there is a clear intention to give to charitable purposes, and the gift is immediate, there is no resulting trust for the next of kin, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except upon the occurrence of uncertain and contingent events. *Chamberlayne v. Brockett*, 21 W. R. 299.

5. In *King v. Mitchell*, 8 Pet. (U. S.) 326, it was held that where an express trust has failed, and the contingency on which a devise over was to take effect has not happened, but still remains possible, a resulting trust arises for the heirs of the testator which may be enforced at once, leaving the case open to the assertion of any rights which may subsequently accrue.

6. *Construction with Respect to Interest of Trustee.* — See *Hill v. London*, 1 Atk. 618; *Cook v. Hutchinson*, 1 Keen 43; *Morice v.*



With Respect to Interest of *Cestui Que Trust*. — So also the construction of the deed with respect to the interest of the *cestui que trust* is necessary in determining whether a trust results to the grantor, as in case the whole equitable estate in fee is granted to the *cestui que trust* there cannot arise any resulting trust to the grantor.<sup>1</sup> These questions will be found fully discussed in other places.<sup>2</sup>

*d. EFFECT OF RESIDUARY CLAUSE IN DEED OR WILL — WILLS.* — The general rule is that the residuary clause in a will carries not only everything not in terms disposed of, but also everything that turns out not to be well disposed of, and it would therefore seem that the interest arising out of a resulting trust would pass under such a clause.<sup>3</sup> But where a resulting trust arose out of the illegality of a residuary devise or bequest in trust, with respect to one of the beneficiaries of such residue, it was held that the property so devised or bequeathed would not pass under the residuary clause to the other beneficiary; still, there was no intestacy with respect thereto, but the court would lay hold of the property and impose thereon a trust in favor of the person who would have been entitled thereto if the testator had died intestate.<sup>4</sup>

*Deeds.* — In the case of a conveyance in trust by trust deed which, after naming specific trusts, contained a trust as to the residue, it was held that on the failure of one of the specific trusts from the death of the *cestui que trust*, the trust with respect to such portion resulted in favor of the grantor, and did not pass under the residuary clause.<sup>5</sup>

**3. Resulting Trusts Arising Out of Payment of Purchase Money — a. IN GENERAL.** — It is the well-settled rule that where the consideration for an estate is paid by one person and the legal title is conveyed to a third person, such third person being a stranger to the person paying the consideration, the person taking the legal title holds the land by way of a resulting trust, in trust for the person making the payment.<sup>6</sup> This trust arises from the character of

Durham, 10 Ves. Jr. 522; *King v. Denison*, 1 Ves. & B. 260; *Cawood v. Thompson*, 17 Jur. 798; *Wheeler v. Smith*, 6 Jur. N. S. 62; *McElroy v. McElroy*, 113 Mass. 509; *Paddock v. Wallace*, 117 Mass. 99; *Van der Volgen v. Yates*, 9 N. Y. 219; *Ford v. Dangerfield*, 8 Rich. Eq. (S. Car.) 95; *Finley v. Hunter*, 2 Strobb. Eq. (S. Car.) 215.

**Parol Evidence to Rebut Resulting Trust.** — In *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346, it was held that where property is devised to trustees upon an express trust which fails, parol evidence is not admissible to rebut the resulting trust to the estate of the testator.

**1. Construction with Respect to Interest of Cestui Que Trust.** — *Irwin v. Simpson*, 7 Bro. P. C. (Toml. ed.) 306; *Crook v. Brooking*, 2 Vern. 51; *Benning v. Benning*, 14 B. Mon. (Ky.) 470; *Boone v. Davis*, 64 Miss. 133; *Steele v. Lowry*, 4 Ohio 72, 19 Am. Dec. 581; *Olcott v. Gabert*, 86 Tex. 121, *reversing* (Tex. Civ. App. 1893) 22 S. W. Rep. 286.

**2. See the titles INTERPRETATION AND CONSTRUCTION; TRUSTS AND TRUSTEES; WILLS.**

**3. Effect of Residuary Clause in Will upon Resulting Trust.** — *Page v. Leapingwell*, 18 Ves. Jr. 463; *Shanley v. Baker*, 4 Ves. Jr. 732; *Aston v. Wood*, 43 L. J. Ch. 715; *Heath v. Chapman*, 2 Drew. 417; *Craig v. Beatty*, 11 S. Car. 380; *Phillips v. Ferguson*, 85 Va. 509, 17 Am. St. Rep. 78. See also, as to the construction and effect of special and general residuary clauses, *Hall v. Warren*, 9 H. L. Cas. 420; *Falkner v. Butler*, Amb. 514; *Carter v. Taggart*, 16 Sim. 423; *De Trafford v. Tempest*, 21 Beav. 564; *Easum v. Appleford*, 5 Myl. & C.

56; *In re Jeaffreson*, L. R. 2 Eq. 276; *Carter v. Green*, 5 W. R. 856; *Champney v. Davy*, 11 Ch. D. 949.

**4. Residue of Residue.** — *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609.

**5. Residuary Clause in Trust Deed.** — *Re Tilt*, 74 L. T. N. S. 163.

**6. Resulting Trusts Arising Out of Payment of Consideration — England.** — *Dyer v. Dyer*, 2 Cox Ch. 92, 1 White & T. Lead. Cas. 255; *Ex p. Vernon*, 2 P. Wms. 549; *Woodman v. Morrel*, Freem. Ch. 33; *Gascoigne v. Thwing*, 1 Vern. 366; *Anonymous*, 2 Vent. 361; *Knight v. Pechey*, 1 Dick. 327; *Lloyd v. Spillet*, 2 Atk. 150; *Rider v. Kidder*, 10 Ves. Jr. 360; *Bartlett v. Pickersgill*, 1 Cox Ch. 15; *Howe v. Howe*, 1 Vern. 415; *Benbow v. Townsend*, 1 Myl. & K. 506; *Wray v. Steele*, 2 Ves. & B. 388; *Prankerd v. Prankerd*, 1 Sim. & St. 1; *Anglesey v. Altham*, 2 Salk. 676; *Lever v. Andrews*, 7 Bro. P. C. (Toml. ed.) 288; *Finch v. Finch*, 15 Ves. Jr. 50; *Ex p. Houghton*, 17 Ves. Jr. 251; *Redington v. Redington*, 3 Ridg. 106; *Young v. Peachy*, 2 Atk. 256; *Groves v. Groves*, 3 Y. & J. 170; *Lade v. Lade*, 1 Wils. C. Pl. 21; *Willis v. Willis*, 2 Atk. 71; *Crop v. Norton*, 2 Atk. 75; *Withers v. Withers*, Amb. 151; *Smith v. Baker*, 1 Atk. 385; *Nicholson v. Mulligan*, Ir. R. 3 Eq. 308.

*Canada.* — *McKercher v. Sanderson*, 15 Can. Sup. Ct. 296, *reversing* 13 Ont. App. 561; *McDonald v. McMillan*, 14 Grant Ch. (U. C.) 99.

*United States.* — *Powell v. Monson*, etc., Mfg. Co., 3 Mason (U. S.) 362; *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Sanford v. Savings*, etc., Soc., 80 Fed. Rep. 54; *Wade v. Sewell*, 56 Fed. Rep. 129; *Lewis v. Wells*, 85



Fed. Rep. 896; Albright v. Oyster, 140 U. S. 493.

*Alabama.* — Rose v. Gibson, 71 Ala. 35; Caple v. McCollum, 27 Ala. 461; Bates v. Kelly, 80 Ala. 142; Carter v. Challen, 83 Ala. 135; Taliaferro v. Taliaferro, 6 Ala. 404; Foster v. Athenæum, 3 Ala. 302; Andrews v. Jones, 10 Ala. 401.

*Arkansas.* — McGuire v. Ramsey, 9 Ark. 518; Sale v. McLean, 29 Ark. 612; Du Val v. Marshall, 30 Ark. 230; Milner v. Freeman, 40 Ark. 62.

*California.* — Hellman v. Messmer, 75 Cal. 166; O'Connor v. Irvine, 74 Cal. 435; Ward v. Matthews, 73 Cal. 13; Millard v. Hathaway, 27 Cal. 119; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Wormouth v. Johnson, 58 Cal. 621; Wilson v. Castro, 31 Cal. 420; Case v. Coddington, 38 Cal. 101; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Bayles v. Baxter, 22 Cal. 575.

*Colorado.* — Lipscomb v. Nichols, 6 Colo. 290; La Fitte v. Rups, 13 Colo. 208; Hall v. Linn, 8 Colo. 264; Lundy v. Hanson, 16 Colo. 267; Denver First Nat. Bank v. Campbell, 2 Colo. App. 271.

*Connecticut.* — Feltz v. Walker, 49 Conn. 93; Ward v. Ward, 59 Conn. 195.

*Delaware.* — Newell v. Morgan, 2 Harr. (Del.) 225.

*Florida.* — Dewhurst v. Wright, 29 Fla. 223.

*Georgia.* — Murphy v. Peabody, 63 Ga. 522; Kirkpatrick v. Davidson, 2 Ga. 297.

*Idaho.* — Lewis v. Lewis, (Idaho 1893) 33 Pac. Rep. 38.

*Illinois.* — Prevo v. Walters, 5 Ill. 35; Mahoney v. Mahoney, 65 Ill. 406; Klock v. Walter, 70 Ill. 416; Mason v. Showalter, 85 Ill. 133; Emmons v. Moore, 85 Ill. 304; Bragg v. Geddes, 93 Ill. 39; Cramer v. Hoose, 93 Ill. 503; Mathis v. Stufflebeam, 94 Ill. 481; DeClerq v. Jackson, 103 Ill. 658; McNamara v. Garrity, 106 Ill. 384; Coates v. Woodworth, 13 Ill. 654; Williams v. Brown, 14 Ill. 200; Lear v. Chouteau, 23 Ill. 39; Franklin v. McEntyre, 23 Ill. 91; Scheerer v. Scheerer, 109 Ill. 11; Whipple v. Whipple, 109 Ill. 418; Springer v. Springer, 114 Ill. 550; Bush v. Stanley, 122 Ill. 406; George Lehman, etc., Co. v. Clark, 33 Ill. App. 33; Nichols v. Thornton, 16 Ill. 113; Bruce v. Roney, 18 Ill. 67; Reynolds v. Sumner, 126 Ill. 58, 9 Am. St. Rep. 523; Donlin v. Bradley, 119 Ill. 412; Harris v. McIntyre, 118 Ill. 275; Smith v. Sackett, 10 Ill. 534; Stephenson v. McClintock, 141 Ill. 604; Champlin v. Champlin, 136 Ill. 309, 29 Am. St. Rep. 323; Springer v. Kroeschell, 161 Ill. 358, affirming 59 Ill. App. 434; Furber v. Page, 143 Ill. 622; Jacksonville Nat. Bank v. Beesley, 159 Ill. 120; Latham v. Henderson, 47 Ill. 185; Kane County v. Herrington, 50 Ill. 232; Goelz v. Goelz, 157 Ill. 33; Roberts v. Opp, 56 Ill. 34.

*Indiana.* — Elliott v. Armstrong, 2 Blackf. (Ind.) 198; Jenison v. Graves, 2 Blackf. (Ind.) 440; Resor v. Resor, 9 Ind. 347; Boyer v. Libey, 88 Ind. 235; Burgess v. Burgess, 2 Ind. 541; Rhodes v. Green, 36 Ind. 7; Milliken v. Ham, 36 Ind. 166; Wynn v. Sharer, 23 Ind. 573; Lochenour v. Lochenour, 61 Ind. 595; Indiana Pottery Co. v. Bates, 14 Ind. 8; Hampson v. Fall, 64 Ind. 382; Fitzpatrick v. Papa, 89 Ind. 17.

*Iowa.* — McLenan v. Sullivan, 13 Iowa 521;

Hagan v. Powers, 103 Iowa 593; Claussen v. La Franz, 1 Iowa 226; Sullivan v. McLenans, 2 Iowa 437, 65 Am. Dec. 780; McIntire v. Skinner, 4 Greene (Iowa) 89; Sunderland v. Sunderland, 19 Iowa 325; Robinson v. Robinson, 22 Iowa 427; Cotton v. Wood, 25 Iowa 44; Tinsley v. Tinsley, 52 Iowa 14.

*Kansas.* — Reynolds v. Reynolds, 30 Kan. 91. *Kentucky.* — Perry v. Head, 1 A. K. Marsh. (Ky.) 46; Pierce v. Pierce, 7 B. Mon. (Ky.) 433; Bedford v. Graves, (Ky. 1886) 1 S. W. Rep. 537; Williams v. McClanahan, 3 Met. (Ky.) 423; Ewing v. Bibb, 7 Bush (Ky.) 654; Letcher v. Letcher, 4 J. J. Marsh. (Ky.) 590; Doyle v. Sleeper, 1 Dana (Ky.) 531; Deaty v. Murphy, 3 A. K. Marsh. (Ky.) 477; Stephenson v. Stephenson, 3 Bibb (Ky.) 15; Fischli v. Dumaresly, 3 A. K. Marsh. (Ky.) 24; Chapline v. McAfee, 3 J. J. Marsh. (Ky.) 513.

*Louisiana.* — Hall v. Sprigg, 7 Mart. (La.) 243, 12 Am. Dec. 506.

*Maine.* — Buck v. Pike, 11 Me. 9; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Lawry v. Spaulding, 73 Me. 31; Stevens v. Stevens, 70 Me. 92; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681.

*Maryland.* — Neale v. Hagthorpe, 3 Bland (Md.) 551; Mutual F. Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673; Groff v. Rohrer, 35 Md. 327; Hays v. Hollis, 8 Gill (Md.) 357; McElderry v. Shipley, 2 Md. 36, 56 Am. Dec. 703; Keller v. Keller, 45 Md. 274; Brawner v. Staup, 21 Md. 328; Plummer v. Jarman, 44 Md. 639; Green v. Drummond, 31 Md. 81; Dorsey v. Clarke, 4 Har. & J. (Md.) 551; Brooks v. Dent, 1 Md. Ch. 523; Witts v. Horney, 59 Md. 584; Glenn v. Randall, 2 Md. Ch. 220; Faringer v. Ramsay, 2 Md. 365; Cecil Bank v. Snively, 23 Md. 253; Keller v. Kunkel, 46 Md. 565; Hollis v. Hayes, 1 Md. Ch. 479.

*Massachusetts.* — Root v. Blake, 14 Pick. (Mass.) 271; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Moore v. Stinson, 144 Mass. 594; Livermore v. Aldrich, 5 Cush. (Mass.) 431; McGowan v. McGowan, 14 Gray (Mass.) 119, 74 Am. Dec. 668; Sherburne v. Morse, 132 Mass. 469; Kendall v. Mann, 11 Allen (Mass.) 15; Blodgett v. Hildreth, 103 Mass. 484.

*Michigan.* — Maynard v. Hoskins, 9 Mich. 485.

*Minnesota.* — Irvine v. Marshall, 7 Minn. 286.

*Mississippi.* — Powell v. Powell, Freem. (Miss.) 134; Brown v. Doe, 7 How. (Miss.) 181; Murdock v. Hughes, 7 Smed. & M. (Miss.) 219; Rannels v. Jackson, 1 How. (Miss.) 358; Mahorner v. Harrison, 13 Smed. & M. (Miss.) 53; Siggins v. Heard, 31 Miss. 426; Harvey v. Ledbetter, 48 Miss. 95; McCarroll v. Alexander, 48 Miss. 128; Brooks v. Shelton, 54 Miss. 353; Leiper v. Hoffman, 26 Miss. 615; Robinson v. Leflore, 59 Miss. 148; Bratton v. Rogers, 62 Miss. 281; Capers v. McCaa, 41 Miss. 479; Barton v. Magruder, 69 Miss. 462; Moore v. Moore, 74 Miss. 59.

*Missouri.* — Paul v. Chouteau, 14 Mo. 580; Rankin v. Harper, 23 Mo. 579; Shaw v. Shaw, 86 Mo. 594; Condit v. Maxwell, 142 Mo. 266; Eddy v. Baldwin, 23 Mo. 588; Kelly v. Johnson, 28 Mo. 249; Baumgartner v. Guessfeld, 38 Mo. 36; Clowser v. Noland, 133 Mo. 221; Johnson v. Quarles, 46 Mo. 423.

the transaction, and is independent of any express agreement on the part of

*Montana.* — Muller v. Buyck, 12 Mont. 354.  
*Nebraska.* — Detwiler v. Detwiler, 30 Neb. 338; Chicago, etc., R. Co. v. Omaha First Nat. Bank, (Neb. 1899) 78 N. W. Rep. 1064, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 5.

*Nevada.* — Frederick v. Hass, 5 Nev. 389; Boskowitz v. Davis, 12 Nev. 446.

*New Hampshire.* — Page v. Page, 8 N. H. 187; Lyford v. Thurston, 16 N. H. 399; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Gove v. Lawrence, 26 N. H. 484; Hopkinson v. Dumas, 42 N. H. 296; Hutchins v. Heywood, 50 N. H. 491; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Pembroke v. Allens-town, 21 N. H. 107; Osgood v. Eaton, 62 N. H. 512; Tebbetts v. Tilton, 31 N. H. 273; Hall v. Young, 37 N. H. 134; Scooby v. Blanchard, 3 N. H. 170; Hallett v. Parker, (N. H. 1896) 39 Atl. Rep. 433; Connor v. Follansbee, 59 N. H. 124.

*New Jersey.* — Depeyster v. Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723; Reeves v. Evans, (N. J. 1896) 34 Atl. Rep. 477; Mershon v. Duer, 40 N. J. Eq. 333; Cutler v. Tuttle, 19 N. J. Eq. 549; Stevens v. Wilson, 18 N. J. Eq. 447; Howell v. Howell, 15 N. J. Eq. 75; Stratton v. Dialogue, 16 N. J. Eq. 70; Havens v. Bliss, 26 N. J. Eq. 363; Plaut v. Plaut, 44 N. J. Eq. 18; Warren v. Tynan, 54 N. J. Eq. 402; Baldwin v. Campfield, 8 N. J. Eq. 891; Johnson v. Dougherty, 18 N. J. Eq. 406; Van Syckle v. Kline, 34 N. J. Eq. 332; Wheeler v. Kirtland, 23 N. J. Eq. 13, case modified 24 N. J. Eq. 552.

*New York.* — Jackson v. Sternbergh, 1 Johns. Cas. (N. Y.) 153; Partridge v. Havens, 10 Paige (N. Y.) 618; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Malin v. Malin, 1 Wend. (N. Y.) 625; Boisford v. Burr, 2 Johns. Ch. (N. Y.) 405; Jackson v. Mills, 13 Johns. (N. Y.) 463; Harder v. Harder, 2 Sandf. Ch. (N. Y.) 17; Forsyth v. Clark, 3 Wend. (N. Y.) 637; Guthrie v. Gardner, 19 Wend. (N. Y.) 414; Siemon v. Schurck, 29 N. Y. 598; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109, affirming Hopk. (N. Y.) 288; Robbins v. Robbins, 89 N. Y. 251; Lounsbury v. Purdy, 18 N. Y. 515; McCartney v. Bostwick, 32 N. Y. 53; Union College v. Wheeler, 59 Barb. (N. Y.) 585; Foote v. Colvin, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; Jackson v. Morse, 16 Johns. (N. Y.) 197, 8 Am. Dec. 306; Boyd v. M'Lean, 1 Johns. Ch. (N. Y.) 582; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; White v. Carpenter, 2 Paige (N. Y.) 218; Gomez v. Tradesmen's Bank, 4 Sandf. (N. Y.) 106; Brown v. Cherry, 59 Barb. (N. Y.) 628.

*North Carolina.* — Henderson v. Hoke, 1 Dev. & B. Eq. (21 N. Car.) 119; Cunningham v. Bell, 83 N. Car. 328; Norton v. McDevit, 122 N. Car. 755; King v. Weeks, 70 N. Car. 372; Lassiter v. Stainback, 119 N. Car. 103; Summers v. Moore, 113 N. Car. 394.

*Ohio.* — Creed v. Lancaster Bank, 1 Ohio St. 1; Williams v. Van Tuyl, 2 Ohio St. 336; Carter v. Cook, Wright (Ohio) 443; McGovern v. Knox, 21 Ohio St. 547, 8 Am. Rep. 80.

*Oregon.* — Parker v. Newitt, 18 Oregon 274; Taylor v. Miles, 19 Oregon 550; Springer v. Young, 14 Oregon 280.

*Pennsylvania.* — Stewart v. Brown, 2 S. & R. (Pa.) 461; Lingenfelter v. Ritchey, 58 Pa.

St. 485; Behm v. Molly, 133 Pa. St. 614; Bickel's Appeal, 86 Pa. St. 204; Galbraith v. Galbraith, 190 Pa. St. 225; Brickell v. Earley, 115 Pa. St. 473; Thompson v. Sankey, 175 Pa. St. 594; Lloyd v. Carter, 17 Pa. St. 216; Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Jackman v. Ringland, 4 W. & S. (Pa.) 149; Lynch v. Cox, 23 Pa. St. 265; Beck v. Graybill, 28 Pa. St. 66; Warren v. Steer, 112 Pa. St. 634; Bigley v. Jones, 114 Pa. St. 510; Hay v. Martin, (Pa. 1888) 14 Atl. Rep. 333; Brock v. Savage, 31 Pa. St. 410; Edwards v. Edwards, 39 Pa. St. 369; Williard v. Williard, 56 Pa. St. 119; Nixon's Appeal, 63 Pa. St. 279; Morey v. Herrick, 18 Pa. St. 129; Zimmerman v. Barber, 176 Pa. St. 1.

*South Carolina.* — Dillard v. Crocker, Spears Eq. (S. Car.) 20; Williams v. Hollingsworth, 1 Strobb. Eq. (S. Car.) 103, 47 Am. Dec. 527; Mims v. Chandler, 21 S. Car. 491; Brown v. Cave, 23 S. Car. 257; Witte v. Wolfe, 16 S. Car. 256; Gaines v. Drakeford, 51 S. Car. 37; Ramage v. Ramage, 27 S. Car. 39; Farrington v. Duval, 32 S. Car. 590; *Ex p.* Trenholm, 19 S. Car. 135; Garrett v. Garrett, 1 Strobb. Eq. (S. Car.) 96; M'Guire v. M'Gowen, 4 Desaus. (S. Car.) 491.

*Tennessee.* — Ensley v. Balentine, 4 Humph. (Tenn.) 233; Click v. Click, 1 Heisk. (Tenn.) 607; Burks v. Burks, 7 Baxt. (Tenn.) 353; Gass v. Gass, 1 Heisk. (Tenn.) 613; Dudley v. Bosworth, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; Thomas v. Walker, 6 Humph. (Tenn.) 93; Smitheal v. Gray, 1 Humph. (Tenn.) 491, 34 Am. Dec. 664.

*Texas.* — Smith v. Strahan, 16 Tex. 314, 67 Am. Dec. 622; Neil v. Keese, 5 Tex. 23, 51 Am. Dec. 746; Burdett v. Haley, 51 Tex. 540; Tarpley v. Poage, 2 Tex. 139; Long v. Steiger, 8 Tex. 460; Guest v. Guest, 74 Tex. 664; Oberthier v. Stroud, 33 Tex. 522; Burns v. Ross, 71 Tex. 517; Smith v. Brown, 66 Tex. 543.

*Utah.* — Rogers v. Donnellan, 11 Utah 108; Fisk v. Patton, 7 Utah 399.

*Vermont.* — Pinney v. Fellows, 15 Vt. 525; Dewey v. Long, 25 Vt. 564; Barron v. Barron, 24 Vt. 375; Clark v. Clark, 43 Vt. 685; Williams v. Wager, 64 Vt. 326.

*Virginia.* — U. S. Bank v. Carrington, 7 Leigh (Va.) 566; Sinclair v. Sinclair, 79 Va. 40; Parker v. Logan, 82 Va. 376; Kane v. O'Connors, 78 Va. 76; McCully v. McCully, 78 Va. 159; Law v. Law, 76 Va. 527; Borst v. Nalle, 28 Gratt. (Va.) 423; Smith v. Profit, 82 Va. 832; Walraven v. Lock, 2 Patt. & H. (Va.) 547; Cox v. Cox, 95 Va. 173; Miller v. Blose, 30 Gratt. (Va.) 745.

*Washington.* — Bowen v. Hughes, 5 Wash. 442.

*West Virginia.* — Currence v. Ward, 43 W. Va. 367; Bright v. Knight, 35 W. Va. 40; Shaffer v. Fetty, 30 W. Va. 248; Harris v. Elliott, 45 W. Va. 245; Smith v. Patton, 12 W. Va. 541; Seiler v. Mohn, 37 W. Va. 507; Murry v. Sell, 23 W. Va. 475; Deck v. Tabler, 41 W. Va. 332, 56 Am. St. Rep. 837; Weinrich v. Wolf, 24 W. Va. 299.

*Wisconsin.* — Rogan v. Walker, 1 Wis. 527.  
 In Waterman v. Seeley, 28 Mich. 77, Campbell, J., said that even before the adoption of the *Michigan Revised Statutes of 1846*, which



the grantee to hold in trust for the payer;<sup>1</sup> and therefore such a trust will result though the title is taken in the name of the grantee with the consent of the person paying the consideration.<sup>2</sup>

**Resulting Trust as to Part of or Part Interest in Land.** — The trust resulting from the payment of the consideration need not be to the extent of the entire interest in the land conveyed to the grantee, but may result as to a part of the land only,<sup>3</sup> or a part interest in the land,<sup>4</sup> according to the intention of the payer.

**Statutory Provisions.** — In some jurisdictions the statutes expressly provide that where real estate is conveyed to one person and the consideration is paid by or for another, a trust presumptively results to the latter.<sup>5</sup>

abolished resulting trusts arising out of payment of the consideration money, such trusts were not in harmony with the Michigan land system, and the Michigan courts had never been disposed to extend them beyond the line of established authority.

In *Hickson v. Mobley*, 80 Ga. 314, the court also disapproved the doctrine of resulting trusts.

**Conveyance Between Tenants in Common.** — Where A, B, and C, tenants in common, conveyed their interest in the land to D, the other tenant in common, and the consideration for the conveyance of the shares of B and C was paid by A, it was held that a trust resulted in A's favor as to the interest of B and C. *Blodgett v. Hildreth*, 103 Mass. 484.

**Payment by Corporation.** — The doctrine in regard to trusts resulting from the payment of the consideration applies equally whether such payment is made by an individual or by a corporation. *Stratton v. Dialogue*, 16 N. J. Eq. 70.

**Payment from Church Funds — Title in Name of Pastor.** — In *Gaines v. Drakeford*, 51 S. Car. 37, it was held that where the payment for lands is made from the funds of a religious society and the title is taken in the name of the pastor, a trust results in favor of the society.

**Possession Taken by Person Paying Consideration.** — Where land is conveyed to one, but the consideration money is paid by another, who goes into possession, there is a resulting trust in favor of the latter. *Lynch v. Cox*, 23 Pa. St. 265; *Beck v. Graybill*, 28 Pa. St. 66.

**Purchase of Reversion by Lessee — Conveyance to Another Person to Prevent Merger.** — A, being in possession of lands for a long term of years, contracted for the purchase of the reversion and inheritance, but to prevent a merger of the term took a conveyance to B absolutely and without declarations of trust from B. The title deeds remained throughout in the custody of A and those claiming under him. It was held that there was a resulting trust for A. *Lever v. Andrews*, 7 Bro. P. C. (Toml. ed.) 288.

**1. Independent of Agreement.** — *Lynch v. Cox*, 23 Pa. St. 265; *Galbraith v. Galbraith*, 190 Pa. St. 225; *Perkins v. Cheairs*, 2 Baxt. (Tenn.) 194; *Burns v. Ross*, 71 Tex. 517.

**2. Title Taken with Consent of Person Paying Consideration.** — *United States v. Wells*, 85 Fed. Rep. 896.

*Indiana.* — *Boyer v. Libey*, 88 Ind. 235; *Marcilliat v. Marcilliat*, 125 Ind. 472; *Fitzpatrick v. Papa*, 89 Ind. 17.

*Missouri.* — *Condit v. Maxwell*, 142 Mo. 266.

*Nebraska.* — *Detwiler v. Detwiler*, 30 Neb. 338.

*New Hampshire.* — *Jones v. Jones*, 66 N. H. 198.

*North Carolina.* — *Summers v. Moore*, 113 N. Car. 394.

*South Carolina.* — *Ramage v. Ramage*, 27 S. Car. 39.

*Texas.* — *Shepherd v. White*, 11 Tex. 346.

*Virginia.* — *Cox v. Cox*, 95 Va. 173.

**Person Paying Consideration Witnessing Deed** — Thus, in *Shepherd v. White*, 11 Tex. 346, a trust was held to result in favor of the person paying the consideration though he was a witness to a deed conveying the property to the grantee.

**Deed Drawn by Person Paying Consideration.** — In *Lewis v. Wells*, 85 Fed. Rep. 896, it was held that a trust would result from the payment of the consideration though the party paying the consideration drew the deed in the name of the nominal grantee himself and had it placed on record.

**3. Resulting Trust as to Part of the Land.** — *Lloyd v. Spillet*, 2 Atk. 148; *Lane v. Dighton*, Amb. 409; *Benbow v. Townsend*, 1 Myl. & K. 506; *Watson v. Murray*, 54 Ark. 499. See also *Maddison v. Andrew*, 1 Ves. 58.

**Resulting Trust to Extent of Mineral Rights in Land Conveyed.** — In *Milner v. Rucker*, 112 Ala. 360, where the purchase price of land was paid by one person and the conveyance was made to another, the latter was held to be a trustee for the former by way of a resulting trust to the extent of the mineral interests in the land.

**4. Resulting Trust as to Part Interest in Land.** — *Benbow v. Townsend*, 1 Myl. & K. 506; *Rider v. Kidder*, 10 Ves. Jr. 360; *Cook v. Patrick*, 135 Ill. 499.

**Resulting Trust as to Life Interest.** — In *Cook v. Patrick*, 135 Ill. 499, a resulting trust in favor of the person paying the consideration to the extent of a life interest only was held to result. This was based on the ground that under the circumstances it was the intention of such person that the grantees should take the beneficial interest in the property after his death.

**Resulting Trust as to Remainder After Life Interest.** — In *Rider v. Kidder*, 10 Ves. Jr. 360, it was held that it was the intention of the person paying the consideration that the grantee should take only a life interest in the property, and a resulting trust in the remainder was decreed in favor of the person paying the consideration.

**5. Statutory Provisions.** — *Graham v. Selbie*, 8 S. Dak. 604; *Rayl v. Rayl*, 58 Kan. 585.



**Resulting Trust an Estate, Not Merely a Lien.** — A resulting trust arising upon the payment by a stranger of the whole or a part of the purchase money of land conveyed to another is a claim to the whole or a definite portion of the land corresponding to the portion of the purchase money paid by him, and not merely a lien upon the land for the money paid.<sup>1</sup>

**b. REBUTTING PRESUMPTION OF RESULTING TRUST.** — The doctrine of a resulting trust arising from the payment of the consideration resting, as it does, upon the supposed intention of the person paying, it may be shown, in order to rebut the presumption as to a resulting trust, that it was the intention of the payer that the grantee should take the beneficial interest in the estate conveyed, and where such an intention is proved no trust will result.<sup>2</sup> The payment of the consideration merely raises a *prima facie* presumption in favor of a resulting trust;<sup>3</sup> and when such payment by a person other than the grantee is shown, the burden is upon the grantee to show by sufficient evidence that it was intended that he should take a beneficial interest.<sup>4</sup>

**1. Resulting Trust an Estate and Not Merely a Lien.** — *Shaffer v. Fetty*, 30 W. Va. 248. See also *Harris v. Elliott*, 45 W. Va. 245.

**2. Rebutting Presumption of Trust — England.** — *Delane v. Delane*, 7 Bro. P. C. (Toml. ed.) 279; *Lane v. Dighton*, Ambl. 409; *Lloyd v. Spillet*, 2 Atk. 148; *Benbow v. Townsend*, 1 Myl. & K. 506; *Rider v. Kidder*, 10 Ves. Jr. 360; *Dyer v. Dyer*, 2 Cox Ch. 92; *Garrick v. Taylor*, 29 Beav. 79; *Standing v. Bowring*, 27 Ch. D. 341; *Graham v. Graham*, 1 Ves. Jr. 275; *Maddison v. Andrew*, 1 Ves. 58; *Nicholson v. Mulligan*, 3 Ir. R. Eq. 332.

*United States.* — *Jenkins v. Pye*, 12 Pet. (U. S.) 241.

*Arkansas.* — *Byers v. Danley*, 27 Ark. 77; *Milner v. Freeman*, 40 Ark. 62.

*California.* — *Tryon v. Huntoon*, 67 Cal. 325.

*Illinois.* — *Goelz v. Goelz*, 157 Ill. 33.

*Indiana.* — *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610.

*Maryland.* — *Walsh v. McBride*, 72 Md. 45.

*Massachusetts.* — *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Blodgett v. Hildreth*, 103 Mass. 484.

*Michigan.* — *Maynard v. Hoskins*, 9 Mich. 485; *Waterman v. Seeley*, 28 Mich. 77.

*Minnesota.* — *Irvine v. Marshall*, 7 Minn. 286.

*Mississippi.* — *Capers v. McCaa*, 41 Miss. 479.

*New Hampshire.* — *Dow v. Jewell*, 21 N. H. 470.

*New Jersey.* — *Baldwin v. Campfield*, 8 N. J. Eq. 891.

*New York.* — *Jackson v. Morse*, 16 Johns. (N. Y.) 197, 8 Am. Dec. 306; *White v. Carpenter*, 2 Paige (N. Y.) 217; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 18, 9 Am. Dec. 256.

*North Carolina.* — *Summers v. Moore*, 113 N. Car. 394.

*Ohio.* — *Creed v. Lancaster Bank*, 1 Ohio St. 1.

*Oregon.* — *Parker v. Newitt*, 18 Oregon 274.

*Pennsylvania.* — *Crouse v. Crouse*, 7 Kulp (Pa.) 363; *Strimpf v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606; *Lynch v. Cox*, 23 Pa. St. 265; *Hays v. Quay*, 68 Pa. St. 263; *Warren v. Steer*, 112 Pa. St. 634; *Zimmerman v. Barber*, 176 Pa. St. 1, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 13.

*Tennessee.* — *Carter v. Montgomery*, 2 Tenn. Ch. 216. See also *Monell v. Cawood*, 8 Baxt. (Tenn.) 176.

*Texas.* — *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Crenshaw v. Claybrook*, (Tex. 1889) 11 S. W. Rep. 536.

*Virginia.* — *Cox v. Cox*, 95 Va. 173.

*West Virginia.* — *Harris v. Elliott*, 45 W. Va. 245; *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837.

**Agreements Preventing Trust Resulting.** — Three persons jointly furnished money, and it was agreed that two of them should purchase land with it and own the land in fee in equal moieties, and that the other, in consideration of the money that she had advanced, should have her wood from the land during her life. The land was purchased, and the deed was taken in the name of one of the two. It was held that no trust resulted in favor of the third party. *Dow v. Jewell*, 21 N. H. 470.

**Subsequent Sale by Grantee to Person Paying Consideration.** — In *Crenshaw v. Claybrook*, (Tex. 1889) 11 S. W. Rep. 536, it was held that though ordinarily a trust results in favor of the person who pays the purchase price for land, still, where the grantee in such a case subsequently reconveys the land to the person who paid the consideration, and the latter, in consideration of such conveyance, executes a note to such grantee reciting that it was given as part payment for the land, such fact sufficiently rebuts the presumption of a resulting trust.

**Grantee Executing Leases.** — Where A purchased an estate in the name of B, and suffered him to execute a lease thereof, and gave receipts for rents in the name of B, a bill by A to declare a resulting trust was dismissed. *Delane v. Delane*, 7 Bro. P. C. (Toml. ed.) 279.

**3. Payment of Consideration Raises Presumption of Trust.** — *Waterman v. Seeley*, 28 Mich. 77; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Lynch v. Cox*, 23 Pa. St. 265; *Warren v. Steer*, 112 Pa. St. 634; *Bigley v. Jones*, 114 Pa. St. 510.

**4. Burden of Proof in Rebutting Presumption.** — *Soar v. Foster*, 4 Kay & J. 152; *Summers v. Moore*, 113 N. Car. 394; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Kluender v. Fenske*, 53 Wis. 118.

**Proof of Intention.** — The intention on the part of the payer that the grantee should take the beneficial interest may be proved not only from the express declarations of the former, but also from the circumstances surrounding the transaction.<sup>1</sup>

**Lapse of Time and Assertion of Ownership by Grantee.** — Thus, lapse of time and, in connection therewith, continued acts on the part of the person paying the consideration recognizing the right of the grantee to the beneficial interest in the property conveyed are always potent and frequently controlling circumstances to show an intention on the part of the former that the grantee should take the beneficial interest and thereby defeat a resulting trust.<sup>2</sup>

**Intention Determined as of Time of Conveyance.** — The intention of the person paying the consideration as to the interest to be taken by the grantee is to be determined as of the time of the conveyance, and where it was understood at such time that the nominal grantee was to have both the legal and the beneficial interest, the payer cannot subsequently put a different construction on the transaction and claim a resulting trust in the property.<sup>3</sup>

**c. DEED PURPORTING ON ITS FACE TO BE FOR BENEFIT OF GRANTEE.** — A trust may result from the payment of the consideration, though the deed of conveyance purports on its face to be for the benefit of the grantee.<sup>4</sup>

**d. DEED RECITING PAYMENT OF CONSIDERATION BY GRANTEE.** — So also a trust may result though the deed recites that the consideration was paid by the grantee.<sup>5</sup>

**e. DECLARATION OF TRUST BY GRANTEE.** — And where the nominal grantee executes a declaration of trust in favor of a person other than the one paying the consideration, the payer may show such payment for the purpose of impeaching the declaration of trust and raising a resulting trust in his own favor.<sup>6</sup> But if the person paying the consideration is the grantee, and the

1. **Proof of Intention — Circumstances Surrounding Transaction.** — *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Zimmerman v. Barber*, 176 Pa. St. 1.

2. **Lapse of Time and Assertion of Ownership by Grantee.** — *Creed v. Lancaster Bank*, 1 Ohio St. 1.

3. **Intention Determined as of Time of Conveyance.** — *Groves v. Groves*, 3 Y. & J. 163; *Walsh v. McBride*, 72 Md. 45; *Warren v. Steer*, 112 Pa. St. 634; *Harris v. Elliott*, 45 W. Va. 245.

**Subsequent Promise of Grantee to Recovery.** — Where the conveyance to the grantee was intended as an advancement, voluntary promises of the grantee, made after the conveyance to him, to convey the property to the one who paid the purchase money, will not create a resulting trust in favor of the latter. *Snider v. Johnson*, 25 Oregon 328.

4. **Deed Purporting on Its Face to Be for Benefit of Grantee.** — *Cotton v. Wood*, 25 Iowa 43; *Stratton v. Dialogue*, 16 N. J. Eq. 70.

5. **Deed Reciting Payment of Consideration by Grantee — England.** — *Plymouth v. Hickman*, 2 Vern. 167; *Lench v. Lench*, 10 Ves. Jr. 511. *Compare Gascoigne v. Thwing*, 1 Vern. 366; *Hooper v. Eyles*, 2 Vern. 480.

**United States.** — *Powell v. Monson*, etc., Mfg. Co., 3 Mason (U. S.) 347.

**Arkansas.** — *Milner v. Freeman*, 40 Ark. 62.

**California.** — *Millard v. Hathaway*, 27 Cal. 11.

**Iowa.** — *Burden v. Sherman*, 2 Iowa 127.

14 Am. Rep. 505; *Cotton v. Wood*, 25 Iowa 43.

**Massachusetts.** — *Blodgett v. Hildreth*, 103 Mass. 484; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Kendall v. Mann*, 11 Allen (Mass.) 13.

**Mississippi.** — *Wilson v. Beauchamp*, 44 Miss. 556.

**Nebraska.** — *Chicago, etc., R. Co. v. Omaha First Nat. Bank*, (Neb. 1899) 78 N. W. Rep. 1064.

**New Hampshire.** — *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Page v. Page*, 8 N. H. 187.

**New Jersey.** — *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723.

**New York.** — *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 582.

**Oregon.** — *Snider v. Johnson*, 25 Oregon 328.

**Pennsylvania.** — *Galbraith v. Galbraith*, 190 Pa. St. 225.

**Tennessee.** — *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

**Texas.** — *Neil v. Keese*, 5 Tex. 23, 51 Am. Dec. 746; *Smith v. Eckford*, (Tex. 1891) 18 S. W. Rep. 210.

**Vermont.** — *Pinney v. Fellows*, 15 Vt. 525; *Williams v. Wager*, 64 Vt. 326.

**West Virginia.** — *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837; *Murry v. Sell*, 23 W. Va. 475.

**Recital in Deeds Does Not Estop Persons Not Parties.** — The person paying the consideration, not being a party to the deed, is not estopped by its recital or covenants to prove all the facts from which a resulting trust may be inferred; that is, the payment of the consideration. *Milner v. Freeman*, 40 Ark. 62. See also *Livermore v. Aldrich*, 5 Cush. (Mass.) 431. And see the title *ESTOPPEL*, vol. 11, p. 400.

6. **Impeaching Declaration of Trust by Grantee.** — Where A executes to B a declaration of trust declaring that a certain mortgage has



conveyance is to him in trust for a third person, he cannot set up a claim for any purchase money paid by him for the purpose of creating a resulting trust in his favor.<sup>1</sup>

*f. CONVEYANCE TO ANOTHER JOINTLY WITH PERSON PAYING CONSIDERATION.* — The rule that a trust results in favor of the person paying the consideration for the conveyance applies equally where the consideration is paid by one and the conveyance is made to him and another.<sup>2</sup>

*g. EFFECT OF DEATH OF GRANTEE.* — The death of the nominal grantee will not prevent the enforcement of a resulting trust in favor of the person paying the consideration.<sup>3</sup>

*h. TITLE TAKEN IN NAME OF THIRD PERSON WITHOUT CONSENT OF PERSON PAYING PURCHASE MONEY* — (1) *In General.* — Where the title is taken in the name of a third person without the consent of the person by whom the purchase money is paid, a trust, of course, results in favor of the latter.<sup>4</sup>

(2) *Agent to Purchase, Purchasing in His Own Name* — **With Funds of His Principal.** — This rule of law is frequently applied where an agent employed by his principal to purchase land purchases in his own name<sup>5</sup> or in the name

been assigned to him for the benefit of B, and that he holds the mortgage in trust for B, it is competent for C to show that the money paid for the assignment was his money, and thus impeach the declaration of trust. *Hanson v. First Presb. Church*, 11 N. J. Eq. 441.

**1. Conveyance to Person Paying Consideration as Trustee.** — *Chambers v. Chambers*, (Ky. 1889) 11 S. W. Rep. 469; *Moore v. Stinson*, 144 Mass. 594. See also *Gould v. Lynde*, 114 Mass. 366; *Gove v. Learoyd*, 140 Mass. 524.

**2. Conveyance to Another Jointly with Person Paying Consideration.** — *Dyer v. Dyer*, 2 Cox Ch. 92; *Ward v. Ward*, 59 Conn. 188; *Heyde v. Ehlers*, 10 N. J. Eq. 283; *Butler v. Rutledge*, 2 Coldw. (Tenn.) 4; *Finch v. Trent*, 3 Tex. Civ. App. 568.

**3. Effect of Death of Grantee.** — *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Williams v. Wager*, 64 Vt. 326; *Pinney v. Fellows*, 15 Vt. 525; *U. S. Bank v. Carrington*, 7 Leigh (Va.) 566.

**4. Title Taken Without Consent of Person Paying Purchase Money** — *Alabama.* — *Olds v. Marshall*, 93 Ala. 138.

*Arkansas.* — *Watson v. Murray*, 54 Ark. 499. *Kentucky.* — *Webb v. Foley*, (Ky. 1899) 49 S. W. Rep. 40; *Neel v. Moore*, (Ky. 1897) 39 S. W. Rep. 1042.

*Michigan.* — *Connolly v. Keating*, 102 Mich. 1. *Minnesota.* — *Petzold v. Petzold*, 53 Minn. 39. *Mississippi.* — *Moore v. Moore*, 74 Miss. 59. *New Jersey.* — *Peer v. Peer*, 11 N. J. Eq. 432. *New York.* — *Haack v. Weicken*, 118 N. Y. 67; *Foot v. Bryant*, 47 N. Y. 544; *Gilbert v. Gilbert*, 2 Abb. App. Dec. (N. Y.) 256.

*Pennsylvania.* — *Olinger v. Shultz*, 183 Pa. St. 469.

*South Carolina.* — *Ramage v. Ramage*, 27 S. Car. 39.

*Texas.* — *Burns v. Ross*, 71 Tex. 516.

*Virginia.* — *Steagall v. Steagall*, 90 Va. 73.

**5. Agent Purchasing in His Own Name with His Principal's Funds** — *United States.* — *Garner v. Providence Second Nat. Bank*, 151 U. S. 420.

*California.* — *O'Connor v. Irvine*, 74 Cal. 435.

*Colorado.* — *Rarick v. Vandevier*, 11 Colo. App. 116.

*Connecticut.* — *Church v. Sterling*, 16 Conn. 388.

*Illinois.* — *Smith v. Wright*, 49 Ill. 403; *Boyd v. Boyd*, 163 Ill. 611; *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523.

*Indiana.* — *Mull v. Bowles*, 129 Ind. 343; *Pierce v. Hower*, 142 Ind. 626; *Warner v. Warner*, 132 Ind. 213.

*Iowa.* — *Lindley v. Martindale*, 78 Iowa 379; *Kibby v. Cold*, 63 Iowa 663.

*Kansas.* — *Martin v. Fix*, 44 Kan. 540; *Mosteller v. Mosteller*, 40 Kan. 658; *Howard v. Howard*, 52 Kan. 469.

*Kentucky.* — *Wilborn v. Ritter*, (Ky. 1891) 16 S. W. Rep. 360; *Lucas v. Lucas*, (Ky. 1896) 38 S. W. Rep. 1146; *Harlan v. Eilke*, 100 Ky. 642; *Miller v. Edwards*, 7 Bush (Ky.) 396; *Bedford v. Graves*, (Ky. 1886) 1 S. W. Rep. 534; *Faris v. Dunn*, 7 Bush (Ky.) 278; *Lyttle v. Rawlings*, 15 Ky. L. Rep. 573; *Russell v. Russell*, (Ky. 1889) 12 S. W. Rep. 709; *Stark v. Canady*, 3 Litt. (Ky.) 402, 14 Am. Dec. 76.

*Maine.* — *Brown v. Dweley*, 45 Me. 52.

*Michigan.* — *Fisher v. Fobes*, 22 Mich. 454; *McCreary v. McCreary*, 90 Mich. 478; *Ransom v. Ransom*, 31 Mich. 301.

*Minnesota.* — *Kraemer v. Deustermann*, 37 Minn. 469; *Lambert v. Stees*, 47 Minn. 141.

*Mississippi.* — *Flynt v. Hubbard*, 57 Miss. 471.

*Missouri.* — *Valle v. Bryan*, 19 Mo. 423; *Reed v. Painter*, 145 Mo. 341; *Wolcott v. Wilsey*, 141 Mo. 200.

*Nebraska.* — *Hews v. Kenney*, 43 Neb. 815.

*New Jersey.* — *New York City Third Nat. Bank v. Cary*, 39 N. J. Eq. 25; *Plaut v. Plaut*, 44 N. J. Eq. 18.

*New York.* — *Higgins v. Higgins*, (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 13; *Voorhees v. Presbyterian Church*, 8 Barb. (N. Y.) 135; *Safford v. Hynds*, 39 Barb. (N. Y.) 625; *Jackson v. Sternbergh*, 1 Johns. Cas. (N. Y.) 153; *Reitz v. Reitz*, 80 N. Y. 538.

*North Carolina.* — *Lackey v. Martin*, 120 N. Car. 391.

*Ohio.* — *Gashe v. Young*, 51 Ohio St. 376.



of a third person,<sup>1</sup> and pays therefor with the money or property of his principal.

**With His Own Funds.** — Where the contract under which the agent was employed to purchase was not in writing, and the agent, instead of purchasing with the funds of his principal, uses his own funds and takes the title in his own name, the better doctrine is that no trust results in favor of the principal, as the agreement to purchase being within the statute of frauds, and the purchase money not having been paid by the principal, the foundation of a resulting trust, namely, payment of the purchase money by one person and title taken in the name of another, is wanting.<sup>2</sup>

**Constructive Trust.** — A trust arising from the title being taken in the name of a third person without the consent of the person by whom the purchase money was paid has been said to fall more properly in the class of implied trusts known as constructive trusts;<sup>3</sup> and where an agent employed by his principal to negotiate for the purchase of land purchased the property in his own name, with his own money, or in part with his own funds, the transaction, on account of the circumstances thereof, has been held to be impressed, from reasons of equity and justice, with a constructive trust in favor of the principal.<sup>4</sup>

## 2. CHARACTER OF PROPERTY IN WHICH TRUST IS ENFORCEABLE —

(1) *Real Estate.* — Though the cases involving the question of resulting trusts arising out of the payment of the purchase money have generally arisen with regard to the conveyance of the fee-simple interest in land to a third person, still the general principles are equally applicable to the acquisition of any interest in land, though it is less than a fee simple. Thus in England a resulting trust has always been recognized when a copyhold estate in lands is granted in the name of one person and the purchase money is paid by another.<sup>5</sup> So also in the case of a lease, the nominal lessee has been held to

*Oregon.* — Puckett v. Benjamin, 21 Oregon 370.

*Pennsylvania.* — Fillman v. Divers, 31 Pa. St. 429.

*Virginia.* — Jackson v. Pleasanton, 95 Va. 654.

*Wisconsin.* — Kluender v. Fenske, 53 Wis. 118; Sheldon v. Sheldon, 3 Wis. 699.

See also Leggett v. Sutton, (Ark. 1892) 18 S. W. Rep. 125.

**Part Payment.** — Where an agent uses the money intrusted to him by his principal for the purchase of land, together with his own money, in making the purchase, and takes the title in his own name, a trust results in favor of the principal in a proportional part of the lands purchased. Sheldon v. Sheldon, 3 Wis. 699.

**Agent to Enter Public Lands.** — Where a person intrusts his agent with money to enter public lands for him, and the agent uses the money, but enters the lands in his own name, a trust results in favor of the principal. Valle v. Bryan, 19 Mo. 423.

**Land Warrant Intrusted to Agent.** — Where a principal intrusted to his agent a bounty-land warrant, for the purpose of having the land entered, and the agent entered the land in his own name, he was held to hold it in trust for his principal. Lee v. Patten, 34 Fla. 149. See also Smith v. Wright, 49 Ill. 403; Reynolds v. Sumner, 126 Ill. 58, 9 Am. St. Rep. 523; Lambert v. Stees, 47 Minn. 141.

**Use of Identical Money Furnished by Principal Not Necessary.** — Runk v. Runk, 146 Ill. App. 116.

**1. Purchase by Agent in Name of Third Person.** — Bostleman v. Bostleman, 24 N. J. Eq. 103; Kearney v. Fleming, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 189; Goforth v. Goforth, 47 S. Car. 126.

**Agent Purchasing in Name of His Wife.** — Bostleman v. Bostleman, 24 N. J. Eq. 103.

**2. Purchase by Agent with His Own Funds.** — Fowke v. Slaughter, 3 A. K. Marsh. (Ky.) 57, 13 Am. Dec. 133; Heacock v. Coatesworth, Clarke (N. Y.) 84; Nash v. Jones, 41 W. Va. 769.

**3. Barger v. Barger,** 30 Oregon 268. See also Long v. King, 117 Ala. 423.

**4. Constructive Trust — Alabama.** — Sanford v. Hamner, 115 Ala. 406; Firestone v. Firestone, 49 Ala. 128. See Long v. King, 117 Ala. 423.

*Florida.* — Boswell v. Cunningham, 32 Fla. 277.

*Kansas.* — Bryan v. McNaughton, 38 Kan. 98; Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 147.

*Pennsylvania.* — Squires's Appeal, 70 Pa. St. 266; Lloyd v. Woods, 176 Pa. St. 63.

*Wisconsin.* — Roller v. Spilmore, 13 Wis. 26.

**5. Resulting Trusts in Copyhold Estates.** — Dyer v. Dyer, 2 Cox Ch. 92; Acherley v. Acherley, 7 Bro. P. C. (Toml. ed.) 273; Smith v. Baker, 1 Atk. 385; Benger v. Drew, 1 P. Wms. 781; Withers v. Withers, Amb. 151; Howe v. Howe, 1 Vern. 415; Clarke v. Danvers, 1 Ch. Cas. 310; Rundle v. Rundle, 2 Vern. 252; Rumboll v. Rumboll, 2 Eden 15. See Edwards v. Fidel, 3 Madd. 237.

be a trustee by way of a resulting trust for the person from whom the consideration for the lease moved.<sup>1</sup>

(2) *Mortgages*. — Where money has been loaned on mortgage, and the mortgage was taken in the name of a third person, the mortgagee has been held to be a trustee by way of a resulting trust for the person lending the money.<sup>2</sup> So also where a mortgage has been assigned to one person and the consideration for the assignment was paid by another, a trust therein has been held to result in favor of the person from whom the consideration for the assignment moved.<sup>3</sup>

(3) *Personal Property*. — Where personal property is purchased by one person and the title is taken in the name of another, the principles of a resulting trust arising from the payment are fully recognized.<sup>4</sup> Thus, where stock was purchased in the name of another,<sup>5</sup> and where an annuity was so purchased,<sup>6</sup> and also where a bond was assigned to another than the person from whom the consideration moved,<sup>7</sup> a resulting trust has been held to arise.

*Personalty of a Perishable Nature*. — In *Tennessee* it has been said that a resulting trust could not be set up in personal property of a perishable nature.<sup>8</sup>

*Gift or Trust*. — Where the person from whom the consideration moved for the purchase of personalty, title to which was taken in the name of another, intended it as a gift to the latter, of course a resulting trust in his favor will not arise.<sup>9</sup> The general principles as to whether a transaction constitutes a gift or a trust have been fully discussed in another place.<sup>10</sup>

(4) *Invalid Claim to Title*. — A resulting trust cannot arise with respect to a claim to the title to property which is without foundation.<sup>11</sup>

*j. CHARACTER OF SALE OR CONVEYANCE* — (1) *In General*. — The character of the sale or conveyance by which the title is vested in the grantee is immaterial. Thus a trust will result from such circumstances not only in the case of voluntary conveyances between individuals,<sup>12</sup> but also in the case of

1. *Leasehold*. — *Dyer v. Dyer*, 2 Cox Ch. 92; *O'Hara v. O'Neil*, 7 Bro. P. C. (Toml. ed.) 227; *Maddison v. Andrew*, 1 Ves. 58.

2. *Mortgage Security Taken in Name of Third Person*. — *Belohradsky v. Kuhn*, 69 Ill. 547; *Robbins v. Robbins*, 89 N. Y. 251.

*Note and Mortgage Payable to Third Person*. — In the case first cited, where a note and mortgage were made payable to a third person by express agreement of the parties in interest, merely for convenience in collection, it was held that the payee was a mere trustee.

3. *Payment of Consideration for Assignment of Mortgage*. — *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 523; *Kelley v. Hill*, 50 Me. 470; *Jones v. Jones*, 66 N. H. 198; *Hanson v. First Presb. Church*, 11 N. J. Eq. 441.

*Part Payment of Consideration for Assignment — Trust Pro Tanto*. — *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623.

4. *Personal Property*. — *Down v. Ellis*, 35 Beav. 578; *Stephenson v. Stephenson*, 3 Bibb (Ky.) 15; 2 Pomeroy's Eq. Jur. (2d ed.), § 1038. In *Currence v. Ward*, 43 W. Va. 367, the court, citing 27 AM. AND ENG. ENCYC. OF LAW (1st ed.) 24, stated that there can be a trust under a legal or equitable estate in anything which a court of equity recognizes as a subject of property.

*Rolling Stock of Railroad*. — In *Central Trust Co. v. Ohio Cent. R. Co.*, 36 Fed. Rep. 520, the court seemed to be of the opinion that a resulting trust in rolling stock of a railroad company would not arise where the purchase money was paid by another than the nominal

purchaser. The case, however, was decided on the ground that the evidence was not sufficient to show the payment of the purchase money by the person seeking to enforce the resulting trust.

5. *Stock Purchased in Name of Another*. — *Sidmouth v. Sidmouth*, 2 Beav. 447; *Forrest v. Forrest*, 11 Jur. N. S. 317; *Garrick v. Taylor*, 29 Beav. 79; *Stover v. Flack*, 41 Barb. (N. Y.) 162; *Creed v. Lancaster Bank*, 1 Ohio St. 1.

6. *Annuity*. — *Rider v. Kidder*, 10 Ves. Jr. 363. See also *Loyd v. Read*, 1 P. Wms. 607.

7. *Consideration for Assignment of Bond*. — *Grant v. Heverin*, 77 Cal. 263.

8. *Perishable Property*. — *Union Bank v. Baker*, 8 Humph. (Tenn.) 447; *Lyon v. Lyon*, 1 Tenn. Ch. 225.

9. *Intention Not to Create Trust*. — *Beeden v. Major*, 11 Jur. N. S. 537.

*Advancement*. — Thus, where stock is purchased by a father in the name of his child, the presumption arises that an advancement or gift to the child was intended. *Sidmouth v. Sidmouth*, 2 Beav. 447. See *infra*, this subsection, *Advancements*.

10. See the title *GIFTS*, vol. 14, p. 1009.

11. *Invalid Claim to Title*. — *Mandeville v. Solomon*, 33 Cal. 38.

12. See generally the cases cited *supra*, this section, to the general proposition that a trust results from the payment of the purchase money.

*Administrator's Sale — Purchase Money Paid by Administrator*. — Where, at an administrator's sale, the purchase money is paid by the ad-

sales and conveyances under orders and decrees of court.<sup>1</sup>

(2) *Conveyances from Government*. — So also the trust will result where the conveyance is from the government and the consideration therefor moves from another than the grantee.<sup>2</sup> But where the purchase from the government is made in fraud of an existing statute and in evasion of its express provisions no trust can result in favor of the guilty party.<sup>3</sup> Still, if the person whose funds were employed was not a party to the violation of the law, he may assert a resulting trust in his favor as against the wrongdoer or his heirs.<sup>4</sup>

*Advancing Expenses of Securing Mining Location*. — Though parcel agreements to locate a mining claim for the benefit of another be within the statute of frauds, so far as vesting any interest in the land is concerned,<sup>5</sup> still, if the person claiming an interest in such a location by way of a resulting trust should have advanced the expenses incurred in securing the patent from the government, and such advances were made before the patent was acquired, an interest in the location may be acquired thereby by way of a resulting trust, and the locator may be required to convey such interest to the person in whose favor the trust results.<sup>6</sup>

*k. NECESSITY FOR CONVEYANCE OF LEGAL TITLE*. — Before a resulting trust can arise from the payment of the purchase money or a part thereof it is necessary that the contract of purchase should have been completed by a conveyance by the grantor to another than the person making such payment;

ministrator and the deed is made to a third person, a trust will result in favor of the administrator. *Gorrell v. Alspaugh*, 120 N. Car. 362. The purchase by an administrator in such a case is not void, but is merely voidable, and he can be held to account only by the heirs at law or creditors of his decedent. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1150.

1. *Judicial Sales* — *Alabama*. — *Tillman v. Murrell*, (Ala. 1898) 24 So. Rep. 712.

*California*. — *O'Connor v. Irvine*, 74 Cal. 435.

*Illinois*. — *Mathis v. Stufflebeam*, 94 Ill. 481. See also *Shinn v. Shinn*, 15 Ill. App. 141.

*Mississippi*. — *Barton v. Magruder*, 69 Miss. 462.

*New Jersey*. — *Van Syckle v. Kline*, 34 N. J. Eq. 332; *Fay v. Fay*, 50 N. J. Eq. 260.

*Pennsylvania*. — *Zimmerman v. Barber*, 176 Pa. St. 1; *Behm v. Molly*, 133 Pa. St. 614.

*South Carolina*. — *Farrington v. Duval*, 32 S. Car. 590.

*Tennessee*. — *Sullivan v. Sullivan*, 86 Tenn. 376.

*Tax Sale — Purchase Money Furnished by Owner*. — Where, at a tax sale, the owner of the property furnishes the purchase money to a third person who purchases in his own name, a trust results in favor of the owner by reason of the money so furnished. *O'Connor v. Irvine*, 74 Cal. 435.

*Assignment of Certificate of Purchase*. — Where a purchaser at an execution sale assigns his certificate of purchase for a consideration expressed as paid to him, though in fact there was no consideration for the assignment, and the conveyance is made to the assignee, a resulting trust will not arise, but the transaction will be held a sale of the property, to the same extent as though the purchaser had taken title to himself and reconveyed to the assignee of the certificate by a deed expressing a consideration. *McDonald v. Stow*, 109 Ill. 40.

2. *Conveyances from Government* — *Arkansas*. — *Lowe v. Loomis*, 53 Ark. 454; *Cain v. Leslie*, 15 Ark. 312.

*Illinois*. — *Latham v. Henderson*, 47 Ill. 185; *Franklin v. McEntyre*, 23 Ill. 91; *Bush v. Stanley*, 122 Ill. 406; *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523.

*Iowa*. — *Testerment v. Perkins*, 3 Greene (Iowa) 209; *Davis v. Moffitt*, 4 Greene (Iowa) 92.

*Kansas*. — *Barlow v. Barlow*, 47 Kan. 676.

*Missouri*. — *Cloud v. Ivie*, 28 Mo. 578; *Buren v. Buren*, 79 Mo. 538; *Boyd v. Mammoth Spring Imp., etc., Co.*, 137 Mo. 482.

*Nebraska*. — *Jones v. Johnson Harvester Co.*, 8 Neb. 446.

*Pennsylvania*. — *Cox v. Grant*, 1 Yeates (Pa.) 164; *Lynch v. Cox*, 23 Pa. St. 265; *Thomson v. Gilliland*, Add. (Pa.) 296; *Strimpfler v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606; *Lee v. Tiernan*, Add. (Pa.) 348; *Brock v. Savage*, 31 Pa. St. 410; *Kulp v. Bird*, (Pa. 1887) 8 Atl. Rep. 618.

*Virginia*. — *Cox v. Cox*, 95 Va. 173.

3. *Public Policy*. — *Dewhurst v. Wright*, 29 Fla. 223; *Miller v. Davis*, 50 Mo. 572; *Higgins v. Higgins*, 55 Mo. 346. See *infra*, this title, *Rules of Public Policy Affecting Enforcement of Implied Trusts*.

4. *Want of Consent of Person Furnishing Funds to Form of Entry*. — *Buren v. Buren*, 79 Mo.

5. *Ducie v. Ford*, 138 U. S. 587; *Moore v. Hamerstag*, 109 Cal. 122. See the title STATUTE OF FRAUDS.

6. *Locating Mining Claim*. — *Campbell v. Denver First Nat. Bank*, 22 Colo. 177. See also *Ducie v. Ford*, 138 U. S. 587.

In *Moore v. Hamerstag*, 109 Cal. 122, it was held that where one enters a mining claim in the name of another, he acquires no interest therein though the person in whose name the claim is located subsequently orally agrees to hold the claim in trust for him.



there must be a mutation of the legal title, and the trust arises by operation of law from the contemporary circumstances giving a different direction to the equitable title from that taken by the legal title.<sup>1</sup>

7. CHARACTER OF CONSIDERATION — (1) *In General*. — The principle upon which one person is regarded as holding estates for another by way of resulting trust is that the consideration for the conveyance moved from the latter. It is therefore immaterial in what manner or form the payment was made to the grantor. It is sufficient that it was made in something of value which induced the conveyance.<sup>2</sup>

(2) *Love and Affection*. — The consideration moving from the person seeking to enforce the resulting trust must, however, have been a valuable consideration. Thus, in case of a conveyance to the defendant in consideration of love and affection on the part of the grantor for the plaintiff, it is held that a trust will not result in favor of the plaintiff on the ground that the consideration for the conveyance moved from the plaintiff.<sup>3</sup>

*m. PAYMENT OF PURCHASE MONEY* — (1) *In General*. — A trust of the kind in question can arise only where the person claiming the benefit of the trust has furnished the consideration money. The payment of the consideration is the foundation of the trust; that is, the trust arises out of the circumstance that the money of the real purchaser, and not of the grantee in the deed, formed the consideration of the purchase and became converted into land.<sup>4</sup>

1. *Actual Conveyance of Estate Required*. — *Green v. Drummond*, 31 Md. 71. See also *Haven v. Hoasas*, 60 Minn. 313; *Durfee v. Pavitt*, 14 Minn. 424. Compare *Cecil Bank v. Snively*, 23 Md. 253; *Mallory v. Mallory*, 5 Bush (Ky.) 464; *Lewis v. Montgomery Mut. Bldg., etc., Assoc.*, 70 Ala. 276.

2. *Character of Consideration* — *Alabama*. — *Preston v. McMillan*, 58 Ala. 84; *Bibb v. Hunter*, 79 Ala. 351.

*California*. — *Roberts v. Haley*, 65 Cal. 397.

*Colorado*. — *Warren v. Adams*, 19 Colo. 515.

*Illinois*. — *Loften v. Witboard*, 92 Ill. 461;

*Donlin v. Bradley*, 119 Ill. 412.

*Indiana*. — *Hill v. Pollard*, 132 Ind. 588;

*Myers v. Jackson*, 135 Ind. 136, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 9.

*Maine*. — *Dwinel v. Veazie*, 36 Me. 509;

*Dudley v. Bachelder*, 53 Me. 403.

*Massachusetts*. — *Blodgett v. Hildreth*, 103 Mass. 484.

*Nevada*. — *Frederick v. Hass*, 5 Nev. 389;

*White v. Sheldon*, 4 Nev. 280.

*New Hampshire*. — *Hallett v. Parker*, (N. H. 1896) 39 Atl. Rep. 433.

*New Jersey*. — *Fay v. Fay*, 50 N. J. Eq. 260;

*Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723.

*New York*. — *Douglas v. Douglas*, 11 Hun (N. Y.) 406; *Malin v. Malin*, 1 Wend. (N. Y.) 625.

*Oregon*. — *Taylor v. Miles*, 19 Oregon 550.

*Rhode Island*. — *Aborn v. Searles*, 18 R. I. 357, citing 10 AM. AND ENG. ENCYC. OF LAW

(1st ed.) 4, 5, 9, 11.

*Texas*. — *Parker v. Coop*, 60 Tex. 111.

*Vermont*. — *Clark v. Clark*, 43 Vt. 685.

*West Virginia*. — *Seiler v. Mohn*, 37 W. Va. 507.

*Credit on Mortgage*. — Where the consideration for the conveyance was a credit given by the person seeking to enforce the resulting trust upon a mortgage which he held upon the land, it was held that this was sufficient to

create a resulting trust in his favor, though no money was actually paid. *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723.

*Judicial Sales — Plaintiff's Share in Proceeds Applied in Payment*. — So, also, where property was sold at a judicial sale and the consideration was paid by the purchaser crediting upon the amount of his bid the amount which a third person was entitled to receive from the proceeds of the property, it was held that this was a sufficient payment by such third person to create a resulting trust in his favor. *Loften v. Witboard*, 92 Ill. 461; *Donlin v. Bradley*, 119 Ill. 412; *Fay v. Fay*, 50 N. J. Eq. 260; *Cutler v. Tuttle*, 19 N. J. Eq. 549.

*Exchange of Land*. — Where the consideration of a conveyance to the defendant was land conveyed to the grantor by the plaintiff, a resulting trust will arise in favor of the plaintiff. *Parker v. Coop*, 60 Tex. 111. See also *Nicklin v. Wythe*, 2 Sawy. (U. S.) 535; *Hallett v. Parker*, (N. H. 1896) 39 Atl. Rep. 433.

3. *Love and Affection*. — *Hawks v. Sailors*, 57 Ga. 234; *Acker v. Priest*, 92 Iowa 610. See also *Stonehill v. Swartz*, 129 Ind. 310. Compare *Dudley v. Bachelder*, 53 Me. 403; *Jarrett v. Manini*, 2 Hawaii 667. And see *infra*, this section, *Payment of Purchase Money — Sufficiency of Payment — Constructive Payment*.

4. *Payment of Consideration Foundation of Trust* — *Alabama*. — *Winston v. Mitchell*, 87 Ala. 395; *Milner v. Stanford*, 102 Ala. 277; *Bibb v. Hunter*, 79 Ala. 351.

*California*. — *Roberts v. Ware*, 40 Cal. 634.

*Colorado*. — *Denver First Nat. Bank v. Campbell*, 2 Colo. App. 271.

*Illinois*. — *Horne v. Ingraham*, 125 Ill. 198; *Remington v. Campbell*, 60 Ill. 516; *Walter v. Klock*, 55 Ill. 362; *Greene v. Cook*, 29 Ill. 186; *Pickler v. Pickler*, 180 Ill. 168, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 11; *Lear v. Chouteau*, 23 Ill. 39.

*Maine*. — *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Dudley v. Bachelder*, 53 Me. 403.

(2) *Agreement to Purchase for Another.* — Many cases decide that if one person contracts by parol with another that he will purchase an estate for the latter, and he purchases the estate and takes the conveyance in his own name and pays for it out of his own money and not out of that of the other party, a resulting trust will not be created in favor of the other party in such a case the law treats the transaction as a parol contract to purchase and hold in trust for the benefit of another, and not as a resulting trust.<sup>1</sup> However, the relations of the parties or the circumstances of the case may be such that it would be a fraud for the person purchasing the estate to repudiate the agreement, and in such cases the courts have granted relief by holding the grantee as a constructive trustee.<sup>2</sup>

(3) *Consideration Must Be for Conveyance of Legal Title.* — The payment relied on to create the resulting trust must have been made for the conveyance of the title. Thus, where land had been conveyed by an absolute deed intended as a mortgage, and the plaintiff, who negotiated for the purchase of the land, paid to the mortgagee the amount necessary to discharge the mortgage, and the mortgagee conveyed the property to the defendant, it was held that a resulting trust in favor of the plaintiff did not arise, the evidence failing to show by whom the consideration for the conveyance to the defendant of the equity of redemption was paid.<sup>3</sup>

*Expenditures in Improving Land.* — So, also, the fact that the plaintiff advanced money which was expended in the improvement of land which was conveyed to a third person by whom the purchase money was paid will not create a resulting trust in favor of the plaintiff.<sup>4</sup>

*Conveyance through Third Person.* — Where land is conveyed by voluntary deed to one person, by whom it is reconveyed to another, in pursuance of an agreement executed at the time of the first conveyance, the transaction is in effect the same as if the deed had been made directly from the first grantor to the last grantee, and does not raise a resulting trust on the ground that the consideration for the conveyance from the second grantor to the last grantee was paid by the first grantor, as in such a case no consideration for the second conveyance is paid.<sup>5</sup>

(4) *Time of Payment* — (a) *In General.* — In order to raise a resulting trust

*Massachusetts.* — Fickett v. Durham, 109 Mass. 419; Livermore v. Aldrich, 5 Cush. (Mass.) 431.

*Michigan.* — Wright v. King, Harr. (Mich.) 12.

*Mississippi.* — Gibson v. Foote, 40 Miss. 788.

*Missouri.* — Shaw v. Shaw, 86 Mo. 594.

*New Jersey.* — Tunnard v. Littell, 23 N. J. Eq. 264; Thalman v. Canon, 24 N. J. Eq. 127.

*New York.* — White v. Carpenter, 2 Paige (N. Y.) 217; Getman v. Getman, 1 Barb. Ch. (N. Y.) 499.

*Oregon.* — Sloan v. Woodward, 25 Oregon 223.

*Pennsylvania.* — Thompson's Appeal, 22 Pa. St. 16.

*South Dakota.* — Graham v. Selbie, 8 S. Dak. 604.

*Texas.* — O'Connor v. Vineyard, 91 Tex. 488, 11 Tex. Civ. App. 187; 14 S. W. Rep. 55; Caldwell v. Bryan, (Tex. Civ. App. 1898) 49 S. W. Rep. 240.

1. *Parol Agreement to Purchase for Benefit of Another.* — *England.* — Fox v. Barker, 4 East 572; Rastel v. Hutchinson, 1 Dick. 44; Crop v. Norton, 2 Atk. 74; Bartlett v. Pickersgill, 1 Cox Ch. 15.

*United States.* — Smith v. Burnham, 3 Sumn. (U. S.) 435; Howland v. Blake, 97 U. S. 624.

*Alabama.* — Bibb v. Hunter, 79 Ala. 351.

*California.* — Roberts v. Ware, 40 Cal. 634.

*Illinois.* — Remington v. Campbell, 60 Ill. 516; Stephenson v. Thompson, 13 Ill. 186; Morton v. Nelson, 145 Ill. 586; Perry v. McHenry, 13 Ill. 227; Jacksonville Nat. Bank v. Beesley, 159 Ill. 120.

*Iowa.* — Burden v. Sheridan, 36 Iowa 125, 14 Am. Rep. 505.

*Maine.* — Fisher v. Shaw, 42 Me. 32.

*Massachusetts.* — Kendall v. Mann, 11 Allen (Mass.) 15; Collins v. Sullivan, 135 Mass. 461.

*New Jersey.* — Bostleman v. Bostleman, 24 N. J. Eq. 103.

*New York.* — Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405.

*Ohio.* — Watson v. Erb, 33 Ohio St. 35.

2. *Constructive Trust.* — See *infra*, this title, *Constructive Trusts*.

3. *Consideration Must Be Paid for Conveyance of Title.* — Boyer v. Floury, 80 Ga. 312. See also Denver First Nat. Bank v. Campbell, 2 Colo. App. 271.

4. *Expenditures in Improving Land.* — B. & W. v. Nutter, 63 N. H. 446; Franchestown v. Deering, 41 N. H. 438; Krauth v. Thiele, 45 N. J. Eq. 407. Compare Thomas v. Standiford, 49 Md. 181.

5. *Conveyance through Third Person.* — Lane v. Lane, 80 Me. 570.



from the payment of the purchase money, the payment must have been made at the time of the purchase. If, after an estate has been conveyed on the credit of the grantee, a third person pays the purchase money, or a part thereof, a resulting trust in his favor will not arise.<sup>1</sup> In *Tennessee* the rule has

1. **Payment at Time of Purchase Required** — *United States*. — *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *In re Wood*, 5 Fed. Rep. 443; *Ducie v. Ford*, 138 U. S. 587.

*Alabama*. — *Bibb v. Hunter*, 79 Ala. 351; *Long v. King*, 117 Ala. 423; *Lehman v. Lewis*, 62 Ala. 129; *Coles v. Allen*, 64 Ala. 98; *Preston v. McMillan*, 58 Ala. 84; *Foster v. Athenæum*, 3 Ala. 302; *Milner v. Stanford*, 102 Ala. 277; *Carleton v. Rivers*, 54 Ala. 467; *Danforth v. Herbert*, 33 Ala. 497; *Caple v. McCollum*, 27 Ala. 461; *Tilford v. Torrey*, 53 Ala. 120; *Robison v. Robison*, 44 Ala. 227.

*Arkansas*. — *Milner v. Freeman*, 40 Ark. 62; *Sale v. McLean*, 29 Ark. 612; *Du Val v. Marshall*, 30 Ark. 230.

*California*. — *O'Connor v. Irvine*, 74 Cal. 435; *Roberts v. Ware*, 40 Cal. 634; *Hunt v. Friedman*, 63 Cal. 510; *Woodside v. Hewel*, 109 Cal. 481.

*Colorado*. — *Denver First Nat. Bank v. Campbell*, 2 Colo. App. 271.

*Delaware*. — *Harvey v. Pennypacker*, 4 Del. Ch. 445; *Rice v. Pennypacker*, 5 Del. Ch. 33.

*District of Columbia*. — *Cohen v. Cohen*, 1 App. Cas. (D. C.) 240.

*Idaho*. — *Motherwell v. Taylor*, 2 Idaho 232; *Lewis v. Lewis*, (Idaho 1893) 33 Pac. Rep. 38.

*Illinois*. — *Stephenson v. McClintock*, 141 Ill. 604; *Fleming v. McHale*, 47 Ill. 282; *Walter v. Klock*, 55 Ill. 362; *Lear v. Chouteau*, 23 Ill. 39; *Reed v. Reed*, 135 Ill. 482; *Alexander v. Tams*, 13 Ill. 221; *Perry v. McHenry*, 13 Ill. 227; *Morton v. Nelson*, 145 Ill. 586; *Van Buskirk v. Van Buskirk*, 148 Ill. 9; *Strong v. Messinger*, 148 Ill. 431; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120; *Dick v. Dick*, 172 Ill. 578; *Keith v. Miller*, 174 Ill. 64; *Devine v. Devine*, 180 Ill. 447; *Pain v. Farson*, 179 Ill. 185.

*Indiana*. — *Brown v. Budd*, 2 Ind. 442; *Burkert v. Burkert*, 58 Ind. 579; *Boyer v. Libey*, 88 Ind. 235; *Mitchell v. Colglazier*, 106 Ind. 464; *Westerfield v. Kimmer*, 82 Ind. 369; *Toney v. Wendling*, 138 Ind. 228.

*Iowa*. — *Olive v. Dougherty*, 3 Greene (Iowa) 371; *Maroney v. Maroney*, 97 Iowa 711; *Burkhardt v. Burkhardt*, 107 Iowa 369, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 24.

*Kentucky*. — *Graves v. Dugan*, 6 Dana (Ky.) 331.

*Maine*. — *Farnham v. Clements*, 51 Me. 426; *Dudley v. Bachelder*, 53 Me. 403; *Conner v. Lewis*, 16 Me. 268; *Gerry v. Stimson*, 60 Me. 186; *Buck v. Swazey*, 35 Me. 41, 56 Am. Dec. 681; *Buck v. Pike*, 11 Me. 9.

*Maryland*. — *Purdy v. Purdy*, 3 Md. Ch. 547; *Keller v. Keller*, 45 Md. 269; *Cecil Bank v. Snively*, 23 Md. 253; *Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88; *Browner v. Staup*, 21 Md. 328; *Hays v. Hollis*, 8 Gill (Md.) 357.

*Massachusetts*. — *Bailey v. Hemenway*, 147 Mass. 326; *Bourke v. Callanan*, 160 Mass. 195; *Kendall v. Mann*, 11 Allen (Mass.) 15; *Davis v. Wetherell*, 11 Allen (Mass.) 19, note; *Barnard v. Jewett*, 97 Mass. 87. Compare *Blodgett v. Hildreth*, 103 Mass. 484.

*Mississippi*. — *Mahorner v. Harrison*, 13 Smed. & M. (Miss.) 53; *Bowman v. O'Reilly*, 31 Miss. 265; *McCarroll v. Alexander*, 48 Miss. 128; *Brooks v. Shelton*, 54 Miss. 353; *Gibson v. Foote*, 40 Miss. 788; *Gee v. Gee*, 32 Miss. 192.

*Missouri*. — *Kelly v. Johnson*, 28 Mo. 249.

*Nevada*. — *Boskowitz v. Davis*, 12 Nev. 446; *Frederick v. Hass*, 5 Nev. 389.

*New Hampshire*. — *Bodwell v. Nutter*, 63 N. H. 446; *Brooks v. Fowle*, 14 N. H. 248; *Fessenden v. Taft*, 65 N. H. 39; *Pembroke v. Allenstown*, 21 N. H. 107; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Francestown v. Deering*, 41 N. H. 438.

*New Jersey*. — *Whitley v. Ogle*, 47 N. J. Eq. 67; *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Krauth v. Thiele*, 45 N. J. Eq. 407; *Tunnard v. Littell*, 23 N. J. Eq. 264; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Howell v. Howell*, 15 N. J. Eq. 75.

*New York*. — *White v. Carpenter*, 2 Paige (N. Y.) 217; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Freeman v. Kelly*, Hoffm. (N. Y.) 90; *Rogers v. Murray*, 3 Paige (N. Y.) 390; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; *Forsyth v. Clark*, 3 Wend. (N. Y.) 637; *Jackson v. Morse*, 16 Johns. (N. Y.) 197, 8 Am. Dec. 306; *Russell v. Allen*, 10 Paige (N. Y.) 249; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Draper v. Gordon*, 4 Sandf. Ch. (N. Y.) 210; *Niver v. Crane*, 98 N. Y. 40; *Jackson v. Moore*, 6 Cow. (N. Y.) 706. Compare *Ross v. Hegeman*, 2 Edw. (N. Y.) 373; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 19.

*North Carolina*. — *National Bank v. Gilmer*, 117 N. Car. 416.

*Ohio*. — *Lescaleet v. Rickner*, 9 Ohio Cir. Dec. 422, 16 Ohio Cir. Ct. 461; *Turpie v. Lowe*, 2 Ohio Cir. Dec. 729, 4 Ohio Cir. Ct. 599.

*Oregon*. — *Taylor v. Miles*, 19 Oregon 550; *Barger v. Barger*, 30 Oregon 268; *Sisemore v. Pelton*, 17 Oregon 546.

*Pennsylvania*. — *Bickel's Appeal*, 86 Pa. St. 204; *Beidler v. Miller*, 1 Woodw. (Pa.) 222; *Robinson v. Robinson*, 29 W. N. C. (Pa.) 159; *Beringer v. Lutz*, 179 Pa. St. 1; *McGinity v. McGinity*, 63 Pa. St. 38; *Kellum v. Smith*, 33 Pa. St. 158; *Miller's Estate*, 8 Lanc. L. Rev. (Pa.) 145; *Barnet v. Dougherty*, 32 Pa. St. 372; *Plumer v. Guthrie*, 76 Pa. St. 441; *Cross's Appeal*, 97 Pa. St. 474; *Walter's Appeal*, (Pa. 1887) 8 Atl. Rep. 406; *Longdon v. Clouse*, 42 Leg. Int. (Pa.) 510; *Nixon's Appeal*, 63 Pa. St. 279; *Engle v. Weidner*, 1 Luz. Leg. Reg. (Pa.) 769.

*South Carolina*. — *Jones v. Hughey*, 46 S. Car. 193; *Richardson v. Day*, 20 S. Car. 412; *Ex p. Trenholm*, 19 S. Car. 127; *Brown v. Cave*, 23 S. Car. 251.

*South Dakota*. — *Graham v. Selbie*, 8 S. Dak. 604.

*Tennessee*. — *Clark v. Timmons*, (Tenn. Ch. 1897) 39 S. W. Rep. 534; *Haggard v. Benson*, 3 Tenn. Ch. 268; *Gee v. Gee*, 2 Sneed (Tenn.) 395; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Sul-*



been laid down that the payment must be made at the time of the conveyance of the legal title, and that payments before or after such time are insufficient.<sup>1</sup> This statement, however, in so far as it refers to payments before the conveyance of the legal title, is not supported by authority.<sup>2</sup>

**Obligation of Grantee Given for Deferred Payments.** — Where the person seeking to enforce the resulting trust did not, at the time of the conveyance, make any part of the cash payment, or made only a part thereof, and the obligation of the grantee was given for the deferred payment, subsequent payments by such person of the deferred payments cannot be taken into consideration in determining the question of a resulting trust in his favor.<sup>3</sup>

(b) **Conveyance on Credit of Third Person.** — It is not necessary that the person seeking to enforce the trust should have paid the cash at the time of the purchase. Thus, if the estate is conveyed on his credit, and he, at the time of the conveyance, executes his own obligations for the future payment of the purchase money, this constitutes a sufficient payment of the purchase money at the time of the conveyance to create a resulting trust,<sup>4</sup> and the grantee

*Ivan v. Sullivan*, 86 Tenn. 376; *McClure v. Doak*, 6 Baxt. (Tenn.) 364.

*Texas.* — *Wallace v. Campbell*, 54 Tex. 87; *Gardner v. Rundell*, 70 Tex. 453; *Oury v. Saunders*, 77 Tex. 278; *Lacey v. Clements*, 36 Tex. 661; *Torrey v. Cameron*, 73 Tex. 583; *Long v. Steiger*, 8 Tex. 461; *Cunio v. Burland*, 1 Tex. Unrep. Cas. 469; *Parker v. Coop*, 60 Tex. 111; *Arnold v. Ellis*, (Tex. Civ. App. 1899) 48 S. W. Rep. 883.

*Vermont.* — *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Dewey v. Dewey*, 35 Vt. 560; *Williams v. Wager*, 64 Vt. 326; *Pinney v. Fellows*, 15 Vt. 525.

*Virginia.* — *Miller v. Blose*, 30 Gratt. (Va.) 744; *Moorman v. Arthur*, 90 Va. 455; *McDevitt v. Frantz*, 85 Va. 740; *Beecher v. Wilson*, 84 Va. 813, 10 Am. St. Rep. 883.

*Washington.* — *Bowen v. Hughes*, 5 Wash. 442.

*West Virginia.* — *Heiskell v. Powell*, 23 W. Va. 717; *Murry v. Sell*, 23 W. Va. 475; *Shaffer v. Petty*, 30 W. Va. 248; *Harris v. Elliott*, 45 W. Va. 245; *Smith v. Turley*, 32 W. Va. 14; *Bright v. Knight*, 35 W. Va. 40.

*Compare Rayl v. Rayl*, 58 Kan. 585 (under statute).

**A Subsequent Payment in Pursuance of a Prior Agreement** has been held enough to establish a resulting trust. See *Gilchrist v. Brown*, 165 Pa. St. 275.

**Proof of Time of Payment.** — The person seeking to enforce a resulting trust arising out of the payment of the consideration must show that the payment was made at the time of the purchase, since the trust results by operation of law from the payment of the money at the time of the purchase, and a subsequent payment would be ineffectual. *Fessenden v. Tafft*, 65 N. H. 39.

1. *Wells v. Stratton*, 1 Tenn. Ch. 328; *Sullivan v. Sullivan*, 86 Tenn. 376.

2. See cases cited *supra* to the general rule requiring payment at the time of purchase.

3. **Obligation of Grantee Executed for Deferred Payments** — *United States.* — *Olcott v. Bynum*, 17 Wall. (U. S.) 44.

*Alabama.* — *Whaley v. Whaley*, 71 Ala. 159; *Carleton v. Rivers*, 54 Ala. 467.

*Illinois.* — *Iear v. Chouteau*, 23 Ill. 39; *Reed v. Reed*, 135 Ill. 482. *Compare Fleming v. McHale*, 47 Ill. 282.

*Indiana.* — *Burkert v. Burkert*, 58 Ind. 579. *Mississippi.* — *Gee v. Gee*, 32 Miss. 192; *McCarroll v. Alexander*, 48 Miss. 128; *Bowman v. O'Reilly*, 31 Miss. 261.

*New Jersey.* — *Culter v. Tuttle*, 19 N. J. Eq. 549; *Howell v. Howell*, 15 N. J. Eq. 75.

*New York.* — *Niver v. Crane*, 98 N. Y. 40.

*Vermont.* — *Pinney v. Fellows*, 15 Vt. 525.

*Washington.* — *Bowen v. Hughes*, 5 Wash. 442.

*Wisconsin.* — *Whiting v. Gould*, 2 Wis. 552.

*Compare Keller v. Keller*, 45 Md. 269; *Bear v. Koenigstein*, 16 Neb. 65; *Gray v. Jordan*, 87 Me. 140.

**Part Payment.** — As to the question whether the person paying such first instalment can enforce a resulting trust *pro tanto*, see *infra*, this section, *Part Payment of Consideration*.

**Note Given by Another for Benefit of Plaintiff.** — In *Lounsbury v. Purdy*, 16 Barb. (N. Y.) 376, part payment of the consideration was made at the time of purchase by the person seeking to enforce the resulting trust, and a note was given for the residue at the same time in her behalf, by her friends, it being the understanding at the time that such note was to be paid with her money, which was done. It was held that this was equivalent to the actual payment of the money at the time of the purchase, and that, therefore, a trust resulted in her favor.

4. **Conveyance on Credit of Third Person** — *Alabama.* — *Bibb v. Hunter*, 79 Ala. 351.

*Kentucky.* — *Brothers v. Porter*, 6 B. Mon. (Ky.) 107.

*Maine.* — *Buck v. Pike*, 11 Me. 9.

*New York.* — *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 582; *Lounsbury v. Purdy*, 16 Barb. (N. Y.) 376, *affirmed* 18 N. Y. 515; *Kline v. McDonnell*, 62 Hun (N. Y.) 177.

*Ohio.* — *McGovern v. Knox*, 21 Ohio St. 547, 8 Am. Rep. 80.

*Texas.* — *Black v. Cavines*, 2 Tex. Civ. App. 118.

*Vermont.* — *Williams v. Wager*, 64 Vt. 326.

In *Honore v. Hutchings*, 8 Bush (Ky.) 687, it was held that if a joint purchase be made in the name of one party, and the other secures to be paid his share of the purchase money, he will be entitled to his proportion of the property purchased as a resulting trust.

cannot, by subsequently paying the purchase money for which the other became bound, defeat a resulting trust in favor of the latter.<sup>1</sup>

(c) *Meaning of Term "Time of Purchase."* — The purchase is to be considered as having been made within the rule requiring the purchase money to have been paid at or before the time of purchase, when the transaction is consummated by a conveyance of the estate, and not when the minds of the parties have agreed upon the terms of the purchase,<sup>2</sup> and therefore though the grantee had entered into a contract with the grantor for the purchase of the land, the conveyance to be made upon the payment of the purchase money, a payment by a third person towards the purchase money at any time before the execution of the conveyance is in time to create a resulting trust.<sup>3</sup>

(5) *Sufficiency of Payment* — (a) *In General.* — As a general rule, the payment must be made by the person in whose favor the trust is sought to be enforced.<sup>4</sup> This rule, however, does not require that he should actually count out and pay down the purchase money to the grantor, it being sufficient if the money or its equivalent is furnished to the grantee or other person, by whom it is paid over to the grantor.<sup>5</sup>

(b) *Constructive Payment* — *aa. IN GENERAL.* — So, also, it is not necessary that the purchase price pass directly from the person seeking to enforce the resulting trust; there may be a constructive payment by him. All that is required is that the purchase money be paid as his money and for his benefit.<sup>6</sup> Thus, if the purchase money was borrowed from a third person on the credit of the person seeking to enforce the resulting trust, and he became bound for its repayment, this is a sufficient payment by him to create a resulting trust in his favor.<sup>7</sup> So, also, if the grantee by whom the purchase money was actually paid was indebted to the person seeking to enforce the resulting trust, and made the payment with the consent of the latter and in discharge of such indebtedness, it is a constructive payment by the creditor and will create a resulting trust in his favor.<sup>8</sup>

**Grantee Surety on Obligation of Plaintiff.** — Where a person seeking to enforce a resulting trust executed his obligation for the payment of the purchase money, the fact that the grantee was a surety thereon will not prevent a trust from resulting. *Buck v. Pike*, 11 Me. 9.

**1. Payment by Grantee of Obligation Given by Third Person.** — *Bibb v. Hunter*, 79 Ala. 351. *Compare Kline v. McDonnell*, 62 Hun (N. Y.) 177.

In *Norris v. Woods*, 89 Va. 873, land was conveyed to a trustee upon an express trust for a married woman, and it was held that his payment, after the conveyance, in discharge of a vendor's lien upon the land, did not create a resulting trust in his favor.

**2. Time of Purchase Refers to Time of Conveyance.** — See *Brown v. Cave*, 23 S. Car. 251; *Milner v. Freeman*, 40 Ark. 68; *Goelz v. Goelz*, 157 Ill. 33.

**Tax Sale — Payment After Issuance of Certificate, but Before Expiration of Time of Redemption and Execution of Sheriff's Deed.** — *O'Connor v. Irvine*, 74 Cal. 435.

**3. Payments After Execution of Contract to Purchase, but Before Conveyance — Alabama.** — *Robison v. Robison*, 44 Ala. 227. *Compare Chapman v. Abrahams*, 61 Ala. 108.

*Arkansas.* — *Milner v. Freeman*, 40 Ark. 62.

*Indiana.* — *French v. Sheplor*, 83 Ind. 266, 43 Am. Rep. 67; *Brown v. Benight*, 3 Blackf. (Ind.) 39, 23 Am. Dec. 373.

*Kansas.* — *Mosteller v. Mosteller*, 40 Kan. 658.

*Maryland.* — *Cecil Bank v. Snively*, 23 Md. 253. *Compare Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88; *Brawnner v. Staup*, 21 Md. 328.

*Mississippi.* — *Moore v. Moore*, 74 Miss. 59. *West Virginia.* — *Seiler v. Mohn*, 37 W. Va. 507; *Heiskell v. Powell*, 23 W. Va. 717; *Murry v. Sell*, 23 W. Va. 475; *Weinrich v. Wolf*, 24 W. Va. 299.

*Compare Conner v. Lewis*, 16 Me. 268; *Sisemore v. Pelton*, 17 Oregon 546.

**4. Payment Must Be by Person Seeking to Enforce Trust.** — *Boyer v. Libey*, 88 Ind. 235; *Burkert v. Burkert*, 58 Ind. 579; *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420.

**5. Seiler v. Mohn**, 37 W. Va. 507.

**6. Constructive Payment.** — *Thomas v. Thomas*, 62 Miss. 531. See also *Tenney v. Simpson*, 37 Kan. 353.

**7. Purchase Money Borrowed on Credit of Another.** — *Key v. Issett*, 1 Morr. (Iowa) 388; *Clowser v. Noland*, 133 Mo. 221; *Hoehne v. Breitkreitz*, 5 Neb. 110. See also *Morey v. Herrick*, 18 Pa. St. 123. *Compare Purdy v. Purdy*, 3 Md. Ch. 547.

**8. Payment by Grantee in Discharge of Indebtedness to Plaintiff.** — *Heberd v. Wines*, 105 Ind. 239; *Thomas v. Thomas*, 62 Miss. 531; *Snell v. Elam*, 2 Heisk. (Tenn.) 82. See also *Cramer v. Hoose*, 93 Ill. 503. But see *Ensley v. Balentine*, 4 Humph. (Tenn.) 233; *Taliaferro v. Taliaferro*, 6 Ala. 404; *Fickett v. Durham*, 109 Mass. 419.

*bb. PAYMENT BY THIRD PERSON FOR BENEFIT OF PLAINTIFF.* — It has been held that a resulting trust may arise where the purchase money was advanced by a third person for another's benefit and was intended as a gift to him.<sup>1</sup> Such instances have quite often arisen when the purchase money or a part thereof was advanced by a parent for the benefit of his child and the conveyance was made to a third person.<sup>2</sup> The authorities upon this subject, however, are not in entire accord, and some decisions refuse to enforce a resulting trust in favor of the person for whom the purchase money was advanced as a gift, holding that the only trust which could result in such a case would be one in favor of the person by whom the purchase money was advanced.<sup>3</sup>

**Constructive Trusts.** — In the jurisdictions so holding, however, if the grantee was guilty of any fraud, actual or constructive, in taking the title in his own name, a constructive trust in favor of the person for whose benefit the purchase money was advanced may be enforced.<sup>4</sup>

(c) **Payment of Purchase Money by Grantee as Loan** — *aa. IN GENERAL.* — Where the purchase money was in fact paid by the grantee, but merely as a loan to the person seeking to enforce the resulting trust, who was liable to the grantee for the repayment of the money so advanced, and the conveyance was made to the grantee as security therefor, this is treated as a constructive payment by the plaintiff, and is sufficient to create a resulting trust in his favor.<sup>5</sup> In

1. **Advance by Third Person for Benefit of Another** — *Hawaii.* — Jarrett v. Manini, 2 Hawaii 667.

*Maine.* — Dudley v. Bachelder, 53 Me. 403.

*Missouri.* — Kelly v. Johnson, 28 Mo. 249.

*New York.* — Siemon v. Schurck, 29 N. Y. 598, affirming 33 Barb. (N. Y.) 9; Gilbert v. Gilbert, 2 Abb. App. Dec. (N. Y.) 256. See also Getman v. Getman, 1 Barb. Ch. (N. Y.) 499. Compare Mason v. Libby, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 104; Crowder v. Hopkins, 10 Paige (N. Y.) 183.

*North Carolina.* — Pegues v. Pegues, 5 Ired. Eq. (40 N. Car.) 418.

*Pennsylvania.* — Peiffer v. Lytle, 58 Pa. St. 386. Compare Darlington v. Darlington, (Pa. 1837) 6 Cent. Rep. 708.

*West Virginia.* — Seiler v. Mohn, 37 W. Va. 507.

See also Wright v. Gay, 101 Ill. 233.

**Failure of Person Paying Consideration to Object to Form of Conveyance.** — In Steagall v. Steagall, 90 Va. 73, a father paid the purchase money for land as an advancement to his daughter. The conveyance, however, was taken by the husband of the daughter without the knowledge or consent of the father. It was held that the neglect of the father to take steps to correct the form of the conveyance would not prejudice the rights of his daughter, as her rights by way of resulting trust were fixed at the time of the execution of the deed and could not be diverted by the failure of her father to take positive action afterwards.

2. **Advance by Parent for Benefit of Child.** — Voorhees v. Blanton, 83 Fed. Rep. 234; Lewis v. Montgomery Mut. Bldg., etc., Assoc., 70 Ala. 276; Siemon v. Schurck, 29 N. Y. 598, affirming 33 Barb. (N. Y.) 9; Gilbert v. Gilbert, 2 Abb. App. Dec. (N. Y.) 256; Peiffer v. Lytle, 58 Pa. St. 386; Steagall v. Steagall, 90 Va. 73.

3. **Decisions Holding Contrary Doctrine.** — Lewis v. Stanley, 148 Ind. 351; Acker v. Priest, 92 Iowa 610. Compare Fausler v. Jones, 7 Ind. 277.

4. **Constructive Trusts.** — Steagall v. Steagall,

90 Va. 73; Newton v. Taylor, 32 Ohio St. 399. See also *infra*, this title, *Constructive Trusts*.

5. **Purchase Money Advanced by Grantee as a Loan to Third Person** — *England.* — O'Hara v. O'Neil, 3 Eq. Cas. Abr. 745, par. 9.

*United States.* — Rothwell v. Dewees, 2 Black (U. S.) 613; Sanford v. Savings, etc., Soc., 80 Fed. Rep. 54.

*Alabama.* — Anthe v. Heide, 85 Ala. 236; Rhea v. Tucker, 56 Ala. 450; Jordan v. Garner, 101 Ala. 411; Lehman v. Lewis, 62 Ala. 129; Walker v. Elledge, 65 Ala. 51; Bates v. Kelly, 80 Ala. 142; Rose v. Gibson, 71 Ala. 35. Compare Moseley v. Moseley, 86 Ala. 289.

*Arkansas.* — Cain v. Leslie, 15 Ark. 312; Lowe v. Loomis, 53 Ark. 454.

*California.* — Ward v. Matthews, 73 Cal. 13; Thomas v. Jameson, 77 Cal. 91; Hellman v. Messmer, 75 Cal. 166; Millard v. Hathaway, 27 Cal. 140; Sandfoss v. Jones, 35 Cal. 481; Somers v. Overhulser, 67 Cal. 237; Hidden v. Jordan, 21 Cal. 92; Walton v. Karnes, 67 Cal. 255; Barroilhet v. Anspacher, 68 Cal. 116.

*Florida.* — Caruthers v. Williams, 21 Fla. 485; Ward v. Spivey, 18 Fla. 847.

*Georgia.* — Scott v. Taylor, 64 Ga. 506.

*Illinois.* — Wallace v. Carpenter, 85 Ill. 590; Smith v. Sackett, 10 Ill. 534; Harris v. McIntyre, 118 Ill. 275; Klock v. Walter, 70 Ill. 416; Low v. Graff, 80 Ill. 360; Scott v. Beach, 172 Ill. 273; Davis v. Hopkins, 15 Ill. 519; Reeve v. Strawn, 14 Ill. 94; Towle v. Wadsworth, 147 Ill. 80.

*Iowa.* — Olive v. Dougherty, 3 Greene (Iowa)

71. *Kansas.* — Tenney v. Simpson, 37 Kan. 353. See also Lyons v. Bodenhamer, 7 Kan. 455.

*Kentucky.* — Hume v. Hutchings, 8 Bush (Ky.) 687.

*Maine.* — Buck v. Pike, 11 Me. 9; Dudley v. Bachelder, 53 Me. 403.

*Maryland.* — Keller v. Kunkel, 46 Md. 565; Dryden v. Hanway, 31 Md. 254, 100 Am. Dec. 61.

*Massachusetts.* — Kendall v. Allen, 11 Allen (Mass.) 15; Davis v. Wetherell, 11 Allen



such a case the grantee merely holds the title as an equitable mortgagee, as security for his loan, and if he sells the land he is liable for the amount of the proceeds received above the amount of his lien.<sup>1</sup> So, also, though the grantee cannot be compelled before the repayment of the loan to convey the legal title to the person in whose favor the trust results,<sup>2</sup> still, after its repayment such conveyance may be compelled.<sup>3</sup>

*bb. DISTINGUISHED FROM PAROL AGREEMENT TO HOLD IN TRUST.* — The instance of a resulting trust arising from the payment by the grantee as a loan is to be carefully distinguished from the case where a person orally agrees to purchase land for another and reconvey to him on repayment of the purchase money, which oral agreement is held to be unenforceable.<sup>4</sup> The criterion for deter-

(Mass.) 19, note; *Jackson v. Stevens*, 108 Mass. 94; *McDonough v. O'Neil*, 113 Mass. 92.

*Minnesota.* — *Bitzer v. Bobo*, 39 Minn. 18.

*Mississippi.* — *Robinson v. Leflore*, 59 Miss. 148; *Chiles v. Gallagher*, 67 Miss. 413; *Runnels v. Jackson*, 1 How. (Miss.) 358; *Evans v. Green*, 23 Miss. 294; *Brooks v. Kelly*, 63 Miss. 616; *McLemore v. Carter*, (Miss. 1890) 7 So. Rep. 357; *Hebron v. Kelly*, 75 Miss. 74.

*Nevada.* — *Frederick v. Hass*, 5 Nev. 389.

*New Hampshire.* — Page v. Page, 8 N. H. 187; *Hall v. Congdon*, 56 N. H. 279.

*New Jersey.* — *Baldwin v. Campfield*, 8 N. J. Eq. 891; *Howell v. Howell*, 15 N. J. Eq. 75.

*New York.* — *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 582; *Lounsbury v. Purdy*, 16 Barb. (N. Y.) 380; *McBurney v. Wellman*, 42 Barb. (N. Y.) 402; *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 499; *Sandford v. Norris*, 4 Abb. App. Dec. (N. Y.) 144; *Abbey v. Taber*, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 548; *Tomlinson v. Miller*, (Buffalo Super. Ct. Gen. T.) 7 Abb. Pr. N. S. (N. Y.) 364.

*North Carolina.* — *Dempsey v. Rhodes*, 93 N. Car. 120.

*Pennsylvania.* — *Ackley v. Ackley*, (Pa. 1885) 1 Cent. Rep. 405; *Howe v. Bates*, 21 Pa. Co. Ct. 570.

*Tennessee.* — *Sullivan v. Sullivan*, 86 Tenn. 376; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 369, 54 Am. Dec. 41.

*West Virginia.* — *Seiler v. Mohn*, 37 W. Va. 507.

*Wisconsin.* — *Rogan v. Walker*, 1 Wis. 527.

In *Texas* it has been held that where the purchase money is advanced by the grantee as a loan and he takes the title under a parol agreement to reconvey upon being reimbursed, such a trust is not a resulting trust, but a parol trust. *Gardner v. Rundell*, 70 Tex. 453. See also *Bailey v. Harris*, 19 Tex. 108; *Clitus v. Langford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 325; *Dupree v. Estelle*, (Tex. 1888) 10 S. W. Rep. 93. In this state parol trusts are not within the statute of frauds, and such a parol agreement is enforceable as a parol trust.

**Grantee Surety on Note by Which Funds Were Raised.** — The plaintiff, in order to raise the purchase money for land, induced A to become his surety on a note which was accepted by a bank, and the money was furnished by it and paid to the grantor. The conveyance, however, was made to A as security for his indorsement. It was held that though the money paid was raised on the credit of both the plaintiff and A, still it was the money of the plaintiff, and therefore a resulting trust

arose in his favor. *Bratton v. Rogers*, 62 Miss. 281.

**Subsequent Payment by Person Whose Credit Is Loaned.** — And where the grantee loans his credit, the fact that he subsequently pays part of the purchase money will not prevent the trust resulting to the extent of the entire estate subject to a charge in favor of the grantee for the money paid by him. *Shroser v. Isaacs*, 28 N. J. Eq. 320.

**Ratification of Advance by Agent.** — If an agent advances his own money or property for the benefit of his principal, and the principal ratifies such advance, the transaction becomes a loan dating from the time of the advance, and the principal is entitled to the advantage of the advance the same as if it had been his own money or property. *Frederick v. Hass*, 5 Nev. 389.

**1. Sale by Grantee at a Profit.** — *Wallace v. Carpenter*, 85 Ill. 590; *Honore v. Hutchings*, 8 Bush (Ky.) 691; *Jackson v. Stevens*, 108 Mass. 94.

**2. Necessity for Repayment of Money Advanced.** — *Dryden v. Hanway*, 31 Md. 254, 100 Am. Dec. 61.

**Tender of Purchase Money Advanced Dispensed With.** — Where the person by whom the purchase money was advanced as a loan, and in whose name the title was taken, openly repudiates the right of the person for whom the loan was made to have a conveyance on repayment thereof, and declares his intention not to reconvey in any event, an actual tender by the latter is not required to enable him to sue to compel a conveyance. *Scott v. Beach*, 172 Ill. 273. See the title TENDER.

**3. Reconveyance Compelled on Repayment of Money Advanced.** — *Lehman v. Lewis*, 62 Ala. 129; *Ward v. Matthews*, 73 Cal. 13; *Reeve v. Strawn*, 14 Ill. 94.

**4. Parol Agreement to Reconvey on Repayment of Purchase Money Advanced — Alabama.** — *Jordan v. Garner*, 101 Ala. 411; *Moseley v. Moseley*, 86 Ala. 289; *Anthe v. Heide*, 85 Ala. 236.

*Illinois.* — *Reeve v. Strawn*, 14 Ill. 94; *Furber v. Page*, 143 Ill. 622; *Morton v. Nelson*, 145 Ill. 586.

*Iowa.* — *Burden v. Sheridan*, 36 Iowa 125, 14 Am. Rep. 505; *Olive v. Dougherty*, 3 Greene (Iowa) 371.

*Kentucky.* — *Com. v. Maysville, etc.*, R. Co., (Ky. 1893) 21 S. W. Rep. 342.

*Massachusetts.* — *Jackson v. Stevens*, 108 Mass. 94; *Barnard v. Jewett*, 97 Mass. 87.

*Mississippi.* — *Miazza v. Yerger*, 53 Miss. 135.

*Pennsylvania.* — *Marshall v. Keller*, (Pa. 1888) 14 Atl. Rep. 362.

mining to which class a case in suit belongs is the fact whether the grantee has or had any enforceable claim against the person seeking to enforce the resulting trust for the repayment of the money advanced; that is, whether the advance was or was not as a loan.<sup>1</sup>

*cc. EFFECT OF AGREEMENT OF GRANTEE TO PURCHASE.* — The mere fact that the grantee had orally agreed to purchase for the person seeking to enforce the resulting trust will not convert a payment of his own money into a loan to the latter and thus indirectly create a resulting trust from the mere existence of such agreement.<sup>2</sup>

*dd. EVIDENCE OF LOAN — Sufficiency.* — Where the grantee denies that he advanced the purchase money as a loan, the evidence introduced by the person seeking to enforce the trust to prove the loan must be clear and satisfactory.<sup>3</sup>

*Parol Evidence.* — Trusts resulting from the payment of the purchase money being expressly exempted from the operation of the statute of frauds, the fact that the payment by the grantee was as and for a loan to the person seeking to enforce the trust may be shown by parol.<sup>4</sup>

*(d) Purchase Money Advanced by Third Person as Loan — e. IN GENERAL.* — The rule is well settled that where one person lends money to another to be used by the borrower in the purchase of land, no resulting trust arises in favor of the lender in the land purchased by the borrower, title to which is taken in the latter's name.<sup>5</sup> And this has been held true though at the time of the loan it

1. **Trust Dependent on Whether Advancement Was as Loan.** — *Bates v. Kelly*, 80 Ala. 142; *Jordan v. Garner*, 101 Ala. 411; *Lehman v. Lewis*, 62 Ala. 129; *Reeve v. Strawn*, 14 Ill. 94.

2. **Effect of Agreement to Purchase as Converting Payment into Loan.** — *Bourke v. Callanan*, 150 Mass. 175.

3. **Sufficiency of Evidence to Show Advance to Have Been a Loan** — *Alabama.* — *Jordan v. Garner*, 101 Ala. 411.

*California.* — *Roberts v. Ware*, 40 Cal. 634; *Millard v. Hathaway*, 27 Cal. 119.

*Illinois.* — *Low v. Graff*, 80 Ill. 360; *Holmes v. Holmes*, 44 Ill. 168; *Scott v. Beach*, 172 Ill. 273; *Wilson v. McDowell*, 78 Ill. 514; *Lantry v. Lantry*, 51 Ill. 458; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120; *Towle v. Wadsworth*, 147 Ill. 80; *Reeve v. Strawn*, 14 Ill. 94.

*Kentucky.* — *Cummins v. Shawhan*, (Ky. 1893) 23 S. W. Rep. 669.

*Maryland.* — *McRae v. McRae*, 78 Md. 270.

*Massachusetts.* — *Kendall v. Mann*, 11 Allen (Mass.) 15; *Fickett v. Durham*, 109 Mass. 419.

*Michigan.* — *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619; *Wetmore v. Neuberger*, 44 Mich. 362.

*Mississippi.* — *Chiles v. Gallagher*, 67 Miss. 413.

*New Hampshire.* — *Page v. Page*, 8 N. H. 187.

*New Jersey.* — *Howell v. Howell*, 15 N. J. Eq. 75.

*New York.* — *Levy v. Brush*, 45 N. Y. 589; *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 499; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582.

4. **Parol Proof Admissible to Show Loan.** — *McDonough v. O'Neil*, 113 Mass. 92; *Kendall v. Mann*, 11 Allen (Mass.) 15. See also the cases cited *supra* to the general proposition that a resulting trust arises by a conveyance by the grantee by way of a loan to the person seeking to enforce the resulting trust. And see the title STATUTE OF FRAUDS.

5. **Purchase Money Advanced as Loan to Grantee**

— *Alabama.* — *Smith v. Garth*, 32 Ala. 368; *Chapman v. Abrahams*, 61 Ala. 108; *Whaley v. Whaley*, 71 Ala. 159; *Lehman v. Lewis*, 62 Ala. 129; *Robison v. Robison*, 44 Ala. 227.

*Arkansas.* — *Camden v. Bennett*, 64 Ark. 155.

*California.* — *Tripp v. Duane*, 74 Cal. 85; *McCue v. Gallagher*, 23 Cal. 51; *O'Connor v. Irvine*, 74 Cal. 435; *Millard v. Hathaway*, 27 Cal. 119.

*Delaware.* — *Harvey v. Pennypacker*, 4 Del. Ch. 445.

*Georgia.* — *Davis v. Davis*, 88 Ga. 191.

*Illinois.* — *Loomis v. Loomis*, 28 Ill. 454; *Stewart v. Fellows*, 128 Ill. 480; *Reed v. Reed*, 135 Ill. 482. Compare *Eames v. Hardin*, 111 Ill. 634.

*Indiana.* — *Resor v. Resor*, 9 Ind. 347; *Jenison v. Graves*, 2 Blackf. (Ind.) 440.

*Iowa.* — *Key v. Iselt*, 1 Morr. (Iowa) 388.

*Maryland.* — *Walsh v. McBride*, 72 Md. 45; *Six v. Shaner*, 26 Md. 415.

*Mississippi.* — *Gibson v. Foote*, 40 Miss. 788; *Hiitt v. Applewhite*, (Miss. 1896) 20 So. Rep. 161; *Chiles v. Gallagher*, 67 Miss. 413.

*Missouri.* — *Shaw v. Shaw*, 86 Mo. 594.

*New Jersey.* — *Wheeler v. Kirtland*, 23 N. J. Eq. 13, 24 N. J. Eq. 552.

*Ohio.* — *Turpie v. Lowe*, 2 Ohio Cir. Dec. 729, 4 Ohio Cir. Ct. 599.

*Pennsylvania.* — *Moyer's Appeal*, (Pa. 1888) 14 Atl. Rep. 253; *Thompson v. Thompson*, 82 Pa. St. 378.

*Tennessee.* — *Stumps v. Heisk* (Tenn.) 658; *Durant v. Davis*, 10 Heisk. (Tenn.) 522; *Morrell v. Cawood*, 8 Baxt. (Tenn.) 176; *Gray v. Baird*, 4 Lea (Tenn.) 212; *Lofist v. Lofist*, 94 Tenn. 232. See also *Smith v. Neilson*, 13 Lea (Tenn.) 461.

*Texas.* — *Torrey v. Cameron*, 73 Tex. 583; *Levy v. Williams*, (Tex. Civ. App. 1890) 50 S. W. Rep. 528, 49 S. W. Rep. 930; *Boehl v. Wadgymar*, 54 Tex. 589.

*Utah.* — *Chambers v. Emery*, 13 Utah 374.

*Virginia.* — *McDevitt v. Frantz*, 85 Va. 922.

was agreed between the borrower and the lender that the interest in the land to be purchased by the borrower should vest in the lender, to the extent of his loan.<sup>1</sup>

*bb. EFFECT OF AGREEMENT FOR SHARE IN PROFITS ON RESALE.* — The fact that at the time of the loan it was agreed between the borrower and the lender that the lender should receive a share of any profits derived by the borrower from the investment will not have the effect of creating a resulting trust in favor of the lender.<sup>2</sup>

*cc. BURDEN OF PROVING LOAN.* — Where it is shown that the purchase money was paid by the person seeking to enforce the resulting trust, and the grantee claims that such payment was made as a loan to him, the burden is upon the grantee to prove that fact.<sup>3</sup>

*dd. RIGHT TO LIEN FOR PURCHASE MONEY ADVANCED.* — It has been held that the person advancing the purchase money to the grantee as a loan does not acquire thereby even any lien on the property purchased for the money so advanced;<sup>4</sup> and this has been held true though there was an express verbal agreement that he should have a lien therefor.<sup>5</sup> Thus, in those jurisdictions in which the courts refuse to recognize the validity of equitable mortgages by deposit of the title deeds,<sup>6</sup> the person advancing the purchase money would not have a lien therefor though the title deed was deposited with him as security for his loan.<sup>7</sup>

(e) *Part Payment of Consideration* — *aa. GENERAL RULE.* — The general rule is well settled that where two or more persons together advance the purchase money for land, and the land is conveyed to one of them or to a third person, a trust results in favor of the persons advancing the purchase money with respect to

*Washington.* — *Reese v. Murnan*, 5 Wash. 373.

*West Virginia.* — *Berry v. Wiedman*, 40 W. Va. 36, 52 Am. St. Rep. 866.

See also *Kinter v. Pickard*, 67 Mich. 125; *Eaton v. George*, 42 N. H. 375. Compare *Warner v. Morse*, 149 Mass. 400.

*Loan of Credit.* — The rule applies where the loan is of the credit of the person seeking to enforce the resulting trust. Thus, where the grantee is a minor and his brother gives his note in payment of the purchase money, a resulting trust does not arise in favor of the latter where it appears that the grantee paid to him a valuable consideration for executing the note. *Watkins v. Atwell*, (Tex. Civ. App. 1898) 45 S. W. Rep. 404.

1. *Rogers v. Simpson*, 10 Heisk. (Tenn.) 655.

2. *Agreement for Share in Profits of Investment.* — *Smith v. Garth*, 32 Ala. 368.

3. *Burden of Proving Loan.* — *Camden v. Bennett*, 64 Ark. 155; *Shaw v. Shaw*, 86 Mo. 594. See *Chambers v. Emery*, 13 Utah 374, for a case where the evidence was held not to show a resulting trust.

*Parol Evidence to Vary Written Contract under Which Money Was Advanced.* — Where the money was advanced by the persons seeking to enforce the resulting trust under a written contract which showed that it was not advanced as a loan to the defendant, it was held that parol evidence was not admissible to show that the money was intended as a loan. *Barnard v. Hawks*, 111 N. Car. 333. See the title PAROL EVIDENCE.

4. *No Lien for Purchase Money Loaned* — *Georgia.* — *Davis v. Davis*, 88 Ga. 191.  
*Illinois.* — *Stagg v. Small*, 4 Ill. App. 192.  
*Indiana.* — *Brown v. Budd*, 2 Ind. 442.

*Iowa.* — *Gilman v. Dingeman*, 49 Iowa 308. See *Stucker v. Yoder*, 33 Iowa 177.

*Maryland.* — *Walsh v. McBride*, 72 Md. 45.

*New York.* — *Marquat v. Marquat*, (Supm. Ct. Gen. T.) 7 How. Pr. (N. Y.) 417.

*Ohio.* — *Stansell v. Roberts*, 13 Ohio 148, 42 Am. Dec. 193.

*Tennessee.* — *Durant v. Davis*, 10 Heisk. (Tenn.) 522; *Gray v. Baird*, 4 Lea (Tenn.) 212; *Rogers v. Simpson*, 10 Heisk. (Tenn.) 658; *Smith v. Neilson*, 13 Lea (Tenn.) 461.

See also *Hitt v. Applewhite*, (Miss. 1896) 20 So. Rep. 161. Compare *Carey v. Boyle*, 53 Wis. 574.

*Overpayment by One of Joint Purchasers.* — The rule applies equally where one of the joint purchasers pays the whole purchase money and the estate is conveyed to both. The one so paying has no lien for the amount of his overpayment. *Brown v. Budd*, 2 Ind. 442; *Walsh v. McBride*, 72 Md. 45. See, however, *Morrell v. Cawood*, 8 Baxt. (Tenn.) 176.

*Loan to Husband Used in Paying for Conveyance to Wife.* — Where money was loaned to a husband for the purpose of paying part of the consideration of property conveyed to his wife, it was held that the lender could not make the land liable in her hands for the debt. *Thompson v. Thompson*, 82 Pa. St. 378.

5. *Agreement for Lien.* — *Chapman v. Abrahams*, 61 Ala. 108; *Davis v. Davis*, 88 Ga. 191; *Gray v. Baird*, 4 Lea (Tenn.) 212; *Rogers v. Simpson*, 10 Heisk. (Tenn.) 658; *Durant v. Davis*, 10 Heisk. (Tenn.) 522; *Loftis v. Loftis*, 94 Tenn. 232.

6. See the title EQUITABLE MORTGAGES, vol. II, p. 132.

7. *Deposit of Title Deed.* — *Davis v. Davis*, 88 Ga. 191.



a share of the land proportionate to the share of the purchase money advanced by each.<sup>1</sup> And where there is an agreement between the purchasers that each

1. Part Payment of Consideration—Resulting Trust Pro Tanto—*England*.—Wray *v.* Steele, 2 Ves. & B. 388; Harrison *v.* Barton, 7 Jur. N. S. 19. Compare *Crop v. Norton*, 9 Mod. 233, explained in *Currence v. Ward*, 43 W. Va. 367.

*United States*.—Obermiller *v.* Wylie, 36 Fed. Rep. 641; Powell *v.* Monson, etc., Mfg. Co., 3 Mason (U. S.) 347. Compare *Ducie v. Ford*, 138 U. S. 587.

*Alabama*.—Larkins *v.* Rhodes, 5 Port. (Ala.) 196; Shelby *v.* Tardy, 84 Ala. 327; Bibb *v.* Hunter, 79 Ala. 351; Rhea *v.* Tucker, 56 Ala. 450; Beadle *v.* Seat, 102 Ala. 532; Anthe *v.* Heide, 85 Ala. 236; Lewis *v.* Montgomery Mut. Bldg. Assoc., 70 Ala. 276.

*Arkansas*.—Russell *v.* Marchbanks, (Ark. 1887) 4 S. W. Rep. 200; Kline *v.* Ragland, 47 Ark. 111; Camden *v.* Bennett, 64 Ark. 155; Watson *v.* Murray, 54 Ark. 499.

*California*.—Somers *v.* Overhulser, 67 Cal. 237; Dikeman *v.* Norrie, 36 Cal. 94; Case *v.* Coddington, 38 Cal. 191; McCreary *v.* Casey, 50 Cal. 349; Hidden *v.* Jordan, 21 Cal. 99; Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498; Murphy *v.* Clayton, 113 Cal. 153; Woodside *v.* Hewel, 109 Cal. 484; Roberts *v.* Haley, 65 Cal. 397; Davis *v.* Baugh, 59 Cal. 573.

*Colorado*.—Lipscomb *v.* Nichols, 6 Colo. 290.

*Connecticut*.—Barrows *v.* Bohan, 41 Conn. 278; Booth's Appeal, 35 Conn. 168.

*Georgia*.—Crawford *v.* Manson, 82 Ga. 118; Brooks *v.* Fowler, 82 Ga. 329.

*Idaho*.—Nasholds *v.* McDonnell, (Idaho 1898) 55 Pac. Rep. 894.

*Illinois*.—Springer *v.* Springer, 114 Ill. 550; Smith *v.* Smith, 85 Ill. 189; McNamara *v.* Garrity, 106 Ill. 384; Donlin *v.* Bradley, 119 Ill. 412; Reed *v.* Reed, 135 Ill. 482; Kelly *v.* Kelly, 126 Ill. 550; Gregory *v.* Gover, 19 Ill. 608; Strong *v.* Messinger, 148 Ill. 431; Towle *v.* Wadsworth, 147 Ill. 80; Latham *v.* Henderson, 47 Ill. 185; Stephenson *v.* McClintock, 141 Ill. 604; Cramer *v.* Hoose, 93 Ill. 503; Bruce *v.* Roney, 18 Ill. 67; Van Buskirk *v.* Van Buskirk, 148 Ill. 9; Smith *v.* Wright, 49 Ill. 403; Harris *v.* McIntyre, 118 Ill. 275.

*Indiana*.—Hill *v.* Pollard, 132 Ind. 588; Brown *v.* Benight, 3 Blackf. (Ind.) 39, 23 Am. Dec. 373; McDonald *v.* McDonald, 24 Ind. 68.

*Iowa*.—Brooks *v.* Ellis, 3 Greene (Iowa) 527; Hines *v.* Light, 83 Iowa 737; Culp *v.* Price, 107 Iowa 133. Compare *Jones v. Storms*, 90 Iowa 369.

*Kansas*.—Rayl *v.* Rayl, 58 Kan. 585.

*Kentucky*.—Pierce *v.* Pierce, 7 B. Mon. (Ky.) 433; Webb *v.* Foley, (Ky. 1899) 49 S. W. Rep. 40; Honore *v.* Hutchings, 8 Bush (Ky.) 687; Stephenson *v.* Stephenson, 3 Bibb (Ky.) 15; Owings *v.* McClain, 1 A. K. Marsh. (Ky.) 231; Letcher *v.* Letcher, 4 J. J. Marsh. (Ky.) 590; Brothers *v.* Porter, 6 B. Mon. (Ky.) 106; Nickels *v.* Clay, 14 Ky. L. Rep. 925.

*Maine*.—Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681; Dudley *v.* Bachelder, 53 Me. 403; Kelley *v.* Jenness, 50 Me. 455, 79 Am. Dec. 623; Lawry *v.* Spaulding, 73 Me. 31.

*Maryland*.—Purdy *v.* Purdy, 3 Md. Ch. 547; Cecil Bank *v.* Snively, 23 Md. 253.

*Massachusetts*.—Livermore *v.* Aldrich, 5 Cush. (Mass.) 431; Moore *v.* Stinson, 144 Mass. 594. Compare *Bourke v. Callanan*, 160 Mass. 195.

*Minnesota*.—Irvine *v.* Marshall, 7 Minn. 286.

*Mississippi*.—Thomas *v.* Thomas, 62 Miss. 531; Barton *v.* Magruder, 69 Miss. 462; McCarroll *v.* Alexander, 48 Miss. 128; Capers *v.* McCaa, 41 Miss. 479; Harvey *v.* Ledbetter, 48 Miss. 95.

*Missouri*.—Cloud *v.* Ivie, 28 Mo. 579; Baumgartner *v.* Guessfeld, 38 Mo. 36.

*Nebraska*.—Bear *v.* Koenigstein, 16 Neb. 65.

*Nevada*.—Frederick *v.* Hass, 5 Nev. 389; Boskowitz *v.* Davis, 12 Nev. 449.

*New Hampshire*.—Pembroke *v.* Allenstown, 21 N. H. 107; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371; Tebbetts *v.* Tilton, 31 N. H. 273; Hall *v.* Young, 37 N. H. 134.

*New Jersey*.—Howell *v.* Howell, 15 N. J. Eq. 75; Cutler *v.* Tuttle, 19 N. J. Eq. 549; Collins *v.* Corson, (N. J. 1894) 30 Atl. Rep. 862; Fay *v.* Fay, 50 N. J. Eq. 260; Warren *v.* Tynan, 54 N. J. Eq. 402.

*New York*.—Botsford *v.* Burr, 2 Johns. Ch. (N. Y.) 405; Ross *v.* Hegeman, 2 Edw. (N. Y.) 373; Jackson *v.* Moore, 6 Cow. (N. Y.) 706; Union College *v.* Wheeler, 59 Barb. (N. Y.) 585; Quackenbush *v.* Leonard, 9 Paige (N. Y.) 334; Freeman *v.* Kelly, Hoffm. (N. Y.) 90; Lormore *v.* Campbell, 60 Barb. (N. Y.) 62. Compare *Schierloh v. Schierloh*, 72 Hun (N. Y.) 150, 148 N. Y. 103; Jackson *v.* Bateman, 2 Wend. (N. Y.) 570; Garfield *v.* Hatmaker, 15 N. Y. 477; Lounsbury *v.* Purdy, 18 N. Y. 515.

*North Carolina*.—Keaton *v.* Cobb, 1 Dev. Eq. (16 N. Car.) 443, 18 Am. Dec. 595.

*Ohio*.—Melvin *v.* Melvin, Wright (Ohio) 508; McGovern *v.* Knox, 21 Ohio St. 547, 8 Am. Rep. 80.

*Oregon*.—Puckett *v.* Benjamin, 21 Oregon 370; Barger *v.* Barger, 30 Oregon 268.

*Pennsylvania*.—Zimmerman *v.* Barber, 176 Pa. St. 1; Ackley *v.* Ackley, (Pa. 1885) 1 Cent. Rep. 405; Morey *v.* Herrick, 18 Pa. St. 129; Slaymaker *v.* St. John, 5 Watts (Pa.) 27; Jackman *v.* Ringland, 4 W. & S. (Pa.) 149; Wallace *v.* Duffield, 2 S. & R. (Pa.) 521, 7 Am. Dec. 660; Speer *v.* Burns, 173 Pa. St. 77; Coder *v.* Huling, 27 Pa. St. 84; Hayes's Appeal, 123 Pa. St. 110; Lally *v.* Moran, 4 Lack. Leg. N. (Pa.) 279; Nixon's Appeal, 63 Pa. St. 279; Harrold *v.* Lane, 53 Pa. St. 268; Crouse *v.* Crouse, 7 Kulp (Pa.) 363; German *v.* Gabbald, 3 Binn. (Pa.) 302, 5 Am. Dec. 372; Chadwick *v.* Felt, 35 Pa. St. 305; Bigley *v.* Jones, 114 Pa. St. 510; Stewart *v.* Brown, 2 S. & R. (Pa.) 461; Lloyd *v.* Carter, 17 Pa. St. 216; Beck *v.* Graybill, 28 Pa. St. 66; Gregory *v.* Setter, 1 Dall. (Pa.) 193.

*Rhode Island*.—Aborn *v.* Searles, 18 R. I. 357, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 4, 5, 9, 11.

*South Carolina*.—Brown *v.* Cave, 23 S. Car. 257; McGee *v.* Wells, 52 S. Car. 472.

*Tennessee*.—Perkins *v.* Cheairs, 2 Baxt. (Tenn.) 194; Shoemaker *v.* Smith, 11 Humph.

shall be entitled to a specific interest in the property, a trust results to each to the extent of such interest;<sup>1</sup> but of course in the absence of an agreement as to their respective shares the trust cannot result beyond the proportionate amount of the payments.<sup>2</sup>

In Michigan it was held, before resulting trusts arising from the payment of the purchase money were abolished by statute, that the payment of a part or anything less than the whole of the purchase money would not raise a resulting trust.<sup>3</sup>

*bb. GRANTEES IN DEED CONTRIBUTING UNEQUALLY TOWARDS PURCHASE MONEY.* — Where land is conveyed by one deed to two or more persons who contribute to the purchase money in unequal amounts, their shares in the property will, in the absence of an agreement to the contrary, be in proportion to their respective contributions.<sup>4</sup>

*cc. PAYMENT MUST BE OF PART OF PURCHASE MONEY.* — As in case of a trust resulting from the payment of the entire consideration, there must of course be a payment of a part of the actual purchase money,<sup>5</sup> and the payment must be made at the time of the conveyance.<sup>6</sup> The latter requirement is, however, as in case of the payment of the entire consideration, sufficiently complied with by the person seeking to enforce a resulting trust *pro tanto* securing to the grantor the payment of his part of the consideration.<sup>7</sup>

(Tenn.) 81; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531.

*Texas.* — *Caldwell v. Bryan*, (Tex. Civ. App. 1898) 49 S. W. Rep. 240; *Roach v. Crume*, (Tex. Civ. App. 1897) 41 S. W. Rep. 86; *Barnett v. Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98; *Black v. Caviness*, 2 Tex. Civ. App. 118; *Neill v. Keese*, 13 Tex. 187; *Baylor v. Hopf*, 81 Tex. 637; *Parker v. Coop*, 60 Tex. 111. *Compare Gardner v. Rundell*, 70 Tex. 453.

*Utah.* — *Rogers v. Donnellan*, 11 Utah 108; *Chambers v. Emery*, 13 Utah 374.

*Vermont.* — *Pinney v. Fellows*, 15 Vt. 525; *Clark v. Clark*, 43 Vt. 685.

*Virginia.* — *Smith v. Proffitt*, 82 Va. 832; *Cox v. Cox*, 95 Va. 173; *Brown v. Brown*, 77 Va. 619; *Kane v. O'Connors*, 78 Va. 76; *Sinclair v. Sinclair*, 79 Va. 40; *McCully v. McCully*, 78 Va. 159.

*Washington.* — *Reese v. Murnan*, 5 Wash. 373; *Guthrie v. Tullock*, 5 Wash. 283; *Bowen v. Hughes*, 5 Wash. 442.

*West Virginia.* — *Currence v. Ward*, 43 W. Va. 367; *Smith v. Patton*, 12 W. Va. 541; *Seiler v. Mohn*, 37 W. Va. 507; *Shaffer v. Fetty*, 30 W. Va. 248; *Weinrich v. Wolf*, 24 W. Va. 299; *Murry v. Sell*, 23 W. Va. 475; *Heiskell v. Powell*, 23 W. Va. 177.

*Wisconsin.* — *Sheldon v. Sheldon*, 3 Wis. 699; *Campbell v. Campbell*, 70 Wis. 311. *Compare Orton v. Knab*, 3 Wis. 576.

**Leading Case.** — In the case of *Wray v. Steele*, 2 Ves. & B. 388, the rule that a part payment of the purchase money by another than the grantee may raise a resulting trust *pro tanto* was first announced. In this case the prior case of *Crop v. Norton*, 9 Mod. 233, which contains seeming dicta of Lord Hardwicke to the contrary, is explained.

**Resulting Trust After Termination of Life Estate.** — In *Booth's Appeal*, 35 Conn. 168, children contributed money towards the purchase of land for the use of their mother for life, and the title to the land was taken in the name of one of them. It was held that a trust

resulted to the other children, in proportion to the amount of the consideration paid by each, in the remainder after the termination of the life estate in the mother.

**Effect of Consent of Plaintiff to Form of Conveyance.** — A trust will result *pro tanto* in favor of a person paying one-half of the consideration, though the conveyance is made to the person paying the other half of the consideration, with the knowledge and consent of the former. *Murphy v. Clayton*, 113 Cal. 153.

**Rebutting Presumption of Trust.** — The presumption of a resulting trust arising from the payment of a part of the consideration is rebuttable, as in case of the payment of the entire consideration, by showing an intention on the part of the parties that the grantee should take the entire beneficial interest. *Brown v. Benight*, 3 Blackf. (Ind.) 39, 23 Am. Dec. 373. See also *supra*, this section, subdiv. 3. *b. Rebutting Presumption of Resulting Trust.*

1. **Agreement as to Interest of Parties.** — *Anthe v. Heide*, 85 Ala. 236; *McNamara v. Garrity*, 106 Ill. 384; *Culp v. Price*, 107 Iowa 133; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371.

2. *McGee v. Wells*, 52 S. Car. 472; *Caldwell v. Bryan*, (Tex. Civ. App. 1898) 49 S. W. Rep. 240.

3. **Rule as to Part Payment of Consideration Not Recognized in Michigan.** — *Bernard v. Bougard*, *Harr.* (Mich.) 130.

4. **Grantees in Deed Contributing Unequally towards Purchase Money.** — *Brothers v. Porter*, 6 B. Mon. (Ky.) 107; *Shroser v. Isaacs*, 28 N. J. Eq. 320.

5. **Payment Must Be of Part of Purchase Money.** — *Latham v. Henderson*, 47 Ill. 185; *Furber v. Page*, 143 Ill. 622; *Neal v. Neal*, 69 Ind. 419; *St. Clair v. Smith*, 3 Ohio 355.

6. **Time of Payment.** — See *supra*, this section, *Time of Payment*.

7. **Share of Consideration Secured to Be Paid.** — *Bibb v. Hunter*, 79 Ala. 351; *Honore v. Hutchings*, 8 Bush (Ky.) 687. See also *Rayl*

*dd.* PART PAYMENT NEED NOT BE IN MONEY. — It is not necessary that the payment should be in money. It may be made in anything of value which is accepted by the grantor, or by one of the grantees who pays the entire money consideration, as a part of the consideration of the conveyance.<sup>1</sup> In such cases, however, it would seem that some fixed valuation must have been placed upon the medium of payment, otherwise there would be no exact way of determining the portions of the consideration advanced by each.<sup>2</sup>

*ee.* PROPORTION OF CONSIDERATION PAID — RULE AS TO ALIQUOT PART. — The rule is laid down in a number of decisions that the part of the consideration paid by him in whose favor the resulting trust is sought to be enforced must be shown to be paid for some specific part or distinct interest in the estate conveyed — for "some aliquot part," as it is sometimes expressed; that is, for a specific share, as a tenancy in common or joint tenancy of one-half, one-quarter, or other particular fraction of the whole, or for a particular interest, as a life estate or tenancy for years, or remainder in the whole; and that a general contribution of a sum of money towards the entire purchase is not sufficient to raise a resulting trust *pro tanto*.<sup>3</sup> This rule is not, however, generally recognized so far as to require the part of the consideration paid to be an exact divisor of the whole consideration, or aliquot part of the whole;<sup>4</sup> for, as has been said in a well-considered case, if, for example, the entire consideration was one hundred dollars and the part payment forty-nine dollars, "forty-nine is just as well a certain fraction of one hundred as is fifty."<sup>5</sup> And in other cases resulting trusts *pro tanto* have been enforced though the part paid by the person seeking to enforce the resulting trust was not one-half, one-third, or a like fraction.<sup>6</sup>

*v.* Rayl, 58 Kan. 585; Bear v. Koenigstein, 16 Neb. 65. Compare Olcott v. Bynum, 17 Wall. (U. S.) 44; Bourke v. Callanan, 160 Mass. 195.

1. Part Payment Need Not Be in Money — California. — Roberts v. Haley, 65 Cal. 397.

Illinois. — Donlin v. Bradley, 119 Ill. 412; Gregory v. Gover, 19 Ill. 608.

Indiana. — Hill v. Pollard, 132 Ind. 588.

Nevada. — Frederick v. Hass, 5 Nev. 389.

Oregon. — Puckett v. Benjamin, 21 Oregon 370.

Rhode Island. — Aborn v. Searles, 18 R. I. 357, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 4, 5, 9, 11.

Texas. — Parker v. Coop, 60 Tex. 111; Baylor v. Hopf, 81 Tex. 637; Caldwell v. Bryan, (Tex. Civ. App. 1898) 49 S. W. Rep. 240.

See also Harrold v. Lane, 53 Pa. St. 268; Bigley v. Jones, 114 Pa. St. 510.

The mere assumption by the grantee, however, as a part of the consideration of the conveyance, of an indebtedness on the part of the grantor to a third person for negotiating the sale, will not create a resulting trust in favor of such third person. Mayfield v. Turner, 180 Ill. 332.

2. Valuation Placed on Items of Mixed Consideration Must Have Been Fixed. — Crop v. Norton, 9 Mod. 233; Wray v. Steele, 2 Ves. & B. 388; Smith v. Burnham, 3 Sumn. (U. S.) 435; Perry v. McHenry, 13 Ill. 227; Sayre v. Townsend, 15 Wend. (N. Y.) 647.

3. Rule Requiring Aliquot Payment — United States. — *In re* Wood, 5 Fed. Rep. 443; Olcott v. Bynum, 17 Wall. (U. S.) 44.

Alabama. — Allen v. Caylor, (Ala. 1898) 24 So. Rep. 512, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 16. Compare Beadle v. Seat, 102 Ala. 532.

Illinois. — Furber v. Page, 143 Ill. 622; Pickler v. Pickler, 180 Ill. 168; Van Buskirk v. Van Buskirk, 148 Ill. 9; Strong v. Messinger, 148 Ill. 431; Reed v. Reed, 135 Ill. 482, affirming 32 Ill. App. 21; Stephenson v. McClintock, 141 Ill. 604.

Massachusetts. — Moore v. Stinson, 144 Mass. 594; Bourke v. Callanan, 160 Mass. 195; McGowan v. McGowan, 14 Gray (Mass.) 119, 74 Am. Dec. 668; Bailey v. Hemenway, 147 Mass. 326.

New Jersey. — Cutler v. Tuttle, 19 N. J. Eq. 549.

New York. — Schierloh v. Schierloh, 72 Hun (N. Y.) 150; White v. Carpenter, 2 Paige (N. Y.) 217; Sayre v. Townsend, 15 Wend. (N. Y.) 647.

Ohio. — Reynolds v. Morris, 17 Ohio St. 510.

Oregon. — Barger v. Barger, 30 Oregon 268.

Rhode Island. — O'Donnell v. White, 18 R. I. 659.

Tennessee. — Haggard v. Benson, 3 Tenn. Ch. 268; Perkins v. Cheairs, 2 Baxt. (Tenn.) 194.

Washington. — Guthrie v. Tullock, 5 Wash. 283.

Wisconsin. — Campbell v. Campbell, 70 Wis. 311.

4. Rule Not Fully Recognized — United States. — Eldredge v. Jenkins, 3 Story (U. S.) 181.

Alabama. — Bibb v. Hunter, 79 Ala. 351.

Illinois. — Fleming v. McHale, 47 Ill. 282.

Iowa. — Culp v. Price, 107 Iowa 133, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 15.

West Virginia. — Currence v. Ward, 43 W. Va. 367.

5. Forty-nine One-hundredths. — Currence v. Ward, 43 W. Va. 367.

6. Other Fractional Payment Held Sufficient. — Rhea v. Tucker, 56 Ala. 450; Camden v. Ben-



*ff.* PROOF OF PROPORTION OF CONSIDERATION PAID. — The person in whose favor the trust is sought to be enforced must show what amount of the consideration was paid by him, and if proof of the amount is uncertain no resulting trust will arise.<sup>1</sup> Still, it has been held in a few cases that where it is shown that part of the consideration was paid by another than the grantee, the law would presume, in the absence of further proof as to the exact amount paid by each, that they contributed equally, and a resulting trust would be decreed to the extent of a one-half interest.<sup>2</sup> And in other cases, though there was no distinct and positive proof of the amount paid by each of the parties, resulting trusts have been decreed in equal proportions where there was evidence that it was the intention of the parties to take equal interests.<sup>3</sup>

*gg.* PRIORITY AS TO MORTGAGE TO GRANTEE FOR BALANCE OF PURCHASE PRICE. — Where only a part of the purchase money is paid at the time of the conveyance and a mortgage on the land conveyed is given by the grantee for the balance, this mortgage will have priority over the claim to a resulting trust *pro tanto* by one who paid part of the purchase money.<sup>4</sup>

*h.* EFFECT OF AGREEMENT TO HOLD IN TRUST. — The fact that the person in whose name the title is taken verbally agrees at the time of the conveyance to hold the property in trust for the person by whom the purchase money was paid, upon the same terms which the law would imply, does not create an express trust, which would be unenforceable on account of the statute of frauds, and thereby prevent the implied trust from resulting from the transaction itself;<sup>5</sup> for, as has been said, an invalid agreement cannot destroy

nett, 64 Ark. 155; Crawford v. Manson, 82 Ga. 118; Latham v. Henderson, 47 Ill. 185; Kelly v. Kelly, 126 Ill. 550; Hill v. Pollard, 132 Ind. 588; Pierce v. Pierce, 7 B. Mon. (Ky.) 433; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Chadwick v. Felt, 35 Pa. St. 305; Clark v. Clark, 43 Vt. 685; Sheldon v. Sheldon, 3 Wis. 699. Compare Dudley v. Bachelder, 53 Me. 403.

*1. Proof of Portion of Consideration Paid* — England. — Crop v. Norton, 9 Mod. 233, explained in Smith v. Burnham, 3 Sumn. (U. S.) 466, and in Wray v. Steele, 2 Ves. & B. 388.

United States. — Smith v. Burnham, 3 Sumn. (U. S.) 435; Olcott v. Bynum, 17 Wall. (U. S.) 44; Ducie v. Ford, 138 U. S. 591; *In re Wood*, 5 Fed. Rep. 443.

Alabama. — Bibb v. Hunter, 79 Ala. 351.

California. — Woodside v. Hewel, 109 Cal. 481.

Iowa. — Culp v. Price, 107 Iowa 133, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 15.

Maine. — Baker v. Vening, 30 Me. 121, 50 Am. Dec. 617.

Massachusetts. — Bailey v. Hemenway, 147 Mass. 326.

Mississippi. — Coppage v. Barnett, 34 Miss. 621.

Nebraska. — Bear v. Koenigstein, 16 Neb. 65; Leader v. Tierney, 45 Neb. 753.

Nevada. — Frederick v. Hass, 5 Nev. 389.

New Jersey. — Wheeler v. Kirtland, 23 N. J. Eq. 13; Shroser v. Isaacs, 28 N. J. Eq. 320; Cutler v. Tuttle, 19 N. J. Eq. 549.

Ohio. — Reynolds v. Morris, 17 Ohio St. 510.

Oregon. — Barger v. Barger, 30 Oregon 268; Sisemore v. Pelton, 17 Oregon 546.

Texas. — Zundell v. Gess, 73 Tex. 144, reversing (Tex. 1888) 9 S. W. Rep. 879.

West Virginia. — Currence v. Ward, 43 W. Va. 367; Shaffer v. Fetty, 30 W. Va. 248; Coleman v. Parran, 43 W. Va. 737.

*2. Equal Contributions Presumed.* — Van Buskirk v. Van Buskirk, 148 Ill. 9; Edwards v. Edwards, 39 Pa. St. 369; Shoemaker v. Smith, 11 Humph. (Tenn.) 81. See also Letcher v. Letcher, 4 J. J. Marsh. (Ky.) 590.

*In Culp v. Price*, 107 Iowa 133, it was, however, expressly held that the court could not assume that the parties contributed equally.

*3. Declarations of Grantee as to Interest of Third Person.* — Stephenson v. McClintock, 141 Ill. 604.

*4. Priority as to Mortgage for Balance of Purchase Money.* — Capers v. McCaa, 41 Miss. 479.

If, however, a fiduciary invests without authority the funds of his *cestui que trust* in part payment for land, and the grantor has knowledge of the ownership of the funds by the *cestui que trust*, a resulting trust *pro tanto* will be decreed in favor of the *cestui que trust*, even as against the claim of the grantor for payment of the balance of the purchase money. Brooks v. Fowler, 82 Ga. 329.

*5. Effect of Oral Promise to Hold in Trust* — United States. — Smithsonian Inst. v. Meech, 169 U. S. 398, reversing 8 App. Cas. (D. C.) 490.

Arkansas. — McGuire v. Ramsey, 9 Ark. 518.

Connecticut. — Corr's Appeal, 62 Conn. 403; Booth's Appeal, 35 Conn. 165; Barrows v. Bohan, 41 Conn. 278; Ward v. Ward, 59 Conn. 196.

District of Columbia. — Sherman v. Sherman, 20 D. C. 330.

Illinois. — Harris v. McIntyre, 118 Ill. 275; Van Buskirk v. Van Buskirk, 148 Ill. 9; McNamara v. Garrity, 106 Ill. 384; Furber v. Page, 143 Ill. 622; Smith v. Smith, 85 Ill. 189. Compare Sheldon v. Harding, 44 Ill. 68.

Indiana. — McCollister v. Willey, 52 Ind. 382; Thornburg v. Buck, 13 Ind. App. 446; McDonald v. McDonald, 24 Ind. 68. Compare Irwin v. Ivers, 7 Ind. 308, 63 Am. Dec. 420; Miller v. Blackburn, 14 Ind. 62.

Iowa. — Cotton v. Wood, 25 Iowa 45.

a good cause of action, and this is no less true of resulting trusts than of other legal rights.<sup>1</sup> If, however, the grantee verbally agrees at the time of the conveyance to hold upon a different trust from that which the law would imply, this, it has been held, will show an intention on the part of the parties that a trust by implication of law should not result, and will defeat the resulting trust which would otherwise have arisen.<sup>2</sup> So, also, when the person by whom the purchase money is paid causes the conveyance to be made upon an express trust set out in the deed, he cannot claim a resulting trust in opposition to such express declaration of trust.<sup>3</sup>

*o. ADVANCEMENTS* — (1) *Creating and Rebutting Presumption of Advancement Generally*. — The usual presumption of a resulting trust which arises where property is purchased by one who furnishes the purchase money but takes title in the name of another is not operative where he who pays the consideration is under a legal, natural, or moral obligation to support the person in whose name title is taken. In such a case the presumption of a resulting trust is rebutted and displaced by a presumption, founded on this moral or legal obligation to support, that the transaction is intended for the grantee's benefit; in other words, the presumption in favor of an advancement overcomes that in favor of a resulting trust.<sup>4</sup>

*Rebutting Presumption of Advancement*. — The presumption of an advancement from the relationship of the parties is founded upon the presumed intention of the parties, and may be rebutted by evidence of a different intention.<sup>5</sup>

(2) *Presumption of Advancement as Between Husband and Wife* — (a) *Payment by Husband, Conveyance to Wife* — *ad. IN GENERAL*. — The presumption of an advancement or settlement arises when a husband purchases in his wife's name

*Kansas*. — *Franklin v. Colley*, 10 Kan. 264; *Rayl v. Rayl*, 58 Kan. 585.

*Maryland*. — *Keller v. Kunkel*, 46 Md. 565. *Mississippi*. — *Runnels v. Jackson*, 1 How. (Miss.) 358; *Thomas v. Thomas*, 62 Miss. 531; *Robinson v. Leflore*, 59 Miss. 148.

*Missouri*. — *Alexander v. Warrance*, 17 Mo. 228; *Condit v. Maxwell*, 142 Mo. 266.

*New Hampshire*. — *Hall v. Congdon*, 56 N. H. 279; *Page v. Page*, 8 N. H. 187; *Converse v. Noyes*, 66 N. H. 570.

*New Jersey*. — *Reeves v. Evans*, (N. J. 1896) 34 Atl. Rep. 477; *Warren v. Tynan*, 54 N. J. Eq. 402.

*New York*. — *Siemon v. Schurck*, 29 N. Y. 598, 33 Barb. (N. Y.) 9; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17; *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 540.

*Pennsylvania*. — *M'Culloch v. Cowher*, 5 W. & S. (Pa.) 427.

*Tennessee*. — *McDaniel v. Self*, 8 Humph. (Tenn.) 58.

*Utah*. — *Chambers v. Emery*, 13 Utah 374; *Rogers v. Donnellan*, 11 Utah 108.

*Compare* *Brothers v. Porter*, 6 B. Mon. (Ky.) 107.

1. *Robinson v. Leflore*, 59 Miss. 148.

2. *Oral Agreement for Trust Inconsistent with Trust Implied by Law* — *Alabama*. — *Rose v. Gibson*, 71 Ala. 35.

*District of Columbia*. — *Meech v. Smithsonian Inst.*, 8 App. Cas. (D. C.) 490.

*Illinois*. — *Stephenson v. Crapnell*, 114 Ill. 19; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Scott v. Harris*, 113 Ill. 447; *Moore v. Horsley*, 156 Ill. 36.

*Iowa*. — *Dunn v. Zwilling*, 94 Iowa 233.

*New Hampshire*. — *Dow v. Jewell*, 21 N. H. 470.

3. *Express Written Declaration of Trust* — *Alabama*. — *Rose v. Gibson*, 71 Ala. 35.

*Mississippi*. — *Mercer v. Stark*, Smed. & M. Ch. (Miss.) 479.

*Missouri*. — *Alexander v. Warrance*, 17 Mo. 228.

*New York*. — *Ring v. McCoun*, 10 N. Y. 268; *Anstice v. Brown*, 6 Paige (N. Y.) 448; *Leggett v. Dubois*, 5 Paige (N. Y.) 114, 28 Am. Dec. 413.

*Pennsylvania*. — *Long v. Long*, 12 W. N. C. (Pa.) 100.

*West Virginia*. — *Coleman v. Parran*, 43 W. Va. 737.

4. *Advancement Presumed from Relationship of Parties*. — *Dyer v. Dyer*, 2 Cox Ch. 92, 1 White & T. Lead. Cas. 255; *Long v. King*, 117 Ala. 423; *Cohen v. Cohen*, 1 App. Cas. (D. C.) 240; *Acker v. Priest*, 92 Iowa 617; *Harris v. Elliott*, 45 W. Va. 245. See also the titles *ADVANCEMENTS*, vol. 1, p. 769; *GIFTS*, vol. 14, p. 1032 *et seq.*; *MARRIAGE SETTLEMENTS*.

*Title in Name of Woman with Whom Illicit Relations Were Sustained*. — Where a man who had seduced a woman and sustained illicit relations with her furnished money to her wherewith to purchase a house, which she did, it was held that there was no trust resulting to him. It was the case of an executed gift intended as a compensation for injury done. *Gisaf v. Neval*, 81 Pa. St. 354.

Where a marriage was void, it was held that a purchase by the man in the names of himself and the woman gave rise to no presumption of advancement. *Soar v. Foster*, 4 Kay & J. 152.

5. *Dyer v. Dyer*, 2 Cox Ch. 94, 1 White & T. Lead. Cas. 255. See also the title *ADVANCEMENTS*, vol. 1, p. 771.



with his own money, and in the absence of evidence to show a contrary intention no resulting trust is created in favor of the husband in such a case.<sup>1</sup>

*bb. CIRCUMSTANCES REBUTTING PRESUMPTION.* — The presumption in favor of an advancement where land is paid for by the husband and conveyance is made to the wife is a presumption of fact and not of law, and may therefore be rebutted by evidence showing that at the time of the conveyance it was the intention of the husband that the wife should not take the beneficial interest,<sup>2</sup>

**1. Payment by Husband, Title in Wife** — *United States*. — *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; *Jackson v. Jackson*, 91 U. S. 122; *Smithsonian Inst. v. Meech*, 169 U. S. 398.

*Alabama*. — *Harden v. Darwin*, 66 Ala. 55.

*Arkansas*. — *Gainus v. Cannon*, 42 Ark. 503; *Kline v. Ragland*, 47 Ark. 111; *Ward v. Ward*, 36 Ark. 586; *Milner v. Freeman*, 40 Ark. 62.

*Colorado*. — *Davis v. Davis*, 18 Colo. 66.

*Connecticut*. — *Corr's Appeal*, 62 Conn. 403.

*District of Columbia*. — *Cohen v. Cohen*, 1 App. Cas. (D. C.) 240; *Meech v. Smithsonian Inst.*, 8 App. Cas. (D. C.) 490; *Sherman v. Sherman*, 20 D. C. 330.

*Illinois*. — *Fry v. Morrison*, 159 Ill. 244; *Sweet v. Dean*, 43 Ill. App. 650; *Thomas v. Chicago*, 55 Ill. 403; *Goelz v. Goelz*, 157 Ill. 33; *Smith v. Smith*, 144 Ill. 299.

*Indiana*. — *Lochenour v. Lochenour*, 61 Ind. 595.

*Iowa*. — *Cotton v. Wood*, 25 Iowa 43; *Andrews v. Oxley*, 38 Iowa 578; *Hagan v. Powers*, 103 Iowa 593; *Burkhardt v. Burkhardt*, 107 Iowa 369.

*Kentucky*. — *King v. Morris*, 2 B. Mon. (Ky.) 99.

*Maine*. — *Long v. McKay*, 84 Me. 199; *Danforth v. Briggs*, 89 Me. 316; *Lane v. Lane*, 80 Me. 570.

*Maryland*. — *Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Groff v. Rohrer*, 35 Md. 327.

*Massachusetts*. — *Cormerais v. Wesselhoeft*, 114 Mass. 550; *Cairns v. Colburn*, 104 Mass. 274; *Edgerly v. Edgerly*, 112 Mass. 175; *Perkins v. Nichols*, 11 Allen (Mass.) 542.

*Minnesota*. — *Johnson v. Johnson*, 16 Minn. 512.

*Mississippi*. — *Wilson v. Beauchamp*, 50 Miss. 24.

*Missouri*. — *Alexander v. Warrance*, 17 Mo. 230; *Schuster v. Schuster*, 93 Mo. 438; *Price v. Kane*, 112 Mo. 413; *Fathman, etc., Planing Mill Co. v. Christophel*, 60 Mo. App. 106; *Kinzey v. Kinzey*, 115 Mo. 496; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429; *Seibold v. Christman*, 75 Mo. 308, *affirming* 7 Mo. App. 254; *Schmalhorst v. Peebles*, 71 Mo. App. 219; *Gilliland v. Gilliland*, 96 Mo. 522.

*Nebraska*. — *Gray v. Gray*, 13 Neb. 453; *Bartlett v. Bartlett*, 13 Neb. 456.

*New Hampshire*. — *Farley v. Blood*, 30 N. H. 354; *Dickinson v. Davis*, 43 N. H. 647, 80 Am. Dec. 202. See, however, *Pembroke v. Allenstown*, 21 N. H. 107; *Tebbetts v. Tilton*, 31 N. H. 273.

*New Jersey*. — *Duval v. Duval*, 54 N. J. Eq. 581; *Leslie v. Leslie*, 53 N. J. Eq. 275; *Bacon v. Devinney*, 55 N. J. Eq. 449; *Whitley v. Ogle*, 47 N. J. Eq. 67; *Clos v. Boppe*, 23 N. J. Eq. 270; *Sing Bow v. Sing Bow*, (N. J. 1894) 30 Atl. Rep. 867; *Read v. Huff*, 40 N. J. Eq.

229; *Wheeler v. Kirtland*, 23 N. J. Eq. 18; *Persons v. Persons*, 25 N. J. Eq. 250; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155.

*New York*. — *Scott v. Calladine*, 79 Hun (N. Y.) 79; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Astreen v. Flanagan*, 3 Edw. (N. Y.) 279.

*North Carolina*. — *Arrington v. Arrington*, 114 N. Car. 116; *Benbow v. Moore*, 114 N. Car. 263.

*Ohio*. — Apparently *contra* in *Parish v. Rhodes*, *Wright* (Ohio) 339.

*Oregon*. — *Taylor v. Miles*, 19 Oregon 550.

*Pennsylvania*. — *Underwood v. Warner*, 4 Phila. (Pa.) 6, 17 Leg. Int. (Pa.) 20; *Earnest's Appeal*, 106 Pa. St. 310; *Roberts's Appeal*, 85 Pa. St. 87; *Gothart v. Geier*, 36 Pa. L. J. 104; *Feig v. Meyers*, 102 Pa. St. 10; *Bowser v. Bowser*, 82 Pa. St. 57; *Wylie v. Mansley*, 6 Pa. Co. Ct. 205; *Kline's Appeal*, 39 Pa. St. 463.

*Rhode Island*. — *Hudson v. White*, 17 R. I. 519, *citing* 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 18.

*South Carolina*. — *Bridgers v. Howell*, 27 S. Car. 425.

*Tennessee*. — *Keys v. Keys*, 11 Heisk. (Tenn.) 425.

*Texas*. — *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

*Vermont*. — *Bent v. Bent*, 44 Vt. 555; *Bennett v. Camp*, 54 Vt. 36.

*Virginia*. — *Irvine v. Greever*, 32 Gratt. (Va.) 411; *Steagall v. Steagall*, 90 Va. 73.

*Washington*. — *Spencer v. Terrel*, 17 Wash. 514.

*West Virginia*. — *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837.

See further the title **ADVANCEMENTS**, vol. 1, p. 773.

**If a Woman, While Sole, Purchases an Estate in Her Own Name**, taking the title, and the person to whom she is engaged pays the price after her marriage, such payment must be regarded as an advancement and provision for her. *King v. Morris*, 2 B. Mon. (Ky.) 99.

**A Verbal Promise of the Husband to Purchase in the Name of the Wife** does not raise a resulting trust in her favor where the deed for the land was actually taken in the name of a third person and the purchase price was paid by the husband. *Lawrence v. Lawrence*, 14 Oregon 77.

**2. Presumption of Advancement Rebuttable** — *England*. — *Murless v. Franklin*, 1 Swanst. 13; *Finch v. Finch*, 15 Ves. Jr. 43.

*Canada*. — *Owen v. Kennedy*, 20 Grant Ch. (U. C.) 163.

*United States*. — *Smithsonian Inst. v. Meech*, 169 U. S. 398.

*Alabama*. — *Harden v. Darwin*, 66 Ala. 55.

*Arkansas*. — *Kline v. Ragland*, 47 Ark. 111; *Milner v. Freeman*, 40 Ark. 62.

*Connecticut*. — *Ward v. Ward*, 59 Conn. 188;



or that she should take the beneficial interest only to a limited extent.<sup>1</sup>

**Agreement of Wife to Hold in Trust.** — Where the wife, at the time of the conveyance to her, agrees to hold the property in trust for her husband, who advanced the purchase money, this negatives the presumed intention on which the presumption rests, and a resulting trust arises in favor of the husband.<sup>2</sup>

**Mistake as to Effect of Deed to Wife.** — So, also, where it appeared that the husband, at the time of the conveyance, was under the impression that by a deed to his wife he would acquire a joint title with her, a resulting trust was held to arise in his favor.<sup>3</sup>

**Purchase by Wife as Agent.** — And where the wife purchased the property as agent for her husband, paying for it with his money, but took the title in her own name, a resulting trust in his favor was held to arise.<sup>4</sup> And this is especially true where the title was taken by the wife in her name against the express objection of her husband.<sup>5</sup>

**Possession and Improvement of Land by Husband.** — The facts that the husband took possession of the land, improved it, and paid the taxes thereon, have been held insufficient to rebut the presumption in favor of an advancement,<sup>6</sup> though these facts connected with declarations by the wife that the land belonged to her husband have been held sufficient.<sup>7</sup>

*cc.* **ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE** — **Admissibility.** — The presumption of an advancement or gift may be either rebutted or supported by proof of antecedent or contemporaneous acts or facts, or by proof of acts or facts so

Corr's Appeal, 62 Conn. 408; *Hart v. Chase*, 46 Conn. 207.

*Illinois.* — *Goelz v. Goelz*, 157 Ill. 33, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 18.

*Iowa.* — *Sunderland v. Sunderland*, 19 Iowa 328.

*Maine.* — *Gray v. Jordan*, 87 Me. 140; *Danforth v. Briggs*, 89 Me. 316.

*Massachusetts.* — *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Peterson v. Farnum*, 121 Mass. 476.

*Mississippi.* — *Wilson v. Beauchamp*, 44 Miss. 556, 50 Miss. 24.

*Missouri.* — *Price v. Kane*, 112 Mo. 412; *Darrier v. Darrier*, 58 Mo. 222; *Hall v. Hall*, 107 Mo. 109; *Seibold v. Christman*, 7 Mo. App. 254.

*New Hampshire.* — *Farley v. Blood*, 30 N. H. 354.

*New Jersey.* — *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155; *Persons v. Persons*, 25 N. J. Eq. 250; *Sing Bow v. Sing Bow*, (N. J. 1894) 30 Atl. Rep. 867; *Duval v. Duval*, 54 N. J. Eq. 581, 56 N. J. Eq. 375.

*New York.* — *Welton v. Divine*, 20 Barb. (N. Y.) 9; *Partridge v. Havens*, 10 Paige (N. Y.) 618; *Bitter v. Jones*, 28 Hun (N. Y.) 492; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Watson v. Le Row*, 6 Barb. (N. Y.) 489; *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 540; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17; *Scott v. Calladine*, 79 Hun (N. Y.) 79.

*North Carolina.* — *Arrington v. Arrington*, 114 N. Car. 116.

*Rhode Island.* — *Hudson v. White*, 17 R. I. 519.

*Vermont.* — *Smith v. Strahan*, 10 Vt. 114, 97 Am. Dec. 622.

*Vermont.* — *Wallace v. Bowen*, 28 Vt. 638.

*Compare* *Lochenour v. Lochenour*, 61 Ind. 595, where under statute the wife was held incapable of making a declaration of trust.

The contention that a presumption is raised

of an advancement or settlement cannot be rebutted because a wife cannot be a trustee for her husband has been expressly overruled. *Harden v. Darwin*, 66 Ala. 55; *Milner v. Freeman*, 40 Ark. 62.

**1. Wife Intended to Take Beneficial Interest as to Part Only.** — *Duval v. Duval*, 56 N. J. Eq. 375. In such a case a trust results as to the interest not intended to be conferred on her.

**2. Agreement of Wife to Hold in Trust** — *Unita States*. — *Smithsonian Inst. v. Meech*, 169 U. S. 398.

*Alabama.* — *Harden v. Darwin*, 66 Ala. 55. *District of Columbia.* — *Sherman v. Sherman*, 20 D. C. 330.

*Iowa.* — *Fox v. Doherty*, 30 Iowa 334; *Cotton v. Wood*, 25 Iowa 43.

*Massachusetts.* — *Cairns v. Colburn*, 104 Mass. 274; *Whitten v. Whitten*, 3 Cush. (Mass.) 191.

*New Jersey.* — *Duval v. Duval*, 54 N. J. Eq. 581.

*New York.* — *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537.

*Compare* *Lochenour v. Lochenour*, 61 Ind. 595.

**3. Mistake as to Effect of Deed.** — *Milner v. Freeman*, 40 Ark. 62. See also *Wallace v. Bowen*, 28 Vt. 638.

**4. Purchase by Wife as Agent.** — *Persons v. Persons*, 25 N. J. Eq. 250. See also *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155.

**5. Gogherty v. Bennett**, 37 N. J. Eq. 87.

**6. Possession and Improvement of Land by Husband.** — *Freeman v. Freeman*, 104 Ill. 111; *Fox v. Morrison*, 159 Ill. 244; *Scott v. Calladine*, 79 Hun (N. Y.) 79.

In *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622, it was held that such facts would be some, though by no means conclusive, evidence that the husband intended that the purchase should be in trust for himself.

**7. Hagan v. Powers**, 103 Iowa 593.

soon after the purchase as to be fairly considered parts of the transaction.<sup>1</sup> An act on the part of the person in whose favor it is sought to introduce such evidence must, however, relate to the time of the purchase.<sup>2</sup>

**Sufficiency.** — It has generally been held that the evidence to overcome the presumption of an advancement in favor of the wife must be clear and explicit.<sup>3</sup>

(b) **Payment by Wife, Conveyance to Husband** — *aa. IN GENERAL.* — Cases where the purchase money is paid by the wife and the purchase is in the name of the husband constitute no exception to the rule that a trust in favor of the person advancing the purchase money will be presumed,<sup>4</sup> for there is not that obligation on the part of the wife to support the husband which rebuts the pre-

**1. Admissibility of Evidence.** — *Goelz v. Goelz*, 157 Ill. 33 [citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 18, 19]; *Wilson v. Beauchamp*, 50 Miss. 24; *Read v. Huff*, 40 N. J. Eq. 229; *Taylor v. Taylor*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 55; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

**2. Subsequent Acts.** — *Read v. Huff*, 40 N. J. Eq. 229; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

**3. Quantum of Proof.** — *Danforth v. Briggs*, 89 Me. 316; *Long v. McKay*, 84 Me. 199; *Cormerais v. Wesselhoeft*, 114 Mass. 550; *Read v. Huff*, 40 N. J. Eq. 229; *Whitley v. Ogle*, 47 N. J. Eq. 67; *Bacon v. Devinney*, 55 N. J. Eq. 449; *Peer v. Peer*, 11 N. J. Eq. 432; *Earnest's Appeal*, 106 Pa. St. 310; *Gothart v. Geier*, 36 Pa. L. J. 104; *Wylie v. Mansley*, 6 Pa. Co. Ct. 205. See also *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

**Evidence Held Insufficient to Rebut Presumption.** — *Cohen v. Cohen*, 1 App. Cas. (D. C.) 240; *Smith v. Smith*, 144 Ill. 299; *Goelz v. Goelz*, 157 Ill. 33; *Whitley v. Ogle*, 47 N. J. Eq. 67; *Sing Bow v. Sing Bow*, (N. J. 1894) 30 Atl. Rep. 867.

**4. Payment by Wife, Purchase in Name of Husband** — *United States*. — *Voorheis v. Blanton*, 89 Fed. Rep. 885; *Nicklin v. Wythe*, 2 Sawy. (U. S.) 535.

*Alabama.* — *Shelby v. Tardy*, 84 Ala. 327; *Kimbrough v. Nelms*, 104 Ala. 554.

*Arkansas.* — *Gainus v. Cannon*, 42 Ark. 503; *Kline v. Ragland*, 47 Ark. 111; *Sale v. McLean*, 29 Ark. 612.

*California.* — *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209.

*District of Columbia.* — *Cooksey v. Bryan*, (D. C.) 22 Wash. L. Rep. 252, 256.

*Georgia.* — *Bell v. Stewart*, 98 Ga. 669; *Brooks v. Fowler*, 82 Ga. 329.

*Illinois.* — *Moss v. Moss*, 95 Ill. 449; *Loften v. Witboard*, 92 Ill. 461; *Francis v. Roades*, 146 Ill. 635; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120.

*Indiana.* — *Heberd v. Wines*, 105 Ind. 239; *Haymond v. Bledsoe*, 11 Ind. App. 202, 54 Am. St. Rep. 502; *Resor v. Resor*, 9 Ind. 347; *Derry v. Derry*, 74 Ind. 560; *Radcliff v. Radford*, 96 Ind. 482; *Catherwood v. Watson*, 65 Ind. 576; *Pierce v. Hower*, 142 Ind. 626.

*Iowa.* — *Seeberger v. Campbell*, 88 Iowa 63.

*Maryland.* — *Thomas v. Standiford*, 49 Md. 181; *Keller v. Keller*, 45 Md. 269; *Brooks v. Dent*, 1 Md. Ch. 523.

*Massachusetts.* — *Hayward v. Cain*, 110 Mass. 273.

*Michigan.* — *Wales v. Newbould*, 9 Mich. 45. *Mississippi.* — *Greaves v. Atkinson*, 68 Miss. 598; *Hopkins v. Carey*, 23 Miss. 58.

*Nebraska.* — *Cleghorn v. Obernalte*, 53 Neb. 687.

*New Jersey.* — *Krauth v. Thiele*, 45 N. J. Eq. 407.

*North Carolina.* — *Ross v. Hendrix*, 110 N. Car. 403; *Cunningham v. Bell*, 83 N. Car. 328.

*Ohio.* — *McGovern v. Knox*, 21 Ohio St. 547, 8 Am. Rep. 80.

*Oregon.* — *Springer v. Young*, 14 Oregon 280.

*Pennsylvania.* — *Henderson v. MacIay*, (Pa. 1886) 5 Cent. Rep. 225; *Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333; *Nichols v. Nichols*, 149 Pa. St. 172; *Light v. Zeller*, 144 Pa. St. 582; *Lloyd v. Woods*, 176 Pa. St. 63; *Bigley v. Jones*, 114 Pa. St. 510; *Moore v. Moore*, 165 Pa. St. 464; *Beringer v. Lutz*, 179 Pa. St. 1; *Crawford v. Thompson*, 142 Pa. St. 551; *Gilchrist v. Brown*, 165 Pa. St. 275.

*Texas.* — *Parker v. Coop*, 60 Tex. 112; *Blum v. Rogers*, 71 Tex. 668.

*West Virginia.* — *Berry v. Wiedman*, 40 W. Va. 36, 52 Am. St. Rep. 866.

**The Presumption of an Advancement** as excluding that of a resulting trust appears to be applied in this class of cases in *Brownell v. Stoddard*, 42 Neb. 177.

**Purchase with Wife's Money — Conveyance to Husband and Wife.** — When a purchase is made with the wife's money and a conveyance in fee is taken to the husband and wife, in the absence of evidence that the wife intended to create a trust for herself it has been held that the law will infer a gift to the husband. *Lux v. Hoff*, 47 Ill. 425, 95 Am. Dec. 502.

**Part Payment by Wife.** — And where part of the purchase money is paid by the wife a trust results in her favor *pro tanto*. *Shelby v. Tardy*, 84 Ala. 327; *Kline v. Ragland*, 47 Ark. 111; *Springer v. Young*, 14 Oregon 280.

**In Tennessee**, while a purchase in the husband's name with the wife's funds, when there is an express contract at the time when the trade is made and the deed is taken that the purchase is for the wife's benefit, will create a resulting trust, *Click v. Click*, 1 Heisk. (Tenn.) 607; *Pritchard v. Wallace*, 4 Sneed (Tenn.) 405; *Pilow v. Thomas*, 1 Baxt. (Tenn.) 130; *Nashville Trust Co. v. Lannom* (Tenn. Ch. 1896) 36 S. W. Rep. 977; yet the mere fact of such a purchase where there is no express contract of this character will not, it seems, raise a presumption of a resulting trust, *Bibb v. Smith*, 12 Heisk. (Tenn.) 728; *Nashville Trust Co. v. Lannom*, (Tenn. Ch. 1896) 36 S. W. Rep.



sumption of a resulting trust where the husband purchases with his money and takes title in his wife's name.<sup>1</sup> Where, at the time of the conveyance, the husband verbally agrees to hold the land in trust for his wife, by whom the purchase money is paid, no question of an intention to confer a beneficial interest upon the husband can arise, and a resulting trust in favor of the wife is raised.<sup>2</sup> So also a trust results in favor of the wife where the title is taken in the name of the husband without the consent of the wife,<sup>3</sup> and also where the deed to the husband was executed by mistake.<sup>4</sup>

**Purchase by Wife with Her Personalty.** — Where real estate is purchased by a wife with personalty to which the husband was entitled by reason of the marital relation, and this is done with the consent of the husband, the transaction stands on the same footing as where land is purchased by the husband in the name of the wife, and no presumption of a resulting trust in favor of the husband arises.<sup>5</sup>

**Rebutting Presumption.** — Where the purchase money is paid by the wife and the conveyance is taken in the name of the husband, the husband may show that it was not the intention of the wife at the time of the purchase that the beneficial interest should remain in her, and thereby rebut the presumption of a resulting trust.<sup>6</sup> To have this effect, however, the relationship of the parties requires that the evidence in support of a gift to the husband shall be clear and unequivocal.<sup>7</sup>

*bh.* **PURCHASE BY HUSBAND WITH PROPERTY OF WIFE — Separate Property.** — Where, without the consent of his wife, the husband invests her separate property in purchases in his own name,<sup>8</sup> or where he is authorized by her to use her sepa-

977; *Smith v. Quarles*, (Tenn. Ch. 1897) 46 S. W. Rep. 1035; *Henderson v. Baniel*, (Tenn. Ch. 1897) 42 S. W. Rep. 470.

**Where a Man and a Woman Are Living Together Without Marriage**, or under an invalid marriage, and property is bought with the woman's money and title is taken in the name of the man, a trust results to the woman. *McDonald v. Carr*, 150 Ill. 204; *Heslop v. Heslop*, 82 Pa. St. 537; *Kinlow v. Kinlow*, 72 Tex. 639; *Hoig v. Gordon*, 17 Grant Ch. (U. C.) 599. *Aliter*, where the evidence clearly negatives the idea that the purchase was intended for the benefit of the woman. *Street v. Hallett*, 21 Grant Ch. (U. C.) 255.

**Reinvestment of Money Allowed to Wife for Homestead.** — Where the husband and wife sell land, and a part of the purchase money is given to the wife on account of her dower and homestead rights in the land sold, and subsequently this money is used for the purchase of other lands, title to which is taken in the husband's name, the transaction is merely a transfer of the wife's dower and homestead rights to the new tract, and there is no resulting trust for her. *Nance v. Nance*, 28 Ill. App. 587.

1. *Kline v. Ragland*, 47 Ark. 111. See also *Henderson v. Maclay*, (Pa. 1886) 5 Cent. Rep. 225.

2. **Agreement of Husband to Hold in Trust.** — *Bell v. Stewart*, 98 Ga. 669; *Watkins v. Jones*, 28 Ind. 12; *Boyer v. Libey*, 88 Ind. 235; *Goldsberry v. Gentry*, 92 Ind. 193; *Myers v. Jackson*, 135 Ind. 136; *Barlow v. Barlow*, 47 Kan. 676; *Bigley v. Jones*, 114 Pa. St. 510.

3. **Title Taken by Husband Without Consent of Wife.** — *Derry v. Derry*, 74 Ind. 560; *Linville v. Smith*, 6 Oregon 202.

4. **Deed to Husband Executed by Mistake.** — *Hayward v. Cain*, 110 Mass. 273; *Cleghorn v.*

*Obernalt*, 53 Neb. 687; *Young v. Senft*, 153 Pa. St. 352.

5. **Purchase by Wife with Her Personalty.** — *Jackson v. Jackson*, 91 U. S. 122. See also *supra*, this subdivision, *Payment by Husband, Conveyance to Wife*.

6. **Rebutting Presumption of Resulting Trust.** — *Brooks v. Fowler*, 82 Ga. 329; *Reed v. Reed*, 32 Ill. App. 21, *affirmed* 135 Ill. 482; *McGinnis v. Curry*, 13 W. Va. 29; *Berry v. Wiedman*, 40 W. Va. 36, 52 Am. St. Rep. 866; *Culver v. Graham*, 3 Wyo. 211.

7. **Evidence Must Be Clear and Unequivocal.** — *Brooks v. Fowler*, 82 Ga. 329. See also *Sasser v. Sasser*, 73 Ga. 275.

8. **Purchase by Husband with Separate Property of Wife — United States.** — *Voorheis v. Blanton*, 89 Fed. Rep. 885.

*Alabama.* — *Walker v. Elledge*, 65 Ala. 51; *Beddow v. Sheppard*, 118 Ala. 474; *Warren v. Jones*, 68 Ala. 449; *Vincent v. State*, 74 Ala. 274; *Whaun v. Atkinson*, 84 Ala. 592; *Lewis v. Mohr*, 97 Ala. 366; *Glenn v. Glenn*, 47 Ala. 204; *Tilford v. Torrey*, 53 Ala. 120; *Nettles v. Nettles*, 67 Ala. 599.

*Florida.* — *Hill v. Meinhard*, 39 Fla. 111.

*Georgia.* — *Sasser v. Sasser*, 73 Ga. 275; *Dodd v. Bond*, 88 Ga. 355.

*Indiana.* — *Dayton v. Fisher*, 34 Ind. 356; *Goldsberry v. Gentry*, 92 Ind. 193; *Radcliff v. Radford*, 96 Ind. 482; *Gray v. Turley*, 110 Ind. 254; *Robertson v. Huffman*, 92 Ind. 247; *Paulus v. Latta*, 93 Ind. 34; *Derry v. Derry*, 74 Ind. 560, 98 Ind. 319; *Boyer v. Libey*, 88 Ind. 235; *Camp v. Smith*, 98 Ind. 409.

*Kentucky.* — *Wilborn v. Ritter*, (Ky. 1891) 16 S. W. Rep. 360; *Allstott v. McCain*, (Ky. 1890) 12 S. W. Rep. 1062.

*Maryland.* — *Thomas v. Standiford*, 49 Md. 181.



rate property in purchases in her name, and instead, without her knowledge, makes the purchase in his own name,<sup>1</sup> a trust results in favor of the wife.

**Property Acquired from Use of Wife's Separate Property.** — The fact that the property with which the purchase was made by the husband was derived by him partly from the use of the separate property of the wife will not make it the property of the wife so as to create the presumption of a resulting trust in her favor in the land purchased.<sup>2</sup>

**Purchase with Personalty to Which Husband Is Entitled by Reason of Marital Relation.** — At common law a husband is vested with the ownership of the personal property of his wife which he has in his possession,<sup>3</sup> and where he uses such property in the purchase of other property in his own name, this is in effect a purchase with his own money, and therefore no trust results in such a case in favor of the wife.<sup>4</sup> This has been held true though the husband, at the time

*Mississippi.* — Porter v. Caspar, 54 Miss. 359; Greaves v. Atkinson, 68 Miss. 598.

*Missouri.* — Jones v. Elkins, 143 Mo. 647; Boynton v. Miller, 144 Mo. 681; Owings v. Wiggins, 133 Mo. 630; Reed v. Painter, 145 Mo. 341.

*Nebraska.* — Cleghorn v. Obernalte, 53 Neb. 687; Mosher v. Neff, 33 Neb. 770; Hews v. Kenney, 43 Neb. 815.

*New Jersey.* — Krauth v. Thiele, 45 N. J. Eq. 407; Lathrop v. Gilbert, 10 N. J. Eq. 344; City Nat. Bank v. Hamilton, 34 N. J. Eq. 158; Irick v. Clement, 49 N. J. Eq. 590.

*New York.* — Guion v. Williams, (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 919.

*Oregon.* — Linnville v. Smith, 6 Oregon 202.

*Pennsylvania.* — Heath v. Slocum, 115 Pa. St. 549; Rupp's Appeal, 100 Pa. St. 537; Kline's Appeal, 39 Pa. St. 463; Raybold v. Raybold, 20 Pa. St. 308; Fillman v. Divers, 31 Pa. St. 429; Peiffer v. Lytle, 58 Pa. St. 389; Henderson v. Maclay, (Pa. 1886) 5 Cent. Rep. 225.

*Tennessee.* — Bloomer v. Bloomer, 6 Baxt. (Tenn.) 98.

*Texas.* — Evans v. Welborn, 74 Tex. 530, 15 Am. St. Rep. 858.

*Wisconsin.* — Fawcett v. Fawcett, 85 Wis. 332, 39 Am. St. Rep. 844.

*Compare* Smith v. Turley, 32 W. Va. 14.

**A Part Payment** out of the wife's separate property raises a trust *pro tanto*. Garner v. Providence Second Nat. Bank, 151 U. S. 420; Voorheis v. Blanton, 89 Fed. Rep. 885; Glenn v. Glenn, 47 Ala. 204; Beringer v. Lutz, 188 Pa. St. 364.

**If Title Is Taken by the Husband in the Name of a Third Person** in such a case a trust results in favor of the wife. City Nat. Bank v. Hamilton, 34 N. J. Eq. 158.

**Where Lands Originally Purchased with Wife's Money** are exchanged by the husband for another tract, the exchange does not affect the wife's right to fasten a resulting trust on the lands received in the exchange. Walker v. Elledge, 65 Ala. 51. *Compare* Jennings v. Longdon, (Pa. 1887) 11 Atl. Rep. 212.

**The Husband's Giving a Note to the Wife for the Money Used in Purchasing Property in His Name**, such use being contrary to the wife's desire, does not change the husband's position from that of a trustee for the wife into that of a mere debtor. Rupp's Appeal, 100 Pa. St. 537. See also Fillman v. Divers, 31 Pa. St. 429.

**A Mere Agreement to Pay Out of the Separate**

**Estate of the Wife** will not create a resulting trust in her favor unless such payment is actually made. Reaves v. Garrett, 34 Ala. 558. See also Danforth v. Herbert, 33 Ala. 497.

**1. Husband Authorized to Purchase for Wife Purchasing in His Own Name** — *United States.* — Garner v. Providence Second Nat. Bank, 151 U. S. 420.

*Illinois.* — Krebaum v. Cordell, 63 Ill. 23; Lofton v. Witboard, 92 Ill. 461.

*Indiana.* — Malady v. McEnary, 30 Ind. 273.

*Kansas.* — Howard v. Howard, 52 Kan. 469; English v. Law, 27 Kan. 242; Mosteller v. Mosteller, 40 Kan. 658.

*Kentucky.* — Hill v. Cornwall, (Ky. 1894) 26 S. W. Rep. 540; Miller v. Edwards, 7 Bush (Ky.) 396.

*Michigan.* — Wales v. Newbould, 9 Mich. 45.

*Mississippi.* — House v. Harden, 52 Miss. 860.

*Missouri.* — Alkire Grocer Co. v. Ballenger, 137 Mo. 369.

*New York.* — Haack v. Weicken, 118 N. Y. 67.

*Ohio.* — Sessions v. Trevitt, 39 Ohio St. 259.

*Pennsylvania.* — Lloyd v. Woods, 176 Pa. St. 63; Light v. Zeller, 144 Pa. St. 570; Dumbach v. Bishop, 183 Pa. St. 602; Logan v. Eva, 144 Pa. St. 312.

*Tennessee.* — McClure v. Doak, 6 Baxt. (Tenn.) 364.

*Texas.* — Carter v. Bolin, (Tex. Civ. App. 1895) 30 S. W. Rep. 1084.

**2. Property Acquired by Use of Wife's Separate Property.** — Jones v. Storms, 90 Iowa 369; Kenneday v. Price, 57 Miss. 771. See also Chambers v. Richardson, 57 Ala. 85; Barger v. Barger, 30 Oregon 268.

**3. See the title HUSBAND AND WIFE, ante.**

**4. Personality of Wife Vested in Husband** — *Alabama.* — Carleton v. Rivers, 54 Ala. 467; Chambers v. Richardson, 57 Ala. 85.

*Illinois.* — Dick v. Dick, 172 Ill. 578; Keith v. Miller, 174 Ill. 64.

*Indiana.* — Miller v. Blackburn, 14 Ind. 62; Westerfield v. Kimmer, 82 Ind. 365; Waldron v. Sanders, 85 Ind. 270; Meredith v. Citizens' Nat. Bank, 92 Ind. 343; Radcliff v. Radford, 96 Ind. 482; Waymire v. Waymire, 144 Ind. 329.

*Iowa.* — Jones v. Storms, 90 Iowa 369.

*Kentucky.* — Bell v. Weatherford, 12 Bush (Ky.) 506; Russell v. Russell, (Ky. 1889) 12 S. W. Rep. 709; Hocker v. Gentry, 3 Met. (Ky.) 474.

of receiving the personalty of his wife, agreed to invest it in land in her name, as such agreement is based upon no valuable consideration.<sup>1</sup>

**Proceeds of Wife's Realty.** — Thus, where the wife's realty is sold and the proceeds are received by the husband and invested in other land in his own name, no trust results in her favor;<sup>2</sup> but if at the time of the sale of her realty and the receipt of the proceeds, the husband agreed to invest the proceeds in other lands in his wife's name, this will impress a trust upon the proceeds, and if they were invested in land in the husband's name a trust results in favor of the wife.<sup>3</sup>

**Money Intrusted to Husband for Investment for Wife.** — Money given to a husband by a third person to be invested in real estate for his wife comes into his hands clothed with a trust, and if lands are bought and title thereto taken in the husband's name, there is a resulting trust in the lands for the benefit of the wife.<sup>4</sup>

**Quantum of Proof of Wife's Ownership of Purchase Money.** — Where it is sought to enforce a resulting trust in land purchased in the name of a husband on the ground that the separate estate of the wife was used therefor, the evidence must show such fact as clearly and satisfactorily as where the transaction is between strangers,<sup>5</sup> and this is especially true where the trust is sought to be enforced as against creditors of the husband.<sup>6</sup>

(3) *Presumption of Advancement as Between Parent and Child and Persons in Loco Parentis.* — (a) **Payment by Parent, Conveyance to Child** — (a) **APPLICATION AND SCOPE OF RULE.** — Where a purchase is made in the name of a child, and the purchase money is paid by the parent, the presumption arises that the purchase was intended as an advancement to the child and rebuts the presump-

*Missouri.* — *Woodford v. Stephens*, 51 Mo. 443; *Modrell v. Riddle*, 82 Mo. 31.

*New Jersey.* — *Skillman v. Skillman*, 15 N. J. Eq. 478, 82 Am. Dec. 279.

*North Carolina.* — *Benbow v. Moore*, 114 N. Car. 263; *Giles v. Hunter*, 103 N. Car. 191; *Hackett v. Shuford*, 86 N. Car. 151.

*Ohio.* — *Boyer v. Davis*, 17 Ohio Cir. Ct. 191, 9 Ohio Cir. Dec. 526.

*Pennsylvania.* — *Beringer v. Lutz*, 179 Pa. St. 1.

*Tennessee.* — *Ezell v. Wright*, 3 Lea (Tenn.) 512; *Bibb v. Smith*, 12 Heisk. (Tenn.) 728; *Lane v. Farmer*, 11 Lea (Tenn.) 568; *Jennings v. Jennings*, 2 Heisk. (Tenn.) 283.

**Effect of Divorce.** — A divorce granted to the wife after such investment by the husband will not change the rule, as on divorce she takes the property as she found it at the time of the divorce. *Lane v. Farmer*, 11 Lea (Tenn.) 568.

**A Purchase by the Husband with the Earnings of the Wife** does not, therefore, create a resulting trust in her favor. *Carleton v. Rivers*, 54 Ala. 467; *Skillman v. Skillman*, 15 N. J. Eq. 478, 82 Am. Dec. 279; *Connors v. Connors*, 4 Wis. 112.

**1. Agreement to Invest for Wife Without Consideration.** — *Wentworth v. Wentworth*, 10 Ind. 365; *Miller v. Blackburn*, 14 Ind. 62; *Waldron v. Sanders*, 85 Ind. 279, *distinguishing* *Tracy v. Kelley*, 52 Ind. 535; *Radcliff v. Radford*, 96 Ind. 482. *Compare* *Beam v. Bridgers*, 108 N. Car. 276, 23 Am. St. Rep. 59; *Click v. Click*, 1 Heisk. (Tenn.) 607.

**2. Proceeds of Wife's Realty.** — *Hackett v. Shuford*, 86 N. Car. 151; *Kirkpatrick v. Holmes*, 108 N. Car. 206; *Giles v. Hunter*, 103 N. Car. 201; *Benedict v. Montgomery*, 7 W. &

S. (Pa.) 238, 42 Am. Dec. 230; *Ex p. Yarrowborough*, 1 Swan (Tenn.) 202.

**3. Agreement by Husband for Investment of Proceeds of Wife's Realty.** — *Mallory v. Mallory*, 5 Bush (Ky.) 464; *Miller v. Edwards*, 7 Bush (Ky.) 396; *Dula v. Young*, 70 N. Car. 451; *Lyon v. Akin*, 78 N. Car. 258; *Brisco v. Norris*, 112 N. Car. 671; *Pritchard v. Wallace*, 4 Sneed (Tenn.) 405, 70 Am. Dec. 254; *Pillow v. Thomas*, 1 Baxt. (Tenn.) 130; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71.

**4. Money Intrusted to Husband to Invest for Wife.** — *Voorheis v. Blanton*, 89 Fed. Rep. 885; *Lord v. Bishop*, 101 Ind. 334; *Newton v. Taylor*, 32 Ohio St. 399.

**5. Quantum of Proof as to Wife's Ownership of Purchase Money.** — *Thor v. Oleson*, 125 Ill. 365; *Keith v. Miller*, 174 Ill. 64; *Thomas v. Chicago*, 55 Ill. 403; *Wilson v. Campbell*, (Ky. 1892) 20 S. W. Rep. 609; *Thomas v. Standiford*, 49 Md. 181; *Andrews v. Farnham*, 10 N. J. Eq. 91; *Crawford v. Thompson*, 142 Pa. St. 551; *Smith v. Turley*, 32 W. Va. 14.

**6. Evidence as Against Husband's Creditors** — *Alabama.* — *Shelby v. Tardy*, 84 Ala. 327.

*Arkansas.* — *Sale v. McLean*, 29 Ark. 612.

*Indiana.* — *Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

*Iowa.* — *Iseminger v. Criswell*, 38 Iowa 382.

*Pennsylvania.* — *Kline's Appeal*, 39 Pa. St. 463; *O'Hara v. Dilworth*, 72 Pa. St. 397; *Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333.

*Tennessee.* — *Gates v. Card*, 93 Tenn. 334; *Page v. Gillentine*, 6 Lea (Tenn.) 246; *Grottenkemper v. Carver*, 9 Lea (Tenn.) 280; *Hardison v. Billington*, 14 Lea (Tenn.) 346.

*West Virginia.* — *Smith v. Taylor*, 10 W. Va. 14.



tion of a resulting trust to the parent.<sup>1</sup>

**Purchase in Joint Names of Stranger and Child.** — This principle is well exemplified in the case of a purchase in the joint names of a stranger and a child, and in such a case it has been held that as regards the title of the stranger, the presumption in favor of a resulting trust in favor of the purchaser arises, whereas with respect to the title of the child the presumption of an advancement arises.<sup>2</sup>

**Purchase by One in Loco Parentis.** — The rule includes cases where the person by whom the money is advanced stands *in loco parentis* towards the person in whose name the purchase is made.<sup>3</sup>

**1. Purchase by Parent in Name of Child** — *England*. — *Dyer v. Dyer*, 2 Cox. Ch. 92, 1 White & T. Lead. Cas. 255; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Down v. Ellis*, 35 Beav. 578.

*Canada*. — *Knox v. Traver*, 24 Grant Ch. (U. C.) 477.

*Alabama*. — *Harden v. Darwin*, 66 Ala. 55; *Long v. King*, 117 Ala. 423. See also *You v. Flinn*, 34 Ala. 409.

*Arkansas*. — *Milner v. Freeman*, 40 Ark. 62; *Watson v. Murray*, 54 Ark. 499; *Robinson v. Robinson*, 45 Ark. 481.

*California*. — *Russ v. Mebius*, 16 Cal. 350.

*Connecticut*. — *Ward v. Ward*, 59 Conn. 188.

*Georgia*. — *Jones v. Fenn*, 103 Ga. 183.

*Illinois*. — *Francis v. Wilkinson*, 147 Ill. 370; *Cartwright v. Wise*, 14 Ill. 417.

*Indiana*. — *Demaree v. Driskill*, 3 Blackf. (Ind.) 115.

*Iowa*. — *McGinnis v. Edgell*, 39 Iowa 419; *Kramer v. Kramer*, 68 Iowa 567; *Culp v. Price*, 107 Iowa 133.

*Kentucky*. — *Doyle v. Slepper*, 1 Dana (Ky.) 531.

*Maine*. — *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

*Massachusetts*. — *Dana v. Dana*, 154 Mass. 491.

*Mississippi*. — *Taylor v. Mosely*, 57 Miss. 544.

*Missouri*. — *Buren v. Buren*, 79 Mo. 538; *Hall v. Hall*, 107 Mo. 101.

*Nebraska*. — *Bartlett v. Bartlett*, 13 Neb. 456.

*New Jersey*. — *Read v. Huff*, 40 N. J. Eq. 229; *Hallenback v. Rogers*, 57 N. J. Eq. 199; *Howell v. Howell*, 15 N. J. Eq. 75.

*New York*. — *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424.

*Ohio*. — *Parish v. Rhodes*, *Wright (Ohio)* 339; *Fleming v. Donahoe*, 5 Ohio 255; *Tremper v. Barton*, 18 Ohio 418.

*Oregon*. — *Lawrence v. Lawrence*, 14 Oregon 77. See also *Snider v. Johnson*, 25 Oregon 328.

*Pennsylvania*. — *Shaw v. Read*, 47 Pa. St. 96; *Wheeler v. Kidder*, 105 Pa. St. 270.

*Texas*. — *Eastham v. Roundtree*, 56 Tex. 110; *Burdett v. Haley*, 51 Tex. 540.

*Vermont*. — *Wallace v. Bowen*, 28 Vt. 638; *Bent v. Bent*, 44 Vt. 555.

*Virginia*. — *Miller v. Blose*, 30 Gratt. (Va.) 751; *Steagall v. Steagall*, 90 Va. 73.

*West Virginia*. — *Lorentz v. Lorentz*, 14 W. Va. 809.

*Wisconsin*. — *Cerney v. Powlot*, 66 Wis. 262.

See further the title **ADVANCEMENTS**, vol. 1, pp. 769, 771, where various illustrations of the doctrine are given.

**Land Warrants Taken in Name of Son.** — In *Pennsylvania* it is held that while a conveyance

taken in the name of a child unprovided for is presumed to be an advancement, still the contrary rule prevails as to applications taken out in the son's name, or warrants paid for by the father, and in the latter case the presumption is in favor of a resulting trust. *Sampson v. Sampson*, 4 S. & R. (Pa.) 329. See also *Van-horne v. Frick*, 6 S. & R. (Pa.) 90; *Cox v. Grant*, 1 Yeates (Pa.) 164.

**Purchase in Name of Several Children.** — Where the purchase is made in the name of several children the presumption of an advancement to each as tenants in common arises. *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211; *Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Partridge v. Havens*, 10 Paige (N. Y.) 618; *Douglass v. Brice*, 4 Rich. Eq. (S. Car.) 322.

**Married Daughter.** — In *Murphy v. Nathans*, 46 Pa. St. 508, a purchase by a mother in the name of her married daughter was held to be an advancement.

**Part Payment of the Consideration by the Parent**, the remainder being paid by the child, is presumably an advancement. *Shepherd v. White*, 11 Tex. 346.

**2. Purchase in Name of Child and Stranger.** — *Lamplugh v. Lamplugh*, 1 P. Wms. 111. See also the title **ADVANCEMENTS**, vol. 1, p. 772.

**3. Person in Loco Parentis** — *England*. — *Tucker v. Burrow*, 2 Hem. & M. 515; *Beckford v. Beckford*, *Lofft* 490; *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Currant v. Jago*, 1 Coll. Ch. Cas. 261.

*United States*. — *Jackson v. Jackson*, 91 U. S. 122.

*Michigan*. — *Waterman v. Seeley*, 28 Mich. 77.

*Mississippi*. — *Wilson v. Beauchamp*, 44 Miss. 556; *Higdon v. Higdon*, 57 Miss. 264.

*New York*. — *Astreen v. Flanagan*, 3 Edw. (N. Y.) 279; *Jackson v. Feller*, 2 Wend. (N. Y.) 465.

*Pennsylvania*. — *Roberts's Appeal*, 85 Pa. St. 84.

*Virginia*. — *Steagall v. Steagall*, 90 Va. 73; *Miller v. Blose*, 30 Gratt. (Va.) 744.

*West Virginia*. — *Harris v. Elliott*, 45 W. Va. 245.

Thus, **Uncle and Nephew** may, under circumstances, come within the rule. *Harris v. Elliott*, 45 W. Va. 245.

**So Brother and Sister.** — *Higdon v. Higdon*, 57 Miss. 264.



**By Father-in-Law.** — A purchase by a father who pays the consideration and takes title in the name of his daughter's husband has been held to be an advancement to the daughter within the principle under discussion.<sup>1</sup>

**A Purchase by a Mother** who takes title in her child's name has been held in *England* not to give rise to the presumption of an advancement,<sup>2</sup> but the contrary rule seems to obtain in the *United States*.<sup>3</sup>

**Reversionary Interest Taken in Name of Child.** — Where the interest taken in the name of the child is in reversion instead of in possession the presumption of an advancement still arises.<sup>4</sup>

*bb. REBUTTING PRESUMPTION.* — The presumption of an advancement in the case of a purchase by a parent in the name of his child may be rebutted by evidence, and where it is shown that at the time of the conveyance it was not intended by the parent that the child should take the beneficial interest, a trust will result in the parent's favor.<sup>5</sup>

*cc. SUFFICIENCY OF EVIDENCE.* — In order to rebut the presumption of an advancement it has been held that the evidence must make it clear and manifest that

**1. Conveyance to Son-in-law Held Advancement to Daughter.** — *James v. James*, 41 Ark. 301; *Baker v. Leathers*, 3 Ind. 558. See also *Batstone v. Salter*, L. R. 10 Ch. 431 (transfer of stock to a married daughter and her husband); *Mahorner v. Harrison*, 15 Smed. & M. (Miss.) 53 (on the facts a resulting trust established as to part and a provision for the son-in-law in the remainder).

Courts, however, have refused to declare a resulting trust, under such circumstances, in favor of the wife of the son-in-law as against the latter. *Acker v. Priest*, 92 Iowa 610; *Wacker v. Wacker*, 147 Mo. 246. See also *Miller v. Blose*, 30 Gratt. (Va.) 744.

In *Steagall v. Steagall*, 90 Va. 73, a resulting trust was successfully asserted by the married daughter as against her husband's creditors, where it appeared that the deed to the husband was collusive and that she was ignorant of the state of the title and not chargeable with laches.

**2. Mother and Child.** — See the title **ADVANCEMENTS**, vol. I, p. 773, note 3. See also *Matter of De Visme*, 2 De G. J. & S. 17; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Batstone v. Salter*, L. R. 10 Ch. 431, in which cases, however, the particular intention making for or against the advancement was shown.

**3.** See the title **ADVANCEMENTS**, vol. I, p. 773, note 2. See also *Watson v. Murray*, 54 Ark. 499; *Hallenback v. Rogers*, 57 N. J. Eq. 199.

In *Flynt v. Hubbard*, 57 Miss. 471, and *Boozar v. Teague*, 27 S. Car. 348, the circumstances of the respective transactions were controlling.

**4. Reversionary Interest Taken in Name of Child.** — *Dyer v. Dyer*, 2 Cox Ch. 92. See also *Finch v. Finch*, 15 Ves. Jr. 43.

**Copyhold Estate.** — This is well shown in the case where a copyhold estate is taken in the name of a father and his son successively, and it is held that the presumption of an advancement arises, though the purchase could not have been taken wholly in the name of the father. *Dyer v. Dyer*, 2 Cox Ch. 92, *overruling* *Dickenson v. Shaw*, decided in Chancery, May 22, 1770.

**5. Presumption of Advancement Held Rebuttable** — *England*. — *Finch v. Finch*, 15 Ves. Jr. 43;

*Dyer v. Dyer*, 2 Cox Ch. 92; *Down v. Ellis*, 35 Beav. 578; *Sidmouth v. Sidmouth*, 2 Beav. 447.

*Alabama*. — *Long v. King*, 117 Ala. 423.

*Arkansas*. — *Watson v. Murray*, 54 Ark. 499.

*California*. — *Wormouth v. Johnson*, 58 Cal. 621.

*Colorado*. — *Lundy v. Hanson*, 16 Colo. 267.

*Georgia*. — *Jones v. Fenn*, 103 Ga. 183.

*Indiana*. — *Gaylord v. Lafayette*, 115 Ind. 423.

*Iowa*. — *Culp v. Price*, 107 Iowa 133; *Cotton v. Wood*, 25 Iowa 43; *Cecil v. Beaver*, 28 Iowa 241, 4 Am. Rep. 174; *McGinnis v. Edgell*, 39 Iowa 419.

*Kentucky*. — *Doyle v. Sleeper*, 1 Dana (Ky.) 531.

*Maine*. — *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

*Maryland*. — *Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

*Massachusetts*. — *Dana v. Dana*, 154 Mass. 491.

*Missouri*. — *Hall v. Hall*, 107 Mo. 101.

*Nebraska*. — *Cresswell v. McCaig*, 11 Neb. 222.

*New Jersey*. — *Hallenback v. Rogers*, 57 N. J. Eq. 199.

*New York*. — *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424; *Jackson v. Feller*, 2 Wend. (N. Y.) 465.

*Ohio*. — *Parish v. Rhodes*, Wright (Ohio) 339; *Tremper v. Barton*, 18 Ohio 418.

*Tennessee*. — *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

*Texas*. — *Burdett v. Haley*, 51 Tex. 540; *Shepherd v. White*, 11 Tex. 346; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

*Vermont*. — *Wallace v. Bowen*, 28 Vt. 638; *Bent v. Bent*, 44 Vt. 555.

*Virginia*. — *Beverly v. Beverly*, 88 Va. 915.

**Title Taken to Idiotic Son.** — In *Cartwright v. Wise*, 14 Ill. 417, wherein a father purchased land, taking title to his idiotic son, it was held that a presumption of an advancement could not be rebutted by proof that the father did not intend the son to take the beneficial interest. "The very idea of selecting an idiot for a trustee is absurd."

a resulting trust was intended by the parent.<sup>1</sup>

**Title Taken in Name of Child Without Consent of Parent.** — The fact that the title is taken in the name of the child without the knowledge or consent of the parent by whom the purchase money was paid is sufficient to rebut the presumption of an advancement.<sup>2</sup>

**Possession and Enjoyment of Property by Parent.** — The fact that the parent takes possession of the property purchased, or enjoys, without objection, the fruits thereof, will not rebut the presumption of an advancement in favor of the child in whose name the title is taken;<sup>3</sup> still the fact of his having taken possession is to be considered as a circumstance going to show the intention of the parent to retain the beneficial interest in the property.<sup>4</sup>

**Other Provisions for Grantee and No Provision for Other Children.** — The fact that the parent had already made provision for the child in whose name the purchase was made, and that his other children were unprovided for,<sup>5</sup> would be insufficient to rebut the presumption of an advancement; but some weight is to be given to such facts.<sup>6</sup>

**Advancement Determined as of Time of Purchase.** — The question whether the purchase was or was not intended as an advancement to the child must be determined by the intention of the parent at the time of the purchase, and when at the time of the purchase an advancement was intended, the parent cannot by a subsequent change of intention affect the rights of the child.<sup>7</sup>

(b) **Payment by Child, Conveyance to Parent.** — The child is under no obligation to support its parents,<sup>8</sup> and where the purchase money is paid by a son or daughter and the purchase is made in the name of his or her father or mother, the presumption in favor of a resulting trust in favor of the child arises to the same extent as where the purchase is made in the name of a stranger.<sup>9</sup>

1. **Sufficiency of Evidence.** — *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211. See also *Finch v. Finch*, 15 Ves. Jr. 43; *Dyer v. Dyer*, 2 Cox Ch. 92.

The cumulative effect of various circumstances may rebut the presumption. *Culp v. Price*, 107 Iowa 133. See also *Hall v. Hall*, 107 Mo. 101; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Chambers v. Chambers*, 92 Tenn. 707; *Hawley v. Geer*, (Tex. 1891) 17 S. W. Rep. 914.

**Son Acting as General Agent of Father.** — In *Long v. King*, 117 Ala. 423, it was held that the fact that the son, in whose name the purchase was made, was acting as a general agent of the father would not be sufficient to rebut the presumption of an advancement where it was not shown that the son was so acting in the purchase in question.

**Subsequent Admissions of the Child** that the land belongs to the parent by whom the purchase money was paid are not of great weight in determining the question of an advancement. *Baker v. Leathers*, 3 Ind. 558.

2. **Title Taken Without Consent of Parent.** — *Olds v. Marshall*, 93 Ala. 138; *Watson v. Murray*, 54 Ark. 499; *Jones v. Fenn*, 103 Ga. 183; *Lindley v. Martindale*, 78 Iowa 379; *Taylor v. Mosely*, 57 Miss. 544.

3. **Possession by Parent.** — *Sidmouth v. Sidmouth*, 2 Beav. 447; *Mumma v. Mumma*, 2 Vern. 19; *Lamplugh v. Lamplugh*, 1 P. Wms. 112; *Redington v. Redington*, 3 Ridg. 106; *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211; *Astreen v. Flanagan*, 3 Edw. (N. Y.) 279. See also *Culp v. Price*, 107 Iowa 133; *Kramer v. Kramer*, 68 Iowa 567; and the title ADVANCEMENTS, vol. I, p. 772.

In *Dana v. Dana*, 154 Mass. 491, the facts

relied on to rebut the presumption of an advancement arising out of the purchase being taken in the name of the child were that the child determined the form of the conveyance, and that the father subsequently during his life kept possession of the property, taking the rents and profits. It was held that these facts were sufficient to sustain a finding of the trial court that an advancement was not intended.

4. **Circumstance to Be Considered.** — *Murless v. Franklin*, 1 Swanst. 17; *Culp v. Price*, 107 Iowa 133; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Chambers v. Chambers*, 92 Tenn. 707. See also *Grey v. Grey*, 2 Swanst. 600; *Stileman v. Ashdown*, 2 Atk. 480.

5. **Child Provided For.** — *Culp v. Price*, 107 Iowa 133. See also *Dyer v. Dyer*, 2 Cox Ch. 94.

6. *Culp v. Price*, 107 Iowa 133; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

7. **Intention as of Time of Purchase Controlling.** — *Finch v. Finch*, 15 Ves. Jr. 43; *Elliot v. Elliot*, 2 Ch. Cas. 231; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Murless v. Franklin*, 1 Swanst. 17; *Prankerd v. Prankerd*, 1 Sim. & St. 3; *Woodman v. Morrel*, Freem. Ch. 32; *Tremper v. Barton*, 18 Ohio 418.

Thus, though the declarations of the parent at the time of the purchase are evidence of his intention not to make an advancement, still his declarations subsequent thereto would not be admissible. *Sidmouth v. Sidmouth*, 2 Beav. 447. See also *Tremper v. Barton*, 18 Ohio 418.

8. See the title PARENT AND CHILD.

9. **Payment by Child, Purchase in Name of Parent.** — *Champlin v. Champlin*, 136 Ill. 309,

**Rebutting Presumption of Resulting Trust.** — The presumption of a resulting trust arising from a purchase by a child in the name of its parent is of course rebuttable, in like manner as where the purchase is in the name of a stranger.<sup>1</sup>

**Purchase by Parent with Property of Child.** — Where a parent uses the money or property of his child in the purchase of land, a trust results in favor of the child in the absence of any explanatory facts.<sup>2</sup>

(4) *Presumption as Between Brothers and Sisters, Uncles and Nephews, etc.* — **Brothers and Sisters.** — As regards the presumption under discussion, brothers or sisters, or brothers and sisters, are to be regarded as strangers; and therefore when the payment is made by one brother or sister, and the purchase is made in the name of another brother or sister, the presumption of a resulting trust in favor of the one paying the purchase money arises.<sup>3</sup> A brother may, however, stand *in loco parentis* towards his sister so as to raise the presumption of an advancement instead of a trust.<sup>4</sup>

**Rebutting Presumption.** — This presumption in favor of a resulting trust may of course be rebutted.<sup>5</sup>

**Uncles, Aunts, Nephews, and Nieces.** — Where the purchase money is paid by an uncle or an aunt, and the title is taken in the name of his or her nephew or niece, or *vice versa*, the relationship between the parties is not sufficient to rebut the presumption of a resulting trust.<sup>6</sup> The presumption may, however, of course, be rebutted by evidence.<sup>7</sup>

29 Am. St. Rep. 323; *Fleming v. McHale*, 47 Ill. 282; *Detwiler v. Detwiler*, 30 Neb. 338; *Howell v. Howell*, 15 N. J. Eq. 75; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 19; *Norton v. McDevit*, 122 N. Car. 755; *Roberts v. Remy*, 56 Ohio St. 249; *Johnson v. Anderson*, 7 Baxt. (Tenn.) 251; *Clark v. Clark*, 43 Vt. 685. See also *Marcilliat v. Marcilliat*, 125 Ind. 472.

**Payment by Minor from His Earnings.** — The fact that the payments by a minor child were made from his own earnings will not prevent a trust resulting in his favor, when the parent in whose name the purchase was made never claimed such earnings, but had relinquished his right thereto. *Fleming v. McHale*, 47 Ill. 282.

1. **Rebutting Presumption.** — *Mullen v. Mullen*, 2 Am. L. Rec. 611, 5 Ohio Dec. (Reprint) 111.

2. **Purchase by Parent with Property of Child.** — *Robinson v. Robinson*, 22 Iowa 427; *Norton v. McDevit*, 122 N. Car. 755. See also *infra*, this section, *Resulting Trusts Arising Out of Purchases with Fiduciary Funds*.

**Purchase with Earnings of Minor Child.** — Parents being entitled to the earnings of their minor children, a purchase by a parent with the earnings of his unemancipated minor child will not raise a resulting trust in the child's favor. *Brennan v. Durkin*, 76 Md. 451. See also *Watson v. Murray*, 54 Ark. 499; *Koster v. Miller*, 149 Ill. 195. *Aliter* where the child has been emancipated. *Harlan v. Eilke*, 100 Ky. 912.

3. **Brothers and Sisters — England.** — *Field v. Lonsdale*, 13 Beav. 78; *Forrest v. Forrest*, 11 Jur. N. S. 317. See also *Bennet v. Bennet*, 10 Ch. D. 474.

*Canada.* — *Wilson v. Owens*, 26 Grant Ch. (U. C.) 27.

*Arkansas.* — *Camden v. Bennett*, 64 Ark. 155.

*Connecticut.* — *Ward v. Ward*, 59 Conn. 188; *Barrows v. Bohan*, 41 Conn. 284; *Feltz v. Walker*, 49 Conn. 93.

*Illinois.* — *Stephenson v. McClintock*, 141 Ill. 604.

*Missouri.* — *Hall v. Hall*, 107 Mo. 101.

*New Jersey.* — *Reeves v. Evans*, (N. J. 1896) 34 Atl. Rep. 477.

*Pennsylvania.* — *Ackley v. Ackley*, (Pa. 1885) 1 Cent. Rep. 405; *Warren v. Steer*, 112 Pa. St. 634; *Edwards v. Edwards*, 39 Pa. St. 369.

*Tennessee.* — *Smitheal v. Gray*, 1 Humph. (Tenn.) 491, 34 Am. Dec. 664.

*Texas.* — *Baylor v. Hopf*, 81 Tex. 637.

See, however, *Printup v. Patton*, 91 Ga. 422, wherein the court held that where one pays the consideration for the purchase of land and causes a conveyance to be made to his brother, an intended gift is probable, and consequently a trust will not necessarily result.

4. **In Loco Parentis.** — See *supra*, this subdivision, *Parent in Loco Parentis towards Child*.

5. **Rebutting Presumption.** — Thus, where the testator, on renewal of a lease, took it in the names of his brother and himself, paying the fine, and receiving the profits himself, the lease was held not to be assets, but to vest in the brother beneficially upon the ground of intention, though proved by but one witness. *Maddison v. Andrew*, 1 Ves. 58.

6. **Uncle, Aunt, Nephew, and Niece.** — *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Summers v. Moore*, 113 N. Car. 394; *Harris v. Elliott*, 45 W. Va. 245.

**Where the Uncle Is in Loco Parentis towards the Nephew** a presumption of advancement arises. *Harris v. Elliott*, 45 W. Va. 245. See also *Currant v. Jago*, 1 Coll. Ch. Cas. 261.

7. **Presumption of Trust in Case Payment by Uncle Held Rebutted.** — *Jackson v. Feller*, 2 Wend. (N. Y.) 465.

A married woman, out of the savings of her separate estate, purchased stock in the name of a niece, and told the niece by letter that it was her intention that the stock should be for the niece herself, but took from the



**§. STATUTORY ENACTMENTS AFFECTING TRUSTS RESULTING FROM PAYMENT OF PURCHASE MONEY — (1) *In General.*** — In some jurisdictions it is expressly provided by statute that when a grant for a valuable consideration shall be made to one, and the consideration shall be paid by another, no trust shall result in favor of the person by whom the consideration shall have been paid, and the title shall vest in the person named as the grantee,<sup>1</sup> subject, however, to a provision allowing creditors of the person by whom the purchase money was paid to enforce a resulting trust in their favor,<sup>2</sup> and also to a provision that the statute shall not apply where the title is taken by the

niece a power of attorney to receive the dividends and sell the stock. It was held that on the death of the aunt the niece was entitled to the stock. *Beeden v. Major*, 11 Jur. N. S. 537, *affirmed* 13 L. T. N. S. 554.

**1. Statutory Abolition of Trust Arising from Payment of Consideration — *Kentucky.*** — *Com. v. Chesapeake, etc.*, R. Co., 94 Ky. 16; *Martin v. Martin*, 5 Bush (Ky.) 47; *Matthews v. Albritton*, 83 Ky. 32; *Burns v. Eastham*, 4 Ky. L. Rep. 899; *Benge v. Benge*, 15 Ky. L. Rep. 514; *Graves v. Graves*, 3 Met. (Ky.) 169; *Grant v. Grant*, 4 Ky. L. Rep. 892; *Russell v. Russell*, (Ky. 1889) 12 S. W. Rep. 709; *Mannen v. Bradberry*, 81 Ky. 153; *Smith v. Morgan*, 4 Ky. L. Rep. 829; *Watt v. Watt*, (Ky. 1897) 39 S. W. Rep. 48; *Bradford v. Bradford*, 4 Ky. L. Rep. 351.

*Michigan.* — *Chapman v. Chapman*, 114 Mich. 144; *Groesbeck v. Seeley*, 13 Mich. 329; *Newton v. Sly*, 15 Mich. 396; *Harwood v. Underwood*, 28 Mich. 427; *Weare v. Linnell*, 29 Mich. 224; *Taylor v. Boardman*, 24 Mich. 287; *Tyler v. Peatt*, 30 Mich. 64; *Hooker v. Axford*, 33 Mich. 453; *Brown v. Bronson*, 35 Mich. 415; *Way v. Stebbins*, 47 Mich. 296; *Winans v. Winans*, 99 Mich. 78; *Yerkes v. Perrin*, 71 Mich. 567; *Tiffany v. Tiffany*, 110 Mich. 219; *Shafter v. Huntington*, 53 Mich. 310; *Barnes v. Munro*, 95 Mich. 612; *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, 9 Mich. 485; *Fisher v. Fobes*, 22 Mich. 454; *Pulford v. Morton*, 62 Mich. 25; *Palmer v. Sterling*, 41 Mich. 218; *Barber v. Milner*, 43 Mich. 248; *Maxfield v. Willey*, 46 Mich. 252; *Bumpus v. Bumpus*, 53 Mich. 346.

*Minnesota.* — *Gen. Stat.* (1878), c. 43, § 7; *Stat.* (1894), § 4280; *Haaven v. Hoas*, 60 Minn. 313; *Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97; *Johnson v. Johnson*, 16 Minn. 512; *Connelly v. Sheridan*, 41 Minn. 18; *Petzold v. Petzold*, 53 Minn. 39.

*New York.* — *Birds. Rev. Stat.* N. Y. (1896), p. 2612, § 74; *Curtin v. Curtin*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 938; *Niver v. Crane*, 98 N. Y. 40; *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *Robertson v. Sayre*, 53 Hun (N. Y.) 490; *Everett v. Everett*, 48 N. Y. 218; *Hurst v. Harper*, 14 Hun (N. Y.) 280; *Bodine v. Edwards*, 10 Paige (N. Y.) 504; *Brewster v. Power*, 10 Paige (N. Y.) 562; *Norton v. Stone*, 8 Paige (N. Y.) 222; *McCahill v. McCahill*, 71 Hun (N. Y.) 221; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Jackson v. Forrest*, 2 Barb. Ch. (N. Y.) 576; *Lee v. Timken*, 10 N. Y. App. Div. 213; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561; *Spaulding v. Cleghorn*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 269.

*Wisconsin.* — *Campbell v. Campbell*, 70 Wis. 311.

**A Certificate of Sale of School Land**, made by the commissioner of the state land office, pursuant to Stat. Minn. (1894), § 3957, is a "conveyance," within the meaning of Stat. Minn. (1894), § 4280, prohibiting resulting trusts in favor of a third person paying the consideration for a conveyance to another. *Haaven v. Hoas*, 60 Minn. 313.

**Term "Grant" Includes Assignment of Lease.** — *Denning v. Kane*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 704. See also *Ostrander v. Livingston*, 3 Barb. Ch. (N. Y.) 426.

**Securities for Payment of Debts.** — The statutory abolition applies only to conveyances of interests in land, and not to securities for the payment of debts taken in the name of another than the creditor. *Lindsay v. Williams*, 2 Duv. (Ky.) 475.

**Title Acquired by Foreclosure of Mortgage Assigned in Trust.** — 1 Rev. Stat. N. Y., p. 728, § 51 (Rev. Stat. N. Y. (9th ed.) 1896, p. 1796, § 51), abolishing resulting trusts arising from the payment of the purchase money, does not apply where a mortgage was assigned under a parol agreement in trust and the title was acquired by the assignee by a foreclosure of the mortgage. *Smith v. Balcom*, 24 N. Y. App. Div. 437.

**Removal of Incumbrances.** — The prohibition in the *Michigan* statute against resulting trusts does not apply where the conveyance is merely the quitclaim of an equity to the owner of the legal estate; this creates no title, but merely removes an incumbrance. *Munch v. Shabel*, 37 Mich. 166.

**Personal Property.** — *Comp. Stat.* Minn., c. 32, in force in 1862 (Stat. 1894, c. 43), which abolishes the common-law trust resulting in favor of a person who pays the consideration for a grant to another, applies to real property only, and does not prevent the application to a case of the purchase of personal property with the funds of another by one who takes the title in his own name of the equitable rule that a trust results in favor of the party furnishing the consideration. *Baker v. Terrell*, 8 Minn. 195.

**2. Rights of Creditors.** — *Fairbairn v. Middlemiss*, 47 Mich. 372; *Garfield v. Hatmaker*, 15 N. Y. 475; *Wait v. Day*, 4 Den. (N. Y.) 439; *Donovan v. Sheridan*, 37 N. Y. Super. Ct. 256; *McCartney v. Bostwick*, 32 N. Y. 53; *Brewster v. Power*, 10 Paige (N. Y.) 562; *Wood v. Robinson*, 22 N. Y. 564; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Brown v. Chubb*, 135 N. Y. 174; *Jackson v. Forrest*, 2 Barb. Ch. (N. Y.) 576; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561; *Kline v. McDonnell*, 62 Hun (N. Y.) 177; *Allen v. McRae*, 91 Wis. 226.

**Even in the Absence of Such a Statutory Provi-**

grantee without the consent of the person paying the purchase money,<sup>1</sup> or where the grantee, in violation of some trust, purchases the property so conveyed with money or property of another.<sup>2</sup>

(2) *Common-law Trust Alone Abolished.* — It is only the common-law trust resulting from the fact of the payment of the consideration, and having no other foundation, that such statutes abolish; they do not interfere with other equities, and do not preclude the assertion of title against one who has thus taken a conveyance for a lawful specific purpose and attempts to retain the property in violation of his agreement, in fraud of the person by whom the purchase money was paid.<sup>3</sup>

(3) *Separate Instrument Declaring Trust.* — So also the statutes abolishing such trusts have no application where the trust is expressly reserved or declared by another instrument, relieving it from the effect of a secret trust.<sup>4</sup>

(4) *Voluntary Grants.* — Where a voluntary grant is made by the owner

sion in favor of creditors of the person paying the purchase money, the statutory prohibition as to a trust resulting in favor of the person paying the purchase money would not deprive his creditors of the right to subject the land to the payment of their debts, if the transaction was fraudulent as to them. *Matthews v. Albritton*, 83 Ky. 32. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 272.

**Nonresident Creditors Included.** — *McCartney v. Bostwick*, 32 N. Y. 53.

**Subsequent Creditors Not Included.** — *Brewster v. Power*, 10 Paige (N. Y.) 562. See also *Cox v. McBurney*, 2 Saff. (N. Y.) 561.

**Rights of Creditors Dependent upon Fraud.** — *Bodine v. Edwards*, 10 Paige (N. Y.) 504.

**Trust in Favor of Creditors Enforceable Only in Equity.** — *Garfield v. Hatmaker*, 15 N. Y. 475, *overruling Wait v. Day*, 4 Den. (N. Y.) 439. See also *Maynard v. Hoskins*, 9 Mich. 485; *Donovan v. Sheridan*, 37 N. Y. Super. Ct. 256; *McCartney v. Bostwick*, 32 N. Y. 53.

**Priority Between Creditors.** — Where several creditors have obtained judgments against the person by whom the purchase money was paid, it seems that the proceeds of the land purchased are to be applied in payment of such judgments according to the priority of the judgments, even though the resulting trust is declared in a suit instituted by one holding a junior judgment. *Brown v. Chubb*, 135 N. Y. 174.

**1. Want of Consent of Person Paying Purchase Money — Indiana.** — *Goldsberry v. Gentry*, 92 Ind. 193.

*Kentucky.* — *Bedford v. Graves*, 8 Ky. L. Rep. 262; *Harlan v. Eilke*, 100 Ky. 642.

*Michigan.* — *Connolly v. Keating*, 102 Mich. 1; *McCreary v. McCreary*, 90 Mich. 478; *Fisher v. Fobes*, 22 Mich. 458; *Ransom v. Ransom*, 31 Mich. 301.

*New York.* — *Reitz v. Reitz*, 80 N. Y. 538, *reversing 14 Hun (N. Y.) 536*; *Haack v. Weicken*, 118 N. Y. 67; *Safford v. Hynds*, 39 Barb. (N. Y.) 625; *Buffalo, etc., R. Co. v. Lampton*, 47 Barb. (N. Y.) 533.

*Wisconsin.* — *Kluender v. Fenske*, 53 Wis. 118; *Knight v. Leary*, 54 Wis. 459; *Bosworth v. Hopkins*, 85 Wis. 50.

**Mistake of Grantor Brings Case Within Exception.** — *Roszell v. Roszell*, 100 Ind. 354.

**Otherwise in Case of Mistake as to Legal Effect of Conveyance to Grantee.** — *Yerkes v. Perrin*, 71 Mich. 567; *Church of St. Stanislaus v. Algemeine Verein*, 31 N. Y. App. Div. 133.

**Right Not Preserved Where Party Pays Only Part of Consideration.** — *Schierloh v. Schierloh*, 148 N. Y. 103, *affirming 72 Hun (N. Y.) 150*. See, however, *Webb v. Foley*, (Ky. 1899) 49 S. W. Rep. 40.

**Parol Evidence Admissible to Show Want of Consent.** — *Connolly v. Keating*, 102 Mich. 1.

**Burden of Proof upon Grantee to Show Consent of Party Supplying Consideration.** — *Church of St. Stanislaus v. Algemeine Verein*, 31 N. Y. App. Div. 133; *Reitz v. Reitz*, 80 N. Y. 538, *reversing 14 Hun (N. Y.) 536*. See also *Lindsay v. Williams*, 2 Duv. (Ky.) 475; *Kluender v. Fenske*, 53 Wis. 118.

**2. Purchase by Grantee in Violation of Trust.** — *Bedford v. Graves*, 8 Ky. L. Rep. 262; *Fisher v. Fobes*, 22 Mich. 454.

**Breach of Parol Agreement with Party Furnishing Only Part of Consideration Not Violation of Trust.** — *Schierloh v. Schierloh*, 148 N. Y. 103, *affirming 72 Hun (N. Y.) 150*.

**3. Only Trust Arising from Payment of Consideration Abolished.** — *Way v. Stebbins*, 47 Mich. 296; *Carr v. Carr*, 52 N. Y. 251; *Bork v. Martin*, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 569; *Abbey v. Taber*, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 548. See also *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402, *modifying 20 Misc. (N. Y.) 513*; *Curtin v. Curtin*, (Supm. Ct. Gen. T.) 34 N. Y. St. Rep. 956.

**Conveyance as Security to Person Advancing Consideration as Loan.** — Where the conveyance is made to the grantee as security for the repayment of the purchase money which was advanced by him as a loan to the person by whom the trust is sought to be enforced and who had repaid the money so advanced, the statute does not apply. *Carr v. Carr*, 52 N. Y. 251. See also *Bork v. Martin*, (Buffalo Super. Ct. Gen. T.) 33 N. Y. St. Rep. 659. Compare *Benge v. Benge*, 15 Ky. L. Rep. 514; *Hurst v. Harper*, 14 Hun (N. Y.) 280.

In *Abbey v. Taber*, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 548, *affirmed without opinion 134 N. Y. 615*, wherein the same principle was held, the court said that the conveyance in such a case was no more than a purchase-money mortgage.

**4. Separate Instrument Declaring Trust.** — *Yerkes v. Perrin*, 71 Mich. 567; *Church of St. Stanislaus v. Algemeine Verein*, 31 N. Y. App. Div. 133.



of land to a third person upon a parol trust, of course the statute abolishing trusts arising from the payment of the purchase money does not apply.<sup>1</sup>

(5) *Knowledge of Person in Whose Name Title Is Taken.* — The fact that the person in whose name the title is taken has at the time of the purchase no knowledge that the title is taken in his name will not prevent the operation of the statute abolishing resulting trusts arising from the payment of the purchase money.<sup>2</sup>

(6) *Relationship of Parties.* — The relationship between the person by whom the purchase money is paid and the grantee will not of itself prevent the operation of the statute. Thus effect has been given to the statutory abolition where the purchase money was paid by a wife and the conveyance was taken in the name of her husband with her consent.<sup>3</sup>

(7) *Agreement by Grantee to Hold in Trust.* — The mere fact that at the time of the conveyance the person in whose name the purchase money was paid orally agreed to hold the property in trust will not necessarily prevent the operation of the statute;<sup>4</sup> still, the relationship of the parties and the circumstances of the transaction have been held to be such that it would work a fraud to allow the grantee to repudiate the oral agreement, and to prevent this fraud the courts have enforced the oral agreement and thereby indirectly prevented the operation of the statute. As has been said, the statute should not be allowed to operate so as to perpetrate a fraud.<sup>5</sup> In *Indiana* and *Kansas* the statutes expressly exempt, in addition to the cases above mentioned, cases where it shall appear that by agreement, and without any fraudulent intent, the grantee was to hold the land in trust for the person paying the purchase money or some part thereof; and therefore, where such an agreement exists, a trust will of course result,<sup>6</sup> but in the absence of such an agreement

1. **Voluntary Grants.** — Where land is conveyed by cotenants to a third person upon a parol trust, the discharge of an incumbrance upon the land by one of the cotenants, so that a clear title can vest in the grantee, is not such a payment of the consideration for the conveyance to the grantee as is contemplated by 1 Rev. Stat. N. Y. 728, § 51 (Rev. Stat. N. Y. (9th ed.) 1896, p. 1796, § 51). *Bork v. Martin*, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 569.

2. **Ignorance of Third Person that Title Was Taken in His Name.** — *Haaven v. Hoaas*, 60 Minn. 313; *Everett v. Everett*, 48 N. Y. 218; *Hoar v. Hoar*, 48 Hun (N. Y.) 314, *affirmed* without opinion 125 N. Y. 735.

**Statute Not Applicable Where Grantee Refuses to Accept Conveyance.** — *Robertson v. Sayre*, 53 Hun (N. Y.) 490.

3. **Payment by Husband, Conveyance in Name of Wife.** — *Watt v. Watt*, (Ky. 1897) 39 S. W. Rep. 48; *O'Connell v. Madden*, (Buffalo Super. Ct. Spec. T.) 7 N. Y. Supp. 338. See also *Hurst v. Harper*, 14 Hun (N. Y.) 280.

**Same Is True Where Payment Is by Wife and Conveyance Is to Husband.** — *Bell v. Weatherford*, 12 Bush (Ky.) 506.

**Rule Applies to Case of Agent Purchasing in His Own Name with Consent of Principal.** — *Woodhull v. Osborne*, 2 Edw. (N. Y.) 615. See also *Reitz v. Reitz*, 80 N. Y. 538.

**Rule Applies Where Purchase Made with Partnership Funds but Title Taken in Name of One Partner.** — *Moore v. Williams*, 55 N. Y. Super. Ct. 116. See also *Winans v. Winans*, 99 Mich. 74; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561.

4. **Oral Agreement of Grantee to Hold in Trust.** — *Com. v. Chesapeake*, etc., R. Co., 94 Ky.

16; *Martin v. Martin*, 5 Bush (Ky.) 47; *Chapman v. Chapman*, 114 Mich. 144; *Barnes v. Munro*, 95 Mich. 612; *McGraw v. Daly*, 82 Mich. 500; *Pulford v. Morton*, 62 Mich. 25; *Johnson v. Johnson*, 16 Minn. 512; *Gould v. Gould*, 51 Hun (N. Y.) 9; *Jeremiah v. Pitcher*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 513, *modified* 26 N. Y. App. Div. 402. See also *Pierson v. Conley*, 95 Mich. 619. *Compare Gage v. Gage*, 83 Hun (N. Y.) 362, *reaffirmed* 13 N. Y. App. Div. 565.

5. **Statute Not Permitted to Work Fraud.** — *Graham v. King*, 96 Ky. 339; *Curtin v. Curtin*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 938; *Carr v. Carr*, 52 N. Y. 251; *Bork v. Martin*, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 569; *Robbins v. Robbins*, 89 N. Y. 251; *Gage v. Gage*, 83 Hun (N. Y.) 362; *Denning v. Kane*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 704.

6. **Indiana Statute.** — *Horner's Stat. Ind.* (1896), § 2969 *et seq.*; *Prow v. Prow*, 133 Ind. 340; *Robertson v. Huffman*, 92 Ind. 247; *Boyer v. Libey*, 88 Ind. 235; *McDonald v. McDonald*, 24 Ind. 68; *Hughes v. White*, 117 Ind. 470; *Hill v. Pollard*, 132 Ind. 588; *Rooker v. Rooker*, 75 Ind. 571; *Fitzpatrick v. Papa*, 89 Ind. 17; *Goldsberry v. Gentry*, 92 Ind. 193; *Thornburg v. Buck*, 13 Ind. App. 446.

**Kansas Statute.** — *Rayl v. Rayl*, 58 Kan. 585. **Person Asserting Trust Must Show Nonexistence of Fraudulent Intent.** — *Barber v. Barber*, 146 Ind. 390.

**Sufficiency of Agreement to Hold in Trust.** — Where a father caused the legal title to land to be conveyed to his son, and wrote to the latter that he had done so, stating that he would want a deed from the son in a few days and would send on a deed for him to sign, a



no trust will result from the mere payment of the purchase money.<sup>1</sup>

(8) *Erection of Improvements by Person Paying Consideration.* — The fact that after the conveyance to the grantee the person by whom the purchase money was paid erected valuable improvements upon the land will not, of itself, take the case out of the operation of the statutory abolition of resulting trusts arising from the payment of the purchase money.<sup>2</sup>

(9) *Sufficiency of Consent to Conveyance* — **Consent Must Be to Form of Conveyance.** — In order to take the transaction out of the exception of a provision that the statute shall not apply where an "absolute conveyance" is taken in the name of a third person without the consent of the person paying the purchase money, it has been held necessary that the latter's consent should be not only to the execution of the conveyance to such third person, but also to the form of the conveyance.<sup>3</sup>

**Must Be Consent of Person in Whose Favor Trust Would Have Resulted.** — So, also, to give operation to the statutory abolition it has been held that the consent relied on to bring the case within the statute must have been the consent of the person in whose favor the trust would have resulted except for the statute. Thus, where the consideration was paid by one person for the benefit of another, and the conveyance was made to a third person, it was held that the consent on the part of the person paying the consideration would not prevent a trust resulting in favor of the person for whose benefit the consideration was paid.<sup>4</sup>

(10) *Voluntary Execution of Trust by Grantee.* — Though under the statute no trust results in favor of the person by whom the purchase money was paid, still, if the grantee voluntarily executes the trust, such execution is binding upon him and cannot be recalled.<sup>5</sup>

resulting trust in favor of the father was held to arise. *Gaylord v. Lafayette*, 115 Ind. 423. See also *Mull v. Bowles*, 129 Ind. 343.

1. *Mescall v. Tully*, 91 Ind. 96; *Green v. Groves*, 109 Ind. 519; *Wright v. Moody*, 116 Ind. 175; *Pearson v. Pearson*, 125 Ind. 341; *Marcilliat v. Marcilliat*, 125 Ind. 472; *Glide-well v. Spaugh*, 26 Ind. 319; *Mitchell v. Skinner*, 17 Kan. 563.

**Evidence Insufficient to Establish Agreement to Hold in Trust.** — *Marcilliat v. Marcilliat*, 125 Ind. 472.

2. **Erection of Improvements.** — *Gould v. Gould*, 51 Hun (N. Y.) 9; *Hurst v. Harper*, 14 Hun (N. Y.) 280.

3. **Consent Must Include Form of Conveyance.** — *Lounsbury v. Purdy*, 18 N. Y. 515, 11 Barb. (N. Y.) 499, 16 Barb. (N. Y.) 376; *Brown v. Cherry*, 57 N. Y. 645, reversing 59 Barb. (N. Y.) 628; *McCahill v. McCahill*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 258; *Fairchild v. Fairchild*, 5 Hun (N. Y.) 407. See also *Swinburne v. Swinburne*, 28 N. Y. 568.

4. **Payment for Benefit of Another.** — *Gilbert v. Gilbert*, 2 Abb. App. Dec. (N. Y.) 256; *Siemon v. Schurck*, 29 N. Y. 598, affirming 33 Barb. (N. Y.) 9; *Foote v. Bryant*, 47 N. Y. 544. See also *McCreary v. McCreary*, 90 Mich. 478; *Robbins v. Robbins*, 89 N. Y. 251, reversing 47 N. Y. Super. Ct. 193; *Aynesworth v. Haldeman*, 2 Duv. (Ky.) 565. *Contra*, *Connelly v. Sheridan*, 41 Minn. 18. See also *Randall v. Constans*, 33 Minn. 329.

In *Gilbert v. Gilbert*, *supra*, as reported in 1 Keyes (N. Y.) 159, the opinion of Ingraham, J., is printed as the opinion of the court and holds the opposite doctrine. The reporter states in a footnote, however, that by "inad-

vertence this opinion was published as the opinion of the court. It is in fact a dissenting opinion."

And in *Foote v. Bryant*, 47 N. Y. 544, *Church, C. J.*, said: "The case of *Gilbert v. Gilbert*, 1 Keyes (N. Y.) 159, I think must be incorrectly reported. It was decided the same year but before the case *Siemon v. Schurck*, 29 N. Y. 598, and seems to hold a contrary doctrine, which can scarcely be supposed. It is probable that a dissenting opinion was published as the opinion of the court, by mistake."

5. **Voluntary Execution of Trust by Grantee.** — *Thornburg v. Buck*, 13 Ind. App. 446; *Robbins v. Robbins*, 89 N. Y. 251, reversing 47 N. Y. Super. Ct. 193; *Bork v. Martin*, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 569. See also *Gaylord v. Lafayette*, 115 Ind. 423. *Compare* *Hurst v. Harper*, 14 Hun (N. Y.) 280.

**Deed Executed but Not Delivered Not Effective.** — *Mitchell v. Skinner*, 17 Kan. 563.

**Power of Attorney to Sell.** — T. paid the consideration for land conveyed by P. to R., and afterward wrote to R. saying: "I purchased of P. last winter [the land] deeded to you. I am doing some business in relation to it, and would wish to have a power of attorney for doing so." It was held that such letter and the power of attorney to sell and convey, given in answer thereto, did not show an express trust in writing by which R. was to convey to T. or his appointee, or constitute an execution of the trust. *Campbell v. Campbell*, 70 Wis. 119.

**Grantee Must Be Sui Juris.** — *Lochenour v. Lochenour*, 61 Ind. 595.

**Validity of Execution of Trust as Against Creditors of Grantee.** — A conveyance of land by a

(11) *Retrospective Effect of Statute.* — A statute abolishing resulting trusts arising from the payment of the purchase money does not have a retrospective effect so as to prevent the enforcement of a common-law resulting trust in favor of the person paying the purchase money which arose before the enactment of the statute.<sup>1</sup>

(12) *Right to Recover Money Paid — Implied Contract.* — In *Kentucky* it has been held that if one person accepts a deed for land at the instance of another who has paid the purchase money, though the statute forbids a resulting trust in the land, still, as its object was not to enable one party to rob another by undertaking a trust which the law would not enforce and at the same time refusing to execute the trust or return the purchase money paid, therefore, on the refusal of the grantee in such a case to reconvey at the request of the person paying the purchase money, a recovery may be had by such person against the grantee on the implied promise raised by law to refund the purchase money paid, as where the grantee receives the conveyance he will be presumed as consenting to the expenditure for his use.<sup>2</sup>

g. EVIDENCE — (1) *Evidence to Establish Resulting Trust* — (a) *Admissibility in General.* — The courts allow the admission as relevant of practically any evidence which tends to show that the purchase money was or was not paid by the grantee or by the person in whose favor the resulting trust is claimed, including circumstantial evidence.<sup>3</sup>

(b) *Pecuniary Standing of Parties.* — While evidence of the impoverished circumstances of the grantee at the time of the purchase would not, of itself, be sufficient to show that the purchase money was not paid by him, or that it was paid by the person seeking to enforce the resulting trust,<sup>4</sup> still, such evidence is admissible, as it tends to show that the purchase money could not have been paid by the grantee, and would tend to support the claim that it was paid by the person seeking to enforce the resulting trust.<sup>5</sup> So, also, the impoverished condition of the person in favor of whom the resulting trust is claimed may be shown as tending to prove that the purchase money was not paid by him.<sup>6</sup>

married woman to her husband in recognition of a parol trust reposed by the latter in the former in having the land taken in her name although paid for by him, when made in good faith, is valid as against the creditors of the wife, although the trust could not have been enforced by the husband, under *How. Annot. Stat. Mich. (1882), § 5569. Desmond v. Myers, 113 Mich. 437.*

After the creditors of the grantee have levied executions upon land, a subsequent conveyance by the grantee to the person by whom the purchase money was paid, in pursuance of an oral agreement to hold in trust, will not affect the rights of such execution creditors. *Barnes v. Munro, 95 Mich. 612.*

1. *Retrospective Effect of Statute.* — *Martin v. Martin, 5 Bush (Ky.) 47; Waterman v. Seeley, 28 Mich. 77; Union College v. Wheeler, 59 Barb. (N. Y.) 585. See also Lochenour v. Lochenour, 61 Ind. 595.*

2. *Recovery of Purchase Money Paid.* — *Martin v. Martin, 5 Bush (Ky.) 47; Smith v. Morgan, 4 Ky. L. Rep. 829; Graves v. Graves, 3 Met (Ky.) 169; Mannen v. Bradberry, 81 Ky. 153. See also the title IMPLIED OR QUASI CONTRACTS, ante.*

3. *Relevancy.* — *Marshall v. Fleming, 11 Colo. App. 515; Kelly v. Kelly, 126 Ill. 550; Strimpfner v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.*

Proof that the purchase money was paid by a third person is admissible to show that it was not paid by the party claiming to have paid it, and in whose favor the resulting trust is sought to be enforced. *Kelly v. Kelly, 126 Ill. 550.*

In *Behm v. Molly, 133 Pa. St. 614*, a letter, written by the grantee to the person in whose favor the resulting trust was sought to be enforced, shortly before the purchase, giving to the latter permission to use the writer's name in making the purchase, was held admissible to show that the former had paid the purchase money.

An agreement on the part of the grantee to purchase for the person seeking to enforce the resulting trust may be considered upon the question whose money was paid. *Bruce v. Roney, 18 Ill. 67.*

Evidence to show the circumstances under which a deed was made is held admissible. *Brown v. Pitney, 39 Ill. 468.*

4. *Wilkins v. Stevens, 1 Y. & C. Ch. 431.*

5. *Evidence of Impoverished Circumstances of Grantee Held Admissible.* — *Willis v. Willis, 2 Atk. 71; Ryal v. Ryal, cited in Lane v. Dighton, Ambl. 413; Wilkins v. Stevens, 1 Y. & C. Ch. 431; Strimpfner v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.*

6. *Poverty of Person Seeking to Enforce Trust Admissible in Evidence.* — *Strimpfner v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Catoe v.*



(c) **Admissibility of Parol Evidence — Statute of Frauds.** — Implied trusts, that is, trusts raised by implication of law, which include a trust resulting from the payment of the purchase money, are not affected by the general provisions of the statute of frauds. In fact, the statutes of frauds in most jurisdictions expressly except this class of trusts from their operation.<sup>1</sup> This express exception, however, is merely declaratory of the existing law, and accordingly, in those states where there is no such express statutory exception, resulting trusts are upon the same footing as in those states where such an exception exists.<sup>2</sup> The effect of the statute upon such trusts will be found fully discussed in another place.<sup>3</sup>

**Parol Evidence Admissible to Prove Payment of Purchase Money.** — Resulting trusts not being affected by the statute of frauds, it is a well-settled rule that parol evidence is admissible to show the payment of the purchase money for the purpose of establishing a resulting trust in favor of the person by or for whom the purchase money was paid.<sup>4</sup> In a number of cases it has been claimed,

Catoe, 32 S. Car. 595; Chambers v. Emery, 13 Utah 374.

**Evidence of Pecuniary Condition Restricted to Time of Conveyance.** — Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

1. **Statute of Frauds.** — See the local statutes.

2. Hoxie v. Carr, 1 Sumn. (U. S.) 173; Faringer v. Ramsay, 4 Md. Ch. 33.

3. See the title STATUTE OF FRAUDS.

4. **Parol Evidence Admissible to Show Payment of Purchase Money — England.** — Willis v. Willis, 2 Atk. 71; Gascoigne v. Thwing, 1 Vern. 366.

**United States.** — Hoxie v. Carr, 1 Sumn. (U. S.) 173; Laughlin v. Mitchell, 14 Fed. Rep. 382; In re Stanger, 35 Fed. Rep. 238.

**Alabama.** — Caple v. McCollum, 27 Ala. 461; Rhea v. Tucker, 56 Ala. 450; Lee v. Browder, 51 Ala. 288.

**Arizona.** — Butler v. Shumaker, (Ariz. 1893) 32 Pac. Rep. 265.

**Arkansas.** — McGuire v. Ramsey, 9 Ark. 518.

**California.** — De Mallagh v. De Mallagh, 77 Cal. 126; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498.

**Colorado.** — Stewart v. Stevens, 10 Colo. 440; Von Trotha v. Bamberger, 15 Colo. 1; Learned v. Tritch, 6 Colo. 432; Lipscomb v. Nichols, 6 Colo. 290.

**Connecticut.** — Corr's Appeal, 62 Conn. 403; Ward v. Ward, 59 Conn. 196; Booth's Appeal, 35 Conn. 169; Todd v. Munson, 53 Conn. 579.

**District of Columbia.** — Cooksey v. Bryan, 2 App. Cas. (D. C.) 557.

**Florida.** — Lofton v. Sterrett, 23 Fla. 565.

**Georgia.** — Scott v. Taylor, 64 Ga. 506.

**Illinois.** — Donlin v. Bradley, 119 Ill. 412; Springer v. Kroeschell, 161 Ill. 358; Bragg v. Geddes, 93 Ill. 40; Strong v. Messinger, 148 Ill. 431; Corder v. Corder, 124 Ill. 229.

**Indiana.** — Myers v. Jackson, 135 Ind. 136; Parmlee v. Sloan, 37 Ind. 469; Elliott v. Armstrong, 2 Blackf. (Ind.) 198; Irwin v. Ivers, 7 Ind. 398, 63 Am. Dec. 421.

**Kentucky.** — Letcher v. Letcher, 4 J. J. Marsh. (Ky.) 590; Faris v. Dunn, 7 Bush (Ky.) 276; P'Pool v. Thomas, (Ky. 1888) 8 S. W. Rep. 198, 10 Ky. L. Rep. 92; Caldwell v. Caldwell, 7 Bush (Ky.) 515; Brothers v. Porter, 6 B. Mon. (Ky.) 109.

**Maine.** — Whitmore v. Learned, 70 Me. 276; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617.

**Maryland.** — Wits v. Horney, 59 Md. 584; Faringer v. Ramsay, 4 Md. Ch. 33; Greer v. Baughman, 13 Md. 257; Hollis v. Hayes, 1 Md. Ch. 479; Dryden v. Hanway, 31 Md. 254.

**Massachusetts.** — Peabody v. Tarbell, 2 Cush. (Mass.) 226; Livermore v. Aldrich, 5 Cush. (Mass.) 431.

**Michigan.** — Ripley v. Seligman, 88 Mich. 177.

**Missouri.** — Shaw v. Shaw, 86 Mo. 594.

**Montana.** — Reece v. Roush, 2 Mont. 586.

**Nevada.** — Boskowitz v. Davis, 12 Nev. 446. **New Hampshire.** — Farrington v. Barr, 36 N. H. 86; Page v. Page, 8 N. H. 187.

**New Jersey.** — Krauth v. Thiele, 45 N. J. Eq. 407; Baldwin v. Johnson, 1 N. J. Eq. 441; Hutchinson v. Tindall, 3 N. J. Eq. 358; Depeyster v. Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723.

**New York.** — Bork v. Martin, (Buffalo Super. Ct. Gen. T.) 33 N. Y. St. Rep. 659; Lowry v. Smith, 9 Hun (N. Y.) 514; Hall v. Erwin, 66 N. Y. 649; Traphagen v. Burt, 67 N. Y. 30; Mason v. Libby, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 104; Moyer v. Moyer, 21 Hun (N. Y.) 67; Hosford v. Merwin, 5 Barb. (N. Y.) 51; Foote v. Bryant, 47 N. Y. 544; Swinburne v. Swinburne, 28 N. Y. 568; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Malin v. Malin, 1 Wend. (N. Y.) 625; Boyd v. M'Lean, 1 Johns. Ch. (N. Y.) 582.

**Ohio.** — Byers v. Wackman, 16 Ohio St. 440; Newton v. Taylor, 32 Ohio St. 399.

**Oregon.** — Chenoweth v. Lewis, 9 Oregon 150; Sisemore v. Pelton, 17 Oregon 546.

**Pennsylvania.** — Walter v. Snowden, (Pa. 1887) 6 Cent. Rep. 731; McGinity v. McGinity, 63 Pa. St. 38; Stafford v. Wheeler, 93 Pa. St. 462; Jackman v. Ringland, 4 W. & S. (Pa.) 149; Lloyd v. Woods, 176 Pa. St. 63.

**South Carolina.** — M'Guire v. M'Gowen, 4 Desaus. (S. Car.) 486.

**Texas.** — Leakey v. Gunter, 25 Tex. 400; Barziza v. Story, 39 Tex. 354; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

**Vermont.** — Salisbury v. Clarke, 61 Vt. 453; Clark v. Clark, 43 Vt. 685.

**Virginia.** — Borst v. Nalle, 28 Gratt. (Va.) 423; Parker v. Logan, 82 Va. 376; Kane v. O'Connors, 78 Va. 76; U. S. Bank v. Carrington



though unsuccessfully,<sup>1</sup> that parol evidence should not be admitted, as it would in effect contradict the deed. The fallacy of such a contention is apparent, as the parol evidence in such a case is not introduced to establish any fact inconsistent with the legal operation of the words of the deed, but merely to engraft a trust upon the legal estate.<sup>2</sup> And it has been held that parol evidence was admissible to show by whom the purchase money was paid, though the consideration clause in the deed recited that the purchase money was paid by the grantee.<sup>3</sup>

**As Against Answer of Alleged Trustee.** — So, also, parol evidence has been held admissible to prove such a trust against the answer of the alleged trustee denying the trust.<sup>4</sup>

**Death of Alleged Trustee.** — The death of the alleged trustee will not render inadmissible parol evidence to prove the trust.<sup>5</sup>

(d) **Admissions and Declarations of Parties** — *aa. ADMISSIBILITY* — **Self-disserving Declarations.** — Declarations on the part of the grantee made after the purchase, tending to show that the purchase money was paid by a third person, and that the grantee held the property in trust for him, being self-disserving declarations, and in disparagement of his title, are of course admissible against him, in an action to establish a resulting trust in favor of such third person.<sup>6</sup> So, also,

ton, 7 Leigh (Va.) 566; *Miller v. Blöse*, 30 Gratt. (Va.) 744.

*West Virginia.* — *Smith v. Patton*, 12 W. Va. 541; *Bright v. Knight*, 35 W. Va. 40; *Currence v. Ward*, 43 W. Va. 367; *Seiler v. Mohn*, 37 W. Va. 507.

**Parol Evidence to Show Nonpayment.** — Parol evidence is of course equally admissible to show that the purchase money was not paid by the person in whose favor the resulting trust is sought to be enforced. *Clark v. Burnham*, 2 Story (U. S.) 1.

**1. Does Not Contradict Deed.** — *McGuire v. Ramsey*, 9 Ark. 518; *Crittenden v. Woodruff*, 11 Ark. 82; *Scott v. Taylor*, 64 Ga. 506; *Boyd v. Boyd*, 163 Ill. 611.

**2. McGuire v. Ramsey**, 9 Ark. 518.

**3. Contrary to Consideration Clause** — *California.* — *Millard v. Hathaway*, 27 Cal. 119.

*Indiana.* — *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198.

*Iowa.* — *Cotton v. Wood*, 25 Iowa 43; *Cooper v. Skeel*, 14 Iowa 578.

*Maine.* — *Buck v. Pike*, 11 Me. 9.

*Maryland.* — *Faringer v. Ramsay*, 2 Md. 365.

*Massachusetts.* — *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Peabody v. Tarbell*, 2 Cush. (Mass.) 232.

*New Hampshire.* — *Page v. Page*, 8 N. H. 187.

*New Jersey.* — *McKeown v. McKeown*, 33 N. J. Eq. 384; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723.

*Tennessee.* — *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406.

*Texas.* — *Neil v. Keese*, 5 Tex. 23, 51 Am. Dec. 746.

*Vermont.* — *Barron v. Barron*, 24 Vt. 375; *Pinny v. Fellows*, 15 Vt. 525.

*West Virginia.* — *Murry v. Sell*, 23 W. Va. 475.

**4. Answer of Trustee Denying Trust** — *Alabama.* — *Larkins v. Rhodes*, 5 Port. (Ala.) 196.

*District of Columbia.* — *Cooksey v. Bryan*, 2 App. Cas. (D. C.) 557.

*Illinois.* — *Enos v. Hunter*, 9 Ill. 211.

*Indiana.* — *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198; *Jenison v. Graves*, 2 Blackf. (Ind.) 441; *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Blair v. Bass*, 4 Blackf. (Ind.) 540, *Collier v. Collier*, 30 Ind. 32.

*Kentucky.* — *Snelling v. Utterback*, 1 Bibb (Ky.) 609.

*Maine.* — *Buck v. Pike*, 11 Me. 24; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

*Maryland.* — *Faringer v. Ramsay*, 2 Md. 365.

*New Hampshire.* — *Moore v. Moore*, 38 N. H. 382; *Page v. Page*, 8 N. H. 187.

*New York.* — *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 582.

**5. Death of Alleged Trustee** — *Arkansas.* — *Milner v. Freeman*, 40 Ark. 62.

*District of Columbia.* — *Cooksey v. Bryan*, 2 App. Cas. (D. C.) 557.

*Indiana.* — *Fausler v. Jones*, 7 Ind. 277.

*New Jersey.* — *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723.

*New York.* — *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 582; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17.

*Pennsylvania.* — *Harrisburg Bank v. Tyler*, 3 W. & S. (Pa.) 373.

*South Carolina.* — *Williams v. Hollingsworth*, 1 Strobb. Eq. (S. Car.) 103, 47 Am. Dec. 527.

*Tennessee.* — *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242.

*Texas.* — *Neil v. Keese*, 5 Tex. 23, 51 Am. Dec. 746.

*Utah.* — *Chambers v. Emery*, 13 Utah 374.

**6. Self-disserving Declaration of Grantee.** — *Lehman v. Lewis*, 62 Ala. 129; *Bibb v. Hunter*, 79 Ala. 351; *Gainus v. Cannon*, 42 Ark. 503; *Corder v. Corder*, 124 Ill. 229; *Springer v. Kroeschell*, 161 Ill. 358; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Shepherd v. White*, 11 Tex. 346; *Guest v. Guest*, 74 Tex. 664.

In *Pennsylvania* it has been held that where land has been purchased by a husband with funds of his wife, his declarations are not admissible against his judgment creditors, in an action of ejectment brought by himself and

declarations against interest on the part of the person seeking to enforce the resulting trust would be admissible against him in favor of the grantee.<sup>1</sup>

**Privies.** — Admissions on the part of the grantee are admissible not only against himself, but also against his privies in interest,<sup>2</sup> though of course it is essential that the admissions by the grantee should have been made while the title was in him, as admissions by him after he has parted with his legal title are not allowable against his successor in title.<sup>3</sup>

**Self-serving Declarations.** — Self-serving declarations are never admissible in evidence in favor of the person making the declaration, or in favor of his privies,<sup>4</sup> unless they were made at the time of the purchase so as to form part of the *res gestæ*.<sup>5</sup>

*bb. WEIGHT OF ADMISSIONS AS EVIDENCE.* — The courts have repeatedly held that such evidence is not entitled to much weight, but should be received with great caution, as it is so easy of fabrication, so incapable of contradiction after the death of the grantee, and as the slightest mistake or failure of recollection on the part of the witness may cause a total alteration of its effect,<sup>6</sup> and after the death of the grantee it is not sufficient to form the basis of a decree establishing a resulting trust, unless it is clear, consistent, and corroborated by circumstances.<sup>7</sup> Still, it has been held that if the declarations of the grantee

his wife to recover the land, to show that the purchase was made with the funds of the wife, and thereby to raise a resulting trust in her favor. *Zeller v. Light*, (Pa. 1889) 17 Atl. Rep. 435.

1. **Of Person Seeking to Enforce Trust.** — *Burdett v. May*, 100 Mo. 13.

2. **Admissibility Against Privies.** — *Tilford v. Torrey*, 53 Ala. 120; *Gainus v. Cannon*, 42 Ark. 503; *Norton v. McDevit*, 122 N. Car. 755; *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71; *Mixon v. Miles*, (Tex. Civ. App. 1898) 46 S. W. Rep. 105.

**As Against Wife's Claim of Homestead.** — So also declarations by the grantee and statements contained in an instrument purporting to be his last will, which show that the purchase money for the conveyance to him was paid by a third person, are admissible as against the wife who claims the land as a homestead. *Shepherd v. White*, 11 Tex. 346.

**Admissions of Wife Against Husband Claiming Curtesy.** — As against a husband claiming curtesy in land the legal title of which is in his wife, declarations of the wife are admissible after her death against the husband to show that the purchase money belonged to her children so as to raise a resulting trust in their favor and thereby defeat the husband's claim of curtesy. *Norton v. McDevit*, 122 N. Car. 755.

3. **Declarations After Parting with Title.** — *Tilford v. Torrey*, 53 Ala. 120.

4. **Self-serving Declarations.** — *Arkansas.* — *Crow v. Watkins*, 48 Ark. 169.

*Illinois.* — *Corder v. Corder*, 124 Ill. 229.

*Indiana.* — *Hubble v. Osborn*, 31 Ind. 249.

*New York.* — *Lowery v. Fardick*, 111 N. Y. 52.

*North Carolina.* — *McConnell v. Caldwell*, 73 N. Car. 338.

*Pennsylvania.* — *Edwards v. Edwards*, 39 Pa. St. 369; *Warren v. Steer*, 112 Pa. St. 634.

5. **Self-serving Declarations as Res Gestæ.** — *Culp v. Price*, 107 Iowa 133; *Hay v. Martin*,

(Pa. 1888) 14 Atl. Rep. 333; *Edwards v. Edwards*, 39 Pa. St. 369; *Leakey v. Gunter*, 25 Tex. 400.

6. **Evidence of Declarations to Be Received with Caution.** — *England.* — *Lench v. Lench*, 10 Ves. Jr. 518.

*United States.* — *Smith v. Burnham*, 3 Sumn. (U. S.) 438.

*Alabama.* — *Tilford v. Torrey*, 53 Ala. 120; *Hatton v. Landman*, 28 Ala. 127.

*Illinois.* — *Corder v. Corder*, 124 Ill. 229; *Bragg v. Geddes*, 93 Ill. 40.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610.

*Kentucky.* — *Snelling v. Utterback*, 1 Bibb (Ky.) 609.

*Maine.* — *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

*Missouri.* — *Woodford v. Stephens*, 51 Mo. 443; *Ringo v. Richardson*, 53 Mo. 385; *Burdett v. May*, 100 Mo. 13.

*New York.* — *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405.

*Pennsylvania.* — *Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333; *O'Hara v. Dilworth*, 72 Pa. St. 397.

*Texas.* — *Hall v. Layton*, 16 Tex. 262.

*Virginia.* — *Donaghe v. Tams*, 81 Va. 132.

7. **Necessity for Corroboration.** — *England.* — *Lench v. Lench*, 10 Ves. Jr. 518.

*Alabama.* — *Bibb v. Hunter*, 79 Ala. 351.

*Delaware.* — *Pierson v. Pierson*, 5 Del. Ch. 11.

*Illinois.* — *Green v. Dietrich*, 114 Ill. 636.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610; *Parker v. Pierce*, 16 Iowa 227; *Maple v. Nelson*, 31 Iowa 322; *Robinson v. Robinson*, 22 Iowa 427.

*Missouri.* — *Berry v. Hartzell*, 91 Mo. 132; *Modrell v. Riddle*, 82 Mo. 31.

*New Jersey.* — *Midmer v. Midmer*, 26 N. J. Eq. 209.

*New York.* — *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256.

*Pennsylvania.* — *Long Estate v. Pa. St.* 100; *Kline's Appeal*, 39 Pa. St. 463; *Crawford v. Thompson*, 142 Pa. St. 551; *Young's Estate*, 137 Pa. St. 433.

were full, clear, and convincing, evidence thereof may be sufficient to establish the trust.<sup>1</sup>

(c) **Quantum and Burden of Proof.** — As the person who undertakes to establish a resulting trust by parol evidence claims an estate not only without deed, but in opposition to the written title, and as records and deeds are not to be easily overthrown, it is a well-settled rule, not only that the burden of proof to prove the payment by him of the purchase money is upon him,<sup>2</sup> but also that the evidence introduced in support of his claim must be clear, full, and satisfactory;<sup>3</sup> and this is especially true where there has been a great delay in

*Tennessee.* — *Newman v. Early*, 3 Tenn. Ch. 714.

*Texas.* — *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172; *Hall v. Layton*, 16 Tex. 262.

*Virginia.* — *Boyd v. Cleghorn*, 94 Va. 780.

1. *Hall v. Livingston*, 3 Del. Ch. 348; *Pillow v. Thomas*, 1 Baxt. (Tenn.) 120.

2. **Burden of Proof** — *England.* — *Wilkins v. Stevens*, 1 Y. & C. Ch. 431.

*Alabama.* — *Lehman v. Lewis*, 62 Ala. 129; *Bibb v. Hunter*, 79 Ala. 351.

*Arizona.* — *Butler v. Shumaker*, (Ariz. 1893) 32 Pac. Rep. 265.

*Illinois.* — *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120, *citing* 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 29.

*Indiana.* — *Meredith v. Citizens Nat. Bank*, 92 Ind. 343; *Hedges v. Keller*, 104 Ind. 479.

*Iowa.* — *Harris v. Stone*, 15 Iowa 273; *Shepard v. Pratt*, 32 Iowa 296.

*Kentucky.* — *Ecton v. Moore*, 4 Ky. L. Rep. 307.

*North Carolina.* — *McConnell v. Caldwell*, 73 N. Car. 338.

*Ohio.* — *Jaffray v. Weatherby*, 5 Ohio Cir. Dec. 201, 12 Ohio Cir. Ct. 205.

*Oregon.* — *Parker v. Newitt*, 18 Oregon 274.

*Pennsylvania.* — *Strimpfner v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606.

*South Carolina.* — *Jones v. Hughey*, 46 S. Car. 193; *Farrington v. Duval*, 32 S. Car. 590.

*Utah.* — *Chambers v. Emery*, 13 Utah 374.

3. **Proof of Payment Must Be Clear and Satisfactory** — *England.* — *Groves v. Groves*, 3 Y. & J. 170; *Willis v. Willis*, 2 Atk. 71; *Wilkins v. Stevens*, 1 Y. & C. Ch. 431; *Lench v. Lench*, 10 Ves. Jr. 517; *Gascoigne v. Thwing*, 1 Vern. 366.

*United States.* — *Allen v. Withrow*, 110 U. S. 119; *Purcell v. Miner*, 4 Wall. (U. S.) 513; *Howland v. Blake*, 97 U. S. 626; *In re Stanger*, 35 Fed. Rep. 238; *Laughlin v. Mitchell*, 14 Fed. Rep. 382.

*Alabama.* — *Tilford v. Torrey*, 53 Ala. 120; *Chambers v. Richardson*, 57 Ala. 85; *Mobile L. Ins. Co. v. Randall*, 71 Ala. 220; *Lee v. Browder*, 51 Ala. 288; *Rhea v. Tucker*, 56 Ala. 450; *Lehman v. Lewis*, 62 Ala. 129; *Bates v. Kelly*, 80 Ala. 142; *Bibb v. Hunter*, 79 Ala. 351; *Reynolds v. Caldwell*, 80 Ala. 232; *Shelton v. Aultman*, etc., Co., 82 Ala. 315.

*Arizona.* — *Butler v. Shumaker*, (Ariz. 1893) 32 Pac. Rep. 265.

*Arkansas.* — *Crittenden v. Woodruff*, 11 Ark. 82; *Byers v. Danley*, 27 Ark. 88; *Crow v. Watkins*, 48 Ark. 169; *Sale v. McLean*, 29 Ark. 612; *Robinson v. Robinson*, 45 Ark. 481; *Johnson v. Richardson*, 44 Ark. 365; *Crow v. Watkins*, 48 Ark. 173; *Camden v. Bennett*, 64 Ark. 155, *citing* 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 29, 30.

*California.* — *Woodside v. Hewel*, 109 Cal. 481; *Millard v. Hathaway*, 27 Cal. 119.

*Colorado.* — *Denver First Nat. Bank v. Campbell*, 2 Colo. App. 271.

*District of Columbia.* — *Cooksey v. Bryan*, 2 App. Cas. (D. C.) 557.

*Florida.* — *Lofton v. Sterrett*, 23 Fla. 565.

*Illinois.* — *Enos v. Hunter*, 9 Ill. 211; *Thomas v. Chicago*, 55 Ill. 403; *Mahoney v. Mahoney*, 65 Ill. 406; *Clarke v. Quackenbos*, 27 Ill. 260; *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310; *Towle v. Wadsworth*, 147 Ill. 80; *Van Buskirk v. Van Buskirk*, 148 Ill. 9; *Pickler v. Pickler*, 180 Ill. 168; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120 [*citing* 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 29]; *Francis v. Roades*, 146 Ill. 635; *Goelz v. Goelz*, 157 Ill. 33; *Corder v. Corder*, 124 Ill. 229; *Thor v. Oleson*, 125 Ill. 365; *St. Patrick's Catholic Church v. Daly*, 116 Ill. 76; *Green v. Dietrich*, 114 Ill. 636.

*Indiana.* — *Jenison v. Graves*, 2 Blackf. (Ind.) 440; *Blair v. Bass*, 4 Blackf. (Ind.) 539; *Fausler v. Jones*, 7 Ind. 277; *Malady v. McEnary*, 30 Ind. 273; *Collier v. Collier*, 30 Ind. 32; *Parmlee v. Sloan*, 37 Ind. 469; *Milliken v. Ham*, 36 Ind. 166.

*Iowa.* — *Olive v. Dougherty*, 3 Greene (Iowa) 371; *Robinson v. Robinson*, 22 Iowa 427; *Noel v. Noel*, 1 Iowa 423; *MacGregor v. Gardner*, 14 Iowa 326; *Nelson v. Worrall*, 20 Iowa 469; *Sunderland v. Sunderland*, 19 Iowa 325; *Monroe v. Graves*, 23 Iowa 597; *Trout v. Trout*, 44 Iowa 471; *Peters v. Jones*, 35 Iowa 512; *Shepard v. Pratt*, 32 Iowa 296; *Burns v. Byrne*, 45 Iowa 285; *Childs v. Griswold*, 19 Iowa 362; *Bradley v. Bradley*, 21 Iowa 480; *Richardson v. Haney*, 76 Iowa 103; *Parker v. Pierce*, 16 Iowa 227; *Rogers v. McFarland*, 89 Iowa 286; *Maroney v. Maroney*, 97 Iowa 711; *Iseminger v. Griswell*, 98 Iowa 382; *Murphy v. Hanscome*, 76 Iowa 192.

*Kentucky.* — *P'Pool v. Thomas*, (Ky. 1888) 8 S. W. Rep. 198; *Snelling v. Utterback*, 1 Bibb (Ky.) 609; *Letcher v. Letcher*, 4 J. J. Marsh. (Ky.) 593; *Carey v. Callan*, 6 B. Mon. (Ky.) 45; *Pool v. Thomas*, 10 Ky. L. Rep. 92.

*Maine.* — *Whitmore v. Learned*, 70 Me. 276; *Kelley v. Hill*, 50 Me. 470; *Burleigh v. White*, 64 Me. 23; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Richardson v. Woodbury*, 43 Me. 206; *Dudley v. Bachelder*, 53 Me. 403.

*Maryland.* — *Greer v. Baughman*, 13 Md. 257; *Faringer v. Ramsay*, 4 Md. Ch. 33; *Witts v. Horney*, 59 Md. 584; *Keller v. Keller*, 45 Md. 269; *Brennan v. Durkin*, 76 Md. 451.

*Massachusetts.* — *Fickett v. Durham*, 109 Mass. 419; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431.

*Michigan.* — *Waterman v. Seeley*, 28 Mich. 77; *Bernard v. Bougard*, Harr. (Mich.) 130.



asserting the claim.<sup>1</sup> It has been held that by the terms "clearness and certainty," as applied to the degree of proof required, was meant, generally, that there must be sufficient positive facts proved to take the matter out of

*Mississippi*. — *Logan v. Johnson*, 72 Miss. 185.

*Missouri*. — *Johnson v. Quarles*, 46 Mo. 423; *Philpot v. Penn*, 91 Mo. 38; *Berry v. Hartzell*, 91 Mo. 132; *Woodford v. Stephens*, 51 Mo. 443; *Forrester v. Scoville*, 51 Mo. 268; *Burdett v. May*, 100 Mo. 13; *Modrell v. Riddle*, 82 Mo. 31; *McFarland v. La Force*, 119 Mo. 585; *King v. Isley*, 116 Mo. 155; *Adams v. Burns*, 96 Mo. 361; *Shaw v. Shaw*, 86 Mo. 594.

*Nebraska*. — *Falsken v. Harkendorf*, 11 Neb. 82; *Robinson v. Jones*, 31 Neb. 20; *Detwiler v. Detwiler*, 30 Neb. 338; *Klamp v. Klamp*, 51 Neb. 17; *Hoehne v. Breitreitz*, 5 Neb. 110.

*Nevada*. — *White v. Sheldon*, 4 Nev. 280; *Frederick v. Hass*, 5 Nev. 389.

*New Jersey*. — *Parker v. Snyder*, 31 N. J. Eq. 164; *Whitley v. Ogle*, 47 N. J. Eq. 67; *Read v. Huff*, 40 N. J. Eq. 229; *Cutler v. Tuttle*, 19 N. J. Eq. 549; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Krauth v. Thiele*, 45 N. J. Eq. 407; *Ward v. Price*, 12 N. J. Eq. 543; *Fisler v. Porch*, 10 N. J. Eq. 243; *Tunnard v. Littell*, 23 N. J. Eq. 264.

*New York*. — *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 409; *White v. Carpenter*, 2 Paige (N. Y.) 217; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 20, 9 Am. Dec. 256; *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 590; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 414.

*North Carolina*. — *Summers v. Moore*, 113 N. Car. 394.

*Ohio*. — *Mannix v. Purcell*, 46 Ohio St. 102, 15 Am. St. Rep. 562; *Miller v. Stokely*, 5 Ohio St. 194.

*Oregon*. — *Sisemore v. Pelton*, 17 Oregon 546; *Parker v. Newitt*, 18 Oregon 274.

*Pennsylvania*. — *Walter v. Snowden*, (Pa. 1887) 6 Cent. Rep. 731; *Silliman v. Haas*, 151 Pa. St. 52; *Brickell v. Earley*, 115 Pa. St. 473; *Serfass v. Serfass*, 14 Pa. Co. Ct. 97; *Jackson's Appeal*, (Pa. 1887) 8 Atl. Rep. 870; *Bennett v. Fulmer*, 49 Pa. St. 155; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333; *Thompson's Appeal*, 22 Pa. St. 16; *Hayes's Appeal*, 123 Pa. St. 110; *Kline's Appeal*, 39 Pa. St. 463; *Farrell v. Lloyd*, 69 Pa. St. 239; *Capehart v. Capehart*, 2 Phila. (Pa.) 134, 13 Leg. Int. (Pa.) 204; *Nichols v. Nichols*, 1 Lack. Jur. (Pa.) 42; *Hoover v. Hoover*, 129 Pa. St. 201; *Buchanan v. Streepier*, 11 W. N. C. (Pa.) 434.

*South Carolina*. — *Catoe v. Catoe*, 32 S. Car. 595; *Gaines v. Drakeford*, 51 S. Car. 37.

*Tennessee*. — *Holder v. Nunnally*, 2 Coldw. (Tenn.) 288; *Hall v. Fowlkes*, 9 Heisk. (Tenn.) 745; *Hardison v. Billington*, 14 Lea (Tenn.) 346; *Page v. Gillentine*, 6 Lea (Tenn.) 244; *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242; *Haynes v. Swann*, 6 Heisk. (Tenn.) 560; *Pillow v. Thomas*, 1 Baxt. (Tenn.) 120; *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406; *Thompson v. Branch*, Meigs (Tenn.) 390.

*Texas*. — *Cunio v. Burland*, 1 Tex. Unrep. Cas. 469; *Agricultural, etc., Assoc. v. Brewster*, 51 Tex. 257; *Henslee v. Henslee*, 5 Tex. Civ. App. 367.

*Virginia*. — *Phelps v. Seely*, 22 Gratt. (Va.) 589; *Steagall v. Steagall*, 90 Va. 73; *Donaghe v. Tams*, 81 Va. 132; *Miller v. Blose*, 30 Gratt. (Va.) 744; *Woodward v. Sibert*, 82 Va. 441; *Parker v. Logan*, 82 Va. 376.

*Washington*. — *Spencer v. Terrel*, 17 Wash. 514.

*West Virginia*. — *Smith v. Patton*, 12 W. Va. 541; *Smith v. Turley*, 32 W. Va. 14.

**The Following Are Some of the Expressions Used by the Courts as to the degree of proof required:**

*Clear*. — *Parker v. Snyder*, 31 N. J. Eq. 164; *Smith v. Patton*, 12 W. Va. 541.

*Very Clear and Received with Great Caution*. — *Corder v. Corder*, 124 Ill. 229; *Millard v. Hathaway*, 27 Cal. 119; *Miller v. Blose*, 30 Gratt. (Va.) 744.

*Clear and Distinct or Explicit*. — *Witts v. Horney*, 59 Md. 584; *Kane v. O'Connors*, 78 Va. 76.

*Clear and Satisfactory*. — *Laughlin v. Mitchell*, 14 Fed. Rep. 382; *P'Pool v. Thomas*, (Ky. 1888) 8 S. W. Rep. 198; *Agricultural, etc., Assoc. v. Brewster*, 51 Tex. 257.

*Not Only Satisfactory, but Clear and Undoubted*. — *Reynolds v. Caldwell*, 80 Ala. 232.

*Unquestionable*. — *Dudley v. Bachelder*, 53 Me. 403.

*Clearly Sufficient*. — *Billings v. Clinton*, 6 S. Car. 90.

*Full, Clear and Convincing*. — *Lee v. Browder*, 51 Ala. 288; *Lehman v. Lewis*, 62 Ala. 129; *Donaghe v. Tams*, 81 Va. 132; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

*Most Satisfactory*. — *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406; *McCammon v. Pettitt*, 3 Sneed (Tenn.) 246.

*Most Satisfactory*. — In two cases in *Illinois*, *Green v. Dietrich*, 114 Ill. 636, and *Heneke v. Floring*, 114 Ill. 554, it was said that the proof must be "of the most satisfactory character." But in both of these it was after the lapse of many years.

**1. Lapse of Time**. — *United States*. — *In re Stanger*, 35 Fed. Rep. 238.

*Illinois*. — *Springer v. Springer*, 114 Ill. 550; *Heneke v. Floring*, 114 Ill. 554; *Strong v. Messinger*, 148 Ill. 431.

*Iowa*. — *Nelson v. Worrall*, 20 Iowa 469; *Maple v. Nelson*, 31 Iowa 322; *Sunderland v. Sunderland*, 19 Iowa 325; *Murphy v. Hanscome*, 76 Iowa 192.

*Kentucky*. — *Hart v. Hawkins*, 3 Bibb (Ky.) 502, 6 Am. Dec. 666; *Ecton v. Moore*, 4 Ky. L. Rep. 307.

*Missouri*. — *Adams v. Burns*, 96 Mo. 361.

*New Jersey*. — *McKeown v. McKeown*, 33 N. J. Eq. 384, 34 N. J. Eq. 560.

*Oregon*. — *Clark v. Pratt*, 15 Oregon 304; *Snider v. Johnson*, 25 Oregon 328.

*Pennsylvania*. — *Yard v. Thompson*, 18 Pa. St. 413; *Crawford v. Thompson*, 142 Pa. St. 551; *Strimppler v. Roberts*, 18 Pa. St. 253, 57 Am. Dec. 606.

*Virginia*. — *Parker v. Logan*, 82 Va. 376.

the realm of conjecture and presumption,<sup>1</sup> and it has also been held error to charge that the "clearest and most positive proof" must be given;<sup>2</sup> but it has been held not error to refuse to charge that such parol evidence should be received with "great caution."<sup>3</sup>

**Particular Cases.** — The sufficiency of the evidence to sustain the claim in favor of a resulting trust must, of course, depend upon the circumstances of each particular case, and reference is made in the notes to collections of cases in which the evidence has been held insufficient,<sup>4</sup> and on the other hand in which it has been held sufficient,<sup>5</sup> to support the claim of a resulting trust.

(2) *Evidence to Rebut Presumption of Trust.* — As heretofore stated, the doctrine of a trust resulting from the payment of the purchase money is based on the presumption, arising from the transaction, that the person paying the purchase money intended to retain the beneficial interest, and may be rebutted by showing that it was his intention that the grantee should take the beneficial as well as the legal title.<sup>6</sup>

1. *Marshall v. Fleming*, 11 Colo. App. 515. See also *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71.

2. **Clearest and Most Positive Proof Not Required.** — *Neyland v. Bendy*, 69 Tex. 711. To the same effect see *Baylor v. Hopf*, 81 Tex. 637. See also *Markham v. Carothers*, 47 Tex. 22.

3. *Jackson v. Stevens*, 108 Mass. 94.

4. **Evidence Held Insufficient** — *England*, — *Wilkins v. Stevens*, 1 Y. & C. Ch. 431.

*United States.* — *In re Stanger*, 35 Fed. Rep. 238; *Laughlin v. Mitchell*, 14 Fed. Rep. 382.

*Alabama.* — *Shelby v. Tardy*, 84 Ala. 327; *Reynolds v. Caldwell*, 80 Ala. 232; *Shelton v. Aultman*, etc., Co., 82 Ala. 315; *Tilford v. Torrey*, 53 Ala. 120; *Lehman v. Lewis*, 62 Ala. 129.

*Arizona.* — *Butler v. Shumaker*, (Ariz. 1893) 32 Pac. Rep. 265.

*Arkansas.* — *Leggett v. Sutton*, (Ark. 1892) 18 S. W. Rep. 125; *Crittenden v. Woodruff*, 11 Ark. 82; *Crow v. Watkins*, 48 Ark. 169.

*California.* — *Woodside v. Hewel*, 109 Cal. 481.

*Colorado.* — *Denver First Nat. Bank v. Campbell*, 2 Colo. App. 271; *Warren v. Adams*, 19 Colo. 515.

*Florida.* — *Lofton v. Sterrett*, 23 Fla. 565.

*Illinois.* — *Towle v. Wadsworth*, 147 Ill. 80; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120; *Schneider v. Becker*, 125 Ill. 109; *Heneke v. Floring*, 114 Ill. 554; *Corder v. Corder*, 124 Ill. 229.

*Indiana.* — *Hedges v. Keller*, 104 Ind. 479.

*Iowa.* — *Maple v. Nelson*, 31 Iowa 322; *Murphy v. Hanscome*, 76 Iowa 192; *Richardson v. Haney*, 76 Iowa 101.

*Kentucky.* — *P'Pool v. Thomas*, (Ky. 1888) 8 S. W. Rep. 198; *Pool v. Detraz*, (Ky. 1897) 42 S. W. Rep. 346.

*Maine.* — *Whitmore v. Learned*, 70 Me. 276.

*Maryland.* — *Brennan v. Durkin*, 76 Md. 451; *Greer v. Baughman*, 13 Md. 257.

*Mississippi.* — *Logan v. Johnson*, 72 Miss. 185.

*Missouri.* — *Plumb v. Cooper*, 121 Mo. 668; *King v. Isley*, 116 Mo. 155; *McFarland v. La Force*, 119 Mo. 585; *Adams v. Burns*, 96 Mo. 361; *Berry v. Hartzell*, 91 Mo. 132.

*Nebraska.* — *Anderson v. South Omaha Land Co.*, 35 Neb. 785; *Williams v. Lowe*, 4 Neb. 382; *Roddy v. Roddy*, 3 Neb. 96.

*New York.* — *Lowery v. Erskine*, 113 N. Y. 52.

*Oregon.* — *Clark v. Pratt*, 15 Oregon 304; *Snider v. Johnson*, 25 Oregon 328.

*Pennsylvania.* — *Wolff's Appeal*, 123 Pa. St. 438; *Ball v. Davidson*, (Pa. 1889) 17 Atl. Rep. 221; *Crawford v. Thompson*, 142 Pa. St. 551; *Kline's Appeal*, 39 Pa. St. 463; *Behm v. Molly*, 133 Pa. St. 614; *Strimpfler v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606.

*South Carolina.* — *Catoe v. Catoe*, 32 S. Car. 595.

*Tennessee.* — *Hall v. Fowlkes*, 9 Heisk. (Tenn.) 745.

*Texas.* — *Atwell v. Watkins*, 13 Tex. Civ. App. 668.

*Utah.* — *Chambers v. Emery*, 13 Utah 374.

*Virginia.* — *Woodward v. Sibert*, 82 Va. 441; *Page v. Lindsay*, 86 Va. 169; *Throckmorton v. Throckmorton*, 91 Va. 42.

5. **Evidence Held Sufficient** — *Alabama.* — *Kimbrough v. Nelms*, 104 Ala. 554.

*Arkansas.* — *McGuire v. Ramsey*, 9 Ark. 518.

*District of Columbia.* — *Cooksey v. Bryan*, 2 App. Cas. (D. C.) 557.

*Illinois.* — *Boyd v. Boyd*, 163 Ill. 611.

*Iowa.* — *Hines v. Light*, 83 Iowa 737.

*Kentucky.* — *Hart v. Hawkins*, 3 Bibb (Ky.) 502, 6 Am. Dec. 666.

*Mississippi.* — *House v. Harden*, 52 Miss. 860.

*Nebraska.* — *Clark v. Clark*, 21 Neb. 402; *Detwiler v. Detwiler*, 30 Neb. 338.

*New Hampshire.* — *Lyford v. Thurston*, 16 N. H. 399.

*New Jersey.* — *Van Syckle v. Kline*, 34 N. J. Eq. 332.

*Pennsylvania.* — *Altoona Coal, etc., Co. v. Burk*, 172 Pa. St. 53; *Hayes's Appeal*, 123 Pa. St. 110; *Farrell v. Lloyd*, 69 Pa. St. 239; *Harold v. Lane*, 53 Pa. St. 268; *Logan v. Eva*, 144 Pa. St. 312.

*South Carolina.* — *Farrington v. Duval*, 32 S. Car. 590.

*Tennessee.* — *Pillow v. Thomas*, 1 Baxt. (Tenn.) 120; *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242.

6. **Presumption of Resulting Trust Rebuttable.** — *Ward v. Ward*, 59 Conn. 188. See *supra*, this section, subdiv. 3. *b. Rebutting Presumption of Resulting Trust.*

**Admissibility of Parol Evidence.** — And for this purpose parol evidence is admissible to rebut this presumption, to the same extent that it is admissible to show the payment of the purchase money and thereby create a resulting trust;<sup>1</sup> and evidence of all the facts and circumstances surrounding the transaction should be admitted for the purpose of determining this intention.<sup>2</sup> The evidence must, however, relate to the intention of the parties at the time of the transaction.<sup>3</sup>

**Right to Testify as to Intention.** — The person by whom the purchase money was paid may testify as to whether it was his intention that the grantee should take the beneficial interest or merely hold as trustee.<sup>4</sup>

**Intention Question of Fact.** — Of course the question as to the intention of the person paying the purchase money is one of fact.<sup>5</sup>

**Burden and Quantum of Proof.** — Unless the presumption of an advancement arises by reason of the relationship of the parties,<sup>6</sup> the burden is upon the grantee to show that the payment by the person in whose favor the resulting trust is sought to be enforced was intended as a gift,<sup>7</sup> as the mere fact of payment creates a *prima facie* presumption of a resulting trust;<sup>8</sup> still, the evidence to rebut the presumption of a resulting trust is not required to be as strong as that required to show the payment of the purchase money.<sup>9</sup>

**4. Resulting Trusts Arising Out of Purchases with Fiduciary Funds** — *a.* IN GENERAL. — The rule is well settled that where a fiduciary purchases an estate in his own name with the fiduciary funds, whether he be or be not authorized to do so, and though he intended to hold the estate for himself, a trust results in favor of the persons entitled to the funds so used, and they may have the benefit of the purchase; and *a fortiori* this is so where the purchase is made directly for the benefit of the *cestui que trust* and is so intended by both parties.<sup>10</sup> The right of the *cestui que trust* becomes at his

**1. Parol Evidence Admissible** — *United States*. — *Jenkins v. Pye*, 12 Pet. (U. S.) 241.

*California*. — *Tryon v. Huntoon*, 67 Cal. 325.

*Illinois*. — *Donlin v. Bradley*, 119 Ill. 412; *Goelz v. Goelz*, 157 Ill. 45; *Maxwell v. Maxwell*, 109 Ill. 588; *Cartwright v. Wise*, 14 Ill. 417; *Taylor v. Taylor*, 9 Ill. 303.

*Maine*. — *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

*Massachusetts*. — *Livermore v. Aldrich*, 5 Cush. (Mass.) 431.

*Minnesota*. — *Irvine v. Marshall*, 7 Minn. 286.

*New Hampshire*. — *Blasdel v. Locke*, 52 N. H. 238; *Farrington v. Barr*, 36 N. H. 86; *Page v. Page*, 8 N. H. 187.

*New Jersey*. — *Peer v. Peer*, 11 N. J. Eq. 432; *Warren v. Tynan*, 54 N. J. Eq. 402.

*New York*. — *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405.

*Ohio*. — *Creed v. Lancaster Bank*, 1 Ohio St. 1.

*Pennsylvania*. — *Warren v. Steer*, 112 Pa. St. 634; *Hays v. Quay*, 68 Pa. St. 263; *Wiser v. Allen*, 92 Pa. St. 317.

*Texas*. — *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

**2. Facts and Circumstances Surrounding Transaction.** — See *Goelz v. Goelz*, 157 Ill. 45 [citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 18, 19]; *Kelley v. Snyder*, 111 Ill. 114; *Lawman v. Barber*, 176 Pa. St. 1; *Carter v. Montgomery*, 2 Tenn. Ch. 216.

**3. Intention at Time of Transaction.** — *Warren v. Steer*, 112 Pa. St. 634.

Thus, the subsequent declarations of the

person paying the purchase money, not bearing upon his intention at the time of the purchase, cannot affect the title. *Warren v. Steer*, 112 Pa. St. 634, 118 Pa. St. 529.

**4. May Testify as to Intention.** — *Derry v. Devon*, 3 Smale & G. 403; *Forrest v. Forrest*, 11 Jur. N. S. 317; *Culp v. Price*, 107 Iowa 133.

**5. Intention Question of Fact.** — *Ward v. Ward*, 59 Conn. 196.

**6.** See *supra*, this section, *Advancements*.

**7. Burden of Proof.** — *Soar v. Foster*, 4 Jur. N. S. 406.

**8.** See the cases cited *supra*, this section, to the general proposition, as to the existence of a resulting trust arising from the payment of the purchase money.

**9. Quantum of Proof.** — *Walsh v. McBride*, 72 Md. 45. See also *Nicholson v. Mulligan*, 3 Ir. Eq. 322.

**10. Purchase with Fiduciary Funds** — *England*. — *Keech v. Sandford*, 1 White & T. Lead. Cas. 53; *Trench v. Harrison*, 17 Sim. 111; *Lench v. Lench*, 10 Ves. Jr. 511; *Mathias v. Mathias*, 3 Smale & G. 552; *Ouseley v. Anstruther*, 10 Beav. 453; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586; *In re Exchange Banking Co.*, 21 Ch. D. 519; *Bagnall v. Carlton*, 6 Ch. D. 371; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 3 App. Cas. 1218; *Lees v. Nuttall*, 1 Russ. & M. 53; *Carter v. Palmer*, 11 Bligh N. S. 397; *Lane v. Dighton*, Amb. 409; *Deg v. Deg*, 2 P. Wms. 412; *Perry v. Phelps*, 4 Ves. Jr. 108; *Powell v. Glover*, 3 P. Wms. 251, note *a*; *Fox v. Mackreth*, 2 Bro. C. C. 400, 2 Cox Ch. 320; *Morret v. Paske*, 2 Atk. 54; *Kimber v. Barber*, L. R. 8 Ch. 56; *Wedderburn v. Wedderburn*, 4 Myl. & C. 41;



election one of ownership of the land, and not merely a lien upon it for the

*Docker v. Somes*, 2 Myl. & K. 665; *Gresley v. Mousley*, 4 De G. & J. 78; *Holman v. Loynes*, 4 De G. M. & G. 270; *Hesse v. Briant*, 6 De G. M. & G. 623; *Knight v. Bowyer*, 2 De G. & J. 421; *Savery v. King*, 5 H. L. Cas. 627; *Thornton v. Stokill*, 1 Jur. N. S. 751; *Phayre v. Peree*, 3 Dow 128; *Ex p. Boyd*, 5 W. R. 634; *Carter v. Long*, 26 Can. Sup. Ct. 430; *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183.

*United States*.—*Philips v. Crammond*, 2 Wash. (U. S.) 441; *Flanders v. Thompson*, 3 Woods (U. S.) 9; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715; *Smith v. Burnham*, 3 Sumn. (U. S.) 435; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *U. S. v. State Nat. Bank*, 96 U. S. 30; *McDonogh v. Murdoch*, 15 How. (U. S.) 367; *Spokane v. Spokane First Nat. Bank*, 68 Fed. Rep. 982; *Roggenkamp v. Roggenkamp*, 68 Fed. Rep. 605; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Friedlander v. Johnson*, 2 Woods (U. S.) 675; *Gaines v. Chew*, 2 How. (U. S.) 619.

*Alabama*.—*Tilford v. Torrey*, 53 Ala. 120; *Crutcher v. Taylor*, 66 Ala. 217; *Walker v. Elledge*, 65 Ala. 51; *Lewis v. Montgomery Mut. Bldg., etc., Assoc.*, 70 Ala. 276; *Carleton v. Rivers*, 54 Ala. 467; *Glenn v. Glenn*, 47 Ala. 204; *Nettles v. Nettles*, 67 Ala. 599; *Morgan v. Morgan*, 68 Ala. 80; *Olds v. Marshall*, 93 Ala. 138; *Lehman v. Lewis*, 62 Ala. 129; *Danforth v. Herbert*, 33 Ala. 497; *Du Bose v. Carlisle*, 51 Ala. 590.

*Arkansas*.—*Pindall v. Trevor*, 30 Ark. 249; *Shelton v. Lewis*, 27 Ark. 190; *Osborne v. Graham*, 30 Ark. 66; *Williamson v. Furbush*, 31 Ark. 539; *Graves v. Pinchback*, 47 Ark. 470; *Wheat v. Moss*, 16 Ark. 255.

*California*.—*Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Eversdon v. Mayhew*, 65 Cal. 163; *Stratton v. California Land, etc., Co.*, 86 Cal. 353; *Roach v. Caraffa*, 85 Cal. 436; *Wells v. Robinson*, 13 Cal. 133.

*Connecticut*.—*Church v. Sterling*, 16 Conn. 388; *Mowry v. Hawkins*, 57 Conn. 453.

*District of Columbia*.—*Balloch v. Hooper*, 6 Mackey (D. C.) 421.

*Florida*.—*Anderson v. Northrop*, 30 Fla. 612; *Claffin v. Ambrose*, 37 Fla. 78.

*Georgia*.—*Henderson v. Williams*, 97 Ga. 709; *Hampton v. Hampton*, 18 Ga. 513; *Phin- izey v. Few*, 19 Ga. 66; *Chastain v. Smith*, 30 Ga. 96; *Sasser v. Sasser*, 73 Ga. 275; *Martin v. Greer*, 1 Ga. Dec. (pt. i.) 109.

*Illinois*.—*Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *Musham v. Musham*, 87 Ill. 80; *Roberts v. Opp*, 56 Ill. 34; *Cookson v. Richardson*, 69 Ill. 137; *Moss v. Moss*, 95 Ill. 449; *Stow v. Kimball*, 28 Ill. 93; *Smith v. Ramsey*, 6 Ill. 373; *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691; *Loften v. Witboard*, 92 Ill. 461; *Ward v. Armstrong*, 84 Ill. 151; *Rice v. Rice*, 108 Ill. 199; *Fischbeck v. Gross*, 112 Ill. 208; *Seaman v. Cook*, 14 Ill. 501; *Weaver v. Fisher*, 110 Ill. 146; *Bruce v. Roney*, 18 Ill. 67; *Breit v. Yeaton*, 101 Ill. 242; *Sholty v. Sholty*, 140 Ill. 81.

*Indiana*.—*French v. Sheplor*, 83 Ind. 266, 43 Am. Rep. 67; *Resor v. Resor*, 9 Ind. 347;

*Miller v. Blackburn*, 14 Ind. 62; *Goldsberry v. Gentry*, 92 Ind. 193; *Boyer v. Libey*, 88 Ind. 235; *Derry v. Derry*, 74 Ind. 560; *Pugh v. Pugh*, 9 Ind. 132; *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 70; *Waldron v. Sanders*, 85 Ind. 270; *Catherwood v. Watson*, 65 Ind. 576; *Hampson v. Fall*, 64 Ind. 382; *Brannon v. May*, 42 Ind. 92; *Pierce v. Hower*, 142 Ind. 626; *Blair v. Bass*, 4 Blackf. (Ind.) 539; *Rhodes v. Green*, 36 Ind. 7.

*Iowa*.—*Fox v. Doherty*, 30 Iowa 334; *Robinson v. Robinson*, 22 Iowa 427; *Burden v. Sheridan*, 36 Iowa 125, 14 Am. Rep. 505; *Reichhoff v. Brecht*, 51 Iowa 633; *Claussen v. La Franz*, 1 Iowa 226; *Schaffner v. Grutmacher*, 6 Iowa 137; *Sunderland v. Sunderland*, 19 Iowa 325; *McLenan v. Sullivan*, 13 Iowa 521; *Williams v. Williams*, (Iowa 1899) 78 N. W. Rep. 792; *Matter of Maxwell*, 83 Iowa 590.

*Kansas*.—*Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145; *English v. Law*, 27 Kan. 242; *Winkfield v. Brinkman*, 21 Kan. 682.

*Kentucky*.—*Lee v. Fox*, 6 Dana (Ky.) 171; *Perry v. Head*, 1 A. K. Marsh. (Ky.) 46; *Chapline v. McAfee*, 3 J. J. Marsh. (Ky.) 515; *Deatly v. Murphy*, 3 A. K. Marsh. (Ky.) 472; *Lewis v. Taylor*, 96 Ky. 556; *Hixon v. Bridges*, (Ky. 1897) 38 S. W. Rep. 1046.

*Louisiana*.—*Hall v. Sprigg*, 7 Mart. (La.) 243, 12 Am. Dec. 506; *Rhodes v. Hooper*, 6 La. Ann. 356; *Livingston v. Morgan*, 26 La. Ann. 646; *Gurney's Succession*, 14 La. Ann. 632.

*Maine*.—*Brown v. Dwelley*, 45 Me. 52; *McLarren v. Brewer*, 51 Me. 402; *Merrill v. Smith*, 37 Me. 394; *Houghton v. Davenport*, 74 Me. 590.

*Maryland*.—*Brooks v. Dent*, 1 Md. Ch. 523; *Thomas v. Standiford*, 49 Md. 181; *Cecil Bank v. Snively*, 23 Md. 253; *Abell v. Brown*, 55 Md. 217; *Hartssock v. Russell*, 52 Md. 619.

*Massachusetts*.—*Richards v. Manson*, 101 Mass. 482; *Bancroft v. Consen*, 13 Allen (Mass.) 50; *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459; *National Mahaiwe Bank v. Barry*, 125 Mass. 20; *Hervey v. Rawson*, 164 Mass. 501; *Moore v. Sunson*, 144 Mass. 594; *McGuire v. Devlin*, 158 Mass. 63.

*Michigan*.—*Michigan Air Line R. Co. v. Mellen*, 44 Mich. 321.

*Mississippi*.—*Harper v. Archer*, 28 Miss. 212; *Hancock v. Titus*, 39 Miss. 224; *Henderson v. Warmack*, 27 Miss. 830; *Cameron v. Lewis*, 56 Miss. 76; *Porter v. Caspar*, 54 Miss. 359; *Wood v. Stafford*, 50 Miss. 370; *Fant v. Dunbar*, 71 Miss. 576.

*Missouri*.—*Valle v. Bryan*, 19 Mo. 423; *Woodford v. Stephens*, 51 Mo. 443; *Modrell v. Riddle*, 82 Mo. 31; *White v. Drew*, 42 Mo. 561; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Boyn-ton v. Miller*, 144 Mo. 681; *Johnson v. Quarles*, 46 Mo. 423; *Jones v. Elkins*, 143 Mo. 647.

*Montana*.—*Muller v. Buyck*, 12 Mont. 354.

*Nebraska*.—*Roy v. McPherson*, 11 Neb. 197; *State Nat. Bank v. Johnson*, 51 Neb. 546.

*New Hampshire*.—*Farley v. Blood*, 30 N. H. 354; *Hall v. Young*, 37 N. H. 134.

*New Jersey*.—*Stratton v. Dialogue*, 16 N. J. Eq. 70; *Nestal v. Schmid*, 29 N. J. Eq. 458; *Lathrop v. Gilbert*, 10 N. J. Eq. 344; *Gogherty*

amount of the trust funds used in the purchase.<sup>1</sup>

**Exchange of Trust Property.** — The principle creating a resulting trust in property purchased with trust funds applies equally where property is acquired by a trustee by an exchange of trust property.<sup>2</sup>

**Not Strictly a Resulting Trust.** — It has been said that the right of a *cestui que trust* to claim property purchased by the trustee with trust funds is not technically nor strictly a resulting trust, but is instead a trust implied or created by law, originating in the right to pursue a trust fund through its various transmutations into a new investment in violation of the duties of the trustee.<sup>3</sup>

*v. Bennett*, 37 N. J. Eq. 87; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Plaut v. Plaut*, 44 N. J. Eq. 18; *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Deegan v. Capner*, 44 N. J. Eq. 339.

*New York.* — *Traphagen v. Burt*, 67 N. Y. 30; *Reid v. Fitch*, 11 Barb. (N. Y.) 399; *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291; *Safford v. Hynds*, 39 Barb. (N. Y.) 77; *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214; *Schlaefel v. Corson*, 52 Barb. (N. Y.) 510; *Day v. Roth*, 18 N. Y. 448; *Butts v. Wood*, 37 N. Y. 317; *Bliss v. Matteson*, 45 N. Y. 22; *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152; *Pascoag Bank v. Hunt*, 3 Edw. (N. Y.) 583; *Bank of America v. Pollock*, 4 Edw. (N. Y.) 215; *Day v. Roth*, 18 N. Y. 448.

*North Carolina.* — *Lyon v. Akin*, 78 N. Car. 258; *Campbell v. Drake*, 4 Ired. Eq. (39 N. Car.) 94; *King v. Weeks*, 70 N. Car. 372; *McEachin v. Stewart*, 106 N. Car. 336; *Ross v. Davis*, 122 N. Car. 265.

*Ohio.* — *Reynolds v. Morris*, 17 Ohio St. 510; *Roberts v. Remey*, 56 Ohio St. 249; *Melvin v. Melvin*, *Wright* (Ohio) 509; *Schaff v. Ensley*, 14 Ohio Cir. Ct. 492, 7 Ohio Cir. Dec. 707.

*Oregon.* — *Springer v. Young*, 14 Oregon 280; *Barger v. Barger*, 30 Oregon 268; *Parker v. Newitt*, 18 Oregon 274; *Petrain v. Kiernan*, 23 Oregon 455; *Sisemore v. Pelton*, 17 Oregon 51.

*Pennsylvania.* — *Lefevre's Appeal*, 69 Pa. St. 122, 8 Am. Rep. 229; *Hamnett's Appeal*, 72 Pa. St. 337; *Thompson's Appeal*, 22 Pa. St. 16; *Kisler v. Kisler*, 2 Watts (Pa.) 323, 27 Am. Dec. 308; *Rupp's Appeal*, 100 Pa. St. 531; *Bigley v. Jones*, 114 Pa. St. 510; *Beck v. Uhrich*, 13 Pa. St. 636, 53 Am. Dec. 507; *Raybold v. Raybold*, 20 Pa. St. 308; *Barrett v. Bamber*, 81 Pa. St. 247; *Robb's Appeal*, 41 Pa. St. 45; *Harrisburg Bank v. Tyler*, 3 W. & S. (Pa.) 373; *Coder v. Huling*, 27 Pa. St. 84; *Harrold v. Lane*, 53 Pa. St. 268; *Beegle v. Wentz*, 55 Pa. St. 369, 93 Am. Dec. 762; *Fillman v. Divers*, 31 Pa. St. 429; *Kline's Appeal*, 39 Pa. St. 463; *In re Brown*, 2 Pa. St. 463; *Beck v. Graybill*, 28 Pa. St. 66; *Reed v. Melior*, 122 Pa. St. 635.

*Rhode Island.* — *Watson v. Thompson*, 12 R. I. 466.

*South Carolina.* — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648; *Gaines v. Drakeford*, 51 S. Car. 37.

*South Dakota.* — *Farmers', etc., Bank v. Kemball Milling Co.*, 1 S. Dak. 388, 36 Am. St. Rep. 739.

*Tennessee.* — *Snell v. Elam*, 2 Heisk. (Tenn.) 82; *Broyles v. Nowlin*, 3 Baxt. (Tenn.) 101;

*Pritchard v. Wallace*, 4 Sneed (Tenn.) 405, 70 Am. Dec. 254; *Burks v. Burks*, 7 Baxt. (Tenn.) 353; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531; *Hawthorne v. Brown*, 3 Sneed (Tenn.) 462; *Pillow v. Thomas*, 1 Baxt. (Tenn.) 120; *Vancil v. Evans*, 4 Coldw. (Tenn.) 340; *Roberts v. Jackson*, 3 Yerg. (Tenn.) 77; *Gordon v. English*, 3 Lea (Tenn.) 634; *Turner v. Petigrew*, 6 Humph. (Tenn.) 438; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 445; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71; *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457; *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242; *Wilkinson v. Wilkinson*, 1 Head (Tenn.) 305.

*Texas.* — *Smith v. Boquet*, 27 Tex. 507; *Neill v. Keese*, 13 Tex. 187; *Kennedy v. Baker*, 59 Tex. 150; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248; *Cooper v. Lee*, 75 Tex. 114; *McClure v. Bryant*, 18 Tex. Civ. App. 141; *Oberthier v. Stroud*, 33 Tex. 522; *Thielau v. Beaumont*, (Tex. Civ. App. 1893) 22 S. W. Rep. 661.

*Vermont.* — *Pinney v. Fellows*, 15 Vt. 525; *Barron v. Barron*, 24 Vt. 375.

*Virginia.* — *Kane v. O'Connors*, 78 Va. 76; *Sinclair v. Sinclair*, 79 Va. 40; *Donaghe v. Tams*, 81 Va. 132; *Parker v. Logan*, 82 Va. 376; *Law v. Law*, 76 Va. 527; *Gregory v. Peoples*, 80 Va. 355; *Sims v. Tyrer*, 96 Va. 5; *Moorman v. Arthur*, 90 Va. 455; *Warwick v. Warwick*, 31 Gratt. (Va.) 70.

*Washington.* — *Case v. Seger*, 4 Wash. 492.

*West Virginia.* — *Webb v. Bailey*, 41 W. Va. 463; *Marshall v. Hall*, 42 W. Va. 641.

*Wisconsin.* — *Barker v. Barker*, 14 Wis. 131; *Kluender v. Fenske*, 53 Wis. 118; *Moffatt v. Shepard*, 2 Pin. (Wis.) 66, 52 Am. Dec. 141.

**Loan on Mortgage and Subsequent Purchase on Foreclosure.** — Where the confidential agent of an aged and illiterate person, having money of his principal to invest, loans it upon mortgage, taking the note and mortgage in his own name, and upon foreclosure buys in the property, he holds under a resulting trust for his principal. *Cookson v. Richardson*, 69 Ill. 1.

**Right of Trustee to Homestead in Land.** — Where the beneficiary elects to take the land, the purchaser or trustee is not entitled to homestead in the land purchased. *Gordon v. English*, 3 Lea (Tenn.) 640. See the title *HOMESTEAD*, *ante*, p. 516.

1. **Estate One of Ownership.** — *Wilkinson v. Wilkinson*, 1 Head (Tenn.) 305.

2. **Exchange of Trust Property.** — *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Porter v. Caspar*, 54 Miss. 350; *Sims v. Tyrer*, 96 Va. 5.

3. **Not Strictly a Resulting Trust.** — *Whaley v. Whaley*, 71 Ala. 159. See, however, *Tilford v. Torrey*, 53 Ala. 120.



And where the trustee used the trust funds without authority, it has been said that the trust which arose in favor of the *cestui que trust* was a constructive trust.<sup>1</sup>

**Title Taken in Name of Third Person.** — Where a fiduciary uses trust funds in the purchase of property, and the title is taken in the name of a third person not a *bona fide* purchaser, a trust results in favor of the trust estate, to the same extent as though the title were taken in the name of the fiduciary.<sup>2</sup>

**b. CASES REFUSING TO RECOGNIZE TRUST.** — In some cases it has been held that the owner of the trust funds, where they have been invested in a purchase by the trustee without authority, and without any intention of creating a trust, has no right to claim a trust in the land purchased, but is only entitled to a lien thereon to secure the repayment of the funds misappropriated.<sup>3</sup>

**c. RIGHT TO CLAIM LIEN** — (1) *In General.* — If the land was purchased by the fiduciary without authority, the *cestui que trust* is not required to claim the land, but may hold the fiduciary personally liable for the funds so misappropriated, and would be entitled to a lien on the land to secure the repayment.<sup>4</sup> The *cestui que trust*, however, cannot claim a lien on real estate of the fiduciary not purchased with the trust funds misappropriated by him.<sup>5</sup>

(2) *Election by Infant.* — Where the *cestui que trust* whose funds have been used is an infant, a court of equity may make the election for the infant.<sup>6</sup>

(3) *Effect of and What Constitutes Election.* — The remedy of the *cestui que trust* by holding the fiduciary personally liable and his alternative remedy of claiming the land purchased are undoubtedly inconsistent, and an election by the *cestui que trust* to resort to one will preclude him from subsequently resorting to the other.<sup>7</sup> The question of what constitutes an election must

1. **Constructive Trust.** — *Winston v. Mitchell*, 87 Ala. 395.

2. **Title Taken in Name of Third Person.** — *Claffin v. Ambrose*, 37 Fla. 78; *Orb v. Coapstick*, 136 Ind. 313; *Wood v. Stafford*, 50 Miss. 370; *Russell v. Allen*, 10 Paige (N. Y.) 249; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 201; *Kennedy v. Baker*, 59 Tex. 150.

3. **Cases Refusing to Recognize Trust.** — *Kirk v. Webb*, Prec. Ch. 84; *Halcott v. Markant*, Prec. Ch. 168; *Sealy v. Stawell*, Ir. R. 2 Eq. 326; *Wallace v. Duffield*, 2 S. & R. (Pa.) 521, 7 Am. Dec. 660; *Bresnihan v. Sheehan*, 125 Mass. 11. See also *Heron v. Heron*, Prec. Ch. 163; *Roy v. Townsend*, 78 Pa. St. 329; *Wallace v. McCollough*, 1 Rich. Eq. (S. Car.) 426.

4. **Right to Claim Lien** — *England.* — *Ryall v. Ryall*, 1 Atk. 59; *Thornton v. Stokill*, 1 Jur. N. S. 751.

*United States.* — *Philips v. Crammond*, 2 Wash. (U. S.) 441.

*Alabama.* — *Parks v. Parks*, 66 Ala. 326; *Morgan v. Morgan*, 68 Ala. 80; *Winston v. Mitchell*, 87 Ala. 395; *Thompson v. Hartline*, 105 Ala. 263; *Griswold v. Griswold*, 111 Ala. 572; *National Mut. Bldg., etc., Assoc. v. Culbertson*, (Ala. 1899) 25 So. Rep. 173; *Nettles v. Nettles*, 67 Ala. 599.

*Arkansas.* — *Shelton v. Lewis*, 27 Ark. 190; *Wheat v. Moss*, 16 Ark. 255.

*Georgia.* — *Phinizz v. Few*, 19 Ga. 66; *Gray v. Perry*, 51 Ga. 180.

*Illinois.* — *Sholty v. Sholty*, 140 Ill. 81; *Breit v. Yeaton*, 101 Ill. 242.

*Kentucky.* — *Yancy v. Holladay*, 7 Dana (Ky.) 235; *Brothers v. Porter*, 6 B. Mon. (Ky.) 111.

*Mississippi.* — *Wood v. Stafford*, 50 Miss. 370; *Fant v. Dunbar*, 71 Miss. 576; *Grouch v. Hazlehurst Lumber Co.*, (Miss. 1894) 16 So. Rep. 496.

*New Jersey.* — *Culver v. Pierson*, (N. J. 1888) 15 Atl. Rep. 269.

*North Carolina.* — *Jones v. Slaughter*, 96 N. Car. 541; *Cooper v. Landis*, 75 N. Car. 526.

*Pennsylvania.* — *Wallace v. Duffield*, 2 S. & R. (Pa.) 521, 7 Am. Dec. 660.

*South Carolina.* — *Guphill v. Isbell*, 1 Bailey L. (S. Car.) 230, 19 Am. Dec. 675.

*Tennessee.* — *Gordon v. English*, 3 Lea (Tenn.) 637; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 201; *Hawthorne v. Brown*, 3 Sneed (Tenn.) 465; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71.

*Virginia.* — *Paxton v. Stuart*, 80 Va. 873.

**Election Must Extend to Transaction as a Whole.** — *Singleton v. Love*, 1 Head (Tenn.) 357.

5. **No Lien on General Real Estate of Fiduciary.** — *Cox v. Bateman*, 2 Ves. 19; *Sealy v. Stawell*, Ir. R. 2 Eq. 326.

6. **Court of Equity Electing for Infant.** — *Parks v. Parks*, 66 Ala. 326.

**Death of Ward—Election by Representatives.** — If the ward whose funds have been invested by his guardian in the purchase of land dies under age, his or her proper representative will have the right to treat the real estate purchased with the ward's money as personalty and distributable as such. *Singleton v. Love*, 1 Head (Tenn.) 357.

7. *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 70; *Richardson v. Day*, 20 S. Car. 412; *Gordon v. English*, 3 Lea (Tenn.) 634. See the title ELECTION OF REMEDIES, 7 ENCYC. OF PL. AND PR. 360.



depend upon the circumstances of each particular case, rather than upon any definite abstract doctrine.<sup>1</sup> The *cestui que trust* is not bound to make an election until all the circumstances of the transaction are known to him, nor will an election in ignorance of his full rights be binding upon him, for until all the circumstances are known to him it would be impossible for him to make a discriminating and deliberate choice which ought to be binding upon him.<sup>2</sup>

**d. TRUST TO INVEST MONEYS.**—Where the trustee holds the funds under a trust to invest them in lands for the benefit of the *cestui que trust*, and he makes the investment in his own name, a court of equity will presume that the investment was made in performance of the obligation imposed by the trust upon the trustee, and will raise a trust in the land in favor of the *cestui que trust*.<sup>3</sup>

**e. NECESSITY FOR EXISTENCE OF FRAUD.**—In order that a trust shall result from the purchase by a fiduciary with trust funds, it is not necessary that there should have been any fraudulent or dishonest conduct on the part of the fiduciary.<sup>4</sup>

**f. PROFITS RECEIVED BY TRUSTEE**—(1) *Resale of Property Purchased.*—Where the trustee resells the property, the *cestui que trust* is entitled to whatever profit the trustee may have made out of the transaction.<sup>5</sup>

(2) *Rents and Profits from Use of Land.*—And where the trustee has remained in possession of the land, the *cestui que trust*, on electing to take the land, may charge the trustee for the rents and profits while he was in possession.<sup>6</sup>

**g. ACTUAL PAYMENT WITH TRUST FUNDS REQUIRED.**—In order to create a resulting trust of this character it is necessary that trust funds should have actually been used in paying the purchase money; thus although the fiduciary agrees with the vendor to pay for the property with trust funds in his hands, yet if he in fact uses his own funds there is no resulting trust.<sup>7</sup>

**h. STATUS OF RIGHT OF CESTUI QUE TRUST BEFORE ASSERTION OF CLAIM TO LAND.**—It has been held that until the *cestui que trust* has elected to take the land his claim is merely a money demand against the trustee, and where such claim has become barred before the assertion of a claim to the land, his right to do so is lost.<sup>8</sup>

**i. CESTUI QUE TRUST INDEBTED TO TRUSTEE.**—It seems that where the trustee uses trust funds in the purchase of an estate, with the authority of the *cestui que trust*, but takes the title in his own name, a trust will result though the *cestui que trust* was indebted to the trustee to an amount equal to the amount of the trust funds used in the purchase.<sup>9</sup>

1. What Constitutes Election. — See *Thompson v. Hartline*, 105 Ala. 263; *Wells v. Robinson*, 13 Cal. 133; *Bitzer v. Bobo*, 39 Minn. 18; *Gordon v. English*, 3 Lea (Tenn.) 634.

2. *Fant v. Dunbar*, 71 Miss. 576; *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572. See also the title GUARDIAN AND WARD, *ante*, p. 16.

3. Trust to Invest Moneys. — *Mathias v. Mathias*, 3 Jur. N. S. 429. See also *Hartscock v. Russell*, 52 Md. 619; *Reynolds v. Morris*, 17 Ohio St. 510.

4. No Necessity for Existence of Fraud. — *Carter v. Long*, 26 Can. Sup. Ct. 430.

5. Profit on Resale of Property. — *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Matthews v. Simmons*, 49 Ark. 468; *Deegan v. Capner*, 44 N. J. Eq. 339; *Methodist Episcopal Church v. Wood*, 5 Ohio 283.

6. Charging Trustee with Rents and Profits. — *Parks v. Parks*, 66 Ala. 326.

When the land is purchased in part with trust funds, the interest of the trustee is liable

for the value of the use and occupation of the part so held in trust. *Spurlock v. Sullivan*, 36 Tex. 511.

7. Actual Payment with Trust Funds Required. — *Reaves v. Garrett*, 34 Ala. 558; *McClure v. Doak*, 6 Baxt. (Tenn.) 364.

The particular money of the *cestui que trust* need not, however, be used in the purchase. Thus, where a person has in his hands the funds of another, and purchases property with the intention that such funds shall pay therefor, a resulting trust will arise though the identical trust funds are not used. *Wolfe v. Citizens' Bank*, (Tenn. Ch. 1897) 42 S. W. Rep. 39.

8. Claim for Money Demand Against Trustee Barred. — *Morgan v. Morgan*, 68 Ala. 80. See also *Bass v. Bass*, 88 Ala. 408.

9. Cestui Que Trust Indebted to Trustee. — *Muller v. Rucker*, 112 Ala. 360. See also *Bumpus v. Bumpus*, 71 Mich. 373; *Green v. Green*, 19 S. W. 138.

*j.* EFFECT OF SUBSEQUENT ACCOUNTING BY TRUSTEE FOR FUNDS USED. — Where a trustee who has used trust funds in a purchase in his own name is in a judicial accounting subsequently charged therewith with compound interest, it has been held that the *cestui que trust* cannot claim a resulting trust in the land;<sup>1</sup> still the trustee could not of his own accord repay the trust money used by him and defeat the right of the *cestui que trust* to claim a resulting trust.<sup>2</sup>

*k.* APPLICATION OF RULE TO SPECIAL FIDUCIARIES — (1) *In General.* — The rules laid down in regard to purchases with trust funds apply to fiduciaries generally, and will be found treated more in detail under the titles dealing with the various trust relations.<sup>3</sup>

(2) *Investment of Stolen Property.* — Where stolen property is invested by the thief, or one receiving it from the thief with notice of the theft, in land or other property, it has been held in some cases that no resulting trust would arise in favor of the owner of the property stolen;<sup>4</sup> whereas in the great majority of the cases a resulting trust has been held to arise.<sup>5</sup> Again, it has been held that though no resulting trust would arise so as to entitle the owner to demand a conveyance of the property, still he would be entitled to a lien thereon to secure the repayment of the value of the property stolen from him.<sup>6</sup>

*l.* PART PAYMENT OF PURCHASE MONEY WITH FIDUCIARY FUNDS. — Where the fiduciary uses the trust funds in part payment for land purchased in his own name, the balance of the purchase money being paid with his own funds, it is held, following the general rule,<sup>7</sup> that a trust results *pro tanto*.<sup>8</sup>

1. Subsequent Accounting by Trustee for Funds Used. — *In re Ricker*, 14 Mont. 153.

2. Trustee Has No Right to Repay and Defeat Trust. — *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398. See also *Palmetto Lumber Co. v. Risley*, 25 S. Car. 309.

3. See such titles as EXECUTORS AND ADMINISTRATORS, vol. II, p. 720; GUARDIAN AND WARD, *ante*, p. 16; TRUSTS AND TRUSTEES. And see the titles AGENCY, vol. I, p. 930; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PARTNERSHIP.

4. Cases Holding No Resulting Trust Where Stolen Property Is Invested. — *Campbell v. Drake*, 4 Ired. Eq. (39 N. Car.) 94; *Union Bank v. Baker*, 8 Humph. (Tenn.) 447.

5. Contrary Doctrine — *England.* — *Taylor v. Plumer*, 3 M. & S. 562.

*California.* — *Wells v. Robinson*, 13 Cal. 133.

*Indiana.* — *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 70.

*Mississippi.* — *Grouch v. Hazlehurst Lumber Co.*, (Miss. 1894) 16 So. Rep. 496.

*Nebraska.* — *State Nat. Bank v. Johnson*, 51 Neb. 546; *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277.

*New York.* — *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152; *Dayton v. H. B. Claflin Co.*, 19 N. Y. App. Div. 120; *New York, etc., Ferry Co. v. Moore*, (Ct. App.) 18 Abb. N. Cas. (N. Y.) 106; *Taylor v. Taylor*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 55; *Bank of America v. Pollock*, 4 Edw. (N. Y.) 215. Compare *Pascoag Bank v. Hunt*, 3 Edw. (N. Y.) 583.

*South Dakota.* — *Farmers', etc., Bank v. Kimball Milling Co.*, 1 S. Dak. 388, 36 Am. St. Rep. 739, 33 Am. & Eng. Corp. Cas. 336.

*Property Stolen by Wife from Husband.* — *In Taylor v. Taylor*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 55, affirmed without opinion 129 N. Y.

623, a conveyance of land standing in the name of the plaintiff's wife was decreed to be made to the husband, on the ground that the purchase money had been abstracted by her from his safe.

*Sufficiency of Evidence.* — A ferry company can enforce a trust in land purchased by its ferry master with money he had stolen. Evidence of his acquisition of property largely in excess of his salary is admissible, and this, coupled with his refusal to testify and with proof that he had had no other apparent means, may be sufficient to establish the trust. And this is so although he was not required to keep accounts and although the company could not tell how much money it had lost. *New York, etc., Ferry Co. v. Moore*, (Ct. App.) 18 Abb. N. Cas. (N. Y.) 106.

6. Lien. — *Humphreys v. Butler*, 51 Ark. 351; *Rorebeck v. Van Eaton*, 90 Iowa 82; *National Mahaiwe Bank v. Barry*, 125 Mass. 20; *Brenihan v. Sheehan*, 125 Mass. 11. See also U. S. v. State Nat. Bank, 96 U. S. 30; *New York City Third Nat. Bank v. Cary*, 39 N. J. Eq. 25; *Campbell v. Drake*, 4 Ired. Eq. (39 N. Car.) 94. Compare *Union Bank v. Baker*, 8 Humph. (Tenn.) 447.

7. See *supra*, this section, subdiv. 3. m. (5) (e) *Part Payment of Consideration.*

8. Resulting Trust Arises from Part Payment with Trust Funds — *Alabama.* — *Glenn v. Glenn*, 47 Ala. 204; *Tilford v. Torrey*, 53 Ala. 120; *Morgan v. Morgan*, 68 Ala. 80.

*Illinois.* — *Roberts v. Opp*, 56 Ill. 34; *Springer v. Springer*, 114 Ill. 550.

*Indiana.* — *Derry v. Derry*, 98 Ind. 319; *Hughes v. White*, 117 Ind. 470.

*Minnesota.* — *Bitzer v. Bobo*, 39 Minn. 18.

*Missouri.* — *Jones v. Elkins*, 143 Mo. 647.

*New York.* — *Dayton v. H. B. Claflin Co.*, 19 N. Y. App. Div. 120, reversing 41 N. Y. Supp. 839.



The *cestui que trust* is not required, however, to accept the land purchased, but may, as where the entire purchase money is paid, hold the trustee personally liable for the trust funds misappropriated and claim a lien for repayment upon the land purchased.<sup>1</sup> In some cases the courts have announced the rule that where the trust funds were used only in part payment, the proper remedy to be given to the *cestui que trust* is merely to allow him a lien on the land for repayment.<sup>2</sup>

**Burden of Proof as to Portion of Trust Funds Used.** — It has been held that where, in the purchase of property, the trustee has mingled trust funds with his individual funds, the purchase will inure to the benefit of the *cestui que trust* solely, if the trustee fails to show what portion of the funds used in making the payment belonged to him.<sup>3</sup>

**m. TIME OF PAYMENT** — (1) *In General.* — In many cases it is said that "the trust must have been coeval with the deeds or it cannot exist at all;"<sup>4</sup> in other words, that trust funds must be applied at the time of the purchase, and that a subsequent use of trust funds in payment does not create a trust.<sup>5</sup> It is apprehended, however, that this statement of the law is inaccurate, and is properly applicable only to pure resulting trusts where there is no relation of trust or confidence except that one party supplies the money and the title is taken in the name of another, and that the true rule is that where there is a fiduciary relation, strictly speaking, and the trust funds have been used in

*Pennsylvania.* — *Sheetz v. Marks*, 2 Pearson (Pa.) 302.

*Rhode Island.* — *Watson v. Thompson*, 12 R. I. 466.

*Tennessee.* — *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242; *Gordon v. English*, 3 Lea (Tenn.) 634; *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 445; *Lane v. Farmer*, 11 Lea (Tenn.) 568.

*Texas.* — *McClure v. Bryant*, 18 Tex. Civ. App. 141.

Compare *Reynolds v. Morris*, 17 Ohio St. 510.

In *Shelton v. Lewis*, 27 Ark. 190, however, it was held that where the trustee makes part payment with the trust funds and receives a contract to convey, the *cestui que trust* may pay the balance and will become entitled to a deed to the entire property.

**1. Right to Lien.** — *Griswold v. Griswold*, 111 Ala. 572; *National Mut. Bldg., etc., Assoc. v. Culberson*, (Ala. 1899) 25 So. Rep. 173; *Bitzer v. Bobo*, 39 Minn. 18.

As to the general right of the *cestui que trust* to claim a lien, see *supra*, this section and subsection, *Right to Claim Lien*.

**2. Only Right to Lien Recognized.** — *Kayser v. Maughain*, 8 Colo. 232; *Warner v. Morse*, 149 Mass. 400; *Wallace v. Duffield*, 2 S. & R. (Pa.) 521, 7 Am. Dec. 660. See also *In re Ricker*, 14 Mont. 153.

**3. Burden of Proof as to Portion of Trust Funds Used** — *England.* — *Russell v. Jackson*, 10 Hare 204.

*Arkansas.* — *Jefferson v. Edrington*, 53 Ark. 545. See also *Atkinson v. Ward*, 47 Ark. 533.

*Illinois.* — *Seaman v. Cook*, 14 Ill. 501.

*Indiana.* — *Fausler v. Jones*, 7 Ind. 277.

*Maine.* — *McLarren v. Brewer*, 51 Me. 402.

*Rhode Island.* — *Watson v. Thompson*, 12 R. I. 466.

*South Carolina.* — *Brazel v. Fair*, 26 S. Car. 370.

See, however, *Bright v. King* (Ky. 1898) 45 S. W. Rep. 508; *Coppage v. Barnett*, 34 Miss. 621; *Reynolds v. Morris*, 17 Ohio St. 510;

*Barger v. Barger*, 30 Oregon 268; *Zundell v. Gess*, 73 Tex. 144.

**4. The Case of Botsford v. Burr**, 2 Johns. Ch. (N. Y.) 405, is the leading case in the United States on this subject, and the language above quoted was used therein by Chancellor Kent. An examination of this case will show that no trust relation was involved. There the person seeking to have a trust declared in his favor had loaned to another, whom he sought to charge as trustee, money to pay the purchase price of lands long after the purchase had been made and the deed executed. The vendee was a simple contract debtor without fiduciary relation to the person whose money was used, and it was held that the transaction subsequent to the purchase created no equity to hold the land. This is in accordance with the general rule above stated. See *supra*, this section, subdiv. 3, m. (4) *Time of Payment*.

**5. Payment at Time of Purchase Required.** — See the following cases where the language above quoted, or some similar expression, was used:

*Alabama.* — *Coles v. Allen*, 64 Ala. 98.

*Arkansas.* — *Sale v. McLean*, 29 Ark. 612.

*Colorado.* — *Denver First Nat. Bank v. Campbell*, 2 Colo. App. 271.

*Delaware.* — *Harvey v. Pennypacker*, 4 Del. Ch. 445.

*Illinois.* — *Alexander v. Tams*, 13 Ill. 221; *Perry v. McHenry*, 13 Ill. 227; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120.

*Indiana.* — *Toney v. Wendling*, 138 Ind. 228.

*Mississippi.* — *Mahorner v. Harrison*, 13 Smed. & M. (Miss.) 53.

*New Jersey.* — *Cutler v. Tuttle*, 19 N. J. Eq. 540.

*New York.* — *Forsyth v. Clark*, 3 Wend. (N. Y.) 637.

*Texas.* — *Ormy v. Saunders*, 75 Tex. 278.

*Virginia.* — *Beecher v. Wilson*, 84 Va. 813, 10 Am. St. Rep. 883.

*Wisconsin.* — *Bosworth v. Hopkins*, 85 Wis. 50.



violation of such relation, when once they are followed and definitely located, then a trust results, whether the funds were so diverted at or after the time of purchase.<sup>1</sup>

(2) *Use of Trust Funds in Improving Land.* — The use by a trustee of trust funds in improving land which he had previously purchased in his own name with his own funds will not create a resulting trust in favor of the *cestui que trust* so as to entitle him to call for a legal conveyance of any portion of the land.<sup>2</sup> Still he would be entitled to a lien thereon to secure the repayment of the trust funds so used.<sup>3</sup>

*n.* EVIDENCE. — In order to entitle the *cestui que trust* to enforce a resulting trust in land purchased in the name of the trustee, he must show clearly that the purchase was made with the trust funds.<sup>4</sup>

**III. CONSTRUCTIVE TRUSTS — 1. In General.** — It is the settled doctrine of courts of equity that where the legal title to property is obtained under circumstances of fraud or oppression, the wrongdoer will be converted into a trustee in favor of the one equitably entitled, whenever this is necessary for the purpose of administering adequate relief.<sup>5</sup> And where the wrongdoer con-

**1. Subsequent Payment Sufficient.** — *Preston v. McMillan*, 58 Ala. 84; *Whaley v. Whaley*, 71 Ala. 159; *Lehman v. Lewis*, 62 Ala. 129; *Atkinson v. Ward*, 47 Ark. 533; *Freeman v. Kelly*, 110ffm. (N. Y.) 90; *Turner v. Petigrew*, 6 Humph. (Tenn.) 438; *Burks v. Burks*, 7 Baxt. (Tenn.) 353; *Gordon v. English*, 3 Lea (Tenn.) 637; *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572; *Ezell v. Wright*, 3 Lea (Tenn.) 512; *Warwick v. Warwick*, 31 Gratt. (Va.) 70.

**Payment with Trust Funds in Pursuance of Contract of Purchase.** — An implied trust is raised in favor of a *cestui que trust* in land purchased with the trust funds and the title to which is taken in the name of the trustee, whether such funds were paid before, at the time of, or after the purchase, if the payment was in pursuance of the contract of purchase. *Webb v. Bailey*, 41 W. Va. 463.

**Lien for Funds Used in Subsequent Payment.** — *Atkinson v. Ward*, 47 Ark. 533; *Dyer v. Jacobway*, 42 Ark. 186; *Haines v. Haines*, 54 Ill. 74. Compare *Lehman v. Lewis*, 62 Ala. 129; *French v. Sheplor*, 83 Ind. 266, 43 Am. Rep. 67.

**Payment of Debts Indirectly Contracted in Purchase of Land.** — In *Salé v. McLean*, 29 Ark. 612, it was held that where a husband borrows money which he uses in the purchase of land, and subsequently uses the separate means of his wife in repaying the indebtedness, the wife has no lien upon the land.

**2. Bonds Used in Improving Land — Alabama.** — *Tilford v. Torrey*, 53 Ala. 120.

*Illinois.* — *Pain v. Farson*, 179 Ill. 185.

*Missouri.* — *Brown v. Turner*, 113 Mo. 27.

*New Hampshire.* — *Bodwell v. Nutter*, 63 N. H. 446.

*Pennsylvania.* — *Cross's Appeal*, 97 Pa. St. 471.

*Tennessee.* — *Clark v. Timmons*, (Tenn. Ch. 1897) 39 S. W. Rep. 534.

**3. Lien.** — *Tilford v. Torrey*, 53 Ala. 120; *Atkinson v. Ward*, 47 Ark. 533; *Fant v. Dunbar*, 71 Miss. 576. *Contra*, *Cross's Appeal*, 97 Pa. St. 471.

**4. Evidence — England.** — *Lane v. Dighton*, Amb. 413.

*Alabama.* — *Burke v. Andrews*, 91 Ala. 360; *Du Bose v. Carlisle*, 51 Ala. 590.

*Arkansas.* — *Shelton v. Lewis*, 27 Ark. 190.

*Illinois.* — *Schneider v. Becker*, 125 Ill. 109; *Lehman v. Rothbarth*, 159 Ill. 270.

*Indiana.* — *Pillars v. McConnell*, 141 Ind. 670.

*Iowa.* — *Cornelison v. Roberts*, 107 Iowa 220.

*Maryland.* — *Suter v. Ives*, 47 Md. 520.

*Missouri.* — *Phillips v. Overfield*, 100 Mo. 466; *Reed v. Painter*, 129 Mo. 674.

*New York.* — *Williams v. Charlier*, 15 N. Y. App. Div. 128; *Higgins v. Higgins*, (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 13.

*Oregon.* — *Sisemore v. Pelton*, 17 Oregon 546.

*Tennessee.* — *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457.

*Texas.* — *Browning v. Pumphrey*, 81 Tex. 163.

*Virginia.* — *Moorman v. Arthur*, 90 Va. 455.

**5. Constructive Trust Arising Out of Fraud — England.** — *Lloyd v. Spillet*, 2 Atk. 150; *Lane v. Dighton*, Amb. 411.

*United States.* — *Wheeler v. Sage*, 1 Wall. (U. S.) 518; *White v. Cannon*, 6 Wall. (U. S.) 443; *Griffith v. Godey*, 113 U. S. 89; *Young v. Fox*, 37 Fed. Rep. 385; *Moore v. Crawford*, 130 U. S. 122; *Felix v. Patrick*, 145 U. S. 317; *Hodge v. Palms*, 68 Fed. Rep. 61; *Angle v. Chicago*, etc., R. Co., 151 U. S. 1; *Jones v. Van Doren*, 130 U. S. 684; *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337; *Lenox v. Notrebe*, Hempst. (U. S.) 225.

*Arkansas.* — *Taliaferro v. Rolton*, 34 Ark. 503; *Bruce v. Patton*, 54 Ark. 455; *Bird v. Jones*, 37 Ark. 195; *Johnson v. Clark*, 5 Ark. 321.

*California.* — *Wingerter v. Wingerter*, 71 Cal. 105; *Kofoed v. Gordon*, 122 Cal. 314; *Hayne v. Hermann*, 97 Cal. 259; *De Leon v. Higuera*, 15 Cal. 483.

*Colorado.* — *Von Trotha v. Bamberger*, 15 Colo. 1; *Hall v. Linn*, 8 Colo. 264; *Kayser v. Maugham*, 8 Colo. 232; *Bohm v. Bohm*, 9 Colo. 100.

*Georgia.* — *Lewis v. Equitable Mortg. Co.*, 94 Ga. 572; *Frick Co. v. Taylor*, 94 Ga. 683.

*Illinois.* — *Scott v. Harris*, 113 Ill. 447; *White v. Ross*, 160 Ill. 56; *Smith v. Wright*, 49 Ill. 403; *Mix v. King*, 55 Ill. 434; *Allen v. Jackson*, 122 Ill. 567; *Yeaton v. Yeaton*, 4 Ill.

veys the property to a *bona fide* purchaser, the former will be required to restore its equivalent in money as a substitute for such property.<sup>1</sup>

**Involuntary Trusts — Trusts *Ex Maleficio*.** — In some jurisdictions such trusts are called involuntary trusts,<sup>2</sup> and in others trusts *ex maleficio*.<sup>3</sup>

**Fraud Basis of Constructive Trust.** — The basis of a constructive trust is fraud, actual or constructive.<sup>4</sup>

App. 579; Alwood v. Mansfield, 59 Ill. 496; Henschel v. Mamero, 120 Ill. 660; Beach v. Dyer, 93 Ill. 295; Powell v. Jeffries, 5 Ill. 387; Dickerman v. Burgess, 20 Ill. 266; Gruhn v. Richardson, 128 Ill. 178.

Indiana. — Barber v. Barber, 146 Ind. 390; Rupert v. Morton, 19 Ind. 313; Warner v. Warner, 132 Ind. 213.

Iowa. — Hall v. Doran, 13 Iowa 368; Harris v. Stone, 8 Iowa 322.

Kansas. — Newell v. Newell, 14 Kan. 202.

Kentucky. — Estill v. Miller, 3 Bibb (Ky.) 177; Buckner v. Forker, 7 Dana (Ky.) 52.

Michigan. — Edwards v. Hulbert, Walk. (Mich.) 54; Culbertson v. Young, 50 Mich. 190; Huxley v. Rice, 40 Mich. 73; Carley v. Graves, 85 Mich. 483, 24 Am. St. Rep. 99; Adams v. Bradley, 12 Mich. 346; Campbell v. Campbell, 21 Mich. 438; Hanold v. Bacon, 36 Mich. 1; Davis v. Filer, 40 Mich. 310; Austin v. Dean, 40 Mich. 386; Crooks v. Whitford, 40 Mich. 599.

Minnesota. — Smith v. Glover, 50 Minn. 58; Luse v. Reed, 63 Minn. 5; Nester v. Gross, 66 Minn. 371; St. Paul Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75.

Mississippi. — Snider v. Udell Woodenware Co., 74 Miss. 353.

Missouri. — Baier v. Berberich, 6 Mo. App. 537.

Nebraska. — Barker v. Barker, 27 Neb. 135; Cogswell v. Griffith, 23 Neb. 334.

New Jersey. — Hamburgh Mfg. Co. v. Edsall, 5 N. J. Eq. 249; Cort v. Skillin, 29 N. J. Eq. 70.

New York. — Reynolds v. Aetna L. Ins. Co., 28 N. Y. App. Div. 591; Converse v. Sickles, 146 N. Y. 200, 48 Am. St. Rep. 790; Brown v. Lynch, 1 Paige (N. Y.) 147; Howland v. Scott, 2 Paige (N. Y.) 406; Wiswall v. Hall, 3 Paige (N. Y.) 313; Freelove v. Cole, 41 Barb. (N. Y.) 318, 41 N. Y. 619; Barry v. Brune, 8 Hun (N. Y.) 395, 71 N. Y. 261; Denston v. Morris, 2 Edw. (N. Y.) 37; Valentine v. Richardt, 126 N. Y. 272; O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Howell v. Berger, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 315.

North Carolina. — Edwards v. Culbertson, 111 N. Car. 342; Wood v. Cherry, 73 N. Car. 110.

North Dakota. — Prondzinski v. Garbutt, 8 N. Dak. 111.

Ohio. — Raymond v. Moore, 1 Cinc. Super. Ct. 456.

Oregon. — Parrish v. Parrish, 33 Oregon 486; Shively v. Parker, 9 Oregon 500; Dray v. Dray, 21 Oregon 59.

Pennsylvania. — M'Culloch v. Cowher, 5 W. & S. (Pa.) 427; Plumer v. Reed, 38 Pa. St. 46; Seichrist's Appeal, 66 Pa. St. 237; Squires's Appeal, 70 Pa. St. 266; Cook v. Cook, 60 Pa. St. 443; Blaylock's Appeal, 73 Pa. St. 146; Boynton v. Housler, 73 Pa. St. 453; Wolford v. Herrington, 74 Pa. St. 311, 15 Am. Rep.

548; Kennedy v. McCloskey, 170 Pa. St. 354; Powers v. Black, 159 Pa. St. 153; Faust v. Haas, 73 Pa. St. 295; Bailey's Appeal, 96 Pa. St. 253; Christy v. Sill, 95 Pa. St. 380; Garber's Estate, 30 Pittsb. Leg. J. (Pa.) 46; Stafford v. Wheeler, 93 Pa. St. 462.

Tennessee. — Edmondson v. Hays, 1 Overt. (Tenn.) 509; Coleman v. Satterfield, 2 Head (Tenn.) 259.

Texas. — Hendrix v. Nunn, 46 Tex. 142; McClenny v. Floyd, 10 Tex. 159; Miller v. Carlton, 2 Tex. Civ. App. 382.

West Virginia. — Dickel v. Smith, 38 W. Va. 635.

Wisconsin. — Walker v. Daly, 80 Wis. 222; Troy City Bank v. Wilcox, 24 Wis. 671; Prickett v. Muck, 74 Wis. 199.

Where a Vendee in a Conditional Sale Prevents the Vendor from repurchasing within the time agreed, the former will in equity be declared a trustee for the latter. Johnson v. Clark, 5 Ark. 321.

**Redemption from Sheriff's Sale Prevented by Fraud.** — So also where the holder of a sheriff's certificate of sale prevents the owner from redeeming by fraudulent promises, he will be held an "involuntary trustee." (Rev. Codes N. Dak. 1895, § 4263.) Prondzinski v. Garbutt, 8 N. Dak. 191.

**Fraudulent Destruction of Advertisements of Execution Sale.** — A purchaser at execution sale who fraudulently pulled down the advertisements, whereby the property was sold under value, was decreed to hold the property only as trustee, and was required to account for all profits. Estill v. Miller, 3 Bibb (Ky.) 177.

**Property Procured through Fraudulent Promises of Marriage.** — Where a woman, by fraudulent promises to marry a man, procured money from him, it was held that on her refusal to marry she would be held a constructive trustee of the money so obtained, and a lien on land in which it was invested by her was decreed for its repayment. Edwards v. Culbertson, 111 N. Car. 342.

1. Valentine v. Richardt, 126 N. Y. 272.

2. **Involuntary Trusts.** — Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. Rep. 337; Hardy v. Harbin, 4 Sawy. (U. S.) 549; Wilson v. Castro, 31 Cal. 420; Salmon v. Symonds, 30 Cal. 301; Bludworth v. Lake, 33 Cal. 256; Prondzinski v. Garbutt, 8 N. Dak. 191.

3. **Trusts *ex Maleficio*.** — Angle v. Chicago, etc., R. Co., 151 U. S. 1; Jones v. Van Doren, 130 U. S. 684; Luse v. Reed, 63 Minn. 5; Valentine v. Richardt, 126 N. Y. 272, affirming 59 Hun (N. Y.) 619, 13 N. Y. Supp. 417; Kennedy v. McCloskey, 170 Pa. St. 354; Hogg v. Wilkins, 1 Grant Cas. (Pa.) 67; Christy v. Sill, 95 Pa. St. 380; Bailey's Appeal, 96 Pa. St. 253.

4. **Fraud Basis of Constructive Trusts.** — Pillow v. Brown, 8 Ark. 290; Kiser v. Mangham, 8 Colo. 232; Pierce v. Pierce, 55 Mich. 629; Hendrix v. Nunn, 46 Tex. 142.

**Necessity for Confidential Relationship.** — And to constitute such a trust it is not necessary that a confidential relationship between the parties should have existed.<sup>1</sup>

**Effect of Statute Abolishing Resulting Trusts.** — It has been held that though a statute abolishes trusts resulting from the payment of the purchase money by another than the grantee,<sup>2</sup> still, if the grantee by fraud induced the person by whom the purchase money was paid to consent to the conveyance, a constructive trust will arise.<sup>3</sup>

**Effect of Independent Investigation of Fraudulent Representations.** — If a person, after false representations have been made to him to induce him to part with property, makes an independent investigation as to the truth of such representations, and then acts upon his own judgment based upon such investigation, and consummates a sale of the property, he cannot treat such representations as a fraud for the purpose of holding the purchaser as a constructive trustee.<sup>4</sup>

**Cancellation or Surrender of Deed Procured by Fraud.** — Though the cancellation or surrender of a deed will not revest the title in the grantor, still where such cancellation has been made under circumstances which would make it a fraud on the part of the holder of the legal title to retain it, a constructive trust will be adopted as a convenient instrument for the fulfilment of justice, thereby holding the owner of the legal title a constructive trustee for the person entitled to the beneficial interest in the property.<sup>5</sup>

**Fraud of Third Person.** — A grantee will not be declared a constructive trustee for the grantor merely on account of the fraud of a third person by which the conveyance was induced, the grantee having neither authorized nor sanctioned such fraud.<sup>6</sup> If the person guilty of the fraud was acting as the agent of the grantee, the fraud is of course to be attributed in law to the grantee.<sup>7</sup>

**2. Trusts Arising Out of Mistakes.** — Where the legal title to land was acquired by a mistake in the deed of conveyance of which the grantee had notice, equity has, where necessary for the doing of complete justice and the prevention of fraud, granted relief through the instrumentality of a constructive trust.<sup>8</sup> And relief on the same principle has been granted where a portion of the land intended to be conveyed was, by mistake, omitted from the deed.<sup>9</sup>

**3. Constructive Trusts Arising Out of Breach of Contracts** — *a.* IN GENERAL. — A mere breach of contract is not, in the absence of fraud, sufficient to create a constructive trustee.<sup>10</sup>

1. Confidential Relationship Need Not Have Existed. — *Christy v. Sill*, 95 Pa. St. 380.

2. See *supra*, this title, *Resulting Trusts*.

3. Statute Abolishing Resulting Trusts. — *Graham v. King*, 96 Ky. 339; *Luse v. Reed*, 63 Minn. 5; *Willink v. Vanderveer*, 1 Barb. (N. Y.) 599.

4. Effect of Independent Investigation of False Representations. — *Edelman v. Latshaw*, 159 Pa. St. 644. See also the title FRAUD AND DECEIT, vol. 14, p. 111.

5. Cancellation or Surrender of Deed Procured by Fraud. — *Taliaferro v. Rolton*, 34 Ark. 503.

6. Fraud of Third Person. — *Barker v. Barker*, 27 Neb. 135; *Brickell v. Earley*, 115 Pa. St. 473. See also *Faurot v. Neff*, 32 Ohio St. 44.

7. Fraud of Agent. — *Barker v. Barker*, 27 Neb. 135. See the title AGENCY, vol. 1, p. 930.

8. Trusts Arising Out of Mistake — *England*. — *Childers v. Childers*, 26 L. J. Ch. 743.

*United States*. — *Godkin v. Cohn*, 80 Fed. Rep. 458.

*Indiana*. — *Andrews v. Andrews*, 12 Ind. 348.

*Kentucky*. — *Overton v. Woolfolk*, 6 Dana (Ky.) 373.

*Nebraska*. — *Cogswell v. Griffith*, 23 Neb. 334.

*Pennsylvania*. — *Anderson v. Nesbit*, 2 Rawle (Pa.) 114.

*Wisconsin*. — *Hubbard v. Burrell*, 41 Wis. 365; *Sullivan v. Bruhling*, 66 Wis. 472. See the title MISTAKE. Where, by mistake in making a deed, a declaration of a trust in favor of the children of the grantor was omitted, and the grantee afterwards conveyed the land to *bona fide* purchasers, it was held that the proceeds of such land were charged with a trust in favor of the children. *Hubbard v. Burrell*, 41 Wis. 365.

See also *Campbell v. Campbell*, 21 Mich. 438, where a deed intended to convey certain property having after a number of years and the death of the grantee been discovered to be worthless, a new quitclaim deed to the grantee's widow was held to convey the legal title to her in trust for the grantee's heirs.

9. *Hensler v. Sefrin*, 19 Hun (N. Y.) 564.

10. Breach of Contract — *United States*. — *Latta v. Kilbourn*, 150 U. S. 524.



**b. EFFECT OF STATUTE OF FRAUDS — (1) Verbal Employment of Agent to Purchase Land — (a) Conflicting Views — Majority Rule.** — Where one person verbally agrees to act as the agent of another in the purchase of land, and instead of purchasing for his principal repudiates the agency and purchases the land in his own name, with his own money, it seems to be held by the weight of authority that a court of equity cannot grant relief by holding him a constructive trustee.<sup>1</sup>

**Minority Rule.** — In a number of cases, however, the courts have held as a constructive trustee an agent employed to purchase land for his principal who, in violation of his duty as agent, purchased the land in his own name, with his own money, though the contract for the employment of the agent was not in writing.<sup>2</sup>

**(b) Use of Principal's Funds.** — If the agent employed under a verbal contract to purchase land purchases the land with the funds of his principal, a resulting trust from the investment of the fiduciary funds will arise.<sup>3</sup>

**(c) Confidential Relation Independent of Agency.** — Where there existed between the parties a confidential relationship aside from the mere employment of the one as agent to purchase for the other, so that the latter was warranted in confiding in the honor of the former, a constructive trust has been enforced.<sup>4</sup>

**(d) Purchase Money Advanced as Loan.** — And if two persons enter into a parol contract for the joint purchase of land, and one acting as agent for the other consummates the purchase, taking the title in his own name, a resulting trust

*Alabama.* — *Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389.

*Illinois.* — *Hamilton v. Downer*, 152 Ill. 651.

*Indiana.* — *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610; *Dunn v. Zwilling*, 94 Iowa 233; *McClain v. McClain*, 57 Iowa 170.

*Minnesota.* — *Tatge v. Tatge*, 34 Minn. 272.

*North Carolina.* — *Blount v. Carroway*, 67 N. Car. 396.

*Pennsylvania.* — *Robertson v. Robertson*, 9 Watts (Pa.) 32; *Martin v. Baird*, 175 Pa. St. 540; *Robinson v. Robinson*, 29 W. N. C. (Pa.) 159; *Kellum v. Smith*, 33 Pa. St. 165; *Barnet v. Dougherty*, 32 Pa. St. 372.

*Compare Miller v. Carlton*, 2 Tex. Civ. App. 382.

**1. Agent Held Not Constructive Trustee — England.** — *Bartlett v. Pickersgill*, 1 Eden 515; *Heard v. Pilley*, L. R. 4 Ch. 548; *James v. Smith*, (1891) 1 Ch. D. 384.

*Arkansas.* — *Hackney v. Butts*, 41 Ark. 393. *Compare Ferguson v. Williamson*, 20 Ark. 272; *McMurry v. Mobley*, 39 Ark. 309.

*Colorado.* — *Hodgson v. Fowler*, 7 Colo. App. 378.

*Iowa.* — *Burden v. Sheridan*, 36 Iowa 125, 14 Am. Rep. 505.

*Kentucky.* — *Fowke v. Slaughter*, 3 A. K. Marsh. (Ky.) 56, 13 Am. Dec. 133.

*Massachusetts.* — *Emerson v. Galloupe*, 158 Mass. 146; *Bailey v. Hemenway*, 147 Mass. 326; *Bourke v. Callanan*, 160 Mass. 195.

*Mississippi.* — *Miazza v. Yerger*, 53 Miss. 135.

*New Jersey.* — *Nestel v. Schmid*, 29 N. J. Eq. 458.

*New York.* — *Rvan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696. See also *Bauman v. Holzhausen*, 26 Hun (N. Y.) 505.

*Ohio.* — *Watson v. Erb*, 33 Ohio St. 35.

*Rhode Island.* — *Jenckes v. Cook*, 9 R. I. 520;

*Whiting v. Dyer*, (R. I. 1899) 43 Atl. Rep. 181; *Aborn v. Padelford*, 17 R. I. 143.

**2. Agent Held Constructive Trustee — England.** — *Carter v. Palmer*, 11 Bligh N. S. 397; *Lees v. Nuttall*, 1 Russ. & M. 53; *Taylor v. Salmon*, 4 Myl. & C. 134.

*United States.* — *Massie v. Watts*, 6 Cranch (U. S.) 148; *Irvine v. Marshall*, 20 How. (U. S.) 558; *Eldredge v. Jenkins*, 3 Story (U. S.) 289. *Compare Denver First Nat. Bank v. Bissell*, 4 Fed. Rep. 694.

*Florida.* — *Boswell v. Cunningham*, 32 Fla. 277.

*Georgia.* — *Chastain v. Smith*, 30 Ga. 96.

*Kansas.* — *Tenney v. Simpson*, 37 Kan. 362; *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145. See also *Hidden v. Jordan*, 21 Cal. 92.

**Contract of Sale Taken in Name of Agent.** — In close analogy to this rule it has been held that where an agent, employed under an oral contract, takes a contract for the sale of land, or an interest therein, in his own name, the principal may specifically enforce the contract. *Cave v. Mackenzie*, 46 L. J. Ch. 564; *Heard v. Pilley*, L. R. 4 Ch. 548.

**3. See supra**, this title, *Resulting Trusts Arising Out of Purchases with Fiduciary Funds*.

**4. Confidential Relation Existing Independent of Agency — United States.** — *Manning v. Hayden*, 5 Sawy. (U. S.) 360.

*Alabama.* — *Waller v. Jones*, 107 Ala. 331.

*California.* — *Settembre v. Putnam*, 30 Cal. 490.

*Illinois.* — *Vallette v. Tedens*, 122 Ill. 607, 3 Am. St. Rep. 502; *Stewart v. Duffy*, 116 Ill. 47.

*Indiana.* — *Warner v. Warner*, 132 Ind. 213.

*Minnesota.* — *Nester v. Gross*, 66 Minn. 371.

*Oregon.* — *Coyote Gold*, etc., Min. Co. v. *First Nat. Bank*.

*Pennsylvania.* — *Lacy v. Hall*, 37 Pa. St. 360.

*Texas.* — *Halsell v. Wise County Coal Co.*, 19 Tex. Civ. App. 564.

*Utah.* — *Haight v. Pearson*, 11 Utah 51.

will arise in favor of the other, though the former paid the entire purchase money, when in making such payment he advanced one-half of the price as a loan to the other.<sup>1</sup>

(e) **Agent Employed to Purchase Outstanding Title.** — Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title, for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money.<sup>2</sup> So also if one, though not in fact the agent of another, pretends to act as his agent and thereby secures title in his own name to property in which such other has an interest, he cannot deny that he was acting as agent and claim the benefit of the purchase, but will be held to hold the title so acquired in trust;<sup>3</sup> if, however, the one for whom he assumed to act had no interest in the property, it seems that he cannot be held as a trustee.<sup>4</sup>

(f) **Voluntary Grant.** — If the grant to the person pretending to act as the agent of another was voluntary and was intended to be for the benefit of the person for whom the agent pretended to act, it has been held that the agent will be held a constructive trustee, though the principal had no enforceable interest in the land acquired by the agent.<sup>5</sup>

(g) **Agent Guilty of Fraud.** — And where the agent entered into a parol agreement to purchase for his principal, and, in violation of the agreement, and with the fraudulent intent of preventing his principal from acquiring the land, purchased for himself, he has been held a constructive trustee.<sup>6</sup>

(2) **Oral Agreement for Interest in Land to Be Purchased.** — A person who orally agrees to purchase land in his own name, with his own money, and reconvey to another person, or give an interest therein to him, neither party having any present interest in the land to be purchased, cannot be held as a constructive trustee on his refusal to perform such agreement.<sup>7</sup> If, however,

1. **Purchase Money Advanced as Loan.** — Towle v. Wadsworth, 147 Ill. 80; Wallace v. Carpenter, 85 Ill. 590; Tenney v. Simpson, 37 Kan. 362. See *supra*, this title, *Resulting Trusts Arising Out of Payment of Purchase Money*.

2. **Agent to Purchase Outstanding Title.** — Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Bryan v. McNaughton, 38 Kan. 98. See also Rothwell v. Dewees, 2 Black (U. S.) 613.

3. **Person Pretending to Act as Agent for Another.** — Conant v. Riseborough, 139 Ill. 383; Reigard v. McNeil, 38 Ill. 400; Dennis v. McCagg, 32 Ill. 429; Hanold v. Bacon, 36 Mich. 1; Rollins v. Mitchell, 52 Minn. 42, 38 Am. St. Rep. 519; Haight v. Pearson, 11 Utah 51.

4. **Rogers v. Simmons**, 55 Ill. 76; Maguire v. Page, 23 Mo. 188; Stiner v. Stiner, 58 Barb. (N. Y.) 643. See also Walter v. Klock, 55 Ill. 362. Compare Belcher v. Sanders, 34 Ala. 9.

5. **Voluntary Grant.** — Rollins v. Mitchell, 52 Minn. 41, 38 Am. St. Rep. 519. See also Roller v. Spillmore, 13 Wis. 26.

The principle of such a case is the same as that where a person persuades a testator to devise land to him by a promise to hold the land for the benefit of a third person. Rollins v. Mitchell, 52 Minn. 42, 38 Am. St. Rep. 519. See *infra*, this section, *Promise of Devisee by Which Devise Is Secured*.

6. **Agent Guilty of Fraud.** — Rives v. Lawrence, 41 Ga. 283.

7. **Verbal Agreement for Interest in Land to Be Purchased.** — *Arkansas.* — Bland v. Talley, 50 Ark. 71; Robbins v. Kimball, 55 Ark. 414, 29 Am. St. Rep. 45.

*California.* — Taylor v. Kelly, 103 Cal. 178; Hunt v. Friedman, 63 Cal. 510. Compare Green v. Brooks, 81 Cal. 328.

*Colorado.* — Von Trotha v. Bamberger, 15 Colo. 1; Bohm v. Bohm, 9 Colo. 100.

*Illinois.* — Walter v. Klock, 55 Ill. 362; Perry v. McHenry, 13 Ill. 227; Stephenson v. Thompson, 13 Ill. 186; Rogers v. Simmons, 55 Ill. 76. See also Campbell v. Powers, 37 Ill. App. 308, affirmed 139 Ill. 128.

*Indiana.* — Thorne v. Thorne, 18 Ind. 462; Irwin v. Ivers, 7 Ind. 308, 63 Am. Dec. 420; Blair v. Bass, 4 Blackf. (Ind.) 539; Minot v. Mitchell, 30 Ind. 228, 95 Am. Dec. 685.

*Kentucky.* — Sherley v. Sherley, 97 Ky. 512; Fowke v. Slaughter, 3 A. K. Marsh. (Ky.) 57, 13 Am. Dec. 133.

*Massachusetts.* — Bailey v. Hemenway, 147 Mass. 326; Bourke v. Callanan, 160 Mass. 195.

*Michigan.* — Wright v. King, Harr. (Mich.) 12.

*New York.* — Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Duffy v. Masterson, 44 N. Y. 557. Compare Sandford v. Norris, 4 Abb. App. Dec. (N. Y.) 144.

*Oregon.* — Taylor v. Miles, 19 Oregon 550; Lawrence v. Lawrence, 14 Oregon 77.

*Pennsylvania.* — Kellum v. Smith, 33 Pa. St. 158; Jackman v. Ringland, 4 W. & S. (Pa.) 149; Barnet v. Dougherty, 32 Pa. St. 371; Kisler v. Kisler, 2 Watts (Pa.) 323, 27 Am. Dec. 308; Williard v. Williard, 56 Pa. St. 119; Kraft v. Smith, 117 Pa. St. 183; Salsbury v. Black, 119 Pa. St. 200, 4 Am. St. Rep. 631; Whetham v. Clyde, 1 Leg. Gaz. (Pa.) 53.

*Texas.* — Rische v. Diessel, (Tex. Civ. App.

one of the parties had a present interest in the land, and the other orally agreed, in consideration of his refraining from prosecuting his claim therefor, or surrendering such claim, to purchase the land with his own money, and upon the repayment of the purchase money or a part thereof to convey to the former the entire land or a part thereof, the purchaser has been held as a constructive trustee on his refusal to perform such agreement.<sup>1</sup> Of course a mere parol declaration on the part of the purchaser of land that he is buying the land for another, or that he intends it for another, is not sufficient to render him a constructive trustee.<sup>2</sup>

(3) *Parol Agreement Relating to Purchase at Judicial Sale* — (a) *In General.*

— The breach of a verbal agreement to purchase land at a judicial sale for the benefit of a third person who had no interest in the land to be sold is on the same footing as an agreement to purchase at a private sale, and the breach of such an agreement will not, according to the weight of authority, constitute such fraud as will render the promisor a constructive trustee.<sup>3</sup>

**Existence of Confidential Relationship.** — Where there existed between the promisor and the promisee a confidential relation, aside from that created by the agreement to purchase, this has been held sufficient to warrant a court of equity in decreeing the promisor to hold as a constructive trustee.<sup>4</sup>

(b) *Sale of Land in Which Promisee Has Interest.* — According to some authorities, where a person verbally promises to attend a judicial or other involuntary sale and purchase for the benefit of another who has a present interest in the land to be sold, something more than the breach of the verbal promise to purchase at the sale is necessary to render the promisor a constructive trustee, in case he purchases in his own name and claims the benefit of the purchase.<sup>5</sup> By

1894) 26 S. W. Rep. 762; *Thorp v. Gordon*, (Tex. Civ. App. 1897) 43 S. W. Rep. 323.

*Compare Leggett v. Leggett*, 88 N. Car. 108; *Harrison v. Emery*, 85 N. Car. 161.

**Agreement Entered into Mala Fide.** — But the contrary has been held where the party made the agreement in bad faith, and with a view to getting rid of the competition of the other party to the agreement. *M'Culloch v. Cowher*, 5 W. & S. (Pa.) 427.

**1. Effect of Surrender of Interest in Land.** — *Brooks v. Ellis*, 3 Greene (Iowa) 527; *Bryant v. Hendricks*, 5 Iowa 256; *Rose v. Treadway*, 4 Nev. 455, 97 Am. Dec. 546; *Plumer v. Reed*, 33 Pa. St. 46; *Gillett v. Treganza*, 13 Wis. 472. *Compare Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97.

**2. United States.** — *Levi v. Evans*, 57 Fed. Rep. 677.

*Arkansas.* — *Bland v. Talley*, 50 Ark. 71.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610.

*Maryland.* — *Dorsey v. Clarke*, 4 Har. & J. (Md.) 551.

*Pennsylvania.* — *Moyer's Appeal*, (Pa. 1887) 14 Atl. Rep. 253; *Tyson v. McMullen*, 2 Del. Co. Rep. (Pa.) 157; *Blyholder v. Gilson*, 18 Pa. St. 134; *Bennett v. Fulmer*, 49 Pa. St. 155.

*Texas.* — *Johnson v. Sulphur Springs First Nat. Bank*, (Tex. Civ. App. 1897) 40 S. W. Rep. 334.

Evidence that A told B that he had bought land to benefit C, and if C would pay him the purchase money, with interest, he would convey the land to C, is not sufficient to set up a trust in favor of C. *Dorsey v. Clarke*, 4 Har. & J. (Md.) 551.

**3. *Miazza v. Yerger***, 53 Miss. 135; *Bank v. Cowperthwaite*, 10 W. N. C. (Pa.) 532; *Walford v. Herrington*, 86 Pa. St. 39, overruling 74 Pa. St. 311. See *supra*, this section, *Verbal*

*Employment of Agent to Purchase Land* — *Conflicting Views.*

**4. Existence of Confidential Relationship.** — *Broder v. Conklin*, 77 Cal. 330. See also *Price v. Reeves*, 38 Cal. 457. And see *supra*, this section, *Confidential Relation Independent of Agency.*

**5. Constructive Trust Held Not to Arise** — *Alabama.* — *White v. Farley*, 81 Ala. 563.

*District of Columbia.* — *Ragan v. Campbell*, 2 Mackey (D. C.) 28.

*Indiana.* — *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685. *Compare Arnold v. Cord*, 16 Ind. 177.

*Iowa.* — *Hain v. Robinson*, 72 Iowa 735; *Dunn v. Zwilling*, 94 Iowa 233; *Maroney v. Maroney*, 97 Iowa 711; *Richardson v. Haney*, 76 Iowa 101.

*Massachusetts.* — *Bourke v. Callanan*, 160 Mass. 195.

*New York.* — *Wheeler v. Reynolds*, 66 N. Y. 227; *Loomis v. Loomis*, 60 Barb. (N. Y.) 22; *Lathrop v. Hoyt*, 7 Barb. (N. Y.) 59. *Compare Peck v. Peck*, 110 N. Y. 64; *Curtin v. Curtin*, (Supm. Ct. Gen. T.) 34 N. Y. St. Rep. 956; *Church v. Kidd*, 3 Hun (N. Y.) 254; *Corse v. Leggett*, 25 Barb. (N. Y.) 389; *Stevens v. Union Trust Co.*, 57 Hun (N. Y.) 498; *Sandford v. Norris*, 4 Abb. App. Dec. (N. Y.) 144.

*Pennsylvania.* — *Martin v. Baird*, 175 Pa. St. 540; *Burr v. Kase*, 168 Pa. St. 81; *Shaffner v. Shaffner*, 145 Pa. St. 163; *Ma Guire v. Price*, 132 Pa. St. 213, 155 Pa. St. 60; *Kraft v. Smith*, 111 Pa. St. 111; *Smith v. Smith*, 110 Pa. St. 200, 4 Am. St. Rep. 631; *Hollinshead's Appeal*, 103 Pa. St. 150; *Fogel v. Schall*, (Pa. 1886) 2 Cent. Rep. 530; *Bennett v. Dollar Sav. Bank*, 87 Pa. St. 382; *Kellum v. Smith*, 33 Pa. St. 158; *Schumacher v. Wuriz*, 1 Leg. Rec. (Pa.) 166; *Faust v. Faust*, 1 Leg. Rec. (Pa.)



other authorities the promisor will not be permitted to repudiate the agreement, and thus perpetrate a fraud, but will be held to be a constructive trustee.<sup>1</sup> And this has been held especially true where the promisor was enabled by reason of his promise to secure the land very much below its value, to the injury of the promisee,<sup>2</sup> or where the promisee was lulled into inactivity by reason of the promise, and prevented from protecting his rights in the land sold.<sup>3</sup> So also a constructive trust has been decreed to enforce such a parol agreement where there was a confidential relation between the parties.<sup>4</sup>

**Promise to Another than Judgment Debtor.** — A distinction has been made between the effect of a verbal promise to purchase for the benefit of the defendant in the execution and a promise to purchase for the benefit of a third person having a *bona fide* claim to the land which would be affected by the sale, and it has been held that while in the former case a constructive trust would not arise, still in the latter case, if the promisee is induced to confide in the promise, and in pursuance of this allows the promisor to become the purchaser, a subsequent denial of the agreement by the promisor is such a fraud as will convert him into a constructive trustee.<sup>5</sup>

248; *Fox v. Heffner*, 1 W. & S. (Pa.) 372; *Kisler v. Kisler*, 2 Watts (Pa.) 327, 27 Am. Dec. 308; *Robertson v. Robertson*, 9 Watts (Pa.) 42; *Haines v. O'Conner*, 10 Watts (Pa.) 320; *Pattison v. Horn*, 1 Grant Cas. (Pa.) 301; *Fricke v. Magee*, 10 W. N. C. (Pa.) 50; *Boyn-ton v. Housler*, 73 Pa. St. 453; *Beegle v. Wentz*, 55 Pa. St. 369, 93 Am. Dec. 762; *Johns v. Tiers*, (Pa. 1886) 6 Cent. Rep. 137; *Sheriff v. Neal*, 6 Watts (Pa.) 534; *Peebles v. Reading*, 8 S. & R. (Pa.) 484. *Compare* *Christy v. Christy*, 176 Pa. St. 421; *Beckett v. Allison*, 188 Pa. St. 279; *Kennedy v. McCloskey*, 170 Pa. St. 354; *Cowperthwaite v. Carbondale First Nat. Bank*, 102 Pa. St. 397; *Wolford v. Herrington*, 86 Pa. St. 39.

**1. Constructive Trust Held to Arise** — *Arkansas*. — *Trappall v. Brown*, 19 Ark. 39; *McNeil v. Gates*, 41 Ark. 264; *Gaines v. Saunders*, 50 Ark. 322.

*Illinois*. — *Wright v. Gay*, 101 Ill. 233; *O'Connor v. Mahoney*, 159 Ill. 69; *Gruhn v. Richardson*, 128 Ill. 178. See also *Pope v. Dapray*, 176 Ill. 478.

*Kentucky*. — *Lillard v. Casey*, 2 Bibb (Ky.) 459; *Bush v. Walker*, (Ky. 1888) 6 S. W. Rep. 717; *Estill v. Miller*, 3 Bibb (Ky.) 179; *Curd v. Williams*, (Ky. 1892) 18 S. W. Rep. 634; *Miller v. Antle*, 2 Bush (Ky.) 408; *Hopkins v. Tarlton*, 4 Bibb (Ky.) 500; *Martin v. Martin*, 16 B. Mon. (Ky.) 8; *Farris v. Farris*, (Ky. 1895) 29 S. W. Rep. 618.

*Mississippi*. — *Hebron v. Kelly*, 75 Miss. 74. *Compare* *Walker v. Brungard*, 13 Smed. & M. (Miss.) 723.

*Missouri*. — *Berlien v. Bieler*, 96 Mo. 491; *Leahey v. Witte*, 123 Mo. 207; *Northcraft v. Martin*, 28 Mo. 469; *Slowey v. McMurray*, 27 Mo. 118, 72 Am. Dec. 251; *Rose v. Bates*, 12 Mo. 30; *Richardson v. Champion*, 143 Mo. 538; *Morrison v. Herrington*, 120 Mo. 665.

*Nebraska*. — *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381.

*New Jersey*. — *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207.

*North Carolina*. — *Strong v. Glasgow*, 2 Murph. (6 N. Car.) 289; *Neely v. Torian*, 1 Dev. & B. Eq. (21 N. Car.) 410; *Hamphill v. Hemphill*, 99 N. Car. 436; *Ferguson v. Haas*, 64 N. Car. 772; *Coble v. Branson*, 98 N. Car. 160; *McNair v. Pope*, 100 N. Car. 404; *Cohn*

*v. Chapman*, Phil. Eq. (62 N. Car.) 92, 93 Am. Dec. 600; *Wilcox v. Morris*, 1 Murph. (5 N. Car.) 116, 3 Am. Dec. 678; *Taylor v. McMillan*, 123 N. Car. 390.

*Ohio*. — *Turpie v. Lowe*, 4 Ohio Cir. Ct. 599, 2 Ohio Cir. Dec. 729.

*Rhode Island*. — *Place v. Briggs*, 20 R. I. 540.

*South Carolina*. — *Buchanan v. Buchanan*, 38 S. Car. 410; *Denton v. M'Kenzie*, 1 Desaus. (S. Car.) 289, 1 Am. Dec. 664.

*Tennessee*. — *Sullivan v. Sullivan*, 86 Tenn. 376. *Compare* *Parker v. Bragg*, 11 Humph. (Tenn.) 212.

*Texas*. — *Byrnes v. Morris*, 53 Tex. 213.

*Virginia*. — *Walraven v. Lock*, 2 Patt. & H. (Va.) 547.

*Wisconsin*. — *Cutler v. Babcock*, 81 Wis. 195, 29 Am. St. Rep. 882.

**2. Land Secured Below Its Value** — *Arkansas*. — *Woodruff v. Jabine*, (Ark. 1891) 15 S. W. Rep. 830.

*District of Columbia*. — *Ragan v. Campbell*, 2 Mackey (D. C.) 28.

*Georgia*. — *Collins v. Williamson*, 94 Ga. 635.

*Kentucky*. — *Vanbever v. Vanbever*, 97 Ky. 344.

*New Jersey*. — *Marlatt v. Warwick*, 18 N. J. Eq. 108; *Wetzler v. Schaumann*, 24 N. J. Eq. 60.

*New York*. — *Allen v. Arkenburgh*, 2 N. Y. App. Div. 452; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Howland v. Scott*, 2 Paige (N. Y.) 406; *Wiswall v. Hall*, 3 Paige (N. Y.) 313; *Freelove v. Cole*, 41 Barb. (N. Y.) 318, 41 N. Y. 619; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, *reversing* 25 Barb. (N. Y.) 440.

*Pennsylvania*. — *Shallcross v. Mawhinny*, (Pa. 1887) 7 Atl. Rep. 734.

*Rhode Island*. — *Jencks v. Cook*, 9 R. I. 520.

**3. Failure of Promisee to Protect His Rights.** — *Wilke v. Miller*, 171 Ill. 556; *Arnold v. Cord*, 16 Ind. 177; *Lillard v. Casey*, 2 Bibb (Ky.) 459; *Kennedy v. McCloskey*, 170 Pa. St. 354; *Cowperthwaite v. Carbondale First Nat. Bank*, 102 Pa. St. 397; *Wolford v. Herrington*, 86 Pa. St. 39.

**4. Confidential Relation.** — *Manning v. Hayden*, 5 Sawy. (U. S.) 360. See also *Pope v. Dapray*, 176 Ill. 478.

**5. Promise to Another than Judgment Debtor.** — *Wolford v. Herrington*, 86 Pa. St. 39.

(c) **Fraudulent Intent Not to Perform Agreement.** — If, at the time of making his promise, the intention of the promisor was not to perform the agreement, it would seem that this is such a fraud as to convert the purchaser into a constructive trustee.<sup>1</sup>

(d) **Sale Induced by Promisor.** — So also where the promisor himself induces the execution debtor to permit his property to be sold, by his advice and promise to purchase for his benefit and reconvey, a constructive trust has been held to arise.<sup>2</sup>

(e) **Promise After Purchase.** — A promise by the purchaser at a judicial sale, made after the sale, to hold for the benefit of the execution defendant or other person interested in the land, is *nudum factum* and of course will not render him a constructive trustee.<sup>3</sup>

(f) **Proof of Agreement.** — In no case will a constructive trust be decreed on account of the breach of an alleged verbal agreement of the purchaser at a judicial sale to purchase for the benefit of the judgment debtor, unless the evidence to prove the agreement is clear and satisfactory.<sup>4</sup>

(g) **Purchaser Holding Himself Out as Buying for Others Interested in Land Sold.** — It has been held that if the purchaser at a judicial sale represents himself as buying for others interested in the sale, for the purpose of suppressing the bidding, and is thereby enabled to secure the land at less than its value, he will, to prevent the perpetration of fraud, be decreed a constructive trustee though he had entered into no agreement to purchase for such others.<sup>5</sup>

(4) **Promise of Devisee by Which Devise Is Secured** — (a) **General Rule.** — Where a devisee or legatee induced the testator to make the devise or bequest to him by verbal promises to hold the property, or an interest therein, for the benefit of a third person, the breach of such promise is such a fraud as will convert the devisee into a constructive trustee; nor is it essential to the upholding of such a trust that the devisee should have been an active agent in procuring the devise to be made in his favor.<sup>6</sup>

1. **Intent Not to Perform Agreement.** — Beegle v. Wentz, 55 Pa. St. 369, 93 Am. Dec. 762.

2. **Sale Induced by Promisor.** — Shallcross v. Mawhinny, (Pa. 1887) 7 Atl. Rep. 734. See also Pope v. Depray, 176 Ill. 478.

3. **Promise After Purchase.** — Wirth's Estate, 34 Pittsb. Leg. J. (Pa.) 424; Tyson v. McMullen, 2 Del. Co. Rep. (Pa.) 157.

4. **Proof of Agreement.** — Davis v. Scovern, 130 Mo. 303; Huffnagle v. Blackburn, 137 Pa. St. 633; Kraft v. Smith, 117 Pa. St. 183; Nesbitt v. Cavender, 30 S. Car. 33; Bright v. Knight, 35 W. Va. 40.

5. **Misrepresentations as to Purchase in Interest of Others** — *Alabama.* — Caple v. McCollun, 27 Ala. 461.

*Georgia.* — McRae v. Huff, 32 Ga. 681.

*Illinois.* — Bethel v. Sharp, 25 Ill. 173, 76 Am. Dec. 790.

*Kentucky.* — Roach v. Hudson, 8 Bush (Ky.) 410; Crutcher v. Hord, 4 Bush (Ky.) 360.

*Missouri.* — Merrett v. Poulter, 96 Mo. 237.

*New York.* — Abell v. Bradner, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 246.

*Rhode Island.* — Jenckes v. Cook, R. I. 520. Compare Taylor v. Boardman, 24 Mich. 287.

6. **Devise Secured by Promises to Testator** — *Alabama.* — *Franklin v. Franklin*, 10 Ala. 341.

*Free v. Free*, 34; Thynn v. Thynn, 1 Vern. 296;

*Devenish v. Baines*, Prec. Ch. 5; *Oldham v.*

*Litchfield*, 2 Vern. 506; *Drakeford v. Wilks*, 3

*Atk. 539*; *Reech v. Kennegal*, 1 Ves. 123;

*Barrow v. Greenough*, 3 Ves. Jr. 152; *Stick-*

*land v. Aldridge*, 9 Ves. Jr. 516; *Byrn v. God-*

*frey*, 4 Ves. Jr. 6; *Paine v. Hall*, 18 Ves. Jr. 475; *Podmore v. Gunning*, 7 Sim. 644; *Russell v. Jackson*, 10 Hare 204; *Wallgrave v. Tebbs*, 2 Kay & J. 321; *Jones v. Badley*, L. R. 3 Eq. 635, *affirmed on appeal*, L. R. 3 Ch. 362; *Rowbotham v. Dunnott*, 8 Ch. D. 430; *Norris v. Frazer*, L. R. 15 Eq. 318; *In re Fleetwood*, 15 Ch. D. 594; *In re Boyes*, 26 Ch. D. 531; *Renehan v. Malone*, 1 N. Bruns. Eq. Rep. 506; *Riordan v. Banon*, 10 Ir. Eq. 469.

*Connecticut.* — Dowd v. Tucker, 41 Conn. 197. *Kentucky.* — Caldwell v. Caldwell, 7 Bush (Ky.) 17.

*Maine.* — Gilpatrick v. Glidden, 81 Me. 137, 10 Am. St. Rep. 245.

*Maryland.* — Browne v. Browne, 1 Har. & J. (Md.) 430; *Owings's Case*, 1 Bland (Md.) 37.

*Massachusetts.* — Olliffe v. Wells, 130 Mass. 221. See also *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418. Compare *Campbell v. Brown*, 129 Mass. 23.

*Mississippi.* — Ragsdale v. Ragsdale, 68 Miss. 92, 24 Am. St. Rep. 256.

*New Jersey.* — Carver v. Todd, 48 N. J. Eq. 102, 27 Am. St. Rep. 466; *Williams v. Vreeland*, 32 N. J. Eq. 135; *Vreeland v. Williams*, 32 N. J. Eq. 734.

*New York.* — Graves v. Graves, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 624; *Edson v. Bartow*, 10 N. Y. App. Div. 104; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53. See also *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. Rep.



(b) **Decedent Induced Not to Make Will.** — Where one who would be entitled to property in case of the intestacy of the owner induces the latter to refrain from making a will in favor of a third person by promises to hold the property for the benefit of such third person, equity will, on his refusal to perform the promise, convert him into a constructive trustee.<sup>1</sup>

(c) **Expectation of Testator.** — The mere expectation of the testator that the legatee or devisee will dispose of the property in accordance with his known wishes will not convert the legatee or devisee into a constructive trustee, in the absence of any promise, express or implied, by the legatee or devisee so to dispose of the property.<sup>2</sup>

(5) **Oral Agreement to Hold in Trust or Reconvey Lands Voluntarily Conveyed** — (a) **General Rule.** — If, at the time of the conveyance, a voluntary grantee orally agreed to hold the land in trust for the grantor, or to reconvey upon demand, and no confidential relationship existed between the parties, and no fraud was used in procuring the conveyance, and the parol agreement which is sought to be enforced was intentionally omitted from the deed, it is held, by the weight of authority, that the grantee will not, on refusal to perform the oral agreement, be converted into a constructive trustee.<sup>3</sup> So also where land was voluntarily conveyed to a grantee upon his promise to devise

*Ohio.* — *Vance v. Park*, 7 Ohio Dec. 564.

*Pennsylvania.* — *Forscht's Estate*, 2 Pa. Dist. 294; *Hoffner's Estate*, 161 Pa. St. 331; *Schultz's Appeal*, 80 Pa. St. 396; *Hoge v. Hoge*, 1 Watts (Pa.) 163, 26 Am. Dec. 52; *Dilts v. Stewart*, (Pa. 1885) 1 Cent. Rep. 607; *Church v. Ruland*, 64 Pa. St. 432; *Edwards v. Smedley*, 1 Del. Co. Rep. (Pa.) 544; *Jones v. McKee*, 3 Pa. St. 496, 6 Pa. St. 425. *Compare Bonner v. Rowdybush*, 3 Penny. (Pa.) 93.

*Tennessee.* — *Richardson v. Adams*, 10 Yerg. (Tenn.) 273.

*Wisconsin.* — *Brook v. Chappell*, 34 Wis. 405.

*Compare Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185.

**Promises Must Affect Disposition of Property.** —

The conduct and promises of a devisee, not contemporaneous with the making of the will, but long afterwards, when the testator was on his deathbed, and which did not prevent the making of a new will, will not constitute such party a trustee *ex maleficio*. *Fox v. Fox*, 88 Pa. St. 19.

**Where There Is No Fraud.** — In *Moran v. Moran*, 104 Iowa 216, the court, while recognizing the general rule, held that where there was no fraud, or no inducement by the devisee to the testator to make the devise, parol evidence is not admissible to charge an absolute devise to one in trust for others, under the code requiring wills to be in writing, and this notwithstanding the devisee acknowledges the trust in writing and defines its extent. See also *Moore v. Campbell*, 102 Ala. 445.

**1. Execution of Will Prevented by Promises.** — *Williams v. Fitch*, 18 N. Y. 546; *Browne v. Browne*, 1 Har. & J. (Md.) 430. See also *Bennett v. Harper*, 36 W. Va. 546.

In *Bedilian v. Seaton*, 3 Wall. Jr. (C. C.) 279, however, it was held that a mere promise, however solemn, by heirs at law, to convey property in accordance with their declarations to their dying brother, was insufficient to take the case out of the statute against frauds, even though the promise was actually coupled with comforting assurances to the dying brother and remonstrances by which his wish to make

a will might have been controlled, there being no proof of fraud in the case.

**2. Expectation of Testator.** — *Amherst College v. Ritch*, 151 N. Y. 282.

**3. Agreement to Hold in Trust or Reconvey — General Rule — Alabama.** — *Rose v. Gibson*, 71 Ala. 35; *Brock v. Brock*, 90 Ala. 86; *Patton v. Beecher*, 62 Ala. 579, *overruling Barrell v. Hanrick*, 42 Ala. 60. See also *Manning v. Phippen*, 95 Ala. 537; *Tolleson v. Blackstock*, 95 Ala. 510. *Compare Bishop v. Bishop*, 13 Ala. 483.

*California.* — *Feeney v. Howard*, 79 Cal. 525; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242.

*Colorado.* — *Bohm v. Bohm*, 9 Colo. 100; *Von Trotha v. Bamberger*, 15 Colo. 1.

*Connecticut.* — *Brown v. Brown*, 66 Conn. 493.

*District of Columbia.* — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 15. *Compare Sherman v. Sherman*, 20 D. C. 330.

*Illinois.* — *Davis v. Stambaugh*, 163 Ill. 557; *Moore v. Horsley*, 156 Ill. 36; *Scott v. Harris*, 113 Ill. 447; *Stevenson v. Crapnell*, 114 Ill. 19; *Lawson v. Lawson*, 117 Ill. 98; *Williams v. Williams*, 180 Ill. 361.

*Iowa.* — *Dunn v. Zwilling*, 94 Iowa 233; *Orwig v. Merrill*, 69 Iowa 733; *Acker v. Priest*, 92 Iowa 610; *Hemstreet v. Wheeler*, 100 Iowa 290.

*Kansas.* — *Gee v. Thrailkill*, 45 Kan. 173.

*Massachusetts.* — *Blodgett v. Hildreth*, 103 Mass. 484; *Titcomb v. Morrill*, 10 Allen (Mass.) 15; *Bartlett v. Bartlett*, 14 Gray (Mass.) 278.

*Michigan.* — *Brown v. Bronson*, 35 Mich. 415; *Palmer v. Sterling*, 41 Mich. 220; *Groesbeck v. Seeley*, 13 Mich. 345; *Newton v. Sly*, 15 Mich. 396; *Trask v. Green*, 9 Mich. 366; *Shafter v. Huntington*, 53 Mich. 310; *Thompson v. Marley*, 102 Mich. 476.

*Minnesota.* — *Tatge v. Tatge*, 34 Minn. 272; *Babbitt v. Bennett*, 68 Minn. 260. *Compare Randall v. Constans*, 33 Minn. 329.

*Missouri.* — *Bobb v. Bobb*, 89 Mo. 412; *Weiss v. Heitkamp*, 127 Mo. 23.



the property upon his death to the grantor, a constructive trust cannot be based on the mere breach of this agreement.<sup>1</sup> The same rule will, of course, apply where the grantee agreed to hold in trust for, or reconvey to, a third person.<sup>2</sup>

(b) **Minority Rule.** — In *England*, however, and in some cases in the *United States*, it has been held that the mere breach of the agreement in such cases is such a fraud as will render the grantee a constructive trustee.<sup>3</sup>

*Nebraska.* — Dailey v. Kinsler, 31 Neb. 340; Courvoisier v. Bouvier, 3 Neb. 61; Hansen v. Berthelsen, 19 Neb. 433; O'Brien v. Gaslin, 20 Neb. 347; Thomas v. Churchill, 48 Neb. 266.

*New Jersey.* — Stucky v. Stucky, 30 N. J. Eq. 546; Lovett v. Taylor, 54 N. J. Eq. 311.

*New York.* — Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; Hutchinson v. Hutchinson, 84 Hun (N. Y.) 482; Wood v. Rabe, 96 N. Y. 426, 48 Am. Rep. 640; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371. Compare Bork v. Martin, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 569; Bitter v. Jones, 28 Hun (N. Y.) 492.

*Ohio.* — Schmitt v. Schnell, 14 Ohio Cir. Ct. 153, 7 Ohio Cir. Dec. 657.

*Oregon.* — Parrish v. Parrish, 33 Oregon 486.

*Pennsylvania.* — Barry v. Hill, 166 Pa. St. 344; Grove v. Kase, 2 Dauphin Co. Rep. (Pa.) 125; Shaffner v. Shaffner, 145 Pa. St. 163; Porter v. Mayfield, 21 Pa. St. 263. Compare Lingenfelter v. Ritchey, 58 Pa. St. 485, 98 Am. Dec. 308; Miller v. Pearce, 6 W. & S. (Pa.) 97; Robinson v. Robinson, 29 W. N. C. (Pa.) 159.

*South Carolina.* — Johnston v. La Motte, 6 Rich. Eq. (S. Car.) 347.

*Vermont.* — Salisbury v. Clarke, 61 Vt. 453.

*Wisconsin.* — Krouskop v. Krouskop, 95 Wis. 296; Fairchild v. Rasdall, 9 Wis. 379; Pavey v. American Ins. Co., 56 Wis. 221.

Compare Butte Hardware Co. v. Cobban, 13 Mont. 351.

In *Acker v. Priest*, 92 Iowa 610, it was held that if one takes title under the express promise to hold in trust for another, a denial of such trust will not be such fraud as to raise a constructive trust, unless it be shown that the promise was part of a scheme to get title for the purpose of defrauding the person for whose benefit the conveyance is claimed to have been made.

An assignor of a judgment of foreclosure cannot, under McClain's Code *Iowa*, § 3105 (Code 1897, § 2918), requiring all declarations of trusts relating to real property to be executed in the same manner as deeds, establish a resulting trust in the land purchased by the assignee on foreclosure by parol proof of an agreement by the assignee of the judgment to hold it for him. *Hemstreet v. Wheeler*, 100 Iowa 290.

**Deed Based on Consideration.** — A parol agreement by the grantee to reconvey will not create a constructive trust, especially where the conveyance was based on a valuable and adequate consideration. *Harper v. Harper*, 5 Bush (Ky.) 177.

**1. Agreement to Devise Land.** — *Manning v. Pippen*, (Ala. 1892) 11 So. Rep. 56, explaining 86 Ala. 357, 11 Am. St. Rep. 46. Compare *Sherman v. Sherman*, 20 D. C. 339.

**2. Parol Trust in Favor of Third Person** — *Arkansas*. — *Crow v. Watkins*, 48 Ark. 169.

*Illinois.* — *Lantry v. Lantry*, 51 Ill. 458. Compare *White v. Cannon*, 125 Ill. 412.

*Indiana.* — *Peterson v. Boswell*, 137 Ind. 211.

Compare *Cox v. Arnsmann*, 76 Ind. 210.

*Iowa.* — *Acker v. Priest*, 92 Iowa 610.

*Massachusetts.* — *Moran v. Somes*, 154 Mass. 200.

*Michigan.* — *Thompson v. Marley*, 102 Mich. 476; *Shafter v. Huntington*, 53 Mich. 310.

*Minnesota.* — *Luse v. Reed*, 63 Minn. 5; *Randall v. Constans*, 33 Minn. 329.

*Pennsylvania.* — *Salter v. Bird*, 103 Pa. St. 436. Compare *Freeman v. Freeman*, 2 Pars. Eq. Cas. (Pa.) 81.

Compare also *Foote v. Foote*, 58 Barb. (N. Y.) 258.

**A Parol Agreement by a Daughter** to whom lands are conveyed by her father, to hold them in trust to be distributed after his death to all his children and heirs at law, is void under the statute of frauds. *Thompson v. Marley*, 102 Mich. 476.

**Conveyance by Father to Son-in-Law.** — Where land is conveyed by a father to his son-in-law, with intention of making an advancement to his daughter, the parol promise of the son-in-law to hold in trust for the daughter (his wife) will not convert him into a constructive trustee. *Acker v. Priest*, 92 Iowa 610; *Rogers v. Rogers*, 52 S. Car. 388. See also *Hause v. Hause*, 57 Ala. 262; *Noe v. Roll*, 134 Ind. 115; *Meredith v. Meredith*, 150 Ind. 209; *Dilts v. Stewart*, (Pa. 1885) 1 Cent. Rep. 606. Compare *White v. Cannon*, 125 Ill. 412.

**An Expression by a Grantee Before Execution of the Deed, of an Intention** not amounting to a promise to hold for another, will not constitute him a trustee *ex maleficio*. *Dilts v. Stewart*, 43 Leg. Int. (Pa.) 205.

**3. Minority Rule** — *England*. — *Haigh v. Kaye*, L. R. 7 Ch. 469; *Davies v. Otty*, 35 Beav. 208; *Booth v. Turtle*, L. R. 16 Eq. 183. See also *Lincoln v. Wright*, 4 De G. & J. 16. Compare *Young v. Peachy*, 2 Atk. 254.

*United States.* — *Albright v. Oyster*, 19 Fed. Rep. 849.

*Indiana.* — *Cox v. Arnsmann*, 76 Ind. 210; *Giffen v. Taylor*, 139 Ind. 573; *Myers v. Jackson*, 135 Ind. 136; *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491. Compare *Peterson v. Boswell*, 137 Ind. 211; *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Barnard v. Flinn*, 8 Ind. 204.

*North Carolina.* — *Cloning v. Summit*, 2 Jones Eq. (55 N. Car.) 513; *Shields v. Whitaker*, 82 N. Car. 516; *Turner v. Eford*, 5 Jones Eq. (58 N. Car.) 106; *Taylor v. Taylor*, 1 Jones Eq. (54 N. Car.) 246.

*Texas.* — *Cordova v. Lee*, (Tex. 1890) 14 S. W. Rep. 208.

Compare *Bowling v. Collins*, 21 Nev. 108, 17 Am. St. Rep. 501.

**Verbal Promise Inconsistent with Trust De-**

(c) **Voluntary Execution of Trust.** — The statute of frauds, however, does not make the parol agreement by the grantee void, but merely voidable, and until so avoided it creates an equitable estate in the *cestui que trust*, which, if voluntarily executed by the grantee, is of course valid;<sup>1</sup> thus the voluntary execution of such parol agreements has been sustained against the claims of creditors of the grantees.<sup>2</sup>

**Parol Declaration of Trust with Respect to Proceeds of Land.** — And although a parol agreement by the grantee to hold the land in trust would not be enforceable, still, if after the grantee has sold the land he makes a parol declaration of trust with respect to the proceeds received, such a trust is enforceable.<sup>3</sup> So also a parol agreement by the grantee to give to the grantor the proceeds or a share thereof on resale is not affected by the statute of frauds.<sup>4</sup>

(d) **Fraud or Imposition.** — If any fraud or imposition was used by the grantee to induce the grantor to make the conveyance, the grantee will be held to be a constructive trustee, though the agreement to hold in trust for the grantee or to reconvey to him was intentionally omitted from the deed.<sup>5</sup>

(e) **Intention Not to Perform Agreement.** — Many decisions hold that the mere intention of the grantee not to perform the verbal agreement to hold in trust for the grantor, if such intention existed at the time of the conveyance, constitutes such fraud as to render the grantee a constructive trustee.<sup>6</sup> But in

**clared in Deed.** — A verbal promise by a grantee of lands in trust to hold the conveyed lands upon a different trust from that created by the deed is void under the statute of frauds. *Dover v. Rhea*, 108 N. Car. 88.

1. **Voluntary Execution of Trust.** — *Begole v. Hazzard*, 81 Wis. 274. See also *Cox v. Arnsman*, 76 Ind. 210. See the title **STATUTE OF FRAUDS**.

2. **Voluntary Execution of Trust Upheld as Against Creditors of Grantee.** — *Schreier v. Scott*, 134 U. S. 405; *Bancroft v. Curtis*, 108 Mass. 47; *Appleton First Nat. Bank v. Bertschy*, 52 Wis. 439; *Hyde v. Chapman*, 33 Wis. 391. See the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 255.

3. **Resale by Grantee — Parol Declaration of Trust with Respect to Proceeds.** — *Maffitt v. Rynd*, 69 Pa. St. 380.

4. *Alabama.* — *Scheerer v. Agee*, 106 Ala. 139.

*California.* — *Green v. Brooks*, 81 Cal. 328.

*Illinois.* — *Towle v. Ambs*, 123 Ill. 410.

*Indiana.* — *Tullis v. Attica First Nat. Bank*, 60 Ind. 556; *Talbot v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491. *Compare* *Pearson v. Pearson*, 125 Ind. 341.

*Iowa.* — *Matter of Maxwell*, 83 Iowa 590.

*Michigan.* — *Edinger v. Heiser*, 62 Mich. 598.

*New York.* — *McGuire v. Richards*, 70 Hun (N. Y.) 67; *Tracy v. Tracy*, 3 Bradf. (N. Y.) 57.

*Pennsylvania.* — *Hacker's Estate*, 5 Pa. Co. Ct. 586; *Weaver's Appeal*, (Pa. 1888) 11 Cent. Rep. 160. *Compare* *Barry v. Hill*, 166 Pa. St. 344.

*Compare* also *Randall v. Constans*, 3 Minn. 329.

5. **Fraud or Imposition — England.** — *Young v. Peachy*, 2 Atk. 254.

*Alabama.* — *Patton v. Beecher*, 62 Ala. 579, explaining *Kennedy v. Kennedy*, 2 Ala. 571.

*Colorado.* — *Bohm v. Bohm*, 9 Colo. 100; *Hall v. Linn*, 8 Colo. 264; *Von Trotha v. Bamberger*, 15 Colo. 1.

*Illinois.* — *Allen v. Jackson*, 122 Ill. 567; *Henschel v. Mamero*, 120 Ill. 660; *Scott v. Harris*, 113 Ill. 447.

*Iowa.* — *Scott v. Thompson*, 21 Iowa 599.

*Montana.* — *Muller v. Buycck*, 12 Mont. 354.

*Oregon.* — *Parrish v. Parrish*, 33 Oregon 486.

*Washington.* — *Rozell v. Vansyckle*, 11 Wash. 79.

**Oral Promise to Hold in Trust Admissible in Evidence to Prove Fraud.** — In *Bohm v. Bohm*, 9 Colo. 100, it was held that though the mere breach of a promise by the grantee to hold in trust for the grantor will not render him a constructive trustee, still, where it is alleged that the conveyance was procured by fraud the oral promise may be received in evidence to show one of the steps by which the fraud was accomplished. See also *Von Trotha v. Bamberger*, 15 Colo. 1.

6. **Intention Not to Perform Agreement — Alabama.** — *Manning v. Pippen*, (Ala. 1892) 11 So. Rep. 56.

*California.* — *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189; *Hays v. Gloster*, 88 Cal. 560.

*Georgia.* — *Brown v. Doane*, 86 Ga. 32.

*Illinois.* — *Larmon v. Knight*, 30 N. E. Rep. 318, affirming 140 Ill. 232, 33 Am. St. Rep. 229.

*Kansas.* — *Newell v. Newell*, 14 Kan. 202.

*Oregon.* — *Parrish v. Parrish*, 33 Oregon 486.

*Washington.* — *Rozell v. Vansyckle*, 11 Wash. 79.

**Proof of Intention to Perform Agreement.** — In *Illinois* it has been held that a husband who secured a conveyance from his wife by means of a parol promise to hold in trust for her children, with the intention of not performing the parol agreement, would be held a constructive trustee for the children; and it was further held that his intention not to perform his promise might be implied from his failure to do so, as he would be presumed to have intended to do, when he obtained the property, what he finally did do. *Larmon v. Knight*, 30 N. E. Rep. 318, affirming 140 Ill. 232, 33 Am. St. Rep. 229.

*Minnesota* the contrary view obtains.<sup>1</sup>

(f) **Existence of Confidential Relation.** — Where, at the time of the conveyance, there existed a confidential relation between the grantor and the grantee, it has been held that a constructive trust would arise though there was no fraud on the part of the grantee in procuring the conveyance, and though he intended at the time of the conveyance to perform the verbal agreement to hold in trust for, or reconvey to, the grantor.<sup>2</sup>

**Husband and Wife.** — Where land was conveyed by a husband to his wife upon her verbal promise to hold in trust for the grantor or reconvey to him, it has been held that a constructive trust would arise from the relation of the parties.<sup>3</sup> In other cases, however, the mere existence of the relation of husband and wife between the grantor and the grantee has been held insufficient to convert the grantee into a constructive trustee by reason of the breach of the parol agreement to hold in trust for, or reconvey to, the grantor.<sup>4</sup>

(g) **Conveyance at Instance of Grantee.** — A distinction has also been made between cases where the conveyance is executed at the instance of the grantor and those where it is induced by the grantee by means of his parol promise, and it has been held that in the latter case a constructive trust arises on the refusal of the grantee to perform the promise.<sup>5</sup>

(h) **Proof of Agreement to Hold in Trust.** — In all cases in which it is sought to convert a grantee into a constructive trustee by reason of his parol promise to hold in trust for, or reconvey to, the grantor or a third person, the existence of such agreement must be shown by clear and convincing evidence, as the parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms unless it is clearly and satisfactorily shown that their intention was otherwise.<sup>6</sup>

1. **Minority Rule.** — *Tatge v. Tatge*, 34 Minn. 272.

2. **Existence of Confidential Relation** — *California*. — *Broder v. Conklin*, 77 Cal. 330; *De Mallagh v. De Mallagh*, 77 Cal. 126; *Butler v. Hyland*, 89 Cal. 575.

*Colorado*. — *Bohm v. Bohm*, 9 Colo. 100.

*Connecticut*. — *Hayden v. Denslow*, 27 Conn. 335.

*Illinois*. — *White v. Ross*, 160 Ill. 56.

*Indiana*. — *Catalani v. Catalani*, 124 Ind. 54, 19 Am. St. Rep. 73.

*Montana*. — *Lewis v. Lindley*, 19 Mont. 422.

*Nevada*. — *Bowler v. Curler*, 21 Nev. 158, 37 Am. St. Rep. 501.

*New York*. — *Wood v. Rabe*, 96 N. Y. 426, 48 Am. Rep. 640; *Goldsmith v. Goldsmith*, 145 N. Y. 313; *Foote v. Foote*, 58 Barb. (N. Y.) 258.

*Washington*. — *Rozell v. Vansyckle*, 11 Wash. 79.

In *De Mallagh v. De Mallagh*, 77 Cal. 126, it was held, under the circumstances of the case, that a confidential relation existed between a mother and her son, to whom she conveyed property to be held in trust for her, and that the son, on refusal to perform the trust, would be held as a constructive trustee. See also *Bohm v. Bohm*, 9 Colo. 100; *Wood v. Rabe*, 96 N. Y. 426, 48 Am. Rep. 640.

In *Goldsmith v. Goldsmith*, 145 N. Y. 313, a constructive trust was raised to prevent fraud where a mother conveyed land to one child upon his oral promise to hold it for the benefit of the other children in common with himself and to give to them their shares therein, and in pursuance of such arrangement the other children furnished board to him without charge for several years.

3. **Husband and Wife.** — *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189; *Hayne v. Hermann*, 97 Cal. 259; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268; *Alaniz v. Casenave*, 91 Cal. 41. See also *Sherman v. Sandell*, 106 Cal. 373; *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229; 30 N. E. Rep. 318; *Austin v. Austin*, 18 Neb. 310; *Bartlett v. Bartlett*, 15 Neb. 593.

**Subsequent Agreement to Hold in Trust.** — The grantee in a conveyance between husband and wife cannot, however, be converted into a constructive trustee by reason of a subsequent parol agreement to hold in trust. *Sherman v. Sandell*, 106 Cal. 373.

4. **Contrary Decisions.** — *Manning v. Pippen*, (Ala. 1892) 11 So. Rep. 56, explaining the prior decision in 86 Ala. 357, 11 Am. St. Rep. 46; *Brock v. Brock*, 90 Ala. 86; *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Moore v. Horsley*, 156 Ill. 36; *Scott v. Harris*, 113 Ill. 447; *Stevenson v. Crapnell*, 114 Ill. 19.

5. **Conveyance at Instance of Grantee.** — *Fischbeck v. Gross*, 112 Ill. 208; *Pope v. Dapray*, 176 Ill. 478; *Lantry v. Lantry*, 51 Ill. 458; *Giffen v. Taylor*, 139 Ind. 573; *Myers v. Jackson*, 135 Ind. 136; *Cox v. Arnsman*, 76 Ind. 210. See also *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 30 N. E. Rep. 318; *Catalani v. Catalani*, 124 Ind. 54, 19 Am. St. Rep. 73; *Phillips v. Phillips*, 50 Mo. 603; *Barker v. Barker*, 27 Neb. 135.

6. **Proof of Agreement to Hold in Trust.** — *Sherman v. Sandell*, 106 Cal. 373; *Bohm v. Bohm*, 9 Colo. 111; *Von Trotha v. Bamberger*, 15 Colo. 1.

An agreement that the grantee should hold the title for the benefit of the grantor cannot be inferred from the poverty of the grantee,



(i) **Agreement to Execute Subsequently a Declaration of Trust.** — Some courts have drawn a distinction between a verbal agreement by the grantee to execute subsequently a written declaration of trust, made at the time of the delivery to him of a deed absolute on its face, whereby such delivery was induced, and a mere verbal agreement to hold in trust, and on the grantee's subsequent refusal to execute the declaration, have converted him into a constructive trustee, irrespective of whether there existed at the time of the agreement a fraudulent intent not to perform the same.<sup>1</sup> So, also, the grantee has been converted into a trustee where by accident the subsequent execution of the declaration of trust was prevented.<sup>2</sup> In other cases the courts have refused to recognize such a distinction, holding the two kinds of agreements to be governed by the same rule of law.<sup>3</sup>

(j) **Right to Recover Recited Consideration.** — It seems that where the deed recited a consideration as paid by the grantee, whereas in fact the conveyance was voluntary, and the grantee repudiates his parol agreement to hold in trust for the grantor or reconvey to him, the grantor should be allowed to recover the recited consideration.<sup>4</sup>

**4. Constructive Trusts Arising Out of Breach of Fiduciary Duties** — *a.* IN GENERAL. — It may be said to be a cardinal principle of courts of equity that a person standing in a fiduciary relation to another will not be allowed to make a personal profit by reason of a breach of his duties as a fiduciary, and a court of equity, for the purpose of granting relief, will, in case of a breach of such duties, convert the fiduciary into a constructive trustee.<sup>5</sup> To create such a fiduciary relation it is necessary, however, that there be something more than the mere reposing of confidence on one side. There must also be an assent, express or implied, of the person in whom the confidence is reposed, to act in a fiduciary capacity toward the person who confides in him.<sup>6</sup>

and continuation of possession in the grantor, and the production, at the time of the trial, of the original deed by him. *Balbec v. Donaldson*, 2 Grant Cas. (Pa.) 459.

**1. Agreement to Execute Declaration of Trust.** — *Eldredge v. Jenkins*, 3 Story (U. S.) 181; *Hacker's Estate*, 5 Pa. Co. Ct. 586. See also *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Hall v. Farmers'*, etc., Bank, 145 Mo. 418.

In *Hacker's Estate*, 5 Pa. Co. Ct. 586, at the time of the delivery of the deed, a separate instrument containing the declaration of trust was delivered to the grantee to be signed by him. This agreement was not signed, however, but was retained by the grantee until its loss. The grantee was held liable as trustee.

**2. Execution of Declaration of Trust Prevented by Accident.** — *Barnard v. Flinn*, 8 Ind. 204.

**3. Constructive Trust Not Enforced.** — *Von Trotha v. Bamberger*, 15 Colo. 1; *Dean v. Dear*, 6 Conn. 285. See, however, *Hall v. Linn*, 8 Colo. 264.

**4. Right to Recover Recited Consideration.** — *Leman v. Whitley*, 4 Russ. 427; *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142. *Contra*, *Tatge v. Tatge*, 34 Minn. 272.

**5. Breach of Fiduciary Duty** — *England*. — *Smith v. Kay*, 7 H. L. Cas. 779.

*United States*. — *Hull v. Chaffin*, 54 Fed. Rep. 437.

*Alabama*. — *Kelly v. Browning*, 113 Ala. 420.

*California*. — *Hunt v. Swyney*, (Cal. 1893) 33 Pac. Rep. 854; *Adams v. Lambard*, 80 Cal. 426.

*Illinois*. — *Frohlich v. Seacord*, 180 Ill. 85; *Allen v. Jackson*, 122 Ill. 567.

*Kansas*. — *Phipps v. Phipps*, 39 Kan. 495.

*Michigan*. — *Carrier v. Heather*, 62 Mich. 441.

*Missouri*. — *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656.

*Montana*. — *Lewis v. Lindley*, 19 Mont. 422.

*New Jersey*. — *Wakeman v. Dodd*, 27 N. J. Eq. 564.

*New York*. — *Miller v. McGuckin*, (Supm. Ct. Gen. T.) 15 Abb. N. Cas. (N. Y.) 204; *Peck v. Peck*, 110 N. Y. 64.

*Ohio*. — *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638.

*Pennsylvania*. — *Everly v. Harrison*, 167 Pa. St. 355; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412; *Duff v. Wilson*, 72 Pa. St. 442; *Dickey's Appeal*, 73 Pa. St. 218; *Coates's Appeal*, 2 Pa. St. 133; *Rankin v. Porter*, 7 Watts (Pa.) 390.

See generally the title TRUSTS AND TRUSTEES and the references there given.

**6. Patten v. Warner**, 11 App. Cas. (D. C.) 149. See also *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Fletcher v. Bartlett*, 157 Mass. 113; *Lewis v. Ziegler*, 105 Mo. 604. And see FIDUCIARY, vol. 13, p. 10.

A wife is not guilty of fraud so as to create a constructive trust in favor of her husband in purchasing in her own name and with her own funds real property which he had talked of purchasing for himself, but in which he had no interest at the time. *Pickler v. Pickler*, 180 Ill. 168.

**Office Associates.** — A purchase in good faith by one person of land offered to his office associate, made during the latter's absence, will not be declared in equity to have been made in trust where no other fiduciary relation ex-

**b. FIDUCIARIES PURCHASING TRUST PROPERTY AT JUDICIAL OR TRUST SALES.** — The general rule is well settled that a trustee is not to be permitted to purchase the trust property at his own or at a judicial sale, either directly or through a third person, and where he does so the *cestui que trust* may, at his option, hold him responsible as a constructive trustee, thereby acquiring the full benefit of the purchase.<sup>1</sup> This is a rule of universal application to all persons occupying a fiduciary position.<sup>2</sup> The underlying principle is that no person can be permitted by a court of equity to purchase property where he has a duty to perform inconsistent with the character of purchaser.<sup>3</sup>

**Property Sold on Executions in Favor of Trust Estate.** — The same principle which prohibits a purchase by a trustee of the trust property also prohibits a purchase by him of property of a third person sold on foreclosure of a mortgage or other lien, or on an execution in favor of the trust estate.<sup>4</sup>

**Members of Family.** — There is not necessarily a fiduciary relation between members of a family so as to render a trustee one who purchases at a judicial sale the property of another.<sup>5</sup>

**Right of Election.** — Of course where the fiduciary purchases the trust property at his own or a judicial sale, or purchases property sold on execution in favor of the trust estate, the *cestui que trust* may, at his election, hold him to the purchase.<sup>6</sup>

**c. FIDUCIARIES PURCHASING ADVERSE TITLES** — (1) *In General.* — A very common form of constructive trust arises where a person in a fiduciary

isted between them and the purchaser made a *bona fide* but unsuccessful effort to obtain the property for the other upon the latter's terms. *Stanford v. Mann*, 167 Ill. 79.

**1. Fiduciaries Purchasing Trust Property — United States.** — *Allen v. Gillette*, 127 U. S. 57.

*Alabama.* — *James v. James*, 55 Ala. 525.

*Arkansas.* — *White v. Ward*, 26 Ark. 445; *Wright v. Campbell*, 27 Ark. 637.

*California.* — *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146.

*Colorado.* — *Wells v. Francis*, 7 Colo. 396.

*Illinois.* — *Roby v. Colehour*, 135 Ill. 300.

*Iowa.* — *Maroney v. Maroney*, 97 Iowa 711; *McCrory v. Foster*, 1 Iowa 271.

*Minnesota.* — *King v. Remington*, 36 Minn. 15.

*Missouri.* — *Darling v. Potts*, 118 Mo. 506.

*Nebraska.* — *Horbach v. Marsh*, 37 Neb. 22.

*New Jersey.* — *Mulford v. Bowen*, 9 N. J. Eq. 797; *Wakeman v. Dodd*, 27 N. J. Eq. 564, affirming 26 N. J. Eq. 484.

*New York.* — *Case v. Carroll*, 35 N. Y. 385; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Terrett v. Crombie*, 6 Lans. (N. Y.) 83.

*Pennsylvania.* — *Rosenberger's Appeal*, 26 Pa. St. 67; *Ricketts's Appeal*, (Pa. 1888) 12 Atl. Rep. 60.

*Texas.* — *Cobb v. Trammell*, 9 Tex. Civ. App. 527.

See generally the title **TAXES AND TRUSTS**; also the titles **JUDICIAL SALES**; **SHERIFFS' SALES**; **TAX SALES**.

**2. For Applications to Particular Fiduciary Relations,** see the titles **AGENCY**, vol. 1, p. 1071 *et seq.*; **ATTORNEYS AT LAW**, vol. 3, p. 340. **EXECUTORS AND ADMINISTRATORS**, vol. 11, pp; 1029, 1032, 1069, 1141. **GUARDIAN AND WARD**, ante, pp. 66, 75, 81.

**3. Stettinische v. Lamb**, 18 Neb. 619; *Columbus Co. v. Hurlford*, 1 Neb. 146; *Wright v. Smith*, 23 N. J. Eq. 106.

**4. Trustee or Attorney Bidding In Property Sold**

**on Execution, etc.** — *Bland v. Fleeman*, 58 Ark. 84; *Wren v. Followell*, 52 Ark. 76; *Reickhoff v. Brecht*, 51 Iowa 633; *Tebbetts v. Estes*, 52 Me. 566; *Gaston v. King*, 63 Miss. 326; *Parker v. Kuhn*, 21 Neb. 432; *Walker v. Hill*, 21 N. J. Eq. 191, 22 N. J. Eq. 513; *Eshleman v. Lewis*, 49 Pa. St. 410; *Luscombe v. Grigsby*, (S. Dak. 1899) 78 N. W. Rep. 357. See also the titles **ATTORNEY AND CLIENT**, vol. 3, p. 340; **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 1000.

**An Attorney for the Collection of Successive Mortgages** who acquires a title under a foreclosure of one of the earlier of them holds this as a constructive trustee for the later mortgagees. *Reese v. Wallace*, 113 Ill. 589. See also *Johnson v. Outlaw*, 56 Miss. 541.

**Partners.** — The purchase by a partner of property sold under foreclosure of a mortgage owned by the firm will not vest the title in him, but such partner holds the title in trust for the benefit of the firm. *Parker v. Kuhn*, 21 Neb. 432. See the title **PARTNERSHIP**.

**Termination of Trust Relation.** — If, after the guardianship has ceased, a guardian, under a judgment in his name as guardian, claiming the proceeds of the judgment as his own, causes land of the debtor to be sold and buys it in satisfaction of the judgment, no resulting trust arises. *Lane v. Farmer*, 11 Lea (Tenn.) 568.

**5. Members of Family.** — *Kyle v. Wills*, 166 Ill. 501; *Evans v. McKee*, 152 Pa. St. 89.

**Husband and Wife.** — *Baker v. Baker*, 22 Minn. 262.

**Brothers.** — One who purchases at an execution sale land belonging to his insane brother will not be converted into a constructive trustee in the absence of evidence of other facts showing a fiduciary relation between the brothers. *Hamilton v. Buchanan*, 112 N. Car. 17.

**6. Right of Election.** — *Gaston v. King*, 63 Miss. 326; *Eshleman v. Lewis*, 49 Pa. St. 410.



relation purchases an adverse title to the trust property which his duties as a fiduciary required him to purchase for his *cestui que trust*.<sup>1</sup> To render the fiduciary a constructive trustee, the title purchased by him must, as a general rule, have been adverse to that of his *cestui que trust*. Thus, where the trust estate was subject to a reversionary interest, it does not seem that the fiduciary would become a constructive trustee by purchasing in his own name such reversionary interest.<sup>2</sup> So also where the *cestui que trust* had no present interest or expectation of interest in the property purchased by the fiduciary, he cannot be adjudged a constructive trustee with respect thereto, though the purchase, if it had been made for the *cestui que trust*, would have been beneficial to him.<sup>3</sup> Under certain circumstances, however, the ownership of the property purchased by the fiduciary may be so essential to the *cestui que trust* that a court of equity would consider a purchase by the fiduciary in his own name a breach of trust, and hold him as a constructive trustee.<sup>4</sup>

(2) *To What Fiduciary Relations Rule Applies.* — It is not possible to lay down any general rule as to when a fiduciary relation exists, so as to render the fiduciary a constructive trustee with regard to an adverse title purchased in his own name.<sup>5</sup>

**1. Fiduciaries Purchasing Adverse Title** — *England.* — *Greenlaw v. King*, 5 Jur. 18.

*United States.* — *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Massie v. Watts*, 6 Cranch (U. S.) 148; *Baker v. Humphrey*, 101 U. S. 494; *Michoud v. Girod*, 4 How. (U. S.) 503.

*California.* — *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *O'Connor v. Irvine*, 74 Cal. 437.

*Illinois.* — *Reese v. Wallace*, 113 Ill. 589; *Stewart v. Duffy*, 116 Ill. 47; *O'Halloran v. Fitzgerald*, 71 Ill. 53.

*Kentucky.* — *Morgan v. Boone*, 4 T. B. Mon. (Ky.) 297, 16 Am. Dec. 153; *Daviess v. Myers*, 13 B. Mon. (Ky.) 511; *McClanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412; *Bowling v. Dobyns*, 5 Dana (Ky.) 446.

*Maryland.* — *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779.

*Minnesota.* — *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656.

*Missouri.* — *Roberts v. Moseley*, 64 Mo. 507; *Jamison v. Glascock*, 29 Mo. 191; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304.

*New Jersey.* — *McKee v. Griggs*, 51 N. J. Eq. 178.

*New York.* — *Torrey v. Orleans Bank*, 9 Paige (N. Y.) 663; *Toole v. McKiernan*, 48 N. Y. Super. Ct. 163; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 33; *Knolls v. Barnhart*, 9 Hun (N. Y.) 443, 71 N. Y. 474.

One who enters premises *pendente lite* under the claims in litigation, and holds subject to the final disposition of the case, becomes a trustee under a tax title subsequently acquired by him. *Whiting v. Beebe*, 12 Ark. 421.

**The Assignee of a Patent Subject to Royalty**, having a confidential relation to the patentee, cannot avail himself of an outstanding or hostile prior patent or incumbrance to the prejudice of his fellow. One who has created such a title will be held in equity to be a trustee *ex maleficio* for the benefit of the interest intended to be defrauded, and equity will decree a reconveyance to the *cestui que trust* without compensation. *Hale, etc., Mfg. Co.'s Appeal*, 3 Penny. (Pa.) 378. See the title PATENTS.

**The Right of a Vendee to Acquire Interests**

**Adverse to His Vendor** is discussed under the title VENDOR AND PURCHASER.

**2. Purchase of Reversionary Interest.** — *Kennedy v. Keating*, 34 Mo. 25.

Where a person was entitled to a life interest only in the property, it was held that after his death a purchase by his executor would not render the latter a constructive trustee for the heirs of the decedent. *Ray v. Durham County*, 110 N. Car. 169.

*3. Rogers v. Simmons*, 55 Ill. 76.

**Partners.** — Thus one partner who purchases property which he knows that the firm is anxious to secure does not necessarily become a constructive trustee. *Wheeler v. Sage*, 1 Wall. (U. S.) 518. See further the title PARTNERSHIP.

**Purchases by Corporation Directors or Officers.**

— Though a director of a railroad company is, in equity, its trustee (see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS), his purchase of land upon which the track is subsequently built and buildings for railroad purposes are erected cannot necessarily be considered, at the option of the company, to have been made in trust for it. *Sandy River R. Co. v. Stubbs*, 77 Me. 594.

In *Loring v. Palmer*, 118 U. S. 321, it was held that a purchase by the largest three stockholders of a corporation, not shown to have any authority to purchase on its account, would not be held to be in trust for the corporation because the property might be necessary to the complete success of the company, and the purchasers had great expectations of indirect benefit to their investments in the corporation from such purchase.

**4.** Thus if a wife be seized in fee of building lots which are separated from a street by a narrow gore of land, and the husband purchases such gore and takes a conveyance in his own name, he will be deemed, in equity, a trustee for the wife's benefit. *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214.

**5.** *Beulah Marble Co. v. Mattice*, 22 Colo. 547; *Watson v. Young*, 30 S. Car. 144; *Dwyer v. Rippetoe*, 72 Tex. 520; *Virginia Coal, etc., Co. v. Kelly*, 93 Va. 332.

**Principle Not Confined to Particular Classes of**

Volume XV.



**Tenant in Common Purchasing Adverse Title.** — As a general rule, a fiduciary relation exists between cotenants, and a cotenant's purchase of an outstanding title will inure to the benefit of all, and the purchaser cannot claim the benefit of the purchase to the exclusion of his cotenants.<sup>1</sup>

**Landlord and Tenant.** — Though there is a *quasi*-fiduciary relation between the landlord and the tenant, the latter, it seems, may purchase in an adverse title and, after surrendering the possession, assert the right so acquired,<sup>2</sup> unless the title purchased arose by reason of a breach of his duty on the part of the tenant.<sup>3</sup>

**Agents, Attorneys, Partners, etc.** — The same principle is applied in cases of the purchase of adverse titles by agents,<sup>4</sup> attorneys,<sup>5</sup> partners,<sup>6</sup> executors or administrators,<sup>7</sup> guardians,<sup>8</sup> and life tenants.<sup>9</sup>

**d. FIDUCIARY MAKING PROFIT OUT OF TRUST.** — A fiduciary is strictly prohibited from making a personal profit out of his fiduciary relation aside from the compensation allowed by law, or by his contract with his *cestui que trust*, and where he does so courts of equity will invariably compel him to account therefor as a trustee.<sup>10</sup> By "fiduciary" in this sense is meant a person who acts representatively. The term applies to and includes general and special agents, attorneys and solicitors, guardians, executors and administrators, assignees in bankruptcy and insolvency, court commissions, public officers, and the like.<sup>11</sup>

**e. CONTRACTS BETWEEN PERSONS IN FIDUCIARY RELATIONS.** — Where persons stand in fiduciary relations towards each other, courts of equity, on account of the temptation afforded to the fiduciary to make a personal profit out of his relation at the expense of his *cestui que trust*, require the utmost good

**Fiduciaries.** — In *Greenlaw v. King*, 5 Jur. 18, Lord Chancellor Cottenham, in speaking of the right of a fiduciary to purchase in a title adverse to that of his *cestui que trust*, said that the principle is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but is a rule of universal application, affecting all persons coming within its principle, which is that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of purchaser.

**1. Cotenant Purchasing Adverse Title.** — *Bissell v. Foss*, 114 U. S. 252; *Brundy v. Mayfield*, 15 Mont. 201; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137. See also the title JOINT TENANTS AND TENANTS IN COMMON.

**2. Landlord and Tenant.** — *Williams v. Garrison*, 29 Ga. 503; *Hodges v. Shields*, 18 B. Mon. (Ky.) 828. See the title LANDLORD AND TENANT.

**3. Burgett v. Taliaferro**, 118 Ill. 503; *Carithers v. Weaver*, 7 Kan. 110.

**4. Principal and Agent.** — *Hull v. Chaffin*, 54 Fed. Rep. 437, 49 Fed. Rep. 524; *Rothwell v. Dewees*, 2 Black (U. S.) 613; *Ringo v. Binns*, 10 Pet. (U. S.) 269. See the title AGENCY, vol. 1, p. 1077.

**5. Attorney and Client.** — *Byington v. Moore*, 62 Iowa 470; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656. See further the title ATTORNEY AND CLIENT, vol. 3, p. 4 et seq.

*A Client Refusing to Accept an Unauthorized Purchase* of an adverse title which the attorney has made in his own name with the expectation of being reimbursed cannot afterwards hold the attorney as a constructive trustee. *Curtis v. Newton*, 58 Fed. Rep. 495.

*A Purchase Two Years After the Relation Had Ceased* was held not presumptive evidence of bad faith in *Rogers v. Gaston*, 43 Minn. 189. See also the title ATTORNEY AND CLIENT, vol. 3, p. 344.

**6. Partners.** — *Kinsman v. Parkhurst*, 18 How. (U. S.) 289; *Roby v. Colehour*, 135 Ill. 300; *Lamar v. Hale*, 79 Va. 147. See the title PARTNERSHIP.

**7. Executors and Administrators.** — *Moore v. Simonson*, 27 Oregon 117. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1067.

**8. Guardian.** — *Taylor v. Calvert*, 138 Ind. 67. See the title GUARDIAN AND WARD, *ante*, p. 75.

**9. Life Tenant.** — *Bowling v. Dobyns*, 5 Dana (Ky.) 446; *Moore v. Simonson*, 27 Oregon 117. See also *Yem v. Edwards*, 3 Kay & J. 564, and the title LIFE TENANTS.

**10. Fiduciary Making Profit Out of Trust**—*England*. — *Darcy v. Hall*, 1 Vern. 49; *Docker v. Simes*, 2 Myl. & K. 664; *Aberdeen v. Aberdeen University*, 2 App. Cas. 544.

*District of Columbia.* — *Ferguson v. Bate-man*, 1 App. Cas. (D. C.) 279.

*Kentucky.* — *Titherington v. Hodge*, 81 Ky. 286.

*Minnesota.* — *Hodge v. Twitchell*, 33 Minn. 389; *Newell v. Cochran*, 41 Minn. 374.

*Missouri.* — *Rea v. Copelin*, 47 Mo. 77.

*New Jersey.* — *Blauvelt v. Ackerman*, 20 N. J. Eq. 141.

*New York.* — *Merino v. Munoz*, 5 N. Y. App. Div. 11.

**11.** See the titles AGENCY, vol. 1, p. 1072; ATTORNEY AND CLIENT, vol. 3, p. 342; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 982; GUARDIAN AND WARD, *ante*, p. 75; and other titles which readily suggest themselves.

faith on the part of the fiduciary in all his transactions with the *cestui que trust*, and often presume fraud from the mere transaction itself, and convert the fiduciary, with regard to property gained by such a transaction, into a constructive trustee for the purpose of granting relief, unless the presumption of fraud is removed by showing the most perfect good faith, the absence of undue influence, and knowledge, intention, and freedom of action on the part of the *cestui que trust*.<sup>1</sup>

**To What Classes of Trustees Rule Applicable.** — This principle is applicable not only to regular recognized trustees, but also to all persons occupying a quasi-fiduciary relation, such as agents, attorneys, guardians, husband and wife, parent and child, etc. The application of the rule to these particular relations will be found fully discussed in other places.<sup>2</sup>

**IV. AGAINST WHOM IMPLIED TRUSTS WILL BE ENFORCED — Bona Fide Purchasers.** — The general principle of courts of equity, that where the equities are equal the law will prevail,<sup>3</sup> is to be applied in determining against whom resulting and constructive trusts will be enforced, and it is a well-settled rule that such trusts will not be enforced against a *bona fide* purchaser of the legal title from the original trustee for a valuable consideration and without notice of the equity of the person in whose favor the trust is claimed.<sup>4</sup> On the other hand, it is equally well settled that he who acquires the legal title to property with notice of an equity in favor of a third person takes subject to such equity, and therefore a resulting or constructive trust will be enforced against a subsequent purchaser of the legal title, with notice of the trust,

**1. Contracts Between Persons in Fiduciary Relations — England.** — *Chesterfield v. Janssen*, 2 Ves. 155; *Hatch v. Hatch*, 9 Ves. Jr. 296.

*United States.* — *Keith v. Kellam*, 35 Fed. Rep. 243.

*Florida.* — *Saunders v. Richard*, 35 Fla. 28.

*Illinois.* — *Roby v. Colehour*, 135 Ill. 300; *Vallette v. Tedens*, 122 Ill. 607.

*Kentucky.* — *Dodge v. Foulks*, 11 B. Mon. (Ky.) 178.

*New Jersey.* — *Dunn v. Dunn*, 42 N. J. Eq. 431; *Moore v. Carling*, 29 N. J. Eq. 432.

*Oregon.* — *Savage v. Savage*, 12 Oregon 459.

*Pennsylvania.* — *Nichols v. Nichols*, 149 Pa. St. 172.

**2. See the titles AGENCY**, vol. i, p. 1071; **ATTORNEY AND CLIENT**, vol. 3, p. 332; and other titles dealing with particular classes of fiduciaries; also **FRAUD AND DECEIT**, vol. 14, p. 194, and *passim*; **GIFTS**, vol. 14, p. 1011, and *passim*; **TRUSTS AND TRUSTEES**, etc.

**3. Where Equities Are Equal, Law Will Prevail.** — *Catherwood v. Watson*, 65 Ind. 576. See the title **EQUITY**, vol. 11, p. 188.

**4. Bona Fide Purchasers for Value — United States.** — *Daggs v. Ewell*, 3 Woods (U. S.) 344; *Trinidad v. Milwaukee*, etc., *Smelting*, etc., Co., 27 U. S. App. 469; *Wilson v. Wall*, 6 Wall. (U. S.) 83; *Olcott v. Rice*, 30 U. S. App. 461.

*Alabama.* — *Lewis v. Mohr*, 97 Ala. 366.

*Arkansas.* — *Sorrells v. Sorrells*, 4 Ark. 296.

*California.* — *Stratton v. California Land*, etc., Co., 86 Cal. 353.

*Florida.* — *Saunders v. Richard*, 35 Fla. 28; *Foster v. Ambler*, 24 Fla. 519; *Gliniski v. Zawadski*, 8 Fla. 405.

*Georgia.* — *Morgan v. Johnson*, 87 Ga. 382.

*Indiana.* — *Catherwood v. Watson*, 65 Ind. 576; *Hampson v. Fall*, 64 Ind. 382; *Parmlee v. Sloan*, 37 Ind. 469; *Gray v. Turley*, 110 Ind. 254; *Carnahan v. McCord*, 116 Ind. 67; *Studa-*

*baker v. Langard*, 79 Ind. 320; *Johnston v. Field*, 62 Ind. 377; *Stewart v. English*, 6 Ind. 176; *Crawfordsville First Nat. Bank v. Carter*, 89 Ind. 317; *Evans v. Nealis*, 69 Ind. 148; *Willis v. Thompson*, 93 Ind. 62; *Barkley v. Tapp*, 87 Ind. 27; *Smith v. Selz*, 114 Ind. 229; *Pillars v. McConnell*, 141 Ind. 670; *Beckett v. Bledsoe*, 4 Ind. 256.

*Iowa.* — *Seymour v. Harrison*, 20 Iowa 592; *Richardson v. Haney*, 76 Iowa 101.

*Kentucky.* — *Hawkins v. Palmer*, (Ky. 1891) 16 S. W. Rep. 274; *Stevens v. Arnold*, (Ky. 1894) 24 S. W. Rep. 617; *Williams v. Williams*, (Ky. 1897) 43 S. W. Rep. 198; *Pribble v. Hall*, 13 Bush (Ky.) 61.

*Louisiana.* — *Rhodes v. Hooper*, 6 La. Ann. 356.

*Michigan.* — *Austin v. Dean*, 40 Mich. 386. *Mississippi.* — *Gilruth v. Decell*, 72 Miss. 232; *Love v. Taylor*, 26 Miss. 574.

*Nebraska.* — *Streitz v. Hartman*, 26 Neb. 33.

*New York.* — *Lamb v. Lamb*, 18 N. Y. App. Div. 250; *Giddings v. Eastman*, 5 Paige (N. Y.) 561; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Kearney v. Fleming*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 148; *Valentine v. Richardt*, 126 N. Y. 272.

*Ohio.* — *Pottenger v. Bailey*, 5 Cinc. L. Bul. 647, 8 Ohio Dec. (Reprint) 106; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 Am. Dec. 487.

*Pennsylvania.* — *Reed v. Mellor*, 122 Pa. St. 635; *Morey v. Herrick*, 18 Pa. St. 123; *Burr v. Kase*, 168 Pa. St. 81.

*Tennessee.* — *Alabama Marble*, etc., Co. v. *Chattanooga Marble*, etc., Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1004; *Eaves v. Gillespie*, 1 Swan (Tenn.) 128; *Coleman v. Satterfield*, 2 Head (Tenn.) 259; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71; *Gordon v. English*, 3 Lea (Tenn.) 634.

*Texas.* — *Wethered v. Boon*, 17 Tex. 146; *Ranney v. Hogan*, 1 Tex. Unrep. Cas. 253.

whenever the trust would have been enforced against the person from whom the purchaser acquired his title, irrespective of whether the purchase was based upon a valuable consideration.<sup>1</sup>

**Creditors.** — It is well settled that an implied trust will be enforced as against the general creditors of the resulting or constructive trustee,<sup>2</sup> though such creditors permitted the trustee to incur his indebtedness to them in reliance on his apparent ownership of the property.<sup>3</sup> And as a creditor who acquires

**1. Purchasers with Notice — England.** — Mackreth v. Symmons, 15 Ves. Jr. 350.

**United States.** — Moore v. Crawford, 130 U. S. 122; Jones v. Van Doren, 130 U. S. 684.

**Arkansas.** — Kline v. Ragland, 47 Ark. 111.

**California.** — Cannon v. Handley, 72 Cal. 133.

**Colorado.** — Wells v. Francis, 7 Colo. 396.

**Connecticut.** — Goddard v. Prentice, 17 Conn. 553; Thrall v. Spencer, 16 Conn. 142.

**Georgia.** — Lewis v. Equitable Mortg. Co., 94 Ga. 572; Dotterer v. Pike, 60 Ga. 29.

**Illinois.** — Breit v. Yeaton, 101 Ill. 242; Alwood v. Mansfield, 59 Ill. 496; Williams v. Brown, 14 Ill. 200; Harris v. McIntyre, 118 Ill. 275.

**Indiana.** — Boyer v. Libey, 88 Ind. 235; Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593; Gray v. Turley, 110 Ind. 254; Chamberlin v. Jones, 114 Ind. 458.

**Iowa.** — Hamilton v. Walters, 3 Greene (Iowa) 556; Ryan v. Doyle, 31 Iowa 53.

**Kentucky.** — Graves v. Graves, 1 A. K. Marsh. (Ky.) 166; Fraily v. Langford, 1 A. K. Marsh. (Ky.) 363; Ligget v. Wall, 2 A. K. Marsh. (Ky.) 149; Langdon v. Woolfolk, 2 B. Mon. (Ky.) 105; Craig v. McBride, 9 B. Mon. (Ky.) 10.

**Maine.** — Warren v. Ireland, 29 Me. 62.

**Maryland.** — Swift v. Williams, 68 Md. 236.

**Michigan.** — Austin v. Dean, 40 Mich. 386; Ready v. Kearsley, 14 Mich. 215.

**Minnesota.** — St. Paul Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75.

**Missouri.** — Darling v. Potts, 118 Mo. 506.

**New Hampshire.** — Page v. Page, 8 N. H. 187; Ferrin v. Errol, 59 N. H. 234.

**New Jersey.** — Gale v. Morris, 29 N. J. Eq. 222, 30 N. J. Eq. 285; Shible v. Ely, 6 N. J. Eq. 181.

**New York.** — Murphy v. Whitney, 140 N. Y. 541; Brown v. Cherry, 57 N. Y. 645, reversing 59 Barb. (N. Y.) 628.

**North Carolina.** — Blount v. Carroway, 67 N. Car. 396.

**South Carolina.** — Jackson v. McAliley, Spears Eq. (S. Car.) 303, 40 Am. Dec. 620.

**South Dakota.** — Luscombe v. Grigzby, (S. Dak. 1899) 78 N. W. Rep. 357.

**Tennessee.** — Turner v. Petigrew, 6 Humph. (Tenn.) 438.

**Texas.** — Montgomery v. Noyes, 73 Tex. 203; Wethered v. Boon, 17 Tex. 143; Dohoney v. Womack, (Tex. 1892) 19 S. W. Rep. 883.

**Vermont.** — Barnes v. Dow, 59 Vt. 530.

**2 General Creditors — Pennsylvania.**

**Hickman, 2 Vern. 167.**

**United States.** — Garner v. Providence Second Nat. Bank, 151 U. S. 420.

**Alabama.** — Walker v. Elledge, 65 Ala. 51.

**Arkansas.** — Fairhurst v. Lewis, 23 Ark. 435.

**California.** — Murphy v. Clayton, 113 Cal. 153; Breeze v. Brooks, 71 Cal. 169.

**Florida.** — Hill v. Meinhard, 39 Fla. 111.

**Indiana.** — Rhodes v. Green, 36 Ind. 7;

**Brookville Nat. Bank v. Kimble, 76 Ind. 195;**

**Lord v. Bishop, 101 Ind. 334.**

**Iowa.** — Robinson v. Robinson, 22 Iowa 427.

**Kansas.** — English v. Law, 27 Kan. 242.

**Kentucky.** — Mallory v. Mallory, 5 Bush (Ky.) 464; Sims v. Spalding, 2 Duv. (Ky.) 121.

**Maine.** — Brown v. Lunt, 37 Me. 423.

**Mississippi.** — Hancock v. Titus, 39 Miss. 224; Porter v. Caspar, 54 Miss. 359.

**Nebraska.** — Cleghorn v. Obernalte, 53 Neb. 687; Hews v. Kenney, 43 Neb. 815; Cresswell v. McCaig, 11 Neb. 222.

**New York.** — Schlaefer v. Corson, 52 Barb. (N. Y.) 510; White v. Carpenter, 2 Paige (N. Y.) 217; Sieman v. Austin, 33 Barb. (N. Y.) 9, affirmed 29 N. Y. 598.

**Ohio.** — McGovern v. Knox, 21 Ohio St. 547.

**Pennsylvania.** — Hay v. Martin, (Pa. 1888) 14 Atl. Rep. 333; Young v. Senft, 153 Pa. St. 352.

**Tennessee.** — Gass v. Gass, 1 Heisk. (Tenn.) 613; Thomas v. Walker, 6 Humph. (Tenn.) 93; Turner v. Petigrew, 6 Humph. (Tenn.) 438; Sandford v. Weeden, 2 Heisk. (Tenn.) 71.

**Compare Page v. Gillentine, 6 Lea (Tenn.) 240.**

**Virginia.** — Parker v. Logan, 82 Va. 376.

**Wisconsin.** — Strong v. Gordon, 96 Wis. 476.

**Compare Buck v. Webb, 7 Colo. 212.**

There is nothing illegal or against public policy in the mere fact that a person entitled to enforce a resulting trust in land permits the legal title to remain in another, and such person is not estopped from asserting his equity and enforcing the trust against the creditors of the trustee where no act of such person induced the creditor to give credit to the trustee.

**Murphy v. Clayton, 113 Cal. 153.**

In *Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333, wherein land was purchased by a husband in his own name, with the funds of his wife, it was held that the fact that the wife joined the husband in a conveyance of a part of the land did not estop her from asserting a resulting trust in her favor to the balance of the land as against the creditors of the husband.

**Evidence.** — To establish an implied trust as against the claims of the creditors of the alleged trustee the evidence must be particularly clear and satisfactory. *Jordan v. Garner, 101 Ala. 411; Hay v. Martin, (Pa. 1888) 14 Atl. Rep. 333; Gates v. Card, 93 Tenn. 334.*

**3. Murphy v. Clayton, 113 Cal. 153.**

Where one invested with the legal title to land in trust for his wife for life, remainder to his children, sells it, and with the proceeds purchases other land in his own name, he holds the land so purchased as he did the other; and, as against the trust, it is not subject to his general debts. This rule is not changed by *Good Manners v. Good Manners*, which makes the property held in the husband's



a lien upon the property of the debtor by attachment, judgment, or levy of execution is regarded as acquiring only such rights as his debtor had, implied trusts are enforced against attachment, judgment, or execution creditors of the resulting or constructive trustee, though such a creditor, at the time of acquiring his lien, had no notice of the implied trust.<sup>1</sup>

**Statutory Provisions.** — In some jurisdictions the statutes provide that implied trusts shall not be enforced as against the "title of creditors," or *bona fide* purchasers without notice; but it has been held that the term "creditors," as therein used did not include a general creditor, but only such creditors as had acquired a lien on the trust property without notice of the trust.<sup>2</sup>

**Estoppel.** — The person in whose favor it is sought to enforce an implied trust may be estopped from asserting it against the general creditors of the one in whose name the legal title is taken, by laches and by holding the latter out as the owner of the trust property, and thereby inducing others to extend credit to him.<sup>3</sup>

name liable for his debts where credit has been extended to him by reason of his apparent ownership. In such case the husband holds the property purchased with the trust fund just as any other trustee. *Porter v. Caspar*, 54 Miss. 359.

**1. Judgment Creditor**—*United States*.—*Brown v. Pierce*, 7 Wall. (U. S.) 205; *Flanders v. Thompson*, 3 Woods (U. S.) 9.

*Georgia*.—*Gray v. Perry*, 51 Ga. 180; *Bell v. Stewart*, 98 Ga. 669.

*Indiana*.—*Heberd v. Wines*, 105 Ind. 237; *Hays v. Reger*, 102 Ind. 524.

*Iowa*.—*Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740.

*Kentucky*.—*Lewis v. Taylor*, (Ky. 1895) 29 S. W. Rep. 444.

*Maryland*.—*Hartsock v. Russell*, 52 Md. 619.

*Mississippi*.—*Hancock v. Titus*, 39 Miss. 224.

*Nebraska*.—*Mosher v. Neff*, 33 Neb. 770.

*New York*.—*Keirsted v. Avery*, 4 Paige (N. Y.) 9; *White v. Carpenter*, 2 Paige (N. Y.) 217; *Siemon v. Schurck*, 29 N. Y. 598, *affirming* 33 Barb. (N. Y.) 9; *Sieman v. Austin*, 33 Barb. (N. Y.) 9, *affirming* 29 N. Y. 598; *Ells v. Tousley*, 1 Paige (N. Y.) 280; *Schlaefel v. Corson*, 52 Barb. (N. Y.) 510; *Lounsbury v. Purdy*, 18 N. Y. 515.

*Pennsylvania*.—*Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333; *Zeller v. Light*, (Pa. 1889) 17 Atl. Rep. 433.

*Tennessee*.—*Thomas v. Walker*, 6 Humph. (Tenn.) 93.

*Texas*.—*Yoe v. Montgomery*, 68 Tex. 338.

*Virginia*.—*Warwick v. Warwick*, 31 Gratt. (Va.) 70.

*Compare Roberts v. Broom*, 1 Del. Ch. 388.

**Execution Creditor.**—*Hawkins v. Willard*, (Tex. Civ. App. 1896) 38 S. W. Rep. 365; *Yoe v. Montgomery*, 68 Tex. 338.

**Statutory Abolition of Resulting Trust.**—Where the statute has abolished trusts resulting from the payment of the purchase money, the rights of the execution creditors of the grantee are not affected by a conveyance of the land, subsequent to the levy, by the grantee to the person by whom the purchase money was paid. *Barnes v. Munro*, 95 Mich. 612.

**Attaching Creditors.**—*English v. Law*, 27 Kan. 242; *Chicago, etc., R. Co. v. Omaha*

*First Nat. Bank*, (Neb. 1899) 78 N. W. Rep. 1064; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Gass v. Gass*, 1 Heisk. (Tenn.) 613; *Click v. Click*, 1 Heisk. (Tenn.) 607.

**2. Construction of Term "Creditors"**—*Alabama Statute*.—In Alabama the statutes protect the title of creditors against the enforcement of latent equities, and while a mere general creditor of an implied trustee would not be entitled to protection against the implied trust, still a judgment creditor who had acquired his judgment without notice of the trust would be entitled to protection, though it would be otherwise if he had notice of the trust before he had recovered his judgment. *Walker v. Elledge*, 65 Ala. 51; *Carter v. Challen*, 83 Ala. 135; *Preston v. McMillan*, 58 Ala. 84. See also *Dickerson v. Carroll*, 76 Ala. 377.

*Oklahoma Statute—Construction of Term "Incumbrancer."*—Acts of Oklahoma, 1890, c. 69, art. 6, § 9, p. 785, provides that "no implied or resulting trust can prejudice the right of the purchaser or incumbrancer of real property for value and without notice of the trust," Chapter 70, § 41, p. 851, provides that "all final judgments in the courts of record for the recovery of money or costs shall be a lien upon real estate \* \* \* liable to execution in the county where the judgment is rendered." It was held that the incumbrance of real property for value referred to in the statute was an incumbrance obtaining and subsisting upon real property by reason of some advantage derived to the property itself, and that, therefore, a judgment recovered against the resulting trustee on a liability incurred before he acquired the legal title was not protected by the statute as an incumbrance for value. *Baird v. Williams*, 4 Okla. 173.

**3. Estoppel—United States.**—*Humes v. Scruggs*, 94 U. S. 22; *Garner v. Providence Second Nat. Bank*, 151 U. S. 420.

*Indiana*.—*Catherwood v. Watson*, 65 Ind. 576.

*Iowa*.—*Richards v. Schreiber*, 98 Iowa 422; *Iseminger v. Criswell*, 98 Iowa 382.

*Nebraska*.—*Hews v. Kenney*, 43 Neb. 815.

*New Jersey*.—*Besson v. Eveland*, 26 N. J. Eq. 468.

*Pennsylvania*.—*Miller's Estate*, 8 Lanc. L. Rev. (Pa.) 145.

See also the title ESTOPPEL, vol. II, p. 385.

The Questions who are purchasers for value, their rights, etc., will be discussed in detail elsewhere in this work.<sup>1</sup>

# V. RULES OF PUBLIC POLICY AFFECTING ENFORCEMENT OF IMPLIED TRUSTS.

— A court of equity will not enforce a resulting or constructive trust where to do so would involve a violation of positive law or an encroachment upon some rule of public policy.<sup>2</sup> This rule is based upon the cardinal principle of equity, that he who comes into a court of equity must come with clean hands,<sup>3</sup> and the analogous principle exemplified by the maxim *in pari delicto potior est conditio defendentis*.<sup>4</sup>

**Alien Incapacitated to Hold Realty.** — Thus, where an alien who is incapacitated to take or hold real estate pays the purchase money for a conveyance to a third person, a resulting trust in his favor will not be enforced.<sup>5</sup>

**Perpetration of Fraud.** — So also an implied trust will not be enforced where the whole scheme between the parties, out of which the right to enforce the trust is claimed to have arisen, was for the perpetration of a fraud upon third persons.<sup>6</sup> Cases of this kind have often arisen where the purchase money is

1. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE. See also the titles NOTICE; RECORDING ACTS.

2. **Public Policy Preventing Enforcement of Implied Trust** — *England*. — Childers v. Childers, 1 De G. & J. 482; Groves v. Groves, 3 Y. & J. 163; *Ex p.* Yallop, 15 Ves. Jr. 60; *Ex p.* Houghton, 17 Ves. Jr. 251; Camden v. Anderson, 5 T. R. 709.

*United States*. — Philips v. Crammond, 2 Wash. (U. S.) 441.

*Florida*. — Dewhurst v. Wright, 29 Fla. 223.

*Illinois*. — Brown v. Pitney, 39 Ill. 468; Thomas v. Chicago, 55 Ill. 403.

*Kentucky*. — Ford v. Lewis, 10 B. Mon. (Ky.) 127.

*Mississippi*. — Alsworth v. Cordtz, 31 Miss. 32; Snider v. Udell Woodenware Co., 74 Miss. 353.

*Nebraska*. — Detwiler v. Detwiler, 30 Neb. 338.

*New Jersey*. — Cutler v. Tuttle, 19 N. J. Eq. 549; Baldwin v. Campfield, 8 N. J. Eq. 891.

*New York*. — Anstice v. Brown, 6 Paige (N. Y.) 448, Leggett v. Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413; Proseus v. McIntyre, 5 Barb. (N. Y.) 425.

*North Carolina*. — Atkins v. Kron, 5 Ired. Eq. (40 N. Car.) 207.

*Tennessee*. — Tipton v. Powell, 2 Coldw. (Tenn.) 19; Dudley v. Bosworth, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

*Virginia*. — Hubbard v. Goodwin, 3 Leigh (Va.) 492.

3. See the title EQUITY, vol. II, p. 162.

4. Wheeler v. Sage, 1 Wall. (U. S.) 518.

5. **Alien Paying Purchase Money.** — Philips v. Crammond, 2 Wash. (U. S.) 441; Leggett v. Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413. See also Jackson v. Leggett, 7 Wend. (N. Y.) 377; Hubbard v. Goodwin, 3 Leigh (Va.) 514. See the title ALIENS, vol. 2, p. 64.

In such a case, however, it seems that a trust in favor of the state by escheat may be enforced. Hubbard v. Goodwin, 3 Leigh (Va.) 514. See also Leggett v. Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413.

**Funds of Alien Invested in Land Without Authority.** — If an agent for the collection of a debt due to an alien purchases the land in his own name in payment of such

debt, without authority from his principal, and without any written declaration of trust, though a court of equity will not enforce a resulting trust in favor of the alien so as to allow him to hold the land, still it will order the land to be sold and converted into money for the purpose of giving to the alien the benefit thereof as personal estate, and will not permit a resulting trust to be created in favor of the state by escheat. Anstice v. Brown, 6 Paige (N. Y.) 448.

6. **Perpetration of Fraud** — *United States*. — Wheeler v. Sage, 1 Wall. (U. S.) 518.

*Iowa*. — Tiffany v. Tiffany, 103 Iowa 133.

*Massachusetts*. — Lawton v. Estes, 167 Mass. 181, 57 Am. St. Rep. 450.

*Mississippi*. — Snider v. Udell Woodenware Co., 74 Miss. 353.

*Texas*. — Hudson v. Morriss, 55 Tex. 595.

*Compare* Hutchins v. Heywood, 50 N. H. 491.

In Wheeler v. Sage, 1 Wall. (U. S.) 518, one partner undertook to purchase for the firm real estate upon which the firm held a mortgage, and which it was anxious to own for partnership purposes. The mortgagor was insolvent, and the scheme under which the partners were to acquire the property was by entering judgment against the mortgagor for an amount in excess of their claim. This was done, and the partner employed to purchase the property purchased it in his own name, and it was held that a constructive trust in favor of the partnership would not be enforced.

In Tiffany v. Tiffany, 103 Iowa 133, it was held that where a husband paid the purchase money for land and takes the title in the name of his sister, for the purpose of defrauding his wife, a resulting trust in his favor will not be enforced.

In Snider v. Udell Woodenware Co., 74 Miss. 353, it was held that where a wife permitted land belonging to her and to her two younger brothers, who were under her care, to be sold for taxes, in order that she might buy the land for her own benefit and thereby defraud her brothers of their interest, and furnished the purchase money to her husband, in whose name the title was taken, a court of equity would not enforce a resulting trust in her favor.

paid by one person and the conveyance is taken in the name of another for the purpose of placing the property beyond the reach of creditors of the former.<sup>1</sup> In such cases, of course, creditors of the person paying the purchase money would be entitled to subject the property to the payment of their claims.<sup>2</sup>

**Transaction Prohibited by Public Policy.** — The question of what transactions are prohibited by rules of public policy will be found fully discussed in another place.<sup>3</sup>

**VI. REMEDIES — 1. In General.** — The remedy almost universally resorted to for the enforcement of an implied trust is a bill in equity to have the trust decreed and to compel a conveyance of the legal title by the trustee to the person entitled.<sup>4</sup>

**2. Ejectment — Title to Support.** — In those jurisdictions in which the common-law rule that the plaintiff in ejectment must be clothed with the legal title prevails, the *cestui que trust* of an implied trust cannot successfully invoke this remedy.<sup>5</sup> In some jurisdictions, by virtue of statute, an action of ejectment may be maintained on an equitable title, and in such cases, of course, this action may be maintained by one entitled to the beneficial interest in an implied trust.<sup>6</sup> In *Pennsylvania*, for want of chancery jurisdiction, the action of ejectment has been substituted in many cases for a bill in equity, and implied trusts have often been enforced by such an action.<sup>7</sup>

**1. Fraud on Creditors — Alabama.** — *Kelly v. Karsner*, 72 Ala. 106; *Patton v. Beecher*, 62 Ala. 579.

*Delaware.* — *Pierson v. Pierson*, 5 Del. Ch. 11.

*Kentucky.* — *Doyle v. Sleeper*, 1 Dana (Ky.) 531; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127.

*Mississippi.* — *Carlisle v. Tindall*, 49 Miss. 229.

*Nebraska.* — *Detwiler v. Detwiler*, 30 Neb. 338; *Bartlett v. Bartlett*, 13 Neb. 456.

*New Jersey.* — *Baldwin v. Campfield*, 8 N. J. Eq. 891.

*New York.* — *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424; *In re Camp*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 141.

*North Carolina.* — *Respass v. Jones*, 102 N. Car. 5; *Summers v. Moore*, 113 N. Car. 394.

*Tennessee.* — *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

*West Virginia.* — *McClintock v. Loisseau*, 31 W. Va. 865.

In *McClintock v. Loisseau*, 31 W. Va. 865, a father purchased real estate and had it conveyed to his son by an absolute deed, and in a suit by the heirs, after the father's death, to set up a resulting trust in their favor, it was held that they could not show that the conveyance to the son was made for a fraudulent purpose by the father, in order to rebut the presumption that it was for an advancement or gift to the son.

**2. Arkansas.** — *Stix v. Chaytor*, 55 Ark. 116.

*Indiana.* — *Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610.

*Kentucky.* — *Doyle v. Sleeper*, 1 Dana (Ky.) 531.

*Missouri.* — *Dunnica v. Coy*, 24 Mo. 167, 69 Am. Dec. 420.

*New York.* — *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Jackson v. Forrest*, 2 Barb. Ch. (N. Y.) 576; *National Bank v. Van Steenburgh*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 35; *Wait v. Day*, 4 Den. (N. Y.) 439.

*South Carolina.* — *Brown v. M'Donald*, 1 Hill Eq. (S. Car.) 297.

See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

3. See the title ILLEGAL CONTRACTS, *ante*.

**4. Bill in Equity.** — *Beddow v. Sheppard*, 118 Ala. 474; *Crawford v. Manson*, 82 Ga. 118; *Matter of Follen*, 14 N. J. Eq. 147. And see the cases cited generally throughout this article.

In *Taylor v. Smith*, 54 Miss. 50, it was held that where a husband, with his wife's money, purchases land in his own name, he holds it as trustee of a resulting trust in his wife's favor, and in such a case the wife's heirs, who are remaindermen in fee of the equitable estate subject to the life estate of the husband by way of tenant by the curtesy, can compel the husband to convey to them the legal estate in remainder.

**5. Ejectment — Title to Support.** — *You v. Flinn*, 34 Ala. 409. See the title EJECTMENT, vol. 10, p. 482 *et seq*.

**6. Rose v. Hayden**, 35 Kan. 108, 57 Am. Rep. 145.

**7. Pennsylvania Rule.** — *Flynn v. Metzgar*, 2 York Leg. Rec. (Pa.) 141; *Campbell v. Galbreath*, 1 Watts (Pa.) 70; *Ross v. Barker*, 5 Watts (Pa.) 391; *Gilchrist v. Brown*, 165 Pa. St. 275.

**Questions for Court and Jury.** — In an action of ejectment to enforce a resulting trust, the judge is a chancellor upon the question of the existence of the trust, and if, in his judgment, the evidence is insufficient to sustain a verdict, the case should be taken from the jury. *Gilchrist v. Brown*, 165 Pa. St. 275.

And the same is true where the defendant sets up a resulting trust in his favor in defense of an action of ejectment. *Wylie v. Mansley*, 132 Pa. St. 65. See also *Reno v. Moss*, 120 Pa. St. 49.

**Federal Courts Sitting in Pennsylvania.** — Where an action of ejectment is brought in a federal court sitting in Pennsylvania, to re-



**Defenses.** — Where the defendant in ejectment is permitted to set up an equitable title in defense,<sup>1</sup> such defense is available to the real beneficiary in an implied trust in an action of ejectment by the holder of the legal title.<sup>2</sup>

**3. Writ of Entry.** — In *New Hampshire* it has been held that where the purchase money for land is paid by one person and the conveyance is taken in the name of another, the legal title vests in the former by the statute of uses, and therefore a writ of entry by him or his grantee will lie for the recovery of the land.<sup>3</sup>

**4. By Whom Enforced.** — An interest in land by way of an implied trust is realty, and on the death of the *cestui que trust* descends to his heirs and should be enforced by them, and cannot be enforced by his personal representative unless it is needed to pay the debts of the estate.<sup>4</sup>

**VII. LACHES AND LIMITATIONS**    **1. The General Principle.** — The well-settled doctrine of courts of equity that the enforcement of an equitable right may be barred by laches applies to suits to enforce resulting and constructive trusts.<sup>5</sup>

**2. Analogy to Statute of Limitations.** — And where it is sought to enforce a resulting or constructive trust, courts of equity, as a rule, act in analogy to the period of limitations relating to actions at law, and apply a like limitation upon the enforcement of such equitable right.<sup>6</sup> This rule, however, is not absolute

covering land in Pennsylvania, title by way of a resulting trust is sufficient to support the action. *Murphy v. Packer*, 152 U. S. 398.

1. See the title **EJECTMENT**, vol. 10, p. 533 *et seq.*

2. **Title by Way of Implied Trust as a Defense.** — *Wylie v. Mansley*, 132 Pa. St. 65; *Kelley v. Hill*, 50 Me. 470. See also *Rose v. Treadway*, 4 Nev. 455, 97 Am. Dec. 546.

3. **Writ of Entry.** — *Osgood v. Eaton*, 62 N. H. 512.

4. **By Whom Enforced.** — *Lill v. Brant*, 6 Ill. App. 366; *Matlock v. Nave*, 28 Ind. 35.

5. **Enforcement of Implied Trusts May Be Barred by Laches** — *England*. — *Beckford v. Wade*, 17 Ves. Jr. 87.

*United States.* — *Whitney v. Fox*, 166 U. S. 637; *Farrand v. Land*, etc., Imp. Co., 86 Fed. Rep. 393; *Hume v. Beale*, 17 Wall. (U. S.) 336; *Boone v. Chiles*, 10 Pet. (U. S.) 177.

*Alabama.* — *Nettles v. Nettles*, 67 Ala. 599.

*Arkansas.* — *James v. James*, 41 Ark. 301.

*Illinois.* — *Miles v. Wheeler*, 43 Ill. 123; *McDonald v. Stow*, 109 Ill. 40; *Mayfield v. Forsyth*, 164 Ill. 32; *Pratt v. Stone*, 80 Ill. 440; *Breit v. Yeaton*, 101 Ill. 242; *Collier v. Beers*, 106 Ill. 150; *Lloyd v. Kirkwood*, 112 Ill. 329; *Green v. Dietrich*, 114 Ill. 636; *McLaffin v. Jones*, 155 Ill. 539, *affirming* 55 Ill. App. 518; *Herr v. Payson*, 157 Ill. 244.

*Iowa.* — *Hall v. Doran*, 13 Iowa 368; *Murphy v. Hanscome*, 76 Iowa 192.

*Maryland.* — *Brawnner v. Staup*, 21 Md. 328.

*Mississippi.* — *House v. Harden*, 52 Miss. 860.

*West Virginia.* — *Smith v. Turley*, 32 W. Va. 14; *Woods v. Stevenson*, 43 W. Va. 149.

A delay by children for eighteen years after arriving at their majority in filing a bill to assert a resulting trust, on the ground that the property was bought by their guardian with funds derived from their ancestor's estate thirty years before, is such, unless satisfactorily accounted for, as to bar relief. *Collier v. Beers*, 106 Ill. 150.

**Unoccupied Lands.** — The fact that the land

has remained unoccupied is not a sufficient excuse for delay. *Lloyd v. Kirkwood*, 112 Ill. 329.

**Equitable Excuse for Delay.** — While equity will not enforce a resulting trust after great delay in seeking its enforcement, unless some equitable excuse is shown for the delay, still the mere lapse of time will not operate as a bar where an excuse is shown which takes hold upon the conscience of the chancellor and is such as to show that it would be inequitable to sustain the bar. *Harris v. McIntyre*, 118 Ill. 275.

Where a widow applies to an attorney to file a bill to establish a resulting trust in lands purchased by her deceased husband, and is advised not to do this, but to claim as widow, and she does so, but, after litigating for a number of years, abandons such claim and files a bill to enforce the trust, the testimony of the attorney is admissible in explanation of the delay, but not as evidence of the claim itself. *House v. Harden*, 52 Miss. 860.

**Relation of Parties.** — The relation of the parties may be considered upon the question whether the delay to assert the right is unreasonable. *Ryder v. Emrich*, 104 Ill. 470.

**6. General Rule Analogous to Limitation of Actions at Law Applied** — *England*. — *Churcher v. Martin*, 42 Ch. D. 312.

*United States.* — *Hall v. Russell*, 3 Sawy. (U. S.) 515; *Manning v. Hayden*, 5 Sawy. (U. S.) 360; *King v. Pardee*, 96 U. S. 90.

*Illinois.* — *School Directors v. School Directors*, 16 Ill. App. 651; *Ryder v. Emrich*, 104 Ill. 470; *Hancock v. Harper*, 86 Ill. 445.

*Kentucky.* — *Manion v. Titsworth*, 18 B. Mon. (Ky.) 601.

*Maryland.* — *Brawnner v. Staup*, 21 Md. 328.

*Mississippi.* — *Cooper v. Cooper*, 61 Miss. 676.

*Pennsylvania.* — *Strimpher v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606; *Fox v. Lyon*, 33 Pa. St. 475; *Brock v. Savage*, 31 Pa. St. 410; *Halsey v. Tate*, 52 Pa. St. 311; *Lingenfelter v. Richey*, 62 Pa. St. 123.

and inflexible, as lapse of time is merely one of the many circumstances from which laches is to be drawn.<sup>1</sup> In a number of cases it is held that where the holding by the trustee is adverse, the statute of limitations begins to run and will be a bar to the enforcement of the trust.<sup>2</sup>

**Statutory Limitations Expressly Relating to Implied Trusts.** — In some jurisdictions there are statutes which expressly limit the time within which an implied or a resulting trust may be enforced.<sup>3</sup>

**3. In Case of Fraud.** — Where the trust sought to be enforced is constructive and arises out of the fraud of the alleged trustee, the question as to what time will constitute a bar is peculiarly within the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject

*Texas.* — *Carlisle v. Hart*, 27 Tex. 350.

In *King v. Pardee*, 96 U. S. 90, the court, in speaking of the rule in *Pennsylvania*, said: "It is, therefore, an undoubted rule of law in Pennsylvania that a resulting trust in land, if not sought to be enforced for a period of twenty-one years, and not reaffirmed or continued, will, under ordinary circumstances, be extinguished. This rule is especially applicable where the party having the legal title has, during the required period of twenty-one years, been in notorious and adverse possession, paying the taxes and exercising all the usual rights of ownership, and his title has, for the whole period, been on record in the proper office."

In *McDonald v. Stow*, 109 Ill. 40, the court said that a person seeking to enforce a resulting trust arising out of his payment of the purchase money should at least assert his claim within seven years, and where the grantee had been in possession, claiming the property as his own, and the person paying the purchase money had delayed for thirteen years to assert his claim, it was held that the claimant was barred by laches.

In *Ryder v. Emrich*, 104 Ill. 470, the court said that the right of children to enforce a resulting trust against the devisees of their father, on the ground that land bought by him was paid for with their money, is not barred as a stable claim by the lapse of any period short of the limitation upon an action of ejectment.

**1. Statute of Limitations Not Absolute Bar — United States.** — *Stevens v. Sharp*, 6 Sawy. (U. S.) 113; *Manning v. Hayden*, 5 Sawy. (U. S.) 360.

*Alabama.* — *Long v. King*, 117 Ala. 423; *Thompson v. Hartline*, 105 Ala. 263. Compare *Nettles v. Nettles*, 67 Ala. 599.

*Illinois.* — *Miles v. Wheeler*, 43 Ill. 123; *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523.

*Kentucky.* — *Talbott v. Todd*, 5 Dana (Ky.) 109.

*New York.* — *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417, 8 Cow. (N. Y.) 360.

*West Virginia.* — *Heiskell v. Powell*, 23 W. Va. 717.

See the title LIMITATION OF ACTIONS.

**2. When Holding by Trustee Is Adverse — Connecticut.** — *Corr's Appeal*, 62 Conn. 408; *Wilmerding v. Russ*, 33 Conn. 67.

*Iowa.* — *Humphreys v. Mattoon*, 43 Iowa 556; *Harbour v. Rhinehart*, 39 Iowa 672.

*Missouri.* — *Reed v. Painter*, 145 Mo. 341;

*Landis v. Saxton*, 105 Mo. 489, 24 Am. St. Rep. 403.

*North Carolina.* — *Norton v. McDevitt*, 122 N. Car. 755.

*South Carolina.* — *Beard v. Stanton*, 15 S. Car. 164; *Joyce v. Gonnells*, 2 Rich. Eq. (S. Car.) 259. Compare *Wamburzee v. Kennedy*, 4 Desaus. (S. Car.) 474.

*Texas.* — *Kennedy v. Baker*, 59 Tex. 150; *Carlisle v. Hart*, 27 Tex. 350.

**3. Statutory Provisions.** — *Murphy v. Packer*, 152 U. S. 398; *Cooper v. Cooper*, 61 Miss. 676; *McKean, etc., Land, etc., Co. v. Clay*, 149 Pa. St. 277; *Silliman v. Haas*, 151 Pa. St. 52; *Blackwell v. Ace*, 3 C. Pl. Rep. (Pa.) 177; *Huffnagle v. Blackburn*, 137 Pa. St. 633; *Hanna v. Meconkey*, 11 Phila. (Pa.) 549, 33 Leg. Int. (Pa.) 330; *Fricke v. Magee*, 10 W. N. C. (Pa.) 50; *Christy v. Sill*, 95 Pa. St. 380; *Morrell v. Trotter*, 39 Leg. Int. (Pa.) 256.

**Pennsylvania Statute — Purchase by Fiduciary of Trust Property.** — An action to enforce a constructive trust arising by legal implication from a purchase by an agent at a judicial sale of the land of his principal is within the operation of the sixth section of the Act of April 22, 1856 (*Bright. Purd. Dig. Laws Pa.*, 1894, p. 1212), limiting the time within which an action to enforce an "implied or resulting trust" must be brought, and such an action must therefore be brought within five years. *McKean, etc., Land, etc., Co. v. Clay*, 149 Pa. St. 277.

**Retrospective Effect of Statute.** — This act is a bar to a bill to establish a resulting trust where the final act establishing the trust was not done until after its passage, although the agreement was made before. *Blackwell v. Ace*, 3 C. Pl. Rep. (Pa.) 177.

**Persons under Disability.** — This act does not contain any saving clause in favor of persons under disability; the action must be brought within the specified time irrespective of whether the *cestui que trust* is or is not *sui juris*. *Way v. Hooton*, 156 Pa. St. 8.

In *Black's Estate*, 18 W. N. C. (Pa.) 455, however, it was held that the limitation in the act as to the time in which a resulting trust must be asserted did not run against a married woman.

**Statute Not Available to Person Claiming under Independent Title.** — In *Murphy v. Packer*, 152 U. S. 398, it was held that the act could be made available only by the person sought to be charged as implied trustee, and would not prevent the assertion of such a trust by the *cestui que trust* as against a person holding under an independent legal title.

to the qualification that diligence must be used to establish the trust, and that equity will not aid a party where the demand is stale or where there has been long acquiescence in the wrong.<sup>1</sup>

4. **Knowledge of Right.** — In order that the right may be lost by lapse of time, it is necessary that, during the time relied on as a bar, the party entitled should have been aware of his right; and therefore time, in order to bar the remedy, will not begin to run until he acquires or may acquire knowledge of his right.<sup>2</sup>

5. **Intervention of Rights of Third Persons.** — Where third persons have acquired an interest in the land on the faith of the trustee's ownership thereof, a delay for a shorter time than would have been necessary if such rights had not intervened will bar a suit to enforce the implied trust.<sup>3</sup>

6. **Recognition of Implied Trust.** — The general rule that lapse of time can constitute no bar to relief where the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim or ownership, applies, of course, where an implied or constructive trustee recognizes the trust.<sup>4</sup>

7. **Possession.** — So, also, where the person in whose favor the implied trust arises has been in possession of the land with respect to which the trust resulted, his claim to enforce the trust by a conveyance of the legal title cannot be barred by lapse of time.<sup>5</sup>

1. **Constructive Trust.** — *Stevens v. Sharp*, 6 Sawy. (U. S.) 113; *Manning v. Hayden*, 5 Sawy. (U. S.) 360; *Michoud v. Girod*, 4 How. (U. S.) 561; *Boone v. Chiles*, 10 Pet. (U. S.) 178; *Miles v. Wheeler*, 43 Ill. 123; *Christy v. Sill*, 95 Pa. St. 380; *Strimpfer v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606.

2. **Knowledge of Fraud** — *United States*. — *Badger v. Badger*, 2 Wall. (U. S.) 87.

*Illinois*. — *Miles v. Wheeler*, 43 Ill. 123.

*Maryland*. — *Brawner v. Staup*, 21 Md. 328.

*Pennsylvania*. — *Rider v. Maul*, 70 Pa. St. 15.

*South Carolina*. — *Buchan v. James*, Spears Eq. (S. Car.) 375.

*Texas*. — *Carlisle v. Hart*, 27 Tex. 350.

The time provided for by Act Pa. April 22, 1856, within which an action to enforce an implied trust must be brought, does not begin to run in case of a constructive trust based on fraud until a discovery of the fraud. *Dicken v. Hays*, (Pa. 1886) 7 Atl. Rep. 58.

Delay of a year after knowledge of the facts in filing a bill to set aside a deed and declare a resulting trust arising out of a purchase with fiduciary funds is not such laches as to bar relief. *Tyler v. Daniel*, 65 Ill. 316.

3. **Intervention of Rights of Third Persons.** — *Olcott v. Rice*, 69 Fed. Rep. 199; *In re Stanger*, 35 Fed. Rep. 238; *Nettles v. Nettles*, 67 Ala. 599; *Pratt v. Stone*, 80 Ill. 440; *Coxe v. Smith*, 4 Johns. Ch. (N. Y.) 271; *Shaver v. Radley*, 4 Johns. Ch. (N. Y.) 310.

4. **Recognition of Implied Trust** — *United States*. — *Baker v. Whiting*, 3 Sumn. (U. S.) 475.

*Alabama*. — *Nettles v. Nettles*, 67 Ala. 599; *Robison v. Robison*, 44 Ala. 227.

*Connecticut*. — *Corr's Appeal*, 62 Conn. 408.

*Idaho*. — *Nasholds v. McDonell*, (Idaho 1898) 55 Pac. Rep. 894.

*Illinois*. — *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523; *Springer v. Springer*, 114 Ill. 510.

*Kentucky*. — *Bohannon v. Sthreshley*, 2 B. Mon. (Ky.) 437.

*Missouri*. — *Condit v. Maxwell*, 142 Mo. 266. *Oregon*. — *Springer v. Young*, 14 Oregon 280.

*Pennsylvania*. — *Hay v. Martin*, (Pa. 1888) 14 Atl. Rep. 333; *Henderson v. Maclay*, (Pa. 1886) 5 Cent. Rep. 225.

*Utah*. — *Chambers v. Emery*, 13 Utah 374.

*Wisconsin*. — *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844.

See also *Irick v. Clement*, 49 N. J. Eq. 590.

5. **Possession** — *Alabama*. — *Robison v. Robison*, 44 Ala. 227.

*California*. — *Mallagh v. Mallagh*, (Cal. 1888) 16 Pac. Rep. 535.

*Idaho*. — *Nasholds v. McDonell*, (Idaho 1898) 55 Pac. Rep. 894.

*Illinois*. — *Boyd v. Boyd*, 163 Ill. 611.

*North Carolina*. — *Norton v. McDevit*, 122 N. Car. 755.

*Pennsylvania*. — *Smith v. Tome*, 68 Pa. St. 158.

**Possession of Implied Trustee as Tenant of Cestui Que Trust.** — In *Condit v. Maxwell*, 142 Mo. 266, wherein the resulting trust which it was sought to enforce arose out of the payment of the purchase money, and it appeared that the grantee went into possession, but acknowledged the rights of the *cestui que trust* by paying rent, it was held that the lapse of time would not bar the right to enforce the trust.

**Husband Implied Trustee for Wife — Possession by Both.** — In *Robison v. Robison*, 44 Ala. 227, wherein a husband purchased land in his own name with the separate property of his wife, it was held that the possession of the husband and wife together must be considered as the possession of the wife, and the lapse of time during such possession would not bar a suit to enforce the resulting trust in her favor.

And in *Miller v. Baker*, 160 Pa. St. 172, it was held that where land is purchased by the wife, and paid for with her money, but the deed is made by mistake to her husband, who recognizes her title, the resulting trust which



8. **Lapse of Time as Affecting Quantum of Proof.** — While the lapse of time may not have been such as to constitute a bar on the ground of laches, it may still have the effect of requiring a higher degree of proof to establish the trust.<sup>1</sup>

**VIII. CHARACTER AND INCIDENTS OF ESTATES ARISING OUT OF IMPLIED TRUSTS** — 1. **Transfer of Estate of Cestui Que Trust.** — The interest of the *cestui que trust* arising out of implied trusts is an equitable estate in the land and is capable of being sold to the same extent as any other equitable estate.<sup>2</sup> And the transfer or conveyance of such an equitable estate must be by writing, in the same manner as other equitable interests in real property are transferred.<sup>3</sup>

2. **Extinguishment of Trust.** — While this is undoubtedly true, yet such an interest may be abandoned or released to the holder of the legal title by matter *in pais*, provided the requisite intention is clearly shown.<sup>4</sup> The execution of a deed by the resulting trustee to the *cestui que trust* extinguishes the resulting trust, and the subsequent destruction of such deed will not revive the trust, as the legal title still remains in the *cestui que trust*.<sup>5</sup>

3. **Estoppel by Covenants in Subsequent Deed.** — The equitable interest of one in whose favor a resulting trust arises by reason of his payment of the purchase money will pass under his covenants of warranty in a deed previously executed by him.<sup>6</sup>

4. **Curtesy.** — Curtesy being an incident to an equitable estate of inheritance as well as to legal estates of the same quality,<sup>7</sup> it follows therefore that the husband of a woman in whose favor a resulting trust in lands arises is entitled to curtesy therein.<sup>8</sup>

5. **Poor Laws.** — In *New Hampshire* it has been held that a person in whose favor a trust in lands results from the payment of the purchase money, where the conveyance is made to another, is to be considered as "having real

arises is not required to be enforced within five years under Act Pa. April 22, 1856, as in such a case, as between them, his possession is referable to his marital rights and cannot be considered as adverse. See also *Springer v. Young*, 14 Oregon 280; *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844. Compare *Nettles v. Nettles*, 67 Ala. 599.

**Wife Implied Trustee for Husband.** — In *Pfiffner v. Pfiffner*, (Pa. 1888) 16 Atl. Rep. 72, it was held that where the wife was a resulting trustee for her husband, the joint possession of the premises by the husband and wife would not prevent an action to enforce the trust by the husband from being barred by such statute.

1. **Lapse of Time as Affecting Quantum of Proof** — *United States*. — *In re Stanger*, 35 Fed. Rep. 238; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Baker v. Whiting*, 3 Sumn. (U. S.) 475; *Stevens v. Sharp*, 6 Sawy. (U. S.) 113.

*Illinois*. — *Heneke v. Floring*, 114 Ill. 554.

*Indiana*. — *Collier v. Collier*, 30 Ind. 32.

*Iowa*. — *Maple v. Nelson*, 31 Iowa 322; *Murphy v. Hanscome*, 76 Iowa 192.

*Pennsylvania*. — *Lingenfelter v. Richey*, 62 Pa. St. 128.

*Tennessee*. — *Lane v. Farmer*, 11 Lea (Tenn.) 568.

2. **Implied Trust Subject of Sale.** — *Sanford v. Hamner*, 115 Ala. 406; *Osgood v. Eaton*, 62 N. H. 512. See also *O'Connor v. Irvine*, 74 Cal. 435; *You v. Flinn*, 34 Ala. 409.

**Bankruptcy.** — In *Gove v. Lawrence*, 26 N. H. 484, it was held that where the conveyance is made to A, but the consideration is paid by B at the time, there is a resulting

trust created in favor of B, and it is proper for him, in his schedule of property, on applying for the benefit of the Bankrupt Act, to describe his interest in the land as an equitable one. See the title *INSOLVENCY AND BANKRUPTCY*.

3. **Transfer of Implied Trust Must Be in Writing.** — *Gorrell v. Alspaugh*, 120 N. Car. 362.

In *Dover v. Rhea*, 108 N. Car. 88, wherein land was conveyed in trust to pay certain judgments which were paid off and discharged by other means, it was held that a trust resulted to the grantor as real estate, which could not be transferred except by writing in compliance with the statute of frauds. And see the title *STATUTE OF FRAUDS*.

4. *Owings v. Owings*, 3 Ind. 142; *Warren v. Tynan*, 54 N. J. Eq. 402; *Gorrell v. Alspaugh*, 120 N. Car. 362. See *Camden v. Bennett*, 64 Ark. 155, where the court held the evidence insufficient to show an intention to release.

In *Carter v. Hopkins*, 79 Cal. 82, where the trustee conveyed other lands to the *cestui que trust* in satisfaction of the latter's interest in the resulting trust, it was held that such trust was extinguished, and the statute of frauds did not require a conveyance by the *cestui que trust* to the implied trustee of his equitable interest.

5. *Weygant v. Bartlett*, 102 Cal. 224.

6. **Estoppel by Covenants in Deed.** — *Olds v. Marshall*, 93 Ala. 138; *Quivey v. Baker*, 37 Cal. 465. See also the title *ESTOPPEL*, vol. 11, p. 405.

7. See the title *CURTESY*, vol. 8, p. 520.

8. *Taylor v. Smith*, 54 Miss. 50.

estate " within the meaning of the poor laws of that state, so as to enable him to acquire a settlement where the land is situated.<sup>1</sup>

**6. Attachment and Execution.** — At common law equitable interests were not subject to attachment or execution.<sup>2</sup> In many jurisdictions, however, statutes subjecting dry trusts to both attachment and execution are construed as rendering equitable interests arising out of resulting or constructive trusts liable thereto at the suit of creditors of the *cestui que trust*.<sup>3</sup> But in other jurisdictions the courts have refused to extend the statute so as to render implied trusts liable to execution.<sup>4</sup>

**1. Poor Laws.** — *Pembroke v. Allenstown*, 21 N. H. 107.

**2.** See the title EXECUTIONS, vol. II, p. 604.

**3. Implied Trusts Subject to Execution** — *United States*. — *Murphy v. Packer*, 152 U. S. 398.

*Colorado*. — *La Fitte v. Rups*, 13 Colo. 208.

*Indiana*. — *Tevis v. Doe*, 3 Ind. 129.

*Missouri*. — *Herrington v. Herrington*, 27 Mo. 560; *Dunnica v. Coy*, 24 Mo. 167, 69 Am. Dec. 420; *Bobb v. Woodward*, 50 Mo. 95.

*New Hampshire*. — *Hutchins v. Heywood*, 50 N. H. 491; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431.

*Pennsylvania*. — *Thompson v. Sankey*, 175 Pa. St. 594.

*Tennessee*. — *Thomas v. Walker*, 6 Humph. (Tenn.) 93.

**New York Rule.** — Prior to the statutory abolishment of resulting trusts arising out of the payment of the purchase money by one person where the conveyance is made to another, it was held that the common-law resulting trust arising in such case was subject to execution at the suit of creditors of the person in whose favor the trust results. *Foote v. Colvin*, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Wait v. Day*, 4 Den. (N. Y.) 439; *Jackson v. Leggett*, 7 Wend. (N. Y.) 377; *Jackson v. Town*, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405; *Ontario Bank v. Root*, 3 Paige (N. Y.) 478;

*Reid v. Fitch*, 11 Barb. (N. Y.) 399. Compare *Brewster v. Power*, 10 Paige (N. Y.) 562.

In *Garfield v. Hatmaker*, 15 N. Y. 475, under the New York statute which abolished resulting trusts arising from the mere payment of the purchase money, but which created a resulting trust "in favor of" creditors of the person by whom the purchase money was paid, it was held that no resulting trust in favor of the person by whom the purchase money was paid resulted which was subject to execution at the suit of his creditors, but that the trust in favor of the creditors could be enforced only by a suit in equity. See also *Donovan v. Sheridan*, 37 N. Y. Super. Ct. 256.

**Attachment.** — *Cecil Bank v. Snively*, 23 Md. 253; *Hutchins v. Heywood*, 50 N. H. 491.

**4. Not Subject to Execution** — *Alabama*. — *You v. Flinn*, 34 Ala. 409; *Mitchell v. Robertson*, 15 Ala. 412; *Wilson v. Beard*, 19 Ala. 629. *Michigan*. — *Maynard v. Hoskins*, 9 Mich. 485.

*North Carolina*. — *Gorrell v. Alsbaugh*, 120 N. Car. 362; *Everett v. Raby*, 104 N. Car. 479, 17 Am. St. Rep. 685; *Love v. Smathers*, 82 N. Car. 369; *Gentry v. Harper*, 2 Jones Eq. (55 N. Car.) 177; *Gowing v. Rich*, 1 Ired. L. (23 N. Car.) 553; *Jimmerson v. Duncan*, 3 Jones L. (48 N. Car.) 537.

*South Carolina*. — *White v. Kavanagh*, 8 Rich. L. (S. Car.) 377; *Harrison v. Hollis*, 2 Nott & M. (S. Car.) 578; *Bauskett v. Holsonback*, 2 Rich. L. (S. Car.) 624.

# IMPLIED WARRANTIES.

BY W. A. MARTIN.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *WARRANTY*.

For *Implied Warranty of Title*, see the title *VENDOR AND PURCHASER*.

For *Implied Warranty of Seaworthiness of Vessel*, see the title *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 156.

For *Implied Warranty of Workmanship*, see the title *WORKING CONTRACTS*. And see also the titles *AGENCY*, vol. 1, p. 930; *CONDITIONAL SALES*, vol. 6, p. 436; *FRAUD AND DECEIT*, vol. 14, p. 12; *HORSES*, *ante*; *INTERPRETATION AND CONSTRUCTION*; *JUDICIAL SALES*; *SALES*; *SHERIFFS' SALES*; *TAX SALES*; *USAGES AND CUSTOMS*.

**I. DEFINITION AND NATURE.** — An implied warranty is a contract which the law implies as collateral to and arising out of an express one for the sale of personal property, and wherein by implication of law the vendor is held to have warranted the title or quality of the property sold, at the time of the sale.<sup>1</sup> While the existence of an implied warranty usually depends upon the intention or understanding of the parties as collected from their acts and expressions at the time of the sale,<sup>2</sup> it may exist without any intention on the

**1. Warranty Defined.** — *Chanter v. Hopkins*, 4 M. & W. 399; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

**Bennett's Definition.** — "Implied warranties are created by law or spring from the facts existing at the time of the sale; from what the parties did rather than from what they said. They are contracts, to be sure, but silent contracts." Bennett's note to Benjamin on Sales (6th Am. ed.) 630.

**Subsequent Warranty.** — In *Morris v. Bradley Fertilizer Co.*, 64 Fed. Rep. 55, the court said: "A warranty is, in general, a collateral undertaking forming part of the transaction of sale. When a distinct subsequent warranty is alleged, it must be more satisfactorily established than by evidence of such a conversation as is here relied on, and must be supported by a new consideration."

**Warranty Not an Essential Element of Sale.** — "A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, forming part of the contract by agreement of the parties, express or implied." Benjamin on Sales (6th Am. ed.), § 610. See also 2 Schouler on Personal Property (2d ed.), § 321; *Foster v. Smith*, 18 C. B. 156, 86 E. C. L. 156; *Mondel v. Steel*, 8 M. & W. 858; *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122; *Chanter v. Hopkins*, 4 M. & W. 399.

**Express Warranty Unnecessary.** — It is not necessary to the warranty of a chattel that there should be an express agreement of warranty. *Naylor v. McSwegan*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 255.

**No Warranty Implied from Mere Contract of Sale.** — A mere contract of sale or agreement to sell does not imply a warranty. *Harley v. Golden State, etc., Iron Works*, 66 Cal. 238. See also *Waeber v. Talbot*, 43 N. Y. App. Div. 180.

**Effect After Sale Complete.** — But in *Edgar v. Breck, etc., Corp.*, 172 Mass. 581, it was said: "When an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted and the sale is complete."

**Conditional Sale.** — While a guaranty or warranty will not be implied in a sale which is conditional upon the approval of the thing by the purchaser after a trial, the parties may agree that in the event that the purchaser incurs loss or expense in making the trial he shall be paid the amount of such loss or expense. *Hoffman v. Price*, 10 Ky. L. Rep. 777.

**2. Dependence of Warranty on Intent of Parties.** — *Figge v. Hill*, 61 Iowa 430; *The Moorcock*, 58 L. J. Adm. 73.

part of the seller to create it, as in case of fraud.<sup>1</sup> A seller cannot escape liability by claiming that he did not intend what his language declared.<sup>2</sup> If the contract of sale is in writing, it is solely for the court to determine whether the words used import a warranty.<sup>3</sup> But if the contract is oral it is the province of the jury to decide upon the existence of the ingredients necessary to constitute a warranty, and of the court to instruct the jury hypothetically upon them, stating what facts, if proved, constitute an implied warranty as a matter of law.<sup>4</sup> Antecedent representations by the vendor, not made part of the terms of the sale, do not constitute a warranty,<sup>5</sup> nor can a warranty, express or implied, be created after a sale is made, by any acts, expressions, or representations of the vendor, unless a new consideration be given for the warranty.<sup>6</sup>

**II. IMPLIED WARRANTY OR CONDITION THAT THINGS SOLD EXIST.** — As a general rule there is an implied warranty, or, more properly speaking, an implied condition, in all sales, that the thing sold exists and is capable of being transferred. This is the rule both at civil<sup>7</sup> and at common law.<sup>8</sup> And if the thing sold does not exist the price may be recovered back in *assumpsit*.<sup>9</sup> If, however, from the nature of the contract the parties must have known from the beginning that it could not be fulfilled, unless when the time of fulfillment arrived some particular subject-matter continued to exist, no warranty that the subject-matter should so continue to exist is to be implied from the fact that the subject-matter was in existence at the time of making the contract. In such case the contract is, therefore, subject to the implied condition that the parties should be excused if, before breach, performance becomes impossible by the perishing of the subject-matter without default of the contractor.<sup>10</sup>

1. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317.

2. *Seller Cannot Deny His Own Language.* — *Robinson v. Harvey*, 82 Ill. 58; *Stroud v. Pierce*, 6 Allen (Mass.) 413; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Smith v. Justice*, 13 Wis. 600.

3. *Construction of Written Contract.* — *Ottawa Bottls, etc., Co. v. Gunther*, 31 Fed. Rep. 208; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Horn v. Buck*, 48 Md. 370.

4. *Construction of Oral Contract.* — *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Horn v. Buck*, 48 Md. 370; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321.

Implied Warranties Are Not Conclusions or Inferences of Fact drawn by the jury, but they are the conclusions or inferences of law pronounced by the court upon facts admitted or proved before the jury. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317.

5. *Antecedent Representations.* — *Benjamin on Sales* (6th Am. ed.), § 610; 2 *Schouler on Personal Property* (2d ed.), §§ 321, 322.

6. *Subsequent Representations.* — *White v. Oakes*, 88 Me. 367; *Benjamin on Sales* (6th Am. ed.), § 611.

7. *Civil-law Doctrine.* — *Pothier, Traité du Contrat de Vente*.

8. *Common-law Doctrine.* — *Meyer v. Richards*, 163 U. S. 388 (under statute); *Terry v. Bissell*, 26 Conn. 23; *Marshall v. Peck*, 1 Dana (Ky.) 612; *Currie v. White*, 45 N. Y. 822, *reversing* (N. Y. Super. Ct. Gen. T.) 37 How. Pr. (N. Y.) 330; *Powell v. Dayton*, etc., R. Co., 12 Oregon 488; *Couturier v. Hastie*, 5 H. L. Cas. 673; *Farrer v. Nightingal*, 2 Esp. 639.

9. *Recovery of Price for Non-existent Chattel.* — *Marshall v. Peck*, 1 Dana (Ky.) 612.

**Illustrations.** — Where a note purporting to be signed by A and indorsed by B was sold to the plaintiff, and B's signature was a forgery, of which fact both the plaintiff and the defendant were ignorant, the plaintiff could recover back the price paid, because the subject-matter had no existence. *Terry v. Bissell*, 26 Conn. 23.

So where a leasehold interest which the purchaser agreed to purchase turned out to be for six years instead of for eight and a half, the contract was void for mistake in the thing sold, because the buyer did not agree to purchase a less term than that offered by the seller. *Farrer v. Nightingal*, 2 Esp. 639.

**Existence of Thing Sold Condition Precedent instead of Warranty.** — "That the subject-matter of a sale exists is sometimes said to be an implied warranty, but it should rather be called a condition precedent, for it is of the essence of the sale, not a collateral undertaking." 2 *Schouler on Personal Property* (2d ed.), § 345.

10. *Limitation of Rule.* — *Howell v. Coupland*, 46 L. J. Q. B. 147.

**Illustration.** — In March, 1872, the defendant agreed to sell to the plaintiff two hundred tons of potatoes, grown on land belonging to the defendant at W., to be delivered in the following September and October. The defendant planted a sufficient quantity to meet the contract in the ordinary course of husbandry. Before the time of the performance of the contract a large portion of the crop was destroyed by disease without any default on the part of the defendant, and the remainder was insufficient to meet the contract. In an action for nondelivery it was held that the contract was for the sale of a specific crop, without any warranty that the crop should continue to exist at the time of the perform-



### III. IMPLIED WARRANTY OF QUANTITY — Greater Amount than Contracted For. —

As a general rule, on sales of goods and chattels there is an implied warranty, or, more accurately speaking, a condition precedent, that the seller will furnish the exact quantity of the commodity sold, and if a greater amount is furnished the buyer may reject the whole.<sup>1</sup> So it has been held that the vendee is not obliged to accept even the exact quantity of the kind of goods ordered where other goods not ordered were shipped with them, and the duty of assorting and selecting would have fallen on the vendee.<sup>2</sup> A mere expression of opinion as to the quantity is not to be construed as an implied warranty.<sup>3</sup> So an estimate of quantity imports no warranty where both parties have equal means of knowledge, and the sale is in gross,<sup>4</sup> and a guaranty that there is a certain quantity of an article sold does not carry an implied warranty that the whole quantity is sound.<sup>5</sup>

**Less Quantity than Contracted For.** — It is also settled that the buyer is not bound to accept a less quantity than that contracted for.<sup>6</sup> Where the quantity stated in the contract is modified by the words "about," or "more or less," a certain reasonable latitude in the performance of the contract will usually be allowed to the vendor.<sup>7</sup>

ance. *Howell v. Coupland*, 1 Q. B. D. 258, 46 L. J. Q. B. 147.

**1. Implied Warranty of Quantity.** — *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Cunliffe v. Harrison*, 6 Exch. 903; *Reuter v. Sala*, 4 C. P. D. 239; *Rommel v. Wingate*, 103 Mass. 327.

**Illustrations.** — Where a purchase was made of ten hogsheads of claret and the vendor sent fifteen, the contract was not performed and the buyer might refuse to receive any. *Cunliffe v. Harrison*, 6 Exch. 903.

So where a person orders two hundred bales of cotton and the seller furnishes two hundred and six bales, he may refuse to receive it. *Dixon v. Fletcher*, 3 M. & W. 146.

The plaintiff wrote to the defendants offering to sell them coal and stating that he had a vessel of three hundred and seventy-six tons which he could load on Monday. The defendants telegraphed their reply on the Monday next after the date of the letter: "Ship that cargo three hundred and seventy-six tons, immediately." The plaintiffs did not begin to load until nine days afterwards, and then shipped a cargo of three hundred and ninety-two tons. The court held that the defendants were not bound to take it. *Rommel v. Wingate*, 103 Mass. 327.

**2. Commingling of Goods Ordered with Goods Not Ordered.** — *Levy v. Green*, 8 El. & Bl. 575, 92 E. C. L. 575.

**3. Expression of Opinion as to Quantity.** — *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488.

**4. Effect of Equal Means of Knowledge.** — *McCrea v. Longstreth*, 17 Pa. St. 316. To the same effect is *Nestor v. Michigan Land, etc., Co.*, 69 Mich. 290, in which case it was held that if the purchaser acts on information derived from his own agent, and does not rely on the seller's representation, and fails to secure an express warranty as to the amount of timber of the quality sold, no warranty will be implied though the yield is much less than was expected, because of unsoundness in the timber.

**5. No Warranty that Whole Quantity Is Sound.** — *Jones v. Murray*, 3 T. B. Mon. (Ky.) 84;

*Moses v. Mead*, 1 Den. (N. Y.) 378, 43 Am. Dec. 676; *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234.

**6. Buyer Need Not Receive Less Quantity.** — *Oxendale v. Wetherell*, 9 B. & C. 386, 17 E. C. L. 401; *Morgan v. Gath*, 3 H. & C. 748; *Rockford, etc., R. Co. v. Lent*, 63 Ill. 288; *Smith v. Lewis*, 40 Ind. 99; *Ortman v. Green*, 26 Mich. 209; *Clifton v. Sparks*, 82 Mo. 115; *Bruce v. Pearson*, 3 Johns. (N. Y.) 534.

**Illustrations.** — Where a vendee buys a number of chattels, and by the terms of the contract of sale they are to be weighed upon the vendor's scales and paid for according to the weight as so determined, there is an implied warranty on the part of the vendor that such scales shall be lawful scales and capable of indicating lawful weights. *Clifton v. Sparks*, 82 Mo. 115.

Under a contract for the delivery of a certain number of posts of a specific quality and size, the party to whom the posts are to be furnished is not bound to receive a part of the posts contracted for, and if the party who was to furnish them delivers a less number, which are not received, he has no right of recovery. *Rockford, etc., R. Co. v. Lent*, 63 Ill. 288.

**Sales Contemplating Delivery at Different Times.** — If a contract of sale be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcel first received if the later deliveries are not made. *Oxendale v. Wetherell*, 9 B. & C. 386, 17 E. C. L. 401. If only a part, under an entire contract, is seasonably delivered, the buyer may refuse to receive the residue. *Wilson v. Wagar*, 26 Mich. 452.

**7. Qualification of Quantity by Use of Word "About."** — Benjamin on Sales (6th ed.), § 691; *McConnel v. Murphy*, L. R. 5 P. C. 203; *Brawley v. U. S.*, 96 U. S. 168; *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589. See also the definitions of the terms ABOUT, vol. 1, p. 196; MORE OR LESS. The definition first referred to contains three rules for the construction of these terms in executory contracts of sale, as laid down by the Supreme Court of

**IV. IMPLIED WARRANTY OF TITLE — 1. Civil-law Rule.** — According to the civil law, in every sale there is an implied warranty of peaceable possession and against eviction, practically equivalent to a warranty of title.<sup>1</sup>

**2. Common-law Rule — a. AS TO CHATTELS IN VENDOR'S POSSESSION —** (1) *Warranty of Title Implied.* — At common law, it has been said, there was no implied warranty of title in the sale of goods.<sup>2</sup> But it is believed that there have never been any decisions squarely to this effect. (On the contrary, the decisions in *England*, *Canada*, and the *United States* are uniform in holding that on the sale of a chattel in possession of the vendor there is an implied warranty that he has a good and valid title thereto,<sup>3</sup> free from all incum-

the *United States* in the second case cited above.

**Illustration.** — An agreement to sell "a cargo of old railroad iron, to be shipped *per* barque Charles William, \* \* \* at thirty dollars per ton, cash, delivered on the wharf [at the port of discharge], dangers of the sea excepted; about 300 or 350 tons," is complied with by a delivery at the port of discharge of as much as that vessel, if seaworthy and in good order, can carry, though only two hundred and twenty-seven tons. *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589.

**1. Civil-law Rule.** — Story on Sales (4th ed.), § 367 c; 2 Schouler on Personal Property (2d ed.), § 379; Benjamin on Sales (6th Am. ed.), §§ 405, 406, 642; 2 Black. Com. 451; 2 Kent's Com. 478.

**2. Noy's Maxims**, c. 42; Co. Litt. 102 a; dictum in *Morley v. Attenborough*, 3 Exch. 500.

**3. Implied Warranty of Chattels in Possession — England.** — *Medina v. Stoughton*, 1 Salk. 210; *Pasley v. Freeman*, 3 T. R. 57; *L'Apostre v. L'Plastrier*, cited in 1 P. Wms. 318; *Raphael v. Burt*, 1 Cab. & El. 325.

**Canada.** — *Fawcett v. Thompson*, 6 L. C. Jur. 139; *Somers v. O'Donohue*, 9 U. C. C. P. 208.

**United States.** — *The Electron*, 74 Fed. Rep. 689; *Curran v. Burdsall*, 20 Fed. Rep. 835.

**Alabama.** — *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Ricks v. Dillahunty*, 8 Port. (Ala.) 133; *Williamson v. Sammons*, 34 Ala. 601.

**Arkansas.** — *Lindsay v. Lamb*, 24 Ark. 222; *James v. Bocage*, 45 Ark. 284.

**California.** — *Miller v. Van Tassel*, 24 Cal. 458; *Gross v. Kierski*, 41 Cal. 111.

**Colorado.** — *Myers v. Bowen*, 3 Colo. App. 537.

**Connecticut.** — *Starr v. Anderson*, 19 Conn. 341.

**Delaware.** — *Reybold v. Henry*, 3 Houst. (Del.) 279.

**Illinois.** — *Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278; *Linton v. Porter*, 31 Ill. 107; *Morris v. Thompson*, 85 Ill. 16.

**Indiana.** — *Marshall v. Duke*, 51 Ind. 62; *Norton v. Hooten*, 17 Ind. 365.

**Iowa.** — *Barton v. Faherty*, 3 Greene (Iowa) 327, 54 Am. Dec. 503.

**Kansas.** — *Paulsen v. Hall*, 39 Kan. 365.

**Kentucky.** — *Chism v. Woods*, Hard. (Ky.) 540; *Payne v. Rodden*, 4 Bibb (Ky.) 304, 7 Am. Dec. 739; *Marshall v. Peck*, 1 Dana (Ky.) 612; *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 202, 39 Am. Dec. 499; *Cook v. Redman*, 2 Bush (Ky.) 53; *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 111.

**Maine.** — *Thurston v. Spratt*, 52 Me. 202; *Huntingdon v. Hall*, 36 Me. 501, 58 Am. Dec. 765; *Butler v. Tufts*, 13 Me. 302; *Eldridge v. Wadleigh*, 12 Me. 372.

**Maryland.** — *Myers v. Smith*, 27 Md. 91.

**Massachusetts.** — *Emerson v. Brigham*, 10 Mass. 202, 6 Am. Dec. 109; *Wilde, J.*, in *Coolidge v. Brigham*, 1 Met. (Mass.) 551; *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57; *Whitney v. Heywood*, 6 Cush. (Mass.) 82; *Bennett v. Bartlett*, 6 Cush. (Mass.) 225.

**Michigan.** — *Hoppin v. Avery*, 87 Mich. 551; *Croly v. Pollard*, 71 Mich. 612; *Hunt v. Sackett*, 31 Mich. 18.

**Minnesota.** — *Close v. Crossland*, 47 Minn. 500; *Davis v. Smith*, 7 Minn. 414.

**Mississippi.** — *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476; *Long v. Hickingbottom*, 28 Miss. 772, 64 Am. Dec. 118.

**Missouri.** — *Schell v. Stephens*, 50 Mo. 375; *Ranney v. Meisenheimer*, 61 Mo. App. 434; *Matheny v. Mason*, 73 Mo. 677, 39 Am. Rep. 541; *Dryden v. Kellogg*, 2 Mo. App. 87; *Robinson v. Rice*, 20 Mo. 229.

**New Hampshire.** — *Sanborn v. Jackman*, 60 N. H. 569.

**New Jersey.** — *Stoutenborough v. Haviland*, 15 N. J. L. 266; *Beninger v. Corwin*, 24 N. J. L. 257; *Harwood v. Murphy*, 9 N. J. L. 215; *Sherron v. Humphreys*, 14 N. J. L. 217.

**New York.** — *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Scranton v. Clark*, 39 Barb. (N. Y.) 273; *Defreeze v. Trumper*, 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Rew v. Barber*, 3 Cow. (N. Y.) 272; *McCoy v. Archer*, 3 Barb. (N. Y.) 323; *Edick v. Crim*, 10 Barb. (N. Y.) 445; *Carman v. Trude*, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 440; *Beckmann v. Bormann*, 3 E. D. Smith (N. Y.) 409; *Reed v. Gannon*, 3 Daly (N. Y.) 414; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Ross v. Terry*, 63 N. Y. 613; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298; *Ledwich v. McKim*, 53 N. Y. 307; *Smith v. Ruggles*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 329.

**North Carolina.** — *Inge v. Bond*, 3 Hawks (10 N. Car.) 101.

**Pennsylvania.** — *M'Cabe v. Morehead*, 1 W. & S. (Pa.) 513; *People's Bank v. Kurtz*, 99 Pa. St. 347, 44 Am. Rep. 112; *Boyd v. Bopst*, 2 Dall. (Pa.) 91.

**Tennessee.** — *Griffin v. Gordon*, 10 Humph. (Tenn.) 480; *Trigg v. Faris*, 5 Humph. (Tenn.) 343; *Charlton v. Lay*, 5 Humph. (Tenn.) 496; *Topp v. White*, 12 Heisk. (Tenn.) 167; *Word v. Cavin*, 1 Head (Tenn.) 506; *Charlton v. Lay*, 5 Humph. (Tenn.) 496.

**Virginia.** — *Commonwealth v. Mountain Transp. Co.*, 10 Gratt. (Va.) 101.



branches of whatever nature,<sup>1</sup> unless the facts and circumstances attending the sale are sufficient to warrant a different conclusion,<sup>2</sup> as where the vendor intended to transfer merely such interest or title as he had in the property,<sup>3</sup> or where he expressly refused to give a warranty of title.<sup>4</sup> It is a consequence of the general doctrine stated that the warranty of title draws any after-acquired right of the warrantor.<sup>5</sup> The warranty is a presumption of law arising from the possession of the vendor.<sup>6</sup> This implication is indulged for the protection of the purchaser against what would otherwise be the fraud of the vendor, practiced upon him when he is himself not chargeable with negligence; for it is unreasonable to exact of the purchaser of the goods that he is in every case to institute an inquiry into the title of his merchant, upon pain of losing both the goods and their price.<sup>7</sup> The implication or presumption, however, is a rebuttable one, and parol evidence is competent to show that no warranty of title was intended.<sup>8</sup>

(2) *Constructive Possession Sufficient.* — Although, as will be subsequently

Co., 31 Vt. 162; *Patee v. Pelton*, 48 Vt. 182; *Reynolds v. Roberts*, 57 Vt. 392.

*Washington.* — *Baker v. McAllister*, 2 Wash. Ter. 48.

*West Virginia.* — *Jarrett v. Goodnow*, 39 W. Va. 602; *Byrnside v. Burdett*, 15 W. Va. 702.

*Wisconsin.* — *Edgerton v. Michels*, 66 Wis. 124; *Lane v. Romer*, 2 Chand. (Wis.) 61, 2 Pin. (Wis.) 404.

**Sale of Goods for Fair Price Implies Warranty of Title.** — In some cases it is held that the sale of chattels for a fair price in the absence of proof of an express warranty of title creates an implied warranty of title. *Boyd v. Whitfield*, 19 Ark. 447; *McKinney v. Fort*, 10 Tex. 220.

**Sale of Personal Property Incident to Sale of Realty.** — Upon a sale of personal property the law implies a warranty of title, and the personal property being machinery accompanying land, a warranty of title to the machinery is none the less implied because the buyer said that all that he wanted was the land, and that he cared nothing for the machinery. *Bechet v. Smithers*, 50 N. Y. Super. Ct. 381. Compare *Johnson v. Laybourn*, 56 Minn. 332, in which it was held that where the assignee of an insolvent sells articles of machinery situated on realty belonging to the insolvent, he does not impliedly warrant that these articles are not fixtures.

**No Warranty Against Unjust Interference.** — There is not, in the sale of either real or personal property, an implied warranty by the vendor that his vendee shall enjoy forever, free from all unjust or legal interference, either by the sovereign or the citizen and the public enemy. *Curtis v. Innerarity*, 6 How. (U. S.) 146.

1. **Freedom from Incumbrances.** — *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Baker v. McAllister*, 2 Wash. Ter. 48.

2. **Facts and Circumstances Showing Intention Not to Warrant.** — *Miller v. Van Tassel*, 24 Cal. 458; *Paulsen v. Hall*, 39 Kan. 365; *Jones v. Huggford*, 3 Met. (Mass.) 515; *Croly v. Pollard*, 71 Mich. 612; *Gould v. Bourgeois*, 51 N. J. L. 361; *Mills v. Porter*, 2 Hun (N. Y.) 524; *Edgerton v. Michels*, 66 Wis. 124.

3. **Transfer of Vendor's Interest Only.** — *Morley v. Attenborough*, 3 Exch. 500; *Croly v. Pollard*, 71 Mich. 612; *Gould v. Bourgeois*, 51

N. J. L. 361; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Cogar v. Burns Lumber Co.*, (W. Va. 1899) 33 S. E. Rep. 219.

**Warranty of Interest in Chattel.** — If one affirms that he has an interest in a chattel, and releases that interest upon a sale, when in fact he has none, he is liable as for a warranty, whether he sells the chattel itself or his interest, right, or title in it. *Strong v. Barnes*, 11 Vt. 221, 34 Am. Dec. 684.

4. **Refusal to Warrant.** — *Miller v. Van Tassel*, 24 Cal. 458.

5. **After-acquired Rights of Vendor.** — *Curran v. Burdsall*, 20 Fed. Rep. 835; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

**Warranty Does Not Inure to Remote Purchaser.** — The vendor's warranty of title does not inure to the benefit of a remote purchaser whose immediate vendor is bankrupt. *Moser v. Hoch*, 3 Pa. St. 230.

6. **Warranty a Presumption of Law.** — *Miller v. Van Tassel*, 24 Cal. 458; *Barton v. Faherty*, 3 Greene (Iowa) 327, 54 Am. Dec. 503; *Chism v. Woods*, Hard. (Ky.) 540; *Coolidge v. Brigham*, 1 Met. (Mass.) 547; *Long v. Hickingbottom*, 28 Miss. 772, 64 Am. Dec. 118; *Edgerton v. Michels*, 66 Wis. 124.

**Possession Prima Facie Evidence of Title.** — "The possession of personal property is *prima facie* evidence of title, and in many cases it would be difficult, if not impossible, before the sale, to discover the defect of title." *Coolidge v. Brigham*, 1 Met. (Mass.) 551.

7. **Reasons on Which Presumption Founded.** — *Gross v. Kierski*, 41 Cal. 114.

8. **Presumption Rebuttable.** — *Miller v. Van Tassel*, 24 Cal. 458; *Paulsen v. Hall*, 39 Kan. 365.

**Facts and Circumstances Held to Show that No Warranty Was Intended.** — Where a mortgage of goods was made to secure payment of money loaned and for which no other security was given, and the mortgagee, by a writing on the mortgage, assigned all his interest in the instrument and everything therein contained, and authorized the assignee to take all legal measures for the recovery to his own use and enjoyment of all the assigned premises, it was held that there was no implied warranty by the mortgagee of his title of the mortgaged goods. *Jones v. Huggford*, 3 Met. (Mass.) 515.



shown, the rule supported by the weight of authority is that in order to raise an implication of warranty of title in the sale of chattels, the chattels sold must be in possession of the vendor, it is held that constructive possession will be sufficient to bring the case within this rule,<sup>1</sup> and in the absence of evidence to the contrary the presumption that the vendor was in possession always obtains.<sup>2</sup>

(3) *Effect on Warranty of Reducing Contract to Writing.* — While it has been held that if the contract of sale is reduced to writing and contains no warranty of title none can be implied or proved,<sup>3</sup> the great weight of authority holds that the principle of implied warranty operates with as much force when the sale and transfer of the property are evidenced by writing or deed as if the evidence of the sale were merely verbal.<sup>4</sup> It is not considered that this rule contravenes the general rule of evidence that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument, because the warranty of the seller's title is as strongly implied from the fact of the sale proved by deed as otherwise. It does not vary the writing, and arises by operation of law from the act or fact of sale itself.<sup>5</sup>

*b. AS TO CHATTELS NOT IN VENDOR'S POSSESSION.* — (1) *Rule in United States.* — As regards sales of goods not in possession, the holdings<sup>6</sup> and dicta<sup>7</sup> are numerous to the effect that there is no implied warranty in sales of chattels not in the possession of the seller. Judge Story has said that "this distinction has now become so deeply rooted in the decisions of courts, in the dicta of judges, and in the conclusions of learned authors and commentators, that even if it were shown to be misconceived in its origin it could not at this day be easily eradicated."<sup>8</sup> In opposition to the rule stated there seem to be

**1. Constructive Possession of Goods Sold.** — Shattuck v. Green, 104 Mass. 42; Reynolds v. Roberts, 57 Vt. 392. See also Phelps v. Quinn, 1 Bush (Ky.) 375.

**Illustrations.** — Thus where mortgaged property on premises occupied by both the mortgagor and the mortgagee was sold by the latter, this possession was held sufficient to raise an implied warranty of title. Reynolds v. Roberts, 57 Vt. 392.

And where a tenant in common of personal property which is in possession of a third person as bailee of all the owners sells his undivided share, the possession of the bailee is his constructive possession, so as to attach to the sale an implied warranty of title. Shattuck v. Green, 104 Mass. 42.

**2. Presumption that Vendor Was in Possession** — Long v. Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118.

**Any Affirmation of Title** by a vendor out of possession will be construed to be a warranty. Huntingdon v. Hall, 36 Me. 501, 58 Am. Dec. 765; Byrnside v. Burdett, 15 W. Va. 702.

**3. Written Contract — Effect on Warranty.** — Sparks v. Messick, 65 N. Car. 440.

**4. Cozzins v. Whitaker**, 3 Stew. & P. (Ala.) 322; Miller v. Van Tassel, 24 Cal. 458; Bennett v. Bartlett, 6 Cush. (Mass.) 225; Trigg v. Faris, 5 Humph. (Tenn.) 343; Word v. Cavin, 1 Head (Tenn.) 506.

The fact that the seller of goods in possession assigns and delivers to the buyer the bill of sale under which he himself acquired the chattel does not prevent his liability upon an implied warranty of title, whether such bill of sale was delivered as a muniment of title or as a symbolical delivery of the chattel, or as a mere incident of the transaction. Shattuck v. Green, 104 Mass. 42.

**5. Rules of Evidence Not Infringed by Implication of Warranty.** — Trigg v. Faris, 5 Humph. (Tenn.) 343.

If the contract of sale is in writing and under seal, and does not contain any express covenant as to the title, the law, in order to give a proper force and effect to the contract, and to discourage dishonesty and bad faith, will create and supply covenants of warranty of title as a necessary result and consequence of the contract. Word v. Cavin, 1 Head (Tenn.) 506.

**Presumption of Warranty Rebuttable as in Case of Verbal Contract.** — Where the vendor of chattels in his possession gives a written bill of sale to the vendee, containing no covenant or warranty, there is an implied warranty the same as though the sale were by parol. Miller v. Van Tassel, 24 Cal. 458.

**6. Sales of Property Not in Possession — Rule in United States.** — Lackey v. Stouder, 2 Ind. 376; Norton v. Hooten, 17 Ind. 365; Huntingdon v. Hall, 36 Me. 501, 58 Am. Dec. 765; Budd v. Power, 8 Mont. 380; Scranton v. Clark, 39 N. Y. 220, 100 Am. Dec. 430; Edick v. Crim, 10 Barb. (N. Y.) 445; Mills v. Porter, 5 Thomp. & C. (N. Y.) 63; Hopkins v. Grinnell, 28 Barb. (N. Y.) 533; McCoy v. Archer, 3 Barb. (N. Y.) 323; Galbraith v. Whyte, 1 Hayw. (2 N. Car.) 464; Scott v. Hix, 2 Sneed (Tenn.) 192, 62 Am. Dec. 458.

**7. Long v. Hickingbottom**, 28 Miss. 772, 64 Am. Dec. 118; Storm v. Smith, 43 Miss. 497; Andres v. Lee, 1 Dev. & B. Eq. (21 N. Car. 318); Word v. Cavin, 1 Head (Tenn.) 506; Byrnside v. Burdett, 15 W. Va. 702.

**8. Statement of Judge Story.** — Story on Sales (4th ed.), § 367, note. See also 2 Kent's Com. 478; 3 Wait's Actions and Defenses 529.

**Possession Subsequently Acquired** — If the

only one actual holding<sup>1</sup> and one dictum;<sup>2</sup> but a few commentators and text writers disapprove the rule.<sup>3</sup> There are also a few decisions in which it is either held or said without qualification that there is an implied warranty of title on the sale of goods. In some of these cases it appears that the goods sold were in possession of the seller; in others the report does not show whether they were or were not in the seller's possession.<sup>4</sup> Therefore it cannot be asserted with any degree of confidence that the proposition that a warranty will be implied on the sale of goods not in possession is sustained by these decisions.<sup>5</sup>

(2) *Rule in England and Canada.* — In England the rule does not limit the warranty to cases where the property is in possession of the seller. It has been thus stated by an eminent text writer: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."<sup>6</sup> The distinction drawn between cases where the vendor is in possession and those where he is not has been expressly repudiated as unsound in principle.<sup>7</sup> In Canada there seems to be no adjudication squarely deciding the question, but it is said in one decision that in all cases of the sale of chattels, the vendor, by selling them as his own, impliedly warrants the title unless the facts show that he intended only to transfer his interest.<sup>8</sup>

**V. IMPLIED WARRANTY OF QUALITY** — 1. **In General.** — The maxim of the common law, *caveat emptor*, is the general rule applicable to sales so far as quality is concerned,<sup>9</sup> and, subject to some exceptions which will be noticed in subsequent subdivisions of this section,<sup>10</sup> there is not, in the absence of fraud, any warranty of the quality of the goods sold; the buyer is deemed to purchase at his own risk, unless an express warranty is given.<sup>11</sup>

chattels sold should subsequently come into the possession of the seller by purchase and be transferred to a *bona fide* purchaser, the title would be complete in such purchaser and would not inure to the benefit of the party first contracting to purchase. *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430.

**Assignment of Property Subject to Execution.** — An assignment of a right of personal property within and under an execution carries with it no warranty of title, and when a sheriff refuses to deliver property levied upon to such an assignee, on account of other liens thereon, no action on the warranty can be maintained against the assignor. *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 533.

1. **Contrary Doctrine** — **Decision.** — *Smith v. Fairbanks*, 27 N. H. 521.

2. **Dictum.** — *Gould v. Bourgeois*, 51 N. J. L. 361.

3. **Statements of Text Writers.** — 2 Schouler on Personal Property (2d ed.), § 378; A. C. Freeman's note to *Scott v. Hix*, 2 Sneed (Tenn.) 192, in 62 Am. Dec. 464, 465.

4. **Cases Not Limiting Warranty to Sales of Goods in Possession.** — *Lines v. Smith*, 4 Fla. 47; *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176; *Hodges v. Wilkinson*, 111 N. Car. 56; *Farmer v. Francis*, 12 Ired. L. (34 N. Car.) 282; *Eagan v. Call*, 34 Pa. St. 236, 75 Am. Dec. 653; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Matthews v. Hartson*, 3 Pittsb. (Pa.) 86; *Colcock v. Goode*, 3 McCord L. (S. Car.) 513; *Moore v. Lanham*, 3 Hill L. (S. Car.) 299.

5. In line with the writer's conclusions is a

statement of the Maine Supreme Court to the effect that the cases where it is asserted in general terms that in sales of personal chattels the law will imply a warranty will be found to be those in which the vendor was in possession, or where the question was not necessarily involved in their determination. *Huntingdon v. Hall*, 36 Me. 504, 58 Am. Dec. 765.

6. **English Rule.** — *Benjamin on Sales* (6th Am. ed.), § 639.

7. *Pasley v. Freeman*, 3 T. R. 51; *Eichholz v. Bannister*, 17 C. B. N. S. 708, 112 E. C. L. 708.

**Reason for Repudiating Distinction.** — In *Pasley v. Freeman*, 3 T. R. 58, Buller, J., said: "I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on."

8. **Rule in Canada.** — *Brown v. Cockburn*, 37 U. C. Q. B. 592.

9. **Caveat Emptor the Common-law Doctrine.** — *Benjamin on Sales* (6th Am. ed.), § 644.

10. **Exceptions to Rule.** — See subdivisions 3 to 7 of this section.

11. **Buyer Purchases at His Own Risk** — *England.* — *Bridge v. Wain*, 1 Stark. 504, 2 E. C. L. 192.

*Alabama.* — *Gachet v. Warren*, 72 Ala. 288; *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

2. **Implied Warranty of Sound Quality from Sound Price.** — The civil-law rule was that the sale of goods for a sound or fall price raised a warranty that the goods were sound.<sup>1</sup> The maxim of the civil law was *caveat venditor*. And a number of decisions, mostly in one state, have adopted this rule or supposed rule to its fullest extent.<sup>2</sup> Further decisions in this state, however, seem to place certain limitations upon the rule. Thus, it has been said in one case (though it was not necessary to a decision thereof) that the rule that a sound price implies a sound article must be limited to cases of secret defects which the buyer could not discover on inspection by the use of ordinary skill and diligence.<sup>3</sup> So another decision holds that where the buyer, by ordinary care, might have discovered the defects, the maxim *caveat emptor* must be rigidly applied.<sup>4</sup> In all other jurisdictions except *Louisiana* the common-law maxim *caveat emptor* prevails, and there is no implied warranty of quality arising from the payment of a sound price.<sup>5</sup> The mere fact that a sound price was paid for a defective or unsound article is not sufficient to show

*Arkansas.* — James v. Bocage, 45 Ark. 284; Curtis, etc., Mfg. Co. v. Williams, 48 Ark. 325.

*California.* — Moore v. McKinlay, 5 Cal. 471.

*Connecticut.* — Drew v. Roe, 41 Conn. 50.

*Indiana.* — Davis v. Murphy, 14 Ind. 158.

*Iowa.* — Richardson v. Bouck, 42 Iowa 185.

*Kentucky.* — Marshall v. Peck, 1 Dana (Ky.) 612.

*Maine.* — Kingsbury v. Taylor, 29 Me. 508, 50 Am. Dec. 607.

*Maryland.* — Rasin v. Conley, 58 Md. 59.

*Mississippi.* — Otts v. Alderson, 10 Smed. & M. (Miss.) 476; Simmons v. Cutreer, 12 Smed. & M. (Miss.) 584.

*Missouri.* — Anthony v. Potts, 63 Mo. App. 517.

*New Jersey.* — Renton v. Maryatt, 21 N. J. Eq. 123.

*New York.* — Wright v. Hart, 18 Wend. (N. Y.) 455.

*North Carolina.* — Farmer v. Francis, 12 Ired. L. (34 N. Car.) 282; Dickson v. Jordan, 11 Ired. L. (33 N. Car.) 166, 53 Am. Dec. 403, 12 Ired. L. (34 N. Car.) 79; Lanier v. Auld, 1 Murph. (5 N. Car.) 138, 3 Am. Dec. 680.

*Oklahoma.* — Brown v. Baird, 5 Okla. 133.

*Pennsylvania.* — Eagan v. Call, 34 Pa. St. 236, 75 Am. Dec. 653; Whitaker v. Eastwick, 75 Pa. St. 229; Edwards v. Hathaway, 1 Phila. (Pa.) 547, 12 Leg. Int. (Pa.) 58; Warren v. Philadelphia Coal Co., 83 Pa. St. 437.

*South Dakota.* — McCormick Harvesting Mach. Co. v. Watson, 5 S. Dak. 9.

*Tennessee.* — Crabtree v. Cheatham, 2 Yerg. (Tenn.) 138; Westmoreland v. Dixon, 4 Hayw. (Tenn.) 223, 9 Am. Dec. 763.

1. **Civil-law Rule.** — See *South Carolina* decisions cited in the next two notes. Compare, however, *Hoe v. Sandborn*, 21 N. Y. 552, 78 Am. Dec. 163, in which case the court, speaking *obiter*, seems to doubt whether this version of the civil-law doctrine is strictly correct.

2. **States Adopting Civil-law Rule.** — *Barnard v. Yates*, 1 Nott & M. (S. Car.) 142; *Crawford v. Wilson*, 2 Mill (S. Car.) 353; *Missroom v. Waldo*, 2 Nott & M. (S. Car.) 76; *Lester v. Graham*, 1 Mill (S. Car.) 182; *Thompson v. Lindsey*, Mill (S. Car.) 236; *Mitchell v. Du Bose*, 1 Mill (S. Car.) 360; *Timrod v. Schoolbred*, 1 Bay (S. Car.) 324, 1 Am. Dec. 620; *Vaughan v. Campbell*, 2 Brev. (S. Car.) 53; *Champney v. Johnson*, 2 Brev. (S. Car.) 268;

*Bailey v. Nickols*, 2 Root (Conn.) 407, 1 Am. Dec. 83, *overruled* by later Connecticut decisions.

3. **Limitations of Rule.** — *Rose v. Beatie*, 2 Nott & M. (S. Car.) 538. In this case it appeared that cotton sold had been damaged by water and then enveloped with good cotton in such manner as to elude detection. It appeared, however, that the defendant was the grower of the article, and from these facts the court held that the defendant was liable for damages because of the defective condition of the cotton. It is apparent from these facts that the question of soundness of price had little, if anything, to do with the decision, because the seller was guilty of a gross and palpable fraud.

4. *Whitefield v. M'Leod*, 2 Bay (S. Car.) 380, 1 Am. Dec. 650. To the same effect see *Vanderhorst v. MacTaggart*, 1 Brev. (S. Car.) 269, 2 Am. Dec. 667, in which case it was held that where a commodity is sold which is capable of easy examination and which might be fully examined at the time of sale and its quality conclusively settled, there is no implied warranty of soundness, although a sound price is paid.

5. **Common-law Rule — England.** — *Parkinson v. Lee*, 2 East 314.

*Alabama.* — *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

*Arkansas.* — *Turner v. Huggins*, 14 Ark. 21.

*Connecticut.* — *Dean v. Mason*, 4 Conn. 432, 10 Am. Dec. 162.

*Indiana.* — *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247.

*Kentucky.* — *Scott v. Renick*, 1 B. Mon. (Ky.) 63, 35 Am. Dec. 177.

*Maryland.* — *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547; *Johnston v. Cope*, 3 Har. & J. (Md.) 89, 5 Am. Dec. 423.

*Massachusetts.* — *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Mixer v. Coburn*, 11 Met. (Mass.) 559, 45 Am. Dec. 230.

*Mississippi.* — *Joslin v. Caughlin*, 26 Miss. 134; *Simmons v. Cutreer*, 12 Smed. & M. (Miss.) 584.

*New Jersey.* — *Beninger v. Corwin*, 24 N. J. L. 257.

*New York.* — *Hart v. Wright*, 17 Wend. (N. Y.) 267; *Seixas v. Woods*, 2 Cai. (N. Y.) 48, 2



fraud; there must be other and stronger evidence,<sup>1</sup> and the burden of proving fraud in such a case is on the vendee.<sup>2</sup>

**3. Sales on Inspection** — *a. IN GENERAL.* — Subject to a few exceptions, which will be noticed hereafter,<sup>3</sup> there is ordinarily, in the absence of fraud, no implied warranty of quality of a chattel sold where the purchaser inspects the chattel at the time of the sale and has equal means of knowledge with the seller.<sup>4</sup> If the buyer has a suitable opportunity to inspect, the rule applies in all strictness whether he actually inspects the goods or neglects his opportunity to do so.<sup>5</sup> The buyer cannot relieve himself and charge the seller on the

Am. Dec. 215; *Holden v. Dakin*, 4 Johns. (N. Y.) 421; *Moses v. Mead*, 1 Den. (N. Y.) 378, 43 Am. Dec. 676; *Defreeze v. Trumper*, 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; *Wright v. Hart*, 18 Wend. (N. Y.) 449.

*North Carolina.* — *Toris v. Long*, Tayl. (1 N. Car.) 17.

*Pennsylvania.* — *Weimer v. Clement*, 37 Pa. St. 147, 78 Am. Dec. 411; *Kirk v. Nice*, 2 Watts (Pa.) 367; *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741; *Dixon v. McClutchey*, Add. (Pa.) 322.

*Rhode Island.* — *King v. Quidnick Co.*, 14 R. I. 131.

*Vermont.* — *Penniman v. Pierson*, 1 D. Chip. (Vt.) 394.

*Virginia.* — *Wilson v. Shackleford*, 4 Rand. (Va.) 5.

"The vexatious and expensive litigations which might often arise on the doctrine of a warranty implied from the soundness of the price are prevented by the adoption of a certain rule which can never operate unjustly, as by the buyer an express warranty may always be demanded." *Dean v. Mason*, 4 Conn. 432, 10 Am. Dec. 162.

**Administrator's Sale.** — In the sale of property at an administrator's sale, the doctrine of *caveat emptor* is applied with great strictness, and in no case will a warranty of soundness be implied from the price at which the property was sold. *Joslin v. Caughlin*, 26 Miss. 134.

**1. Payment of Sound Price for Defective Goods Not Conclusive of Fraud.** — *Johnston v. Cope*, 3 Har. & J. (Md.) 89, 5 Am. Dec. 423; *Fleming v. Slocum*, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224.

**2. Burden of Proof.** — *Beninger v. Corwin*, 24 N. J. L. 257.

**3.** See subsequent subdivisions of this section.

**4. No Implied Warranty in Absence of Fraud** — *England.* — *Fitzgerald v. Iveson*, 1 F. & F. 410; *Osborne v. Hart*, 23 L. T. N. S. 851; *Parkinson v. Lee*, 2 East 314.

*Canada.* — *Fraser v. Salter*, 1 Nova Scotia Dec. 424.

*United States.* — *Lindley v. Hunt*, 22 Fed. Rep. 52; *Carleton v. Jenks*, 80 Fed. Rep. 937; *Dooley v. Gallagher*, 3 Hughes (U. S.) 214.

*Alabama.* — *Burnett v. Stanton*, 2 Ala. 195; *Perry v. Johnston*, 59 Ala. 648; *Livingston v. Arrington*, 28 Ala. 424.

*California.* — *Moore v. McKinlay*, 5 Cal. 471.

*Illinois.* — *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Rayner v. Rees*, 58 Ill. App. 292; *Becker v. Brawner*, 18 Ill. App. 39; *Luetger v. Volker*, 54 Ill. App. 287.

*Indiana.* — *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Hege v. Newsom*, 96 Ind. 426;

*Bowman v. Clemmer*, 50 Ind. 10; *Postel v. Oard*, 1 Ind. App. 252.

*Iowa.* — *Street v. Rider*, 14 Iowa 506.

*Louisiana.* — *McGuire v. Kearny*, 17 La. Ann. 295.

*Maryland.* — *Taymon v. Mitchell*, 1 Md. Ch. 496.

*Massachusetts.* — *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

*Nebraska.* — *Watson v. Roode*, 30 Neb. 264; *Halliday v. Briggs*, 15 Neb. 219.

*New Hampshire.* — *Deming v. Foster*, 42 N. H. 165.

*New York.* — *Moses v. Mead*, 1 Den. (N. Y.) 378, 43 Am. Dec. 676; *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437; *Rinschler v. Jelliffe*, 9 Daly (N. Y.) 469; *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428; *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234; *Seixas v. Woods*, 2 Cai. (N. Y.) 48, 2 Am. Dec. 215.

*Pennsylvania.* — *Jennings v. Gratz*, 3 Rawle (Pa.) 168, 23 Am. Dec. 111; *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504; *Carson v. Baillie*, 19 Pa. St. 375, 57 Am. Dec. 659; *Houston v. Cook*, 153 Pa. St. 43.

*Tennessee.* — *Goad v. Johnson*, 6 Heisk. (Tenn.) 340.

*Texas.* — *Needham v. Dial*, 4 Tex. Civ. App. 141.

*Wisconsin.* — *Getty v. Rountree*, 2 Chand. (Wis.) 28, 2 Pin. (Wis.) 379, 54 Am. Dec. 138; *Barnes v. Burns*, 81 Wis. 332.

**Illustrations.** — There is no implied warranty as to the quality of ricks of hay which the purchaser examined as much as he desired before completing the contract. *Becker v. Brawner*, 18 Ill. App. 39.

In sales of standing trees examined by the buyer, there is no implied warranty of the quality of logs which the trees will make. *Hege v. Newsom*, 96 Ind. 426.

A representation that lumber is sound amounts to nothing if the seller in getting the lumber out of the woods found it reasonably sound to appearance, and did not know and had no means of knowing that it was unsound. *Houston v. Cook*, 153 Pa. St. 43.

**5. Inspection Unnecessary if Opportunity to Inspect Given** — *England.* — *Horsfall v. Thomas*, 1 H. & C. 90; *Kirkpatrick v. Gowan*, Ir. R. 9 C. L. 521.

*United States.* — *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383.

*Illinois.* — *Rockford Wholesale Grocery Co. v. Stevenson*, 65 Ill. App. 609; *Becker v. Brawner*, 18 Ill. App. 39.

*Indiana.* — *Pattison v. Jenkins*, 33 Ind. 87.

*Iowa.* — *Dean v. Morey*, 33 Iowa 120; *Berthold v. Seevers Mfg. Co.*, 89 Iowa 506.

ground that the examination will occupy time and is attended with labor and inconvenience.<sup>1</sup> If the buyer has an opportunity to inspect and fails to do so, the seller is not guilty of fraud in not pointing out defects.<sup>2</sup> In respect to goods sold on inspection or with the opportunity therefor, the rule seems to be that the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in doing so.<sup>3</sup> If there is an express warranty of quality, such warranty is of course not affected by the fact that the purchaser inspected or had an opportunity to inspect the chattel.<sup>4</sup> The vendor may warrant against a defect which is patent and obvious, as well as any other,<sup>5</sup> provided the statement made is not glaringly inconsistent with the visible condition of the thing sold.<sup>6</sup>

**b. PATENT DEFECTS.** — There is no implied warranty against defects which are plainly visible and equally within the knowledge of the purchaser and the seller.<sup>7</sup> The reason why a general warranty does not cover obvious

*Louisiana.* — *Bevans v. Farrell*, 18 La. Ann. 232.

*Maryland.* — *Horne v. Parkhurst*, 71 Md. 110; *Rice v. Forsyth*, 41 Md. 389.

*Missouri.* — *Muhr v. Eagle*, 7 Mo. App. 590.  
*New York.* — *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437.

*Wisconsin.* — *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667.

If the Article Is Susceptible of Convenient Examination, the purchaser is bound to make that examination and abide by it. *Bevans v. Farrell*, 18 La. Ann. 232.

And if He Is Satisfied Without a Warranty, and can inspect and declines to do so, he assumes all risk as to the quality of the article. *Barnard v. Kellogg*, 10 Wall. (U. S.) 383.

**Illustrations.** — The rule *caveat emptor* applies to the sale of a "cribber," where the examination of the horse's mouth by the purchaser would have disclosed the defect. *Dean v. Morey*, 33 Iowa 120.

Where a quantity of cheeses were bought to be selected from a quantity on hand, and the buyer had an opportunity to inspect but did not do so, the rule of *caveat emptor* applies, if there was no special warranty. *Rockford Wholesale Grocery Co. v. Stevenson*, 65 Ill. App. 609.

Where the defendant had an opportunity before purchasing lumber to inspect it, there is no implied warranty that it was merchantable for the purpose intended. *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667.

In the sale of baled hemp, open to inspection, or which can readily be examined, there is no implied warranty that the interior of the bales conforms to the exterior. *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437.

**Inspection of Similar Goods.** — There is no implied warranty in the sale of a machine where the buyer has an opportunity to inspect a similar machine known to him to be in operation in the same city. *Curran v. Hauser*, 4 Ohio Dec. 449. This case seems to stretch the rule to an unwarranted extent.

**1. Inconvenience No Excuse for Failure to Inspect.** — *Barnard v. Kellogg*, 10 Wall. (U. S.) 383.

**Opportunity to Inspect on Sales by Description.** — Where the quality of goods is described under a contract of sale is specified in the con-

tract, the purchaser who accepts such goods without warranty, and with opportunity to determine whether they correspond to the requirements of the contract, cannot recover on an implied warranty because the goods fail to correspond with the requirements of the contract. *Berthold v. Seevers Mfg. Co.*, 89 Iowa 506.

**2. Seller Need Not Point Out Defects.** — *Horsfall v. Thomas*, 1 H. & C. 90; *Cogel v. Knisley*, 89 Ill. 598.

**3. Seller May Permit Buyer to Cheat Himself.** — *Armstrong v. Bufford*, 51 Ala. 410; *Biggs v. Perkins*, 75 N. Car. 397.

**Must Not Obstruct Purchaser's Examination.** — Though a vendor of chattels may be excused from the obligation of pointing out defects or blemishes in the property he proposes to sell, he is not thereby at liberty to hinder or obstruct the purchaser in his attempts to find them out for himself. *Rozeman v. Canovan*, 43 Cal. 110.

**4. Express Warranty Not Abrogated by Inspection.** — *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. Rep. 890.

**5. Vendor May Warrant Against Patent Defects.** — *Chadsey v. Greene*, 24 Conn. 572; *Fletcher v. Young*, 69 Ga. 591; *Pinney v. Andrus*, 41 Vt. 631. See also *Warren v. Philadelphia Coal Co.*, 83 Pa. St. 437.

**6. Tabor v. Peters**, 74 Ala. 98, 49 Am. Rep. 804; 1 Wharton on Contracts, § 245.

**Illustration.** — A general warranty of soundness may cover even patent defects, when so intended, as where the writing recited: "One horse now having a cold or little distemper." *Fletcher v. Young*, 69 Ga. 591.

**7. Patent Defects — England.** — *Baily v. Merrell*, 3 Bulst. 94.

*Canada.* — *Vipond v. Findlay*, 7 Montreal Super. Ct. 243.

*United States.* — *Carleton v. Jenks*, 80 Fed. Rep. 937.

*Alabama.* — *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804.

*Georgia.* — *Hoffman v. Oates*, 77 Ga. 701; *Ragsdale v. Shipp* (Ga. 1899) 34 S. E. Rep. 11.

*Iowa.* — *Storrs v. Emerson*, 72 Iowa 390.

*Louisiana.* — *McGuire v. Kearny*, 17 La. Ann. 298.

*Mississippi.* — *Anderson v. Burnett*, 5 How. W. 100.

defects is because it is presumed that they are not intended to be included in it, being known to the parties before the warranty is given.<sup>1</sup> But the rule does not apply to an apparent defect to understand the true nature of which requires the aid of skill, experience, or judgment.<sup>2</sup> So it has been held that even as to patent defects the vendor is guilty of fraud if he says or does anything whatever with the intention to divert the eye or obscure the observation of the buyer.<sup>3</sup>

*c. DEFECTS OF WHICH BUYER HAS PERSONAL KNOWLEDGE.* — There is no implied warranty of quality where the defects in the chattel sold were known to the buyer at the time of the sale.<sup>4</sup>

*d. LATENT DEFECTS.* — The general rule is that there is no implied warranty against latent defects on sales on inspection, if the seller had no knowledge of such defects.<sup>5</sup> It has been held, however, that if the seller makes

*Missouri.* — *Stewart v. Dugin*, 4 Mo. 245, 28 Am. Dec. 348.

*New York.* — *Studer v. Bleistein*, 115 N. Y. 316; *Brown v. Burhans*, 4 Hun (N. Y.) 227.

*North Carolina.* — *Galbraith v. Whyte*, 1 Hayw. (2 N. Car.) 464; *Duckworth v. Walker*, 1 Jones L. (46 N. Car.) 507; *Hudgins v. Perry*, 7 Ired. L. (29 N. Car.) 102.

*Texas.* — *Williams v. Ingram*, 21 Tex. 300; *McKinney v. Fort*, 10 Tex. 220.

*Vermont.* — *Hill v. North*, 34 Vt. 604.

See the last text proposition in the subdivision immediately preceding.

"To warrant a thing that may be perceived at sight is not good." *Baily v. Merrell*, 3 Bulst. 94.

It may be laid down as a rule condensed from the authorities, that if the defect in the article be equally open to the observation of both parties, if the means of information be equally accessible to both, if neither says or does anything tending to impose upon the other, and if the one in possession of material facts, knowing the other to be ignorant of them, be under no special obligation by confidence, repose or otherwise, to communicate them fully and fairly, then the disclosure of this superior knowledge as to the facts affecting the value of the commodity is not requisite to the validity of the sale. *McKinney v. Fort*, 10 Tex. 220; *Story on Sales* (4th ed.), c. 12.

*Illustrations of Rule.* — Where an ungelded mule having the usual developments in the scrotum is sold at public auction, the maxim *caveat emptor* applies to the claim of damages for unsoundness for want of castration. *Duckworth v. Walker*, 1 Jones L. (46 N. Car.) 507.

Sourness and unsoundness in salted fish in barrels, when these defects can be detected by smell when the barrels are opened and inspected, are patent defects against which the seller is not bound to warrant the buyer on a sale subject to inspection. *Vipond v. Findlay*, 7 Montreal Super. Ct. 242.

The rule that there is an implied warranty that work and materials furnished shall be suitable and adapted to the purpose for which they are intended has no application in respect to a defect which is open and as plainly visible to the purchaser as to the seller. *Carleton v. Jenks*, 80 Fed. Rep. 937.

*1. Reason Why General Warranty Does Not Cover Patent Defects.* — *Chadsey v. Greene*, 24 Conn. 572.

*2. Apparent Defects Requiring Skill to Detect.*

— *Jordan v. Foster*, 11 Ark. 139; *Shewalter v. Ford*, 34 Miss. 417; *Herndon v. Bryant*, 39 Miss. 335; *Birdseye v. Frost*, 34 Barb. (N. Y.) 367; *Pinney v. Andrus*, 41 Vt. 631.

*Illustration.* — Thus the rule does not extend to a case where the purchaser was aware of the existence of disease in the chattel sold, though, its precise character not being obvious to the senses, its extent was uncertain and unknown. *Herndon v. Bryant*, 39 Miss. 335.

*3. Fraudulent Attempt to Divert Attention from Defects.* — *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Hull v. Kirkpatrick*, 4 Ind. 640; *Hanks v. M'Kee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265; 2 Kent's Com. 484, 485.

*Illustration.* — On the sale of a patent right to an improved churn which the vendor himself was manufacturing, and a specimen of which he exhibited to the purchaser, stating that it was made of juniper wood, and that the dasher was nickel-plated and would not discolor the milk and butter; whereas the churn was made of white pine and the dasher was polished iron, which discolored the milk and butter, it was held that the difference in the appearance of these substances was not so great as to bring the case within the principle applicable to open defects. *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804.

*The Reason of the Rule* that a general warranty does not extend to visible defects ceases when the vendor uses art to conceal, and succeeds in concealing, such defects from the purchaser. *Chadsey v. Greene*, 24 Conn. 562.

*4. Defects Known to Buyer at Time of Sale.* — *Dooly v. Jinnings*, 6 Mo. 61; *Wood v. Ashe*, 1 Strobb. L. (S. Car.) 407; *Carnochan v. Gould*, 1 Bailey L. (S. Car.) 179; *Porcher v. Caldwell*, 2 McMull. L. (S. Car.) 329; *Long v. Hicks*, 2 Humph. (Tenn.) 305; *Williams v. Ingram*, 21 Tex. 300.

*5. Latent Defects Unknown to Seller.* — *Briggs v. Hutton*, 87 Me. 145, 47 Am. St. Rep. 318; *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607; *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329; *Lindsay v. Davis*, 30 Mo. 406; *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440; *American Forcible Powder Mfg. Co. v. Brady*, 4 N. Y. App. Div. 95; *Erwin v. Maxwell*, 3 Murph. (7 N. Car.) 241; *Shisler v. Baxter*, 109 Pa. St. 443, 58 Am. Rep. 738; *Kimmel v. Lichty*, 3 Yeates (Pa.) 262; *Neilson v. Dickenson*, 1 Desaus. (S. Car.) 133. See also *Chandelor v. Lopus*, Cro. Jac. 4.



untrue representations which he believes to be true, yet if he was informed and knew of facts which in the exercise of common sense and ordinary prudence were sufficient to put him on inquiry, and would have led him to a knowledge of the actual condition of the thing sold, he is liable the same as if he had actual knowledge.<sup>1</sup> An implied warranty of quality arises in case the thing sold has latent defects of which the seller has knowledge, because in this case he is guilty of fraud,<sup>2</sup> and common honesty makes it obligatory on him to tell of defects not open to observation which he knows but which are unknown to the purchaser.<sup>3</sup>

**4. Sales by Description.** — *a. WARRANTY THAT GOODS WILL CORRESPOND WITH DESCRIPTION.* — Where goods which there has been no opportunity to inspect are sold by description this amounts to a condition precedent, according to some decisions,<sup>4</sup> or to an implied warranty, according to others,<sup>5</sup> that

**Illustrations.** — Where the defendant sold winter rye for seed spring rye, and the plaintiff thereby lost his crop, there could be no recovery unless the defendant knew it to be winter rye. *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607.

Where a market gardener who had purchased certain cabbage seeds the year before inquired for the same kind and was shown certain seeds which he bought and which proved of little value, and the seed that he wanted could not be distinguished by its appearance, it was held that, there being no fraud and no warranty, he had no cause of action. *Shisler v. Baxter*, 109 Pa. St. 443, 58 Am. Rep. 738.

One who sells a horse affirming it to be sound and receiving a sound price is not liable for its unsoundness if he did not know thereof at the time of sale. *Kimmel v. Lichty*, 3 Yeates (Pa.) 262.

**Statutory Exceptions to Rule.** — By virtue of statutes in *Georgia* and *Louisiana* the vendor warrants that he knows of no latent defects undisclosed. *Bulkley v. Honold*, 19 How. (U. S.) 390; *Perdue v. Harwell*, 80 Ga. 150; *Snowden v. Waterman*, 100 Ga. 588, 105 Ga. 384. Thus where the vendor, who had owned a mare for three years, stated on selling her that her shortness of wind was caused by epizootic, when in fact it was caused by another disease which soon made her worthless, he was held liable for breach of warranty. *Perdue v. Harwell*, 80 Ga. 150.

**1. Constructive Knowledge of Defect.** — *Craig v. Ward*, 3 Keyes (N. Y.) 302.

**2. Latent Defects Known to Seller.** — *Patterson v. Kirkland*, 34 Miss. 423; *McAdams v. Cates*, 24 Mo. 223; *Lindsay v. Davis*, 30 Mo. 406; *Grigsby v. Stapleton*, 94 Mo. 423; *Bigler v. Atkins*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 235, affirmed 118 N. Y. 671; *Brown v. Burhans*, 4 Hun (N. Y.) 227; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Galbraith v. Whyte*, 1 Hayw. (2 N. Car.) 464; *Cornelius v. Molloy*, 7 Pa. St. 293; *McGavock v. Ward*, Cooke (Tenn.) 403.

**3. McAdams v. Cates, 24 Mo. 223.**

**Illustrations.** — The rule applies to the sale of live stock afflicted with disease, but which fact cannot be detected on inspection. *McAdams v. Cates*, 24 Mo. 223; *Lindsay v. Davis*, 30 Mo. 406; *Grigsby v. Stapleton*, 94 Mo. 423; *Galbraith v. Whyte*, 1 Hayw. (2 N. Car.) 464. *Snowden v. Waterman*, 100 Ga. 588, 105 Ga. 384. And it has been held accordingly that the

sale of animals which the seller knows have a contagious disease but of which the purchaser does not know should be regarded as a fraud when the fact of the existence of the disease is not communicated. *Grigsby v. Stapleton*, 94 Mo. 423.

So it has been held that if the vendor of a horse is aware at the time of the sale of the existence of a latent defect unknown to the vendee, of such a character that the vendee would not have made the purchase had he known of it, and such as would have ordinarily escaped the observation of men in buying horses, and without disclosing the defect the vendor allows the vendee to purchase, he is guilty of a fraudulent concealment and must respond in damages to the vendee. *McAdams v. Cates*, 24 Mo. 223.

Where a quantity of metal which is not copper, but a composition, is sold as copper, and the vendor has knowledge of this, he is liable in an action of deceit. *Cornelius v. Molloy*, 7 Pa. St. 293.

**4. Condition Precedent.** — *Bowes v. Shand*, 46 L. J. Q. B. 561; *Pope v. Allis*, 115 U. S. 363; *Morse v. Union Stock Yards Co.*, 21 Oregon 289.

**5. Implied Warranty that Goods Will Correspond to Description.** — *England.* — *Jones v. Just*, 9 B. & S. 141; *Wieler v. Schilizzi*, 17 C. B. 619, 84 E. C. L. 619; *Lomi v. Tucker*, 4 C. & P. 15, 19 E. C. L. 255; *Tye v. Fynmore*, 3 Campb. 462; *Gardiner v. Gray*, 4 Campb. 144; *Nichol v. Godts*, 23 L. J. Exch. 314; *Gompert v. Bartlett*, 2 El. & Bl. 849, 75 E. C. L. 849; *Allan v. Lake*, 18 Q. B. 561, 83 E. C. L. 561; *Chanter v. Hopkins*, 4 M. & W. 399; *Shepherd v. Kain*, 5 B. & Ald. 240, 7 E. C. L. 82; *Behn v. Burness*, 3 B. & S. 751, 113 E. C. L. 751; *Barr v. Gibson*, 3 M. & W. 399; *Bridge v. Wain*, 1 Stark. 504, 2 E. C. L. 192; *Bowes v. Shand*, 46 L. J. Q. B. 561.

*Canada.* — *Baker v. Lyman*, 38 U. C. Q. B. 498; *Hunell v. Whitlaw*, 14 U. C. Q. B. 241.

*United States.* — *Pope v. Allis*, 115 U. S. 363.

*Alabama.* — *Gachet v. Warren*, 72 Ala. 288.

*California.* — *Flint v. Lyon*, 4 Cal. 17.

*Illinois.* — *Morris v. Wibaux*, 159 Ill. 627.

*Indiana.* — *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 90; *Overbay v. Lighty*, 27 Ind. 27.

*Iowa.* — *Forcheimer v. Stewart*, 65 Iowa 593, 54 Am. Rep. 30.

*Kentucky.* — *Phelps v. Quinn*, 1 Bush (Ky.) 375; *Fogg v. Rodgers*, 84 Ky. 558.

the goods shall correspond to the description; and it has been held in a few decisions that inspection or opportunity to inspect does not waive the warranty that the goods will correspond with the description.<sup>1</sup>

*b. RIGHTS AND REMEDIES OF BUYER FOR BREACH OF WARRANTY.* — The right to repudiate the purchase for nonconformity of the article delivered to the description under which it was sold is universally conceded. This right is founded on the engagement of the vendor, by such description, that the article delivered will correspond with the description,<sup>2</sup> and even though the vendee does not return the goods or give notice that they do not comply with the description, he may sue for a breach of the warranty.<sup>3</sup> Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the court and not the jury must determine; <sup>4</sup> and if the contract be by parol, it will be for the determination of the jury, from an account of the sale and the circumstances of each particular case, whether the language used was an expression of opinion merely, leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller.<sup>5</sup>

*c. WARRANTY OF FITNESS FOR PURPOSE INTENDED.* — On sales of goods by description there is ordinarily no implied warranty of fitness for the purpose intended.<sup>6</sup>

*Maryland.* — *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317.

*Massachusetts.* — *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Winsor v. Lombard*, 18 Pick. (Mass.) 60; *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367; *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

*Missouri.* — *Whitaker v. McCormick*, 6 Mo. App. 114; *Catchings v. Hacke*, 15 Mo. App. 51; *Voss v. McGuire*, 18 Mo. App. 477; *Murphy v. Gay*, 37 Mo. 536; *Carter v. Black*, 46 Mo. 384; *Graff v. Foster*, 67 Mo. 512.

*New York.* — *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136.

*North Carolina.* — *Lewis v. Rountree*, 78 N. Car. 323.

*Oregon.* — *Morse v. Union Stock Yard Co.*, 21 Oregon 289.

*Pennsylvania.* — *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85.

*Texas.* — *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280.

**Application of Rule.** — The following decisions will serve to illustrate the principle enunciated in the text:

If wool sold in sacks be marked on the sacks and described in the invoice by authority of the seller as being of a certain quality, there is a warranty by the seller that wool is of that quality. *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 90.

So an agreement for the sale and delivery of oil, described as "foreign refined rape oil, \* \* \* warranted only equal to samples," is not complied with by the tender of oil which is not "foreign refined rape oil," although it is equal to the quality of the samples. *Nichol v. Godts*, 10 Exch. 191, 23 L. J. Exch. 314.

It has also been held that the use in a sale note of a given name for the goods sold is a warranty that the goods sold are those which are known by that name. *Flint v. Lyon*, 4 Cal. 17.

**What May Be Shown as Defense to Action for Price.** — In an action to recover the agreed price for goods sold and delivered without warranty of quality, the defendant cannot show that the goods were of inferior quality to those usually sold for the same price; but he may show that the goods are not such as would be known in the trade as goods of the description under which they were sold. *Mixer v. Coburn*, 11 Met. (Mass.) 559, 45 Am. Dec. 230.

**1. Doctrine that Opportunity to Inspect Does Not Alter Rule.** — *Josling v. Kingsford*, 13 C. B. N. S. 447, 106 E. C. L. 447; *Long v. J. K. Armsby Co.*, 43 Mo. App. 253; *Lewis v. Rountree*, 78 N. Car. 323.

**2. Repudiation of Contract for Nonconformity.** — *Wolcott v. Mount*, 36 N. J. L. 266, 13 Am. Rep. 438.

After delivery the purchaser may, on detecting within a reasonable time the fact that the goods do not answer the description, return them and recover the price. *Fogg v. Rodgers*, 84 Ky. 558.

**3. Suit for Breach of Warranty.** — *Lewis v. Rountree*, 78 N. Car. 323.

**4. Construction of Written Contracts.** — *Behn v. Burness*, 3 B. & S. 751, 113 E. C. L. 751.

**5. Construction of Oral Contracts.** — *Lomi v. Tucker*, 4 C. & P. 15, 19 E. C. L. 255; *Power v. Barham*, 4 Ad. & El. 473, 31 E. C. L. 114; *De Sewhanberg v. Buchanan*, 5 C. & P. 343, 24 E. C. L. 352; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438.

**6. See *infra*, this section, *Particular Kinds of Warranty — Of Fitness for Purpose Intended.***

**Patent Defects.** — In the sale of goods by description which comprehends quality as well as variety, the descriptive words may be treated by the purchaser as a warranty of both, and though inspection by him before acceptance will exclude from the warranty all patent defects, it will have no influence on latent defects. *Miller v. Moore*, 83 Ga. 684, 20 Am. St. Rep. 329.

5. Sales by Sample — *a. IMPLIED WARRANTY THAT GOODS WILL CORRESPOND WITH SAMPLE.* — In *England*,<sup>1</sup> *Canada*,<sup>2</sup> and in all of the *United States*,<sup>3</sup> so far as is shown by reported decisions, except in *Pennsylvania*,<sup>4</sup>

1. *Warranty that Goods Will Correspond with Sample* — *England.* — *Gardiner v. Gray*, 4 Campb. 144; *Germaine v. Burton*, 3 Stark. 32, note *a*, 14 E. C. L. 152, note *a*; *Parker v. Palmer*, 4 B. & Ald. 387, 6 E. C. L. 529; *Clark v. Schwartz*, 2 W. R. 16; *Parkinson v. Lee*, 2 East 314; *Azumar v. Casella*, L. R. 2 C. P. 431; *Megaw v. Molloy*, 2 L. R. Ir. 530; *Carter v. Crick*, 4 H. & N. 412; *Lovegrove v. Fisher*, 2 F. & F. 128.

2. *Canada.* — *Borthwick v. Young*, 12 Ont. App. 671.

3. *United States.* — *Conrad v. Dater*, 2 Biss. (U. S.) 342; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159.

*Alabama.* — *Magee v. Billingsley*, 3 Ala. 679; *Gachet v. Warren*, 72 Ala. 288.

*California.* — *Moore v. McKinlay*, 5 Cal. 471; *Hughes v. Bray*, 60 Cal. 284.

*Connecticut.* — *Merriman v. Chapman*, 32 Conn. 148.

*Illinois.* — *Converse v. Harzfeldt*, 11 Ill. App. 173; *Hanson v. Busse*, 45 Ill. 496; *Webster v. Granger*, 78 Ill. 230; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294.

*Iowa.* — *Home Lightning Rod Co. v. Neff*, 60 Iowa 138; *Myers v. Wheeler*, 65 Iowa 390; *Brigham v. Retelsdorf*, 73 Iowa 712.

*Kansas.* — *Field v. Kinnear*, 4 Kan. 476; *Gill v. Kaufman*, 16 Kan. 571; *McCarty v. Gordon*, 16 Kan. 35.

*Kentucky.* — *Gifford v. McBurnie*, 9 Ky. L. Rep. 147.

*Louisiana.* — *Phillipi v. Gove*, 4 Rob. (La.) 315; *Clarke v. Lockhart*, 10 Rob. (La.) 5; *Hall v. Plassan*, 19 La. Ann. 11.

*Maryland.* — *Gunther v. Atwell*, 19 Md. 157.

*Massachusetts.* — *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Williams v. Spafford*, 8 Pick. (Mass.) 250; *Henshaw v. Robins*, 9 Met. (Mass.) 86, 43 Am. Dec. 367; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122.

*Minnesota.* — *Taylor v. Mueller*, 30 Minn. 343, 44 Am. Rep. 199.

*Mississippi.* — *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476.

*Missouri.* — *Voss v. McGuire*, 18 Mo. App. 477; *Hollender v. Koetter*, 20 Mo. App. 79; *Graff v. Foster*, 67 Mo. 512.

*New Hampshire.* — *Morrill v. Wallace*, 9 N. H. 111; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140.

*New York.* — *Moses v. Mead*, 1 Den. (N. Y.) 378, 43 Am. Dec. 676; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Gallagher v. Waring*, 9 Wend. (N. Y.) 20; *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Oncida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Dike v. Reitlinger*, 23 Hun (N. Y.) 241; *Brower v. Lewis*, 19 Barb. (N. Y.) 574; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Hargous v. Stone*, 5 N. Y. 73; *Leonard v. Fowler*, 44 N. Y. 289; *Osborn v. Gantz*, 60 N. Y. 540.

*Ohio.* — *Dayton v. Hooglund*, 39 Ohio St. 671.

*South Carolina.* — *Rose v. Beatie*, 2 Nott & M. (S. Car.) 538.

*Texas.* — *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Whittaker v. Hueske*, 29 Tex. 355; *Texas, etc., R. Co. v. Overall*, 82 Tex. 248; *Pontiac Shoe Mfg. Co. v. Hamilton*, 18 Tex. Civ. App. 283.

*Wisconsin.* — *Getty v. Rountree*, 2 Chand. (Wis.) 28.

*Illustrations.* — A manufacturer of iron sold some of his product to A, and advised B, knowing him to be a manufacturer of bolts, to buy of A a ton or so for sample, should he wish to test the quality with a view to importing it. B, acting on this suggestion, found the iron satisfactory, and so wrote to the manufacturer, at the same time ordering twenty tons. It was held that there was a warranty that the twenty tons would be equal in quality to the sample obtained from A. *Dayton v. Hooglund*, 39 Ohio St. 671.

A manufacturer who, after furnishing, in obedience to several orders from a customer, an article (in this case steel) of a certain quality, fills an order from him with an article of an inferior quality, is liable on his undertaking that it be of the quality ordered; and this though the customer did not test it before using it. *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159.

A offered to sell to B certain barley like a sample formerly furnished, and the offer was accepted. It was held that there was a warranty that the goods were equal to the sample. *Myer v. Wheeler*, 65 Iowa 390.

4. *The Rule in Pennsylvania* differs from the one stated in the text. On a sale by sample there is, in general, no implied warranty that the goods will equal the sample in quality. The only warranty that may be implied, in the absence of fraud or circumstances indicating that the sample was to be taken as a standard of quality, is that the article to be delivered is to correspond with the sample in kind and substance, and be simply merchantable. *Sidney School Furniture Co. v. School-Dist.*, (Pa. 1886) 7 Atl. Rep. 65; *Fralcy v. Bispham*, 10 Pa. St. 320, 51 Am. Dec. 486; *Selzer v. Roberts*, 105 Pa. St. 242, 51 Am. Rep. 205; *Boyd v. Wilson*, 83 Pa. St. 319, 24 Am. Rep. 176; *West Republic Min. Co. v. Jones*, 108 Pa. St. 55; *Sims v. Stribler*, 13 W. N. C. (Pa.) 92; *Fogel v. Brubaker*, 122 Pa. St. 7; *Iron Works v. Axle Co.*, 6 W. N. C. (Pa.) 271; *Haddock v. Meyer*, 38 Leg. Int. (Pa.) 311; *Roebbing v. Brown*, 9 W. N. C. (Pa.) 170; *Hoffman v. Burr*, 155 Pa. St. 218; *Gest v. Espy*, 2 Watts (Pa.) 267; *Weimer v. Clement*, 37 Pa. St. 147, 78 Am. Dec. 411; *Whitaker v. Eastwick*, 75 Pa. St. 229; *McFarland v. Newman*, 9 Watts (Pa.) 56, 34 Am. Dec. 497; *Jennings v. Gratz*, 3 Rawle (Pa.) 168, 23 Am. Dec. 111.

The risk is that of the purchaser, and to him is applied the doctrine of *curat emptor* in all such purchases. *Sims v. Stribler*, 13 W. N. C. (Pa.) 92.

Thus there is no implied warranty that the



the rule is well settled that when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the purchaser that all the goods shall correspond in kind, character, and quality, with those exhibited. And his liability is the same whether he knew or did not know that the sample differed from the bulk.<sup>1</sup> The main reason why the rule of *caveat emptor* does not apply to sales by sample is that there is no opportunity to inspect the commodity from which the sample is taken.<sup>2</sup>

**Sales by Average Sample.** — Where a vendor takes samples from various lots of packages, and, mixing them, shows the mixture as a sample of the average bulk of the lots or packages, the implied warranty is not that any particular lot of the bulk shall not be inferior to the sample, but only that the bulk of the various lots when mixed shall equal the mixed sample in quality.<sup>3</sup>

**b. RIGHT TO COMPARE GOODS WITH SAMPLE BEFORE ACCEPTANCE.** — In all sales by sample, the right of final inspection by the vendee before acceptance is implied, and a refusal to permit this justifies rescission of the contract.<sup>4</sup> After receipt of the goods the vendee is entitled to a reasonable time to examine them and compare the bulk with the sample.<sup>5</sup>

**c. RIGHTS AND REMEDIES OF BUYER IN CASE GOODS DO NOT CONFORM TO SAMPLE.** — And if the goods do not correspond with the sample, the purchaser may either rescind the contract by returning the goods or he may keep them and recover damages for breach of the warranty.<sup>6</sup> What is a reasonable time for examination of the goods must, it is conceived, depend to a great extent on the particular facts and circumstances attending the sale. At all events, there must be no unnecessary delay in making the examination and communicating the purchaser's conclusions to the seller.<sup>7</sup> If, on final

goods are "sound goods," "not damaged or spoiled." A degree of unsoundness which will support an assumpsit upon an implied warranty must be such as to destroy the merchantable quality of the goods and convert them into an article substantially different in kind. *Selser v. Roberts*, 105 Pa. St. 242, 51 Am. Rep. 205.

Notwithstanding the rule stated, a stipulation that future deliveries will equal the sample may become a part of the contract and be enforced as such. *West Republic Min. Co. v. Jones*, 108 Pa. St. 55.

It is then unnecessary to determine whether the stipulation is a warranty or a condition. *West Republic Min. Co. v. Jones*, 108 Pa. St. 55.

1. *Whittaker v. Hueske*, 29 Tex. 355.

2. **Reason for Rule.** — *Barnard v. Kellogg*, 10 Wall. (U. S.) 388.

3. **Sales by Average Sample.** — *Schnitzer v. Oriental Print Works*, 114 Mass. 123; *Leonard v. Fowler*, 44 N. Y. 289.

4. **Right to Inspect Before Acceptance.** — *Benjamin on Sales* (6th ed.), § 648; *Lorymer v. Smith*, 1 B. & C. 1, 8 E. C. L. 1.

5. **Purchaser Entitled to Reasonable Time to Examine.** — *Magee v. Billingsley*, 3 Ala. 679.

6. **Rescission and Suit for Breach of Warranty** — *England*. — *Couston v. Chapman*, L. R. 2 H. L. Sc. 250; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Grimoldby v. Wells*, L. R. 10 C. P. 391; *Lucy v. Moufflet*, 5 H. & N. 229.

*United States*. — *Conrad v. Dater*, 2 Biss. (U. S.) 342.

*Alabama*. — *Magee v. Billingsley*, 3 Ala. 679.

*California*. — *Hughes v. Bray*, 60 Cal. 284.

*Illinois*. — *Hubbard v. George*, 49 Ill. 275;

*Webster v. Granger*, 78 Ill. 230.

*Indiana*. — *Garling v. Newell*, 9 Ind. 572.

*Kansas*. — *McCarty v. Gordon*, 16 Kan. 35; *Gill v. Kaufman*, 16 Kan. 572; *Field v. Kinneer*, 4 Kan. 476.

*Missouri*. — *Voss v. McGuire*, 18 Mo. App. 477.

*New Hampshire*. — *Butler v. Northumberland*, 50 N. H. 33.

*New York*. — *Waring v. Mason*, 18 Wend. (N. Y.) 425.

*Vermont*. — *Houghton v. Carpenter*, 40 Vt. 588.

**What Rejection of Goods Sufficient.** — The purchaser, it has been held, may reject the goods by giving notice to the vendor that he will not accept them, and that they are at the vendor's risk; it is unnecessary to send back or offer to send back the goods to the vendor, or to place them in neutral custody. *Grimoldby v. Wells*, L. R. 10 C. P. 391, explaining *Couston v. Chapman*, L. R. 2 H. L. Sc. 250.

**Burden of Proof.** — If the buyer accepts and uses the goods, the burden of proof is on him to show that they do not correspond with the sample. *Mobile, etc., R. Co. v. Wilkinson*, 72 Ala. 286; *Brigham v. Retelsdorf*, 73 Iowa 712.

But if the vendee, on examination of the goods within a reasonable time, refuses to accept them on the ground that they do not correspond with the sample, the burden of proof in a suit for the price is on the vendor to show that they do so correspond. *Merriman v. Chapman*, 32 Conn. 147.

7. **What Is Reasonable Time for Inspection.** — *Couston v. Chapman*, L. R. 2 H. L. Sc. 250. See also *Heilbutt v. Hickson*, L. R. 7 C. P. 451, in which case *Bovill, C. J.*, said: "It is, however, generally necessary, in order to enable the purchaser to recover back the price which he may have paid for the goods, that he should not have done more than was nec-

inspection, the purchaser omits to rescind the contract, and neither returns nor offers to return the goods, he is liable for the price,<sup>1</sup> unless the goods are utterly valueless.<sup>2</sup>

*d. LIABILITY OF SELLER WHERE SAMPLE CONTAINS LATENT DEFECTS.* — Where the seller is himself the manufacturer of the goods sold, it seems that if the sample contain defects not discoverable on reasonable examination by either party, there is a warranty that the goods are free from such defects.<sup>3</sup> The rule is otherwise where the seller is not the manufacturer,<sup>4</sup> unless he has been guilty of fraudulent conduct in creating or concealing the defects.<sup>5</sup>

*e. WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE.* — The warranty implied from sales by sample is not ordinarily one of merchantability,<sup>6</sup> but when the facts and circumstances justify it, such a warranty may be implied.<sup>7</sup> So the general rule is that in a sale by sample there is no implied warranty that the goods sold shall be fit for the purpose for which they were purchased.<sup>8</sup> And it makes no difference that the seller is informed of such purpose.<sup>9</sup>

*f. WHAT CONSTITUTES SALE BY SAMPLE.* — The mere fact that the seller exhibited a sample at the time of the sale will not, of itself, make the sale one by sample so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods.<sup>10</sup> To constitute a sale by sample with implied warranty it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were

essary for a fair trial of them, or for the purpose of examination and comparison, and also that he should reject the goods within a reasonable time, and that he should not have done any act to alter the position of the vendor, nor, as was said by Parke, J., in *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122, to delay the return of the goods. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them."

**Patent Defects.** — Where goods are sold by sample without representation as to their packing, and are accepted and retained by the purchaser without an offer to return them, the facts that they were not properly packed and that the brands on the case had been effaced will constitute no defense to an action for the price, the defects complained of being patent on first inspection. *Bolles v. Valentine*, 15 Dal. 285.

**1. Failure to Rescind or Return Goods — Effect.** — *Couston v. Chapman*, L. R. 2 H. L. Sc. 250; *Parker v. Palmer*, 4 B. & Ald. 387, 6 E. C. L. 529. See also *McCormick v. Sarson*, 45 N. Y. 265, 6 Am. Rep. 80; *Dutchess Co. v. Harding*, 49 N. Y. 321. Compare *Pennock v. Stygles*, 54 Vt. 226.

**2. Valueless Goods.** — See *Poulton v. Lattimore*, 9 B. & C. 259, 17 E. C. L. 373; *Heilbutt v. Hickson*, L. R. 7 C. P. 451.

**3. Latent Defects — Sale by Manufacturer.** — *Drummond v. Van Ingen*, 12 App. Cas. 284; *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

**4. Sales by Person Not Manufacturer.** — *Parkinson v. Lee*, 2 East 314; *Clarke v. Lockhart*, 10 Rob. (La.) 5; *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Sands v. Taylor*, 5 Johns. (N. Y.) 404, 4 Am. Dec.

374. Compare *Love v. Miller*, 104 N. Car. 582, in which case it was held that as the true quality of cotton cannot be ascertained by inspection of a sample drawn from a bale, and as the purchaser had no opportunity to inspect it before delivery, the warranty would be deemed to have extended to latent defects, and not to have been merely for a certain grade according to a particular mode of inspection.

**5. Effect of Fraudulent Conduct by Seller.** — *Benjamin on Sales* (6th ed.), § 651 *et seq.*; *Mody v. Gregson*, L. R. 4 Exch. 49. See also *Clarke v. Lockhart*, 10 Rob. (La.) 5.

**6. Warranty of Merchantability.** — *Benjamin on Sales* (6th ed.), § 667; *Parkinson v. Lee*, 2 East 314; *Baker v. Frobisher*, Quincy (Mass.) 4.

**7. Benjamin on Sales** (6th ed.), § 667; *Mody v. Gregson*, L. R. 4 Exch. 49.

**Illustration.** — Thus, where a contract is for merchantable goods, and the sale is by sample which represents to the buyer a merchantable article and discloses no defect, and the goods are accepted as complying with the sample, there is still an implied warranty of their being merchantable in respect to all such matters as cannot be ascertained by the sample, just as there would be if the bulk had been inspected and the defects could not thereby be ascertained. *Mody v. Gregson*, L. R. 4 Exch. 49.

**8. Warranty of Fitness for Particular Purpose.** — *Gachet v. Warren*, 72 Ala. 288; *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329.

**9. Wisconsin Red Pressed Brick Co. v. Hood**, 67 Minn. 329.

**10. Mere Exhibition of Sample Does Not Constitute Sale by Sample.** — *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Beirne v. Dord*, 5 N. Y. 99, 55 Am. Dec. 321; *Cousinery v. Pearsall*, 40 N. Y. Super. Ct. 118; *Hargous v. Stone*, 5 N. Y. 85; *Proctor v. Spralley*, 78 Va. 254.



so dealing with the quality of the bulk.<sup>1</sup> Thus, the fact that a sample is exhibited at the time of the sale does not make it a sale by sample if the sample be shown merely to enable the purchaser to form a judgment of its kind and quality,<sup>2</sup> or if the goods are to be different in quality from the sample so exhibited,<sup>3</sup> or if a full opportunity is given to the purchaser to inspect the goods,<sup>4</sup> or in case there is an express warranty,<sup>5</sup> or where there is a sold note in writing which is silent as to quality.<sup>6</sup> Whether a sale is or is not a sale by sample is a question of fact for the jury to determine from the evidence in each case.<sup>7</sup>

**How Affected by Custom or Usage.** — Evidence of a particular custom, not sufficient to establish a general usage of trade, is not admissible to show that an exhibition of a sample was intended to be a warranty of quality;<sup>8</sup> nor can

**1. Parties Must Contract with Reference to Sample.** — *Reynolds v. Palmer*, 21 Fed. Rep. 433; *Day v. Raguet*, 14 Minn. 273; *Beirne v. Dord*, 5 N. Y. 98, 55 Am. Dec. 321; *Hargous v. Stone*, 5 N. Y. 85; *Cousinery v. Pearsall*, 40 N. Y. Super. Ct. 113; *Proctor v. Spratley*, 78 Va. 254.

**What Are Sales by Sample Illustrated.** — A written sale in London of a cargo of wheat then lying in Queenstown closed with these words: "The above cargo is accepted on the report and samples of Messrs. Scott & Co. [corn factors] of Queenstown." A contention by counsel that this clause only warranted that the report of Scott & Co. was a genuine report, and the samples genuine samples taken by them, and that it was not a warranty either that the statements in the report were true or that the cargo was equal to the samples, was considered not well founded. The court held that the meaning of the clause was that the samples shown to the buyer were samples drawn from the cargo, as represented by the report of Scott & Co., and that the bulk corresponded with the samples. *Russell v. Nicolopulo*, 8 C. B. N. S. 362, 98 E. C. L. 362. For further illustrations see *Clark v. Schwartz*, 2 W. R. 16; *Gallagher v. Waring*, 9 Wend. (N. Y.) 20; *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132.

**2. Samples Shown to Enable Purchaser to Judge Quality.** — *Gardiner v. Gray*, 4 Campb. 144; *Beirne v. Dord*, 5 N. Y. 98, 55 Am. Dec. 321.

**3. Goods to Be Different from Sample.** — *Day v. Raguet*, 14 Minn. 273.

**4. Sales with Opportunity to Inspect** — *United States*. — *Lindley v. Hunt*, 22 Fed. Rep. 52; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383.

*New York*. — *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 576, 27 Am. Dec. 158; *Hargous v. Stone*, 5 N. Y. 73; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321.

*Pennsylvania*. — *Selser v. Roberts*, 105 Pa. St. 242, 51 Am. Rep. 205.

*Virginia*. — *Proctor v. Spratley*, 78 Va. 254.

See also *Borthwick v. Young*, 12 Ont. App. 671. *Compare Williams v. Spafford*, 8 Pick. (Mass.) 250.

**5. Sales with Express Warranty.** — *Tye v. Fynmore*, 3 Campb. 462; *Powell v. Horton*, 2 Bing. N. Cas. 668, 29 E. C. L. 452; *Carter v. Crick*, 4 H. & N. 412; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. Rep. 455. See also *Gardiner v. Gray*, 4 Campb. 144, in which case it was held that where, before or at the time

of sale, a specimen of the goods is exhibited to the buyer, if there is a written contract which merely describes the goods as of a particular denomination, it is not a sale by sample.

**6. Sales with Sold Note Silent as to Quality.** — *Meyer v. Everth*, 4 Campb. 22.

**7. Sale by Sample Question for Jury.** — *Atwater v. Clancy*, 107 Mass. 369; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Jones v. Wasson*, 3 Baxt. (Tenn.) 211.

**Intent of Parties Must Govern.** — The evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was intended by the parties as a sale by sample. *Gardiner v. Gray*, 4 Campb. 144; *Meyer v. Everth*, 4 Campb. 22; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

**Question Not Affected by Inconvenience of Examination.** — The fact that a personal examination of the bulk of the goods by the purchaser at the time of the sale is not practicable or convenient furnishes no sufficient ground to say that a sale is by sample. If the acts and declarations of the parties in making the contract for the sale of goods are of doubtful construction, evidence that it was impracticable or inconvenient to examine the bulk of the goods would be proper, and, in connection with evidence of other circumstances attending the transaction, might aid in coming to a correct conclusion in respect to the true character of the contract. *Beirne v. Dord*, 5 N. Y. 100, 55 Am. Dec. 321.

**8. Sales by Sample — How Affected by Custom or Usage.** — *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321. *Compare Atwater v. Clancy*, 107 Mass. 369, in which case it was held that evidence of a usage in trade to sell a certain kind of goods by sample is admissible to support testimony that a lot of such goods were so sold; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158, where it was held admissible to show that in a certain locality the sale of packed cotton is a sale by sample, though the written contract of sale was silent on this point.

**Reason for Rule.** — No custom in a sale of any particular description of goods can be admitted to control the general rules of law. Such a practice would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sale of chattels. *Beirne v. Dord*, 5 N. Y. 102, 55 Am. Dec. 321.



this fact be shown by evidence of a custom of which the parties were ignorant.<sup>1</sup>

**6. Particular Kinds of Warranty** — *a. Of MERCHANTABILITY* — (1) *Under What Circumstances Warranty Arises* — *Sales Without Inspection.* — A vendor impliedly warrants goods sold by him without any opportunity of inspection on the part of the buyer to be of a merchantable character,<sup>2</sup> especially where the goods are sold by specific description.<sup>3</sup> Where a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterwards to be produced, or grown, or manufactured, the contract carries with it an obligation that the article shall be merchantable,<sup>4</sup> at least of medium quality or goodness.<sup>5</sup> The buyer cannot, however, insist that the goods shall be of

**1. Custom of Which Parties Were Ignorant.** — *Barnard v. Kellogg*, 10 Wall. (U. S.) 389. See also *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656.

**2. Sales Without Inspection** — *England.* — *Jones v. Bright*, 5 Bing. 544, 15 E. C. L. 532; *Laing v. Fidgeon*, 6 Taunt. 108, 1 E. C. L. 327, 4 Campb. 169.

*Canada.* — *Hardy v. Fairbanks*, 2 Nova Scotia 432; *Spurr v. Albert Min. Co.*, 13 N. Bruns. 361.

*California.* — *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199.

*Georgia.* — *Gammell v. Gunby*, 52 Ga. 504.

*Illinois.* — *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Fish v. Roseberry*, 22 Ill. 288; *Doane v. Dunham*, 65 Ill. 512; *Hansen v. U. S. Brewing Co.*, 70 Ill. App. 265; *Chicago Packing, etc., Co. v. Tilton*, 87 Ill. 547.

*Iowa.* — *Russell v. Critchfield*, 75 Iowa 69; *McClung v. Kelley*, 21 Iowa 512; *Davis v. Sweeney*, 75 Iowa 45.

*Kansas.* — *Bigger v. Bovard*, 20 Kan. 204.

*Maine.* — *Warner v. Arctic Ice Co.*, 74 Me. 475.

*Massachusetts.* — *Murphy v. Cornell*, 155 Mass. 60, 31 Am. St. Rep. 526; *Baker v. Frobisher*, Quincy (Mass.) 4.

*Mississippi.* — *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476.

*New York.* — *Gallagher v. Waring*, 9 Wend. (N. Y.) 20; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; *Cleu v. McPherson*, 1 Bosw. (N. Y.) 480; *Peck v. Armstrong*, 38 Barb. (N. Y.) 215; *Newbery v. Wall*, 35 N. Y. Super. Ct. 106; *Hargous v. Stone*, 5 N. Y. 86; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515.

*Pennsylvania.* — *Edwards v. Hathaway*, 1 Phila. (Pa.) 547, 12 Leg. Int. (Pa.) 58; *Adams v. Rogers*, 9 Watts (Pa.) 121; *Fogel v. Brubaker*, 122 Pa. St. 7.

*Texas.* — *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264.

*Wisconsin.* — *Ketchum v. Wells*, 19 Wis. 25; *Merriam v. Field*, 24 Wis. 640, 29 Wis. 592.

**Warranty that Goods Shall Be Free from Remarkable Defects.** — In executory sales, or, more properly speaking, in sales of indeterminate things, there is always a warranty implied that the thing to be delivered shall at least be free from any remarkable defects. *McClung v. Kelley*, 21 Iowa 512; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572.

**3. Sales on Description** — *England.* — *Gardiner v. Gray*, 4 Campb. 144; *Jones v. Just*, L.

R. 3 Q. B. 197; *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371.

*United States.* — *English v. Spokane Commission Co.*, 57 Fed. Rep. 451.

*Alabama.* — *Gachet v. Warren*, 72 Ala. 288.

*Connecticut.* — *Bailey v. Nickols*, 2 Root (Conn.) 408, 1 Am. Dec. 83.

*Maryland.* — *Rice v. Forsyth*, 41 Md. 389.

*Massachusetts.* — *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Alden v. Hart*, 161 Mass. 576.

*New York.* — *Carleton v. Lombard*, 72 Hun (N. Y.) 254.

*West Virginia.* — *Hood v. Bloch*, 29 W. Va. 244.

*Wisconsin.* — *Morehouse v. Comstock*, 42 Wis. 629.

**Caveat Emptor Not Applicable.** — So far as reported decisions show, there has been no case in which the maxim *caveat emptor* applied where there was no opportunity of inspection, or where that opportunity was not waived. *Jones v. Just*, L. R. 3 Q. B. 204.

**4. Rule Applicable Whether Goods in Possession of Vendor or Not.** — *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199; *Hargous v. Stone*, 5 N. Y. 86; *Newbery v. Wall*, 35 N. Y. Super. Ct. 106; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

**5. Hargous v. Stone**, 5 N. Y. 86.

**Applications of Rule** — *Coal.* — Where coal is ordered from a mine, it is an implied term of the contract that it shall be of a merchantable character. *Edwards v. Hathaway*, 1 Phila. (Pa.) 547, 12 Leg. Int. (Pa.) 58; *Spurr v. Albert Min. Co.*, 13 N. Bruns. 361.

*Waste Silk.* — Where property sold is described in a sale note as "12 bags of waste silk," the purchaser has a right to expect a salable article, answering the description in the contract. *Gardiner v. Gray*, 4 Campb. 144.

*Lumber.* — So where lumber is sold without opportunity for examination by the vendee, there is an implied warranty that it is merchantable. *Merriam v. Field*, 39 Wis. 578.

*Stave Bolts.* — A contract to deliver to the defendants, who were manufacturers of barrels and staves, a certain quantity of stave bolts requires delivery of bolts of a good merchantable character. *Ketchum v. Wells*, 19 Wis. 25.

*Growing Crops.* — An executory contract for the sale of growing crops of tobacco, to be well cured and in good condition, implies a

any particular quality or fineness,<sup>1</sup> nor is there a warranty that they shall be of the best quality.<sup>2</sup> The intention of both parties must be taken to be that the commodity was to be salable in the market under the denomination mentioned in the contract between them.<sup>3</sup>

**Rule Not Applicable Where Buyer Relies on His Own Judgment.** — The rule, of course, does not apply where the buyer clearly shows that he does not intend to rely upon the seller's judgment to furnish him with a merchantable article of the kind ordered. If he specifies the article he is to have and fixes the character and quality, and the seller delivers to him an article conforming with the order, there is no implied warranty of merchantability.<sup>4</sup>

(2) *What Period of Time Covered by Warranty.* — Where a manufacturer contracts to deliver a manufactured article at a distant place, he must stand the risk of any extraordinary or unusual deterioration.<sup>5</sup> But in the absence of any express stipulation he is not liable for any deterioration of quality rendering the article unmerchantable at the place of delivery, if such deterioration would result necessarily from the transit.<sup>6</sup> A seller will, however, be liable for a deterioration in the value or merchantability of the goods during transit to the buyer if this results from defects in the manner in which the goods were packed and shipped by the seller.<sup>7</sup>

(3) *Rights of Buyer on Breach of Warranty.* — If the goods are not merchantable the vendor may rescind the contract and return them after he has had a reasonable time to inspect them. He is not bound to receive or pay for them, because they are not what he agreed to purchase.<sup>8</sup> It has also been

warranty of merchantability. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

*Beer.* — A contract for the sale of two thousand barrels of beer, to be delivered from time to time as requested, contemplates the delivery of beer of a merchantable quality in the vendee's business. *Hansen v. U. S. Brewing Co.*, 70 Ill. App. 265.

*Wheat.* — Wheat sold in stacks implies a warranty of merchantability. *Fish v. Roseberry*, 22 Ill. 288.

*Ice.* — A contract for the sale of "ice" implies a merchantable quality of that commodity. *Warner v. Arctic Ice Co.*, 74 Me. 475; *Murchie v. Cornell*, 155 Mass. 60, 31 Am. St. Rep. 526.

**1. Buyer Not Entitled to Article of Particular Fineness.** — *Gardiner v. Gray*, 4 Campb. 144; *Gallagher v. Waring*, 9 Wend. (N. Y.) 20.

**2. Best Quality Not Implied.** — *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471. See also *Braumiller v. Erwin*, 55 Ill. App. 675, in which case it was held that a sale of grain with an implied warranty of merchantable quality, does not import a warranty of any particular grade above the lowest; *Smith v. Servis*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 301, holding that an agreement to manufacture furniture to be "finished in a good, workmanlike manner," without any particular mention as to the quality of the finish, established no warranty as to the particular kind of finish which would survive acceptance of the goods.

**3.** *Gardiner v. Gray*, 4 Campb. 144.

**4. When Rule Not Applicable.** — *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288, 48 E. C. L. 288; *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371; *Simcoe County Agricultural Soc. v. Wade*, 12 U. C.

Q. B. 614; *Armstrong v. Bufford*, 51 Ala. 410. See also *Day v. Mapes-Reeve Constr. Co.* (Mass. 1899) 54 N. E. Rep. 878.

**5. Extraordinary or Unusual Deterioration.** — *Bull v. Robison*, 10 Exch. 342.

**6. Deterioration Resulting Necessarily from Transit.** — *Bull v. Robison*, 10 Exch. 342; *English v. Spokane Commission Co.*, 57 Fed. Rep. 451; *Leggat v. Sands' Ale Brewing Co.*, 60 Ill. 158; *Mann v. Everston*, 32 Ind. 355; *Scott v. Renick*, 1 B. Mon. (Ky.) 63, 35 Am. Dec. 177; *Leopold v. Van Kirk*, 27 Wis. 152. See also *Stamm v. Kuhlmann*, 1 Mo. App. 296. *Compare Beer v. Walker*, 46 L. J. C. P. 677, 37 L. T. 278, which seems to maintain a contrary doctrine. In this case it was held that where rabbits were sent from Liverpool to Birmingham, by one dealer to another, and were sound when delivered to the railroad company, and it was proved that they were sent in the ordinary course of business, and that nothing exceptional had occurred during the transit, there was an implied warranty that the rabbits should be fit for human food, and this warranty extended until in the ordinary course of transit they should reach the purchaser.

**7. Deterioration Caused by Defective Packing.** — *Jones v. Just*, L. R. 3 Q. B. 197; *Mann v. Everston*, 32 Ind. 355.

**8. Rescission of Contract.** — *Chanter v. Hopkins*, 4 M. & W. 399; *Alden v. Hart*, 161 Mass. 576; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; *Hart v. Wright*, 17 Wend. (N. Y.) 277; *Hargous v. Stone*, 5 N. Y. 86; *Edwards v. Hathaway*, 1 Phila. (Pa.) 547, 12 Leg. Int. (Pa.) 58.

**After Acceptance by the Buyer,** he cannot recover unless he shows that there were latent defects in the goods not discoverable by due diligence, by ordinary inspection and by the application of the ordinary and usual tests.

held that he may resell the goods for the best price obtainable, without a tender of delivery, and recover what he has lost by the transaction.<sup>1</sup>

*b. OF FITNESS FOR PURPOSE INTENDED* — (1) *Principle on Which This Implied Warranty Rests.* — In practically all cases of implied warranties of fitness, the underlying principle is that where a vendee relies upon the skill and judgment of the vendor to make for or deliver to him articles fit for the use to which they are to be put, the law will imply a warranty upon the part of the vendor that he has done his duty and has made or furnished articles adapted to the purpose for which they were ordered.<sup>2</sup>

(2) *Of Manufacturer of Article to User* — (a) *Where Buyer Relies on Manufacturer's Judgment* — *as. STATEMENT OF RULE* — *See In General.* — Ordinarily there is no implied warranty of quality in sales: but where a manufacturer sells any article or commodity of his own make to be used for a specified purpose, communicated to him by the purchaser, and the latter has not the opportunity to inspect the thing purchased, there is an implied warranty that it will be reasonably fit for the purpose for which it was intended.<sup>3</sup> This rule applies

*League Cycle Co. v. Abrahams*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 548; *Pennsylvania, etc., Oil Co. v. Spitelnik*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 557.

**Merely Receipt of the Goods, Even Where the Defect Is Patent and the Unmerchantability Subject to Discovery upon Examination, is Not Necessarily a Waiver of the Implied Warranty of Merchantability.** *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560.

**What Is Sufficient Notification of Intent to Rescind.** — If the buyer notifies the seller immediately after examination that he will not receive the goods, and returns the bill of lading to the carrier, he has done all that is necessary to a rescission though he does not return the invoice. *Alden v. Hart*, 161 Mass. 576.

**1. Resale and Suit for Loss.** — *Holloway v. Jacoby*, 120 Pa. St. 583, 6 Am. St. Rep. 737.

**2. Benjamin on Sales** (6th ed.). §§ 661, 661a; *Biddle on Chattel Warranties*, § 167 *et seq.*; *Story on Sales* (4th ed.), §§ 371, 374. See also *Jones v. Just*, L. R. 3 Q. B. 197; *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371; *Randall v. Newson*, 2 Q. B. D. 102; and cases cited in preceding subdivisions of this section.

**3. Manufacturer's Liability to One Purchasing for His Own Use** — *England.* — *George v. Skivington*, 39 L. J. Exch. 8, L. R. 5 Exch. 1, 21 L. T. N. S. 495, 18 W. R. 118; *Macfarlane v. Taylor*, L. R. 1 H. L. Sc. 245, 18 L. T. N. S. 214; *Jones v. Bright*, 3 M. & P. 155, 5 Bing. 533, 15 E. C. L. 529, 7 L. J. C. Pl. 213, 30 Rev. Rep. 728; *Jones v. Padgett*, 59 L. J. Q. B. 261, 24 Q. B. D. 650, 62 L. T. N. S. 934, 38 W. R. 782; *Drummond v. Van Ingen*, 56 L. J. Q. B. 563, 12 App. Cas. 284, 57 L. T. N. S. 1, 36 W. R. 20; *Ollivant v. Bayley*, 5 Q. B. 288, 48 E. C. L. 288, 1 Dav. & M. 373, 13 L. J. Q. B. 34, 7 Jur. 1130; *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371, 2 Scott N. R. 496, 1 Drink. 106, 10 L. J. C. Pl. 66; *Randall v. Newson*, 46 L. J. Q. B. 259, 2 Q. B. D. 102, 36 L. T. N. S. 164, 25 W. R. 113; *Shepherd v. Pybus*, 4 Scott N. R. 434, 3 M. & G. 868, 42 E. C. L. 452, 11 L. J. C. Pl. 101.

*Canada.* — *Bigelow v. Boxall*, 38 U. C. Q. B. 452; *Morrow v. Watrous Engine Co.*, 18 N. Bruns. 509.

*United States.* — *Dawes v. Peebles*, 6 Fed.

Rep. 856; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Cunningham v. Hall*, 1 Sprague (U. S.) 404.

*Alabama.* — *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Gachet v. Warren*, 72 Ala. 288; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Kennebrew v. Southern Automatic Electric Shock Mach. Co.*, 106 Ala. 377.

*Arkansas.* — *Curtis, etc., Mfg. Co. v. Williams*, 48 Ark. 325; *Weed v. Dyer*, 53 Ark. 155. *California.* — *Correio v. Lynch*, 65 Cal. 273; *Hoult v. Baldwin*, 67 Cal. 610; *Fox v. Stockton Combined Harvester, etc., Works*, 83 Cal. 333.

*Connecticut.* — *Pacific Iron Works v. Newhall*, 34 Conn. 77.

*Georgia.* — *Wilcox v. Hall*, 53 Ga. 635.

*Illinois.* — *Beers v. Williams*, 16 Ill. 69; *Archdale v. Moore*, 19 Ill. 565; *Huyett, etc., Mfg. Co. v. Saile*, 45 Ill. App. 562; *Hawley v. Florsheim*, 44 Ill. App. 320; *Lanz v. Wachs*, 50 Ill. App. 262; *Hallock v. Cutler*, 71 Ill. App. 471.

*Indiana.* — *Brenton v. Davis*, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769; *Bushman v. Taylor*, 2 Ind. App. 12, 50 Am. St. Rep. 228; *Page v. Ford*, 12 Ind. 46; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *McClamrock v. Flint*, 101 Ind. 278; *Conaut v. National State Bank*, 121 Ind. 323; *Street v. Chapman*, 29 Ind. 142; *Robinson Mach. Works v. Chandler*, 56 Ind. 575.

*Iowa.* — *Blackmore v. Fairbanks*, 79 Iowa 282; *Alpha Checkrower Co. v. Bradley*, 105 Iowa 537.

*Kansas.* — *Craver v. Hornburg*, 26 Kan. 94; *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 420.

*Kentucky.* — *Dent v. Murphy*, 13 Ky. L. Rep. 44.

*Maine.* — *Downing v. Dearborn*, 77 Me. 457; *White v. Oakes*, 88 Me. 367.

*Massachusetts.* — *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

*Michigan.* — *Blodgett v. Detroit Safe Co.*, 76 Mich. 538.

*Minnesota.* — *Hart v. Minneapolis, etc., Minn.*, 486; *Breen v. Moran*, 51 Minn. 525; *Maxwell v. Lee*, 34 Minn. 511; *Goulds v. Brophy*, 42 Minn. 109.



whether the article or commodity which is the subject of the contract is already manufactured and in stock<sup>1</sup> or is to be made on the purchaser's order.<sup>2</sup> The ground on which this warranty is based is the presumed superior knowledge of the manufacturer<sup>3</sup> and the necessity of trusting to his skill and judgment.<sup>4</sup>

**No Warranty that Articles Are of Best Quality.** — Although goods ordered for a particular purpose are impliedly warranted to be fit for that purpose, there is no warranty that the article sold shall be the best of its kind.<sup>5</sup>

**Warranty Does Not Extend to Purposes Not Specified.** — The implied warranty will not go beyond the thing warranted and the purpose to which it is applicable and for which it is designed.<sup>6</sup>

*Mississippi.* — *Brown v. Murphee*, 31 Miss. 91; *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476.

*Missouri.* — *Lee v. J. B. Sickles Saddlery Co.*, 38 Mo. App. 201.

*Nebraska.* — *Omaha Coal, etc., Co. v. Fay*, 37 Neb. 68.

*Nevada.* — *O'Neil v. New York, etc., Min. Co.*, 3 Nev. 141.

*New York.* — *William Anson Wood Mower, etc., Co. v. Thayer*, 50 Hun (N. Y.) 516; *Maurer v. Bliss*, 14 Daly (N. Y.) 150; *Jefferson Iron Co. v. Thompson*, 20 N. Y. Wkly. Dig. 317; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Levy v. American Wax, etc., Mfg. Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 204; *Gurney v. Atlantic, etc., R. Co.*, 58 N. Y. 358; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636.

*North Carolina.* — *Thomas v. Simpson*, 80 N. Car. 4.

*Ohio.* — *Edmands v. Hiltz*, 2 West. L. J. 45; 1 Ohio Dec. (Reprint) 81; *Mowry Car, etc., Works v. Shorter*, 7 Cinc. L. Bul. 32, 8 Ohio Dec. (Reprint) 290; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Byers v. Chapin*, 28 Ohio St. 300; *Curran v. Hauser*, 4 Ohio Dec. 449.

*Pennsylvania.* — *Chambers v. Crawford, Add. (Pa.)* 150; *Mills v. Fibre Co.*, 4 W. N. C. (Pa.) 463; *Warder v. Blair*, 4 Penny. (Pa.) 182; *Osborne v. Walley*, 8 Pa. Super. Ct. 193; *Ulrich v. Stohrer*, 12 Phila. (Pa.) 199, 34 Leg. Int. (Pa.) 132.

*South Carolina.* — *Robson v. Miller*, 12 S. Car. 586, 32 Am. Rep. 518.

*Tennessee.* — *Donelson v. Young, Meigs (Tenn.)* 155; *Overton v. Phelan*, 2 Head (Tenn.) 445; *Tennessee River Compress Co. v. Leeds*, 97 Tenn. 574.

*Texas.* — *Aultman v. Hefner*, 67 Tex. 54.

*Vermont.* — *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102; *Harris v. Waite*, 51 Vt. 480.

*Virginia.* — *Gerst v. Jones*, 32 Gratt. (Va.) 518, 34 Am. Rep. 773.

*Wisconsin.* — *Fuller-Warren Co. v. Shurts*, 95 Wis. 606; *Getty v. Rountree*, 2 Chand. (Wis.) 28, 2 Pin. (Wis.) 379, 54 Am. Dec. 138; *Walton v. Cody*, 1 Wis. 420; *Bird v. Mayer*, 8 Wis. 362; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Leopold v. Van Kirk*, 27 Wis. 152.

**1. Articles Already Manufactured.** — *George v. Skivington*, 39 L. J. Exch. 8; *Ollivant v. Bayley*, 5 Q. B. 288, 48 E. C. L. 288; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Curtis, etc., Mfg. Co. v. Williams*, 48 Ark. 325; *McClamrock v. Flint*, 101 Ind. 278; *White v. Adams*, 77 Iowa 295.

**2. Articles to Be Manufactured on Purchaser's Order.** — *Ollivant v. Bayley*, 5 Q. B. 288, 48 E. C. L. 288; *Weed v. Dyer*, 53 Ark. 155; *Blackmore v. Fairbanks*, 79 Iowa 282; *White v. Adams*, 77 Iowa 295; *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429; *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476.

**3. Reasons on Which Warranty Is Based.** — *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

**4. Curtis, etc., Mfg. Co. v. Williams**, 48 Ark. 325.

When the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defects caused by such process, and against which reasonable diligence might have guarded. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects, of which the latter, if he used due care, must have been informed during the process of manufacture. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

**5. No Warranty that Goods Are of Best Quality.** — *Hodge v. Tufts*, 115 Ala. 366; *Harris v. Waite*, 51 Vt. 480.

**Illustrations.** — Where it appeared that certain gas meters furnished by the plaintiff, a manufacturer, on a general order, worked as accurately and well and lasted as long as the meters of other reputable makers, but did not work as accurately and well nor last as long as the meters of certain English and perhaps certain other American makers, it was held in an action for the price that the meters were of the kind and quality required by the order. *Harris v. Waite*, 51 Vt. 480.

A contract calling for "common hard brick" creates a warranty that the bricks shall come up to the standard implied by that term. *Day v. Mapes-Reeve Constr. Co. (Mass. 1899)*, 54 N. E. Rep. 878.

**6. No Warranty of Fitness for Purpose Other than That Specified.** — *Robinson Mach. Works v. Chandler*, 56 Ind. 575; *Conant v. National State Bank*, 121 Ind. 323; *McGraw v. Fletcher*, 35 Mich. 104; *Bierman v. City Mills Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 140.

**Illustrations.** — A manufacturer of a "Chandler & Taylor Mulay sawmill" does not impliedly warrant that it will "saw and work in as good and efficient manner as ordinary Mulay sawmills," or any other kind of saw-

(b) *For What Latent Defect Liable.* — The sale of a chattel for a purpose known to the manufacturer always carries with it a warranty against latent defects growing out of the process of manufacture.<sup>1</sup> It is reasonable to presume that one who made a thing which has a defect arising solely from the manner in which it was made is cognizant of that defect;<sup>2</sup> so if he knowingly uses improper materials in the construction or manufacture of the thing sold, he is liable.<sup>3</sup> Whether the manufacturer is liable for any latent defects in the materials used, which he could not have discovered by reasonable diligence, is not well settled. There are rulings both ways on this question.<sup>4</sup> So it has been held that a manufacturer does not impliedly warrant an article against latent defects unknown to him resulting from unskillfulness in the work of some previous manufacturer or owner, without his knowledge or fault,<sup>5</sup> or for latent defects not known to him resulting from the use of defective materials furnished by others,<sup>6</sup> except in those cases where the sale of an article by him

mill, nor that it will saw all kinds of lumber. The implied warranty extends only to the work done by, and kind of lumber sawed by, an ordinary "Chandler & Taylor Mulay saw-mill." *Robinson Mach. Works v. Chandler*, 56 Ind. 575.

So where a rock drill was bought to use in exploring for minerals, both parties understanding that the machine had not been contrived for that kind of work and that its usefulness therefor had not been tested, but the vendor having, before his purchase, seen it in operation drilling rock, and the indications being that it was tacitly understood that he should take it at his own risk, it was held that there was no implied warranty. *McGraw v. Fletcher*, 35 Mich. 104.

**Defects in Other Articles with Which Article Ordered Is Used.** — An implied warranty of an article will not extend beyond the article itself or other articles or appliances connected therewith, even though included in the same order and bought at the same time; the implication is that the article sold is reasonably fit for the purpose for which it is designed, and if this article is broken, or fails to accomplish its purpose, through the defect or inappropriateness of other articles with which it is used, the warranty is not broken. *Troy Laundry Co. v. Henry*, 23 Oregon 232.

**1. Latent Defects Growing Out of Process of Manufacture.** — *Reynolds v. Newell*, 2 Q. B. D. 102; *Jones v. Bright*, 5 Bing. 533, 15 E. C. L. 529.

*United States.* — *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 103.

*California.* — *Hoult v. Baldwin*, 67 Cal. 610 (under special statutory provision).

*Illinois.* — *Beers v. Williams*, 16 Ill. 69.

*Michigan.* — *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221.

*New York.* — *Weber v. Demuth*, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 658; *Hoe v. Sanborn*, 21 N. Y. 566, 78 Am. Dec. 163; *Carleton v. Lombard*, 149 N. Y. 144; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636; *Darbhrow, etc., Mfg. Co. v. Cuming*, 35 N. Y. App. Div. 376.

*Ohio.* — *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290.

*Tennessee.* — *Tennessee River Compress Co. v. Leeds*, 97 Tenn. 574.

*Vermont.* — *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364.

**2. Reason for Rule.** — *Hoe v. Sanborn*, 21 N. Y. 562, 78 Am. Dec. 163.

**Illustration of Rule.** — The plaintiff purchased of the defendant, for a sound price, cheese made by the defendant, and for a purpose made known to the defendant, namely, sale in a foreign market. The cheese was not fit for market, owing to a fault in the manufacture, and the defect was a latent one. It was held that the defendant was liable upon an implied warranty that the cheese was fit for the purpose stated. *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364.

**Rule the Same Whether Contract Is Oral or Written.** — *Carleton v. Lombard*, 149 N. Y. 137.

**3. Latent Defects Caused by Use of Defective Materials When Known to Manufacturer.** — *Hoult v. Baldwin*, 67 Cal. 610 (under special statutory provision); *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221; *Hoe v. Sanborn*, 21 N. Y. 566, 78 Am. Dec. 163; *Carleton v. Lombard*, 149 N. Y. 144; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636.

**4. That Manufacturer Is Liable for Undiscoverable and Latent Defects.** — The following cases hold that the warranty extends to latent defects, unknown to and undiscovered by the vendor, which render the article sold unfit for the purpose intended: *Randall v. Newson*, 2 Q. B. D. 102; *Rodgers v. Niles*, 11 Ohio St. 51, 78 Am. Dec. 290; *Nashua Iron, etc., Co. v. Brush*, 91 Fed. Rep. 214.

In *Rodgers v. Niles*, 11 Ohio St. 51, 78 Am. Dec. 290, it was said: "The manufacturer is an insurer of the quality of the material as made, as much as he is an insurer of the workmanship."

**That Manufacturer Is Not Liable for Undiscoverable and Latent Defects.** — On the other hand, there are cases holding that the manufacturer is not liable for defects in the materials which he uses, where he could not have discovered them by careful inspection. *Hoe v. Sanborn*, 21 N. Y. 566, 78 Am. Dec. 163; *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221. In this last case it was held that one selling an engine is not liable on an implied warranty for a break in the shaft, due to latent defects unknown to him which he could not have discovered by examination of the shaft.

**5. Latent Defects from Unskillfulness in Work of Another Manufacturer.** — *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102.

**6. Latent Defects from Materials Furnished by**



is in and of itself legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects, as is the case in the sale of provisions for domestic use.<sup>1</sup>

*Illustrations of Rule.* — A warranty of fitness for the purpose intended has been implied in the sale of the following articles of merchandise or chattels: clothing,<sup>2</sup> building material,<sup>3</sup> copper sheathing for vessels,<sup>4</sup> cold-blast iron,<sup>5</sup> spirituous liquors,<sup>6</sup> a hair-restoring compound,<sup>7</sup> barges,<sup>8</sup> barrels,<sup>9</sup> boxes for packing purposes,<sup>10</sup> and machinery of all descriptions,<sup>11</sup> such as farming implements,<sup>12</sup> stationary engines,<sup>13</sup> furnaces,<sup>14</sup> windmills,<sup>15</sup> or mining pumps.<sup>16</sup> On the other hand, it has been held that firewood is not a manufactured article within the rule.<sup>17</sup>

(b) *Where Known, Described, and Defined Article Is Ordered.* — Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if a known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.<sup>18</sup> In sales

**Another Manufacturer.** — *Wilson v. Lawrence*, 139 Mass. 318.

**Illustration.** — In *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102; the defendant, a machinist and founder, sold by the pound a wrought iron shaft, of which he was not the maker, but which he turned and prepared for the reception of pulleys, at an additional price per day for the labor. The shaft was to be used in running machinery in a carriage shop, and on being put to the described use broke because of a flaw and an imperfect weld, which defects were unknown to both parties, and were not discoverable on ordinary inspection or examination. It was held that there was no implied warranty of the soundness of the shaft.

1. *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102.

2. **Illustrations: Clothing.** — *Jones v. Padgett*, 59 L. J. Q. B. 261; *Drummond v. Van Ingen*, 56 L. J. Q. B. 563.

3. **Building Material.** — *Breen v. Moran*, 51 Minn. 525.

4. **Copper Sheathing.** — *Jones v. Bright*, 5 Bing. 533, 15 E. C. L. 529.

5. **Iron.** — *Mowry Car, etc., Works v. Shorter*, 7 Cinc. L. Bul. 32, 8 Ohio Dec. (Reprint) 290.

6. **Spirituous Liquors.** — *Macfarlane v. Taylor*, 18 L. T. N. S. 214.

7. **Hair Restorer.** — *George v. Skivington*, 39 L. J. Exch. 8.

8. **Barges.** — *Shepherd v. Pybus*, 3 M. & G. 868, 42 E. C. L. 452.

9. **Barrels.** — *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730.

10. **Packing Boxes.** — *Gerst v. Jones*, 32 Gratt. (Va.) 518, 34 Am. Rep. 773.

11. **Machinery.** — *Kennebrew v. Southern Automatic Electric Shock Mach. Co.*, 106 Ala. 377; *Craver v. Hornburg*, 26 Kan. 94; *McClamrock v. Flint*, 101 Ind. 278; *Tennessee River Compress Co. v. Leeds*, 97 Tenn. 574; *Aultman v. Hefner*, 67 Tex. 54.

12. **Harvesters, Reapers, Potato Diggers, Corn Cutters.** — *Fox v. Stockton Combined Harvester, etc., Works*, 83 Cal. 333 (harvester); *Hallock v. Cutler*, 71 Ill. App. 471 (potato digger); *Alpha Checkrower Co. v. Bradley*, 105 Iowa 537 (corn cutter); *Warder v. Blair*, 4 Penny. (Pa.) 182; *Osborne v. Walley*, 8 Pa. Super. Ct. 193 (reaper); *William Anson Wood*

*Mower, etc., Co. v. Thayer*, 50 Hun (N. Y.) 516 (reaper).

13. **Stationary Engines.** — *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Lefebvre v. Léforais*, 6 Rev. Lég. 600.

14. **Furnaces.** — *Huyett, etc., Mfg. Co. v. Saile*, 45 Ill. App. 562; *Fuller-Warren Co. v. Shurts*, 95 Wis. 606.

15. **Windmills.** — *McClamrock v. Flint*, 101 Ind. 278.

16. **Mining Pumps.** — *Getty v. Rountree*, 2 Chand. (Wis.) 28.

17. **Firewood.** — *Correio v. Lynch*, 65 Cal. 273.

18. **Known, Defined, and Described Articles.** — *England.* — *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 1 Dav. & M. 373, 5 Q. B. 288, 48 E. C. L. 288, 13 L. J. Q. B. 34, 7 Jur. 1130; *Turner v. Mucklow*, 8 Jur. N. S. 870.

*Canada.* — *Morrow v. Waterous Engine Co.*, 18 N. Bruns. 509.

*United States.* — *Grand Ave. Hotel Co. v. Wharton*, 79 Fed. Rep. 43, 49 U. S. App. 108; *District of Columbia v. Clephane*, 110 U. S. 212; *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510; *Ottawa Bottle, etc., Co. v. Gunther*, 31 Fed. Rep. 208.

*Alabama.* — *Gachet v. Warren*, 72 Ala. 288.

*California.* — *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228.

*Illinois.* — *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631.

*Maryland.* — *Walker v. Pue*, 57 Md. 155; *Rice v. Forsyth*, 41 Md. 389.

*Massachusetts.* — *Lothrop v. Otis*, 7 Allen (Mass.) 435; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331. See also *Day v. Mapes-Reeve Constr. Co.* (Mass. 1899) 54 N. E. Rep. 878.

*Minnesota.* — *Goulds v. Brophy*, 42 Minn. 109; *Cosgrove v. Bennett*, 32 Minn. 371; *Wisconsin Red Pressed-Brick Co. v. Hood*, 60 Minn. 401, 51 Am. St. Rep. 539; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.*, 66 Minn. 156.

*New York.* — *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Cafre v. Lockwood*, 22 N. Y. App. Div. 11.

*Pennsylvania.* — *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; *Jarecki Mfg. Co. v. Kerr*, 165 Pa. St. 529.



by description there is in general only a warranty that the goods are of the kind specified.<sup>1</sup> A manufacturer does not impliedly warrant the fitness of an article which he makes in accordance with the directions, appliances, and specifications of the vendee, and for which the manufacturer is in no way responsible except that he is required to conform to the requirements of the vendee.<sup>2</sup>

(c) *Where Goods Are Ordered for Experimental Use.* — When a well known article is to be manufactured for experimental purposes, the utmost that can be claimed is that it is to be reasonably fit for that purpose.<sup>3</sup>

(3) *By Manufacturer to Dealers and Other Manufacturers.* — Where a manufacturer contracts to sell to a dealer or middleman, who buys, as the manufacturer knows, to sell again, there is an implied warranty on the part of the manufacturer that the thing sold shall be reasonably fit for the purpose for which it is made and for which the dealer intends to sell it.<sup>4</sup> And so, where a manufacturer sells his product to another manufacturer, who buys it to use in another manufactured product, of which it is a material, there is an implied warranty of its reasonable fitness as such material.<sup>5</sup>

(4) *By Dealer to User.* — (a) *General Rule.* It is believed that the weight of authority sustains the rule that where a dealer contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the dealer, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied.<sup>6</sup> There

*Vermont.* — *Tilton Safe Co. v. Tisdale*, 48 Vt. 83.

*Virginia.* — *Mason v. Chappell*, 15 Gratt. (Va.) 584.

*Wisconsin.* — *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33.

*Illustrations.* — Where a person orders a machine, previously known and ascertained, for which the seller has a patent, it is no defense to an action for the price of the machine that it did not answer the purpose specified in the patent, although it is not shown that the buyer had had previous opportunities of exercising his judgment as to the usefulness of the machine. *Ollivant v. Bayley*, 5 Q. B. 288, 48 E. C. L. 288.

So where the plaintiffs, who were manufacturers of safes, sent to the defendant a safe answering the terms of a written order, viz., "1 No. 4 safe with combination lock," it was held that there was no implied warranty as to the merit or usability of the lock. *Tilton Safe Co. v. Tisdale*, 48 Vt. 83.

So where a contract called for the delivery of a certain kind of coal, designated by its trade name, there was no implied warranty of its fitness for any purpose, or of its qualities other than that it was of the kind specified. *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631.

It was also held that where one contracted to furnish and set up in a mill an engine and boiler of specified make, size, and power, there was no implied warranty that the apparatus would furnish power sufficient to operate the mill. *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.*, 66 Minn. 156.

1. *Warranty Only that Goods Will Correspond with Description.* — *Archdale v. Moore*, 19 Ill. 595; *Wisconsin Red Pressed-Brick Co. v. Hood*, 60 Minn. 401, 51 Am. St. Rep. 539; *Wolcott v. Mount*, 36 N. J. L. 267, 13 Am. Rep. 438; *Cram v. Gas Engine, etc., Co.*, 75 Hun (N. Y.) 316.

2. *Goods Manufactured According to Specifications of Vendee.* — *Cosgrove v. Bennett*, 32 Minn. 371; *O'Neil v. New York, etc., Min. Co.*, 3 Nev. 141. But see *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, a case of express warranty and where the specifications were prepared by the manufacturer.

3. *No Warranty of Goods for Experimental Purposes.* — *Maurer v. Bliss*, 14 Daly (N. Y.) 150, affirmed 116 N. Y. 665. See also *Cosgrove v. Bennett*, 32 Minn. 371.

*Illustration.* — Where a manufacturer contracts to make fireproof brick to be used between the beams in floors of a building, such use being experimental, although brick of this description for use between iron beams had been used before that time, the only warranty is that the brick shall be reasonably good of its kind, and free from defects produced by manufacture and from latent defects. *Maurer v. Bliss*, 14 Daly (N. Y.) 150, affirmed 116 N. Y. 665.

4. *Sales by Manufacturers to Dealers and Other Manufacturers.* — *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *William Anson Wood Mower, etc., Co. v. Thayer*, 50 Hun (N. Y.) 516, *League Cycle Co. v. Abrahams*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 548; *Philadelphia, etc., Coal, etc., Co. v. Hoffman*, (Pa. 1886) 4 Atl. Rep. 848.

5. *Downing v. Dearborn*, 77 Me. 457; *Gautier v. Douglass Mfg. Co.*, 13 Hun (N. Y.) 514; *Park v. Morris Axe, etc., Co.*, 4 Lans. (N. Y.) 103, affirmed 54 N. Y. 586. See also *Jones v. Bright*, 5 Bing. 533, 15 E. C. L. 520.

6. *Liability of Dealer to User — England.* — *Gray v. Cox*, 6 Dowl. & R. 200, 4 B. & C. 108, 10 E. C. L. 283, 1 C. & P. 784, 28 Rev. Rep. 760, 8 Dowl. & R. 220, 5 B. & C. 458, 11 E. C. L. 276, *Gillespie v. Cheney*, (1896) 2 Q. B.

*Georgia.* — *Sims v. Howell*, 49 Ga. 620; *Gammell v. Gunby*, 52 Ga. 504.

*Illinois.* — *Hutchinson v. Cobb*, 43 Ill. App.

are, however, some decisions which are apparently in conflict with the rule stated.<sup>1</sup> This rule, of course, does not extend to cases where the purchaser and the seller have equal means or knowledge as to the fitness of the thing sold for the purpose for which it is sold,<sup>2</sup> or where the dealer informs the buyer that he has no personal knowledge of the article purchased.<sup>3</sup>

**Necessity for Seller to Know Purpose for Which Articles Wanted.** — It is, of course, necessary, in order to raise an implied warranty, that the purpose for which the goods are intended to be used should be known to the seller,<sup>4</sup> and that the buyer should rely on the seller's judgment in regard to the article.<sup>5</sup>

(b) **Liability for Latent Defects.** — Where the vendor is not the manufacturer, and the purchaser knows this fact, the former is not responsible for latent defects in the absence of proof of an express warranty or of fraud and deceit

261; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199.

*Indiana.* — *Zimmerman v. Druecker*, 15 Ind. App. 512.

*Kansas.* — *Smith v. McNair*, 19 Kan. 332, 27 Am. Rep. 117; *Shaw v. Smith*, 45 Kan. 334.

*Kentucky.* — *Miller v. Gaither*, 3 Bush (Ky.) 153.

*Michigan.* — *Little v. Van Syckle*, 115 Mich. 480.

*Minnesota.* — *Shatto v. Abernethy*, 35 Minn. 538.

*Missouri.* — *Armstrong v. Johnson Tobacco Co.*, 41 Mo. App. 254; *Johnson v. Sproull*, 50 Mo. App. 121.

*New York.* — *Newman v. Wilson*, 78 Hun (N. Y.) 295.

*Oregon.* — *Morse v. Union Stock Yard Co.*, 21 Oregon 289.

*Pennsylvania.* — *Leggoe v. Mayer*, 2 Pa. Super. Ct. 529, 39 W. N. C. (Pa.) 247.

*Vermont.* — *Wing v. Chapman*, 49 Vt. 33; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570.

**Illustrations — Seed.** — In a sale of flax seed sold to be used for planting purposes, there is an implied warranty that the seed is of a kind that will grow. *Shaw v. Smith*, 45 Kan. 334; *Johnson v. Sproull*, 50 Mo. App. 121.

So on a sale of wheat for the express purpose of being used for seed for the production of a crop, there is an implied warranty that it is fit for that purpose. *Shatto v. Abernethy*, 35 Minn. 538.

**Fertilizers.** — The vendor of a fertilizer is presumed to warrant that the article sold is reasonably fit for the purpose intended. *Sims v. Howell*, 49 Ga. 620; *Gammel v. Gunby*, 52 Ga. 504. *Contra*, *Farrow v. Andrews*, 69 Ala. 96.

**Hogs.** — Where hogs were purchased for shipment to market and sale therein, it was held that there was an implied warranty on the part of the vendor that they were fit for the purpose, the vendee having no opportunity of inspecting them, but relying on the judgment of the vendor, and both parties understanding for what purpose they were intended. *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570.

**Pianos.** — A dealer who sells a piano by written contract is bound by an implied warranty that the instrument is properly constructed; and that is so though the contract contains no warranty, and it is expressly provided that the vendor will not be responsible for any agreement or understanding between

salesman and purchaser other than those contained in the contract. *Little v. Van Syckle*, 115 Mich. 480.

**Warranty in Case of Repairs Made by Purchaser.** — Where a seller does not expressly refuse to warrant, but points out defects and states how they may be repaired, there is an implied warranty that when those repairs are made the machine will be fit for the purpose for which he knows it to be intended. *Cochran v. Jones*, 85 Ga. 678.

1. See *Farrow v. Andrews*, 69 Ala. 96; *Welsh v. Carter*, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473; *Williams v. Slaughter*, 3 Wis. 347.

2. **Equal Means of Knowledge — How Rule Affected By.** — *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428; *Livingston v. Stevenson*, 163 Pa. St. 262; *Stevens v. Smith*, 21 Vt. 90; *White v. Stelloh*, 74 Wis. 435.

**Illustration.** — Where the plaintiff sold to the defendant old potash kettles which, as the plaintiff knew, were to be used by the defendant in stove making, and the defendant had an opportunity to examine the kettles, and the plaintiff knew of no defect and was guilty of no fraud, it was held that there was no implied warranty of fitness for use and that the defendant was liable for the full price. *Stevens v. Smith*, 21 Vt. 90.

3. **Where Dealer Disclaims Personal Knowledge.** — *Englehardt v. Clanton*, 83 Ala. 336.

4. **To Raise Warranty, Purpose Must Be Known to Seller.** — *Jones v. Padgett*, 24 Q. B. D. 650; *Titley v. Enterprise Stone Co.*, 127 Ill. 457; *Talbot Paving Co. v. Gorman*, 103 Mich. 403; *Charlotte, etc., R. Co. v. Jesup*, (N. Y. Super. Ct. Spec. T.) 44 How. Pr. (N. Y.) 447.

**Indefinite Statement of Purpose.** — A warranty of fitness will not be implied where the statements of the purpose for which a chattel was to be used were indefinite and failed to disclose a material feature of such purpose, and there was no reliance on the seller's judgment. *Morris v. Bradley Fertilizer Co.*, 64 Fed. Rep. 55.

5. **Purchaser Must Rely on Seller's Judgment.** — *Morris v. Bradley Fertilizer Co.*, 64 Fed. Rep. 55.

In the absence of evidence that a particular use of an article is so usual as to affect the manufacturer with a knowledge of the purpose for which it is required, there is no implied warranty that the article is fit for every ordinary purpose for which an article of that description is used. *Jones v. Padgett*, 24 Q. B. D. 650.



upon the part of the seller.<sup>1</sup> Where, however, the seller knows that the buyer relies on the former's judgment and knew or ought to have known of the existence of the defects, there is an implied warranty against latent defects.<sup>2</sup> And the same is true where the seller knows of the defect and fraudulently conceals it from the buyer at the time of the sale.<sup>3</sup>

**By Lessor to User.** — A lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is intended.<sup>4</sup>

(5) *By Grower or Producer to User.* — The liability of a grower or producer of an article or commodity sold for a particular purpose is identical with that of the manufacturer of an article or commodity so sold.<sup>5</sup> This rule obviously has its limits. It does not impute to the seller knowledge as to the qualities or fitness which no human foresight or skill can attain, and raise an implied warranty in respect to them, when the vendor and the purchaser are in equal condition as to the means of knowledge, or the latter must understand from the nature of the case that the information, experience, and knowledge of the vendor are not superior to his own.<sup>6</sup>

### 7. Sales Imposing Exceptional Liability on Seller — *a. SALES OF FOOD* —

(1) *English Rule* — On Sales to Dealer or Middleman. — Blackstone says that in contracts for provisions it is always implied that they are wholesome, and that if they are not wholesome, an action on the case for deceit lies against the vendor.<sup>7</sup> No authority is cited for this proposition and it is believed that the English cases support the rule that at common law there is no implied warranty of quality, fitness, or wholesomeness in the sale of provisions, even when sold by a dealer for immediate domestic use, except in cases where such warranty would be implied from the facts and circumstances of the sale, independently of the fact that the thing sold was an article for domestic consumption. In other words, there are no special implied warranties in the sale of food that do not exist with reference to other articles.<sup>8</sup>

(2) *Rule in United States* — (a) *On Sales to Dealer or Middleman.* — In the United States the rule stated is adopted, at least to this extent: there is no implied

1. *Dealer's Liability for Latent Defects.* — *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476; *American Forcite Powder Mfg. Co. v. Brady*, 4 N. Y. App. Div. 97.

2. *Latent Defects Known to Dealer.* — *Ottis v. Alderson*, 10 Smed. & M. (Miss.) 476.

3. *Fraudulent Concealment of Defects.* — *Downing v. Dearborn*, 77 Me. 457.

4. *Warranty by Lessor of Chattels for Hire.* — *Reynolds v. Roxburgh*, 10 Ont. 649.

5. *Liability of Grower or Producer to User.* — *Merchants', etc., Sav. Bank v. Frazee*, 9 Ind. App. 161, 53 Am. St. Rep. 341; *Weller v. Bectell*, 2 Ind. App. 228; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150.

6. *Limitations of Rule.* — *Scott v. Renick*, 1 B. Mon. (Ky.) 64, 35 Am. Dec. 177; *McQuaid v. Ross*, 85 Wis. 492, 39 Am. St. Rep. 864. But compare *Hutchings v. Cole*, 42 Ill. App. 261.

7. *Statement of Blackstone.* — 3 Black. Com. 165.

8. *No Implied Warranty of Fitness According to English Decisions.* — *Emmerton v. Mathews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. N. S. 261. See also *Burnby v. Bollett*, 16 M. & W. 644, which supports the rule stated in the text, at least by implication; and Benjamin on Sales (6th ed.), § 672, in which the writer, having cited and commented upon 3 Black. Com. 166; *Pasley v. Freeman*, 3 T. R. 51; *Chitty on Contracts* 419 (ed. 1881); *Emmerton v.*

*Mathews*, 7 H. & N. 586, 31 L. J. Exch. 130; and *Burnby v. Bollett*, 16 M. & W. 644, said: "It is submitted that it results clearly from these authorities that the responsibility of a victualer, vintner, brewer, butcher, or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any damage caused by their sale of unwholesome food. *Emmerton v. Mathews*, therefore, when applying the maxim of *caveat emptor* to the sale of an article of food, even when the vendor is a general dealer, if the buyer has bought on his own judgment, without express warranty, does not seem to be at all in contradiction with the earlier authorities, as explained in *Burnby v. Bollett* by Parke, B., and the correctness of the decision has since been confirmed by the Common Pleas Division."

The rule is also recognized by other text writers. See 1 Wharton on Contracts, § 222; 2 Schouler on Personal Property (2d ed.), § 348; *Benjamin on Contracts* (6th ed.), § 672; *Harman v. Bennett*, 1 F. & F. 460; *Stancliffe v. Clarke*, 7 Exch. 439.

*Illustration.* — A salesman who sells in a public market meat which is afterwards found to be unfit for human food, but which he had no means of knowing, or reason to suspect, was other than good and wholesome meat, is not liable upon an action for implied warranty. *Emmerton v. Mathews*, 7 H. & N. 586.



warranty of soundness or wholesomeness arising from the sale of food provisions to a dealer or middleman who buys on the market, not for consumption, but for sale to others.<sup>1</sup>

(b) *On Sales to Consumer by Regular Dealer.* — In case the sale is directly to the consumer the rule is different. In all sales of food provisions by a retail dealer for immediate domestic use there is an implied warranty of fitness and wholesomeness for consumption. The holdings<sup>2</sup> and dicta<sup>3</sup> to this effect are numerous, and they proceed upon the theory that a rule of this nature is necessary for the preservation of health and life.<sup>4</sup>

(c) *On Sales to Consumer by One Not Regular Dealer.* — Whether a warranty would be implied in a sale for domestic use where the vendor is not a regular dealer is not well settled. In one case it is held that a warranty will be implied.<sup>5</sup> On the other hand, it is said in one case<sup>6</sup> and held in another<sup>7</sup> that there will

**1. No Warranty on Sales to Dealer or Middleman** — *Illinois.* — *Wiedeman v. Keller*, 171 Ill. 93, reversing 58 Ill. App. 382.

*Indiana.* — *Humphreys v. Comline*, 8 Blackf. (Ind.) 516.

*Kentucky.* — *Jones v. Murray*, 3 T. B. Mon. (Ky.) 83.

*Louisiana.* — *Rocchi v. Schwabacher*, 33 La. Ann. 1364.

*Massachusetts.* — *Winsor v. Lombard*, 18 Pick. (Mass.) 57; *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608.

*Minnesota.* — *Hanson v. Hartse*, 70 Minn. 282; *Ryder v. Neitge*, 21 Minn. 70.

*New York.* — *Goldrich v. Ryan*, 3 E. D. Smith (N. Y.) 324; *Moses v. Mead*, 5 Den. (N. Y.) 617; *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234; *Cotton v. Reed*, (County Ct.) 25 Misc. (N. Y.) 380.

*Pennsylvania.* — *Cannon v. Young*, 19 Pa. Co. Ct. 239, 5 Pa. Dist. 772.

*Tennessee.* — *Goad v. Johnson*, 6 Heisk. (Tenn.) 340.

*Texas.* — *Battaglia v. Thomas*, 5 Tex. Civ. App. 563.

**Applications of Rule.** — In the sale of a live cow by a farmer to a retail butcher, there is no implied warranty that she is fit for food, although the seller knows that the animal is bought to be cut up into beef for immediate domestic consumption. *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Cotton v. Reed* (County Ct.) 25 Misc. (N. Y.) 380. But compare *Money v. Fisher*, 92 Hun (N. Y.) 347.

So it has been held that a drover selling beef cattle to a butcher does not imply a warranty that they are not bruised. *Goldrich v. Ryan*, 3 E. D. Smith (N. Y.) 324.

**Effect of Fraud on Part of Seller.** — In case the seller of food provisions makes fraudulent representations as to the article which he is selling, he will be liable as on an implied warranty. *Burch v. Spencer*, 15 Hun (N. Y.) 504.

**Exceptions to Rule — Sale of Bread.** — It has been held in one decision that a baker impliedly warrants the wholesomeness of the bread which he sells at a discount to a peddler who distributes it. This is clearly a case of a sale to a middleman, but the court reasoned that bread is an article sold for immediate consumption and never enters into commerce, and as one of the prime necessities of life is of no use unless it is good for food; that the peddler was in fact a mere go-between for the baker and his customers, as he was only required to pay for the bread he sold, receiving

the discount from the retail price. *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327.

**2. Warranty on Sales Directly to Consumer — Decisions.** — *Wiedeman v. Keller*, 171 Ill. 93, reversing 58 Ill. App. 382; *Craft v. Parker*, 96 Mich. 245; *Money v. Fisher*, 92 Hun (N. Y.) 347; *McNaughton v. Joy*, 1 W. N. C. (Pa.) 470.

**Illustrations.** — Where butter and potatoes were sold for table use, it was held that there was an implied warranty that they were fit for such use and were wholesome. *McNaughton v. Joy*, 1 W. N. C. (Pa.) 470. See also *Money v. Fisher*, 92 Hun (N. Y.) 347.

**3. Dicta.** — *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429; *Jones v. Murray*, 3 T. B. Mon. (Ky.) 83; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Ryder v. Neitge*, 21 Minn. 70; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Moses v. Mead*, 1 Den. (N. Y.) 387, 43 Am. Dec. 676.

**4. Reason for Rule.** — See *Hoover v. Peters*, 18 Mich. 51; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339.

**Limitations of Rule — Sale of Canned Goods.** — In a recent decision it was held that there is no implied warranty on the sale of canned food, not prepared for the seller, that it is fit for food. In reaching this decision the court reasoned as follows: The doctrine of implied warranty proceeds upon the assumption that the vendor had some means of knowledge, opportunities for inspection, or sources of information with regard to the article, which are not accessible or are unknown to the purchaser. Those who purchase ought to be presumed to know that the retail merchant who sells to the consumer food in sealed cans, and with which he has no connection other than as conduit between packer and consumer, has no other means of knowing the contents of the cans than the purchaser has, and in that event, if the purchaser desires to protect himself, he may ask for an investigation at the time of purchase, or he may get an express warranty as to the quality of the goods; and if he fails to do this, the maxim *caveat emptor* must apply. *Julian v. Laubenberger*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 646.

**5. Whether Warranty Arises if Vendor Is Not Regular Dealer — Affirmative View.** — *Hoover v. Peters*, 18 Mich. 51.

**6. Negative View.** — *Wiedeman v. Keller*, 171 Ill. 93.

**7. Giroux v. Stedman**, 145 Mass. 439, 1 Am. St. Rep. 472.

be no warranty under such circumstances.

(d) *On Sales of Food for Cattle.* — The courts have refused to extend the rule to food sold for consumption by domestic animals, holding that the rule is recognized on the grounds of public policy, only for the protection of human health.<sup>1</sup> Of course there is an implied warranty that the feed is reasonably fit for food, if the purchaser has no opportunity to inspect it,<sup>2</sup> or if the seller turns it over to the buyer without disclosing latent defects of which he has knowledge.<sup>3</sup>

b. *SALES OF DRUGS.* — In the sale of drugs, medicines, or chemicals, the rule *caveat emptor* does not apply if the purchaser is not an expert, and buys in reliance upon the knowledge and skill of the druggist. In such case there is an implied warranty that the thing sold is what it purports to be, fit for the uses to which it is usually put or for which a druggist has recommended it, and that it is not another or a more dangerous drug than the one called for by the purchaser.<sup>4</sup> For a breach of this warranty the druggist is liable in damages, and if he sells as a harmless drug a dangerous and poisonous one he is liable for any injuries that follow, even though such sale was to a dealer who sold again to the person injured, relying on the knowledge, skill, and representations of the original seller.<sup>5</sup>

8. *Implied Warranty that Goods Sold Are Manufacturer's Own Make.* — Whether a manufacturer who is not otherwise a dealer impliedly warrants that he will fill orders for articles of the kind he manufactures, with goods of his own make, does not seem to be well settled. There are rulings both ways on this question.<sup>6</sup>

9. *Time Covered by Warranty.* — An implied warranty extends only to defects existing at the time of the sale.<sup>7</sup> Therefore, if the chattel is sound at the time of the sale, the implied warranty of soundness is complied with although it was unsound at the time of delivery.<sup>8</sup>

10. *No Implied Warranty in Executed Contract of Sale.* — In executed contracts of sale of personal property the rule of the common law is *caveat emptor*, and there is no implied warranty as to the quality of the article sold.<sup>9</sup>

1. *No Implied Warranty in Sales of Food for Cattle.* — *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429. In this case a farmer bought of a miller a sack of bran for his cows. Before it was removed from the mill, two copper clasps fell into it, and one of the cows swallowed them and was killed thereby. The bran was part of a quantity on hand, open to inspection, and there was no express warranty. The court held that the buyer had no remedy against the miller.

2. *Warranty Implied When Purchaser Does Not Inspect.* — *Coyle v. Baum*, 3 Okla. 695.

3. *Or Where Dealer Does Not Disclose Latent Defects.* — *French v. Vining*, 102 Mass. 112. A defect. — 440, in which case it was held that if a person sells, for the purpose of being fed to a cow, a lot of hay on which he knows white lead to have been spilt, and the cow dies from the effects of the lead, he is liable for the loss although he carefully endeavored to separate and remove the damaged hay and thought he had succeeded.

4. *Sales of Drugs.* — *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280.

*Application of Rule.* — Where a druggist, not being applied to for Paris green, knowing that it was required for killing cotton worms, delivered an inferior article as Paris green, without express warranty, he was nevertheless held liable in damages for the failure of the

crop caused thereby. *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

5. *Liability of Original Seller.* — *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

6. *That Warranty Is Implied in Such Case.* — In *Johnson v. Raylton*, 7 Q. B. D. 439, it was held that where goods are purchased of a manufacturer not otherwise a dealer in them, in the absence of any custom or usage to the contrary there is an implied condition that the goods are of the seller's own make, and it is immaterial whether the goods proposed for delivery are as good as or even better than similar goods of the seller's own make.

*That Warranty Is Not Implied in Such Case.* — In *West Stockton Iron Co. v. Neilson*, 17 Scot. L. Rep. 719, the court laid down the opposite doctrine from that stated in the preceding note, and this rule was followed in the later decision of *Johnson v. Nicoll*, 18 Scot. L. Rep. 268.

7. *Defects Existing at Time of Sale.* — *Pestel v. Oard*, 1 Ind. App. 252; *Garrett v. Heaston*, 5 Blackf. (Ind.) 349; *Price v. Barr*, Litt. Sel. Cas. (Ky.) 217; *Stamm v. Kuhlmann*, 1 Mo. App. 296.

8. *No Liability for Unsoundness at Time of Delivery.* — *Price v. Barr*, Litt. Sel. Cas. (Ky.) 217. See also *Joliff v. Bendell*, R. & M. 136, 21 E. C. L. 397.

9. *No Implied Warranty in Executed Contracts of Sale.* — *McClung v. Kelley*, 21 Iowa 508;



Fraud will, however, prevent the application of the maxim in such a case.<sup>1</sup> Whether a contract is executed or executory is a question to be determined by the jury from all the facts and circumstances of the case.<sup>2</sup>

**VI. IMPLIED WARRANTY IN PAROL GIFT.** — The law implies no warranty in the case of a parol gift of a chattel.<sup>3</sup>

**VII. IMPLIED WARRANTY ON EXCHANGE OF PROPERTY** — **Warranty of Title.** — A warranty of title is implied upon an exchange the same as upon a sale of chattels, and this warranty is as much a part of the contract as if it had been express.<sup>4</sup> The warranty is not confined to a party's right to exchange property, but is in substance a warranty that his title is perfect and free from all liens and incumbrances.<sup>5</sup>

**Warranty of Quality.** — As a general rule there is no implied warranty of quality upon an exchange of chattels.<sup>6</sup>

**VIII. IMPLIED WARRANTY ON SALES OF SECOND-HAND CHATTELS.** — In the sale of second-hand chattels, there is ordinarily no implied warranty of quality, or that they are fit for the purpose for which they were made.<sup>7</sup>

**IX. IMPLIED WARRANTY IN SALES OR TRANSFERS OF CHOSSES IN ACTION** — **Statement of Rule.** — It is a general rule that one making a sale or transfer of a chose in action warrants its genuineness, and this is so whether he warrants it

Cleu v. McPherson, 1 Bosw. (N. Y.) 480; Hart v. Wright, 17 Wend. (N. Y.) 267; Perkins v. Harrison, (N. Y. City Ct. Tr. T.) 2 City Ct. (N. Y.) 111; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; McNeal v. Banks, 6 Kulp (Pa.) 371.

**Purchaser Takes Property Regardless of Defects.** — As a general rule, in completed sales the purchaser must take the property regardless of defects, unless there has been an express warranty, false representation, or fraudulent concealment, while in executory sales the contract always carries an obligation that the article sold shall be merchantable or at least not have any remarkable defects. McClung v. Kelley, 21 Iowa 508.

**1. Except in Cases of Fraud.** — McClung v. Kelley, 21 Iowa 508; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; McNeal v. Banks, 6 Kulp (Pa.) 371.

**2. Whether Contract Executed or Executory Question for Jury.** — McClung v. Kelley, 21 Iowa 508; Cleu v. McPherson, 1 Bosw. (N. Y.) 480.

**3. Warranty in Case of Parol Gifts.** — Pate v. Barrett, 2 Dana (Ky.) 427.

**4. Implied Warranty on Exchange of Property.** — Gaylor v. Copes, 16 Fed. Rep. 49; Hunt v. Sackett, 31 Mich. 18; Close v. Crossland, 47 Minn. 500; Sargent v. Currier, 49 N. H. 310, 6 Am. Rep. 524; Rivers v. Grugett, 1 McCord L. (S. Car.) 100, 10 Am. Dec. 654; Patee v. Pelton, 48 Vt. 182; Byrnside v. Burdett, 15 W. Va. 702. See the title EXCHANGE OF PROPERTY, vol. II, p. 576 *et seq.*

**5. Sargent v. Currier,** 49 N. H. 310, 6 Am. Rep. 524.

**Illustration of Rule.** — A warranty of title is to be implied from a contract, as much in the case of exchange of horses then in the possession of those making the trade as upon a sale. Byrnside v. Burdett, 15 W. Va. 702.

**Giving of Property in Payment.** — When, in case of a settlement between debtor and creditor, property wholly outside of the differences between the parties is given in payment, there

is an implied warranty of title the same as in the case of a sale or exchange of property. Gaylor v. Copes, 16 Fed. Rep. 49.

**6. La Neuville v. Nourse,** 3 Campb. 351; Power v. Wells, 1 Dougl. 24, note 8; Gibson v. Hammell, Tappan (Ohio) 79. See also Emanuel v. Dane, 3 Campb. 299; Crevier v. Chayer, 3 Montreal Leg. N. 84.

**Warranty of Quality — How Affected by Custom.** — Where a contract for an exchange of yachts was effected by the plaintiff through the defendant's agent, who represented to the plaintiff that the defendant's yacht was away from the city, and did not, until the day on which the contract was signed, inform him that it was in port, and where there was a custom, in buying and selling yachts, to rely on the representations made as to their condition and completeness of outfit, and it was known that the plaintiff intended to rely on the representations made to him, it was held that the rule of *caveat emptor* did not apply. Dawson v. Chisholm, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 171.

**7. Second-hand Chattels.** — Ramming v. Caldwell, 43 Ill. App. 175; Cogel v. Kniseley, 89 Ill. 598; Holden v. Clancy, 58 Barb. (N. Y.) 590.

Where a second-hand engine with defects known to the seller was examined by the buyer and an expert chosen by him, without discovery of the defects, it was held that the failure of the seller to disclose the defects, under the circumstances, did not charge him with an implied warranty. Cogel v. Kniseley, 89 Ill. 598.

**Implied Warranty that Article Is New.** — A purchase of a machine from a dealer implies that the machine shall be new — that is, not second-hand, or the worse for wear — and under an order, therefore, the dealer cannot impose upon the vendee a second-hand and worn machine, whether it complies or fails to comply with the terms of his warranty that it is well made and that it will do as good work as any machine of its class. Grieb v. Cole, 60 Mich. 397, 1 Am. St. Rep. 533.



in terms or is silent at the time when the sale or transfer is made.<sup>1</sup> The seller does not, however, undertake that the instrument is worth what it represents, but merely that it is what it purports to be. He only warrants the genuineness of the claim.<sup>2</sup>

**Applications of Rule Bills and Notes.** — The general principles in regard to the implied warranties arising from the transfer of a bill of exchange or promissory note have already been stated.<sup>3</sup>

**Shares of Stock.** — There is an implied warranty that shares of stock sold or

**1. Warranty in Sales or Transfers of Choses in Action.** — *Tyler v. Bailey*, 71 Ill. 34; *Flynn v. Allen*, 57 Pa. St. 482.

**2. Genuineness Only Warranty Implied.** — *Flynn v. Allen*, 57 Pa. St. 482; *Lyons v. Dibelbis*, 22 Pa. St. 185.

**3. Bills and Notes.** — See the titles **BILL AND NOTE BROKERS**, vol. 4, p. 51; **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 481. In addition to the cases cited under these titles, see the following on the points indicated by the headlines:

**Warranty of Title and Genuineness Implied.** — *Alleman v. Wheeler*, 101 Ind. 144.

**Express Refusal to Warrant.** — If, at the time of the sale of a promissory note, the vendor expressly declines to warrant the genuineness thereof, there can be no implied warranty of genuineness. *Bell v. Dagg*, 60 N. Y. 528.

**Warranty Implied of a Valid and Subsisting Obligation.** — *Mandeville v. Newton* 119 N. Y. 10; *Earnest v. Barrett*, 6 Ind. App. 371; *Curtis v. Brooks*, 37 Barb. (N. Y.) 476; *Marshall v. Morgan*, 58 Vt. 60; *White v. Stelloh*, 74 Wis. 435; *Daskam v. Ullman*, 74 Wis. 474; *Hurd v. Hall*, 12 Wis. 112; *Giffert v. West*, 33 Wis. 617.

The rule that there is an implied warranty, upon the purchase of a note, that it is a valid obligation does not apply in favor of one who purchases a note from the holder for the purpose of securing the benefit of collateral security under an arrangement with the makers of the note, who are his debtors, that he may apply the surplus to the payment of his debt. *Mandeville v. Newton*, 119 N. Y. 10.

**Warranty Implied that Instrument Is Unpaid.** — *White v. Stelloh*, 74 Wis. 435; *Daskam v. Ullman*, 74 Wis. 474.

**Warranty Implied of Legal Capacity of Parties to Instrument.** — *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682. *Contra*, *Baldwin v. Van Deusen*, 37 N. Y. 487.

**Warranty Implied of Power to Act in Representative Capacity.** — *Hussey v. Sibley*, 66 Me. 192, 22 Am. Rep. 557.

**Warranty that Instrument Has Not Been Materially Altered.** — *Jones v. Ryde*, 5 Taunt. 488, 1 E. C. L. 166.

**Warranty Against Defense Arising from Seller's Acts.** — *Smith v. Corege*, 53 Ark. 295; *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Ross v. Terry*, 63 N. Y. 613.

**Warranty that Seller Knows of No Defense.** — *Benjamin's Chalmers's Dig. Law of Bills of Exchange*, art. 226; *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 476; *Bridge v. Batchelder*, 9 Allen (Mass.) 394; *Willson v. Force*, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195.

**Undisclosed Insolvency of Maker.** — If the seller of a note knows at the time of sale that the parties to it are insolvent, the sale is a fraud on the purchaser, and the latter may recover the consideration paid for the instrument. *Bridge v. Batchelder*, 9 Allen (Mass.) 394; *Willson v. Force*, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195.

**Warranty of Genuineness of Signature** — *England.* — *Jones v. Ryde*, 5 Taunt. 488, 1 E. C. L. 166.

*Arkansas.* — *Smith v. Corege*, 53 Ark. 295.

*Connecticut.* — *Eagle Bank v. Smith*, 5 Conn. 74, 13 Am. Dec. 37; *Terry v. Bissell*, 26 Conn. 31.

*Hawaii.* — *Dana v. Angel*, 1 Hawaii 180.

*Illinois.* — *Wolverton v. Sumner*, 53 Ill. App. 115.

*Indiana.* — *Earnest v. Barrett*, 6 Ind. App. 371; *Alleman v. Wheeler*, 101 Ind. 144; *Hoffman v. Hollingsworth*, 10 Ind. App. 353.

*Kentucky.* — *Marshall v. Peck*, 1 Dana (Ky.) 612; *Glass v. Read*, 2 Dana (Ky.) 168; *Wynn v. Poynter*, 3 Bush (Ky.) 55.

*Louisiana.* — *Michel v. Valentine*, 10 Rob. (La.) 404.

*Minnesota.* — *Brown v. Ames*, 59 Minn. 476.

*New York.* — *Baldwin v. Van Deusen*, 37 N. Y. 492; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298; *Whitney v. National Bank*, 45 N. Y. 303; *Bell v. Dagg*, 60 N. Y. 528.

*Ohio.* — *Lamson v. Pfaff*, 1 Handy (Ohio) 449.

*Pennsylvania.* — *Haldeman v. Pennsylvania Cent. R. Co.*, 50 Pa. St. 441, 88 Am. Dec. 549.

*South Carolina.* — *Strange v. Ellison*, 2 Bailey L. (S. Car.) 385.

*Tennessee.* — *Barton v. Trent*, 3 Head (Tenn.) 167.

*Vermont.* — *Allen v. Clark*, 49 Vt. 590.

But compare *Baxter v. Duren*, 29 Me. 434, 50 Am. Dec. 602; *Fisher v. Rieman*, 12 Md. 497; *Ellis v. Wild*, 6 Mass. 321.

**No Warranty of Solvency of Parties.** — *Kentucky.* — *Markley v. Withers*, 4 T. B. Mon. (Ky.) 542; *Hurst v. Chambers*, 12 Bush (Ky.) 155.

*Maine.* — *Milliken v. Chapman*, 75 Me. 306, 46 Am. Rep. 386.

*Massachusetts.* — *Day v. Kinney*, 131 Mass.

*Rhode Island.* — *Aldrich v. Jackson*, 5 R. I. 218; *Bicknell v. Waterman*, 5 R. I. 43; *Burgess v. Chapin*, 5 R. I. 225; *Beckwith v. Farnum*, 5 R. I. 230.

*Virginia.* — *Lyons v. Miller*, 6 Gratt. (Va.) 427, 52 Am. Dec. 129.

*Wisconsin.* — *Hurd v. Hall*, 12 Wis. 112; *Giffert v. West*, 33 Wis. 617.

transferred are genuine,<sup>1</sup> but not that they are valuable,<sup>2</sup> or that they have not been fraudulently issued in excess of the charter limit,<sup>3</sup> or that they will not depreciate in value, whether from causes before or after the sale,<sup>4</sup> or that the corporation issuing the stock was a corporation *de jure*.<sup>5</sup>

**Bonds.** — There is also an implied warranty of genuineness in the sale of all kinds of bonds.<sup>6</sup> A purchaser may therefore recover back the money paid on them if they prove to be counterfeit.<sup>7</sup> There is, however, no liability on the part of the seller if the bonds are held void for want of authority in the legislature to pass the acts under which they were issued,<sup>8</sup> or in case they prove to be a fraudulent reissue of genuine bonds,<sup>9</sup> or in case they are void for want of corporate existence of the city issuing them,<sup>10</sup> or in case they prove to be a fraudulent overissue.<sup>11</sup> It has been held, however, in a recent decision of the United States Supreme Court, which is somewhat hard to distinguish from other decisions of that court cited in this section, that an implied warranty of the validity of state bonds as existing obligations arises on a sale of such bonds having the genuine signature of state officers and the seal of the state thereon, and appearing on their face to be valid (and which are believed by both parties to the sale to be valid), but which have been declared void by a constitutional provision enacted after their issuance.<sup>12</sup>

**Other Choses in Action.** — On a sale of accounts there is an implied warranty

**1. Stock — Genuineness.** — *Titus v. Poole*, 73 Hun (N. Y.) 383; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

**2. No Warranty of Value.** — *Jones v. Garlington*, 44 S. Car. 533.

**3. No Warranty that Stock Has Not Been Overissued.** — *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

**4. No Warranty Against Depreciation.** — *Harter v. Eltzroth*, 111 Ind. 159.

**No Warranty of Title of Corporation to Property Held by It.** — The transferrer of stock without representation or specification as to the particular property held by the corporation warrants only his title to the stock, and not the title of the corporation to the property held by it. *State v. North Louisiana, etc.*, R. Co., 34 La. Ann. 947.

**5. No Warranty of Existence of Corporations Issuing.** — *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

**Warranty that Stock Has Been Issued by Proper Officers.** — There is an implied warranty that shares of corporate stock have been issued by the duly constituted officers of the company. *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

**6. Bonds — Government.** — *Young v. Cole*, 3 Bing. N. Cas. 724, 32 E. C. L. 302; *Otis v. Cullum*, 92 U. S. 447 (city bonds); *Utley v. Donaldson*, 94 U. S. 29 (railroad bonds); *Meyer v. Richards*, 46 Fed. Rep. 727 (city bonds); *Sutro v. Rhodes*, 92 Cal. 117 (county bonds); *McCay v. Barber*, 37 Ga. 423 (coupons attached to bonds); *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117 (school bonds); *Emmerson v. Claywell*, 14 B. Mon. (Ky.) 15 (bond for land or money); *Winstell v. Hehl*, 6 Bush. (Ky.) 62 (bond for land or money); *Pugh v. Moore*, 44 La. Ann. 209 (state bonds); *Herwig v. Richardson*, 44 La. Ann. 703 (state bonds); *Donaldson v. Newman*, 9 Mo. App. 235 (railroad bonds); *Kauffelt v. Leber*, 9 W. & S. (Pa.) 93 (indemnity bond); *Flynn v. Allen*, 57 Pa. St. 482 (township bonds); *Ruohs v. Chatta-*

*nooga Third Nat. Bank*, 94 Tenn. 57 (town bonds).

**What Is Not a Waiver of Warranty of Genuineness.** — Parties sent a telegram in response to a bid for certain bonds, saying, "We accept your offer," and also mailed a letter in which after saying, "We accept your offer," etc., they said, "We would further add that we have purchased the bonds from a party strange to us, and not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central all O. K.). We do not doubt the bonds, but, coming to us through strange parties, we use this as a precaution, and [are] not willing to take any risk." The buyers, who had already sold the bonds "to arrive," before receipt of the letter, having had only a few minutes in which to examine the bonds, telegraphed that they were all correct. It was held, on discovery that the bonds were counterfeit, that the implied warranty of genuineness had not been waived by the contract. *Utley v. Donaldson*, 94 U. S. 29.

**7. Counterfeit Bonds.** — *Utley v. Donaldson*, 94 U. S. 29. See also *Donaldson v. Newman*, 9 Mo. App. 235.

**8. Issued under Unconstitutional Act of Legislature.** — *Otis v. Cullum*, 92 U. S. 447. See also *Memphis First Nat. Bank v. Oldham*, 6 Lea (Tenn.) 728, in which case it was said that a loss on county bonds declared void by the courts after the sale thereof, because of the unconstitutionality of the act under which they were issued, would probably fall on the purchaser.

**9. Fraudulent Reissue.** — *Meyer v. Richards*, 46 Fed. Rep. 727.

**10. Issued by Body Without Corporate Existence.** — *Ruohs v. Chattanooga Third Nat. Bank*, 94 Tenn. 57.

**11. Fraudulent Overissue.** — *Sutro v. Rhodes*, 92 Cal. 117.

**12. Meyer v. Richards**, 163 U. S. 385.

that they are genuine<sup>1</sup> and free from set-off.<sup>2</sup> So a party who transfers a judgment must be held to an implied warranty that there is such a judgment and that the defendant is liable to pay it.<sup>3</sup> but there is no implied warranty that the proceedings are free from error and the judgment irrevocable.<sup>4</sup> There is an implied warranty of genuineness in the sale of land warrants,<sup>5</sup> county warrants,<sup>6</sup> certificates of indebtedness,<sup>7</sup> transportation tickets,<sup>8</sup> bank bills or money,<sup>9</sup> treasury notes,<sup>10</sup> drafts<sup>11</sup> and public securities,<sup>12</sup> and in *England* statutory provisions give rise to the implication of the genuineness of trademarks.<sup>13</sup>

#### X. IMPLIED WARRANTY IN SALES OF PATENTS. — On a mere sale of the ven-

**1. Applications of Rule — Accounts.** — *Gilchrist v. Hilliard*, 53 Vt. 592, 38 Am. Rep. 706; *Kingsley v. Fitts*, 55 Vt. 293; *Marshall v. Morgan*, 58 Vt. 60.

**2. *Gilchrist v. Hilliard***, 53 Vt. 592, 38 Am. Rep. 706.

**To What Extent Seller Liable.** — If accounts sold are not due and owing, the seller must refund the consideration paid and must pay the reasonable expenses of the buyer's suit in which he sought to collect the accounts. *Kingsley v. Fitts*, 55 Vt. 293.

**3. Judgments.** — *Lile v. Hopkins*, 12 Smed. & M. (Miss.) 299, 51 Am. Dec. 115.

**4. No Warranty that Judgment Is Not Reversible.** — *Glass v. Read*, 2 Dana (Ky.) 168. See also *Colburn v. Mathews*, 1 Strobb. L. (S. Car.) 232, in which case it was held that there was no implied warranty that the judgment, which was by confession, was not fraudulently confessed.

**Sale of Judgments Distinguished from Sale of Forged Notes.** — The sale of a reversible judgment is not like the sale of a forged note. The sale of a note is accompanied with an implied warranty of its genuineness, because the vendee can never be presumed to be cognizant of the fact that it is a forgery. But the reversibility or irreversibility of a judgment depends upon whether it has a proper legal foundation or not, which again depends upon what the law is with regard to that particular case, and of this all men are presumed to be equally cognizant. *Glass v. Read*, 2 Dana (Ky.) 168.

**5. Land Warrants.** — *Tyler v. Bailey*, 71 Ill. 34; *Presbury v. Morris*, 18 Mo. 165; *Boyd v. Anderson*, 1 Overt. (Tenn.) 438, 3 Am. Dec. 762.

**Liability of Seller in Case of Forgery.** — Where land warrants which have been transferred are subsequently ascertained to be counterfeit, an obligation accrues to restore the purchase money to the purchaser. *Tyler v. Bailey*, 71 Ill. 34.

**6. County Warrants.** — *Rogers v. Walsh*, 12 Neb. 28; *Walsh v. Rogers*, 15 Neb. 309. In this case it was held that where one purchases what purport to be and are supposed to be the genuine warrants of a county, but which are void because issued without authority, the purchaser, upon discovering their true character, may at once rescind the contract of purchase and recover the price paid for them. This holding is clearly against the weight of authority.

**Town Orders.** — By the sale of a town order, the seller impliedly warrants that it is a genuine order and that the drawee and acceptor

had authority to draw and accept it. *Hussey v. Sibley*, 66 Me. 192, 22 Am. Rep. 557.

**School Orders.** — A sale of school orders does not involve any warranty that the officer who issued them had authority to do so. *White v. Robinson*, 50 Mich. 73.

**7. Certificates of Indebtedness.** — *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523. In this case it appeared that the plaintiff purchased of the defendant, through a broker, what purported to be certificates of a corporation declaring a scrip dividend of ten per cent. on the amount of its capital stock, with interest payable at the option of the company. It being shown that the certificate had been declared void by a decree in chancery, the court held that the plaintiff was entitled to recover the money thus paid.

**8. Transportation.** — *Elston v. Fieldman*, 57 Minn. 70. But it was held in this case that the mere sale of the ticket did not bind the seller for anything except its genuineness, and that by the sale he did not undertake to transport the buyer or guarantee that the carrier would do so.

**9. Bank Bills or Money.** — *Tyler v. Bailey*, 71 Ill. 34; *Buck v. Doyle*, 4 Gill (Md.) 478, 45 Am. Dec. 176; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446; *Edmunds v. Digges*, 1 Gratt. (Va.) 359, 42 Am. Dec. 561.

It must be presumed that he who passes a bill as money passes it as genuine, and the law implies an assumptit or warranty that it is so, and if the bill should be counterfeit and worthless, this implied promise is, immediately upon passing the bill, broken, and action will lie for the breach; nor does it matter whether he who passes it knows or is ignorant of the fact that it is a counterfeit. *Watson v. Cresap*, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572.

**No Warranty of Value of Banknote.** — Although there is an implied warranty of genuineness on the sale of a banknote, there is no implied warranty of its value. *Edmunds v. Digges*, 1 Gratt. (Va.) 359, 42 Am. Dec. 561.

**10. Treasury Notes.** — *Michel v. Valentine*, 10 Rob. (La.) 404.

**11. Drafts.** — *Chambers v. Union Nat. Bank*, 78 Pa. St. 205.

**That Acceptance Is Drawn Against Funds.** — No warranty or representation by the seller of an acceptance that it is drawn against funds or is not accommodation paper can be implied. *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481.

**12. Public Securities.** — *Turner v. Tuttle*, 1 Root (Conn.) 351.

**13. Trademarks.** — *Benjamin on Sales* (6th ed.) § 471.



dor's right or interest in a patent, there is no implied warranty of the validity of the patent. The vendee is merely placed in the vendor's position.<sup>1</sup> If, however, the vendor assumes to sell or assign letters patent, a different question is presented. There is some conflict of authority as to whether there is an implied warranty of title to or validity of the patent. In *England* it has been held that there is no warranty in such cases,<sup>2</sup> and this view has been approved in *Canada*.<sup>3</sup> Although there is one decision in the *United States* to the same effect,<sup>4</sup> the weight of authority, as shown by numerous decisions and dicta, is that on the sale or assignment of a patent there is an implied warranty of the title to or the validity of the patent, and that it is not wholly useless.<sup>5</sup> As regards usefulness it has been held that the vendor is entitled to recover the full price if the patent is of any value whatever.<sup>6</sup> So it has been held that the invalidity of the patent is no defense to an action to recover royalties for the use of the patent for the time during which the defendants enjoyed the use under the license,<sup>7</sup> and a mere notice by a third

**1. Sale of Vendor's Right or Interest.** — Biddle on Chattel Warranties, § 257.

**2. Sales of Patents — English Rule.** — Hall v. Conder, 2 C. B. N. S. 22, 89 E. C. L. 22. In this case it was held that where an agreement recited that the plaintiff had invented a method for the prevention of boiler explosions, and that he transferred to the defendants one-half of his patent, there was no warranty, in the absence of a showing of fraud, that the plaintiff was the true inventor or that the invention was useful or new.

**3. Canadian Rule.** — Gray v. Billington, 21 U. C. C. P. 288.

**4. Hiatt v. Twomey**, 1 Dev. & B. Eq. (21 N. Car.) 318, in which case it was said: "The subject-matter is not relative to any corporeal thing, either real or personal, but to something intangible and incorporeal, resting wholly in grant. In contracts for the assignment of such interests, if there be no fraud, the purchaser must depend, in case they prove of no value, wholly upon his covenants. \* \* \* The loss must fall wherever the bargain leaves it."

**5. Warranty of Title, Validity, and Usefulness — United States.** — Wilder v. Adams, 2 Woodb. & M. (U. S.) 331; Faulks v. Kamp, 17 Pat. Off. Gaz. 851.

*Connecticut.* — Bull v. Pratt, 1 Conn. 346; Johnson v. Willimantic Linen Co., 33 Conn. 442.

*Indiana.* — McClure v. Jeffrey, 8 Ind. 80.

*Massachusetts.* — Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Dickinson v. Hall, 14 Pick. (Mass.) 220, 25 Am. Dec. 390; Harlow v. Putnam, 124 Mass. 553.

*Missouri.* — Jolliffe v. Collins, 21 Mo. 343.

*New Hampshire.* — Earl v. Page, 6 N. H. 480; Holden v. Curtis, 2 N. H. 61.

*New York.* — Van Ostrand v. Reed, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529.

*Ohio.* — Darst v. Brockway, 11 Ohio 462.

*Pennsylvania.* — McDowell v. Meredith, 4 Whart. (Pa.) 311; Geiger v. Cook, 3 W. & S. (Pa.) 266; Bellas v. Hays, 5 S. & R. (Pa.) 427, 9 Am. Dec. 385; Angier v. Eaton, 98 Pa. St. 594.

*Wisconsin.* — Costigan v. Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

**Reason for Rule.** — In sales of personal property there is an implied warranty that the

vendor has title to the property. A patent, if valid, confers an exclusive right to use, vend, etc., and the dealers in such property, unless it is expressly stipulated to the contrary, should ever be held to the same implications which the law raises against the vendor of any species of personal property. Darst v. Brockway, 11 Ohio 462.

**Where Invention Is Useless, Good Faith of Vendor Immaterial.** — In an action upon a note given upon a patent right, the plaintiff cannot recover if it appears that the invention for which the patent was granted was not new and useful, although both parties acted in good faith. Geiger v. Cook, 3 W. & S. (Pa.) 266; McClure v. Jeffrey, 8 Ind. 80.

**Effect of Knowledge by Vendee that Vendor's Title Is Questionable.** — If the patentee, in consideration of a royalty, grants to another a license to use his patent, and the latter uses it, and the patentee's right is in litigation, and that fact is known to the licensee, as long as he is not interfered with he cannot plead in defense that the invention was not new nor that the patentee was not the first inventor. Jones v. Burnham, 67 Me. 93, 24 Am. Rep. 10.

**No Warranty of Fitness for Particular Purpose.** — When a man purchases a patented article, with a known title, there is no implied warranty that it will answer any particular purpose, but it is for the jury to say whether there was any express warranty, and the mere fact that in printed invoices or prospectuses the invention is described as effecting an object is not in itself conclusive evidence of a warranty. Prideaux v. M'Murray, 2 F. & F. 225.

*Vaughan v. Porter*, 16 Vt. 266.

**Adequacy of Consideration Not Involved.** — If the patent is void the consideration fails, but if it is valid the court will not inquire into the adequacy of the consideration. Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435.

**Invalidity of Patent — When No Defense.** — Lawes v. Purser, 38 Eng. L. & Eq. 48; Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43, 82 N. Y. 526.

**The Licensee Must Pay for the Privilege of Using the Patents** until he can show that they have been rescinded or revoked, or until notice has been given that he will not pay any more under the contract. Lawes v. Purser, 38 Eng. L. & Eq. 48.

person of his claim that an article purchased infringes a patent owned by him is not of itself an eviction of a purchaser so as to show a breach of the seller's implied warranty of a right to use.<sup>1</sup>

**XI. IMPLIED WARRANTY IN OFFICIAL AND JUDICIAL SALES — 1. As to Title — Sheriff's Sales.** — In sales of property by a sheriff there is no implied warranty of title, and the rule applies with equal force whether the property is personal<sup>2</sup> or real.<sup>3</sup>

**Sales by Executors, Administrators, etc.** — So in sales by executors, administrators, guardians, or any other fiduciary or person acting in a representative capacity, there is no implied warranty of title to the property sold, whether it be real<sup>4</sup> or personal.<sup>5</sup> And the maxim *caveat emptor* applies as well in equity as at

1. What Amounts to Eviction from Use of Patent. — *The Electron*, 74 Fed. Rep. 689.

2. Warranty of Title — Personal Property — *England*. — *Chapman v. Speller*, 14 Q. B. 621, 68 E. C. L. 621; *Morley v. Attenborough*, 18 L. J. Exch. 150.

*United States*. — *The Monte v. Allegre*, 9 Wheat. (U. S.) 616.

*Arkansas*. — *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242.

*Connecticut*. — *Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251.

*Georgia*. — *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

*Kentucky*. — *Harrison v. Shanks*, 13 Bush (Ky.) 620.

*Missouri*. — *Hensley v. Baker*, 10 Mo. 157; *Estes v. Alexander*, 90 Mo. 453.

*New York*. — *Hoe v. Sanborn*, 21 N. Y. 556, 78 Am. Dec. 163.

*South Carolina*. — *Jones v. Burr*, 5 Strobb. L. (S. Car.) 147, 53 Am. Dec. 699; *Thayer v. Sheriff*, 2 Bay (S. Car.) 169.

See the title SHERIFFS' SALES.

**Warranty that Sheriff Is Not Totally Without Title.** — It has been said in one of the earlier decisions on this question (*Peto v. Blades*, 5 Taunt. 657, 1 E. C. L. 224) that the law raises an implied promise by a sheriff selling the goods taken in execution that he is not absolutely destitute of title. No decision to this effect has ever been made, so far as reported decisions show.

3. Real Property — *California*. — *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643; *Boggs v. Fowler*, 16 Cal. 560, 76 Am. Dec. 561.

*Indiana*. — *Dunn v. Frazier*, 8 Blackf. (Ind.) 432; *Neal v. Gillaspay*, 56 Ind. 451.

*Iowa*. — *Dean v. Morris*, 4 Greene (Iowa) 312; *Cameron v. Logan*, 8 Iowa 434.

*Kentucky*. — *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613.

*Montana*. — *Chumasero v. Vial*, 3 Mont. 376.

*Nebraska*. — *Miller v. Finn*, 1 Neb. 254.

*Ohio*. — *Corwin v. Benham*, 2 Ohio St. 36.

*Pennsylvania*. — *Bashore v. Whisler*, 3 Watts (Pa.) 490; *Smith v. Wildman*, 178 Pa. St. 245,

56 Am. St. Rep. 760; *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134.

*South Carolina*. — *Davis v. Hunt*, 2 Bailey L. (S. Car.) 412; *Yates v. Bond*, 2 McCord L. (S. Car.) 382; *Commissioner in Equity v. Thompson*, 4 McCord L. (S. Car.) 434; *Harth v. Gibbes*, 3 Rich. L. (S. Car.) 316.

*Tennessee*. — *Burwell v. Whitson*, 1 Woodd. (Tenn.) 524; *Henderson v. Overton*, 2 Verg. (Tenn.) 394, 24 Am. Dec. 492.

*Texas*. — *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Walton v. Reager*, 20 Tex. 103.

*Virginia*. — *Stone v. Pointer*, 5 Munf. (Va.) 287.

**Tax Sales.** — The doctrine of *caveat emptor* applies in its fullest extent to tax sales. *State v. Casteel*, 110 Ind. 174; *Worley v. Cicero*, 110 Ind. 208; *Logansport v. Humphrey*, 84 Ind. 467; *McWhinney v. Indianapolis*, 98 Ind. 182, 101 Ind. 150; *Hilgenberg v. Marion County*, 107 Ind. 494. See the title TAX SALES.

4. Sales by Administrators, etc. — Real Property. — *Brewer v. Christian*, 9 Ill. App. 57; *Cogan v. Frisby*, 36 Miss. 178; *Evans v. Dendy*, 2 Spears L. (S. Car.) 9, 42 Am. Dec. 356; *Fuller v. Fowler*, 1 Bailey L. (S. Car.) 75; *Doxey v. Burns*, 37 Tex. 719; *Fleming v. Holt*, 12 W. Va. 143.

**Duty of Purchaser to Examine Title.** — The purchaser must, at an administrator's sale, inquire into the title and ascertain the quality before he makes the purchase. The administrator sells only the interest that was vested in the intestate, and he makes no warranty either for himself or for the estate of the defendant whom he represents. *Bingham v. Maxcy*, 15 Ill. 295.

5. Personal Property. — *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Mason v. Wait*, 5 Ill. 127; *Bingham v. Maxcy*, 15 Ill. 295; *Stanbrough v. Evans*, 2 La. Ann. 474; *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176; *Blood v. French*, 9 Gray (Mass.) 197; *Cogan v. Frisby*, 36 Miss. 178; *Mellen v. Boarman*, 13 Smed. & M. (Miss.) 100; *Ranney v. Meisenheimer*, 61 Mo. App. 434; *Cohn v. Ammidown*, 120 N. Y. 398; *Sparks v. Messick*, 65 N. Car. 440; *O'Neill v. Abney*, 2 Bailey L. (S. Car.) 317.

**Sales by Road Commissioners.** — Commissioners of roads selling estrays, as public agents, are not liable for any implied warranty for defects in regard to soundness. *Road Com'rs v. Macon*, 2 Brev. (S. Car.) 105.

**Sales by Ordinary.** — There is no implied warranty in a sale made by an ordinary in partition proceedings. *Evans v. Dendy*, 2 Spears L. (S. Car.) 9, 42 Am. Dec. 356.

**Sales by Commissioners in Equity.** — A distributee of the proceeds of a sale of personal property made by a commissioner in equity is not liable to a purchaser upon a warranty. *Fuller v. Fowler*, 1 Bailey L. (S. Car.) 75.

**Sale by Trustees of Mortgage.** — On a sale of chattels by trustees of a creditor's mortgage

law.<sup>1</sup> The purchaser takes the property subject to all legal incumbrances, of whatsoever nature,<sup>2</sup> and if the sale is by the sheriff he acquires only the title of the execution defendant.<sup>3</sup> There is no warranty raised by implication of law on any of the parties concerned in such sale; neither on the part of the former owner, the defendant, nor the sheriff, who is the mere organ of the law for transferring the right of the defendant.<sup>4</sup>

2. **As to Quality.** — In sales by sheriffs, executors, administrators, trustees, and others acting in a representative capacity, there is no implied warranty of soundness or quality.<sup>5</sup>

3. **Exceptions to Rules Stated.** — There are a few exceptions to the rules laid down in the preceding subdivisions of this section. Thus it has been held that if a sheriff sells without previously doing what the law requires from him to render the sale valid, and the purchaser is evicted, the sheriff is bound to indemnify him.<sup>6</sup> So in case the sheriff, administrator, trustee, or other person acting in a representative capacity is guilty of fraud, he is liable as on an implied warranty of title.<sup>7</sup> The authorities do not agree, however, as to whether the fraud must consist in actual representation or whether a mere *suppressio veri* will render the officer liable.<sup>8</sup>

**XII. IMPLIED WARRANTY IN SALES BY AGENTS.** — One employed to make sales of personal property for another as a general agent may, by his conduct and the circumstances under which he makes the sale, raise an implied warranty of title, quality, or quantity. The ordinary maxim of agency, *qui facit per alium facit per se*, governs in such cases, and the act of the agent is the act of the principal in so far as the buyer is concerned. It is well settled that

there is no implied personal warranty of title on their part. *Cohn v. Ammidown*, 120 N. Y. 398.

**Sales by Administrators in Conformity with Statute.** — Where an administrator sells property which has come into his hands as assets of the estate, in conformity with the requirements of the statute, the purchaser, in the absence of a warranty and of fraud, either in representation or in concealment, cannot resist the payment of the purchase money on the ground that he has been dispossessed of the property since the sale, under a title paramount to that of the intestate and of which he had notice at the time of his purchase. *Pool v. Hodnett*, 18 Ala. 752.

1. **In Equity.** — *Lang v. Waring*, 25 Ala. 625, 60 Am. Dec. 533.

2. **Purchaser Takes Subject to Incumbrances.** — *Corwin v. Benham*, 2 Ohio St. 36; *Harth v. Gibbs*, 3 Rich. L. (S. Car.) 316.

3. **Title of Execution Defendant.** — *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134; *Jones v. Barr*, 5 Strobb. L. (S. Car.) 147, 53 Am. Dec. 699.

4. **No Warranty by Sheriff or Any Other Person.** — *Thayer v. Sheriff*, 2 Bay (S. Car.) 171.

"There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject of the title to the property he exposes for sale." *Hoe v. Sanborn*, 21 N. Y. 556, 78 Am. Dec. 163.

"Every man who goes to a sheriff's sale ought to take care and examine into the title of the defendant carefully before he attempts to bid." *Thayer v. Sheriff*, 2 Bay (S. Car.) 171.

5. **Warranty of Quality or Soundness.** — *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Hart v. Hampton*, 7 T. B. Mon. (Ky.) 381, 18 Am. Dec. 186; *Storm v. Smith*, 43 Miss. 497;

*Hensley v. Baker*, 10 Mo. 157; *O'Neill v. Abney*, 2 Bailey L. (S. Car.) 317.

6. **Neglect of Duty by Sheriff.** — *Friedlander v. Bell*, 17 La. Ann. 43; *Fleming v. Lockart*, 10 Mart. (La.) 308. See also *Armstrong County v. Smith*, 10 Watts (Pa.) 391.

7. **Fraud of Sheriff or Administrator.** — *Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251; *Mason v. Wait*, 5 Ill. 127; *Com. v. Dickinson*, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139; *Harrison v. Shanks*, 13 Bush (Ky.) 622; *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176. See also *Ray v. Virgin*, 12 Ill. 216.

While there is no implied warranty of title in sales of personal property by an officer on execution, yet the officer is bound to use perfect fairness in dealing with bidders for the property; he equally has no right to aid the creditor in an attempt to impose upon the bidder, and sell as the property of the execution debtor that to which he has no title. *Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251.

8. **That False Representations Are Necessary.** — *Mason v. Wait*, 5 Ill. 127.

**That False Representations Are Not Necessary.** — *Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251; *Com. v. Dickinson*, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139; *Harrison v. Shanks*, 13 Bush (Ky.) 622.

**Honest but Erroneous Expression of Opinion.** — Where the representations of an administrator that his intestate had a good title and that the administrator could make a good title are but the honest expression of his judgment upon facts equally known to the purchaser at the time as to the administrator, they will not release the purchaser, under the well-known rule of *caveat emptor*, which requires him to exercise his own judgment as to title upon the known facts. *Walton v. Reager*, 20 Tex. 103.



an agent with general authority to sell will be presumed to have authority to give a warranty, either express or implied, unless the contrary appears.<sup>1</sup> The presumption is that the agent possesses the powers usual and reasonably necessary to discharge the duties and carry on the business confided to him, such as are usually exercised by other similar agents under like circumstances.<sup>2</sup> Thus an agent with general power to sell has authority to warrant title<sup>3</sup> or to warrant quality and soundness.<sup>4</sup> So a general agent who sells by sample impliedly warrants that the goods shall equal the sample in quality,<sup>5</sup> and a general agent may also impliedly warrant the fitness of the goods for a particular purpose.<sup>6</sup> It is altogether immaterial that the seller has directed his agent not to warrant the goods sold, if the buyer has no knowledge of these directions.<sup>7</sup> What has been said must of course be taken with this qualification: An agent with power to sell has no implied power to warrant unless the sale is one usually attended by a warranty.<sup>8</sup> The party seeking to enforce a warranty should show express authority from the principal to make it, or that such sales are usually attended with such warranty.<sup>9</sup> Ordinarily a special

**1. General Agent Has Implied Authority to Warrant**—*England*.—Dingle v. Hare, 7 C. B. N. S. 145, 97 E. C. L. 145; Howard v. Shewart, L. R. 2 C. P. 148.

*United States*.—Schuchardt v. Allen, 1 Wall. (U. S.) 359.

*Alabama*.—Skinner v. Gunn, 9 Port. (Ala.) 305; Gaines v. McKinley, 1 Ala. 446.

*Indiana*.—Talmage v. Bierhause, 103 Ind. 270.

*Iowa*.—Murray v. Brooks, 41 Iowa 45.

*Maine*.—Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169.

*Massachusetts*.—Upton v. Suffolk County Mills, 11 Cush. (Mass.) 589, 59 Am. Dec. 163.

*Minnesota*.—McCormick v. Kelly, 28 Minn. 135.

*Missouri*.—Samuel v. Barte, 53 Mo. App. 557.

*New York*.—Ahern v. Goodspeed, 72 N. Y. 114; Sturgis v. New Jersey Steamboat Co., 62 N. Y. 625; Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Milburn v. Belloni, 34 Barb. (N. Y.) 607; Nelson v. Cowing, 6 Hill (N. Y.) 336.

*North Carolina*.—Hunter v. Jameson, 6 Ired. L. (28 N. Car.) 252.

*Wisconsin*.—Roche v. Pennington, 90 Wis. 111.

And see the title AGENCY, vol. 1, p. 930.

**2. Presumption as to Agent's Powers.**—Roche v. Pennington, 90 Wis. 111.

"The strong presumption is that when a principal authorizes an agent to sell goods for him, he authorizes him to give all such warranties as are usually given in the particular trade or business." "An agent to sell has a general authority to do all that is usual and necessary in the course of such employment." *Per* Erle, C. J., and Byles, J., in Dingle v. Hare, 7 C. B. N. S. 145, 97 E. C. L. 145.

**3. Warranty of Title.**—Cocke v. Campbell, 13 Ala. 286.

**4. Warranty of Quality.**—Skinner v. Gunn, 9 Port. (Ala.) 305; Gaines v. McKinley, 1 Ala. 446; Cocke v. Campbell, 13 Ala. 286; Hunter v. Jameson, 6 Ired. L. (28 N. Car.) 252; Ezell v. Franklin, 2 Sneed (Tenn.) 236.

**5. Warranties in Sales by Sample.**—Randall v. Kehlor, 60 Me. 47, 11 Am. Rep. 169; Nelson v. Cowing, 6 Hill (N. Y.) 336; Andrews v. Kneeland, 6 Cow. (N. Y.) 354.

**6. Warranty of Fitness for Particular Purpose.**—Murray v. Smith, 4 Daly (N. Y.) 277.

**Implied Warranty Which Binds Agent Personally.**—A broker or factor for distillers who contracts in his own name to sell and deliver on board of cars, by transfer of bill of lading, spirits in bond for export, and does so deliver them, impliedly warrants that the barrels shall be fit and properly filled for such transportation, and is liable, independently of negligence, for loss by leakage due to improper barrelling, as in such case there is no opportunity nor duty on the part of the buyer to inspect, for the seller was to select the barrels for the spirits. *Stevens v. Pincoffs*, 14 Cinc. L. Bul. 110, 9 Ohio Dec. (Reprint) 479.

**7. Effect of Directions by Seller Not to Warrant.**—Howard v. Sheward, L. R. 2 C. P. 148; Woodford v. McClenahan, 9 Ill. 85; Talmage v. Bierhause, 103 Ind. 270; Bryant v. Moore, 26 Me. 36, 45 Am. Dec. 96; Samuel v. Barte, 53 Mo. App. 587; Milburn v. Belloni, 34 Barb. (N. Y.) 607; Boothby v. Scales, 27 Wis. 626.

**8. Sale Must Be One Which Is Usually Attended with Warranty.**—The Monte Allegre, 9 Wheat. (U. S.) 647; Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; McCormick v. Kelly, 28 Minn. 135; Smith v. Tracy, 36 N. Y. 79; Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876; Larson v. Aultman, etc., Co., 86 Wis. 281, 39 Am. St. Rep. 893.

**Presumption as to Custom in Warranty.**—It will be presumed, in the absence of a showing to the contrary, that a warranty is not an unusual incident to a sale by an agent for a dealer in the commodity, where the thing sold is not present and subject to the inspection of the purchaser. *Talmage v. Bierhause*, 103 Ind. 270.

**9. Western v. Page**, 94 Wis. 252.

**Illustration.**—A general agent for the sale of iron safes has no implied authority to warrant or represent the safes to be burglar proof, and in the absence of an express authority the act of the agent in making such warranty or representation would not be binding on the principal, unless there existed at the time of the sale a custom in the sale of safes to warrant or represent them as burglar proof. *Herring v. Skaggs*, 73 Ala. 446.

agent with limited powers for the sale of personal property has no power to give a warranty of quality.<sup>1</sup> But it has been said that even a special agent may bind his principal by such warranties, either expressed or implied, as are customary in the particular business.<sup>2</sup> No warranty can be implied so as to bind the principal on a sale by an agent where the law would not have implied one had the sale been made by the principal in person.<sup>3</sup> And neither a special nor a general agent, even though he has power to warrant, can give, either expressly or impliedly, an unusual and extraordinary warranty without express authority so to do, for the law will not presume the existence of such power in an agent, and the buyer is presumed to know the law.<sup>4</sup>

**XIII. CUSTOM AND USAGE AS AFFECTING IMPLIED WARRANTY.**—The decisions do not agree as to the effect which a particular custom or usage may have in creating an implied warranty or in relieving the seller from an implied warranty which the law would otherwise raise. Of course the usage or custom will have a controlling effect where the parties clearly show by their acts that they contracted with special reference to it,<sup>5</sup> and it has been said that evidence of a custom is admissible to explain a warranty, but not to show that there is one.<sup>6</sup> On the other hand, no particular custom will have any effect if the parties at the time of contracting had no knowledge of it,<sup>7</sup> and the contract cannot be affected by a usage as to which the evidence is slight and insufficient.<sup>8</sup> So a custom which is unreasonable does not affect the contract,<sup>9</sup> and the same is true where the custom is opposed to the general policy of the state on the subject to which it refers.<sup>10</sup> So it is said that usages will not be permitted to conflict with settled rules of law and the legal interpreta-

**1. Special Agent Ordinarily Without Power to Warrant.**—*Brady v. Todd*, 9 C. B. N. S. 592, 99 E. C. L. 592; *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210.

**2. Under What Circumstances Special Agent May Warrant.**—2 *Schouler on Personal Property* (2d ed.), § 324; *Story on Sales* (4th ed.), § 350. See also dicta in *Alexander v. Gibson*, 2 Campb. 555; *Helyear v. Hawke*, 5 Esp. 72; and see *Tice v. Gallup*, 2 Hun (N. Y.) 446, where it was held that a special agent authorized to sell a horse might warrant its age and the cause of its apparent lameness, by virtue of his agency, unless forbidden so to do by his principal.

**3. Where No Warranty Would Be Implied on Sale by Principal.**—*Blood v. French*, 9 Gray (Mass.) 197, in which case it was held that as an administrator is not held to a warranty of the condition of the goods of his intestate sold by him pursuant to law, an auctioneer selling for him cannot bind him.

**4. Unusual or Extraordinary Warranty.**—*Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Palmer v. Hatch*, 46 Mo. 585. See also *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

**Instances.**—A general power of sale given to an agent does not carry with it such unusual authority as a right to warrant against any seizure of the article sold, as, for instance, whiskey, for violation of the revenue laws prior to the sale. *Palmer v. Hatch*, 46 Mo. 585.

So a general agent has no implied authority to bind his principals by warranty that flour sold by him on their account will keep sweet during a sea voyage, in the absence of any usage of business to that effect. *Upton v.*

*Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

**5. Where Parties Contract with Reference to Custom.**—*Conestoga Cigar Co. v. Finke*, 144 Pa. St. 159. See generally the title *USAGES AND CUSTOMS*.

**6. Evidence Admissible to Explain but Not to Prove Warranty.**—*Baird v. Matthews*, 6 Dana (Ky.) 136. See also *Atwater v. Clancy*, 107 Mass. 369.

**7. Custom of Which Parties Were Ignorant.**—*Barnard v. Kellogg*, 10 Wall. (U. S.) 389; *Murray v. Brooks*, 41 Iowa 45.

**8. Furman v. Miller**, 2 Brev. (S. Car.) 127.

**9. Unreasonable Usage Does Not Affect Contract.**—*Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726. In this case a usage which gives to a broker implied authority to warrant goods sold by him to be merchantable was held inadmissible.

**10. Tremble v. Crowell**, 17 Mich. 493.

**Illustration.**—A custom that the seller of fish caught within the state and sold in barrels to a dealer, without express warranty, shall refund the price if the fish prove to be unsound, tends to defeat the purpose of the inspection laws of the state, and is therefore opposed to the general state policy on that subject and cannot be supported. "As the supposed usage assumes that the article is purchased without the safeguard of inspection, and that the buyer will be saved from loss on a purchase of uninspected fish by the right given him by the usage to recover of the vendor the price actually paid, the effect of the usage must be to cause dealers to dispense with inspection and pave the way for those consequences which the law was designed to avert." *Tremble v. Crowell*, 17 Mich. 493.



tion of the effect of the contract.<sup>1</sup> Some decisions apparently deny without qualification the right of either party to a contract to give evidence of a custom or usage in order to affect the contract.<sup>2</sup> On the other hand, evidence of customs or usages which materially affected the contract has been held admissible in some cases.<sup>3</sup>

#### XIV. EXCLUSION OF IMPLIED WARRANTIES BY EXPRESS WARRANTIES —

1. **Express Warranty of Quality Excludes Implied Warranty of Quality.** — There is some conflict of opinion as to whether there can be an implied warranty where the contract of sale contains an express warranty, and if so, under what circumstances. The weight of authority, however, it is believed, is to the effect that where a contract for the sale of goods contains a warranty as to certain qualities, there can be no implied warranty that they also possess other qualities.<sup>4</sup> The general rule denies an implied warranty as to any matter or particular which may be brought within the purview or intendment of a special warranty.<sup>5</sup> It has therefore been held that where the contract of sale contains express warranties as to any quality of the article sold, there can be no implied warranty that such article is fit for the purpose for which it is sold,<sup>6</sup>

1. **Usages Cannot Affect Settled Rules of Law.** — *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Murray v. Bogert*, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321.

2. *Polhemus v. Heiman*, 50 Cal. 438; *Hughes v. Bray*, 60 Cal. 284; *Thompson v. Ashton*, 14 Johns. (N. Y.) 316; *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741.

**Instances.** — Where the defendant offered to prove the existence of a general custom and usage among the grain dealers of San Francisco that sales of grain by sample are not considered complete until the buyer has actually inspected and accepted the grain sold, the reviewing court held that the evidence was properly rejected. *Hughes v. Bray*, 60 Cal. 284.

So evidence to show the existence of a custom of the trade at the port of Philadelphia that soda ash is sold upon the representation of the seller as to the percentage of alkali contained in it, without warranty of sample, was also held inadmissible. *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741.

3. **Instances.** — Where it was customary in a sale of drugs by catalogue to state in the catalogue whether they were damaged by the sea, and if not so stated it was assumed that they were not damaged, it was held that a failure to catalogue them as damaged imported a warranty that they were not damaged. *Jones v. Bowden*, 4 Taunt. 847.

And where there was evidence of a usage at the port of Philadelphia that on a purchase and sale of cotton the vendor should answer to the vendee for any latent defect of the article, though there was no fraud, and in the absence of any warranty, such evidence was held admissible. *Snowden v. Warder*, 3 Rawle (Pa.) 101.

Evidence to show an established usage among Cincinnati tobacco merchants in all sales of a particular kind of tobacco to warrant the article as sound and merchantable for four months after the sale, and on proof of its being to the contrary to make a reduction in price, was held admissible, and the usage was held to be reasonable. *Fatman v. Thompson*, 2 Disney (Ohio) 482.

4. **Express Warranty of One Quality Excludes Implied Warranty of Other Qualities** — *England*. — *Budd v. Fairman*, 8 Bing. 48, 21 E. C. L. 217; *Parkinson v. Lee*, 2 East 314; *Dickson v. Zizinia*, 10 C. B. 602, 70 E. C. L. 602.

*United States*. — *Grand Ave. Hotel Co. v. Wharton*, 79 Fed. Rep. 43; *Buckstaff v. Russell*, 79 Fed. Rep. 611; *DeWitt v. Berry*, 134 U. S. 306.

*Connecticut*. — *Mullain v. Thomas*, 43 Conn. 255.

*Georgia*. — *Johnson v. Latimer*, 71 Ga. 470; *Malsby v. Young*, 104 Ga. 205.

*Illinois*. — *White v. Gresham*, 52 Ill. App. 399.

*Iowa*. — *Shepherd v. Gilroy*, 46 Iowa 193; *Bucy v. Pitts Agricultural Works*, 89 Iowa 464.

*Michigan*. — *McGraw v. Fletcher*, 35 Mich. 104.

*Minnesota*. — *Cosgrave v. Bennett*, 32 Minn. 371.

*Missouri*. — *Boyer v. Neel*, 50 Mo. App. 26.

*New Hampshire*. — *Deming v. Foster*, 42 N. H. 165.

*New York*. — *Prentice v. Dike*, 6 Duer (N. Y.) 220; *Carleton v. Lombard*, 72 Hun (N. Y.) 254.

*North Carolina*. — *Lanier v. Auld*, 1 Murph. (5 N. Car.) 138, 3 Am. Dec. 680.

*South Carolina*. — *Ober v. Blelock*, 40 S. Car. 31; *McLaughlin v. Horton*, 1 Hill L. (S. Car.) 383.

*Texas*. — *Battaglia v. Thomas*, 5 Tex. Civ. App. 563.

*Wisconsin*. — *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590.

**Expressum Facit Cessare Tacitum.** — "The maxim of the common law, *expressum facit cessare tacitum*, embodies the principle." *Johnson v. Latimer*, 71 Ga. 475. See also *Dickson v. Zizinia*, 10 C. B. 602, 70 E. C. L. 602; *Parkinson v. Lee*, 2 East 314.

5. **International Pavement Co. v. Smith, etc., Mach. Co.**, 17 Mo. App. 264; *Boothby v. Scales*, 27 Wis. 626.

6. **Express Warranty of Quality Excludes Implied Warranty of Fitness.** — *De Witt v. Berry*, 134 U. S. 306; *Mullain v. Thomas*, 43 Conn. 255; *International Pavement Co. v. Smith, etc., Mach. Co.*, 17 Mo. App. 264; *Deming v.*



or that it is merchantable.<sup>1</sup> Other illustrations are set out in the notes hereto.<sup>2</sup>

**Limitations and Qualifications of Rule.**—Some decisions apparently limit or qualify the rule just stated. Thus it has been held that the express warranty that goods will pass inspection does not exclude an implied warranty of fitness for the purpose intended.<sup>3</sup> And it has likewise been said that a warranty as to quantity does not exclude the implied warranty of quality.<sup>4</sup> So where goods are sold by the manufacturer, who knows the purposes for which they are to be used, the fact that they correspond in all respects to the sample does not exclude an implied warranty that they shall be fit for use in the manner in which goods of the same quality and general character would ordinarily be used, if the defect in the sample is latent and not discoverable by due diligence.<sup>5</sup> It has been similarly held that an express warranty as to a certain quality does not exclude an implied warranty against secret defects in the material or in the process of manufacture which could have been avoided by the exercise of ordinary care and which were not discernible on inspection.<sup>6</sup>

Foster, 42 N. H. 165; Ober v. Blelock, 40 S. Car. 31; J. I. Case Plow Works v. Niles, etc., Co., 90 Wis. 590.

**Instances.**—Where a written contract for the sale of machinery expressly specifies the kind, amount, and size of it, this excludes any implied warranty or fitness of the machinery for the purpose for which it was bought. Buckstaff v. Russell, 79 Fed. Rep. 611. But compare Alpha Checkrower Co. v. Bradley, 105 Iowa 537, in which case it was held that an express warranty that goods shall be well made and finished does not exclude a warranty of fitness for the purpose intended, if the facts in the case are such that the law would imply a warranty of this nature.

So where oxen are sold or warranted sound, this excludes an implied warranty or fitness for farm work. Deming v. Foster, 42 N. H. 165.

And it has been held that any implied warranty that the articles were fit for their intended use was excluded by the express warranty: "These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered. Turpentine copal varnish at 65c. per gallon. Turpentine japan dryer at 55c. per gallon." De Witt v. Berry, 134 U. S. 306.

**1. Express Warranty of Quality Excludes Implied Warranty of Merchantability.**—De Witt v. Berry, 134 U. S. 306. See also Parkinson v. Lee, 2 East 314, in which case it was held that on a sale by sample with warranty that the bulk shall equal the sample, there is no implied warranty of merchantability.

**2. Other Illustrations of Rule—Express Warranty of Soundness.**—An express warranty of soundness excludes an implied warranty as to age. Budd v. Fairmaner, 8 Bing. 48, 21 E. C. L. 217.

And an express warranty as to soundness and age excludes any implied warranty as to other qualities. Lanier v. Auld, 1 Murph. (5 N. Car.) 138, 3 Am. Dec. 680. As, for instance, that a horse sold with such warranty is broken and safe for use. Mullain v. Thomas, 43 Conn. 255. So it has been held that a special warranty that a negro sold was sound and healthy according "to the best of his [the seller's] knowledge" excluded the general im-

plied warranty of soundness. M'Laughlin v. Horton, 1 Hill L. (S. Car.) 383.

**Express Warranty of Merchantability at Time of Shipment.**—If a contract contains an express warranty that the article sold shall be in a good and merchantable state at the time of shipment, this excludes the implication of the more extended warranty that the article shall be in a good and merchantable condition for a foreign voyage. Dickson v. Zizinia, 10 C. B. 602, 70 E. C. L. 602.

**Warranty that Article Is of Good Material and Workmanship.**—An express warranty that a machine shall be of good material, well made, and will do good work in threshing and cleaning grain if properly managed, excludes an implied warranty that the machine will thresh equally well with any other machine of any other manufacture, and will work perfectly in all particulars. Bucy v. Pitts Agricultural Works, 89 Iowa 464.

**Warranty Requiring Notice in Case Article Is Defective.**—The rule that the seller of a machine intended for a particular purpose impliedly warrants its fitness for that purpose does not apply when the contract to sell contains a special warranty of the quality and capacity of the machine, requiring the purchaser, after a specified trial, to notify the seller of its defectiveness or to return it. Boyer v. Neel, 50 Mo. App. 26.

**3. Express Warranty that Goods Will Pass Inspection.**—Bigge v. Parkinson, 7 H. & N. 955.

**4. Express Warranty as to Quantity.**—Whitaker v. McCormick, 6 Mo. App. 114. See International Pavement Co. v. Smith, etc., Mach. Co., 17 Mo. App. 264, where Lewis, P. J., further said, by way of illustration, that "there may be an implied warranty so wholly independent of anything contemplated in the express warranty, as to stand by its own distinctive force."

**5. Latent Defects in Sales by Sample.**—Drummond v. Van Ingen, 12 App. Cas. 294.

**6. Latent Defects Caused by Material or Workmanship.**—Carleton v. Lombard, 149 N. Y. 601.

**Contract of Doubtful Meaning.**—A guano note which contains the clause, "guano sold and guaranteed under analysis of Dr. A. Means, inspector, Savannah, which analysis has been

2. **Express Warranty of Title Excludes Implied Warranty of Title.**— On the same principles as were announced in the preceding subdivisions of this section, it has been held and seems to be well settled that an express warranty of title will exclude an implied warranty of title.<sup>1</sup>

3. **Whether Implied Warranty of Title Excluded by Express Warranty of Quality.**— According to some decisions it has been held that the express warranty of quality does not exclude an implied warranty of title.<sup>2</sup>

4. **Implied Warranty of Quality Not Excluded by Express Warranty of Title.**— And it has also been held that an express warranty of title does not exclude an implied warranty of quality.<sup>3</sup> The last two rules are not supported by unquestioned authority, a number of decisions apparently holding that where there is a complete contract of sale in writing, there can be no implied warranty whatever as to the subject-matter.<sup>4</sup>

**XV. EXCLUSION OF IMPLIED WARRANTY BY REFUSAL TO WARRANT.**— As nothing can be implied against the contract of the parties, an express refusal by the seller to warrant excludes any implication of warranty.<sup>5</sup> What amounts to a refusal to warrant is in general a question to be determined by the jury.<sup>6</sup> It seems, however, that although the vendor exempts himself from the implication of a warranty by refusing to warrant, he is nevertheless liable for fraud if he wilfully sells a chattel with a material defect of which he has

submitted to me," does not by implication exclude the implied warranty that the fertilizer is reasonably suited to the purposes for which it was sold. *Wilcox v. Owens*, 64 Ga. 601. This decision seems to be based, in a measure at least, on the rule that if a contract is of doubtful meaning it is to be construed against the party who drew it.

1. **Express Warranty of Title Excludes Implied Warranty of Quality.**— *Brown v. Smith*, 5 How. (Miss.) 387; *Dyer v. Britton*, 53 Miss. 270.

2. **Implied Warranty of Title Not Excluded by Express Warranty of Quality.**— *Carleton v. Lombard*, 72 Hun (N. Y.) 260; *Lanier v. Auld*, 1 Murph. (5 N. Car.) 138, 3 Am. Dec. 680.

3. **Implied Warranty of Quality Not Excluded by Express Warranty of Title.**— *Wells v. Spears*, 1 McCord L. (S. Car.) 421; *Wood v. Ashe*, cited in *Heyward v. Wallace*, 4 Strobb. L. (S. Car.) 187; *Trimmer v. Thomson*, 10 S. Car. 164; *Houston v. Gilbert*, 3 Brev. (S. Car.) 63, 5 Am. Dec. 542; *Hughes v. Banks*, 1 McCord L. (S. Car.) 537.

4. **Complete Contract in Writing.**— *Wren v. Wardlaw*, Minor (Ala.) 363, 12 Am. Dec. 60; *Barnes v. Blair*, 16 Ala. 71; *Ramming v. Caldwell*, 43 Ill. App. 175; *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.) 58; *Pender v. Fobes*, 1 Dev. & B. L. (18 N. Car.) 250; *Smith v. Williams*, 1 Murph. (5 N. Car.) 426, 4 Am. Dec. 564; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33. See also *Johnson v. Powers*, 65 Cal. 179.

**Instances.**— Thus it has been held that a warranty of title expressed in writing excludes any implication of a warranty of soundness. *Wren v. Wardlaw*, Minor (Ala.) 363, 12 Am. Dec. 60; *Pender v. Fobes*, 1 Dev. & B. L. (18 N. Car.) 250.

So it has been held that when the contract is in writing, an additional warranty not expressed is implied by its terms that the article is fit for the particular use intended, either by implication of law or by parol proof. *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.) 58.

5. **Refusal to Warrant Excludes Implied Warranty.**— *Miller v. Van Tassel*, 24 Cal. 458; *Lynch v. Curfman*, 65 Minn. 170; *Habersham v. Rodrigues*, 1 Spears L. (S. Car.) 314; *Smith v. State Bank*, Riley Eq. (S. Car.) 113; *Boinest v. Leigne*, 2 Rich. L. (S. Car.) 464. See also *West v. Anderson*, 9 Conn. 110, 21 Am. Dec. 737; *Thompson v. Lindsey*, Mill (S. Car.) 236; *Wood v. Ross*, (Tex. Civ. App. 1894) 26 S. W. Rep. 148.

If the contract is in writing, refusal is notice that the party does not intend to be bound further than his written contract goes, and he who buys after such notice must take the thing purchased subject to the rule of *caveat emptor*. *Habersham v. Rodrigues*, 1 Spears L. (S. Car.) 314.

6. **Refusal to Warrant, Question for Jury.**— *Habersham v. Rodrigues*, 1 Spears L. (S. Car.) 314.

**What Amounts to Refusal to Warrant.**— Where a warranty of quality inserted in a bill of sale before the execution thereof is stricken out by the seller, this amounts to a refusal to warrant. *Smith v. State Bank*, Riley Eq. (S. Car.) 113.

So the express declaration by the vendor that he warrants nothing but the title precludes an implied warranty of soundness. *Boinest v. Leigne*, 2 Rich. L. (S. Car.) 464.

**How Refusal to Warrant Affected by Statements as to Quality.**— Where the vendor makes statements as to the quality of the article, but accompanied by an express and positive refusal to warrant it, and gives notice to the vendee that he will not and does not warrant it, his statements as to quality must be deemed mere expressions of opinion and not a contract for warranty, at least in the absence of any fraud or deceit, and where the property is present for the inspection of the vendee. *Lynch v. Curfman*, 65 Minn. 170.

**Renunciation of Warranty by the Purchaser** is not binding on him where there has been fraud on the part of the seller. *Bevans v. Farrell*, 18 La. Ann. 232.



knowledge and of which the purchaser is ignorant.<sup>1</sup>

**XVI. BREACH OF IMPLIED WARRANTY — 1. Of Title — a. RIGHTS AND REMEDIES OF BUYER — (1) Where Analogy of Covenants Against Incumbrances Is Adopted.** — The decisions are in hopeless conflict as to the time when a breach of the implied warranty of title occurs and as to the time when or the circumstances under which an action for the breach may or should be brought. A number of the cases hold that the warranty is in the nature of a covenant of seizin and against incumbrances,<sup>2</sup> that if the vendor is without title the breach occurs at the time of the sale,<sup>3</sup> and that the statute of limitations begins to run from the time of the sale.<sup>4</sup> Where this view prevails it is immaterial to a right of action for breach of the implied warranty that the purchaser has not been deprived of the possession of the chattel.<sup>5</sup> No recovery of the goods by the true owner, by suit or otherwise, is essential to an action for the breach.<sup>6</sup> To sustain the action it is sufficient to show that the vendor's title is defective and that some one else owns the goods warranted,<sup>7</sup> but the evidence of these facts must be strong and satisfactory.<sup>8</sup>

(2) *Where Analogy of Covenants for Quiet Enjoyment Is Adopted.* — The rules just stated are clearly against the weight of authority. According to what is thought to be the better doctrine, the implied warranty of title upon the sale of personal property is analogous to a covenant for quiet enjoyment in the sale of lands.<sup>9</sup> It follows, therefore, that the breach does not occur at the time of the sale;<sup>10</sup> that the purchaser cannot resist payment of the price merely by showing a defect in the seller's title and paramount title in a third person;<sup>11</sup> that the statute of limitations does not begin to run against an action to recover for the breach until the purchaser's possession is disturbed by the true owner;<sup>12</sup> and that so long as the purchaser maintains possession he cannot maintain an action for breach of implied warranty.<sup>13</sup> According to some of the earlier *New York* decisions in which the analogy of the covenant for quiet enjoyment is applied, the purchaser cannot maintain an action for

1. Effect of Fraud. — *Smith v. State Bank*, Riley Eq. (S. Car.) 113. See also *Bartholomew v. Bushnell*, 20 Conn. 278, 52 Am. Dec. 338.

2. Warranty Analogous to Covenants Against Incumbrances. — *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; *Perkins v. Whelan*, 116 Mass. 543. See also cases cited in the next note.

3. Breach Occurs at Time of Sale. — *Pusey v. Wathen*, 90 Ky. 473; *Payne v. Rodden*, 4 Bibb (Ky.) 304, 7 Am. Dec. 739; *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 217; *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; *Tipton v. Triplett*, 1 Met. (Ky.) 572; *Plummer v. Newdigate*, 2 Duv. (Ky.) 3; *Grose v. Hennessey*, 13 Allen (Mass.) 389; *Perkins v. Whelan*, 116 Mass. 543; *Word v. Cavin*, 1 Head (Tenn.) 507.

4. When Statute of Limitations Begins to Run. — *Pusey v. Wathen*, 90 Ky. 473; *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 202, 39 Am. Dec. 499; *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 217; *Grose v. Hennessey*, 13 Allen (Mass.) 389; *Perkins v. Whelan*, 116 Mass. 543; *Word v. Cavin*, 1 Head (Tenn.) 507.

5. Immaterial that Purchaser Retains Possession. — *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; *Payne v. Rodden*, 4 Bibb (Ky.) 304, 7 Am. Dec. 739; *Tipton v. Triplett*, 1 Met. (Ky.) 573; *Plummer v. Newdigate*, 2 Duv. (Ky.) 3; *Grose v. Hennessey*, 13 Allen (Mass.) 389.

6. Recovery by True Owner Unnecessary. — See cases cited in the preceding note.

7. Proof of Defective Title Sufficient. — *Tipton v. Triplett*, 1 Met. (Ky.) 573.

8. Evidence Must Be Conclusive. — *Plummer v. Newdigate*, 2 Duv. (Ky.) 3.

9. Warranty Analogous to Covenant for Quiet Enjoyment. — *Close v. Crossland*, 47 Minn. 500; *Matheny v. Mason*, 73 Mo. 677, 39 Am. Rep. 541; *McGiffin v. Baird*, 62 N. Y. 330; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Bordewell v. Colie*, 1 Lans. (N. Y.) 141; *O'Brien v. Jones*, 91 N. Y. 197; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Webster v. Laws*, 89 N. Car. 224; *Cowan v. Silliman*, 4 Dev. L. (15 N. Car.) 46; *Hodges v. Wilkinson*, 111 N. Car. 56.

10. No Breach at Time of Sale. — *Gross v. Kierski*, 41 Cal. 111; *Linton v. Porter*, 31 Ill. 107.

11. Recovery Not Warranted by Showing Defect of Title. — *Linton v. Porter*, 31 Ill. 107; *Wanser v. Messler*, 29 N. J. L. 256; *McGiffin v. Baird*, 62 N. Y. 329; *Webster v. Laws*, 89 N. Car. 229; *Krumbhaar v. Birch*, 83 Pa. St. 426.

12. When Statute of Limitations Begins to Run. — *Gross v. Kierski*, 41 Cal. 111; *Linton v. Porter*, 31 Ill. 107.

13. Purchaser in Possession Cannot Sue for Breach. — *Wanser v. Messler*, 29 N. J. L. 256; *McGiffin v. Baird*, 62 N. Y. 329; *Krumbhaar v. Birch*, 83 Pa. St. 426. See also cases cited in subsequent notes in this section.

Obligation to pay the price remains until eviction or at least until disturbance of quiet enjoyment by the paramount owner. *Wanser v. Messler*, 29 N. J. L. 256.



breach of the implied warranty until he has been evicted by legal process.<sup>1</sup> This doctrine, however, no longer obtains even in the state in which these decisions were made.<sup>2</sup> The rule settled by the weight of authority is that the purchaser may recover on breach of the implied warranty on return of the goods to the seller,<sup>3</sup> on a judicial eviction,<sup>4</sup> on surrender of the goods to a third person claiming paramount title, without legal proceedings,<sup>5</sup> or on the payment of claims or incumbrances against the goods sold.<sup>6</sup> In all cases where the purchaser returns the property to the seller<sup>7</sup> or surrenders the chattels, without suit, to a third person claiming them,<sup>8</sup> he must show conclusively that the title was in a third person, or his action will fail. So in case he has paid an outstanding claim or incumbrance, he must show that the claim or incumbrance is valid.<sup>9</sup> In strict accordance with the rules just stated, it has been held that even though a judgment has been recovered against the purchaser for the value of the chattels, if the purchaser sues the seller before paying the judgment he can recover only nominal damages, because only a liability to loss has been established. There must be a loss actually suffered.<sup>10</sup>

**1. Cases Holding Eviction by Legal Process Necessary.** — Case *v. Hall*, 24 Wend. (N. Y.) 102, 35 Am. Dec. 605; *Vibbard v. Johnson*, 19 Johns. (N. Y.) 79.

**Civil-law Rule.** — And this is also the rule of the civil law. The warranty implied in a sale made by general terms under the system of the civil law is equivalent to a covenant that the buyer shall quietly possess and enjoy, and nothing more, and to give to a buyer a right of action upon this warranty there must have taken place an actual judicial eviction by the sentence of a competent tribunal, which has been carried into effect. *Fowler v. Smith*, 2 Cal. 568.

**2. Overruled by Subsequent Decisions.** — See *New York* decisions cited in subsequent notes in this section.

**3. Where Purchaser May Sue — Return of Goods to Seller.** — *McGiffin v. Baird*, 62 N. Y. 329.

**4. Judicial Eviction.** — See *Close v. Crossland*, 47 Minn. 500; *Webster v. Laws*, 89 N. Car. 229.

**5. Surrender to True Owner Without Legal Proceedings** — *Illinois*. — *Linton v. Porter*, 31 Ill. 107.

*Iowa*. — *Barton v. Faherty*, 3 Greene (Iowa) 327, 54 Am. Dec. 503.

*Minnesota*. — *Close v. Crossland*, 47 Minn. 500.

*Missouri*. — *Dryden v. Kellogg*, 2 Mo. App. 87.

*New York*. — *Sweetman v. Prince*, 26 N. Y. 224; *Bordwell v. Collie*, 45 N. Y. 494, *affirming* 1 Lans. (N. Y.) 141.

*North Carolina*. — *Parker v. Dunn*, 2 Jones L. (47 N. Car.) 203; *Webster v. Laws*, 89 N. Car. 229; *Hodges v. Wilkinson*, 111 N. Car. 56.

*Pennsylvania*. — *Krumbhaar v. Birch*, 83 Pa. St. 426.

*Vermont*. — *Reynolds v. Roberts*, 57 Vt. 392.

It is perfectly competent to the vendee to dispute the title of his vendor without waiting to be charged at the suit of another person by due process of law. The purchaser, if satisfied that the claimant of the property is the true owner, and can and will in an action against him recover the property from him or its value, is not bound to resist the claim of such owner, but may abandon the property to

such owner or pay him the value thereof without action. *Matheny v. Mason*, 73 Mo. 682, 39 Am. Rep. 541.

**6. Payment of Claims Against Chattels Sold.** — *Close v. Crossland*, 47 Minn. 500; *Ranney v. Meisenheimer*, 61 Mo. App. 434; *Matheny v. Mason*, 73 Mo. 677, 39 Am. Rep. 541; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Bordwell v. Collie*, 45 N. Y. 494, *affirming* 1 Lans. (N. Y.) 141; *McGiffin v. Baird*, 62 N. Y. 329; *O'Brien v. Jones*, 91 N. Y. 193; *Cahill v. Smith*, 101 N. Y. 355.

**Illustrations — Outstanding Chattel Mortgage.** — One who purchases chattels encumbered by a valid chattel mortgage of which he knew nothing may pay the amount of the mortgage and recover it from the seller. *Ranney v. Meisenheimer*, 61 Mo. App. 434.

A vendee of personal property who is compelled, in order to retain the property, to discharge an incumbrance existing at the time of the sale may bring assumpsit against the seller for the money thus paid. *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524.

Where the purchaser was not only deprived of his title by the enforcement of a valid prior mortgage and sale thereunder, but regained a right to its possession only by paying money upon an obligation which the seller had expressly agreed to satisfy, but did not, he is entitled to recover of the seller the amount due on the mortgage. Actual eviction is unnecessary; the purchaser could not withhold the property without becoming a wrongdoer. *Cahill v. Smith*, 101 N. Y. 355.

**7. Must Show Title in Another.** — *McGiffin v. Baird*, 62 N. Y. 329.

**8. Dryden v. Kellogg**, 2 Mo. App. 87; *Bordwell v. Collie*, 45 N. Y. 494, *affirming* 1 Lans. (N. Y.) 141; *Sweetman v. Prince*, 26 N. Y. 224; *O'Brien v. Jones*, 91 N. Y. 193; *Hodges v. Wilkinson*, 111 N. Car. 56. See also *Bergen v. Riggs*, 34 Ill. 170, 85 Am. Dec. 304.

**9. See Ranney v. Meisenheimer**, 61 Mo. App. 434.

**10. Loss Actually Suffered Necessary.** — *Burt v. Dewey*, 40 N. Y. 253, 100 Am. Dec. 482.

**Dispossession of a Person Buying from Purchaser — When Original Purchaser May Sue.** — The original purchaser of a chattel cannot recover from the original seller on an implied

and in a suit for breach of warranty of title a judgment against the vendor by a third person for recovery of the property sold is not even *prima facie* evidence of the vendor's want of title, so as to throw upon him the burden of proof where no notice of such third person's suit was given to him.<sup>1</sup>

*b. MEASURE OF DAMAGES.* — According to some commentators, in case there is a breach of an implied warranty of title the loss of the vendee is usually the same as if there had been a failure to deliver.<sup>2</sup> The decisions are not at all harmonious on this question, and no rule which will be accepted by the courts of all jurisdictions can be deduced. An *English* decision has held that where there is a failure of title to all the chattels sold the purchaser can treat the transaction as presenting an instance of an entire failure of consideration and may sue for the money paid,<sup>3</sup> and two decisions in the *United States* seemingly adopt the rule that the price paid is the measure of damages; but it does not appear from the reports of these decisions whether a claim for greater damages was set up.<sup>4</sup> So another decision seems, too, to fix the measure of damages as the difference in value between such title as the purchaser acquired and such title as the seller covenanted to convey.<sup>5</sup> There is also a line of decisions which go further than those just cited, but seem to limit the measure of damages to the price paid with interest thereon.<sup>6</sup> This rule is extended by another line of decisions, which hold that in addition to the price paid and interest thereon the purchaser is also entitled to recover costs and expenses necessarily incurred in defending his title in a suit brought against him by the paramount owner, provided he has notified the seller of such suit.<sup>7</sup> There are also decisions which lay down the same rule, except that nothing is said in them as to the necessity of notifying the seller of the suit.<sup>8</sup> There is also a dictum to the effect that the purchaser is entitled to recover the necessary expenses incurred in instituting the proper course of legal proceedings for the ascertainment and protection of his rights under the

warranty of title when it appears that not the original purchaser, but one purchasing from him, was dispossessed of the chattel by the legal owner, and that the original purchaser has not reimbursed the second purchaser or been made liable by him for the value of the chattel. *Myers v. Bowen*, 3 Colo. App. 537.

**1. Effect of Judgment of Third Person Without Notice to Seller.** — *Roper v. Rowlett*, 7 Lea (Tenn.) 320, wherein it was said that the rule would have been otherwise if the owner had been duly notified of the third person's suit.

**2. Loss Same as on Failure to Deliver.** — 2 *Sutherland on Damages*, § 669.

**3. Various Rulings as to Measure of Damages — Price Paid.** — *Eichholz v. Bannister*, 17 C. B. N. S. 708, 112 E. C. L. 708.

**4. *Brown v. Pierce***, 97 Mass. 46, 93 Am. Dec. 57; *Atkins v. Hosley*, 3 Thomp. & C. (N. Y.) 322.

**Goods Sold Beyond Their Value.** — Where goods are sold for a price which is much in excess of their actual value, the measure of damages in a suit to rescind the contract for breach of the implied warranty of title is the sum paid, not the real value of the goods. *Wilkinson v. Ferree*, 24 Pa. St. 190.

**5. Difference in Value of Title Conveyed and Title Warranted.** — *Grose v. Hennessey*, 13 Allen (Mass.) 389.

**6. Price Paid and Interest** — *Kentucky*. — *Wood v. Wood*, 1 Met. (Ky.) 518; *Johnson v. Sevier*, 4 J. J. Marsh. (Ky.) 142; *Ellis v. Gosney*, 7 J. J. Marsh. (Ky.) 110.

*Massachusetts*. — *Eaton v. Mellus*, 7 Gray (Mass.) 566.

*South Carolina*. — *Ware v. Weathnall*, 2 McCord L. (S. Car.) 413.

*Tennessee*. — *Crittenden v. Posey*, 1 Head (Tenn.) 311.

*Texas*. — *Sutton v. Page*, 4 Tex. 142; *Anderson v. Duffield*, 8 Tex. 237; *Scranton v. Tilley*, 16 Tex. 183; *Hall v. York*, 22 Tex. 641; *Wheeler v. Styles*, 28 Tex. 240; *Anding v. Perkins*, 29 Tex. 348; *Granberry v. Haupe*, 30 Tex. 409; *Goss v. Dysant*, 31 Tex. 187.

**Rule Where Title Is Good for Part of Time.** — Ordinarily the price given with interest from time of payment for a chattel sold is the measure of damages for breach of the implied warranty of title, but if the title is good for a certain period the interest is not to be computed until the termination of the time for which the title is good. Thus if an absolute estate in a chattel is conveyed by the person having only an estate *pur autre vie*, the title being good for a certain period, the vendee is entitled to the price paid with interest only from the termination of the life estate held by the seller. *Crittenden v. Posey*, 1 Head (Tenn.) 311.

**7. Price Paid, Interest, and Expense of Defending Title.** — *Marlatt v. Clary*, 20 Ark. 251; *Boyd v. Whitfield*, 19 Ark. 470; *Johnson v. Meyers*, 34 Mo. 255; *Burt v. Dewey*, 31 Barb. (N. Y.) 540.

**8. Rowland v. Shelton**, 25 Ala. 217; *Noel v. Wheatly*, 30 Miss. 181; *Arthur v. Moss*, 1 Oregon 193; *Brown v. Woods*, 3 Coldw. (Tenn.) 182.

purchase.<sup>1</sup> However much the cases may vary in regard to the elements of damage just considered, it cannot be doubted that the purchaser cannot recover for the profits which he is obliged to return to one to whom he has resold the chattels. This clearly cannot be considered an element of damage in a suit against the original vendor for breach of warranty of title.<sup>2</sup>

**2. Of Quality** — *a. RIGHTS AND REMEDIES OF BUYER* — (1) *Action for Damages or Recoupment in Action for Price.* — In case there is a breach of the implied warranty of quality, there are several remedies open to the buyer; he may retain the goods and when sued for the purchase price set up the breach in reduction of damages,<sup>3</sup> or he may bring suit to recover the damages caused thereby.<sup>4</sup>

**Obligation to Return Goods or Notify Seller of Defects.** — As a general rule, whether

**1. Expense Incurred in Bringing Suit to Determine Title.** — *Kingsbury v. Smith*, 13 N. H. 125, where it was further said that there can be no sound distinction between a case in which the expenses are incurred in the necessary and proper prosecution of a suit for the ascertainment and protection of the purchaser's rights, and the case of a defense made for the same purpose.

**2. Profits on Resale.** — *Noel v. Wheatly*, 30 Miss. 181; *Arthur v. Moss*, 1 Oregon 193.

**Breach of Warranty of Title to Growing Crop.** — The measure of damages for breach of warranty of title to a growing crop is the highest market price of the crop where growing, if there was any market value for it there, and as it was; if not, then, if the plaintiffs were prepared to gather it and carry it to the market, the market value there less the cost of gathering and carriage. *Dabovich v. Emeric*, 12 Cal. 171.

**Where There Is Failure of Title to a Part, or an Inferior Title Only Is Sold,** the loss is the difference between the property as conveyed and its value had the title been as warranted. *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 53 Am. Rep. 783.

**3. Setting Up Breach in Reduction of Price** — *California.* — *Polhemus v. Heiman*, 45 Cal. 573; *Wheelock v. Pacific Pneumatic Gas Co.*, 51 Cal. 223.

*Illinois.* — *Prickett v. McFadden*, 8 Ill. App. 197.

*Indiana.* — *Zimmerman v. Druecker*, 15 Ind. App. 512; *Bushman v. Taylor*, 2 Ind. App. 12, 50 Am. St. Rep. 228; *Merchants', etc., Sav. Bank v. Frazee*, 9 Ind. App. 161, 53 Am. St. Rep. 341.

*Massachusetts.* — *Dorr v. Fisher*, 1 Cush. (Mass.) 271; *Mixer v. Coburn*, 11 Met. (Mass.) 561, 45 Am. Dec. 230; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Gilmore v. Williams*, 162 Mass. 352.

*Missouri.* — *Branson v. Turner*, 77 Mo. 489.

*New York.* — *Carleton v. Lombard*, 149 N. Y. 137; *Marshuetz v. McGreevy*, 23 Hun (N. Y.) 408; *Waters' Patent Heater Co. v. Tompkins*, 14 Hun (N. Y.) 219; *Levy v. American Wax, etc., Mfg. Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 204.

*North Carolina.* — *Lewis v. Rountree*, 78 N. Car. 327.

*Texas.* — *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264.

*Vermont.* — *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570.

*Wisconsin.* — *Bonnell v. Jacobs*, 36 Wis. 60; *Fisk v. Tank*, 12 Wis. 302, 78 Am. Dec. 737; *Getty v. Rountree*, 2 Pin. (Wis.) 379; *Ketchum v. Wells*, 19 Wis. 25; *Boothby v. Scales*, 27 Wis. 638; *Warder v. Fisher*, 48 Wis. 338.

For a consideration of this question arising in specific kinds of sales, see *supra*, this title, *Implied Warranty of Quality* — *Sales by Description*; *Sales by Sample*.

For remedies of the buyer for breach of a warranty of merchantability, see *supra*, this title, *Implied Warranty of Quality* — *Particular Kinds of Warranty* — *Of Merchantability*.

**4. Action for Breach** — *England.* — *Fielder v. Starkin*, 1 H. Bl. 17.

*California.* — *Polhemus v. Heiman*, 45 Cal. 573.

*Iowa.* — *Rogers v. Hanson*, 35 Iowa 287.

*Kansas.* — *Field v. Kinnear*, 4 Kan. 476.

*Maine.* — *Downing v. Dearborn*, 77 Me. 457.

*Maryland.* — *Horn v. Buck*, 48 Md. 358; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Lane v. Lantz*, 27 Md. 218; *Franklin v. Long*, 7 Gill & J. (Md.) 407.

*Massachusetts.* — *Vincent v. Leland*, 100 Mass. 432; *Gilmore v. Williams*, 162 Mass. 352; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88.

*Missouri.* — *Thompson v. Botts*, 8 Mo. 710; *Shultz v. Christman*, 6 Mo. App. 338.

*New York.* — *Rust v. Eckler*, 41 N. Y. 488; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Levy v. American Wax, etc., Mfg. Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 204; *Muller v. Eno*, 14 N. Y. 597; *Dounce v. Dow*, 57 N. Y. 16; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63.

*North Carolina.* — *Cox v. Long*, 69 N. Car. 7.

*Ohio.* — *Dayton v. Hooglund*, 39 Ohio St. 671.

*Pennsylvania.* — *Vanleer v. Earle*, 26 Pa. St. 277; *Youghiogeny Iron, etc., Co. v. Smith*, 66 Pa. St. 340; *Freyman v. Knecht*, 78 Pa. St. 141.

*South Carolina.* — *Hughes v. Banks*, 1 McCord L. (S. Car.) 537.

*Vermont.* — *Vail v. Strong*, 10 Vt. 457; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570.

*Wisconsin.* — *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129; *Bonnell v. Jacobs*, 36 Wis. 60; *Fisk v. Tank*, 12 Wis. 302, 78 Am. Dec. 737; *Getty v. Rountree*, 2 Pin. (Wis.) 379, 54 Am. Dec. 138; *Ketchum v. Wells*, 19 Wis. 25; *Boothby v. Scales*, 27 Wis. 630.



the buyer retains the goods and sues for a breach of warranty, or retains the goods and is sued for the price, it is not necessary for him, to entitle him to damages for the breach, to return or offer to return the goods or to notify the seller of the defects.<sup>1</sup> The only result of a failure to return the goods or to notify the vendor of their defective quality is to raise a presumption that the complaint of the quality is not well founded.<sup>2</sup>

(2) *Rescission* — (a) *View that Buyer May Rescind Whether Contract Is Executed or Executory.* — Although there is some conflict of authority on this question, the weight of authority, it is believed, is to the effect that in all sales the buyer may, on a breach of the implied warranty of quality, return or offer to return the property and rescind the contract, whether it is executed or executory, and whether it is or is not tainted with fraud.<sup>3</sup> This right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract. Where the contract is to be rescinded at all it must be rescinded *in toto* and the parties put *in statu quo*,<sup>4</sup> unless the use of the article in testing its qualities destroys it or renders it impossible to restore it to the seller, in which case the rule stated does not apply.<sup>5</sup> It has been held that to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that the buyer holds the goods subject to his order, or to request him to come and take them back, is not a sufficient offer to return; that if the seller would rescind the contract he must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do he is relieved of the obligation by refusal to receive them if tendered.<sup>6</sup> There must be a return or an offer to return the property within a

**1. No Obligation to Return Goods or Notify Seller of Defects** — *England.* — *Fielder v. Starkin*, 1 H. Bl. 17.

*Maryland.* — *Taymon v. Mitchell*, 1 Md. Ch. 496.

*Massachusetts.* — *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88; *Vincent v. Leland*, 100 Mass. 432.

*Missouri.* — *Thompson v. Botts*, 8 Mo. 710. *New York.* — *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652.

*North Carolina.* — *Cox v. Long*, 69 N. Car. 7; *Lewis v. Rountree*, 78 N. Car. 327.

*Ohio.* — *Dayton v. Hooglund*, 39 Ohio St. 671.

*Vermont.* — *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570.

*Wisconsin.* — *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129; *Bonnell v. Jacobs*, 36 Wis. 60; *Getty v. Rountree*, 2 Pin. (Wis.) 379, 54 Am. Dec. 138; *Ketchum v. Wells*, 19 Wis. 25; *Boothby v. Scales*, 27 Wis. 636.

**2. Presumption Arising from Failure to Notify Seller of Defects.** — *Lewis v. Rountree*, 78 N. Car. 327.

**3. May Rescind Executed or Executory Contracts** — *Alabama.* — *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4.

*California.* — *Dill v. Baldwin*, 67 Cal. 610; *Polhemus v. Heiman*, 45 Cal. 573.

*Illinois.* — *Prickett v. McFadden*, 8 Ill. App. 195.

*Indiana.* — *Dill v. O'Ferrell*, 45 Ind. 268; *Wynn v. Hiday*, 2 Blackf. (Ind.) 123.

*Iowa.* — *Jack v. Des Moines, etc., R. Co.*, 53 Iowa 399; *Rogers v. Hanson*, 35 Iowa 283; *Davis v. Sweeney*, 75 Iowa 45.

*Kansas.* — *Craver v. Hornburg*, 26 Kan. 94.

*Maine.* — *Milliken v. Skillings*, 89 Me. 180;

*Tyler v. Augusta*, 88 Me. 504; *Sharp v. Ponce*, 76 Me. 350; *Marston v. Knight*, 29 Me. 341; *Downing v. Dearborn*, 77 Me. 457.

*Maryland.* — *Taymon v. Mitchell*, 1 Md. Ch. 496; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Rutter v. Blake*, 2 Har. & J. (Md.) 353, 3 Am. Dec. 550.

*Massachusetts.* — *Morse v. Brackett*, 98 Mass. 205; *Alden v. Hart*, 161 Mass. 576; *Bryant v. Isburgh*, 13 Gray (Mass.) 607, 74 Am. Dec. 655; *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485; *Gilmore v. Williams*, 162 Mass. 352; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103.

*Minnesota.* — *Knoblauch v. Kronschnabel*, 18 Minn. 400.

*Missouri.* — *Branson v. Turner*, 77 Mo. 489; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co.*, 60 Mo. App. 148.

*New York.* — *Hart v. Wright*, 17 Wend. (N. Y.) 267; *Hargous v. Stone*, 5 N. Y. 86.

*Ohio.* — *Byers v. Chapin*, 28 Ohio St. 300.

*South Carolina.* — *Fowler v. Williams*, 2 Brev. (S. Car.) 304, 4 Am. Dec. 579.

*Wisconsin.* — *Warder v. Fisher*, 48 Wis. 338; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 347.

**4. Seller Must Be Placed in Statu Quo.** — *Hunt v. Silk*, 5 East 449; *Pacific Guano Co. v. Mullen*, 66 Ala. 584; *Jemison v. Woodruff*, 34 Ala. 143; *Prickett v. McFadden*, 8 Ill. App. 198; *Sharp v. Ponce*, 76 Me. 350; *Milliken v. Skillings*, 89 Me. 180; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103.

**5. Unless Article Worthless.** — *Pacific Guano Co. v. Mullen*, 66 Ala. 582. See also *Sharp v. Ponce*, 76 Me. 350; *Shultz v. Christman*, 6 Mo. App. 338.

**6. What a Sufficient Offer to Return.** — *Tyler v. Augusta*, 88 Me. 504.

reasonable time;<sup>1</sup> and the time is to be computed from the time when the unsoundness was discovered,<sup>2</sup> the question as to what is a reasonable time being usually one of fact to be passed on by the jury.<sup>3</sup> Yet the time may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law.<sup>4</sup>

(b) *View that Executed Contracts Cannot Be Rescinded in Absence of Fraud.* — The decisions now under consideration maintain a different rule from that laid down in the preceding section. According to dicta in some of these decisions<sup>5</sup> and holdings in others,<sup>6</sup> if the sale be absolute and the title has vested in the purchaser his only remedy is on the warranty, unless the contract be tainted with fraud, or unless the right of return is expressly reserved in the contract of sale, or the seller subsequently consents thereto. These decisions recognize the right of rescission in case the seller has been guilty of fraud.<sup>7</sup>

*b. MEASURE OF DAMAGES* — (1) *Where Purchaser Retains Property* — (a) *Statement of General Rule.* — Although it has been said that formerly the measure of damages for the breach of an implied warranty of soundness would be the difference between the contract price and that for which it would sell with its defect,<sup>8</sup> it is now well settled that the measure of damages in such case is the difference between the actual value of the property at the time of the sale and what its value would have been had it conformed to the warranty.<sup>9</sup> The

**A Tender, to Have the Effect of a Return of the Goods,** must be such that the other party has nothing to do, in order to make the property in the chattel vest in him, but to signify acceptance. *Walls v. Gates*, 6 Mo. App. 242.

**1. Must Be Offer to Return in Reasonable Time.** — *Prickett v. McFadden*, 8 Ill. App. 198; *Rogers v. Hanson*, 35 Iowa 283; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Branson v. Turner*, 77 Mo. 489; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co.*, 60 Mo. App. 148; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 347; *Warder v. Fisher*, 48 Wis. 338.

**2. How Time Computed.** — *Taymon v. Mitchell*, 1 Md. Ch. 496.

**3. Reasonable Time — When Question of Fact.** — *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100.

**What Is Reasonable Time Illustrated.** — An offer to return the goods found to be unsound, made within a month after the sale and immediately after their unsoundness was discovered, was held to be within a reasonable time. *Taymon v. Mitchell*, 1 Md. Ch. 496.

**4. When Question of Law.** — *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100.

**5. No Rescission of Executed Contracts.** — *Dawson v. Pennaman*, 65 Ga. 698; *Horn v. Buck*, 48 Md. 358; *Walls v. Gates*, 6 Mo. App. 242 (the actual holdings in this state are to the contrary); *Day v. Pool*, 52 N. Y. 418, 11 Am. Rep. 719; *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; *Muller v. Eno*, 14 N. Y. 597; *Rust v. Eckler*, 41 N. Y. 488; *Brigg v. Hilton*, 99 N. Y. 527, 52 Am. Rep. 63; *Freyman v. Knecht*, 78 Pa. St. 141; *Kase v. John*, 10 Watts (Pa.) 107, 36 Am. Dec. 148.

**6. Street v. Blay**, 2 B. & Ad. 456, 22 E. C. L. 122 (*disapproving* dictum in *Curtis v. Hannay*, 3 Esp. 82); *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *Lightburn v. Cooper*, 1 Dana (Ky.) 273; *Wright v. Davenport*, 44 Tex. 164; *West v. Cutting*, 19 Vt. 536.

**7. Effect of Fraud.** — *Lightburn v. Cooper*, 1 Dana (Ky.) 273; *Voorhees v. Earl*, 2 Hill (N.

Y.) 288, 38 Am. Dec. 588; *Freyman v. Knecht*, 78 Pa. St. 141; *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658.

**8. Measure of Damages Where Purchaser Retains Property — Former Rule.** — *Wood's Mayne on Damages*, § 224; *Loder v. Kekulé*, 3 C. B. N. S. 128, 91 E. C. L. 128.

**9. Present Rule — Alabama.** — *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Foster v. Rodgers*, 27 Ala. 602; *Kornegay v. White*, 10 Ala. 255; *Marshall v. Wood*, 16 Ala. 806.

*Arkansas.* — *Tatum v. Mohr*, 21 Ark. 349.

*Connecticut.* — *Scranton v. Mechanics' Trading Co.*, 37 Conn. 130.

*Georgia.* — *Hook v. Stovall*, 26 Ga. 704; *Atkins v. Cobb*, 56 Ga. 86.

*Illinois.* — *Wilson v. King*, 83 Ill. 232; *McClure v. Williams*, 65 Ill. 390; *Wheelock v. Berkeley*, 138 Ill. 153.

*Indiana.* — *Howe Mach. Co. v. Reber*, 66 Ind. 498; *Street v. Chapman*, 29 Ind. 142; *Ferguson v. Hosier*, 58 Ind. 438; *Booher v. Goldsborough*, 44 Ind. 490.

*Iowa.* — *McCormick v. Vanatta*, 43 Iowa 389; *Likes v. Baer*, 8 Iowa 368; *Lacey v. Straughan*, 11 Iowa 258; *Douglass v. Moses*, 89 Iowa 43, 48 Am. St. Rep. 353; *Callanan v. Brown*, 31 Iowa 333; *Gates v. Reynolds*, 13 Iowa 1.

*Kansas.* — *Field v. Kinnear*, 4 Kan. 476; *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491; *Weybrich v. Harris*, 31 Kan. 92; *Loomis Milling Co. v. Vawter*, (Kan. Ct. App. 1898) 57 Pac. Rep. 43.

*Louisiana.* — *Slaughter v. McRae*, 3 La. Ann. 455.

*Maine.* — *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Wright v. Roach*, 57 Me. 600.

*Maryland.* — *Horn v. Buck*, 48 Md. 358; *Lane v. Lantz*, 27 Md. 216.

*Massachusetts.* — *Morse v. Brackett*, 98 Mass. 205; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Tuttle v. Brown*, 4 Gray (Mass.) 457, 64 Am. Dec. 80; *Stiles v. White*, 11 Met. (Mass.) 356, 45 Am. Dec. 214.

*Minnesota.* — *Minneapolis Harvester Works*



rule, of course, does not apply where there is an express or implied agreement that the vendee shall not keep the article, but shall return it to the seller, if not such as was stipulated for.<sup>1</sup> While the price paid, or contracted to be paid, for the property sold is competent<sup>2</sup> and even strong<sup>3</sup> evidence of what the value of the property would have been if it had conformed to the warranty, it is not conclusive evidence.<sup>4</sup> It has accordingly been held erroneous to reject evidence of what would have been the real value of the property at the time of the sale if sound, and to instruct the jury that the proper measure of damages was the difference between the price paid for it and its value with the defect.<sup>5</sup> Nevertheless it has been held that if there is no other evidence as to the value of the property, if it had been as it was warranted to be, the price paid or agreed to be paid will be regarded as such value.<sup>6</sup>

(b) **Whether Measure of Damages Affected by Resale.** — The application of the rule is not changed or modified by the fact that the purchaser has resold the property.<sup>7</sup> The disposition which the purchaser makes of the goods is immaterial, and the price for which he sells them can never be introduced to work a modification of the rule that the measure of damages is the difference between the goods as contracted for and the goods as actually delivered.<sup>8</sup> The right to

*v. Bonnallie*, 29 Minn. 373; *Merrick v. Wiltse*, 37 Minn. 41.

*Missouri.* — *Stearns v. McCullough*, 18 Mo. 411; *Courtney v. Boswell*, 65 Mo. 196; *Lason v. Wilson*, 37 Mo. App. 636; *Kerr v. Emerson*, 64 Mo. App. 160; *McCormick Harvesting Mach. Co. v. Heath*, 65 Mo. App. 461; *Shultz v. Christman*, 6 Mo. App. 338.

*Montana.* — *Hogan v. Shuart*, 11 Mont. 498. *Nebraska.* — *Birdsall v. Carter*, 11 Neb. 143; *Young v. Filley*, 19 Neb. 543.

*New Hampshire.* — *Carr v. Moore*, 41 N. H. 131; *Fisk v. Hicks*, 31 N. H. 535; *Page v. Parker*, 40 N. H. 47; *Noyes v. Blodgett*, 58 N. H. 502; *Hurd v. Dunsmore*, 63 N. H. 173.

*New York.* — *Muller v. Eno*, 14 N. Y. 597; *Bach v. Levy*, 101 N. Y. 511; *Passinger v. Thorburn*, 34 N. Y. 640, 90 Am. Dec. 753; *Hoe v. Sanborn*, 36 N. Y. 98; *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Hunt v. Van Deusen*, 42 Hun (N. Y.) 392; *Bank of North Collins v. Cary Safe Co.*, 42 N. Y. App. Div. 233.

*Pennsylvania.* — *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85; *Cothers v. Keever*, 4 Pa. St. 168; *Freyman v. Knecht*, 78 Pa. St. 141; *Youghiogheny Iron, etc., Co. v. Smith*, 66 Pa. St. 340; *Seigworth v. Leffel*, 76 Pa. St. 476.

*South Dakota.* — *Western Twine Co. v. Wright*, (S. Dak. 1899) 78 N. W. Rep. 942.

*Tennessee.* — *Smith v. Cozart*, 2 Head (Tenn.) 526.

*Texas.* — *Wright v. Davenport*, 44 Tex. 164. *Vermont.* — *Woodward v. Thacher*, 21 Vt. 580, 52 Am. Dec. 73; *Houghton v. Carpenter*, 40 Vt. 588.

*Virginia.* — *Thornton v. Thompson*, 4 Gratt. (Va.) 121; *Boyles v. Overby*, 11 Gratt. (Va.) 205; *Eastern Ice Co. v. King*, 86 Va. 97.

*Wisconsin.* — *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Aultman, etc., Co. v. Hetherington*, 42 Wis. 622.

In other words, the vendee is entitled to "such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not

existed." *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299.

**Place of Delivery.** — In *Heilman Milling Co. v. Hotaling*, (Ky. 1899) 53 S. W. Rep. 655, the court said that "difference in value, if any, is to be estimated at the place of delivery."

**1. Sale with Privilege of Return.** — *Wright v. Davenport*, 44 Tex. 165.

**2. Price Paid Competent Evidence.** — *Thornton v. Thompson*, 4 Gratt. (Va.) 121; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 591.

**3. Strong Evidence.** — *Likes v. Baer*, 8 Iowa 368; *Fisk v. Hicks*, 31 N. H. 535; *Page v. Parker*, 40 N. H. 47; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299.

**4. Not Conclusive Evidence.** — *Street v. Chapman*, 29 Ind. 143; *Likes v. Baer*, 8 Iowa 368; *Page v. Parker*, 40 N. H. 47; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Freyman v. Knecht*, 78 Pa. St. 141; *Smith v. Cozart*, 2 Head (Tenn.) 526; *Aultman, etc., Co. v. Hetherington*, 42 Wis. 622.

**5. Cary v. Gruman**, 4 Hill (N. Y.) 625, 40 Am. Dec. 299.

**6. Price Paid Conclusive as to Value in Absence of Other Evidence.** — *Weybrich v. Harris*, 31 Kan. 92; *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491; *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373; *Williamson v. Canaday*, 3 Ired. L. (25 N. Car.) 349; *Youghiogheny Iron, etc., Co. v. Smith*, 66 Pa. St. 340; *Seigworth v. Leffel*, 76 Pa. St. 476; *Houghton v. Carpenter*, 40 Vt. 588.

**7. How Measure of Damages Affected by Resale.** — *Medbury v. Watson*, 6 Met. (Mass.) 246, 39 Am. Dec. 726; *Brown v. Bigelow*, 10 Allen (Mass.) 242.

**8. Clare v. Maynard**, 7 C. & P. 741, 32 E. C. L. 713; *Atkins v. Cobb*, 56 Ga. 86; *Wheelock v. Berkeley*, 138 Ill. 153; *Medbury v. Watson*, 6 Met. (Mass.) 246, 39 Am. Dec. 726; *Brown v. Bigelow*, 10 Allen (Mass.) 242; *Texada v. Camp, Walk. (Miss.)* 150; *Hogan v. Shuart*, 11 Mont. 498; *Hunt v. Van Deusen*, 42 Hun (N. Y.) 392; *Muller v. Eno*, 14 N. Y. 597; *Brock v. Clark*, 60 Vt. 551; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590.

What the purchaser realizes on the resale is



damages for a breach of contract of warranty does not depend at all upon the circumstance of reclamation, and no presumption can arise, in the absence of proof, that the goods were sold for the market price of a sound commodity without any liability to respond in damages.<sup>1</sup> It follows then that as a general rule evidence of the price obtained on resale is not competent,<sup>2</sup> but it has been held that when the property is resold at auction, on notice to the original seller, the amount received at such sale may be shown in the absence of other testimony to prove the value of the goods.<sup>3</sup>

(c) *To What Extent Rule Modified by Fraud of Seller.* — It has also been held that the damages recoverable by the buyer for a breach of warranty may be greatly augmented when they are the consequence of a fraudulent misrepresentation by the vendor.<sup>4</sup>

(d) *Under What Circumstances Rule Extended to Allow Consequential Damages.* — While, as already shown, the ordinary measure of damages applying to warranties of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted, additional damages may be recovered for breach of the implied warranty of quality if they are such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, when they are such as might naturally be expected to follow its violation, and when they are capable of being definitely ascertained.<sup>5</sup> It results from this rule that where the vendor, knowing that

of no consequence except as it may tend to illustrate the question of value. *Atkins v. Cobb*, 56 Ga. 86.

The disposition which the purchaser makes of property is an independent and collateral fact having no connection with the bargain by which he acquired his title. *Brown v. Bigelow*, 10 Allen (Mass.) 244, the court saying: "It is difficult to see how it can have any legitimate bearing on the damages which another person ought to pay him for a breach of a wholly distinct and separate contract. But if such evidence is competent, it ought to appear affirmatively that the resale was made by the original vendee on terms such as would preclude him from any loss or damage by reason of the breach of warranty by the original vendor."

1. *Muller v. Eno*, 14 N. Y. 609.

*Illustration.* — If A sells with warranty an unsound chattel to B, in an action by B against A on the warranty it is no defense to the action that before its institution B sold the chattel to a third person, and that no recovery had been had against B. *Texada v. Camp*, Walk. (Miss.) 150.

2. *Evidence of Resale Usually Incompetent.* — *Hogan v. Shuart*, 11 Mont. 498; *Hunt v. Van Deusen*, 42 Hun (N. Y.) 392; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590.

3. *Under What Circumstances Evidence of Resale Admissible.* — *Bach v. Levy*, 101 N. Y. 511. See also *Woodward v. Thacher*, 21 Vt. 580, 52 Am. Dec. 73, in which case it was held that if the owner of an unsound horse sells it, warranting it to be sound, the buyer may sell the horse for the best price he can obtain without first offering to return it to the vendor; and if the buyer acts with common prudence and discretion in disposing of the horse, the measure of damages in an action by him against the vendor will be the difference between the price which he obtained for the horse and what it would have been worth if it had been sound as warranted.

4. *Measure of Damages — How Affected by Fraud.* — *Benjamin on Sales* (6th Am. ed.), § 904; *Marsh v. Webber*, 16 Minn. 418; *Wintz v. Morrison*, 17 Tex. 373, 67 Am. Dec. 658; *Maynard v. Maynard*, 49 Vt. 297. See also *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607; *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; *Stone v. Denny*, 4 Met. (Mass.) 151.

5. *Under What Circumstances Consequential Damages Recoverable — England.* — *Randall v. Newson*, 46 L. J. Q. B. 259; *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84; *Page v. Pavey*, 8 C. & P. 769, 34 E. C. L. 628; *Wagstaff v. Shorthorn Dairy Co.*, 1 Cab. & El. 324. *Connecticut.* — *Ferris v. Comstock*, 33 Conn. 513.

*Georgia.* — *Snowden v. Waterman*, 105 Ga. 384.

*Kansas.* — *Weybrich v. Harris*, 31 Kan. 92.

*Maine.* — *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310.

*New Jersey.* — *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425.

*New York.* — *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Schutt v. Baker*, 9 Hun (N. Y.) 556; *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403 (*reversing* 34 Barb. (N. Y.) 607); *Parks v. Morris Ax, etc., Co.*, cited in *Ross v. Terry*, 63 N. Y. 615; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Fox v. Everson*, 27 Hun (N. Y.) 355.

*Pennsylvania.* — *Philadelphia, etc., Coal, etc., Co. v. Hoffman*, (Pa. 1886) 4 Atl. Rep. 848.

*Texas.* — *Aultman v. Hefner*, 67 Tex. 54; *Jones v. George*, 61 Tex. 346, 48 Am. Rep. 280.

*Vermont.* — *Maynard v. Maynard*, 49 Vt. 297.

*Wisconsin.* — *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 591. See also *Aultman v. Jett*, 42 Wis. 480.

*This Rule Has Been Frequently Applied in the Sale of Seed for agricultural purposes.* The weight of authority holds that where seed bought for agricultural purposes proves to be

the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfil such contract, agrees to supply the article to enable him to do so, the purchaser may recover the profits which he would have made upon the resale had the articles been in conformity with the warranty.<sup>1</sup> The damages recoverable, however, must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract; they must be such as might naturally be expected to follow its violation.<sup>2</sup> There can be no recovery of damages resulting from defects in an article sold, where the contract provides that if it fails to work as warranted the sellers are to be notified and an opportunity given them to make it work, and that they shall take it back in case they fail so to do.<sup>3</sup>

(2) *Where Property Is Returned.*—In an early *English* case it was held that in case the goods were returned the measure of damages for breach of warranty is the price paid.<sup>4</sup> Some recent decisions in the *United States* have held that interest on the price paid is also recoverable.<sup>5</sup>

of a different quality or variety from that represented, the vendee may recover the difference between the value of the crop as raised and the alleged value of the crop which would have resulted had the seed been as represented. *Edgar v. Breck*, 172 Mass. 581; *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753 (the leading case on this subject); *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Schutt v. Baker*, 9 Hun (N. Y.) 556; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Page v. Pavey*, 8 C. & P. 769, 34 E. C. L. 628; *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84. *Compare* *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 503, which condemns the rule stated as too speculative and contingent to afford a standard of recovery, and which holds that the measure of damages for the breach of a warranty as to the productiveness of the seed is limited to the purchase money with interest and the expenses incurred in planting the seed and the cultivation of the soil; *Ferris v. Comstock*, 33 Conn. 513, holding that in an action for breach of a warranty as to the quality of onion seed, the measure of damages is the amount the plaintiff paid for the seed, after deducting the benefit to the land, and the value of his labor in planting the seed, with interest on the several amounts; *Hurley v. Buchi*, 10 Lea (Tenn.) 346, which still further restricts the rule stated. In this case the measure of damages was held to be simply the difference in value between the seed sold and as represented.

**Seed Which Proves Totally Unproductive.**—Where the seed proves totally unproductive there may be a recovery of the value of the crop which would have been raised if the seed had been as represented, without deduction for cost of cultivation and tillage. *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136.

**Knowledge of Purchaser of Inferior Character of Seed.**—Where a party has knowledge of the inferior character of seed before he sows it, the party furnishing the seed is not liable for damages resulting to either crop or land in consequence of the use of such inferior seed. *Oliver v. Hawley*, 5 Neb. 439. See also *Stewart v. Sculthorp*, 25 Ont. 544; *Nye v. Iowa City Alcohol Works*, 51 Iowa 129, 33 Am. Rep. 121.

So on a Sale of Manure to Be Used as a Fertilizer, the vendor was held liable for the loss of

crops on the land on which it was used, occasioned by its not being as good as warranted. *Dingle v. Hare*, 7 C. B. N. S. 145, 97 E. C. L. 145. See also *Bell v. Reynolds*, 78 Ala. 511.

**And Where a Preparation Sold to Be Used in Destroying Insects** which infested a growing crop was totally unfit for that purpose, the buyer was held to be entitled to the value of the crop as it stood before destruction by the insects together with the cost of the preparation and the cost of the application thereof to the crop, with interest on the money thus expended. *Jones v. George*, 61 Tex. 346, 48 Am. Rep. 280.

**Expense of Transportation on Resale.**—In *Merkley v. Phillips*, (Ky. 1899) 53 S. W. Rep. 1037, besides the difference in value, recovery was allowed for the freight charges paid by the buyer for the transportation to one to whom he had sold the goods and who refused to accept them.

**1. Sales with Knowledge that Goods Are to Be Resold.**—*Thorne v. McVeagh*, 75 Ill. 81; *McHose v. Fulmer*, 73 Pa. St. 365. See also *Messmore v. New York Shot, etc., Co.*, 40 N. Y. 422.

**2. Damages Must Be Such as Would Naturally Result from Breach.**—*Hadley v. Baxendale*, 9 Exch. 341; *Herring v. Skaggs*, 62 Ala. 189, 34 Am. Rep. 4; *McCormick v. Vanatta*, 43 Iowa 389; *Weybrich v. Harris*, 31 Kan. 92; *Froreich v. Gammon*, 28 Minn. 476; *Wilson v. Reedy*, 32 Minn. 256; *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753.

In the absence of fraud or bad faith, the proper measure of damages in a suit by the purchaser of a safe against the maker, who warranted it burglar proof, is the difference between the value of the safe as it was and what it would have been worth if it had been as represented, and not the damages sustained from the loss of the valuables taken out of the safe by burglars who effected an entrance into it. *Herring v. Skaggs*, 62 Ala. 181, 34 Am. Rep. 4.

**3. Where Seller Is to Be Notified of Defect.**—*Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210.

**4. Measure of Damages Where Property Returned—Price Paid.**—*Caswell v. Coare*, 1 Taunt. 566.

**5. Interest.**—*Berry v. Walter A. Wood Mowing, etc., Mach. Co.*, 62 Mo. App. 41;

(3) *Where Property Is Wholly Worthless.* — Where the goods sold are wholly worthless and the purchase price has been paid, the measure of damages in an action on the implied warranty is the whole price paid,<sup>1</sup> and in one case interest in addition to the price paid has been allowed.<sup>2</sup>

Kerr v. Emerson, 64 Mo. App. 160; South Bend Pulley Co. v. Caldwell (Ky. 1899), 54 S. W. Rep. 12.

**Measure of Damages for Breach of Warranty of Genuineness.** — The measure of damages for a breach of an implied warranty of genuineness is the same as for a breach of an implied warranty of quality. Reggio v. Braggiotti, 7 Cush. (Mass.) 166.

**Allowance of Interest.** — In one case it was held that on a breach of warranty as to quality of the article sold, the purchaser is entitled to recover at least the difference between its actual value and what would have been its value

as warranted, and that, since the jury may also allow interest on that sum, the court may properly refuse to instruct that that difference in value is the measure of damages. Foster v. Rodgers, 27 Ala. 602. This decision is against the clear weight of authority. See the list of cases cited in support of the proposition stated in the text.

**1. Measure of Damages Where Goods Are Worthless.** — Home Lightning Rod Co. v. Neff, 60 Iowa 138; Williamson v. Canaday, 3 Ired. L. (25 N. Car.) 349.

**2. Interest Sometimes Allowable.** — Egleston v. Macaulay, 1 McCord L. (S. Car.) 379.





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